Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?

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NOTES AND COMMENTS

FEDERAL RULE OF CIVIL PROCEDURE 52(a) AND THE SCOPE OF APPELLATE FACT REVIEW: HAS APPLICATION OF THE CLEARLY ERRONEOUS RULE BEEN CLEARLY ERRONEOUS?

Rule 52(a) of the Federal Rules of Civil Procedure requires that, in the absence of a jury, or in those instances where an advisory jury is utilized, a trial court specifically state the findings of fact and conclusions of law upon which its decision rests. Appellate review of the lower court’s findings of fact is contemplated by the rule, but the findings “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” This “clearly erroneous” standard has been the subject of heated controversy, not because of difficulty in determining whether lower court findings are clearly erroneous, but because of the language in the rule referring to the trial court’s opportunity to judge witness demeanor. That language has been invoked in justification of widely divergent appellate decisions, ranging from complete adherence to the trial court’s findings of fact to complete disregard of those findings, depending upon the

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1 Rule 52(a) provides in part:
In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. 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 of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.


2 Id.


4 See notes 43-44 and accompanying text infra.

5 See notes 30-55 and accompanying text infra.
qualitative difference between witness testimony and documentary evidence. This Note will examine the controversy surrounding the proper application of rule 52(a). As an aid to understanding its current interpretation by the various circuit courts of appeals, the rule's historical background will be traced. This Note will then attempt to delineate the numerous factors to be considered in applying the rule equitably, placing particular emphasis upon the distinction which has developed with respect to the nature of the evidence presented to the trial court.

**Scope of Appellate Review of Findings of Fact Prior to the Federal Rules of Civil Procedure**

Federal appellate courts historically have possessed the power to review factual determinations made by juries in legal actions and by judges in equity suits.⁶ Fear that jury verdicts would be rendered freely reviewable, and hence meaningless,⁷ was dispelled by the inclusion in the Constitution of the seventh amendment, which states that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.”⁸ While jury verdicts thus traditionally have been held to be inviolate in the presence of sufficient supporting evidence,⁹ no such

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⁶ U.S. Const. art. III, § 2 provides: “The judicial Power [vested in the Supreme Court] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .” Article III further provides: “[T]he Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const. art. III, § 2. Pursuant to the power given Congress to create inferior federal courts, id. art. I, § 8, federal appellate courts were given powers of review similar to those of the Supreme Court. 28 U.S.C. §§ 1291, 1292 (1970).

⁷ The constitutional provision permitting review of factual questions “was construed as . . . [taking] away from the citizen his right to a jury trial, and [setting] the verdict of the jury at naught in the hands of an unfriendly and as yet unconstituted federal court.” Clark & Stone, Review of Findings of Fact, 4 U. CHI. L. REV. 190, 192 (1937) [hereinafter cited as Clark & Stone] (citing SECRET PROCEEDINGS AND DEBATES OF THE FEDERAL CONVENTION 80-81 (1787); J. Dickinson, Letter of Fabius on the Federal Constitution (1788); Pamphlet of Elbridge Gerry (Boston 1788); R.H. Lee, Letters of a Federal Farmer to a Republican (New York, October 12, 1787); G. Mason, Objections Addressed to the Citizens of Virginia; Winthrop, Essays of Agrippa, Massachusetts Gazette, December 11, 1787). There existed at the time a deep seated prejudice in America against the courts of chancery, which were perceived as symbols of autocratic power and overly strong central government. It was felt that the citizen could be protected from these tribunals only by the presence of a jury. SECRET PROCEEDINGS AND DEBATES OF THE FEDERAL CONVENTION 79 (1787), cited in Clark & Stone, supra, at 192; Blume, supra note 3, at 69 (citing JOURNAL OF WILLIAM MACLAY 107-09 (E. Maclay ed. 1890)); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 102 (1923).

⁸ U.S. Const. amend. VII.

