JUDICIAL FINDINGS OF FACT UNDER THE MISSOURI CODE

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1. FROM 1849 TO 1855

The so-called code of civil procedure, as originally adopted in Missouri in 1849, contained a section which expressly authorized actual or constructive waivers of juries in all civil actions in the nature of actions at law.[1] With slight verbal changes this section has remained a part of the code ever since.[2] The original code also prescribed, in cases where the judge tried the facts, a method of preserving the judicial findings. The method was prescribed as follows:

> Upon a trial of a question of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts shall be first stated, and then the conclusions of law upon them. Judgment upon the decision shall be entered accordingly.[3]

As construed by the Supreme Court of Missouri, this method was prescribed for equity cases as well as for actions at common law where a jury was waived.[4] Under the code of 1849 it was mandatory upon the judge to make a separate finding of facts in every case submitted without a jury, regardless of whether or not a litigant requested such finding. The authors of the code were considering the appellate rights of litigants. It was intended that the code should simplify the process of appellate review by eliminating in many cases all necessity for instructions or bills of exceptions. At least a part of the responsibility for preparing the record for review was to be placed on the trial court and, to that extent, removed from the private litigants. In commenting upon this section (after it was repealed) the Supreme Court said: "The object of the act was manifestly to enable parties to make a case for the revision of this court, in which the facts and the law would separately appear, without requiring instructions and bills of exceptions."[5] In a still earlier case, it was stated: "Instructions were asked in the present case; but that practice is evidently inappropriate and useless when it is the duty of the court to find the facts, and pronounce the law upon the

[1] Laws, 1848-1849, Art. 15, Sec. 1, page 90.
[2] R. S. 1919, Sec. 1400.
[3] Laws, 1848-1849, Art. 15, Sec. 2, page 90.
[4] Bates v. Bower (1853), 17 Mo. 550—a suit to foreclose a mortgage.
[5] Bailey v. Wilson (1859), 29 Mo. 21.

facts found. If the facts found do not warrant the conclusions of law, the judgment is erroneous. But this conclusion of law, to be stated in the decision of the court, is distinct from the judgment, for the act directs that after the decision is made containing the facts and the conclusion of law, 'judgment upon the decision shall be entered accordingly.' "[6]

From the outset there was no doubt in the Supreme Court that the authors of the code intended the written findings of fact and conclusions of law, which together constituted the decision, to be a part of the record proper, although distinct from the judgment. This was expressly held in the case of *Ragan v. McCoy.*[7] Under the code of 1849, after some vacillation,[8] it was finally and positively held to be reversible error for the trial court to make a general finding, analogous to a general verdict, in any case where there were disputed issues of fact and a jury was waived. The judicial finding was necessarily in the nature of a special verdict at common law or a statement of facts in the old form of rendering a decree in chancery.[9]

2. FROM 1855 TO 1889

While the Supreme Court left no doubt as to the duty of the trial court under the new section of the code just considered, it seems that the provision was extremely unpopular among some circuit judges and practising attorneys. It is a well known fact that the new code in Missouri was received with open and persistent hostility by an influential portion of the profession. In 1855, an amended code of civil procedure, promulgated by the legislature, omitted this section and contained no reference whatever to a finding of facts by the trial court, although of course it allowed a waiver of trial by jury. Under the code of 1855, therefore, no distinction in legal effect existed between a finding by a judge as evidenced in a judgment in a law suit where a jury was waived, and a general verdict of a jury in other law suits. If, as often hap-

[6] Gobin v. Hudgens (1852), 15 Mo. 400.
[7] (1858), 26 Mo. 166—a case initiated under the code of 1849.
[8] Gobin v. Hudgens, *supra.*
[9] Bates v. Bower, *supra;* Farrar v. Lyon (1853), 19 Mo. 122; Davidson v. Rozier (1854), 20 Mo. 132. The opinion of the Supreme Court in the Davidson case is probably as short as any in the reports. *In extenso* it is as follows: "Gamble, Judge. Trial of issues before the court without a jury. No finding of facts by the court. Judgment reversed and cause remanded." To remand the case for a new trial was a drastic penalty. Under the corresponding section of the original Field Code in New York, the practice was to return the decision to the trial judge for amendment, unless for special reasons that procedure was impracticable, in which case a new trial would be ordered. See Tillinghast & Shearman's Pleading and Practice in New York (1865), Vol. II, page 511.

