Florida Law Review

Volume 3 | Issue 3 Article 1

October 1950

Judicial Review of Findings of Fact in Florida

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University of Florida Law Review

Vol. III FALL 1950 No. 3

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The unwritten law, it is said, may be found in reported cases. Logically, then, at least a portion of the law of Florida should be found in the Florida Reports; and there it is, discovered and expressed by generations of learned justices. On the general question of the weight to be accorded to the findings of fact of a judicial body[1] there are myriad Florida cases and at times more than one current rule on the same proposition. Each occasion has prompted a statement of a rule — or two or four or five — sometimes with no particular thought to the effect of these pronouncements on efficient functioning of the lower courts of this state, and on the practice of law at any judicial level.

The basic premise is that the trial court, or any other agency hearing the evidence, is the finder of fact, and that the appellate court in the proper exercise of its jurisdiction is ordinarily confined to questions of law. A second premise is that some amount of evidence is, as a matter of law, necessary to sustain findings of fact. If a precise delineation of that amount of evidence were possible, then the second premise would demand that a given finding stand or fall.

A precise definition is impossible, however, because of the very nature of the fact-finding process. Evidence cannot be weighed in mechanical scales; its weight depends entirely upon its convincing power, which at best is a subjective determination made by the person who hears or observes it. An appellate court is of course expected to correct those errors of law appearing as either improper procedure[2]

[1]See generally, on review of findings of fact, Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944). See also 2 U. OF FLA. L. REV. 131 (1949).

[2]*E.g.*, Mathews v. State, 44 So.2d 664 (Fla. 1950). Harmless error does not, however, warrant reversal, FLA. STAT. §54.23 (1949), Hopkins v. McClure, 45 So.2d 656 (Fla. 1950); and a trial judge should not grant a new trial for such error, Thomas v. Parliament Loan Corp., 45 So.2d 750 (Fla. 1950).

or the application of an incorrect rule of substantive law;[3] this phase of review occasions little difficulty to the appellate court in deciding whether to reverse. The real problem is to determine how far the appellate court should go in policing those subjective judgments of the lower court known as "findings of fact." This issue is further complicated by the custom of sometimes regarding a wide departure from the weight of evidence, resulting in an erroneous conclusion or finding of fact, as an error of law. In this policing function, are there objective standards of review, or is each justice merely substituting his judgment for that of the trial court and ruling on appeal as he would have if he had been trying the case below?[4] In *Porter v. Gordon*,[5] the circuit judge found the verdict so inadequate as to ". . . shock the judicial conscience";[6] accordingly he awarded a new trial on the issue of damages only. The Supreme Court prescribed a new trial on the merits, the precise reason given being that "justice" required it.[7] In the very next case reported, justice apparently did not require it, so the judgment for damages was affirmed because the verdict was sustained by ". . . ample substantial evidence . . . ."[8] Yet in *Feal v. Rodriguez*[9] the judgment below was reversed on the question of damages alone, the contention of appellant being that they were grossly inadequate. The specific reason given for reversal was that ". . . we think there is merit to this contention."[10]

Are there, then, any ascertainable standards or norms governing review? The cases do not all fit into a logical pattern, but at least some generalizations are here attempted, in the hope that analysis may serve to point up the problems currently existing in this field.

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[3]*E.g.*, Summersett v. Linkroum, 44 So.2d 662 (Fla. 1950).

[4]FLA. STAT. §59.34 (1949) reads as follows: "The court, on an appeal, shall examine the record and reverse or affirm the judgment, sentence or decree of the court below; give such judgment, sentence, or decree as the court below should have given; or otherwise as to it may appear according to law." Despite the language employed, Section 59.34 does not require the appellate court to place itself in the position of the trial court upon review; indeed, such a requirement appears to be beyond the power of the legislature. *See In re* Alkire's Estate, 144 Fla. 606, 625, 198 So. 475, 483 (1940) (supplemental opinion).

[5]46 So.2d 19 (Fla. 1950).

[6]*Id.* at 20.

[7]*Ibid.*

[8]Upton v. Hutchinson, 46 So.2d 20, 21 (Fla. 1950).

[9]44 So.2d 679 (Fla. 1950).

[10]*Ibid.*

I. Trial Court with Jury

1. Directed Verdict

Under Florida practice the trial judge may determine that one of the parties has failed to submit evidence on which a jury might lawfully find a verdict for such party. Accordingly, upon motion of the opposite party, he may by directing a verdict eliminate any weighing of evidence by the jury.[11] The statutes, however, make no attempt to define the precise weight of evidence upon which a jury may legally reach a verdict; instead they leave this determination to the courts.

If either party, on the basis of his evidence taken alone and without contradictory evidence, fails to prove a controverted cause of action, he has no more right to a jury trial than he would have if he failed in the first place to allege a cause of action in his pleading.[12] The evidence must at least be sufficient in itself to produce a "reasonable" belief in the existence of those facts essential to the verdict.[13] In the federal courts this doctrine has been held equivalent to the statutory rule demanding "substantial" evidence as a prerequisite to an administrative finding;[14] and, indeed, no conceptual distinction between the two rules can be discovered.[15] Many Florida cases have held that unless a party presents substantial evidence a directed verdict for his opponent is proper.[16]

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[11]Fla. Stat. §54.17 (1949); Fla. C.L.R. 40(a),(b); *cf.* Wigginton, *New Florida Common Law Rules,* 3 U. of Fla. L. Rev. 1, 27 (1950).

[12]Stevens v. Tampa Elec. Co., 81 Fla. 512, 88 So. 303 (1921).

[13]Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911).

[14]*E.g.,* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299 (1939).

[15]*See, e.g.,* Laney v. Board of Public Instr'n, 153 Fla. 728, 738, 15 So.2d 748, 753 (1943), in which Brown, J., citing the *Columbian* case, *supra* note 14, stated the principle as follows: "This means that there must be evidence which supports a substantial basis of fact from which the fact in issue can reasonably be inferred. It must do more than create a suspicion of the fact to be established, and must be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." See also 9 Wigmore, Evidence §2494 (3d ed. 1940); Dickinson, *Crowell v. Benson, Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. of Pa. L. Rev. 1055 (1932).