⁹ See Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 91 (1891); 5A Moore's Federal Practice
definitive rule existed regarding the bounds of appellate review of factual findings made by a judge in an equitable action. As a consequence of this lack of guidance, appellate courts developed a self-imposed body of principles establishing limited review of lower

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\[ \text{\textsuperscript{1}} \] 52.02, at 2611 (2d ed. 1977) [hereinafter cited as Moore]. Questions of law were and are freely reviewable. Id. \[ \text{\textsuperscript{2}} \] 52.03(2), at 2662.

\[ \text{\textsuperscript{10}} \] In an early attempt to establish a concrete standard of factual review in equity actions, Congress enacted section 22 of the Judiciary Act of 1789. Ch. 20, § 22, 1 Stat. 84. The statute subjected equity appeals to the writ of error procedure, id., and thereby precluded review of a trial judge's findings of fact in those actions. See Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). The Judiciary Act abolished another equitable practice, the taking of evidence by deposition, and substituted the common law devices of oral testimony and examination of witnesses. Ch. 20, § 30, 1 Stat. 88 (1789). This latter provision, thought to be a "great triumph for the anti-chancery party," Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 100 (1923), coupled with the writ of error procedure, significantly increased the importance of the lower court's role in determining the credibility of witnesses.

In 1802, depositions were again permitted in equity suits at the request of either party, Act of April 29, 1802, ch. 31, § 25, 2 Stat. 166, and in 1803, the use of the writ of error in those actions was abolished. The Act of March 3, 1803 provided that appeals would be allowed in equity, and added a requirement that a transcript of the lower court proceeding be transmitted to the appellate court. Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244. The statute was construed as abolishing the writ of error in equity cases. The San Pedro, 15 U.S. (2 Wheat.) 132 (1817). One commentator found three reasons for the abandonment of the writ of error procedure: the writ of error requirement that questions of fact be separated from questions of law was nearly impossible to fulfill since the two are so intermingled in equity cases; there was a large percentage of cases in which the only important questions were those of fact, and which therefore were completely unreviewable; and the Judiciary Act had required the lower courts to send a statement of facts to the appellate court rather than the evidence itself, and therefore encouraged the trial court to first reach a result and then draw up a statement of facts supporting that result. Blume, supra note 3, at 69-70.

With the adoption in 1912 of Equity Rule 46, Equrry R. 46, 226 U.S. 661 (1912), which reinstated the requirement that the testimony of witnesses in equity trials be taken in court rather than by deposition, lower courts' findings of fact became significantly more persuasive to the appellate courts in those cases in which elements of credibility of witnesses were determinative. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 510-11 (1963).

\[ \text{\textsuperscript{11}} \] Appellate self-discipline has been said to have resulted in a level of review approaching the standard employed in actions at law. Clark & Stone, supra note 7, at 207. Since there was no constitutional prohibition against review of findings of fact in equity actions, however, the self-control exercised by an appellate court was discretionary in nature, and exceptions were readily made where justice so required. It has been noted that "[e]quity review, as defined in the federal precedents, tended to follow a middle course, broader than that in legal actions where reversal was only for errors of law, but more restrictive than that in admiralty . . . ." Advisory Committee Note of 1955 to Proposed (but Unadopted) Amendments to the Federal Rules of Civil Procedure, reprinted in Moore, supra note 9, ¶ 52.01[7] at 2608. See notes 12-15 and accompanying text infra. Admiralty cases were traditionally subject to de novo review as to both fact and law, Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 VAND. L. REV. 521, 533 (1954), but in 1954 the Supreme Court confirmed a trend in favor of extending application of the clearly erroneous standard, applying it in admiralty cases. McAllister v. United States, 348 U.S. 19 (1954). In 1966, the Federal Rules of Civil Procedure were expressly made applicable to all admiralty
court findings of fact in equity cases. The degree of latitude permitted in evaluating such findings was governed by the nature of the evidence which formed the basis of the lower court determination. The character of evidence fell into three categories. Conclusions dependent upon oral testimony were often treated as presumptively correct, as the trial judge was in the best position to determine demeanor and credibility. Findings based purely on documentary or undisputed evidence were never deemed conclusive, and were subject to more extensive review, since the evidence was as easily interpreted at the appellate level as at the actual trial. When the evidence, though documentary, was conflicting, a third standard of review was employed: the lower court's findings were presumed correct unless obvious error was found to have been made in considering the evidence. Thus, factual conclusions reached by a jury in a legal action were subject to one standard of review, while those of

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1. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See Clark & Stone, supra note 7, at 207-09. Reversal of lower court findings of fact under such circumstances were predicated on their being "clearly erroneous," which was ultimately defined by the Supreme Court: "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." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

2. Professor Blume stood alone in expressing doubt concerning the validity of the notion that a trial judge who hears testimony first hand is in a better position to judge credibility than an appellate judge who depends on a printed record:

   This supposed truth became accepted before the days of court stenographers and has persisted in spite of the fact that it is now possible to reproduce for the appellate court the exact words of the questions propounded, and the answers given, in the court below . . .