pened, the trial judge filed a written instrument in the nature of a detailed finding of facts, the same was regarded as a gratuitous memorandum or opinion. In *Martin v. Martin*,[10] decided under the code of 1855, the Supreme Court said: "The practice of finding the facts in cases tried by the court without the intervention of a jury no longer obtains, and such cases, in which instructions are neither asked nor given, will not be reviewed in this court except on questions of law duly saved during the progress of the trial; and the finding of facts by the court cannot be referred to for any legitimate purpose, as it has not properly any place under the present law in the record. A case then submitted to the court without a jury must be treated in all respects as if it had been tried by a jury, and this court will not interfere except for such errors as will authorize the reversal of a judgment on the verdict of a jury."

From the passage quoted it is clear that the David Dudley Field experiment of doing away with instructions, or declarations of law, in trials without a jury was a failure in Missouri within six years after the experiment began. Under the theory of 1849, conclusions of law upon facts found and stated were to be a part of the record proper, and therefore subject to appellate review without the necessity of incorporating them into the bill of exceptions. From 1855 to 1899, there inevitably grew up again the practice of asking the judge in trials without a jury to indicate his views as to the law applicable to the case, exactly as he would do if a jury were present to decide the issues of fact. The convenient method of doing this was by giving instructions or declarations of law as they are more appropriately called. But these instructions were not a part of the record proper and would have to be excepted to by the objecting party and made a part of the record by the bill of exceptions in order to be preserved for appellate review.

In civil actions, it is not necessary for the judge to instruct the jury except when requested to do so by a litigant.[11] And, of course, under the code of 1855, when a jury was waived, if no instructions were requested of the trial court, the absence of such instructions would not be reversible error.[12]

Although the practice of formulating a special finding of facts in law suits without a jury was abolished in 1855, in the sense that a failure to find specially was not reversible error and if found the action of the trial judge in so finding facts could never be regarded as anything more

[10] (1858), 27 Mo. 227.
[11] R. S. 1919, Sec. 1417.
[12] Kurlbaum v. Roebke (1858), 27 Mo. 161.

than a general verdict in the appellate court, nevertheless, the practice itself, so in accord with common sense, so consistent with traditions of chancery, seems to have persisted in the *nisi prius* courts of Missouri, in spite of the legislature and in spite of the appellate courts. Toward the end of the period now surveyed, Judge Ellison, speaking for the Kansas City Court of Appeals and reviewing a case in the nature of special assumpsit from Davies County, said: "At the close of the evidence defendant asked the court to give several declarations of fact. The court refused to give them as asked, but gave them as amended, and defendant excepted. I am not aware of any rule of practice in this state entitling a party to a declaration of facts, and defendant's exceptions on this head will be ruled against him."[13]

3. FROM 1889 TO THE PRESENT

In the Missouri code as revised and enacted in 1889 there appeared a section which is still a part of the statutory law of the state, as follows:

> Upon the trial of a question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law.[14]

4. THE STATUTORY FINDING AS APPLIED TO SUITS IN EQUITY

Under the code of 1849, as stated above, the Supreme Court interpreted the judicial duty to find and record facts as a statutory duty applicable to both equitable and legal cases. Under the code of 1889, the Supreme Court and the Courts of Appeal have been understood as holding that the statutory duty to find and state facts, when requested, is applicable only to actions in the nature of common law actions and not to actions in the nature of suits in equity. Judge Lamm, speaking for the court *en banc,* in *Walther v. Null,*[15] said: "It has been soundly ruled that the statute requiring a written finding of fact and conclusions of law, on request, pertains to law suits and not to equity cases pure and simple." Since the statute under review by its very terms applies to questions of "equity" as well as "law," what the appellate courts mean is this: if the trial judge fails to perform this statutory duty in an equity case, that failure is not reversible error on appeal because an