[16]*E.g.,* Saucer v. West Palm Beach, 155 Fla. 659, 21 So.2d 452 (1945); Carter v. Florida Power & Light Co., 138 Fla. 220, 189 So. 705 (1939); Biscayne Trust Co. v. Pennsylvania Sugar Co., 103 Fla. 155, 137 So. 147 (1931); Stevens v. Tampa Elec. Co., 81 Fla. 512, 88 So. 303 (1921).

Under the Florida statutory direction[17] the judge may weigh the total of the evidence for either party, considering it as if uncontroverted, in order to ascertain its overall legal effect, but he is not empowered to weigh conflicting evidence on a comparative basis. He determines whether there is substantial evidence to go to the jury, although in so doing he has of necessity been permitted to rule on the probative force of the testimony offered, when taken as a whole and as uncontroverted.[18] This power of the trial judge must also be kept in mind when his function of ruling on a motion for new trial is considered; it is in this connection that serious problems arise.

New Florida Common Law Rule 40 provides for a reservation of decision on a motion for directed verdict when made at the close of all the evidence, and for a later determination of the legal questions raised by the motion.[19] This provision enables the court to direct a verdict, whether it accords with that rendered by the jury, or is contrary thereto, or is entered in the absence of any jury verdict. This new procedure on motion for directed verdict permits a greater use of this method of determination of facts by both the trial and appellate courts, inasmuch as consent of the parties to the reservation of jurisdiction is not required.[20]

2. *New Trial*

The considerations and legal principles that guide the judicial discretion in directing a verdict are not the same as those called into play when the trial judge considers granting a new trial on conflicting evidence. The evidence produced on both sides may be legally sufficient – that is, there may be substantial evidence on both sides of the disputed question, with the result that a motion for directed verdict would necessarily be denied – and yet the mere legal sufficiency of the evidence for either litigant, taken separately, does not prevent the judge from granting a new trial.[21] The problem is, therefore, when may a new trial be granted, even though there is substantial evidence

[17]FLA. STAT. §54.17 (1949).

[18]Saucer v. West Palm Beach, 155 Fla. 659, 21 So.2d 452 (1945); Carter v. Florida Power & Light Co., 138 Fla. 220, 189 So. 705 (1939); Stevens v. Tampa Elec. Co., 81 Fla. 512, 88 So. 303 (1921).

[19]*Cf.* Wigginton, *supra* note 11, at 27-28.

[20]Talley v. McCain, 128 Fla. 418, 174 So. 841 (1937) (holding, under the prior law, that a ruling on the motion on the evidence cannot be reserved, at least not without consent of the parties); see note 19 *supra*.

[21]Gravette v. Turner, 77 Fla. 311, 81 So. 476 (1919).

to support the verdict?

When the trial judge refuses to set aside the verdict and denies a new trial, there is a presumption on appeal that he exercised his discretion properly; and because of this added presumption the case is not presented to the appellate court as it was to him.[22] A strong showing must be made before the appellate court will reverse the judgment, since it represents a concurrent conclusion of judge and jury. Thus, when there is substantial evidence to support the verdict, and it is not shown to be clearly contrary to the manifest weight of the evidence, the appellate court will allow it to stand.[23]

The granting of a new trial is generally sustained when the conflicts in the evidence produce a belief that the jury was motivated by prejudice, passion, mistake, or any other improper cause.[24] But when, there being no ground for such belief, the trial judge is convinced merely that there is difficulty in reconciling the verdict with the manifest weight of the evidence or with the justice of the case as conceived by him, and accordingly grants a new trial, he is less likely to be sustained under present Florida law.

The Common Law Background. At common law the Statute of Westminster II[25] fixed the practice in civil cases by providing in Section 1 of Chapter 30 for the commissioning of nisi prius judges, and in Section 2 for return of the "inquest" (verdict) to the King's Bench and rendition of judgment there. The commission of the nisi prius judge was exhausted as soon as the *postea* was sent to the full bench at the conclusion of the trial. The complaining party could, for a time, obtain his writ of attaint;[26] but this proceeding died out around 1600 and was never used in America.[27] The new remedy furnished for an improper verdict was a new trial. The Court of Common Pleas once adopted the practice of granting a new trial upon the certificate of the trial judge that the verdict was against his opinion; but that

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[22]Schultz v. Pacific Ins. Co., 14 Fla. 73 (1872).

[23]*E.g.*, Davis v. Turner, 118 Fla. 907, 160 So. 376 (1935); Jennings v. Pope, 101 Fla. 1476, 136 So. 471 (1931).

[24]*E.g.*, Carney v. Stringfellow, 73 Fla. 700, 74 So. 866 (1917); Schultz v. Pacific Ins. Co., 14 Fla. 73 (1872); *see* First Fed. Savings & Loan Ass'n of Miami v. Wylie, 46 So.2d 396, 401 (Fla. 1950).

[25]13 EDW. I, c. 30 (1285).

[26]See 3 BL. COMM. **389-390, 402-405.

[27]*See* Wendell v. Safford, 12 N.H. 171, 175 (1841); Riddell, *New Trial at the Common Law*, 26 YALE L.J. 49, 54 (1916).

practice never prevailed either in the King's Bench or, so far as is known, in the Exchequer.[28] When the trial was at bar, however, new trials were granted by the court sitting en banc in term.[29]

It was recognized at an early date by the Florida judiciary that our circuit courts are but partially in the position of the old nisi prius court – and then only as to some procedural points such as entering exceptions in the record. Their general function is rather that of the Court of King's Bench sitting en banc trying cases at bar; they hear the evidence, conduct the trial, render judgment, and even exercise some appellate functions.[30] The common law trial at bar was not held en banc or during term, but our circuit court trials do take place during term. It appears, therefore, that our circuit judge is affording a trial by jury as it was known at common law, even when he orders a new trial for error of law or because the verdict is against the weight of the evidence.

The distinction between review of the verdict by a trial court and review in an appellate court took several years to develop. In the early Florida cases the discretion of the trial court in ruling on motions for new trial was conceded to be beyond the reach of the writ of error,[31] and thus was practically immune to review. On that writ the only questions concerning the evidence were whether it was competent and whether the jury could have found the facts it did from the evidence.[32] This restricted the appellate function to a narrow degree, and required a "glaring departure" of the verdict from the evidence – glaring to the extent that there was no competent evidence – before the Supreme Court would reverse.[33] In 1859 the Court set its rule for appellate review of instances of agreement by judge and jury below:[34] "When there is conflicting evidence and the verdict is

[28]See 3 BL. COMM. *388.