   . . . It may be that in the course of time scientific discovery will make it possible to read a man's mind by looking at his face and hands, but until that time comes very little weight can be given safely to demeanor evidence.

   Blume, supra note 3, at 71-72.

3. Slight weight was given to lower court findings where the evidence was in the form of deposition or uncontradicted testimony. Equitable Life Assurance Soc'y of United States v. Irelan, 123 F.2d 462, 464 (9th Cir. 1941); see Kaeser & Blair, Inc. v. Merchants' Ass'n, 64 F.2d 575 (6th Cir. 1933). But see Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 768 (1957), wherein it is stated that "there was no generally accepted doctrine as to the scope of review of findings of fact where the testimony was not oral."

4. See, e.g., Fienup v. Kleinman, 5 F.2d 137, 141 (8th Cir. 1925); Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 F. 609, 616 (9th Cir. 1918), aff'd, 249 U.S. 12 (1919); Lilienthal v. McCormick, 117 F. 89, 97 (9th Cir. 1902).
judges in equitable actions were evaluated under one of three separate and distinct principles.

This area of the law was further complicated by the enactment of the Act of March 3, 1865,16 which allowed the waiver of jury trial in legal actions. The result of the legislation was an action which closely resembled a suit in equity, due to the absence of a jury, but which was in reality an action at law, and treated as such by appellate courts; the trial judge's findings of fact, whether special or general, were given the same effect as the verdict of a jury.17 Following the merger of law and equity mandated by Congress in 1934,18 the multiple standards of factual review presented a serious problem to the drafters of the proposed Federal Rules of Civil Procedure.

**DRAFTING AND ADOPTING RULE 52(a)**

Early debate concerned the proper scope of appellate review of nonjury findings of fact in a unified system, and centered upon a choice among three alternatives as the principle to adopt: maintaining the existing system of review under which the findings of fact made by a court were reviewable as to both weight and sufficiency of evidence in suits at equity, while according findings of fact in legal actions the same effect as a jury verdict; affording all findings of fact, in law or equity, the effect of a jury verdict; adopting the equity standard of review in all cases, thereby rendering all trial-judge findings completely reviewable.19 The Advisory Committee on Rules for Civil Procedure chose to apply the broader standard of equity review.20 Thus, the 1936 Preliminary Draft of the Federal Rules provided that: "The findings of the court in such cases shall

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14 Ch. 86, § 4, 13 Stat. 501 (1865).
17 Id. The enactment of the jury waiver provision was perceived as "a victory of the common law over its rivals and an extension of its jurisdiction and procedural review even over those cases where the jury was not present." Clark & Stone, supra note 7, at 199 (footnote omitted). Professor Blume, however, characterized the statute as a "legislative error" which accorded the findings of a trial judge greater weight than the verdict of a jury, since the trial judge's findings are reviewed by an appellate court whereas a jury verdict is reviewed by the trial judge on motion for a new trial. Blume, supra note 3, at 71.
19 ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, NOTE TO THE SUPREME COURT, PRELIMINARY DRAFT, FEDERAL RULES OF CIVIL PROCEDURE 120-21 (1936).
20 Id. at 120. The Committee rejected a dual standard based upon law and equity as "[perpetuating] the very procedural distinctions which [the Committee was] attempting to abolish," id., but gave no particular reason for rejecting the law standard: "Such treatment, though providing for a uniform and simple method of review and fulfilling the mandate of our enabling statute has not met with approval by a majority of the Committee." Id. at 120-21.
have the same effect as that heretofore given to findings in suits in equity."

In adopting the form of the rule as it reads today, the Committee, apparently intending to deemphasize the distinction among various types of evidence recognized under the equity standard, clarified its formulation by articulating the clearly erroneous test, and mandating that "due regard . . . be given to the opportunity of the trial court to judge of the credibility of the witnesses." The adoption of what was in essence the equity standard sparked lively debate, in which the Reporter for the Committee, Judge

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21 Id. at 118.
22 See note 33 infra. The change in language may have been prompted by the debate over the standard to be used—legal or equitable—waged by Judge Clark and Professor Blume. See note 24 infra. The original language, a full and simple adoption of equity practice, seems to have been toned down by the imposition of a definite test, which restricts the discretionary power of the appellate court. Compare Advisory Comm. on Rules for Civil Procedure, Note to the Supreme Court, Preliminary Draft, Federal Rules of Civil Procedure 118 with Fed. R. Civ. P. 52(a).