[13] Edwards v. Meyers (1886), 22 Mo. App. 481. See also Ervin v. Brady (1871), 48 Mo. 560.
[14] R. S. 1889, Sec. 2135; R. S. 1919, Sec. 1402. [15] (1910), 233 Mo. 104.

equity case on appeal is a trial *de novo,* and therefore the trial judge's finding of fact in an equity case is only advisory and the absence of an advisory finding, if the evidence is available, can never be prejudicial to a litigant. This was the holding in the case last cited and also in *Parish v. Casner*[16] and *Thompson v. Schultz.*[17] In each of these cases there was a bill of exceptions, with the evidence, before the appellate court. In *Kuczma v. Droszkowski,*[18] there was no bill of exceptions before the appellate court but the petition apparently stated a cause of action for equitable relief which was denied by the trial judge for failure to prove an essential fact. Apparently the trial judge had stated conclusions of fact and conclusions of law, apart from the judgment. These were not before the Supreme Court and the judgment of dismissal was affirmed. Judge Bond said that even if the conclusions of fact, without the evidence, were before the Supreme Court, they would not have been passed upon because "the statute requiring, upon request, the trial judge to state in writing his conclusions of facts, found separately from his conclusions of law, pertains only to legal actions." The reason was stated by Judge Graves in an earlier case[19] as follows: "In equity cases it is not only the privilege but the duty of this court to examine the evidence and draw our own conclusions of fact as well as of law." But if the appellant fails to bring up the evidence in his bill of exceptions, the appellate court cannot perform the duty, and the appellant cannot possibly complain of the judgment, provided it is justified by the pleadings. This would be true even if the bill of exceptions contained the conclusions of fact, without the evidence, and those conclusions did not justify the judgment, provided the pleadings justified the judgment. The Supreme Court went even further in *Patterson v. Patterson.*[20] There was a bill of exceptions but it did not contain the evidence. The judgment itself contained the finding of fact, and appellant assigned as error that on the findings the judgment should have been for the appellant. The Supreme Court affirmed the judgment and said: "Since the appellant has not brought up for our examination the evidence that was adduced at the trial he is not entitled to have the judgment reversed, even if we should be of the opinion that it is not a correct legal result of the facts found. In the absence of the evidence the presumption is in favor of the correctness of the judgment." But if the judicial finding in the judgment is clearly an agreed statement of facts, which does not sustain the judgment, or if the judgment is for the plain-

[16] (1926), 282 S. W. 392.
[17] (1927), 296 S. W. 205.
[18] (1912), 243 Mo. 57.
[19] Miller v. McCalab (1907), 208 Mo. 562.
[20] (1906), 200 Mo. 335.

tiff on a petition which does not state a cause of action, then the Supreme Court will reverse even if there is no bill of exceptions.[21]

Admittedly[22] the appellate courts' emphasis upon the retrial theory of an appealed equity case is explained in part by the existence of their rules requiring all evidence in equity cases to be incorporated into the bill of exceptions.[23] Of course these rules are based upon sound traditional appellate practice in equity cases.[24] *Blount v. Spratt*[25] was the first case before the Supreme Court involving the section of the code of 1889 now under review. In speaking for the court, Judge Macfarlane said: "We do not think it was the intention of the legislature by adding this section to the code of procedure to abrogate the practice of this court, so long followed, of supervising the findings of the trial courts in equity cases." In other words, the appellate court in an equity case is not required by the statute to be bound by the finding of the chancellor as it would be bound by the verdict of a jury in an action at law.

According to existing Missouri law of procedure, it is a matter of discretion and not a matter of reversible error for a trial judge when deciding an equity case to refuse to formulate his finding of facts, even when requested to do so by a litigant who invokes the statute. This result is probably in accord with the "rule of convenience," or with "pragmatism," to use a modern term. The contrary principle probably would increase the opportunities for entrapping the trial court into reversible error. So far as equity cases are concerned, the statute is directory and not mandatory.

