THE EVER WIDENING SCOPE OF FACT REVIEW IN FEDERAL APPELLATE COURTS—IS THE "CLEARLY ERRONEOUS RULE" BEING AVOIDED?

THE HONORABLE JOHN F. NANGLE*

I. INTRODUCTION

In 1957 Professor Charles Alan Wright expressed alarm that the appellate courts were, by various methods, drawing unto themselves almost complete power over our judicial system.[1] One of the methods being utilized in this process,[2] argued Professor Wright, was the misinterpretation by the appellate courts of the "Clearly Erroneous Rule."[3]

In 1981, twenty-four years after Professor Wright's warning, the scope of appellate fact review continues to widen. The expansion that has occurred in the federal courts is of principal concern to this writer. An important factor underlying the expansion of appellate court power is the avoidance of Rule 52(a) or the circumvention of it by ever-changing interpretations. Appellate judges have "become bolder [and bolder]."[4] Not only have they refused to be bound by trial court findings based on documentary evidence, as mentioned by Professor Wright,[5] but also such courts have made exceptions to the Clearly Erroneous Rule in findings based on deposition evidence and on disputed underlying facts. Appellate courts have increasingly moved toward the

* United States District Judge, Eastern District of Missouri. B.A., 1943, University of Missouri, J.D., 1948, Washington University. This Article was initially presented as the subject of a panel discussion at the Eighth Circuit Judicial Conference in Rapid City, South Dakota on August 23, 1979.

1. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957) [hereinafter cited as *Doubtful Omniscience*]. This article was, to some extent, an update on prior arguments by Professor Leon Green. L. GREEN, JUDGE AND JURY 380 (1930).

2. *Doubtful Omniscience, supra* note 1, at 764-71.

3. FED. R. CIV. P. 52(a):

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of the witnesses.

Id.

4. *Doubtful Omniscience, supra* note 1, at 751.

5. *Id.* at 764-71.

position that the second clause of the Clearly Erroneous Rule—"and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of the witnesses"—limits the application of the Rule rather than merely adding a specific additional restriction to their authority.[6]

The appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule. Although purporting to pay homage to the Clearly Erroneous Rule, appellate courts have become less reticent to substitute their view of the evidence for that of the trial court to "do justice."[7]

The writer is not alone in this viewpoint. During the last few years the trial bench and bar have expressed a growing concern on this point. Trial judge Andrew Bogue, in a letter to this writer,[8] expressed the concern as follows:

> [I] feel that there is more criticism directed to the appellate courts than ever before, particularly on this clearly erroneous rule and also upon the trial *de novo* issue, which can in some instances be the same things. The credibility of the trial judges is being challenged and the attorneys have consistently told me in recent years that they automatically appeal because they "get two bites out of the apple". They not only get a ruling by the trial court but they get a good chance of getting a trial *de novo* in the appellate court as well because of the appellate court's failure to recognize the clearly erroneous rule and apply it.[9]

The current mood of the trial bar fully comports with Judge Bogue's view.

Hopefully, this Article will be considered as it is intended—a genuine expression of alarm over the great imbalance that has developed

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6. *Id.* at 769-70.

7. *Id.* at 779.

8. Letter from the Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, to the Honorable John F. Nangle (April 19, 1979).

> Of the seven lawyers gathered here, excepting me, six of them had very, very strong ideas that the appellate courts were searching for error rather than the truth in most of their cases and that they simply did not give credit to the trial judges which is required under the clearly erroneous rule. This was not limited to any particular court, but was their feeling as to both state and federal courts. The seventh attorney said that he rather suspected it depended upon the success of each individual as to whether he believed the rule was being eroded. In other words, when an attorney loses he feels they ignored the rule and when he wins, he feels the opposite . . . .

Id.

9. *Id.*

between trial courts and appellate courts. The purpose of this Article is not to rehash any individual case. The writer's aim is to call attention to this issue and, hopefully, to secure a rethinking of the Clearly Erroneous Rule by both bench and bar.

In this Article, a brief historical background to the Clearly Erroneous Rule is presented because many of the current problems are best understood against this background. The language of the Rule and its Supreme Court interpretations are also examined. Then the current application of the Rule by the Eighth Circuit Court of Appeals is explored. In this connection, the application by the Eighth Circuit is considered because of this writer's familiarity with that circuit, not because of any problems unique to it.[10] A recent student note[11] ably reviewed the applications of the Rule in the various circuits, and there is no need to do so again in this Article. Rather, the application of the Rule by the Eighth Circuit is examined merely to illustrate what this writer feels is the uncertainty and confusion surrounding the Rule's present application in all of the Circuit Courts of Appeals. Thereafter the Article discusses the consequences of the treatment given Rule 52(a) and the writer's general conclusions.

II. Appellate Factual Review Prior to the Adoption of the Federal Rules of Civil Procedure: A Brief Historical Background

Cases tried to a jury before the adoption of the Federal Rules of Civil Procedure in 1937 presented, perhaps, the most easily understood standard of appellate review. There were no categories or levels of review depending on the type of fact that was found,[12] and the all-encompassing standard was simply stated. Facts found by a jury were not to be overturned by the appellate court unless there was no substantial evidence to support the findings.[13] The review of jury verdicts was by writ of error, and the appellate court could reverse only if the jury was

10. Indeed, quite the contrary seems true—the problems are not limited by circuit boundaries.

11. Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 St. John's L. Rev. 68 (1977).

12. *See* notes 22-26 *infra* and accompanying text (regarding appellate review of the findings of an equity court).

13. Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891).

improperly instructed on the law or obviously misapplied the law.[14] The jury could disregard all conflicting evidence and choose to believe only one side.[15] Even so, if there was any evidence presented that would support the jury's findings, the appellate court was powerless to overturn these findings.[16]

The narrow review was apparently dictated by the seventh amendment.[17] The amendment states, "no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of common law."[18] The adoption of the Federal Rules has not altered this scope of review,[19] but, as noted by Professor Wright,[20] appellate courts have found the seventh amendment to be no impediment to review of the trial court's denial of a motion for a new trial on the ground that the verdict is against the clear weight of the evidence.[21]

Review of findings by the court in equity cases was not as narrow. No simply stated rule was applicable, as in the case of findings by a jury. The proper scope of review was not entirely clear, which partly explains the present uncertainty surrounding the application of the Clearly Erroneous Rule.[22]

The trial court's findings were generally considered presumptively correct and would be upheld on appeal unless clearly against the weight of the evidence or induced by an erroneous view of the law.[23] "Presumptively correct," however, apparently took on different meanings depending on the type of evidence to be reviewed. Findings based on oral evidence were not reversed unless clearly erroneous because of the trial court's superior position to judge the demeanor and credibility of the witnesses.[24] Findings based on documentary or undisputed evidence were subject to more extensive review because the appellate court was apparently in a position as good as the trial court to weigh

14. Lundgren v. Freeman, 307 F.2d 104, 113 (9th Cir. 1962).
15. Willoughby v. City of Chicago, 235 U.S. 45 (1914).
16. 13 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3502 (1973).
17. U.S. CONST. amend. VII.
18. *Id.*
19. Basham v. Pennsylvania R.R., 372 U.S. 699, 700-01 (1963).
20. *Doubtful Omniscience, supra* note 1, at 758-63.
21. Eastern Air Lines v. Union Trust Co., 239 F.2d 25 (D.C. Cir. 1956).
22. *See* Note, *supra* note 11, at 69-72. *But see* Comment, *Scope of Appellate Fact Review Widened*, 2 STAN. L. REV. 784, 785-86 (1950).
23. Comment, *supra* note 22, at 786.
24. Note, *supra* note 11, at 71.

the evidence and make findings from the record.[25] Findings based on disputed documentary evidence were presumed correct, although the review was more extensive than when oral findings were concerned.[26]

This tri-level standard of review was not simply applied or easily followed. The confusion surrounding its application loomed large in the later confusion surrounding the application of the Clearly Erroneous Rule.

The Act of March 3, 1865[27] allowed waiver of a jury trial in all legal actions. Thus the hybrid situation of a legal action tried to the court was born. The issue arose: Were the findings of the court in such actions entitled to the same finality of those of a jury in other legal actions, or were they subject to the more extensive review of the findings of a court in equity actions? The general consensus was that such findings were to be given the same weight as those of a jury.[28] "Where a jury is waived, a trial judge functions as both judge and jury, and his findings of fact are in all respects as final and conclusive as a verdict of a jury would have been had the issues of fact been determined by a verdict."[29]

III. The Adoption of the Clearly Erroneous Rule and Supreme Court Interpretation

It is against this background of appellate factual review that Rule 52(a) of the Federal Rules of Civil Procedure was adopted. The Federal Rules abandoned the procedural distinctions between law and equity.[30] Therefore, it was no longer deemed advisable to differentiate the finality accorded the trial court's findings based on characterization of the case as legal or equitable. The issue, however, was whether to unite under the banner of the legal standard or the equitable standard. Resolution of the issue was not without serious debate.

Judge Charles E. Clark, the Reporter of the Advisory Committee on the Rules and one of the most respected authorities in the field at the time, advocated the adoption of the standard of review previously ap-

25. *Id.*
26. *Id.*
27. Ch. 86, § 4, 13 Stat. 501 (1865).
28. United States v. Washington Dehydrated Food Co., 89 F.2d 606, 609 (8th Cir. 1937).
29. *Id.*
30. Fed. R. Civ. P. 1, 2.

plied in jury-waived legal cases in all cases tried without a jury.[31] Judge W.C. Chesnut concurred with Clark.[32] Judge Chesnut feared that adoption of the equitable standard would derogate from the importance of the trial judge's judicial function.[33]

Professor W.W. Blume, on the other hand, feared that granting finality to the trial court's findings would arouse distrust and suspicion in the public mind. Blume therefore favored adoption of the equitable standard in all cases.[34] Professor Blume felt that appellate courts should be able to review facts as well as law to insure the administration of justice.[35]

Adoption of the equitable standard in all cases prevailed. In the preliminary draft of the rules the standard of review was stated as follows: "The findings of the court in such cases [actions tried upon the facts without a jury] shall have the same effect as that heretofore given to findings in suits in equity."[36] It was feared, however, that the proposed rule would incorporate the uncertainty associated with the prevailing equity practice.[37] The Rule as finally adopted did not refer specifically to the prior practice in reviewing findings of equity courts but, rather, formulated a standard to be applied in all cases.

The standard, commonly referred to as the Clearly Erroneous Rule, reads as follows: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of the witnesses."[38] The language employed is not complex; the sentence is not overly complicated, and the words are not multisyllabic. Yet the misunderstanding and misapplication of this simple rule has given rise to unending debate.

The notes of the Advisory Committee on the Rules commented on the Clearly Erroneous Rule as follows: "The rule . . . accords with the decisions on the scope of the review in modern federal equity practice. It is applicable in all classes of findings in cases tried without a jury

31. Clark, *Review of Facts Under Proposed Federal Rules*, 20 J. AM. JUD. SOC'Y 129 (1936).

32. Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533 (1936).

33. *Id.*

34. Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUD. SOC'Y 68 (1936).

35. Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. AM. JUD. SOC'Y 130 (1936).