[29]*Cf.* Lord Mansfield in Bright v. Eynon, 1 Burr. 390, 97 Eng. Rep. 365 (K.B. 1757).

[30]*See Ex parte* Henderson, 6 Fla. 279, 291 (1855).

[31]Randall v. Parramore & Smith, 1 Fla. 409 (1847); *see* Putnam v. Lewis, 1 Fla. 455, 471 (1847); Stewart & Fontaine v. Bennett, 1 Fla. 437, 443 (1847).

[32]Randall v. Parramore & Smith, 1 Fla. 409 (1847).

[33]Sanderson & Co. v. Hagan & Harrison, 7 Fla. 318, 326 (1857).

[34]Tallahassee R.R. v. Macon, 8 Fla. 299, 305 (1859); that this rule was being laid down for the appellate court, as distinct from the trial court, is indicated by reference to the lower court as "the Judge" in the same paragraph. Ammons v. State, 9 Fla. 530, 558 (1861), affirmed the rule for "this court," *i.e.*, the Supreme Court of Florida. For a recent confirmation see Driver v. State, 46 So.2d 718 (Fla. 1950).

not manifestly against the weight of evidence, the Court will not interfere to set aside the verdict of a jury."

In 1872, in a case involving two concurring verdicts and denial of a motion for new trial, the mere fact that the Supreme Court would have been willing to affirm a contrary verdict was held insufficient in itself to warrant reversal.[35]

The Rule of Farrell v. Solary. By 1895 the Supreme Court of Florida was faced directly with the problem of the weight to be accorded the ruling of a trial judge in granting a new trial.[36] There had been two consecutive trials and two verdicts for defendant, with a verdict for plaintiff in a third trial granted him along with a change of venue. Upon appeal by defendant, the Supreme Court took the position that the trial judge had a better opportunity than an appellate court to pass upon the propriety of the determination of the jury; and accordingly it affirmed his authority to grant any number of new trials as against verdicts not supported by or contrary to the preponderance of the evidence.[37] The principle was summarized as follows:[38]

> ". . . the order of the trial judge granting a new trial should not be disturbed unless it appears affirmatively from the record that there has been an abuse of sound discretion, or that some settled principle of law has been violated."

In 1901, in *Farrell v. Solary,*[39] the Court laid down at some length the orthodox rule of review consistently followed until recent years:[40]

"A trial court should not grant a new trial on the ground that

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[35]Wilson v. Dibble, 14 Fla. 47 (1872).

[36]Reddick v. Joseph, 35 Fla. 65, 16 So. 781 (1895).

[37]The appellate court is less inclined, however, to affirm a second award of new trial after two similar verdicts based on the same evidence, *see, e.g.,* Farrell v. Solary, 43 Fla. 124, 133, 31 So. 283, 286 (1901); Reddick v. Joseph, 35 Fla. 65, 71, 16 So. 781, 782 (1895); *cf.* 3 BL. COMM. *387.

[38]Reddick v. Joseph, 35 Fla. 65, 70, 16 So. 781, 782 (1895).

[39]43 Fla. 124, 31 So. 283 (1901) (Maker of promissory note admittedly altered due date provisions so as to lessen period by 20 days; he testified after his default that defendant-endorser had consented to this alteration; defendant denied this when sued as endorser; upon verdict for plaintiff-holder in due course based on the conflicting testimony of these two witnesses only, judge granted motion for new trial, which order was affirmed on writ of error).

[40]*Id.* at 131, 31 So. at 286.

> the verdict is not supported by the evidence where there is a material conflict in the evidence unless the weight of the testimony so clearly preponderates against the verdict found, as to require its annulment in order to meet the demands of justice. But trial courts, of necessity, are vested with discretion in granting or withholding new trials. And where they grant one on the ground that the evidence does not sustain the verdict in a case in which the evidence is conflicting upon a material issue, an appellate court will not reverse such order unless it is affirmatively and clearly made to appear, from a clear and palpable preponderance of evidence in support of the verdict overturned, that the trial judge has abused the discretion with which he is vested in such cases, or that some settled principle of law has been violated. Simply because an appellate court, from the showing made in the record before it, might not have granted the new trial had it acted in the first instance in place of the trial judge, or because it would not under the same circumstances have disturbed a ruling denying such new trial, furnishes no reason of itself to an appellate court for reversing an order of a trial judge granting a new trial."

The opinion clearly distinguishes between the function of the trial judge in reviewing the evidence, including the testimony and demeanor of the witnesses, for the purpose of ruling on a motion for new trial, and the function of the appellate court in reviewing the evidence actually in the record for the purpose of deciding whether the trial judge has abused his discretion. It is axiomatic that the convincing power of evidence can seldom, if ever, be accurately portrayed by the cold words of the record, which may well show substantial evidence for each party and yet indicate no preponderance. This is preeminently the type of situation in which the position of the trial judge is superior to that of the appellate court in determining whether the verdict is a proper one; he observes at first hand the conduct of the parties and the appearance and demeanor of the witnesses.

The rule of the *Farrell* case renders difficult any reversal of an order granting a new trial. The trial judge is placed in such a position that he can determine for himself the weight of the evidence, can consider its legal sufficiency, and, even after finding sufficient evidence to warrant denial of a motion for directed verdict, can still set aside a verdict rendered against what he considers the manifest weight of

the evidence.[41] Moreover, he can do this secure in the knowledge that his judgment will not be set aside on appeal unless a clear preponderance of the evidence in the record demonstrates that he has abused his discretion. The result is that he can weigh the evidence himself in considering a motion for new trial unless he overrides a clear preponderance favoring the verdict; and the onus in attacking his ruling falls on the appellant. This rule has been used as recently as 1948 to sustain an order granting a motion for new trial.[42]

The Rule of Seaver v. Stratton. In *Seaver v. Stratton*[43] Mr. Justice Terrell expressed the following rule:[44]

> "If there was substantial competent evidence in support of the verdict, whether or not it preponderated in favor of the plaintiff was not for the trial court to determine . . . .
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> "When it is shown that the jury is deceived as to the force and credibility of or is influenced by illegal and improper evidence or influenced by considerations outside the evidence, the Court may set its verdict aside and grant a new trial but when nothing is involved but the sufficiency of and probative force of the evidence, the trial court is under no circumstances warranted in pitting his judgment against that of the jury. It is an abuse of discretion to grant a new trial when the verdict finds ample support in the record and no illegal evidence is shown to have gone to the jury and nothing can be accomplished except to have another jury review the cause."