With reference to this statutory duty as applied to equity cases on appeal, the actual holdings of our appellate courts have been quite consistent since 1889. But it is impossible to harmonize the dicta. In *Beyer v. Schlenker*[26] the Supreme Court held that it was not reversible error in an equity case for the trial judge to disobey the statute. But the court also said that the statute was "imperative" on a trial judge, sitting in an equity case. This case and others[27] seem to recognize the sound equity tradition that a chancellor should state facts in rendering

[21] Blount v. Spratt (1892), 113 Mo. 48, and South St. J. Land Co. v. Bretz (1894), 125 Mo. 418, as critically distinguished in Patterson v. Patterson, *supra.*
[22] Patterson v. Patterson, *supra.*
[23] Supreme Court Rule 7 (before 1891, Rule 12); St. Louis Court of Appeals Rule 9; Kansas City Court of Appeals Rule 14; Springfield Court of Appeals Rule 9.
[24] Huff v. Shepard (1874), 58 Mo. 242; Darrier v. Darrier (1874), 58 Mo. 222; Ringo v. Richardson (1873), 53 Mo. 385.
[25] *Supra,* footnote 21. [26] (1915), 181 S. W. 69.
[27] Walther v. Null, *supra;* Patterson v. Patterson, *supra.*

his decree. The statute amplifies and perpetuates this sound equity tradition. But the statute acts on the conscience of the trial judge. His conscience will not be controlled by the appellate courts.[28]

5. THE STATUTORY FINDING AS APPLIED TO ACTIONS AT LAW

Under this code provision the difference between an action in the nature of an action at common law and an action in the nature of a suit in equity is sharply marked. As above stated, it is not reversible error for the trial judge in an equity suit to refuse to make a judicial finding as prescribed in the statute. But the statute confers upon every litigant in a law suit the right, fully protected on appeal, to request and obtain a special finding of fact by the trial judge when a jury is waived. A refusal to make such a finding, when requested, is ground for reversal. This was the direct holding in *Backer v. Insurance Company,*[29] wherein Judge Allen's lucid opinion contains this: "We do not enter into the merits of the controversy for the reason that, in our judgment, the case must be reversed for error on the part of the court in failing, upon due request made therefor, to make a finding of facts, stating separately its conclusions of law, as required by the statute." The trial judge cannot avoid error by requesting counsel to submit suggestions and then merely rejecting the suggestions submitted, without a finding by himself.[30]

Although zealous in preserving the litigant's right to a statutory finding in an action at law, our appellate courts are not hypercritical when the trial judge has actually formulated his finding. The finding is treated as nearly as may be like the verdict of a jury. If the finding is sustained by substantial evidence, it is binding on the appellate court.[31] If an issue is raised by the pleadings but is not contested at the trial, it is not reversible error for the court to make no specific finding on that point.[32] And if a contested issue is immaterial, the finding of the trial court may safely ignore it.[33] Furthermore, if the special finding of the trial court is silent as to a material point, it is deemed a finding against the party who has the burden of proof. This important holding, strengthening the presumption against prejudicial error, was

[28] In addition to cases cited, *supra,* see State ex rel. v. Jarrott (1904), 183 Mo. 204—a mandamus suit.
[29] (1913), 174 Mo. App. 82. To the same effect: Cochran v. Thomas (1895), 131 Mo. 258; Colorcraft Co. v. American Packing Co. (1919), 216 S. W. 831.
[30] Backer v. Insurance Co., *supra.*
[31] Raucsh v. Michel (1905), 192 Mo. 293; Barnett v. Hastain (1923), 256 S. W. 750, where Commissioner Railey cited numerous authorities from Missouri cases.
[32] German-American Ins. Co. v. Tribble (1901), 86 Mo. App. 546.
[33] Cochran v. Thomas, *supra.*

made in a case which was tried in the St. Louis City Circuit Court by Judge Muench, whose statutory conclusions of fact and conclusions of law were ultimately affirmed by the Supreme Court of Missouri and by the Supreme Court of the United States.[34]

