

REVIEW OF FINDINGS OF FACT

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THE decision of the Supreme Court of the United States to unite the law and equity procedures in the federal district courts, pursuant to authority granted by a recent congressional act, is an event of historic significance for its effect both on law administration in our national judicial system and as an example for other systems.¹ When the new procedure is made effective by rules now being formulated, it will bring about more extensive changes in the federal practice than any that have occurred since the First Judiciary Act of 1789. Obviously not all the consequences can now be foreseen, but with care and study the difficulties of the transition can be minimized and a flexible practice developed which will reflect the best of the English and state codes and rules. The chief problems involved in a complete union of law and equity concern the preservation of the jury trial right as required by the Seventh Amendment of the Constitution. It is believed, however, as discussed elsewhere, that a simple and effective system is possible by requiring the claim of the right to be made at an early stage of the proceedings in each case or otherwise to be considered waived.² A similar problem, although perhaps not of quite the same permeating importance, is that of the manner of appeal and the extent of review to be accorded by the court of review. Traditionally, and for historical reasons, the equity review is a re-examination of the entire record, on both the facts and the law, while that at law is limited to a consideration of the legal errors which may have been committed by the trial court. If this difference on appeal is to be continued

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¹ Order of June 3, 1935, 295 U.S. 774, 775 (1935), under Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C.A. §§ 723b, 723c (1936). See Preliminary Draft of Advisory Committee, Federal Rules of Civil Procedure (May 1, 1936). Citation of the already extensive literature is made in Clark, *The Proposed Federal Civil Rules of Procedure*, 22 A.B.A.J. 447 (1936).

² James, *Trial by Jury and the New Federal Rules of Procedure*, 45 Yale L. J. 1022 (1936); Rules 45, 46, Preliminary Draft, *loc. cit. supra* note 1; *cf.* Clark and Moore, *A New Federal Civil Procedure—I. The Background*, 44 Yale L. J. 387, 415 (1935); *II. Pleadings and Parties*, 44 *id.* 1291, 1292-99 (1935).

even after a formally united procedure is adopted, it means that the ancient and troublesome distinctions between law and equity, though supposedly abolished in the trial court, are yet to be preserved for purposes of appeal. It has seemed clear, therefore, that some change in those rules is necessary, and the conclusion to that effect by the Advisory Committee on Rules for Civil Procedure, appointed by the Court to assist it in the preparation of rules of practice, seems to have met with general approval.³

If revision is to be had, there are two practicable possibilities, each of which has persuasive arguments in its support and as to the relative merits of which the bar as a whole seems quite divided. The first is that the complete review of equity be extended to include all cases tried without a jury—the constitutional provisions as to the jury preventing its extension to jury trials. This is the plan tentatively adopted and approved by a majority of the Advisory Committee in Rule 68 of its Preliminary Draft.⁴ It has the advantages of according the parties a re-examination of the case by at least one more court and of avoiding the somewhat arbitrary distinction between law and facts, though it does continue differences in review. The other plan is that of extending the law review to all cases. This achieves complete uniformity of review; it is also identical with review in other forms of litigation of great importance in the federal system, notably claims against the government and appeals from administrative rulings. It does continue the distinction between law and fact which the Seventh Amendment makes necessary for jury cases; but it also discourages and limits appeals.⁵

³ See Note to Rule 68, Preliminary Draft, at pp. 118-21. The comments received by the Committee in response to its invitation to the profession apparently show no dissent from this conclusion; the division of views occurs as to the suggested changes. See note 5 *infra*. The power of the Court to adopt a rule on this topic is not discussed herein; it is assumed and believed that it has such power. For discussion of this point, see Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv. L. Rev. 1303 (1936).

⁴ *Op. cit. supra* note 3. The rule after requiring the trial court in all actions tried without a jury to "find the facts specially and state separately its conclusions of law thereon" continues: "The findings of the court in such cases shall have the same effect as that heretofore given to findings in suits in equity." For the provision of the Seventh Amendment expressly preventing its extension to jury trials, see text and note 11 *infra*.

⁵ Comments from the bar on Rule 68 indicate a sharp division of opinion as to these plans. For able support of the rule, see Professor W. W. Blume, Review of Facts in Non-Jury Cases, 20 J. Am. Jud. Soc. 68 (1936); for like support of the other alternative see Judge W. Calvin Chesnut, Analysis of Proposed New Federal Rules of Civil Procedure, 22 A.B.A.J. 533, 540 (1936). Representatives of the government have pointed out the desirable identity of this form of review with review of administrative and claims appeals; the law on these points is ably set forth in an earlier monograph by Helen R. Carlross, special assistant to the Attorney General, in Monograph on Findings of Fact, printed by the government in 1934.

The primary purpose of this article is to set forth the background of the problem in the history of the federal courts and the attitudes of the various states in the hope that this may be of assistance in the formulation of a judgment as to the proper rule. To this end our own conclusion may not be of importance. It has seemed desirable, however, to express it, together with some expansion of the arguments for it, in order to disclose whatever bias may have influenced our exposition, and possibly to add a little to the clarification of the problem. Accordingly with some hesitation and with deference particularly to the members of the Committee with whom we have had the honor of collaborating in the enjoyable task of preparing the proposed new federal rules, we have expressed reasons why we believe the second plan is to be preferred. It is a pleasure to examine this concrete procedural issue not only because of its importance, but also as a slight tribute to the memory of that wise and knowing master of pleading, Professor Edward W. Hinton. We have some hope that our exposition as well as our argument would not seem inconsistent with his shrewd appraisal of pleading realities.

I

The struggle for a single standard of review is not a new battle. It has waged since the beginnings of our Constitution, when the framers of that document provided that the "supreme court shall have appellate Jurisdiction *both as to Law and Fact*, with such Exceptions and under such Regulations as the Congress shall make."⁶ This was construed by the opponents of the new Constitution as a provision which took away from the citizen his right to a jury trial, and set the verdict of the jury at naught in the hands of an unfriendly and as yet unconstituted federal court.⁷

Luther Martin, Esq., in his report of the Secret Proceedings of the Federal Convention to the Legislature of Maryland, was most violent in his condemnation of the appellate jurisdiction and the method of review proposed to be given to the Supreme Court under the new Constitution.⁸ So great was the fear of any semblance of arbitrary power in the hands of the central government that men turned to the jury as the very symbol of their freedom from autocratic power.

⁶ Constitution of the United States of America, Art. III, § 2 (2) (*italics added*).

⁷ Secret Proceedings and Debates of the Federal Convention 80-81 (1787); Letter of Fabius in 1788 on the Federal Constitution, written by John Dickinson; Pamphlet of Elbridge Gerry published in Boston, 1788; Richard Henry Lee, Letters of a Federal Farmer to a Republican, New York, October 12, 1787; George Mason, Objections Addressed to the Citizens of Virginia; John Winthrop, Essays of Agrippa, Massachusetts Gazette, December 11, 1787.

⁸ Secret Proceedings and Debates of the Federal Convention 79 (1787).

The fight thus centered about the right to trial by jury. Hamilton, in some of the later papers in the Federalist series,⁹ pointed out the great difficulty of drawing a constitutional provision which would attempt to limit and preserve the right of trial by jury, because of the various practices of the states in this regard: some of the states tried all cases to a jury; others attempted a dichotomy on the ground of equity and law; still others made no distinction except that of the convenience to the court. He concluded that the safest way would be to declare generally that the Supreme Court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe to answer the ends of public justice and security.

Hamilton consistently maintained that no such provision as that of the Seventh Amendment was necessary to protect the right of trial by jury, but he recognized that one of the great obstacles in the path of the adoption of the Constitution was this uncertainty as to the effect of the Constitution upon the right to jury trial. He wrote:

The friends and adversaries of the Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of full government.¹⁰

The outcome of the struggle, as everyone knows, was the adoption of the Constitution with the added protection of the Seventh Amendment. The latter, in addition to preserving the right of trial by jury, provided 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 the common law."¹¹

The status of the review in chancery cases in the federal courts was settled by the First Judiciary Act of September 24, 1789, which provided that final decrees and judgments in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from the courts of the several states, or removed there by appeal from a district court, when the matter in dispute exceeded the sum or value of two thousand dollars, exclusive of costs, might be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.¹² When the

⁹ The Federalist, No. lxxxi, July 4, 8, 1788.

¹⁰ The Federalist, No. lxxxiii, July 15, 18, 22, 25, 1788. See also an address by James Wilson, later a justice of the Supreme Court, delivered in Philadelphia on October 6, 1787, where he set forth the same thesis as that of Hamilton.

¹¹ Adopted in 1789 as one of the first ten amendments or bill of rights attached to the Constitution of the United States.

¹² Sec. 22, c. 20, 1 Stat. 84 (1789).

Supreme Court reversed a judgment or decree, it was to proceed to render such judgment or pass such decree as the lower court should have rendered or passed, except that when the reversal was in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed were uncertain, the court was to remand the case for a final decision. It was further provided that in no case removed on writ of error should the Supreme Court issue execution, but it should send a special mandate to the circuit court to award execution thereon.¹³ At the same time, it was also provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law.¹⁴

This latter provision was bitterly opposed by the chancery party of the legislature, since it was considered to be an attempt "to try facts on civil law principles, without the aid of a jury" and struck at the time-honored practice of chancery of the use of depositions instead of the testimony of witnesses in open court. It was a victory for the so-called anti-chancery party.¹⁵

The career of the single method of review at law and equity prescribed by the Judiciary Act of 1789 was not a smooth one. There were scattered objections to the imposition of the common law theories of review upon the chancery and admiralty causes.¹⁶ The attack of the chancery lawyers upon the system arose from a justifiable pride in the integrity of their own system, goaded on by the ancient rivalry between the two systems of courts, and certain inconveniences which arose from the prescriptions as to the mode of trial.¹⁷ The admiralty lawyers were concerned more with the necessity of adapting the decisions of the courts to the needs and position of a new nation at odds with many powerful foreign powers,

¹³ Sec. 24, c. 20, 1 Stat. 85 (1789).