It is readily apparent that the second paragraph of the foregoing quotation refers in the first sentence to illegal and improper evidence only; to say that the Court may grant a new trial when the "force

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[41]Carney v. Stringfellow, 73 Fla. 700, 74 So. 866 (1917).

[42]Knudsen v. Hanlan, 160 Fla. 566, 36 So.2d 192 (1948).

[43]133 Fla. 183, 183 So. 335 (1937) (Yacht was sold for partial cash payment and promissory note of third parties; dispute arose between vendor and purchaser, after default in payment of note, as to whether it was accepted in absolute payment or merely as collateral for balance due on purchase price, and also as to whether defendant-purchaser was outside Florida upon accrual of cause of action, so as to toll running of three-year limitation period; motion for directed verdict at close of plaintiff's testimony was denied; after verdict for plaintiff, motion for new trial was granted; this order of circuit court was reversed on writ of error).

[44]*Id.* at 187, 183 So. at 337.

and credibility" of proper evidence is involved, but may not do so when its "probative force" in involved, would be meaningless.

By virtue of this rule, several orders for new trial have been reversed, some of them very recently.[45] When there is substantial competent evidence in the record, the trial judge cannot properly direct a verdict against the party producing it; and when substantial competent evidence appears for both parties, he must send the case to the jury and must affirm the verdict unless improper evidence has been admitted or unless passion, prejudice, or mistake on the part of the jury is demonstrated, even though he is firmly convinced that the preponderance of the evidence lies the other way. This is a more limited discretion than that accorded the trial court under the *Farrell* rule; in fact it is virtually no discretion at all.

The trial court's dilemma is found in the concurrent application of both the *Farrell* and the *Seaver* rules. This is illustrated by *Knudsen v. Hanlan*,[46] in which the decision, based on the *Farrell* rule, sustained the new trial, and, in the same volume of the reports, *Urga v. State*,[47] in which the majority, adopting the *Seaver* rule, reversed the order for new trial while the dissenters, following the *Farrell* rule, would have affirmed it. Today the sixty-four dollar question is: Which rule is the Supreme Court going to use this time?

II. Trial Court without Jury

1. Motion for Directed Verdict

In those cases in which a jury is waived, the procedure is the same as that in jury trials. A motion for directed verdict should not be granted when there is substantial evidence for the adverse party.[48] The trial judge, in a ruling on the evidence as a matter of law, performs exactly the same function that he does when a jury is present. After ruling as a matter of law, he then acts as a jury and weighs the conflicting evidence.

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[45]Edwards v. Miami Shores Village, 40 So.2d 360 (Fla. 1949); White v. E. Levy & Sons, 40 So.2d 142 (Fla. 1949); Miami Beach v. Silver, 38 So.2d 305 (Fla. 1949); Urga v. State, 160 Fla. 740, 36 So.2d 421 (1948); Albert v. Miami Transit Co., 154 Fla. 186, 17 So.2d 89 (1944); Hart v. Held, 149 Fla. 33, 5 So.2d 878 (1941).

[46]160 Fla. 566, 36 So.2d 192 (1948).

[47]160 Fla. 740, 36 So.2d 421 (1948).

[48]E. E. Alley Co. v. Ball, 102 Fla. 1034, 136 So. 704 (1931).

2. *Motion for New Trial*

The Court has recently stated without further discussion that the scope of review when a jury has been waived is the same as that governing review of a verdict;[49] by statute, litigants in an action at law may by agreement try a case without a jury, and the judgment is in such event as effectual as on verdict.[50] This issue has not been completely clarified in the cases, however; another opinion expresses the view that the weight to be given to a finding of fact made below is a matter to be decided by the appellate court for itself.[51]

III. Referee

The finding of a referee will not be disturbed as against the weight of the evidence unless the preponderance against it is "very clear" or unless it appears to be based on mistake, passion, prejudice, or corruption.[52] The judgment of the referee goes into the records as the judgment of the court that appointed him; for the purposes of the case he is, so to speak, the court.[53] If his findings are supported by substantial evidence the aggrieved party has the burden of showing error. This is the rule applied either when the trial court sits without a jury or when the findings of the jury are concurred in by the trial judge.[54]

IV. Arbitrator

An award of a board of arbitration is entitled, upon appeal, to that respect due the judgment of a court of last resort.[55] When the statutory requirements[56] have been substantially followed,[57] the parties have by

[49]Cassels v. Ideal Farms Drainage Dist., 156 Fla. 152, 23 So.2d 247 (1945); Jernigan v. Harrison, 136 Fla. 320, 186 So. 511 (1939).

[50]Fla. Stat. §54.10 (1949).

[51]*See In re* Alkire's Estate, 144 Fla. 606, 623, 198 So. 475, 482 (1940) (supplemental opinion); this case, however, involves review in probate, although the dictum is not so limited.

[52]Hodges v. Fries, 34 Fla. 63, 16 So. 682 (1894); Broward v. Roche, 21 Fla. 465 (1885).

[53]Fla. Stat. §56.04 (1949), State *ex rel.* Sanchez v. Call, 36 Fla. 305, 18 So. 771 (1895).

[54]*E.g.*, Wilson v. T. A. Monk, Inc., 140 Fla. 797, 192 So. 407 (1939); *see* Atlantic C.L. R.R. v. Partridge, 58 Fla. 153, 157, 50 So. 634, 636 (1909).

[55]Florida Yacht Club v. Renfroe, 67 Fla. 154, 64 So. 742 (1914).

[56]Fla. Stat. c. 57 (1949).