36. Note, *supra* note 11, at 72-73.

37. Note, *supra* note 11, at 73 n.24.

38. FED. R. CIV. P. 52(a).

whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony."[39] The ambiguity of this seemingly innocuous comment is readily apparent. It was not at all clear that "scope of the review in modern federal equity practice" was the same for "all classes of findings."[40] Nevertheless, the Comment sets forth the Committee's view that the same standard is applicable regardless of the nature of the evidence on which the finding was based. This view was meant to prevail.

Although one should not become bound, of course, by the strict meaning of words, it is useful to inspect the definition of "clearly."[41] "Clearly" is defined, with respect to something asserted or observed, as "without doubt or question."[42] Therefore, the Clearly Erroneous Rule apparently would require that appellate courts refrain from reversing a trial court's finding of fact unless the appellate court is convinced the finding is erroneous "without doubt or question." Sadly, the law does not generally evolve in a straight-forward manner. The nature of courts is continually to redefine and reformulate the standards by which the law is applied.

The initial Supreme Court exposition on the meaning of the Clearly Erroneous Rule was in *United States v. United States Gypsum Co.*[43] The Court stated:

> [Rule 52(a)] was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice . . . . The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*[44]

The emphasized language, which restates the clearly erroneous standard, has been used continually by the Supreme Court.[45]

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39. 5 MOORE'S, FEDERAL PRACTICE ¶ 52.01[4] (2d ed. 1951); *Doubtful Omniscience, supra* note 1, at 765.

40. *See* notes 24-27 *supra* and accompanying text.

41. *See also* United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945).

42. WEBSTER'S THIRD NEW INT'L DICTIONARY 420 (1971).

43. 333 U.S. 364 (1948).

44. *Id.* at 394-95 (emphasis added) (citations omitted).

45. The above formulation was cited approvingly as recently as 1978. Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 74 n.19 (1978).

The value of this restatement, however, may be questioned. First, there is doubt that any restatement was necessary; "a definite and firm conviction that a mistake has been committed" does not appear to be any more easily understandable or applicable than the original phrase—"clearly erroneous." The new phraseology did no more than further muddle an already elusive standard.

Furthermore, there is doubt that *Gypsum* truly captured the essence of the Rule. Whenever there are two versions of the facts, or two interpretations of undisputed facts, the trial court and then the appellate court must choose which version or interpretation to believe. In making the choice, a court is necessarily convinced of the correctness of the chosen view and is necessarily, therefore, convinced that the opposing view is erroneous. Being convinced that a view is erroneous, however, is not the same as being convinced that a view is clearly erroneous. A court may be convinced of the correctness of its view and at the same time concede the merit of the opposing view. Whether the requirement that the appellate court be "definitely and firmly" convinced of the correctness of its choice actually provides a solution for this problem is questionable. A court may on making a choice simply say that it is definitely and firmly convinced of the choice. Whether the requirement is actually one of substance is doubtful.

In any event, this is the phraseology initially adopted and consistently applied by the Supreme Court. There is value in consistency, even though the precise words used may be of questionable value.

The Supreme Court has commented several times on the value of restricted appellate review of findings of fact. In *Commissioner v. Duberstein*[46] the Court stated:

> Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.[47]

46. 363 U.S. 278 (1960).
47. *Id.* at 289.

Similarly, in *Dayton Board of Education v. Brinkman*[48] the Court commented that there was "great value" in appellate courts showing deference to the fact finding of the trial courts.[49]

The Supreme Court has consistently followed the comments of the Advisory Committee with respect to application of the Rule to all classes of findings. The Rule applies to factual inferences derived from undisputed basic facts.[50] If the underlying facts are undisputed, arguably the inferences to be drawn from them are as readily drawn by the appellate court as by the trial court. The Supreme Court apparently rejected the view that direct observation of witnesses is the controlling criterion of the weight to be accorded the trial court's findings.[51]

The Supreme Court has stressed, however, the particularly appropriate nature of restricted review in cases in which the trial court is in a unique position to weigh the evidence. The Court has found the Clearly Erroneous Rule especially applicable in two instances: when evidence is largely the testimony of experts as to which the trial court may be enlightened by scientific demonstrations[52] and when a vast record of distant transactions, motives, and purposes is presented, the effect of which depends largely on the credibility of witnesses.[53]

Finally, the Supreme Court has left no doubt that findings of fact need not be sustained if they are based on an erroneous view of the law.[54] This aspect of the prior practice has obviously survived.

The Supreme Court decisions that touch on the application of the Clearly Erroneous Rule leave the impression that review of factual

48. 443 U.S. 526 (1979).

49. *Id.* at 534 n.8.

50. United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963); Commissioner v. Duberstein, 363 U.S. 278, 291 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948). *Cf.* United States v. General Motors, 384 U.S. 127, 141-42 n.16 (1966) (where the Court says in dicta that the rationale behind the Rule, the trial court's opportunity to observe the demeanor and credibility of the witnesses, is of less force in a "paper case"; the Court does not say, however, that the Rule is inapplicable in such cases.).

51. This approach was carried to extreme in Orvis v. Higgins, 180 F.2d 537 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). In this opinion, Judge Jerome N. Frank set out seven narrowly defined categories, each determined by the type of case and the importance of oral testimony to the result reached. He argued that the scope of appellate review was dependent upon the class in which the case was placed. This opinion was severely criticized in Comment, *supra* note 22.

52. Graver Tank Mfg., Inc. v. Linde Air Prods. Co., 336 U.S. 271, 274-75 (1949).

53. United States v. Oregon State Med. Soc'y, 343 U.S. 326, 332 (1952).

54. Guzman v. Pichirilo, 369 U.S. 698, 701 (1962); Commissioner v. Heininger, 320 U.S. 467, 475 (1943).

findings by appellate courts is to be quite restricted.[55] Although blind adherence to such findings is not mandated, substantial deference is required.[56] Whether the appellate courts have followed this mandate is the next topic of discussion.