¹⁴ Sec. 30, c. 20, 1 Stat. 88 (1789).

¹⁵ See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49 (1923).

¹⁶ Charles Warren in his treatise on *The Supreme Court in United States History*, vol. I, at 104 (1922), quotes Attorney General Randolph as saying that "the Premier (Jay) aimed at the cultivation of Southern popularity; that the Professor (Wilson) knows not an iota of equity; that the North Carolinian (Iredell) repented of the first ebullitions of a warm temper; and that it will take a score of years to settle, with such a mixture of Judges, a regular course of chancery."

¹⁷ In 1792 at the request of the attorney general, the Supreme Court set out the rule of practice that "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." 2 *Dall. (U.S.)* 413-14 (1792).

an adaptation which was not always readily available in the courts of first instance.¹⁸

The argument sprang into full flower in the case of *Wiscart v. D'Auchy* in 1796.¹⁹ The question before the court was whether a statement of facts²⁰ by the circuit court was conclusive in all cases. Chief Justice Ellsworth gave the opinion of the court, stating that even where causes are removed by writ of error with a statement of the facts and also with the evidence, the statement of facts was conclusive as to all the facts contained in it. Mr. Justice Wilson, dissenting from the opinion of the court,²¹ was of the opinion that although the Judiciary Act had provided that all cases should be brought up by writ of error this was a mere restriction upon appeal and not a prohibition of the use of appeal for the review of causes in equity and admiralty. The chief justice states clearly his position thus:

If, however, the construction, that a statement of facts by the circuit court is conclusive, would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences. But surely it cannot be deemed a denial of justice that a man shall not be permitted to try his case two or three times over. If he has an opportunity for the trial of all the parts of his case, justice is satisfied; and even if the decision of the circuit court had been made final, no denial of justice could be imputed to our Government; much less can the imputation be fairly made, because the law directs that in cases of appeals, part shall be decided by one tribunal, and part by another; the facts by the court below and the law by this court. Such a distribution of jurisdiction has long been established in England.²²

This decision was followed in the later case of *Jennings v. The Brig Perseverance*,²³ where, because of the death of the district judge below, the record of evidence was sent to the Supreme Court without a statement of

¹⁸ See Mr. Justice Wilson's dissenting opinion in *Wiscart v. D'Auchy*, 3 Dall. (U.S.) 320, 327 (1796); and Blume, *op. cit. supra* note 5. See also the full account of this history in Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 26-35 (1930), discussed *infra* this article.

¹⁹ 3 Dall. (U.S.) 320, 327 (1796).

²⁰ This statement of facts had been provided for by § 19, c. 20, of the Act of September 24, 1789, 1 Stat. 83 which provided: "That it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree, by a stating of the case by the court." This section was altered by the Act of March 3, 1803, § 2, c. 40, 2 Stat. 244 which provided for appeals in these cases on the evidence and papers.

²¹ The vote on the proposition was two to four. See 3 Dall. (U.S.) 337 (1796).

²² *Id.* at 328-29.

²³ 3 Dall. (U.S.) 336 (1797).

the facts, and the Supreme Court refused to consider the evidence of the facts and affirmed the decree.

Chief Justice Ellsworth resigned in 1800 owing to ill health. The election of 1800 had resulted in the overthrow of the Federalist party, and the Anti-Federalists with their pronounced animosity to the federal judiciary entered into power.²⁴ It was not unexpected that they would attempt to give vent to their continued opposition to the interpretation which the Supreme Court under Chief Justice Ellsworth had made as to its power. Nor was it unexpected that the new legislature should turn to the complaints of the chancery lawyers against the imposition upon them of the common law procedure.

The first lasting fruit of this new victory came in 1802 when Congress provided that on the request of either party in an equity cause the court might in its discretion order the testimony of witnesses therein to be taken by depositions.²⁵ Thus the first reform of those who had favored the joined procedure was invaded. The second step came in the following year when Congress provided that appeals should be allowed in equity and admiralty cases, and abolished writs of error in these cases.²⁶ Thus was brought back into the federal courts the dual method of review on appeals and writs of error, and the basis of the distinction was made not the convenience of the court, but the ancestry of the writ, that is, whether it derived from Lord Coke or Lord Ellesmere.

II

When Ellsworth resigned as chief justice, the Federalists desired the appointment of Mr. Justice Paterson to succeed him.²⁷ President Adams, however, first turned to Jay, the former chief justice, who refused the appointment on the grounds of the onerous duties imposed upon the judges by the "circuit riding."²⁸ Then the President named John Mar-

²⁴ See Warren, *op. cit. supra* note 16, at 168.

²⁵ Act of April 29, 1802, § 25, c. 31, 2 Stat. 156, 166.

²⁶ A short-lived Act of February 13, 1801, had provided that an appeal would lie from all final judgments or decrees in any circuit court, in cases of equity, admiralty and maritime jurisdiction, and of prize or no prize (§ 33, c. 4, 2 Stat. 89). But this Act was repealed by the Act of March 8, 1802 (c. 8, 2 Stat. 132), and the former statutes restored. These provisions were, however, substantially restored by the Act of March 3, 1803 (c. 40, 2 Stat. 244); *The San Pedro*, 2 Wheat. (U.S.) 132 (1817). The necessity of this restoration appeared with the decision of the Supreme Court in *U.S. v. Hooe*, 1 Cranch (U.S.) 318 (1803), where the government's writ of error was dismissed for lack of a statement of fact as required by the Judiciary Act of 1789, § 19.

²⁷ Warren, *op. cit. supra* note 16, at 174-76.

²⁸ *Id.* at 173.

shall, who, in the teeth of strong Federalist opposition, was affirmed as the new chief justice.

An attempt in 1801 to provide by statute for appeals as well as writs of error from the district courts to the circuit courts and thence to the Supreme Court was repealed in the following year, perhaps inadvertently, perhaps deliberately.²⁹ At any rate, appeals were restored by an act in 1803 in suits in equity, admiralty and maritime practice, and it was provided that a transcript of the bill, libel, answer, depositions, and all other proceedings of any kind whatever should be transmitted to the Supreme Court on such appeal.³⁰

The fear of the Anti-Federalists that the Federalists would attempt to superimpose a strange and foreign network of practice upon the state courts, and so gradually encroach upon the familiar practices of the several states, finds its expression in the statutes of this period. The tendency of the legislators is clearly that of adapting the federal practice to that of the states in conformity in all possible instances, and of providing limits for the jurisdiction of the federal courts.³¹

From 1800 to 1865 there were no further successful attempts at establishing a joined system of review in law and equity cases. This is the period in which the two systems of review go their own ways, each with its own rules of procedure, with the rift widening between the review of actions at law and suits in equity.

In 1865, however, the problem arose in the enactments of that year concerning the waiver of jury trial in civil actions, and the provision for the trial of both questions of fact and of law by the trial court sitting without a jury.³² Here, then, we have moved forward to a changed con-

²⁹ See note 26 *supra*.

³⁰ *Ibid.*

³¹ For example, see the Act of May 13, 1800 (c. LXI, 2 Stat. 82), where the legislature was providing for the designation of jurors in the courts of the United States, and, perhaps mindful of the storm of protest raised against the Constitution on the ground that it did not adequately preserve the right to jury trial, it provided that such jurors should be chosen by lot in each district or state, as nearly as possible in the same manner, as they were chosen in that state. The Act of July 20, 1840 (c. XLVII, 5 Stat. 394), went further in allowing the federal courts to make rules or orders from time to time, conforming their practice to any change hereafter adopted by the legislatures of the several states. The statutes regulating the jurisdiction of the federal courts are very numerous in this period, and it is not necessary to cite them in this place. See Clark and Moore, *op. cit. supra* note 2, at 387 ff.

³² Act of March 3, 1865, § 4, c. 86, 13 Stat. 501, 28 U.S.C.A. §§ 773, 875 (1928), which provided that "issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict

cept. The action is one at law. It is tried as to its facts not by the time-honored practice of a jury, but it is tried to the court alone. There is no question of the judge's charging himself as to the law which he must consider in his finding of the facts. From the standpoint of the origin of the action, it is like a law case, and should be reviewed by a writ of error, but there is here no question of a jury trial involved, no sacred right to trial by jury to be preserved inviolate. From the actual physical set-up of the trial it is like an equity case, since it is tried to the judge alone, who finds both the facts and the law.

The Act of March 3, 1865, in providing for this class of cases, sets forth that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.³³ On review of these cases, the rulings of the court in the progress of the trial, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.³⁴

These enactments take the position, therefore, that in all cases at law, where a jury trial might be claimed, whether the trial is had to a jury or to the court alone sitting without a jury, the review of such cases shall be the same, *viz.*, according to the rules of the common law. The statutes were early interpreted to have been passed to preserve to the parties submitting a cause to a trial before the court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court, as theretofore obtained only in cases in which the facts were found by a jury or were admitted by the parties upon a case stated and submitted upon the questions of law.³⁵ Further it was held that by this statute the facts as found and stated by the court below are conclusive on review, and that the review of cases with special findings extends only to a determination of whether the facts as found are sufficient to support the judgment,³⁶ but not as to whether the findings are supported by the weight of the evidence.³⁷

Thus was more firmly cut the line of demarcation between the two

of a jury." This was followed by the provisions as to review and that the review of special findings might "extend to the determination of the sufficiency of the facts found to support the judgment," as stated below in the text.

³³ *Id.* at § 773.

³⁴ *Id.* at § 875.

³⁵ *Flanders v. Tweed*, 9 Wall. (U.S.) 425 (1870).

³⁶ *Boogher v. New York Life Ins. Co.*, 103 U.S. 90, 97 (1880).