[57]Payne v. McElya, 90 Fla. 900, 107 So. 241 (1925); Readdy v. Tampa Elec. Co., 51 Fla. 289, 41 So. 535 (1906).

their own agreement substituted by permission of law a tribunal of their own choosing outside the judiciary; and to permit review of the merits by the regular courts would destroy the very purpose and utility of arbitration.[58] Therefore, the umpire and arbitrators are considered the sole and final judges of the evidence; there is no provision for bringing it as such before an appellate court.[59] Their award, unless impeached by what is virtually a collateral attack on one of the grounds and in the manner provided by statute,[60] is conclusive on the merits of the cause.[61]

V. County Judge's Court

The judge of the county judge's court hears and sees the witnesses, while the appellate courts do not; therefore it follows logically that neither the circuit court nor the Supreme Court should interfere with his conclusions of fact when there is substantial evidence to sustain them and his procedure is free from error. In other words, if he reasonably could have reached the conclusions he did, they should not be disturbed.[62]

Yet in this type of review also there are conflicting rules. The *Donnelly* rule, expressed by Mr. Justice Thomas, is that ". . . the conclusion of the probate court on conflicting evidence will not be disturbed unless the legal effect of the proof has been misapprehended or there is a lack of evidence to support the findings."[63] This rule has been specifically applied in 1950.[64] The problem arises, however, as to just what "the legal effect of the proof" is. Does this phrase signify all the evidence, taken as a whole; or, whenever there is substantial evidence to sustain the findings of the probate judge, does the rule forbid the circuit judge to reverse, regardless of where in his estimation the preponderance of the evidence lies? In the *Donnelly* case

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[58]Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916).

[59]Ogden v. Baile, 73 Fla. 1103, 75 So. 794 (1917).

[60]Fla. Stat. §57.07 (1949) limits grounds for impeachment to fraud, corruption, gross negligence, or misbehavior on the part of an umpire or arbitrator, or evident mistake acknowledged. Fla. Stat. §§57.06 and 57.08 (1949) specify the procedure to be followed in attempting to set aside his award in the trial court.

[61]Ogden v. Baile, 73 Fla. 1103, 75 So. 794 (1917).

[62]*In re* Manney's Estate, 42 So.2d 535 (Fla. 1949); *In re* Donnelly's Estate, 137 Fla. 459, 188 So. 108 (1938).

[63]*In re* Donnelly's Estate, 137 Fla. 459, 483, 188 So. 108, 117 (1938).

[64]Gair v. Lockhart, 45 So.2d 193 (Fla. 1950).

evidence to sustain the decisions of the probate judge, reversed by the circuit court but reinstated by the Supreme Court, was regarded as "ample" by the majority.[65]

In re *Alkire's Estate*,[66] following a year later, likewise resulted in a rehearing and a split in the Court. Although Mr. Justice Whitfield paid lip service to the *Donnelly* rule, he nevertheless persuaded a majority to proceed on the opposite tack, and summed up the proper basis for probate review as follows:[67]

> "The mere presence in the record of substantial evidence to sustain the decree or judgment appealed from is not enough to justify an affirmance. The legal effect of the entire evidence as it is duly made a part of the record on appeal, as well as the law on the issues made, should be considered and determined by the appellate court in the process of adjudicating an affirmance or a reversal of the decree or judgment on appeal."

Once again, the question today is: Which rule is the Supreme Court going to use this time?

VI. Administrative Agency

If there is substantial evidence as a basis for the finding of fact of an administrative agency, the court is to refrain from weighing the evidence or comparing it with the evidence offered in refutation.[68] In the case of such agencies as the Railroad Commission[69] or the occupational boards,[70] the circuit court should not overturn orders of the

[65]*In re* Donnelly's Estate, 137 Fla. 459, 484, 188 So. 108, 118 (1938).

[66]144 Fla. 606, 198 So. 475 (1940).

[67]*Id.* at 625, 198 So. at 483 (supplemental opinion).

[68]Becker v. Merrell, 155 Fla. 379, 20 So.2d 912 (1944); Laney v. Board of Public Instr'n, 153 Fla. 728, 15 So.2d 748 (1943). See Note, *Judicial Review of Administrative Findings of Fact: The Doctrine of Jurisdictional Facts in Florida*, 2 U. of Fla. L. Rev. 86 (1949).

[69]Florida Motor Lines, Inc. v. Railroad Comm'rs, 100 Fla. 538, 129 So. 876 (1930). Fla. Const. Art. V, §35, specifically authorizes the Legislature to clothe any railroad commission with "judicial" powers; but most administrative agencies, when exercising the "quasi-judicial" function, are today allowed the same degree of authority in finding facts.

[70]Hammond v. Curry, 153 Fla. 245, 14 So.2d 390 (1943). Mandamus will of course lie to compel action of some sort when an administrative agency refuses to function at all; *cf.* State *ex rel.* Hollywood Jockey Club, Inc. v. Stein, 129 Fla. 777, 176 So. 849 (1937).

agency based on substantial evidence. Until recently, however, little weight has been accorded the findings of the Industrial Commission. It was regarded for quite some time as an agency confined to the mere taking of testimony;[71] its findings were given ". . . about the same weight and consideration which the chancellor should give to the findings of fact by a special master appointed by the court for that purpose."[72] Today, however, the full commission is coming into line as a fact-finding authority, although, for some odd reason not yet explained by the bench, the deputy commissioner, who actually hears the testimony and observes the witnesses, is relegated to the position of a mere recording clerk.[73]

The effect of the present law governing the weight of findings of fact by a master is discussed *infra* in Part VII, inasmuch as this bears a close relationship to the present status of findings by the Industrial Commission. The other commissions have more rapidly attained the category of the chancellor receiving the evidence personally. They are the triers of fact; they come to the conclusions that they deem appropriate on the evidence presented to them; and the circuit court is acting strictly as an appellate court when it reviews a cause.[74] Hence the same rule of appellate review is used.

VII. Suit in Equity

In analyzing the weight due to findings of fact by the chancellor, the various methods of taking the testimony must be considered individually. It is here that the greatest confusion exists.

1. Master Selected by Chancellor to Find Facts

One of the most common current means of arriving at the facts in equity suits is the appointment of a special master to hear the testimony and, in many instances, to make findings of fact and law thereon.[75] When the master makes findings in which the chancellor concurs, these are given the weight of a verdict; if there is substantial

[71] *E.g.*, Star Fruit Co. v. Canady, 159 Fla. 488, 32 So.2d 2 (1947).