While the appellate courts will defer to a judicial finding of fact exactly as they will to a jury's verdict, yet they are very particular not to mistake a so-called finding of fact for a conclusion of law. In *Hammill v. Thomas,*[35] a suit on a foreign judgment for alimony, the Kansas City Court of Appeals reversed and remanded a case, where a special finding was requested, because the so-called finding was not "responsive" to the request. The insufficiency, which alone was reversible error, consisted in stating a conclusion of law as to the service on the defendant in the foreign jurisdiction without stating the facts on which that conclusion was based. By calling a conclusion of law a conclusion of fact, nothing is accomplished in the way of removing from the appellate court its duty to review the record for errors of law. To the same effect is *Idalia Realty Co. v. Norman's Southeastern Company,*[36] where the Supreme Court declined to adopt the construction of a written contract, which construction was set forth as a fact in the statutory finding of facts, because, of course, the construction of a contract is not a matter of fact but a matter of law. In *Monmouth College v. Dockery,*[37] a suit involving a partner's liability for his partner's fraud, reliance was placed on the so-called judicial finding of fact that certain acts were outside the scope of the partnership. The Supreme Court said: "That is not a finding of facts; it is only an opinion on a point of law." For errors of law when "law" is miscalled "fact," the appellate courts will not hesitate to reverse.

The appellate courts are reluctant to disturb the finding of a trial judge which is clearly in the domain of fact, yet such a finding is no more sacred than the verdict of a jury. In a clear case, where there is no relation between the evidence and the finding, the finding will be set aside and the judgment reversed. In *Case v. Espenschied,*[38] the Supreme Court said: "This court will treat that finding as it would the verdict of a jury. But even the verdict of a jury must have some substantial evidence to support it. Here there is no evidence that even tends to support the finding of fact."

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[34] Prendergast Construction Co. v. Goldsmith (1918), 273 Mo. 184; same case (1920), 252 U. S. 12.
[35] (1897), 72 Mo. App. 22.
[36] (1920), 219 S. W. 923.
[37] (1912), 241 Mo. 522.
[38] (1902), 169 Mo. 215.

6. REQUEST AS A PREREQUISITE TO STATUTORY FINDING IN ACTIONS AT LAW

This existing section was evidently intended by the legislature as a compromise between the extreme position of judicial responsibility set forth in the code of 1849, and the extreme position of litigant's responsibility set forth in the code of 1855. Under the present system in a trial at law without a jury, the litigant has the option of either requesting instructions in accord with one general verdict or of requesting the judge to render in effect a special verdict and then formulate the appropriate conclusions of law. There is no obligation resting upon the trial court to make a special finding unless a litigant's request is presented.[39] And the request must be made before the case is submitted to the trial court for adjudication.[40] If no request for a separate finding is made, the duty of the trial judge is exactly what it was under the code of 1855, namely, to render a general finding or verdict in favor of either plaintiff or defendant on the issues of fact as presented by the pleadings.[41] If the trial judge as a matter of discretion in an action at law makes a written finding of facts when not requested to do so, the finding is to be regarded as a mere voluntary statement, whether embodied in the text of the judgment or in a separate paper, and cannot be regarded as anything more than a general verdict.[42] Such a memorandum will not be considered on appeal as a statutory finding would be considered, and, to quote Judge Daues in *Dittmeier Real Estate Company v. Knox*,[43] "the judgment should not be disturbed, if it can be sustained on any reasonable theory of law under the facts of the record."

7. CONCLUSIONS OF LAW UNDER THE STATUTE

One of the obvious purposes of the statute is to prescribe a new method of requiring the trial court to reveal the theory of law on which the decision is based after the facts are found. The old method was for the litigants to proceed under what is now R. S. 1919, Sec. 1417, and ask for the giving of written instructions, generally stated in hypothetical form, contingent upon a general finding of issues in favor of either the plaintiff or defendant. The giving or refusing of such instructions,

[39] Kostuba v. Miller (1897), 137 Mo. 161; Lundstrum v. City of Excelsior Springs (1924), 302 Mo. 623.
[40] Loewen v. Forsee (1897), 137 Mo. 29. Apparently there is an argument for the contrary position if the request is made on the same day the judgment is rendered. Stotts City Bank v. Miller Lumber Co. (1903), 102 Mo. App. 75.
[41] Lawyers' Cooperative Publishing Co. v. Gordon (1902), 173 Mo. 139.
[42] Lesan Advertising Co. v. Castleman (1915), 265 Mo. 345.
[43] (1924), 259 S. W. 835.