³⁷ *Dooley v. Pease*, 180 U.S. 126 (1901). See note 90 *infra*.

types of review, not on grounds of convenience, nor yet on the ground of the presence or absence of a jury trial, but on the inherent difference between actions at law and suits in equity. This was further evidenced by the attitude of the courts toward the use of juries in equity causes, such as patent suits, where the courts were unwilling to grant that the presence of a jury in such a suit rendered the review of the judgment on the verdict that of actions at law.³⁸

These enactments of 1865 and their resultant interpretations must be construed as a victory of the common law over its rivals and an extension of its jurisdiction and procedural review even over those cases where the jury was not present.³⁹

III

We now come to the period in the history of the federal courts when two important trends, exercising increasing force, converged to bring us to our present problem. The first is the development of code pleading

³⁸ 28 U.S.C.A. § 772 (1928); Act of February 16, 1875, § 2, c. 77, 18 Stat. 316. See also case of *Watt v. Starke*, 101 U.S. 247 (1880).

³⁹ Professor Blume in his article, *loc. cit. supra* note 5, at 70, objects to the common law review in jury-waived cases on this ground: "As in jury cases, a motion for new trial may be made on the ground that findings are contrary to the weight of the evidence, but this motion must be addressed to the judge who made the findings and his decision on the motion is final." This objection is more properly addressed to the rule that decisions on motions for new trial are not reviewable in the appellate court except for abuse of discretion. *Ralston Purina Co. v. Bausau*, 73 F. (2d) 430, 431 (C.C.A. 7th 1934); *Chicago and N. W. Ry. Co. v. Kelly*, 74 F. (2d) 31 (C.C.A. 8th 1934). Of course the appellate court, as well as the trial court in actions at law, whether a jury trial has been waived or not, can grant a new trial, as was done in the case of *Flanders v. Tweed*, 9 Wall. (U.S.) 425 (1870). The same strict limitation on review of the judge's decision on a motion for a new trial is conventionally stated in state practice, although abuse of discretion is apparently discoverable from the state of the evidence, particularly where the trial court has upset a jury verdict. *Cf. La Fayette Fire Ins. Co. v. Camnitz*, 111 Fla. 556, 149 So. 653 (1934); *Hart v. Stence*, 219 Iowa 55, 257 N.W. 434 (1934); *Grigsby v. Grigsby*, 249 Ky. 727, 61 S.W. (2d) 605 (1933); *Bumgarner v. Ekstrum*, 228 Mo. App. 424, 67 S.W. (2d) 520 (1934). See also 2 *Graham and Waterman, New Trials* 43 ff. (1855); *Hinton, Power of Federal Appellate Court to Review Ruling on Motion for New Trial*, 1 *Univ. Chi. L. Rev.* 111, 113 (1933); 19 *A.L.R.* 744 (1922); 24 *A.L.R.* 1267 (1923); 33 *A.L.R.* 10 (1924).

Professor Blume has recently amplified his views with an interesting argument that more extensive review of facts in jury cases is really permitted under the Seventh Amendment. *Blume, Review of Facts in Jury Cases—The Seventh Amendment*, 20 *J. Am. Jud. Soc.* 130 (Dec. 1936). As pointed out below in this article, we are in accord with him in believing that the rule of review at law should be made more flexible, but, as we state, it is believed that the way to achieve that result is to make such review applicable to all cases. In view of the express wording of the Seventh Amendment (note 11 *supra*), it is obviously out of the question to apply the equity rule in terms to cases tried by jury. To announce two separate and conflicting rules for jury and jury-waived cases would seem to be a way of emphasizing the gap between them, rather than closing it.

in this country, which emphasized the union of law and equity and brought about a decline of the procedural distinctions between the two systems, a decline extending even to the non-code states. The second is the pressure of business upon the federal judicial system with the growth of the country and the complexity of the problems presented to the national courts for solution, making it necessary that their jurisdiction, particularly the jurisdiction on review, should be sharply curtailed.

The code movement in this country began, as is well known, with the adoption of the Field Code in the State of New York in 1848.⁴⁰ The response in the other states was literally amazing in the light of the general slow movement of judicial reform.⁴¹ It had more extensive effects, too, than in this country alone, for the sweeping changes of the Judicature Act in England in 1873 and later in the English colonies followed the same lines.⁴² Even yet its force is not exhausted, as witnessed by the recent revision of practice in Illinois, effective in 1934,⁴³ and by the federal statute of 1934, authorizing the new rules—a bill long sponsored by the American Bar Association which, since 1922 and at the behest of Chief Justice Taft, had included authorization for the united procedure.⁴⁴ It had its effect in all the jurisdictions to bring about greater interchange between equity and law, and at most only five or six states can fairly be considered now to have a truly divided system.⁴⁵ On matters of appeal the states have been less successful in working out a single system of review. As pointed out hereinafter, perhaps a third of the strictly code states have the single review, but in others the rule varies and a considerable amount of the advantage of the union has thus been lost.⁴⁶ The

⁴⁰ N.Y.L. 1848, c. 379, § 62, which provided: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." See 1 Clark, *Cases on Pleading and Procedure* 502-5 (1930).

⁴¹ Clark, *Code Pleading* 19-22 (1928); Hepburn, *The Development of Code Pleading* 1 ff. (1896).

⁴² Clark, *Code Pleading* 14-17 (1928); Hepburn, *The Development of Code Pleading*, c. VI (1896); cf. C. H. S. Fifoot, *English Law and Its Background* 14-16 (1932).

⁴³ Illinois C.P.A. effective January 1, 1934, Smith Hurd's Ill. Rev. Stat. 1935, c. 110; cf. Clark, *The New Illinois Civil Practice Act*, 1 *Univ. Chi. L. Rev.* 209 (1933).

⁴⁴ Act of June 19, 1934, note 1 *supra*. For the history of this portion of the act see Clark, *op. cit. supra* note 3, at 1304, n. 3.

⁴⁵ Clark, *The Challenge of a New Federal Civil Procedure*, 20 *Corn. L. Q.* 443 (1935). In certain of the so-called common law states the procedure is, if anything, more united than in some of the code states; witness Massachusetts, where a case begun in equity can be completed at law without change or amendment. *Adams v. Silverman*, 280 Mass. 23, 182 N.E. 1 (1932); *Callahan v. Broadway Nat'l Bank*, 286 Mass. 223, 190 N.E. 792 (1934).

⁴⁶ See pp. 215-16 and note 112 *infra*.

general success of the united practice, the saving of delay and expense and the avoiding of reversals for technicalities, has made it so popular that the trend has been all in that direction, a trend which has had its influence on the federal system.

The first impact of code pleading upon the federal system seems to be found in the Conformity Act of 1872,⁴⁷ providing that the federal practice at law should conform as near as may be to that of the state where the court was held. Prior to that date the federal statutes had required a static conformity, that is, one to the state practice as of a certain date (the exact date being changed by successive statutes). The swift spread of the codes made such a static conformity worse than useless, for it might easily require the practice at law to conform to a practice already outmoded and abolished in the state courts. Consequently the theory of continuing conformity as of the time of the action was applied in the Act of 1872 and is still in effect, although a main purpose of the proposed present revision of the federal procedure is the abolition of conformity completely.⁴⁸

Meanwhile the increasing congestion in the federal courts had called for relief, and one development to this end had been the restriction on the extent of review to be granted in federal cases. This bit of history has been so fully developed by Professor Felix Frankfurter that we need do no more here than summarize his exposition.⁴⁹ In 1875 the arrears in the business of the Supreme Court led to relief not merely by lifting the level of the jurisdictional amount, but by restricting review in admiralty cases. To this end Congress restored the provisions of the First Judiciary Act limiting admiralty review to a determination of questions of law arising upon the record,⁵⁰ and, as Professor Frankfurter puts it, "in language reminiscent of Ellsworth's, Chief Justice Waite, for the Court, carried out the remedial purpose of the Act."⁵¹ At about this time Attorney-General Garland was urging upon Congress the extension of the principles of the

⁴⁷ 17 Stat. 196 (1872), 28 U.S.C.A. § 724 (1928).

⁴⁸ For the history leading up and subsequent to the Conformity Act and the objections to it, see Clark and Moore, *op. cit. supra* note 2, at 387 ff.; also Clark, *op. cit. supra* note 45.

⁴⁹ Frankfurter and Landis, *op. cit. supra* note 18, at 26-35. In view of the full citations of authorities given by Professor Frankfurter, supporting citations are here reduced to a minimum. For an able discussion of the congestion in the federal courts in this country, see Budd, *The United States Court of Appeals*, 9 Law Q. Rev. 51 (1893); and *cf.* also Frankfurter and Landis, *The Business of the Supreme Court* (1927), especially c. II.

⁵⁰ Act of February 16, 1875, § 1, 18 Stat. 315.

⁵¹ In *The Abbotsford*, 98 U.S. 440, 445 (1878). See Frankfurter, *op. cit. supra* note 18, at 29. The reference is to Ellsworth's opinion in *Wiscart v. D'Auchy*, 3 Dall. (U.S.) 320 (1796).

Act of 1875 to appellate review in equity cases.⁵² Meanwhile the Act of 1865, referred to above,⁵³ had made clear the limitations on review in federal actions at law, and the Supreme Court, by rule originally adopted in 1865 and still followed,⁵⁴ had required the court of claims to make findings of fact and conclusions of law, thus limiting review to questions of law, with the findings of fact treated like a special verdict.⁵⁵ A corresponding requirement of findings was made for the district courts when acting upon claims against the United States under the provision of the Tucker Act in concurrent jurisdiction with the court of claims,⁵⁶ and review of its findings is limited to questions of law.⁵⁷ Another important similar development was the Act of 1874 concerning the appellate jurisdiction of the Supreme Court over the judgment and decrees of territorial courts, which required that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict should be reported.⁵⁸ Under this act review in the Supreme Court of the decisions of the territorial supreme courts was restricted to questions of law, independently of whether the territory had or had not abolished the distinction between law and equity.⁵⁹

Whether these several developments might have led to a restriction of the equity rule of review as urged by Attorney-General Garland is an

⁵² Rep. Att'y-Gen'l 1885, 42; *id.* 1886, 18; *id.* 1887, xv; *id.* 1888, xiv, as cited in Frankfurter and Landis, *op. cit. supra* note 18, at 30.