IV. PRESENT APPLICATION OF THE RULE

As stated earlier,[57] the present application of the Rule in the Eighth Circuit is stressed in this section. This selectivity should not be taken to mean, however, that the problems are unique to this Circuit. Rather, the application of the Rule in this Circuit clearly illustrates the problems that exist in all federal appellate courts.

Two basic difficulties accompany the use of the Rule in the Eighth Circuit. First, the Rule is constantly restated and reformulated. Although mere rewording of the Rule would not be a cause for concern, it is this writer's belief that the various formulations expressed also alter the substance of the Rule's application. Furthermore, these casual reformulations reflect a basic disrespect for the essence of the Rule. It is as if the appellate court feels that it is free to do whatever it wishes after stating the proper talismanic words. The meaning of the words is overlooked. Second, there is continuous disagreement in this Circuit as to when the Rule is applicable and as to whether credibility determinations are the touchstone of applicability.

The Eighth Circuit has never been satisfied with the phrase "clearly erroneous." In a fashion similar to the Supreme Court in *Gypsum*,[58] the Eighth Circuit has rephrased the Rule in more comfortable terms. Unlike the Supreme Court, however, the Eighth Circuit has not consistently applied the same formulation.

The late Judge Sanborn rendered one of the first interpretations of the Clearly Erroneous Rule in the Eighth Circuit. He reformulated the rule as follows: "The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."[59] In stating that

55. Commissioner v. Duberstein, 363 U.S. 278, 290 (1960) ("appellate review of findings in this field must be quite restricted").

56. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

57. *See* note 10 *supra* and accompanying text.

58. United States v. United States Gypsum Co., 333 U.S. 364 (1948).

59. Aetna Life Ins. Co. v. Kepler, 116 F.2d 1, 5 (8th Cir. 1941). This formulation has been

findings which are unsupported by substantial evidence were not binding on the appellate court, Judge Sanborn was undoubtedly correct. "[U]nsupported by substantial evidence" is the standard utilized to overturn findings of a jury,[60] and was the standard used before adoption of the Federal Rules to overturn findings by the court in a jury-waived law case.[61] The standard is more restrictive than the clearly erroneous standard was meant to be.[62] To say, therefore, that a finding is unsupported by substantial evidence is perforce to say it is clearly erroneous.

This characterization of the Clearly Erroneous Rule is correct, however, only when read in conjunction with the next phrase—"or are clearly against the weight of the evidence."[63] A finding may be supported by substantial evidence, yet still not be binding on the appellate court if it is clearly against the weight of the evidence.[64] Conversely, a finding that is clearly against the weight of the evidence always will be unsupported by substantial evidence.

Therefore, the phrase "unsupported by substantial evidence" is superfluous to Judge Sanborn's formulation, although the inclusion of the phrase does not distort the meaning of the Rule. It does not change the meaning of the formulation, because any misconception caused by it is corrected by addition of the second phrase.

Problems developed, however, when Judge Sanborn's reformulation was itself reformulated, and when the converse of his formulation was also stated as the Rule. Judge Sanborn himself was one of the first to fall into the trap. Nine years after his opinion in *Aetna Life Insurance co. v. Kepler*,[65] he stated the rule as follows: "The findings of fact of a trial court should be accepted by this Court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary

utilized in numerous subsequent cases. Richmond v. Carter, 616 F.2d 381, 383 (8th Cir. 1980); Marshall v. Kirkland, 602 F.2d 1282, 1291 (8th Cir. 1979); Stanley v. Henderson, 597 F.2d 651, 653 (8th Cir. 1979); Southern Ill. Stone Co. v. Universal Eng'r Corp., 592 F.2d 446, 451 (8th Cir. 1979).

60. *See* text accompanying notes 13-16 *supra*.

61. *See* text accompanying notes 27-29 *supra*.

62. *See* text accompanying notes 30-37 *supra*.

63. Aetna Life Ins. v. Kepler, 116 F.2d 1, 5 (8th Cir. 1941).

64. 2B BARRON-HOLTZOFF, FEDERAL PRACTICE & PROCEDURE Rev. Rules § 1135 at 549 (1961). *See also* concurring opinion of Judge Lay in Jackson v. Hartford Accident & Indem. Co., 422 F.2d 1272, 1275 (8th Cir.) (Lay, J., concurring), *cert. denied*, 400 U.S. 855 (1970).

65. 116 F.2d 1 (8th Cir. 1941).

support or were induced by an erroneous view of the law."[66] This formulation has been adopted subsequently in this Circuit.[67]

The exact meaning of this formulation is unclear. Does "without adequate evidentiary support" mean "unsupported by substantial evidence," "against the weight of the evidence," or something in between? If the former, the Rule stated unnecessarily restricts review. Even though it might not be "clearly demonstrated" that a finding is unsupported by substantial evidence, the finding might still be clearly erroneous.[68] When read in context, Judge Sanborn's formulation may have indeed meant this former interpretation because, immediately before the above-quoted statement, he stated that there is no logical reason to place the findings of fact of a trial court on a substantially lower level of conclusiveness than those of a jury or an administrative agency.[69]

Sanborn's apparent misstatement of the Rule became more obvious in subsequent decisions. Sanborn's "adequate" later became "substantial," and the Rule, as formulated in *Cole v. Neaf*, then read: "Findings of fact can be set aside only upon clear demonstration that they are without *substantial* evidentiary support or that they are induced by an erroneous view of the law."[70] When viewed in light of the common understanding of the phrase "substantial evidence,"[71] the formulation is too restrictive.