The change in language also was thought to simplify and standardize application of the rule by providing a concrete test. Although the general principles of equity review seem to have been clear, see notes 10-15 and accompanying text supra, there was sufficient doubt as to the uniformity of their application, especially where documentary or undisputed evidence was involved, to justify clarification. See Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751, 765-69 (1957): "[W]hile isolated cases can be found prior to 1937 in which it was said that the old de novo review continued to apply where the evidence was not oral, it is far from clear that these represented any considered or consistent view." Id. at 766.

It should be noted that the Advisory Committee cited two cases in its Note on Rule 52 which hold that the appellate court need not accord weight to the lower court findings of fact when based upon documentary evidence or admitted facts. Notes of Advisory Committee on Rules, Fed. R. Civ. P. 52, 28 U.S.C. app. R. 52, at 7815 (1970) [hereinafter cited as Original Committee Note] (citing Kaeser & Blair, Inc. v. Merchants' Ass'n, 64 F.2d 575, 576 (6th Cir. 1933); Dunn v. Trefry, 260 F. 147, 148 (1st Cir. 1919)). The reference to these two cases, however, is preceded by a compare signal in the Original Committee Note, which tends to indicate that it is doubtful that the Committee intended to utilize these cases as examples, regardless of whether they represented a trend in the decisions. See also Clark & Stone, supra note 7, at 208; Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 VA. L. REV. 506, 515 n.51 (1963).

23 Public debate began with the publication of an article written by District Judge Chesnut attacking the proposed rule's adoption of the equitable standard of review. Chesnut, Analysis of Proposed New Federal Rules of Civil Procedures, 22 A.B.A.J. 533 (1936). Solicitous of the sensibilities of district courts, Judge Chesnut feared that the application of equitable review would "derogue from the importance of [the trial judge's] judicial function." Id. at 540. More specific objections included the possibilities of greater numbers of appeals, fewer non-jury trials, and longer records on appeal, as well as the observations that the trial judge is fully as competent as a jury to find the facts, and is better able to judge witness credibility and determine factual issues than an appellate court which can only examine a "cold printed record." Id. at 540-41.

Judge Chesnut was soon answered by Professor Blume, who supported the extension of equitable review to non-jury cases in the name of necessary reviewability:
Clark, publicly disagreed with the majority by advocating adoption of the scope of review applicable to legal actions tried by juries.\footnote{Clark, Review of Facts Under Proposed Federal Rules, 20 J. Am. Jud. Soc'y 129 (1936); Clark & Stone, supra note 7, at 217; note 24 supra.} Nonetheless, the 1937 Committee Note to the Rules stated that the rule in its final form "accords with the decisions on the scope of the review in modern federal equity practice."\footnote{Clark, Review of Facts Under Proposed Federal Rules, 20 J. Am. Jud. Soc'y 129 (1936)}. The task confronting the judiciary then became one of interpreting the rule in light of the multiple standards previously applied by appellate courts.\footnote{Original Committee Note, supra note 22, at 7815. The language of the rule itself is derived in part from Equity Rule 70\(\frac{1}{2}\) as amended in 1935, which provided, in part: \begin{footnote} In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action. \end{footnote}} Would the nature of the evidence taken by a trial court, be it oral, docu-
mentary, disputed, or undisputed, still control the latitude of review now that a single standard had been articulated? 28

EARLY INTERPRETATION OF THE RULE

The rules were not long in force before a number of courts began to interpret rule 52(a) as placing an emphasis upon the nature of the evidence adduced at trial. The courts developed what has been termed a "gloss," 29 and in effect established a separate standard, 30 holding that where the evidence was documentary, the appeals court was as competent as the trial court to interpret the facts and judge trustworthiness for itself. 31 In support of this conclusion, the courts pointed to the admonition to give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses," 32 which was read as a limitation on the application of the clearly erroneous standard. This reading of the rule was contrary to its drafters' apparent intent to deemphasize evidentiary distinctions, 33 although it was consistent with a strict interpretation of the

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28 Although the original language regarding the clearly erroneous standard has remained unchanged, the rule has been amended twice, in 1946 and again in 1963. The first amendment placed trials held before an advisory jury in the same status as non-jury trials, permitted findings of fact and conclusions of law to be incorporated in a memorandum or opinion, and explicitly stated that findings and conclusions were unnecessary on decisions of motions except in limited instances. In 1963, the rule was amended to conform with concurrent amendment to Rule 58. For the text of these amendments and accompanying committee notes, see Moore, supra note 9, 52.01[2], [5], [9], [10].