⁵³ Notes 33 and 34 *supra*.

⁵⁴ Rule 1, 3 Wall. (U.S.) vii (1865), amended in 17 Wall. (U.S.) xvii (1873). See Revised Rules of the Supreme Court of the United States 1936, rules 40 and 41; subdivision 3 of the latter providing that the special finding shall be in the nature of a special verdict. Since the Act of Feb. 13, 1925, §§ 3(a) and 3(b), c. 229, 43 Stat. 939, review by the Supreme Court of the judgment of the court of claims, except for questions certified by the latter court, has been on certiorari only. *Cf.* 28 U.S.C.A. §§ 346, 347 (1928); for review by the circuit court of appeals, see Act of Feb. 13, 1925, § 4, c. 229, 43 Stat. 939, 28 U.S.C.A. § 226 (1928).

⁵⁵ The cases are very numerous. Among more recent cases see *Portsmouth Harbor, Land and Hotel Co. v. U.S.*, 260 U.S. 327 (1922); *Stilz v. U.S.*, 269 U.S. 144 (1925); *Rogers v. U.S.*, 270 U.S. 154 (1926); *Luckenbach Steamship Co. v. U.S.*, 272 U.S. 533 (1926); *U.S. v. Wells*, 283 U.S. 102 (1931); see also Frankfurter, *op. cit. supra* note 18, at 32. This has been true, also, in cases sounding in equity or admiralty, notwithstanding the former difference in manner of appeal. *Chase v. U.S.*, 155 U.S. 489 (1894); *Brown's Guide to Federal and Bankruptcy Practice* 500 (1933).

⁵⁶ Under what is now 28 U.S.C.A. § 41, subdiv. 20 (1928); the provision as to findings, now 28 U.S.C.A. § 764 (1928), was originally in Act of March 3, 1887, § 7, 24 Stat. 505, 506.

⁵⁷ *Wessel v. U.S.*, 49 F. (2d) 137 (C.C.A. 8th 1931); *Lee Hardware Co. v. U.S.*, 25 F. (2d) 42 (C.C.A. 8th 1928); Frankfurter and Landis, *op. cit. supra* note 18, at 32.

⁵⁸ Act of April 7, 1874, § 2, 18 Stat. 27.

⁵⁹ Full citations are given by Frankfurter and Landis, *op. cit. supra* note 18, at 33, 34, pointing out also certain recent exceptions under special acts.

interesting question. Instead, relief came of a different sort. In 1891 Congress created the circuit court of appeals and thus effectively lifted the pressure from the Supreme Court. No provision was made for findings by the district court as a foundation of appeal to the circuit court of appeals or by the latter as a basis of review on certiorari, and the practice returned again to a review of the entire record in admiralty as well as equity causes.⁶⁰ In 1930, however, as we shall point out later, the Supreme Court by amendment of the equity rules restored the provision in equity and admiralty requiring separate findings of facts and conclusions of law to be stated, and thus, as Professor Frankfurter points out, it "has restored in substance the provisions made for it by Congress in 1789."⁶¹

Meanwhile a direct approach to the code union was being made in the federal courts. The first step was in the Federal Equity Rules of 1912, providing for free transfer of equity causes to the law side of the court, and this was supplemented by the Law and Equity Act of 1915, providing for the filing of equitable defenses in actions at law and for the transfer of law cases to the equity calendar.⁶² As a result of these legislative and judicial steps and the construction given them by the Court, a substantial union of law and equity has already been achieved in the federal courts, leaving, however, formal vestiges of the ancient practice to raise troublesome, technical questions and without changing the divided form of review.⁶³

Moreover, the Equity Rules of 1912 restored the former provision of the First Judiciary Act of 1789 that the testimony of witnesses in all trials in equity shall be taken in open court, except in certain limited

⁶⁰ Frankfurter and Landis, *op. cit. supra* note 18, at 30, 31.

⁶¹ Frankfurter and Landis, *op. cit. supra* note 18, at 32. Professor Frankfurter re-emphasizes his position by the following statement (p. 32, n. 58): "Under the new rules review in equity and admiralty will, as in common law actions, in effect be restricted to questions of law, thus restoring the practice of 1789, but the review, instead of being entitled 'by writ of error' as in 1789, is now called 'appeal.'" Compare Professor Blume's criticism of the requirement of Rule 68 for special findings as "worse than useless" when full review is had. *Op. cit. supra* note 5, at 73. Messrs. Frankfurter and Landis had previously advocated limitation of review in the Supreme Court to "the theory upon which review of decisions of the Court of Claims, as well as review of common law actions without a jury, has already been based." Frankfurter and Landis, *op. cit. supra* note 49, at 290-92; and see also the same authors' *The Supreme Court under the Judiciary Act of 1925*, 42 *Harv. L. Rev.* 1, 23 (1928); *cf.* Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 *Harv. L. Rev.* 483, 501 (1929).

⁶² Equity Rules 1912, Nos. 22, 23; March 3, 1915, c. 90, 38 Stat. 956, 28 U.S.C.A. §§ 397, 398 (1926), Jud. Code §§ 274a, 274b; *Liberty Oil Co. v. Condon National Bank*, 260 U.S. 235, 241 (1922); *cf.* 30 *Ill. L. Rev.* 535 (1935), commenting upon *Joyce v. Humbird*, 78 F. (2d) 386 (C.C.A. 7th 1935).

⁶³ Clark and Moore, *op. cit. supra* note 2, at 387 ff.; Clark, *op. cit. supra* note 45.

cases, and that the court shall pass upon the admissibility of all evidence offered as in actions at law.⁶⁴ This represented a clear and unmistakable adjustment of the procedure in equity to that at law, and the removal of one of the most important arguments for the separate scope of review in equity. Heretofore, the fact that in equity cases the usual method of taking testimony had been by deposition, which being in written form could be examined by the appellate court as fairly and easily as by the trial court, had been at the base of the contention that in equity suits the review should proceed as a rehearing upon the written documents, since it did not involve questions as to the credibility or behavior under examination of witnesses.⁶⁵

In 1928 an attempt was made to abolish the writ of error in cases, civil and criminal, and substitute appeal in its place.⁶⁶ The motives behind this enactment were a desire to simplify and make more easy the procedure by which the review of an action could be obtained.⁶⁷ The procedure for taking an appeal was free from many of the technicalities which accompanied the old procedure for obtaining a writ of error, and the change was to effect merely a less complicated procedure for taking an appeal, and was not to affect the scope of the review which was to be had in an action. But so great was the outcry from bench and bar alike,⁶⁸ which interpreted the reform to be a substitution of the equity review for that at law, that the further Act of April 26, 1928, was immediately passed, which emasculated the proposed reform into a mere change of words by providing that the statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the

⁶⁴ Federal Equity Rule 46, superseding old rule 67. See compiler's note to the new rule in 28 U.S.C.A. following § 723 at p. 309 (1928). Former rule 67 had provided as a departure from the usual practice that "upon due notice given as prescribed by previous order, the court may, in its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing." This rule was, however, merely permissive and accomplished little in the way of reform.

⁶⁵ That the reason for the rule of equity was that the evidence in chancery was not oral but by deposition and should not now apply when the chancellor sees the witnesses, see *Dickinson v. Todd*, 172 Mass. 183, 51 N.E. 976 (1898), and *Old Corner Book Store v. Upham*, 194 Mass. 101, 80 N.E. 228 (1907); and see also *American Rotary Valve Co. v. Moorehead*, 226 Fed. 202 (C.C.A. 7th 1915), discussing the effect of the equity rules.

⁶⁶ 28 U.S.C.A. § 861a (1936), which provided that "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

⁶⁷ For an excellent historical account of the passing of this statute, see Payne, *Writs of Error in the Federal Courts*, 15 Va. L. Rev. 305 (1929). See also Frankfurter and Landis, *op. cit. supra* note 61, at 27-29; the same authors, *The Business of the Supreme Court at October Term, 1930*, 45 Harv. L. Rev. 271 (1931); 41 Harv. L. Rev. 673 (1928).

⁶⁸ See Payne, *op. cit. supra* note 67.

mode of exercising that right and of invoking that relief, should be applicable to the appeal substituted for the old writ of error.⁶⁹ Thus the old writ of error now became known as an appeal, but its characteristics remained unchanged otherwise.⁷⁰

Beginning in 1930 the Supreme Court placed increasing emphasis upon the necessity of findings of facts in equity cases, by the adoption of Equity Rule 70½⁷¹ (extended to the court's action in granting or refusing interlocutory injunctions by an amendment as recent as November 25, 1935), by which it is required that in deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon, and that these findings and conclusions shall be entered of record, and included in the record on appeal. By reason of this rule, and of the federal statutes regulating the trial of issues of fact to the court in jury-waived cases,⁷² there is required in all cases tried to the court without a jury that findings of facts be made by the trial court and returned to the reviewing court on appeal. The court has shown its intention to enforce this rule and has emphasized the absolute need thereof as an aid in the sifting out of complex facts from voluminous records.⁷³

This trend toward the requirement of special findings is in accord with the practice in the states. Only two states, Illinois⁷⁴ and Michigan,⁷⁵ have taken a definite step away from the practice of requiring or preferring that the trial court make findings of fact in cases tried to the court without a

⁶⁹ 28 U.S.C.A. § 861b (1936).