Other variations of the *Cole* formulation have appeared. The appellate courts "can upset fact findings only when they are not supported by substantial evidence,"[72] and "a finding is clearly erroneous only . . . if

66. Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950). It is interesting to note that Judge Sanborn also quotes his prior formulation in this opinion. *Id.* at 137. This shows the ease of confusion resulting from constant restating of the Rule, because there is no indication in the opinion that Judge Sanborn thought he was changing the substance of the Rule by restating it.

67. Republic Rice Mill, Inc. v. Empire Rice Mills, Inc., 313 F.2d 717, 721 (8th Cir. 1963); Collins v. Owen, 310 F.2d 884, 884-85 (8th Cir. 1962); Nelson v. Seaboard Sur. Co., 269 F.2d 882, 886 (8th Cir. 1959).

68. *See* note 64 *supra* and accompanying text.

69. Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).

70. Cole v. Neaf, 334 F.2d 326, 329 (8th Cir. 1964) (emphasis added). This formulation has been utilized in subsequent cases. United Stores of Am., Inc., v. Insurance Consultants, Inc., 468 F.2d 1010 (8th Cir. 1972); Worthen Bank & Trust Co. v. Franklin Life Ins. Co., 370 F.2d 97, 100 (8th Cir. 1966); Lewis v. Super Valu Stores, Inc., 364 F.2d 555, 556 (8th Cir. 1966).

71. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). *See also* notes 11-16 *supra* and accompanying text.

72. Tyson v. Iowa, 283 F.2d 802, 809 (8th Cir. 1960). *See also* Cotton v. Lockhart, 620 F.2d 670, 671 (8th Cir. 1980).

substantial evidentiary support is lacking."[73]

Several decisions have stated that if a finding is supported by substantial evidence, the reviewing court may nevertheless reverse the finding if "satisfied" that a mistake has been made.[74] Although these decisions commendably recognize that support by substantial evidence does not necessarily mean a finding is not clearly erroneous,[75] the formulation allows for review of trial court findings beyond that contemplated by the Rule. To be "satisfied" that a mistake has been made is far from being "definitely and firmly convinced"[76] and is far from saying a finding is "clearly erroneous."[77]

Another standardless standard was expressed by the Eighth Circuit in *Gay Lib v. University of Missouri*.[78] In commenting on the scope of review in court-tried cases, it was stated that "there is still the qualitative factor of truth and right of the case—the impression that a fundamentally wrong result has been reached."[79] This statement comes as close to Wright's concern that appellate courts seek to "do justice" in each case[80] as is reasonable to expect an appellate court to admit.

Finally, the phraseology initially adopted by the Supreme Court—"definite and firm conviction that a mistake has been committed"—is used by the Eighth Circuit in some opinions.[81]

This writer's belief is that the utilization of various formulations by the Eighth Circuit reflects the growing tendency of appellate courts to employ differing standards on a case-by-case basis to "do justice." Some formulations reflect a more restrictive scope of review than contemplated by the Rule;[82] some a more expansive scope.[83] The inconsis-

73. Whitson v. Yaffe Iron & Metal Corp., 385 F.2d 168, 169 (8th Cir. 1967). *See also* Sherman v. Lawless, 298 F.2d 899, 902 (8th Cir. 1962).

74. Automated Controls, Inc. v. MIC Enterprises, Inc., 599 F.2d 288, 289 (8th Cir. 1979); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F.2d 129, 131 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979).

75. *See* note 64 *supra* and accompanying text.

76. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

77. FED. R. CIV. P. 52(a).

78. 558 F.2d 848 (8th Cir. 1977).

79. *Id.* at 853 n.10 (citing Oil Screw Noah's Ark v. Bentley & Felton Corp., 322 F.2d 3, 5-6 (5th Cir. 1963)).

80. *Doubtful Omniscience, supra* note 1, at 779.

81. Arkansas Educ. Ass'n v. Portland, Ark. Bd. of Educ., 446 F.2d 763, 770 (8th Cir. 1971); Barryhill v. United States, 300 F.2d 690, 694 (8th Cir. 1962).

82. *See* notes 66-73 *supra* and accompanying text.

83. *See* notes 74-76 *supra* and accompanying text.

tency concerns this writer.[84] It indicates a casual attitude toward the Rule, which, in turn, reflects a casual attitude toward its application. Were the appellate court to consciously and deliberately consider the meaning of the formulation it adopts, it is likely that it would act with greater reluctance before reversing a trial court's findings of fact.

The other problem in this Circuit is disagreement as to the application of the Rule to various classes of findings. It is clear to this writer that the Supreme Court and the drafters of the Rule view the Rule as applicable to all classes of findings. The Eighth Circuit decisions reflect disagreement on this issue. In *Cole v. Neaf*[85] the court stated: "We have repeatedly and consistently held, at least subsequent to the Supreme Court's decision in *Commissioner of Internal Revenue v. Duberstein*, [citation omitted], that the clearly erroneous standard applies to reasonable inferences to be drawn from stipulated or undisputed facts and that it is for the trial court rather than this court to draw legitimate and permissible inferences."[86] The Eighth Circuit rejected any contention that credibility determinations are the touchstone of the Rule's applicability.[87]

Whatever was "repeatedly and consistently" held in 1964, however,

84. The present Chief Judge of the Eighth Circuit, the Honorable Donald P. Lay, expressed a similar concern more than ten years ago in his concurring opinion in Jackson v. Hartford Accident & Indem. Co., 422 F.2d 1272, 1275 (8th Cir.) (Lay, J., concurring), *cert. denied*, 400 U.S. 855 (1970).

85. 334 F.2d 326 (8th Cir. 1964).

86. *Id.* at 329.