29 The term "gloss" was coined by Judge Clark in an article criticizing the trend toward modification of the clearly erroneous rule. See note 35 infra.

30 See, e.g., Ball v. Paramount Pictures, Inc., 169 F.2d 317 (3d Cir. 1948), cert. denied, 339 U.S. 911 (1949); Panama Transp. Co. v. The Maravi, 165 F.2d 719 (2d Cir. 1948); Equitable Life Assur. Soc'y v. Irelan, 123 F.2d 462 (9th Cir. 1941); Carter Oil Co. v. McQuigg, 112 F.2d 275 (7th Cir. 1940); State Farm Mut. Auto Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940). The trend was not universally followed, however, and conflicts developed within and among the circuits, with some courts retaining strict adherence to the rule, applying it without regard to the nature of the evidence below. See, e.g., Collins v. Commissioner, 216 F.2d 519 (1st Cir. 1954); Holt v. Werbe, 198 F.2d 910 (8th Cir. 1952); Central Ry. Signal Co. v. Longden, 194 F.2d 310 (7th Cir. 1952); Quon v. Niagara Fire Ins. Co., 130 F.2d 257 (9th Cir. 1951).

31 The gloss is traceable to ancient equity practice, where the customary mode of taking evidence was by deposition and appellate courts were able to exercise broad factual review. See notes 10-15 and accompanying text supra. With such a background, "it has at least the merit of being a sound gloss." Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 764 (1957).


33 The Original Committee Note stated: "[The rule] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was a conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony." Original Committee Note, supra note 22, at 7815. In an attempt to reemphasize its intent
Commenting upon the emerging construction of the rule, Judge Clark observed:

[T]here have appeared judicial statements which suggested a greater power of review where the evidence below was by deposition. This was perhaps not harmful, though to add an additional measure of discretion to a rule calling for the exercise of discretion was, if not confusing, at least gilding the lily. But by a process almost inveterate in legal thinking, a negative was soon deduced as the opposite of the affirmations; and now the definitely erroneous gloss is being stated in place of the rule itself to the effect that the stated rule does not apply at all unless the trial judge saw the witnesses in person. Hence we have the rule now so overturned that when the appellate court wishes to apply the policy of non-reviewability of the original rule, it finds it necessary to utter an apology for seeming to violate the rule of the case law.

The early judicial gloss placed upon rule 52(a) was carried to its ultimate refinement by the Second Circuit. In Orvis v. Higgins, a decision which provoked sharp criticism, the pertinent findings that the rule be applied in all cases, the Advisory Committee in 1955 proposed an amendment to rule 52(a), stating:

The amendment is designed to end the confusion and show definitely that the "clearly erroneous" test is not modified by the language which formerly followed it, but is applicable in all cases. The separate provision that regard must be given the trial court's opportunity to judge the credibility of witnesses who appeared personally emphasizes only the special reluctance which must be felt in holding clearly erroneous a finding based on oral testimony.

ADVISORY COMMITTEE NOTE OF 1955 TO PROPOSED (BUT UNADOPTED) AMENDMENTS TO THE FEDERAL RULES OF CIVIL Procedure, quoted in Moore, supra note 9, ¶ 52.01[7], at 2609-10 [hereinafter cited as 1955 COMMITTEE NOTE]. Although the attempted amendment failed, see notes 52-55 infra, the Committee had made its position clear, prompting the suggestion that it intended that findings based upon oral evidence be more than clearly erroneous before they may be set aside. Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 535 (1963).

Judge Clark, one of the drafters of the rule and a vigorous opponent of equity review, offered the following version of the Committee's intent: "In this rule the design was to develop a formula which would suggest to the trial court the appropriate value to be placed upon the direct observations of a witness, but would not make that the controlling criterion of the rule itself." Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 505 (1950).

See note 31 supra.

Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 505-06 (1950) (footnotes omitted).

34 180 F.2d 537 (2d Cir.), cert. denied, 340 U.S. 810 (1950).

of fact made by the lower court were based on both undisputed facts and oral testimony. In reversing the lower court’s decision, Judge Frank, writing for the Second Circuit, recognized discrete gradations of appellate review. In the Judge’s view, general or special jury verdicts must stand when supported by a “reasonable inference” drawn from the evidence, regardless of whether the evidence is testimonial or documentary. Where there is no jury, however, the rule varies with the character of the evidence: (a) If [the judge] decides a fact issue on written evidence alone, [the appellate court is] as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge’s finding and substitute our own, (1) if the written evidence on some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge’s finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.

