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COURTS - DUE PROCESS- FINDINGS OF FACT BY COURT ON BASIS OF TRANSCRIPT WHERE MASTER HAS NOT SUBMITTED REPORT

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COURTS — DUE PROCESS — FINDINGS OF FACT BY COURT ON BASIS OF TRANSCRIPT WHERE MASTER HAS NOT SUBMITTED REPORT—After taking evidence upon a matter referred to him, a master in chancery closed the proofs, but died before making his report. The district court, after receiving briefs of counsel and hearing argument, made an ultimate finding based on the transcript of evidence. *Held*, such action by a court which has not seen the witnesses is not in accord with due process.[1] *Smith v. Dental Products Co.*, (C.C.A. 7th, 1948) 168 F. (2d) 516.

The rules governing references in American courts, like the rules of trial procedure, reflect the conviction that, where possible, the trier of facts should see and hear the witnesses.[2] Master's findings are given much weight,[3] because they represent an evaluation of the credibility of the witnesses.[4] In accordance with this principle, a proceeding *de novo* has frequently been required where the master's report is unobtainable.[5] Demeanor evidence, however, is not always

[1] Failure to make subsidiary findings was likewise held error.

[2] See Coyner v. United States, (C.C.A. 7th, 1939) 103 F. (2d) 629, suggesting that cases where the issues depend on the credibility of witnesses should not usually be referred. Not all courts accept this view. HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 135 (1940).

[3] 30 C.J.S., Equity, § 543(b); Davis v. Schwartz, 155 U.S. 631, 15 S.Ct. 237 (1895). See Federal Rule 53(e)(2), adopting Equity Rule 61½.

[4] Hitt v. Smallwood, 147 Va. 778, 133 S.E. 503 (1926); Camden v. Stuart, 144 U.S. 104, 12 S.Ct. 585 (1892); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 860, 66 S.Ct. 1187 (1946).

[5] People v. Lewe, 383 Ill. 549, 50 N.E. (2d) 577 (1943); Devlin v. City of New York, 62 How. Pr. (N.Y.) 163 (1880); In re Rubin and Lipman, (D.C. N.Y. 1914) 215 F. 669; Wainright v. Roots Co., 176 Ind. 682, 97 N.E. 8 (1911) (death

the controlling factor in determining issues of fact. The trial court, in making the findings which support its judgment, may modify or disregard the master's report, in proper cases.[6] On appeal, the higher court may review the evidence again with a view to reaching its own conclusion.[7] Thus the bare record may, and occasionally does, serve as a basis for findings that are directly contrary to the master's report,[8] made by courts that have not seen the witnesses. If the judicial conscience is not pricked by this deliberate rejection of the effect of demeanor evidence, why should it be sensitive to use of the master's transcript without benefit of demeanor evidence in the infrequent cases where his report cannot be secured?[9] References are notoriously long and costly. Testimony may become unavailable. Besides the master's transcript, the trial court has briefs, argument of counsel, and additional evidence at its disposal. Whether a determination of the issues can properly be made without a new reference might be left to the discretion of the court. Burdensome re-references could thus be avoided in some cases where the witnesses have not personally appeared before the trier of facts.[10] In the principal case, reliance was placed on an earlier decision of the same court,[11] in a case where an examiner of the Federal Trade Commission died before making his report. Both cases leaned heavily on *Ohio Bell Telephone Co. v. Public Utilities Commission*,[12] and *Morgan v. United States*.[13] It is submitted, however, that these decisions of the Supreme Court do not support the result in the principal case. In the *Ohio Bell Telephone* case, the denial of due process was the commission's failure to disclose the evidence on which its findings rested, and its denial to respondent of open argument on the findings.[14] The evil condemned in the *Morgan* case was determination of the issues by one who not

of trial judge); Labonte v. Lacasse, 78 N.H. 489, 102 A. 540 (1917) (death of trial judge). Contra: Credle v. Ayers, 126 N.C. 11, 35 S.E. 128 (1900); Rioux v. Cronin, 222 Mass. 131, 109 N.E. 898 (1915), where the master's findings were incomplete; Davidson v. Copeland, 69 S.C. 47, 48 S.E. 33 (1903).

[6] 19 AM. JUR., Equity, § 379; 33 A.L.R. 745 (1924); Kimberley v. Arms, 129 U.S. 512, 9 S.Ct. 355 (1889); Boesch v. Graff, 133 U.S. 697, 10 S.Ct. 378 (1890); Mallinger v. Shapiro, 329 Ill. 629, 161 N.E. 104 (1928); Koffman v. Besera, 262 Mass. 165, 159 N.E. 624 (1928). See Federal Rule 53(e)(2).

[7] Tilghman v. Proctor, 125 U.S. 136, 8 S.Ct. 894 (1888); Synthetic Patent Co. v. Sutherland, (C.C.A. 2d, 1927) 22 F. (2d) 491. In Adams County v. Northern P. Ry. Co., (C.C.A. 9th, 1940) 115 F. (2d) 768 at 779, it is said, "This rule, of course, [requiring acceptance of master's report 'unless clearly erroneous'] regulates the conduct of the trial judge and not that of the appellate court." Where the evidence is not in the appellate record, of course, the master's report will not be disturbed. Coyner v. United States, (C.C.A. 7th, 1939) 103 F. (2d) 629; Brownell v. Nason, 270 Mass. 490, 170 N.E. 462 (1930).

[8] Duvall v. Barry, (C.C.A. 7th, 1939) 103 F. (2d) 653.

[9] See cases cited contra, note 5, supra.

[10] Where the credibility of witnesses is not a factor, re-reference is clearly unnecessary. Cf. Carter Oil Co. v. McQuigg, (C.C.A. 7th, 1940) 112 F. (2d) 275.

[11] Buchsbaum & Co. v. Federal Trade Commission, (C.C.A. 7th, 1946) 153 F. (2d) 85.

[12] 301 U.S. 292, 57 S.Ct. 724 (1936).

[13] 304 U.S. 1, 58 S.Ct. 773 (1938).

[14] 301 U.S. 292 at 302, 303, 57 S.Ct. 724 (1936).

only failed to hear the evidence, but also failed to hear the oral argument.[15] Both opinions declare that the trier of facts must be acquainted with the evidence and must hear the argument on the issues, but it is not laid down that he must see and hear the witnesses.[16] Later decisions support the view that issues may be determined on evidence taken by subordinates who make no findings of fact, where the tribunal provides opportunity for argument by the parties.[17] That demeanor evidence merits high consideration in the determination of factual matters is not open to question. It seems less certain, however, that due process must inflexibly demand the re-reference of complicated causes in order to obtain such evidence, when there are policy considerations against that practice and the evidence taken by the master is before the court.

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[15] For analysis of the Morgan case, see United States v. Standard Oil Co., (D.C. Cal. 1937) 20 F. Supp. 427; and 33 ILL. L. REV. 227 (1938).

[16] In 304 U.S. 1 at 22, 58 S.Ct. 773 (1938), Chief Justice Hughes in terms suggested approval of the taking of evidence by a subordinate if the trier of fact considered it and heard argument on the proposed findings. See also, 37 MICH. L. REV. 597 at 600 (1939).

[17] N.L.R.B. v. Mackay Co., 304 U.S. 333, 58 S.Ct. 904 (1938); Edison Co. v. N.L.R.B., 305 U.S. 197, 59 S.Ct. 206 (1938); N.L.R.B. v. Cherry Cotton Mills, (C.C.A. 5th, 1938) 98 F. (2d) 444. See also, 33 ILL. L. REV. 227 (1938).