87. The Eighth Circuit has repeatedly stated, however, that application of the rule is particularly appropriate when resolution of conflicting evidence involves credibility determinations. Kellin v. ACF Indus., 629 F.2d 532, 534 (8th Cir. 1980); Stanley v. Henderson, 597 F.2d 651, 653 (8th Cir. 1979); Merrill Lynch, Pierce, Fenner & Smith v. Goldman, 593 F.2d 129, 131 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979); Lide v. Carothers, 570 F.2d 253, 256 (8th Cir. 1978). *See also* note 53 *supra* and accompanying text.

This rule is soundly based. It is impossible for any appellate judge or judges to read a bare transcript and secure from it all of the nuances bearing on the question of credibility—the lifted eyebrow; the "yes" which means "no" or "maybe," or vice versa; the delays or hesitations in answering questions; the soft-spoken word; the loud voice; the nervous voice; the quizzical glance. *See* Kellin v. ACF Indus., 629 F.2d at 534.

This, of course, does not mean that the appellate court is powerless to overturn a trial court's credibility determination. In Wharton v. Knefel, 415 F. Supp. 633 (E.D. Mo. 1976), the trial court specifically found the testimony of Hedy Epstein to be "totally lacking in credibility, and not worthy of any consideration." *Id.* at 635. The appellate court, on an extensive review of the factors which led to the trial court's conclusion, found that such a determination was unjustified, although never specifically referring to the trial court's conclusion as "clearly erroneous." Wharton v. Knefel, 562 F.2d 550, 554 (8th Cir. 1977). This writer has no quarrel with exercise of such reviewing power in appropriate cases. It should be remembered, however, as appellate courts

is no longer repeatedly and consistently held. Recent decisions are anything but consistent. Perhaps the inconsistency is best illustrated by *Gay Lib v. University of Missouri*.[88] Resolution of *Gay Lib* turned on whether defendants had met their burden of showing that recognition by the state university of a homosexual rights group would be likely to cause an increase in violations of state laws prohibiting homosexual activities.[89] Resolution of the issue was admittedly a close question.[90] Conflicting views of experts were presented in the district court on the issue.[91] These views were presented to the district court in the administrative record developed before filing of the suit.[92]

The trial court found that recognition of the group would likely increase violations of state laws.[93] Defendants argued that the finding was binding on the appellate court because it was not clearly erroneous.[94] The appellate court, however, said that it was not bound by the trial court's findings of fact. "[T]his court is not bound by the district court's credibility evaluation of witnesses where the evidence is submitted by deposition or in other documentary form."[95]

Judge Regan dissented.[96] He believed that the Clearly Erroneous Rule was fully applicable even though the trial court had no better opportunity to judge the credibility of the witnesses.[97] Judges Gibson and Henley, in dissenting from the denial of a petition for rehearing en banc, expressed a similar view.[98] Judge Stephenson, however, although agreeing with Judge Gibson and Henley that rehearing en banc should have been granted, stated that the Clearly Erroneous Rule was inapplicable.[99]

The prior law in the Eighth Circuit was clearly supportive of the view expressed by Judges Regan, Gibson, and Henley. Numerous

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generally have, that a finding as to credibility made by the trial court after hearing oral testimony is entitled to great weight and should be overturned only with the greatest reluctance.

88. 558 F.2d 848 (8th Cir. 1977).
89. *Id. See also* Gay Lib v. University of Mo., 416 F. Supp. 1350, 1369 (W.D. Mo. 1976).
90. Gay Lib v. University of Mo., 558 F.2d 848, 850 (8th Cir. 1977).
91. Gay Lib v. University of Mo., 416 F. Supp. 1350, 1368-70 (W.D. Mo. 1976).
92. Gay Lib v. University of Mo., 558 F.2d 848, 852 (8th Cir. 1977).
93. Gay Lib v. University of Mo., 416 F. Supp. 1350, 1368-70 (W.D. Mo. 1976).
94. Gay Lib v. University of Mo., 558 F.2d 848, 853 n.10 (8th Cir. 1977).
95. *Id.*
96. *Id.* at 858-59 (Regan, J., dissenting).
97. *Id.*
98. *Id.* at 860-61 (Gibson, J., dissenting).
99. *Id.* at 861 (Stephenson, J., dissenting).

cases stated that the Clearly Erroneous Rule applied to inferences from undisputed or documentary evidence.[100] A decision issued less than one month earlier unequivocally stated that "[the Clearly Erroneous Rule] applies both to evaluations of conflicting oral testimony and to inferences drawn from documents and undisputed facts."[101] Similarly, subsequent decisions stated that the Rule is applicable to these findings.[102] The *Gay Lib* holding, however, has also been followed in a subsequent case.[103]

The *Frito-Lay, Inc. v. So Good Potato Chip Co.*[104] decision presented a similar situation concerning the relationship between the applicability of the Clearly Erroneous Rule and the ability of the trial court to assess credibility.[105] In *Frito-Lay*, the issue was whether the design of two corn chip packages was similar.[106] The appellate court refused to be bound by the trial court's finding of nonsimilarity in the absence of a showing that it was clearly erroneous. "This Court must view the same evidence and, in doing so, is free to reach a different conclusion unrestricted by the limitation of the clearly erroneous standard of review."[107]

100. School Dist. No. 54 v. Celotex Corp., 556 F.2d 883, 885 (8th Cir. 1977); Worthen Bank & Trust Co. v. Franklin Life Ins. Co., 370 F.2d 97, 100 (8th Cir. 1966); Lewis v. Super Valu Stores, Inc., 364 F.2d 555, 556 (8th Cir. 1966); Baker v. United States, 343 F.2d 222, 224 (8th Cir. 1965); Cole v. Neaf, 334 F.2d 326, 329 (8th Cir. 1964); Frank Adam Elec. Co. v. Colt's Patent Fire Arms Mfg. Co., 148 F.2d 497, 499 (8th Cir. 1945).