when excepted to by a complaining litigant, could always be made reviewable on appeal by means of a bill of exceptions. This old method, of course, still prevails when a litigant does not invoke the statute on special judicial findings.[44] The statute, R. S. 1919, Sec. 1402, prescribes in effect that the new method, when used at all, is to state "conclusions of law" as absolute propositions, not hypothetical propositions, after the facts are found specially. One of the early cases alluding to this section after its appearance in the code of 1889 was *Suddarth v. Robertson.*[45] In this case, an action in ejectment, it was said in effect that this new method was to be regarded as a substitute for the other method of revealing to the appellate court the theory on which a case is tried, namely, the giving and refusing of instructions. In *Kostuba v. Miller,*[46] the Supreme Court adhered to the same view, using the following language: "In the trial of actions at law by the court without a jury, in order that the theory of law upon which the case was tried may be made apparent, as well as how the court found the facts, the court may either give or refuse instructions, or pursue the course pointed out by Sec. 2135, R. S. 1889 (Sec. 1402, R. S. 1919). The court, of course, ought not to pursue both courses because they are inconsistent, and is not required to pursue either unless requested, but may make a general finding which is equivalent to a declaration of law upon all the facts found."

In this latter case, as a matter of actuality, the trial court on request made a special finding of facts with conclusions of law and also on request gave instructions,—both at the instance of the appellant. There was no reason for reversing the case but the opinion of the court makes it clear that the conclusion-method and the instruction-method should be regarded as mutually exclusive. Twenty-five years later,[47] the Kansas City Court of Appeals said: "The rule is well established that a trial court sitting as a jury, either should give its declarations of law, or make findings of fact with conclusions of law, but cannot be required to do both." In *Colorcraft Company v. American Packing Company,*[48] it appeared that the appellant's request for special findings and conclusions of law was denied and appellant excepted. Being forced to rely upon a general finding, appellant requested instructions under R. S. 1919, Sec. 1417. On appeal, the St. Louis Court of Appeals held that appellant had not waived his rights under R. S. 1919, Sec. 1402,

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[44] Waverly Sales Co. v. Ford (1917), 194 S. W. 1085; Oak Grove Telephone Co. v. Round Prairie Telephone Co. (1919), 209 S. W. 552.
[45] (1893), 118 Mo. 286. [46] (1897), 137 Mo. 161.
[47] Bretall v. Missouri Pacific Ry. Co. (1922), 239 S. W. 597.
[48] (1919), 216 S. W. 831.

Judge Reynolds for the court, saying: "In the case at bar, by the action of the trial court in refusing to make a finding of facts and conclusions of law under the statute, which action was excepted to, plaintiff was driven to pursue the best course he could and ask to have his points of law presented."

Query: If the plaintiff should ask for a finding and conclusions under R. S. 1919, Sec. 1402, and the defendant should ask for instructions under R. S. 1919, Sec. 1417, what should the trial judge do? Since R. S. 1919, Sec. 1402 is of more recent origin than the R. S. 1919, Sec. 1417, it must control in case of an apparent conflict of rights. At the same time it would be easy for the trial judge to comply with both requests and not commit reversible error.

It was formerly supposed that the statutory conclusions of law were a part of the record proper.[49] Instructions have always been recognized as a matter of exception.[50] This distinction would indicate a more radical difference between conclusions and instructions than the mere difference between the hypothetical form and the abolute form of announcing legal propositions. But since *Fruin v. O'Malley*[51] was decided by the Supreme Court, it is understood that conclusions of law under R. S. 1919, Sec. 1402, like instructions under R. S. 1919, Sec. 1417, if deemed prejudicial by a litigant, must be excepted to and brought up for review by the bill of exceptions.