[72] Firestone Auto Supply & Service Stores v. Bullard, 141 Fla. 282, 192 So. 865 (1940).

[73] *E.g.*, Sonny Boy's Fruit Co. v. Compton, 46 So.2d 17 (Fla. 1950); Sanford v. A. P. Clark Motors, Inc., 45 So.2d 185 (Fla. 1950) (deputy commissioner reversed by full commission, reversed in turn by circuit court, reversed in turn by Supreme Court).

[74] *E.g.*, Miami v. Huttoe, 38 So.2d 819 (Fla. 1949).

[75] Fla. Stat. §§63.54-63.65 (1949), providing for appointment of masters.

evidence in the record to support them, they should be affirmed. It is pertinent to note that the Court sometimes relies on administrative review cases to sustain this position.[76] From the nature of the procedure no valid distinction appears between the two fact-finding agencies; accordingly the opinions on this point should be interchangeable as precedent. It will be interesting, however, to see whether the Court will in future cases employ the terminology applied to a verdict or will continue the "abuse of discretion" phraseology.

When the chancellor disagrees with the master on the findings of fact, *Harmon v. Harmon*[77] forbids him to reject them unless "clear" error is established, and upon successful objection to them before the chancellor the appellee bears in the Supreme Court the burden of sustaining their rejection. In view of the fact that the chancellor has appointed a master presumably competent and has delegated to him the duty of finding the facts from the evidence, coupled with the additional further fact that the latter alone has heard all the testimony and observed all the witnesses, the chancellor is in a less favorable position than the master to make the determination. The chancellor has nothing but the cold record of the proceedings; and in this respect he is in no better position than the Supreme Court to review them. As a result, there is no presumption in favor of the chancellor's contrary findings when there is substantial evidence to support those of the master.[78] One wonders whether the Supreme Court will similarly bind itself, as it logically should on this reasoning, in respect to the findings of a commissioner appointed by it for the same purpose.[79]

Prior to the *Harmon* case[80] the position of a chancellor reviewing findings of a master appointed by him had been regarded as similar to that of a trial court ruling on a motion for new trial;[81] but the *Harmon* decision in effect rejects this view as inconsistent with the

[76]*E.g.*, Blanchard v. McCord, 40 So.2d 457 (Fla. 1950); Means v. Bateman, 39 So.2d 478 (Fla. 1949); both cases cite Miami v. Huttoe, 38 So.2d 819 (Fla. 1949), and Nelson v. State *ex rel.* Quigg, 156 Fla. 189, 23 So.2d 136 (1945).

[77]40 So.2d 209 (Fla. 1949).

[78]*Id.* at 213. Of course, the master's findings can and should be rejected when predicated on no evidence at all, *e.g.*, Rubenstein v. Rubenstein, 46 So.2d 602 (Fla. 1950); this is "clear" error on his part.

[79]It does utilize a commissioner on occasion, *e.g.*, State *ex rel.* Davis v. Avon Park, 117 Fla. 565, 158 So. 159 (1934).

[80]Harmon v. Harmon, 40 So.2d 209 (Fla. 1949).

[81]*E.g.*, Empire Lumber Co. v. Morris, 102 Fla. 226, 135 So. 508 (1931).

proper distinction between jury trials and equity suits as actually conducted. When a trial court is ruling on motion for new trial, the judge hears the evidence, observes the witnesses, and is at least as competent as a juror to estimate the worth of the testimony. In equity, however, in those instances in which the chancellor does not hear the testimony personally, he cannot conceivably be in the position of a trial judge at law in dealing with questions of fact. Furthermore, when a new trial is ordered the cause of action is not determined until the new trial is had and judgment rendered; but when the chancellor modifies the findings of a master he arrives at a final decision.

A verdict is subject to two different reviews: one by the trial judge and one by the appellate court. It does not reach the appellate court until it has been approved or disapproved by the trial judge. Under the *Farrell* rule,[82] which was unquestionably the one in effect at the time the decisions[83] in equity prior to *Harmon* were rendered, the trial judge can set aside the verdict whenever he regards it as contrary to the manifest weight of the evidence; and when he does so the burden of establishing error on his part rests on the appellant. Under the *Seaver* rule,[84] however, the appellee must affirmatively justify the action of the trial judge; the appellant, to obtain reversal, need demonstrate no more than the existence in the record of substantial evidence in support of the rejected verdict. The real difference between the two rules is the extent of the evidence necessary to warrant disapproval of the verdict by the trial judge. The *Harmon* case evidently follows the *Seaver* rule; it regards the master as a jury, functionally speaking, and insists that if he has substantial evidence before him his findings of fact should be left undisturbed.[85] The language in the opinion is definite, it might be added, but the action of the Supreme Court was not; the chancellor was permitted to change one important finding of the master, in spite of "considerable testimony" in the record supporting it.[86]

2. *Master Approved by Parties to Find Facts*

Although not all jurisdictions make a distinction in those instances in which the parties agree to the submission of disputed questions of

[82]See p. 287 *supra.*

[83]See note 88 *infra.*

[84]See p. 289 *supra.*

[85]Harmon v. Harmon, 40 So.2d 209, 213 (Fla. 1949).

[86]*Id.* at 211.

fact to a master, Florida has adopted the policy of according added importance to the findings of such a master.[87] They carry the weight of a jury verdict, regardless of whether the chancellor accepts them.[88] This distinction, however, is unimportant when the chancellor approves of them; and even when he rejects them the practical importance of this policy is not readily apparent, inasmuch as the findings of the master must be accepted unless shown to be "clearly erroneous" even though the master is one selected by the chancellor alone.[89] Yet this is the rule applied to jury verdicts.[90]

It may be argued that the chancellor in the *Harmon* case would not have been allowed to override the finding of domicile on conflicting testimony if the master had been the choice of the parties, but the opinion contains no language to this effect. The distinction, if any, is of degree and is slight; and in any event it is of no import unless the master's findings are disapproved by the chancellor. The trend is to place the master in the position of the jury, regardless of whether the appointment is made by the chancellor alone or by agreement of the parties.

3. *Chancellor Taking Evidence Himself*

The same rule is applied to the findings of fact of the chancellor who personally hears the evidence; the burden is on the appellant to show that the chancellor erred if there is substantial evidence in the record supporting his findings.[91] Although the decisions normally place the findings of a chancellor who has not heard the testimony on a lower plane than that of a verdict,[92] there is a strong presumption in

[87]*Id.* at 213.