⁷⁰ See *Weinstein v. Black Diamond S.S. Corp.*, 31 F. (2d) 519 (C.C.A. 2d 1929).

⁷¹ This was a new rule promulgated June 2, 1930, to take effect October 1, 1930. The amendment of 1935 was foreshadowed by *Public Service Commission v. Wisconsin Telephone Co.*, 289 U.S. 67 (1933); *cf. Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289 U.S. 287, 330 (1933).

⁷² 28 U.S.C.A. §§ 773, 875 (1928), cited note 32 *supra*.

⁷³ "Our rules do not permit adequate opportunity for presentation of such cases as upon trial *de novo*." Butler, J., dissenting in *Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289 U.S. 287, 330 (1933). *Cf. also Public Service Commission v. Wisconsin Telephone Co.*, 289 U.S. 67 (1933). The necessity of reducing the record is stressed by Judge Chesnut, *op. cit. supra* note 5, although apparently questioned by Professor Blume, *op. cit. supra* note 5. It is also stressed many times by Professor Frankfurter. See Frankfurter and Landis, *op. cit. supra* note 49, at 290; Frankfurter and Landis, *op. cit. supra* note 18, at 23, 30-35; Frankfurter and Landis, *op. cit. supra* note 67, at 278, particularly n. 16, giving some data concerning long records before the Supreme Court; also Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 86 (1936).

⁷⁴ Smith-Hurd's Ill. Rev. Stat. 1935, c. 110, § 64(2).

⁷⁵ Mich. Court Rules 1933, rule 37, § 11. See also Final Report of the Michigan Procedural Commission, 111-12 (1929), for a presentation of the reasons which led Michigan to abolish the necessity of special findings.

jury. Of this attitude, the statute in Illinois affords a fair example. It is there provided that

no special findings of fact or propositions of law shall be necessary in any case at law tried without a jury to support the judgment or as a basis for review.⁷⁶

It is to be noted that this provision is limited to cases at law, and that it is not a statement that no findings may be made, but merely that they are not essential to the support of the judgment or as a basis for review.⁷⁷ The procedure in both of these states is based upon a close following of the English practice, where the courts are not faced by the problem of crowded appellate dockets or of voluminous trial records.

In some seven of the states is found no express statutory provision or court rule regarding the matter of special findings.⁷⁸ But in the majority of the states of the union there are found, either in the statutes or in the court rules, definite provisions for the use and requirement of findings of fact in all cases tried to the court without the intervention of a jury, including both jury-waived and "equity" cases. In some nineteen of the states, there is a definite requirement that the court in such cases must make special findings of fact in writing and state them separately from the conclusions of law.⁷⁹ These include such states as California,

⁷⁶ Smith-Hurd's Ill. Rev. Stat. 1935, c. 110, § 64(2).

⁷⁷ For example, in the Michigan rule it is stated that "no special findings shall be required, but it shall be sufficient for the trial judge to find generally for or against the several parties," but "the trial judge shall sign and file or dictate to the stenographer, an opinion in which he shall set forth his decision and the substance of the judgment with a concise statement of his reasons therefor, and where he awards damages, the manner in which he determined the amount."

In Illinois, where findings are made, as in *Baker v. Himrichs*, 359 Ill. 138, 194 N.E. 284 (1934), it was held that, in a proceeding to contest an election, the finding of the trial judge who saw and heard the witnesses will not be disturbed on appeal unless it is palpably against the weight of the evidence; and in *Mandel Bros., Inc. v. The Industrial Commission*, 359 Ill. 405, 194 N.E. 730 (1935), and *Stellwagen v. The Industrial Commission*, 359 Ill. 557, 195 N.E. 29 (1935), it was held that a finding by the commission upon a contested question of fact will not be disturbed by the Supreme Court unless the conclusion reached is contrary to the manifest weight of the evidence, and where the commission has seen and heard the witnesses, its finding is entitled to great weight. In *Weiniger v. Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420 (1935), it was held that where co-partners who have insured their stock of goods against fire, bring a suit in equity on several policies covering the loss, the finding of the chancellor will not be disturbed on review where it is well within the range of the evidence, and not against its manifest weight.

⁷⁸ Delaware, Georgia, Maine, Maryland, Mississippi, Virginia, and West Virginia.

⁷⁹ Ark. Civ. Code 1934, § 364; Cal. Code Civ. Proc. 1933, §§ 633-634; Colo. Code, § 307 (Courtright-Mills, 1933); Conn. Pr. Bk. 1934, § 232; Idaho Code 1932, §§ 7-302, 7-305; Mass. Ann. L. 1932, c. 214, § 23; Mason's Minn. Stat. 1927, § 9311 (supp. 1936); Nev. Comp.

Colorado, Connecticut, Massachusetts, Minnesota, New Mexico, North and South Carolina, Utah, Washington, and Wisconsin. In some twenty other states it is provided by statute or court rule that the court may make special findings of fact in such cases, and must do so where so requested by the parties.⁸⁰ These states include Alabama, Arizona, Indiana, Iowa, Missouri, Montana, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, Texas, and Wyoming.

With this history we now come to the Act of June 19, 1934, under which the Supreme Court is proceeding to unite the law and equity procedures in the federal courts.⁸¹

IV

Before we attempt a final revaluation of proposed Rule 68 there are certain other factors which should be noted. The first is the crystallization in the equity courts themselves of principles of review which are self-denying ordinances, making the equity review in reality not widely different from that at law. The importance of this factor lies in the fact that, while theoretically the review in cases in equity is that of a rehearing or a trial *de novo*, there have grown up certain well settled and often reiterated principles observed by equity courts in the consideration of findings of facts. The constant application of these principles to cases on review has resulted in a doctrine which when applied reaches conclusions very closely analogous to those achieved in the review of actions at law.

One of these principles announced by the courts of equity in the review of findings of facts is that the findings of the lower court on the facts will stand in the appellate court unless clearly erroneous, because the trial

L. 1929, § 8783; N. J. Sup. Ct. rule 113 (1929); N. M. Stat. 1929, § 105-813; N. C. Code 1935, § 569; N. D. Comp. L. Ann. 1913, § 7641; Ore. Code Ann. 1930, § 2-502; 1 S. C. Code 1932, § 649; S. D. Comp. L. 1929, §§ 2525-26; Utah Rev. Stat. 1933, § 104-26-2; Vt. Pub. L. 1933, § 2069; Wash. Rev. Stat. Ann., § 367 (2 Remington, 1932); Wis. Stats. 1931, § 270.33.

⁸⁰ Ala. Code 1929, § 9500; Ariz. Rev. Code 1928, § 3819; Ind. Ann. Stat., § 603 (Burns, 1926); Iowa Code 1931, § 11435; Kan. Rev. Stat. Ann. 1923, § 60-2921; Ky. Codes Ann., Civil Prac. § 332 (Carroll, 1927); 2 Mo. Stat. Ann. 1932, § 952; Mont. Rev. Code, § 9369 (Choate, 1921); Neb. Comp. Stat. 1929, § 20-1127; N. H. Pub. L. 1926, c. 316, § 12; N. Y., Parson's Practice Manual, §§ 439, 440 (1934); Ohio Gen. Code 1926, § 11470; 1 Okla. Stats. 1931, § 374; Pa. Sup. Ct. Equity Rules, rule 67 (1925); R. I. Gen. L. 1923, c. 337, § 6; Tenn. Code, § 8811 (6 Williams, 1934); Tex. Rev. Civ. Stat., § 2208 (6 Vernon, 1926); Wyo. Rev. Stat. 1931, § 89-1321. Two doubtful states, whose decisions seem in accord with this practice, are Florida and Louisiana. The New York Code was amended by L. 1936, c. 915, to make it unnecessary for the judge to pass separately upon the parties' requested findings and to permit him to incorporate the facts in his decision. See 2d Report, N.Y. Judicial Council, 199-211 (1936).

⁸¹ Note 1 *supra*.

judge has had the opportunity of seeing and estimating the credibility of the witnesses, an advantage which is not available to the appellate court. This is a canon of decision so well accepted that it is scarcely necessary to cite specific instances.⁸² Another principle is that where the court below has considered conflicting evidence, and has made its findings and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law to the facts, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand on review.⁸³

The reviewing court in equity cases distinguishes between findings based on conflicting evidence and those based on undisputed evidence, between those based on oral testimony given in open court and those based on written documents and depositions, and accords to findings based on conflicting evidence or oral testimony in open court a high presumption of correctness, which can be rebutted only by a clear showing of obvious error or mistake.⁸⁴

The net result of the application of these principles is that reversals of equity cases for errors of fact are comparatively rare. A random sampling of some fifty-five cases between 1900 and 1934 shows only four reversals after examination of the facts, and these involve such matters as the ultimate conclusion of fraud or the infringement of copyright suits, matters, at least under some rulings, to be treated as essentially

⁸² Even Professor Blume, *op. cit. supra* note 5, at 71, states that "in literally thousands of cases courts of the United States have iterated and reiterated the supposed truth that a trial judge who sees and hears the witnesses is in a better position to determine issues of fact than an appellate court which gets its impressions from a cold, printed record." He then argues that this "supposed truth" became accepted before the days of court stenographers and has persisted in spite of the fact that it is now possible to reproduce the exact words of the witnesses. But the general experience seems to be opposed to Professor Blume's view and more in accord with that of Judge Chesnut, *op. cit. supra* note 5, which he criticizes. The universally approved change from depositions to the taking of direct testimony in equity cases (see notes 64 and 65 *supra*) witnessed this. Moreover, the appellate equity courts themselves seem to take another view in their anxiety to obtain a reduction of the records by insulating themselves against the testimony through the requirements of its reduction to narrative form and of findings of facts. *Cf. supra* note 73.