Thus, under the Second Circuit approach, inferences drawn by the trial judge from undisputed facts were subjected to the same broad review as that afforded documentary evidence.

In arriving at this result, Judge Frank relied on United States v. United States Gypsum Co., a Supreme Court antitrust case which established the definitive formulation of the “clearly erro-

Moore, supra note 9, ¶ 52.04.

38 In Orvis, an estate tax case, the decedents, husband and wife, each established a trust naming the other as beneficiary. The wife died a year before the husband and the value of the corpus of her trust was included by the Commissioner in the taxable value of his estate upon a determination that the trusts were intended to be reciprocal. The executors of the husband’s estate paid the tax assessed, and then sued to recover that payment. Although the executors prevailed in the district court, the defendant appealed, claiming the trusts were reciprocal and made in contemplation of death. The Second Circuit reversed the factual conclusion of the district judge, and found the trusts to be reciprocal. 180 F.2d at 541.

39 Id. at 539.

40 Id. at 539-40 (footnotes omitted). Judge Frank noted the ironic consequences of expanded fact review:

A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge’s finding has far less respect because he is blessed neither with jurors’ inexperience nor administrative officers’ expertise.

Id. at 540 n.7.

41 333 U.S. 364 (1948).
neous” test. In Gypsum, the Court reversed a decision on the ground that the lower court’s findings of fact were clearly erroneous. In so doing, the Gypsum Court articulated a definition of clearly erroneous which has enjoyed continued vitality: “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.” Judge Frank relied heavily upon a passage in the Gypsum opinion which states: “Where such [oral] testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact.” Judge Frank also found support in the Gypsum Court’s statement that the federal equity practice prior to the adoption of the Rules accorded the trial court’s findings of fact great weight when dependent upon oral testimony. The judge, however, apparently discounted or overlooked other language in Gypsum: “In so far as this finding and others . . . are inferences drawn from documents or undisputed facts, . . . Rule 52(a) . . . is applicable.” More importantly, the oral testimony of most of the witnesses in Gypsum directly contradicted contemporaneous documents which tended to show that the witnesses had acted in concert, whereas in Orvis, the oral testimony was never directly

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42 The Supreme Court reversed a district court judgment for the defendant, a manufacturer of gypsum products. The Court held that the lower court findings of fact, i.e., that there was no conspiracy to eliminate production of a certain type of board, obtain patent licenses, eliminate the sale of products to jobbers, or fix the price of unpatented gypsum products, were clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 395-99 (1948).


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. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; . . . it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions.

Id. at 433 (citation omitted).

44 333 U.S. at 395.

45 Id. at 396.

46 Id. at 395. See notes 10-15 and accompanying text supra.

47 333 U.S. at 394.

48 Id. at 395-96.
contradicted. Irrespective of whether Judge Frank's elaborate classification of review is desirable, most commentators agreed with the position of Judge Chase, who dissented in Orvis:

The trial judge saw and heard witnesses who testified concerning matters which had a direct tendency to explain plausibly how these two trusts might have been created . . . .

This is a typical instance for the application of Civil Rule 52(a). Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.

In 1955, the Advisory Committee proposed an amendment to rule 52 apparently designed to halt the expansion of factual review of non-jury cases. According to the Committee Note, the proposal would have established "definitely that the 'clearly erroneous' test is . . . applicable in all cases." The recommendation provided that "[f]indings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge of the credibility of those witnesses who appeared personally before it." The amendment was not adopted by the Supreme Court, leading one commentator to conclude that the Court was implicitly supporting a broader exercise of appellate discretion.

Recent Application of Rule 52(a)

Presently, a majority of the circuits, as well as the Supreme Court, approves of application of the clearly erroneous rule without

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9 The Orvis testimony consisted of statements made by a lawyer concerning the intent of the decedents in creating their respective trusts. See note 38 supra. These statements were credited by the trial court, but were discounted by Judge Frank in favor of his own inferences drawn from undisputed events leading to the creation of the trusts. In the process, the Second Circuit assumed that the witness spoke the truth, 180 F.2d at 541, but held that "the trial judge relied on no positive testimony that Mr. and Mrs. Orvis acted independently but relied merely on negative testimony as to the absence of an expressed intention to act reciprocally . . . ." Id. at 540.