101. Anderson v. Property Developers, Inc., 555 F.2d 648, 653 n.4 (8th Cir. 1977).

102. Clark Equip. Co. v. Keller, 570 F.2d 778, 800 (8th Cir. 1978).

103. Stuppy v. United States, 560 F.2d 373, 376 n.6 (8th Cir. 1977).

104. 540 F.2d 927 (8th Cir. 1976).

105. *Frito-Lay* also presents an example of the appellate court, in addition to questioning the applicability of the Rule because of its ability to assess the evidence, asserting that the question was actually not one of fact, but rather a mixed question of law and fact. *Id.* at 930 n.4. A similar claim was made in Gay Lib v. University of Mo., 558 F.2d 848, 853-54 n.10 (8th Cir. 1977). This is a claim oftentimes made when the appellate court seeks to avoid the constraints of the Clearly Erroneous Rule; the appellate court is, of course, free to fully review issues of law.

The issue in *Frito-Lay* was whether design of two corn chip packages was similar. 540 F.2d at 928. In Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605 (1950), the Supreme Court held that the issue of "equivalence"—whether two devices perform substantially the same function in substantially the same way to obtain the same result—was an issue of fact not to be disturbed unless clearly erroneous. *Id.* at 609-10. This writer would contend that the issue of similarity is likewise an issue of fact. In the interest of candor, the writer notes that it was his finding of nonsimilarity which was reversed by the appellate court in *Frito-Lay*.

106. Frito-Lay, Inc. v. So Good Potato Chip Co., 540 F.2d 927, 928 (8th Cir. 1977).

107. *Id.* at 930.

> Where, as here, there is no dispute as to the evidence upon which the District Court's findings are based, where there are no credibility issues before this Court, and where

This case, coupled with *Gay Lib* and its progeny, reflects the appellate courts' growing dissatisfaction with the constraints of the Clearly Erroneous Rule. The decisions reflect movement toward the belief that the Rule should only be applicable when the trial court's findings are the result of weighing conflicting oral testimony. In effect, these decisions use the second clause of the Rule to expand appellate authority to overturn trial court findings of fact. The courts read the second clause as a qualification on the application of the first rather than as an added admonition to the appellate court.[108]

This writer cannot so read the Rule. The second clause is an added admonition to the appellate court, and a reminder that it should recognize the superior position of the trial court in matters involving oral testimony. The clause is not, and should not be, a limitation on the applicability of the first. Even when findings are drawn from undisputed facts or documents, a trial judge who has participated in the case from the beginning and has seen its entire mosaic unfold should be better able to determine the facts than an appellate judge. Even in assessing a witness' deposition a trial court will weigh the witness' testimony in the context of the entire trial and, oftentimes, determine credibility of a deposition witness based on veiled references made by live witnesses. Certainly, a trial court's findings in these cases should be subject to the Clearly Erroneous Rule.

To read the Rule otherwise is to contravene the drafters' clear intent, as expressed in the comment accompanying the Rule[109] and relevant Supreme Court holdings.[110] To read the Rule in this manner is also a contravention of the words of the Rule itself. The two clauses are joined by the conjunction "and," not by the hypothetical "if." The significance of this "should [be] apparent to anyone who understands the difference between a hypothetical and a conjunctive proposition."[111]

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both the contract and the physical evidence upon which the District Court based its findings are a part of the record on appeal, we are not confined by the customary clearly erroneous standard of review. First, no special deference is required in the review by this Court of the interpretation given by the District Court to a nonambiguous agreement . . . . Second, the same exhibits (the disputed packages) are before this Court as were before the District Court. The trial judge reached his finding of nonsimilarity not on the basis of expert testimony, but upon the basis of his personal observation of the appearance of the packages of Frito-Lay and So Good arranged side-by-side.

Id.

108. *See Doubtful Omniscience, supra* note 1, at 769 (two clauses are separate restrictions).

109. *See* note 39 *supra* and accompanying text.

110. *See* note 50 *supra* and accompanying text.

111. *Doubtful Omniscience, supra* note 1 at 770.

V. What Are the Consequences of This Ever-Broadening Scope of Appellate Review?

Perhaps the foregoing discussion of the current application of Rule 52(a) is what Chief Judge Lay had in mind when, in writing on the same question, he said, "I dislike entering into a mired, well worn path of semantic debate."[112] The writer realizes that a reader, too, must wonder if we are not making too much out of mere words or phrases. Yet, it is submitted that more than superficial comparison of words or phrases is involved. The words or phrases employed are but the outward manifestation of an inner philosophy. The consequences of increasing involvement of appellate courts in the fact finding process are quite serious and should be addressed.

Charles Alan Wright expressed the concern of the writer, and of many judges and lawyers, in discussing this question:

> The principal consequences of broadening appellate review are two. Such a course impairs the confidence of litigants and the public in the decisions of the trial courts, and it multiplies the number of appeals . . . . We may be sure that the broadened scope of appellate review we have seen will mean an increase in the number of appeals . . . . It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should get on a course which inevitably must increase congestion and delay . . . . It is hard to believe that there has been any great public dissatisfaction with the restricted appellate review which was traditional in this country . . . .[113]

Time has proven the correctness of Professor Wright's prophesies. Many argue that public esteem of our trial courts is at its lowest point in history. Admittedly, other factors contribute to the public's lack of confidence in these courts, but the foremost reason is the increasingly cavalier attitude of appellate courts in reversing trial court decisions.

Similarly, the proposition appears self-evident that litigants appeal trial court decisions much more frequently in view of the broadened range of appellate fact review. This writer is in daily contact with the bench and bar of a metropolitan district court and will state categorically that a noticeably greater percentage of trial court decisions is appealed today than was appealed twenty, fifteen, or even ten years ago.