⁸³ See, for example, such cases as *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.*, 104 Fed. 243 (C.C.A. 8th 1900); *Lilienthal v. McCormick*, 117 Fed. 89 (C.C.A. 9th 1902); *Silver King Coalition Mines Co. v. Consolidated Mining Co.*, 204 Fed. 166 (C.C.A. 8th 1913), *cert. den.* 229 U. S. 624 (1913); *Butte and Superior Copper Co. v. Clark Montana Realty Co.*, 248 Fed. 609 (C.C.A. 9th 1918), *cert. den.* 247 U. S. 516 (1918); *Unkle v. Wills*, 281 Fed. 29 (C.C.A. 8th 1922); *Fienup v. Kleinman*, 5 F. (2d) 137 (C.C.A. 8th 1925).

⁸⁴ See *Simkins*, Federal Practice 799 (1934), and cases therein cited.

questions of law. Five other cases were reversed on other grounds, while forty-six were affirmed.⁸⁵

We have seen that in Professor Frankfurter's view the requirement of special findings of fact in equity cases, emphasized since 1930 by amendment to the equity rules, led automatically to a restriction on the scope of review.⁸⁶ This point has not been passed on directly by the Supreme Court, although decisions of the circuit court of appeals have applied the former rule of review without apparently contemplating the possibility that a change had occurred.⁸⁷ Even if Professor Frankfurter is incorrect in the extent to which the rule goes, it is clear, however, that this requirement will reinforce the presumption which the Court has already applied in favor of the trial court's action.

It should be noted, also, that the review at law is not wholly inflexible. In fact, there has already been a modification of the original rules of

⁸⁵ The cases were chosen at random from the citations under notes 1286-89 to the Federal Equity Rules appearing after 28 U.S.C.A. § 723 (1928), but with weighted distribution in the various circuits comparable to the total number of cases cited in the notes and with representative distribution as to subject matter. The following cases were reversed and remanded to the lower court on the basis of an examination of the findings: *Ridge v. Healy*, 251 Fed. 798 (C.C.A. 8th 1918) (overreaching by attorney in contract for fee); *Kansas City So. Ry. Co. v. May*, 2 F. (2d) 680 (C.C.A. 8th 1924) (fraud); *United States v. Mammoth Oil Co.*, 14 F. (2d) 705 (C.C.A. 8th 1926) (fraud); *Harold Lloyd Corp. v. Witwer*, 65 F. (2d) 1 (C.C.A. 9th 1933) (infringement of copyright). The following cases were reversed or vacated on other grounds than error in the finding: *Rochester German Ins. Co. of Rochester, N. Y. v. Schmidt*, 162 Fed. 447 (C.C.A. 4th 1908); *Semidey v. Central Aguirre Co.*, 239 Fed. 610 (C.C.A. 1st 1917), *cert. den.* 243 U.S. 652 (1917); *John T. Porter v. Java Cocoanut Oil Co.*, 4 F. (2d) 476 (C.C.A. 9th 1925), *cert. den.* 268 U.S. 697 (1925); *Carey v. Donohue*, 209 Fed. 328 (C.C.A. 6th 1913); *Moran v. Morgan*, 252 Fed. 719 (C.C.A. 2d 1918). The last two were reversed on the law as applied to the facts found by the lower court. The other forty-six cases were affirmed, and the findings of the trial court approved. Since they continuously repeat and apply the "familiar rule" that the chancellor's findings are "presumptively correct," not to be disturbed "unless an obvious error has intervened in the application of the law, or some serious mistake has been made on the consideration of the evidence," citation of all the cases would seem unnecessary. But it is instructive to note how overwhelmingly numerous the affirmances are as compared to the reversals. Instructive examples are *Blank v. Aronson*, 187 Fed. 241 (C.C.A. 8th 1911) (from which the quotations are made); *U.S. v. U.S. Shoe Mach. Co.*, 247 U.S. 32, 41 (1918); *American Rotary Valve Co. v. Moorehead*, 226 Fed. 202, 203 (C.C.A. 7th 1915); *Schlank v. Smith*, 246 Fed. 686 (C.C.A. 8th 1917); *Unkle v. Wills*, 281 Fed. 29, 34 (C.C.A. 8th 1922); *Taylor v. Nevada Humboldt Tungsten Mines Co.*, 295 Fed. 112, 114 (C.C.A. 9th 1924).

⁸⁶ Note 61 *supra*.

⁸⁷ *Boynton v. Moffat Tunnel Improvement Dist.*, 57 F. (2d) 772 (C.C.A. 10th 1932), *cert. den.* 287 U.S. 620 (1932); *Johnson v. Umsted*, 64 F. (2d) 316 (C.C.A. 8th 1933); *Hopkins v. Texas Co.*, 62 F. (2d) 691 (C.C.A. 10th 1933), *cert. den.* 290 U.S. 629 (1933); *cf.* also *Public Service Comm. v. Wisconsin Telephone Co.*, 289 U.S. 67 (1933); *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U.S. 287 (1933); *Martin v. Drexel Ice Cream Co.*, 80 F. (2d) 768 (C.C.A. 7th 1935).

review in jury-waived cases, rules which concealed pitfalls for the lawyer and thus deservedly came into disfavor for reasons other than on the merits of the issue in which we are interested. It was difficult for counsel to secure an adequate review of a jury-waived case unless he had taken the two precautions of making a written waiver and, usually, of requesting and obtaining special findings. If he went to trial on oral waiver, he was held to have submitted the case to the judge as an arbitrator; and under the statute of 1865, as we have seen, it was only where special findings were had that the review could go to the sufficiency of the facts found to support the judgment.⁸⁸ In 1930 the jury waiver statute was amended to include waiver in open court, and the proposed Rule 68 requires special findings in all cases.⁸⁹ It would seem, therefore, that these technical difficulties formerly such a trap to the lawyers will be a thing of the past, and the law review may therefore, on its side, tend to lose some of its sharper contours. One advantage of a single form of review would be the bringing to a culmination of these trends towards each other of the two reviews, while the adoption now of rules re-emphasizing the division might tend to administer a sharp check to them. Even as it is, the cases show that some review of the facts is had in examining the sufficiency of the facts to sustain the judgment.⁹⁰ The tendency is now to incorporate this

⁸⁸ 28 U.S.C.A. §§ 773, 875 (1928), cited notes 32-34, *supra*. For discussion of the applicable rules, see *Fleischmann Co. v. U.S.*, 270 U.S. 349 (1926); *Clark and Moore, op. cit. supra* note 2, at 411-14 (1935), the latter pointing out that review could also be secured by obtaining rulings on propositions of law presented to the court and by motion for judgment. *Cf. Simkins, op. cit. supra* note 84, at 84-86.

⁸⁹ 28 U.S.C.A. § 773 (1928), as amended May 29, 1930, c. 357, 46 Stat. 486 (1930), 28 U.S.C.A. § 773 (1936), note 32 *supra*; for Rule 68 of the Preliminary Draft, see note 4 *supra*.

⁹⁰ For the cases, see extensive annotations to 28 U.S.C.A. § 877 (1928), particularly notes 26-34. For reversals for erroneous conclusions, see *French v. Edwards*, 21 Wall. (U.S.) 147 (1874); *McLaughlin v. Pacific Lumber Co.*, 293 U.S. 351 (1934) (on motion for judgment); *Order of United Commercial Travelers v. Shane*, 64 F. (2d) 55 (C.C.A. 8th 1933). For the general rule, see *Norris v. Jackson*, 9 Wall. (U.S.) 125 (1869); *Roogher v. Ins. Co.*, 103 U.S. 90, 97 (1880); *Lehnen v. Dickson*, 148 U.S. 71, 78 (1893); *Behn v. Campbell*, 205 U.S. 403 (1907); *Troxell v. Delaware, L. & W. R. Co.*, 227 U.S. 434, 444 (1913); *Churchill v. Buck*, 102 Fed. 38, 43-44 (C.C.A. 8th 1900); *Anglo-American Land, Mortgage and Agency Co. v. Lombard*, 132 Fed. 721 (C.C.A. 8th 1904), *cert. den.* 196 U.S. 638 (1904); *Huglin v. H. M. Byllesby & Co.*, 72 F. (2d) 341 (C.C.A. 8th 1934). The case of *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935), so much discussed as to the power of the appellate court to direct a judgment of dismissal on the merits instead of a new trial, is instructive here. In *Redman v. Baltimore & Carolina Line*, 70 F. (2d) 635 (C.C.A. 2d 1934), with *Manton, Cir. J.*, dissenting, the testimony in an action of negligence was widely divergent; but the court ruled it insufficient to support the verdict and ordered a new trial. The Supreme Court denied a petition for *certiorari* by the plaintiff challenging the ruling on the insufficiency of the evidence (293 U.S. 577 (1934)), but granted it to review the issue whether a new trial or a dismissal on the merits

rule of review into the statutes governing the newly created administrative tribunals. Witness the amendment to the Radio Act, which provides, with regard to review of orders of the Federal Radio Commission, "that the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."⁹¹ Contrast this rule with that stated for equity review, "that the court will not disturb the findings below unless they are clearly erroneous or manifestly against the weight of the evidence."⁹² And it may be suggested that the gap between the two rules seems not overlarge, and that the law review may permit of a rule sufficiently extensive to do all that justice requires without inviting appeals on unwieldy records.⁹³

Another factor is the development of a vast number of administrative tribunals within the government and the crystallization of a form of review of the finding of such tribunals. Such tribunals include the Interstate Commerce Commission,⁹⁴ the Federal Trade Commission,⁹⁵ the

should be ordered (293 U.S. 541 (1934)), and eventually directed the judgment of the circuit court of appeals to be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, to be affirmed, thereby supporting a review of a case certainly on the border line between the *weight* and the *sufficiency* of the evidence.

⁹¹ 46 Stat. 844, c. 788 (1930), 47 U.S.C.A. § 96 (1936), now repealed in 47 U.S.C.A. § 402e (1936), note 98, *infra*; Federal Radio Commission v. Nelson Bros. B. & M. Co., 289 U.S. 266 (1933).