10 See authorities cited in note 37 supra.

11 180 F.2d at 541-42 (Chase, J., dissenting).

12 See Proposed (But Unadopted) Amendment to Rule 52, quoted in Moore, supra note 9, ¶ 52.01[6], at 2607-08.

13 1955 Committee Note, supra note 22, at 2609-10. The amendment was "designed to correct a judicial gloss upon the rule which had tended to distort it." Id. at 2608.

14 Proposed (But Unadopted) Amendment to Rule 52, quoted in Moore, supra note 8, ¶ 52.01[6], at 2607-08 (new matter in italics).

regard to the character of the evidence received by the trial court.\textsuperscript{56} There exist subtle intimations of evasion and modification of the rule, however, which call into question the uniformity of its application.\textsuperscript{57} In light of the Supreme Court’s refusal to adopt the 1955 amendment to rule 52(a),\textsuperscript{58} two of that Court’s more recent decisions merit close examination.

In \textit{Zenith Radio Corp. v. Hazeltine Research, Inc.},\textsuperscript{59} the Court unqualifiedly applied the clearly erroneous standard.\textsuperscript{60} It should be noted, however, that the testimony in question in that case was oral, and the Court affirmed the findings of the lower court.\textsuperscript{61} Interestingly, one of the cases cited by the \textit{Zenith} Court was \textit{Orvis v. Higgins}.\textsuperscript{62} Although the Court referred to that part of the \textit{Orvis} opinion which noted the trial court’s advantage where oral testimony is involved,\textsuperscript{63} its citation of \textit{Orvis}, a decision strongly identified with broad review, seems to indicate at least tacit approval of the differing levels of review discussed in that case.

There is more concrete evidence that the Supreme Court will not strictly apply the clearly erroneous standard in \textit{United States
v. General Motors Corp., an antitrust case in which the Court upset a lower court's finding that no conspiracy had been proven. Although the Court based its reversal upon the trial court's improper application of the controlling legal standard to the undisputed facts, it went on to note that the rationale underlying rule 52(a) is of limited applicability in a case such as this where the evidence is overwhelmingly documentary in nature. This passage of the opinion appears to suggest that the Supreme Court may not yet have opted for unqualified application of rule 52(a).

In the decisions of the circuits which mandate strict application of the clearly erroneous standard, the predominant language indicates that an unequivocal standard of review is being utilized:

[W]e are not to weigh the evidence de novo, or disturb the findings simply because we might have reached a contrary result on the same evidence. And not only must we give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses," but we must also measure the findings by the

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45 Id. at 141-42. Although the district court had found that there existed no conspiracy which violated the antitrust laws, id. at 140, its express findings of fact included what the Supreme Court considered to be the essentials of a conspiracy within the meaning of the Sherman Act. Id. at 140-42. General Motors had acted in concert with certain of its dealers to stop other dealers from selling cars at lower prices through referral services and discount houses. The lower court made, inter alia, the following findings of fact: the nonparticipating dealers had complained to General Motors personnel about the discount sales; General Motors personnel discussed the matter with every Chevrolet dealer in the area and obtained promises from these dealers that they would not do business with the discount houses; these agreements were policed jointly by three dealers' associations at General Motors' request, which associations supplied information to General Motors and thereby enabled it to bring "wayward dealers into line;" and a number of reneging dealers were forced to repurchase cars which they had sold through the discount houses. Id. at 140-41.
46 Id. at 141-42. The court stated:

[T]he question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case.

. . . [W]e resort to the record not to contradict the trial court's findings of fact, as distinguished from its conclusory 'findings,' but to supplement the court's factual findings and to assist us in determining whether they support the court's ultimate legal conclusion that there was no conspiracy.

Id. at 141 n.16 (emphasis in original).
47 Id.
48 Although the Court's comments concerning the nature of the evidence adduced at trial may not have been intended to allow free review of all factual questions, the Court does seem to have sanctioned a somewhat broader standard of review where the evidence is primarily documentary. In so doing, the General Motors Court observed that in the case of documentary evidence, the trial court does not have its "customary opportunity to evaluate the demeanor and thus the credibility of the witnesses . . . ." Id.
49 See cases cited in note 56 supra.
"clearly erroneous" test even when they are based on inferences drawn from documents or undisputed facts.70

As previously noted, actual application of the standard had not always been as clear as the language articulating it,71 and in fact, the welter of inter-circuit and intra-circuit conflicts72 has only re-

70 Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973); see Indiana State Employees Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974), wherein it was stated:

“The Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court . . . . The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly . . . . In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law . . . .”