And why should not a losing party appeal, especially in a judge-tried

112. Jackson v. Hartford Accident & Indem. Co., 522 F.2d 1272, 1275 (8th Cir.) (Lay, J., concurring), *cert. denied*, 400 U.S. 855 (1970).

113. *Doubtful Omniscience, supra* note 1, at 779-81.

case? Trial lawyers are close observers of the trends in court matters. They sense that trial judges are becoming more and more like special masters,[114] and that a trial de novo, by whatever name, is certainly a possibility on appeal. Most lawyers will seek "two bites of the apple,"[115] especially in a case in which the trial judge decided the facts.

Other undesirable consequences result from circumvention of Rule 52(a). A lowering in the morale of district court judges has clearly occurred. Any attendant at judicial meetings will attest to this. The lowered morale goes well beyond the normal complaints about reversals. It is reflected occasionally in a "what's the difference" attitude in opinion writing and in a number of intangible ways. The morale factor not only affects sitting judges, but it also makes the securing of top caliber new judges more difficult.

The writer submits that another undesirable result is the decreasing likelihood of settlements, at least at the trial level. Invariably, all parties feel they will benefit from a second trial of the facts. In fact, uncertainty about the scope of appellate fact review in some cases can cloud the case from its very beginning.

The last significant consequence is that the widening of appellate fact review is legally wrong. It is contrary to the history of our system of jurisprudence. It exceeds the function of an appellate court, which is "to discover and declare—or to make—the law."[116] If our appellate courts openly ignore the law, the respect for our legal system obviously will decline.

Of course, appellate courts do not consciously seek to arrogate onto themselves authority that more properly belongs in the trial courts. Appellate judges are just as conscientious and dedicated as trial judges, and it would be irresponsible to suggest otherwise. Instead, it is submitted that the expansion of appellate court power through circumvention of Rule 52(a) is reflective of the sincere struggle transpiring in almost every appellate judge's mind as he reviews a case. Shall he seek to "do justice"[117] as he sees it, or shall he limit his review of the cases to the traditional scope of review called for by this writer? Because an appellate judge may often disagree with the trial court as to what "jus-

114. *See* Pendergrass v. New York Life Ins. Co., 181 F. 2d 136, 138 (8th Cir. 1950).

115. *See* note 9 *supra* and accompanying text.

116. *Doubtful Omniscience, supra* note 1, at 779.

117. *Id. See also* Miller v. United States, No. 79-1964, slip op. at 23 (8th Cir. Aug. 28, 1980) (Arnold, J., dissenting).

tice" dictates in a particular case, avoidance of the constraints of the Clearly Erroneous Rule or subtle variations in the scope of review are available techniques for the appellate judge who desires to "do justice."

Dean Leon Green recognized this tendency well before the adoption of the Federal Rules of Civil Procedure and Rule 52(a).[118] During their work on the Rules, Judge Clark and others anticipated the same problem and warned of the consequences of increased appellate fact review.[119] Yet despite the good intentions of appellate judges and the many warnings sounded by respected legal scholars, the appellate courts today continue "to encroach upon the prerogatives of [the] fact finder"[120] and to "derogate from the importance of [the trial judge's] judicial function."[121]

VI. CONCLUSION

This writer's plea is that the United States Circuit Courts of Appeals consider the consequences of their increasing involvement in the fact finding domain of the trial court. Solution of the problems addressed in this Article remains with these courts; the Supreme Court is unlikely to exercise its authority in the area.[122]

Solution of the problem does not call for a revision of the Rule or the appointment of a committee to study the problem. Rather, appellate judges must examine their own philosophies. They should ask themselves whether they are truly giving to a trial court's findings of fact the deference envisioned by the Rule and called for by Supreme Court precedents.

This writer believes great strides could be taken toward solving this problem if the appellate courts would keep in mind two basic precepts:

1) The Clearly Erroneous Rule should be applied "in all classes

118. L. GREEN, JUDGE AND JURY 380 (1930).

119. *See* note 31 *supra* and accompanying text.

120. Trio Process Corp. v. L. Goldstein's Sons, Inc., 612 F.2d 1353, 1364 (3rd Cir. 1980) (Aldisert, J., dissenting).

121. Chesnut, *supra* note 32.

122. *See* Sumner v. Mata, 101 S. Ct. 764, 767 (1981):

> If this were simply a run of the mine case in which an appellate court had reached an opposite conclusion from a trial court in a unitary judicial system, there would be little reason for invocation of this Court's discretionary jurisdiction to make a third set of findings.

Id. See also Guzman v. Pichirilo, 369 U.S. 698, 704 (1962) (Harlan, J., dissenting).

of findings in cases tried without a jury."[123] Even when a finding is based on purely documentary evidence or stipulated facts, the structure of the federal judicial system calls for the trial court's findings to be sustained unless clearly erroneous.

2) In the words of the Honorable Learned Hand,

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.[124]

Conceding that appellate courts will continue to define the phrase, however, the writer urges that, in so doing, they always keep in mind the concept of reluctance and deference which is embodied within the Rule.

If these two precepts are consistently kept in mind, the appellate courts can redirect the bulk of their energies to their vital and traditional role of discovering, declaring, or, when appropriate, making the law. If the courts' traditional role is attained, litigants, the bench, and the bar will benefit. The general administration of justice will be vastly improved by a return to the traditional balance between trial and appellate courts.

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123. *Doubtful Omniscience, supra* note 1, at 765 (citing 5 MOORE'S FEDERAL PRACTICE ¶ 52.01[4] (2d ed. 1951)).

124. United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945).