⁹² Brown's Guide to Federal and Bankruptcy Practice 509 (1933); *cf.*, 30 Ill. L. Rev. 535 (1936), cited note 62 *supra*.

⁹³ There seems to be no hard and fast distinction between questions of law and questions of fact; on debatable points the issue seems largely one of degree; and since there are so many cases on the border line between ultimate facts and conclusions of facts, *i.e.*, law, the way is open to a court with understanding to accomplish substantial justice, whatever the formula. See discussion in Clark, *op. cit. supra* note 41, at 150-60; Cook, Statements of Fact in Pleading under the Codes, 21 Col. L. Rev. 416 (1921); Cook, 'Facts' and 'Statements of Fact,' *post* p. 233; Isaacs, The Law and the Facts, 22 Col. L. Rev. 1 (1922); and *cf.* U.S. v. Wells, 283 U.S. 102 (1931), on ultimate facts. The Connecticut court, which reviews only errors of law, includes *conclusions* of facts in that category. Dexter Yarn Co. v. American Fabric Co., 102 Conn. 529, 129 Atl. 527 (1925). Messrs. Arnold and James (Cases and Materials on Trials, Judgments, and Appeals 833-34, n. 50 (1936)), point out that "the elasticity of these two escapes" of review of an error of law or of an arbitrary finding without evidence to support it, as is reserved by Brandeis, J., concurring in St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 73 (1936), "is sufficient to give the Court almost complete power to review if it wants to take it."

⁹⁴ See provisions in 15 U.S.C.A. § 21 (1928) ("The findings of the Commission or board as to the facts, if supported by testimony, shall be conclusive").

⁹⁵ See provisions in 15 U.S.C.A. § 45 (1928).

Securities and Exchange Commission,⁹⁶ the National Labor Relations Board,⁹⁷ the Federal Communications Commission, formerly the Radio Commission,⁹⁸ as well as functions of executive officers such as the Secretary of Agriculture.⁹⁹ They are set up for the purpose of dealing with a specified class of cases, and are composed of men who are assumed to have particular skill and knowledge in the fields in which they act. They are to hear and examine witnesses and reports, which are of a technical and particularized nature, and report their findings of fact as based on such examination.

These findings of facts and the report thereon are subject to judicial review, and it is instructive to consider the trend of the decisions on review in these cases. These findings of commissions and boards are returned to the reviewing court, with the report of the commission and the evidence upon which the findings are made.¹⁰⁰ The testimony and evidence in these cases is voluminous and often of a technical character, which would render it exceedingly difficult to review *de novo*. On the other hand, the matter in controversy in these cases is often of profound governmental and political significance, especially in those cases where the commission is itself the party complaining in investigation of an infringement of a statute. These problems have made the matter of review of these cases an exceedingly delicate task, particularly in the rate cases.

In approaching this problem the courts were possessed of the analogy presented by these cases to those where a special master was appointed by the court to hear and pass upon testimony and evidence and to report

⁹⁶ See Act of June 6, 1934, § 25(a), c. 404, 48 Stat. 881, 901-2 ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." But the Court may order the Commission to hear additional material evidence which had not been brought forth before for reasonable grounds).

⁹⁷ See 29 U.S.C.A. §§ 160e, 160f (1936) (similar to note 94 *supra*, substituting "evidence" for "testimony").

⁹⁸ 47 U.S.C.A. § 96 (1936), cited in note 91 *supra*, was repealed by the Communications Act of 1934 (June 19, 1934, c. 652, § 609, 48 Stat. 1105, 47 U.S.C.A. § 602 (1936), and the power formerly possessed by the Radio Commission to regulate radio matters was given to the Federal Communications Commission. 47 U.S.C.A. § 301 *et seq.* (1936). The provisions limiting review which were in the Radio Act, cited in the text at note 91 *supra*, are repeated as to the Federal Communications Commission by 47 U.S.C.A. § 402e (1936).

⁹⁹ *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38 (1936), commented on in 50 *Harv. L. Rev.* 78 (1936); *Tagg Bros. & Moorhead v. U.S.*, 280 U.S. 420 (1930); *Acker v. U.S.*, 56 *Sup. Ct.* 824 (1936).

¹⁰⁰ Where findings are not made, the court will not search the record to ascertain the basis of the decision, but will remand the case for the drafting of findings. See *Public Service Comm. v. Wisconsin Telephone Co.*, 289 U.S. 67, 70, 71 (1933); *Atchison, T. & S. F. Ry. Co. v. U.S.*, 295 U.S. 193, 201-2 (1935); but see *U.S. v. B. & O. Ry. Co.*, 293 U.S. 454, 465 (1935). As to the necessity of findings by the President "as to the existence of the required basis of his action," see *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431 (1935).

his findings thereon. In those cases the report of the master was to be treated as presumptively correct, but was to be subject to review by the court, and the court might adopt the same, or modify or reject it in whole or in part, when the court was satisfied fully that error had been committed.¹⁰¹ In the case of findings of commissions, however, the court was presented with findings of fact by a board of experts in such matters, and the recent decisions in the Supreme Court have pointed out again and again that it is not the province of the court on review to substitute its judgment for that of the commission,¹⁰² and that the findings of the commission, if supported by testimony, shall be conclusive.¹⁰³ Thus the findings of a commission are coming more and more to be regarded in the same light as the verdict of a jury of experts, and not as a mere advisory opinion to the court. In recent acts it is stated expressly as a part of the legislation.¹⁰⁴

¹⁰¹ See Federal Equity Rule 61½ promulgated May 31, 1932, 28 U.S.C.A. following § 723, at p. 3 (1936).

¹⁰² See *Adams v. Mills*, 286 U.S. 397, 407 (1932), and *Florida v. U.S.*, 292 U.S. 1, 12 (1934); cf. cases in note 99 *supra*, also in notes 103, 104, 106, 108, *infra*.

¹⁰³ The cases are very numerous. The following citations, in addition to those given elsewhere in this article, are only illustrative: *Federal Trade Comm. v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Federal Trade Comm. v. Keppel & Bros.*, 291 U.S. 304, 314 (1934); *Terminal Warehouse Co. v. Penn. Ry.*, 56 Sup. Ct. 546 (1936); *B. & O. R. R. v. U.S.*, 56 Sup. Ct. 797 (1936); *Goss v. Federal Radio Comm.*, 67 F. (2d) 507, 508 (App. D. C. 1933); *Federal Trade Comm. v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C.C.A. 3d 1935); Cf. *G. C. Henderson, The Federal Trade Commission*, c. III, also pp. 336-37 (1924).

A report of the Committee on Administrative Law of the American Bar Association, in advocating the establishment of a court of administrative justice, urges as a function of such court the review of administrative findings and makes objection to the present rule, which it regards as well settled. Report of the Special Committee on Administrative Law, Advance Program, 59th Annual Meeting 1936, 209, 213, 219. And see also McGuire, Proposed Reforms in Judicial Review of Federal Administrative Action, 19 A.B.A.J. 471 (1933). But see the excellent article, R. M. Cooper, The Proposed U.S. Administrative Court, 35 Mich. L. Rev. 193, 248-49 (1936), referring to the constitutional problem stated below. See note 105 *infra*.

The much controverted question raised by *Crowell v. Benson*, 285 U.S. 22 (1932), that the Supreme Court must review "constitutional facts," that is, must review the findings to the extent to see that constitutional rights are not violated, while it may in practice greatly affect the scope of review, yet, however it may eventually be settled, it does not controvert the theory; for the issue of constitutionality is necessarily a legal one and the real debate is as to how inclusive that issue shall be made. Cf. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. of Pa. L. Rev. 1055 (1932); 41 Yale L. J. 1037 (1932); 21 Calif. L. Rev. 266 (1933); and 50 Harv. L. Rev. 78 (1936), on *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38 (1936), cited note 99 *supra*.

¹⁰⁴ "The findings of the board as to the facts are made conclusive by section 10(c), 29 U.S. C.A. § 160(c) (1936)." *National Labor Relations Board v. Associated Press*, 85 F. (2d) 56 (C.C.A. 2d 1936), citing *Federal Trade Comm. v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Florida v. U.S.*, 292 U.S. 1 (1934); and *Helvering v. Rankin*, 295 U.S. 123 (1935); cf. note 91 *supra*.

The rulings of the court with reference to the Radio Act in this connection are instructive. Before the amendment referred to above, the District of Columbia Court of Appeals was directed to review the evidence and revise the decision appealed from and enter such judgment as to it might seem just. This provision made the court a superior and revising agency in the administrative field, and consequently its decision was not a judicial judgment reviewable by the Supreme Court.¹⁰⁵ But the amendment was held, however, in the *Nelson* case to be sharply in contrast with the previous grant of authority: "The limitation manifestly demands judicial, as distinguished from administrative, review." And hence this being a judicial review it was within the function of the court to consider it.¹⁰⁶ Although the point is not now open, in view of the history of the chancery courts, it would seem that the equity review in like measure is an administrative one, as compared to the law review which is a judicial one. The equity review treats the trial judge with no more favor than were administrative experts under some, at least, of the earlier acts, now definitely being superseded.

The distinction in form of review becomes more troublesome where a choice of method is open to the parties. Thus, as we have seen, the district court has concurrent jurisdiction under the Tucker Act with the court of claims as to claims against the government not exceeding \$10,000. As matters now stand, the review from either tribunal is the same and is limited.¹⁰⁷ With the proposed Rule 68, unless a special exception is to be made, an exception not yet suggested, the review of cases coming from the two tribunals will be quite different. A similar situation will occur as to claims for tax refunds made either in a district court or directly from the board of tax appeals to the circuit court of appeals.¹⁰⁸ If the former is to be subjected to full review while the latter remains as at present, there is incentive to jockeying for position in these cases, and

¹⁰⁵ Federal Radio Comm. v. Virginia Electric Co., 281 U.S. 464 (1930); cf. Harvey v. United States, 105 U.S. 671, 691 (1881) ("equity jurisdiction conferred in a special case by a special act"). See Cooper, *loc. cit. supra* note 103; W. G. Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894 (1930); 29 Mich. L. Rev. 766 (1931).