[88]McAdow v. Smith, 127 Fla. 29, 172 So. 448 (1937); Kent v. Knowles, 101 Fla. 1375, 133 So. 315 (1931); Croom v. Ocala Plumbing & Elec. Co., 62 Fla. 460, 57 So. 243 (1911).

[89]Harmon v. Harmon, 40 So.2d 209, 213 (Fla. 1949).

[90]See Part I, 2 *supra.*

[91]*E.g.*, Bailey Motor & Equip. Co. v. Cullison, 42 So.2d 581 (Fla. 1949); Mercer v. Mercer, 41 So.2d 318 (Fla. 1949); Means v. Bateman, 39 So.2d 478 (Fla. 1949); Foxworth v. Maddox, 103 Fla. 32, 137 So. 161 (1931).

[92]*E.g.*, State v. Fort Pierce, 133 Fla. 348, 182 So. 774 (1938); Century Trust Co. of Baltimore v. Allison Realty Co., 105 Fla. 456, 141 So. 612 (1932); Bowery v. Babbit, 99 Fla. 1151, 128 So. 801 (1930); Gagnon v. Magic City Lumber Co., 98 Fla. 270, 123 So. 757 (1929); Shippey v. Shippey, 97 Fla. 881, 122 So. 272 (1929); McCamy v. Payne, 94 Fla. 210, 116 So. 267 (1928); Mock v. Thompson, 58 Fla. 477, 50 So. 673 (1909). If a majority of the Supreme Court happen to agree with the chancellor, however, even on evidence not heard by him, he will

favor of the correctness of the findings of a chancellor who personally hears the testimony and receives the evidence; and unless an "abuse of discretion" or "clear" error is affirmatively shown his conclusion will stand.[93]

4. *Master Appointed Merely to Report Evidence*

A special master may at times be appointed for no other purpose than to report evidence.[94] The chancellor is not then in any better position than is the appellate court to determine probative value or credibility; and as a logical consequence his conclusion should not be accorded more than the deference due to a skilled review of the evidence. Nevertheless, "clear" error is necessary to warrant reversal of his findings.[95]

Conclusion

The more recent decisions of the Supreme Court of Florida are pointed toward reduction of the scope and importance of the role of the trial judge or chancellor. While errors of substantive law, and procedural errors of any practical importance in the particular case, will be dealt with on appeal if left uncorrected below, a difficult problem of review arises in connection with the so-called facts of the case, which are "found" from the evidence introduced.

The *Farrell* and *Seaver* rules,[96] though alike in some respects, are in the final analysis irreconcilable. Under both there must be substantial evidence to warrant a jury verdict. In the absence thereof, motion for directed verdict should be granted, since there is no function for the jury to perform. Under both the jury should be called

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be sustained, *e.g.*, Hall v. Hall, 46 So.2d 449 (Fla. 1950); Acheson v. Acheson, 46 So.2d 13 (Fla. 1950).

[93]*E.g.*, *contrast* Joseph Langer, Inc. v. Finston & Co., 45 So.2d 338 (Fla. 1950), and Hastings v. Hastings, 45 So.2d 115 (Fla. 1950), *with* Carlson v. Becker, 45 So.2d 116 (Fla. 1950), Saliba v. Saliba, 160 Fla. 959, 37 So.2d 536 (1948), Florida Nat. Bank of Gainesville v. Sherouse, 80 Fla. 405, 86 So. 279 (1920), and Carr v. Lesley, 73 Fla. 233, 74 So. 207 (1917). *See* State v. Fort Pierce, 133 Fla. 348, 351, 182 So. 774, 775 (1938); Magill v. Sherman, 129 Fla. 797, 804, 176 So. 795, 798 (1937); Farrington v. Harrison, 95 Fla. 769, 770, 116 So. 497 (1928).

[94]McGill v. Chappelle, 71 Fla. 479, 71 So. 836 (1916).

[95]*E.g.*, Bethea v. Langford, 45 So.2d 496 (Fla. 1949).

[96]See Part I, 2 *supra*.

upon if there is substantial evidence on both sides, that is, evidence sufficient to enable one "reasonable" man to reach a conclusion in favor of one party and another "reasonable" man to reach the opposite conclusion. Under both a new trial should be awarded when two factors are present: (1) evidence improperly admitted, or demonstrated prejudice or passion or actual moral dishonesty on the part of the jury; and (2) a showing that some such factor influenced the verdict.

Strictly speaking, the improper admission of evidence, or the use of a disqualified juror, is an error in procedural law. It is also apparent that a determination that some extraneous factor has influenced the jury in reaching its verdict is normally an objective judgment on the part of the judge; the only person who knows subjectively whether a given juror has been swayed by improper considerations is that juror himself — and even he may not be conscious of his bias. In other words, the judge must, and does, decide for himself whether the evidence as a whole preponderates against the verdict; if he concludes that it does, he presumes that the verdict rests at least in part on one or more of these factors shown to exist when they should not.[97] If, however, he regards the verdict as in accord with the weight of the evidence, his presumption is the opposite, and the error is passed off as "harmless."[98]

There is still another type of situation, namely, that in which substantial evidence on each side has been introduced and nothing im-

[97]In the very recent case of Trice v. Loftin, 47 So.2d 6, 7 (Fla. 1950), the Court, in attempting to square the *Seaver* rule with an application of the *Farrell* rule, stated:

> "Our adjudications sustain the view that if a trial judge, after hearing all the testimony adduced by the respective parties litigant, reaches the conclusion that he has difficulty in reflecting the justice of the cause with the verdict of the jury and the weight of the evidence, then as a matter of law it becomes his duty to award a new trial. Likewise, if the jury's verdict fails to square with right and justice of the controversy and reasonable doubt exists in the mind of the trial court to conclude that the jury, in the consideration of the case, acted through sympathy, passion, prejudice, mistake or the verdict as rendered reflects an arbitrary or capricious action in weighing or considering the testimony and the instructions of the court upon the law, then the ends of justice require that the verdict be set aside and a new trial awarded."