8. STATUTORY JUDICIAL FINDING AND THE RECORD PROPER

We have already seen that under the code of 1849, the special finding was a part of the record proper,—it being the intention of the authors of that code to do away, whenever possible, with bills of exceptions. Under the code of 1889 some of the early appellate decisions expressed the same view. Thus in *Nichols v. Carter*[52] the Kansas City Court of Appeals said positively that the written statement of conclusions of fact and law become "a part of the record proper and if the finding of facts does not support the judgment based thereon, we will reverse the judgment for error apparent on the record." But in *Bailey v. Emerson*[53] the St. Louis Court of Appeals used language of different import: "Such statements of facts shall embrace all that are constitutive, and are open to attack in appellate courts for failure in this respect upon due exceptions saved in the trial court." And in *Steele v. Johnson*,[54] Judge

[49] Steele v. Johnson (1902), 96 Mo. App. 147.
[50] Sickles Company v. Bullock (1900), 86 Mo. App. 89.
[51] (1912), 241 Mo. 250.
[52] (1892), 49 Mo. App. 401.
[53] (1900), 87 Mo. App. 221.
[54] (1902), 96 Mo. App. 147.

Barclay clearly stated that the finding of fact under this statute was a matter of exception, but the conclusion of law was a part of the record proper.

Prior to sixteen years ago, it was impossible to reconcile the holdings and comments of our appellate courts on this point. In *Fruin v. O'Malley*,[55] an action at law, there was a separate finding of facts, obviously prepared in compliance with the statute. On appeal this judicial finding, separate from the judgment, was actually before the court, purporting to be a part of the record proper and there was no bill of exceptions. The question was squarely up for decision: is the statutory judicial finding of fact, separate from the judgment, a part of the record proper or is it a matter of exception? Recognizing the point as "not altogether free from difficulty" and referring to earlier conflicting decisions, the Supreme Court decided that the judicial finding of fact was not a part of the record proper. Judge Brown, speaking for the court, said: "Both the special findings of facts and conclusions of law should be entirely separate from the judgment, to the end that the party requesting such finding may except to the 'decision of the court on the conclusions of law or equity arising in the case.' This statute clearly means that such exceptions to the court's conclusion of law shall be saved as may be properly included in a bill of exceptions. The law never contemplates that exceptions shall be written into the record proper."

It may seem strange that a verdict of a jury should be a part of the record proper[56] and a judicial finding of facts should be a matter of exception. However, here again it is probably true that the final holding of our appellate courts is in accord with common sense, convenience, and the tests of pragmatism. If a special finding of facts could be brought to the appellate court without a bill of exceptions, the result probably would be to put a premium on the efforts of resourceful and tricky lawyers to entrap the trial judges into reversible error. In the opinion of this writer many of the superficial inconsistencies in our Missouri appellate reports are due to a laudable desire on the part of our appellate judges to discourage the efforts of some practising lawyers to entrap the trial judges into reversible error.

9. METHODS OF DETERMINING FACTS UNDER THE EXISTING CODE IN ACTIONS AT LAW

Under the present code of civil procedure in Missouri there are four

[55] (1912), 241 Mo. 250.

[56] Bateson v. Clark (1865), 37 Mo. 31.

possible methods of determining final and disputed issues of fact,—entirely apart from actions in the nature of suits in equity and reference cases.

The first method is by the general verdict of a jury.[57]

The second method is by a general finding in the nature of a general verdict, in cases where a jury is waived and no request is made for a special finding under R. S. 1919, Sec. 1402.

The third method is by a special finding gratuitously made by a trial judge when a jury is waived and no request is presented by a litigant. Such a gratuitous special finding is not in itself erroneous, and very likely induces accuracy on the part of the trial judge, but is treated in appellate courts as merely equivalent to a general verdict on the pleadings.

The fourth method is by a special finding when requested by a litigant invoking rights under R. S. 1919, Sec. 1402, after a jury is waived. This particular kind of judicial finding is frequently and properly referred to in the appellate reports as the "statutory finding."

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[57] The so-called special verdict provided for in R. S. 1919, Sec. 1418 and Sec. 1420, is so highly restricted by R. S. 1919, Sec. 1419, that it practically amounts to nothing more than the verdict of an advisory jury in an equity case. A statute authorizing special verdicts in "all actions" was enacted in 1885 and repealed exactly two years later. See Laws, 1885, page 214; Laws, 1887, page 229.