¹⁰⁶ Federal Radio Comm. v. Nelson Bros. B. & M. Co., 289 U.S. 266 (1933).

¹⁰⁷ See notes 56 and 57 *supra*. For review in bankruptcy see *In re 620 Church St. Bldg. Corp.*, 57 Sup. Ct. 88 (1936), and Brown, *op. cit. supra* note 55, at 526; for review on certain anomalous and miscellaneous appeals see Brown, *id.*, at 501, 502.

¹⁰⁸ 26 U.S.C.A. §§ 617f, 641, 641c (1935), 28 U.S.C. § 41 (20) (1926); *Helvering v. Rankin*, 295 U.S. 123 (1935); *Comm. of Internal Revenue v. Field*, 67 F. (2d) 876 (C.C.A. 2d 1933); *Comm. of Internal Revenue v. Newbury*, 80 F. (2d) 631 (C.C.A. 7th 1935); *Comm. of Internal Revenue v. H. F. Neighbor's Realty Co.*, 81 F. (2d) 173 (C.C.A. 6th 1936); *Beech v. Comm. of Internal Revenue*, 82 F. (2d) 42 (C.C.A. 3d 1936).

the development of clear cut and certain rules of substantive law, upon which business men may rely, is impeded.¹⁰⁹

A third factor to be considered is the attitude of the state courts. Here there is the greatest variation. A substantial number of jurisdictions have extended the equity review substantially as provided in Rule 68.¹¹⁰ Perhaps a still larger group give lip service to the old line of demarcation, but construe away its force by extensive application of the presumption in favor of the trial court's finding.¹¹¹ The state codes, too, reflect the difficulties occasioned by the divided procedure on appeal requiring resort to historical distinctions for the purpose of appeal, if for no other.¹¹² Some eight or nine states have, however, completely assimilated the review of equity cases in that of the law.¹¹³ In these states the difficulty as to the separate rules is done away with, and all cases are treated alike. It does

¹⁰⁹ Judge Chesnut and Professor Blume, *op. cit. supra* note 5, present somewhat diverse views as to the effect of these various reviews in accelerating or reducing waiver of jury trial by the parties. Perhaps conclusive evidence cannot be afforded on this question, but statistics from one of the states applying the law review to all cases—Connecticut—shows an unusually large waiver of jury cases in all kinds of actions, negligence, contract, or what not, and demonstrates, at least for that jurisdiction, that unitary review has certainly had no deleterious results in this regard. See Clark and Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 *Yale L. J.* 867 (1934). It is doubtful if the parties at the time waiver is had and before trial are then anxious to look forward to extensive appeal or are then greatly influenced by the possibility of extending the appeal.

¹¹⁰ See note to Rule 68, Preliminary Draft, p. 18, listing, with citations, the following sixteen jurisdictions: Alabama, California, Colorado, Illinois, Minnesota, New Jersey, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin; with, however, possible doubt as to California and Washington.

¹¹¹ *Cf.*, for example, *Adams v. Silverman*, 280 *Mass.* 23, 182 *N.E.* 1 (1932) (findings of fact made by the trial judge after hearing oral testimony cannot be reversed on appeal, "unless they appear to be plainly wrong"); and *Barry v. Merrill*, 85 *N.H.* 525, 161 *Atl.* 34 (1932). The states included are those not listed in notes 110 *supra* and 113 *infra*.

¹¹² See, e.g., *Sherwood v. Sherwood*, 44 *Iowa* 192 (1876); *Di Menna v. Cooper & Evans Co.*, 220 *N. Y.* 391, 115 *N.E.* 993 (1917); *Carroll v. Bullock*, 207 *N. Y.* 567, 101 *N.E.* 438 (1913); *Learned v. Tillotson*, 97 *N. Y.* 1 (1884); *Campbell v. Gowans*, 35 *Utah* 268, 100 *Pac.* 397 (1909); and *cf.* also *Liberty Oil Co. v. Condon Nat. Bank*, 260 *U.S.* 35 (1922); *Joyce v. Humbird*, 78 *F. (2d)* 386 (*C.C.A.* 7th 1935), commented on in 30 *Ill. L. Rev.* 535 (1936).

¹¹³ See *Arizona*, *Franklin v. Havalena Mining Co.*, 18 *Ariz.* 201, 216-17, 157 *Pac.* 986 (1916) (interpreting the effect to be given to § 3819 of the Revised Code); *Connecticut*, *Meriden Trust and Safe Deposit Co. v. Miller*, 88 *Conn.* 157, 90 *Atl.* 228 (1914); *Idaho*, § 11-219 Code (1932), see also *Lisenby v. Inter-Mountain State Bank*, 33 *Idaho* 101, 190 *Pac.* 355 (1920); *Kansas*, *Laycock v. Study*, 141 *Kan.* 756, 761, 44 *P. (2d)* 220 (1935); *Kentucky*, § 331 (2), *Carroll's Code of Civ. Practice*; *Nevada*, c. 90, § 15 Stat. (1935), in the light of the older case *State of Nevada v. Yellow Jacket Silver Mining Co.*, 5 *Nev.* 415, 418 (1868); *New Mexico*, §§ 105-2520, 105-813 Stat. (1929), *Fraser v. State Savings Bank*, 18 *N.M.* 340, 137 *Pac.* 592 (1912); *North Carolina*, art. IV, § 13 of the constitution; *Pennsylvania*, § 1165 *Purdon's Stat.* tit. 12 (1931), *Brinton v. Davidson*, 308 *Pa.* 371, 373, 162 *Atl.* 905 (1932), *Equitable Life Ass. Soc. v. Klein*, 315 *Pa.* 156, 173 *Atl.* 188 (1934).

not appear that appeals are not fairly decided, but, if one can judge by reading the reported cases, there seems to be a real gain in simplicity of procedure.

In this connection the English procedure should be noted. While it has afforded us many fine examples of procedural reform,¹⁵⁴ it presents in the matter of review a different situation from that which we face in this country. The high cost of appeals in that country serves as a sufficient deterrent to promiscuous appeals. The fact that the presence or absence of a jury trial in that country is a matter of discretion with the court, and not a mandate of the constitution, places a different emphasis upon the review of findings. Nevertheless, despite the fact that the Rules of the High Court of Judicature in England announce that all appeals to the Court of Appeal shall be by way of a rehearing,¹⁵⁵ the English courts have accorded a high presumption of correctness to findings of facts in the trial court.¹⁵⁶

It should be seen, too, that the English concept of a rehearing of the case is designed to secure affirmation unless there is real error, not wider review and more extensive control over the action of the trial court. In other words, the English idea of review is not facilitated by the equity review; it is approximated, perhaps to the extent permissible under our constitutional protection of jury trials, by the federal statutes, reiterated in the proposed rules, against reversals except for material error affecting the substantial rights of the parties.¹⁵⁷

V

Here, then, is the background against which the choice of the proper rule of review must be made.

Continuance of the old division as fixed essentially by historical accident, to wit, the place where chancery jurisdiction finally became settled, is definitely undesirable as requiring the upper court to make distinctions which it is the main purpose of the new reform to avoid.

¹⁵⁴ For example, the new Proposed Rules of Procedure in District Courts have borrowed in many particulars from the English practice.

¹⁵⁵ Order LVIII, rule 1 of the Rules of the Supreme Court of Judicature, Annual Practice 1935, at 1235, provides that all appeals to the Court of Appeal shall be by way of a rehearing.

¹⁵⁶ For example, Lord Halsbury in the case of *Montgomerie & Co. v. Wallace-James*, [1904] A.C. 73, 75, states: "Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have." To the same effect see the opinion of Lindley, L. J., in the case of *Coghlan v. Cumberland*, [1898] 1 Ch. 704, 705, and of Lord Dunedin in *Cooper v. General Accident, etc., Corp.*, [1922] 2 Ir. R. 214.

¹⁵⁷ 28 U.S.C.A. §§ 391, 777 (1928), Rules 50, 70, Preliminary Draft, *loc. cit. supra* note 1.

Extension of the equity review to jury-waived cases as suggested in Rule 68 has a definite appeal to those who feel that at least a second review by an upper tribunal of more than a single judge is necessary for the proper control of the trial court's action. It cannot be extended to jury trials because of the express provisions of the Seventh Amendment. It does afford a fairly flexible system not bound by definite rule, with potentially at least very extensive power in the appellate court.

Nevertheless, our history would seem to indicate considerable insistence on the view that the right of appeal should be restricted. This is based in part on the protection from a plethora of cases of our important federal appellate courts, notably the Supreme Court of the United States, through a reduction in both the number of appeals and the records in those cases where appeals are allowed. It is also based upon the feeling that the trial judge's reaction to the witnesses is on the whole more dependable than those to be obtained only from the printed record, a feeling which has resulted in a restriction of the equity review in practice.

An extension of review at the present time would appear out of keeping with this history. It would also present definite problems of conflicts as to other important federal cases, notably claims against the United States, claims for tax refunds, and appeals from administrative tribunals. It would continue a divided practice on appeal and prevent the simplicity and uniformity of one single concrete rule. On the whole, therefore, having in mind the advantages of simplicity and uniformity, of compatibility with other federal jurisdiction, of reducing appeals and complex records, of giving due weight to the findings of the judge who actually hears the witnesses, and of limiting reversals except on substantial grounds while nevertheless affording ample power to correct where necessary, there would seem a substantial basis for argument in support of extending the law review, perhaps stated in the very words of the amendment to the Radio Act quoted above, to all cases alike.