Hence it may be that there is no necessity for the demonstration of extraneous factors that influence the jury's determination; the trial judge may assume the existence of such factors simply because the verdict, in his opinion, "fails to square with right and justice."

[98]See note 2 *supra.*

proper has occurred in the fact-finding process itself, yet the judge simply cannot see how any reasonable man could reach the verdict rendered in view of what to him is a "manifest" weight of evidence pointing the other way. Can he order a new trial? Said Mr. Chief Justice Taylor in the *Farrell* case, he can ". . . grant one on the ground that the evidence does not sustain the verdict in a case in which the evidence is conflicting upon a material issue . . . .";[99] and the award of a new trial should not be reversed on appeal merely ". . . because there was evidence reasonably tending to support the verdict . . . ."[100] Said Mr. Justice Terrell in the *Seaver* case, ". . . when nothing is involved but the sufficiency of and the probative force of the evidence, the trial court is under no circumstance warranted in pitting his judgment against that of the jury."[101]

Two diametrically opposed rules appear, yet neither decision has been expressly overruled. The same conceptual conflict emerges in probate in connection with reversal by the circuit judge of the judgment of the judge of the county judge's court on the ground of "clear" discrepancy between the evidence as a whole and the latter's findings, as highlighted by the *Donnelly* and *Alkire* cases.[102] Again, neither decision has been openly discarded.

Adoption of one rule or the other must of course stem from considerations other than these rules themselves. Basically, is the judge-jury process one, or is the trial judge sitting in review on the opinion expressed by the laymen in their verdict as a jury? Does the specific organic prescription that "supervision" as well as "appellate" jurisdiction shall be exercised by the circuit court in probate[103] signify anything, or is it pure verbiage? Is the lay mind, largely untrained in sifting and weighing evidence and usually susceptible to appeals to passion and prejudice made by clever counsel, such an ideal medium for determining the conclusions of "fact" that a trained mind is unnecessary in any capacity other than as linesman in the game? Is the final solution of those complex probate problems such as undue influence and intent of the testator best entrusted to one that need not even be a member of the bar?

Undoubtedly, the less the opportunity for new trial or reversal, the

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[99]Farrell v. Solary, 43 Fla. 124, 132, 31 So. 283, 286 (1901).

[100]*Id.* at 130, 31 So. at 285.

[101]Seaver v. Stratton, 133 Fla. 183, 188, 183 So. 335, 337 (1937).

[102]See Part V *supra.*

[103]FLA. CONST. Art. V, §11.

greater the speed in reaching final determination. From this, of course, it could logically be argued that all cases should be tried by a municipal judge without a jury, and with no right of appeal. This would be the essence of speed. But in those relatively few close cases producing disagreement between judge and jury, just how important is speed as a component of justice?[104]

A search in the Supreme Court opinions for an answer to these questions, or for even an analysis of them, yields nothing, essential though they are to any intelligent determination of the rule that should be followed. The Court has simply created of late a policy of discouraging new trials or reversals, thereby rejecting decades of precedent and virtually eliminating whatever purpose the trial judge formerly served in contributing to the fact-finding process.

The same tendency is being shown in equity, as illustrated by the warning in the *Harmon* case[105] that the chancellor should not reject the findings of fact made by the master unless these are "clearly" erroneous. And yet, at the very same time, the treatment of the findings of the deputy commissioner of the Industrial Commission proceeds squarely in the opposite direction; the binding determination is made by the Commission on review.[106] Again, one searches in vain for an explanation of this patent inconsistency. Either the individual hearing the testimony and observing the witnesses is best qualified to appraise its worth or he is not. A decision on this point, which is basic, must be made one way or the other, if reasoning is to be used at all in arriving at a policy to govern review of findings of fact.

Disregarding the deputy commissioner, however, it can be stated in broad fashion that the different fact-finding bodies throughout Florida procedure are gradually being brought under the same rule, whether they be lower courts, administrative agencies, referees, arbitrators, masters or juries. The rule emerging today is that their findings are not to be reversed, or a fresh start made, unless substantial evidence

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[104]High cost to the litigant is also a factor of major importance on occasion; and in recent cases the Supreme Court has demonstrated a commendable determination to combat this evil in those instances in which it can do so, *e.g.*, Gulfstream Park Racing Ass'n v. Clark, 42 So.2d 279 (Fla. 1949); Coast Cities Coaches, Inc. v. Miami Transit Co., 41 So.2d 664 (Fla. 1949); Cohn v. Cohn, 160 Fla. 619, 36 So.2d 199 (1948). But to save costs by terminating the litigation before the cause can be properly tried below, even if "proper" trial involves a new trial, is of highly doubtful expediency.

[105]Harmon v. Harmon, 40 So.2d 209 (Fla. 1949).

[106]See Part VI *supra*.

is lacking or unless improper factors are shown to have influenced those findings. The motion for new trial, as distinct from motion for directed verdict, is rendered largely insignificant other than as a remedy in the original proceeding for harmful error of law therein; the discretion formerly exercised by the trial judge has been drastically curtailed. So has the traditional authority of the chancellor, in formulating his decree, to modify the findings of the master, even though the decree still constitutes the first official judicial disposition of the suit.

Discretion to determine how much weight either the trial court or the appellate court should accord to findings of fact lies entirely in the Supreme Court; and in reaching this formulation of principle it is not bound by precedent.[107] There is little doubt of its power to change the rules governing such matters whenever it chooses to do so. What it does, therefore, takes on an added importance. The Supreme Court has accomplished much in promulgating through its opinions definite rules for the review of findings of fact in several types of situations embodying this process. Nevertheless, as regards jury verdicts, findings by a master in chancery, and findings by the probate judge, the most that can be said at present is that the trial judge or chancellor may well find that he is wrong, whatever he does. The scales are weighted somewhat in favor of doing nothing; his best bet is to place his stamp of approval on the findings, regardless of whether he considers them accurate. This trend has definitely appeared in recent years, even though a valid reason for it has not.

In any event, even a diminution of the role of the trial judge or chancellor is preferable to a different role in each case, with no method of determining what it is until his part has been played. It is to be hoped that the progress made in formulating principles for such determination in other types of review will soon be exhibited in these areas that remain confused.

[107] *See In re* Alkire's Estate, 144 Fla. 606, 623, 198 So. 475, 482 (1940) (supplemental opinion).