Id. at 1241-42 (quoting Cleo Syrup Corp. v. Coca Cola Co., 139 F.2d 416, 417-18 (8th Cir. 1943), cert. denied, 321 U.S. 781 (1944)).

71 See notes 29-32 and accompanying text supra.

72 Only two of the circuits adhering to the majority position, the Fourth and the Eighth, have consistently applied the rule strictly. In the Eighth Circuit's leading case, Cole v. Neaf, 334 F.2d 326 (8th Cir. 1964), the court observed:

We have repeatedly and consistently held, at least subsequent to the Supreme Court's decision in Commissioner of Internal Revenue v. Duberstein . . . 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.

Id. at 329 (citations omitted). See Salomon v. Crown Life Ins. Co., 536 F.2d 1233 (8th Cir. 1976), cert. denied, 97 S. Ct. 87 (1977) in which the court commented that its “duty on appeal [is] to give great deference to the factual findings of the trial court . . . .” Id. at 1243. See also Jarvis v. Montgomery Ward & Co., 525 F.2d 1267 (8th Cir. 1975); United Stores of America, Inc. v. Insurance Consultants, Inc., 468 F.2d 1010 (8th Cir. 1972); Jackson v. Hartford Accident & Indemn. Co., 422 F.2d 1272 (8th Cir.), cert. denied, 400 U.S. 855 (1970).

The Fourth Circuit cases, although often containing dictum which tends to cloud their meaning, express the same commitment to the clearly erroneous standard: “Where much of the testimony is by deposition, this Court is as able to judge of credibility as the Trial Court; nevertheless, the findings still must be tested by the 'clearly erroneous' rule . . . .” Prendis v. Central Gulf Steamship Co., 330 F.2d 893, 895 (4th Cir. 1963) (citations omitted). See Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973), cert. denied, 416 U.S. 994 (1970), in which the court treated an issue concerning pretrial publicity as one of mixed law and fact, allowing the reviewing court to evaluate independently the voir dire testimony of the jurors. Id. at 98. It was ultimately held that “the District Court was in plain error” in concluding that the jury was incompetent. Id.

An examination of each of the remaining circuits following the majority view reveals earlier interpretations of the rule ranging from wholesale adoption of the oral testimony-documentary evidence dichotomy to complete agreement with the present standard. See, e.g., Leach v. Crucible Center Co., 388 F.2d 176 (1st Cir. 1968); Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962); Commissioner v. Spermacet Whaling & Shipping Co., S/A, 281 F.2d 646, 651 (6th Cir. 1960); Cherot v. United States Fidelity & Guar. Co., 264 F.2d 76 (10th Cir. 1959); Gudgel v. Commissioner, 273 F.2d 206 (6th Cir. 1959); Commissioner v. Consolidated Premium Iron Ores, Ltd., 265 F.2d 330 (6th Cir. 1959); Dixie Sand & Gravel Corp. v. Holland, 255 F.2d 304 (6th Cir. 1958); Lamb v. ICC, 259 F.2d 358 (10th Cir. 1958); Yunker v. Commissioner, 256 F.2d 130 (6th Cir. 1958); Ellison v. Frank, 245 F.2d 837 (9th Cir. 1957); Randall Foundation, Inc. v. Riddell, 244 F.2d 803 (9th Cir. 1957); Bishop v. United States, 223 F.2d
cently resolved itself73 into this “correct” interpretation of rule 52(a).74

A minority of circuits still appear to afford a trial judge’s findings less deference when they are premised upon non-oral testimony.75 There are differences among the circuits, however, with respect to the standards utilized. The Second Circuit continues to adhere to the standards articulated in *Orvis*, applying that decision’s classification in cases where there is no oral testimony.76 When, however, the district court draws factual inferences from undisputed basic facts, a line of Second Circuit decisions appears to depart from the *Orvis* formulation, and unequivocally applies the clearly erroneous rule.77 In addition, several recent decisions in that circuit have employed an enhanced standard of review when preliminary injunctive relief is sought, thereby creating a basis of distinc-

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73 See notes 56 & 72 and accompanying text supra.
74 See note 22 and accompanying text supra.
75 See notes 76-84 and accompanying text infra.
76 In Reyher v. Children’s Television Workshop, 533 F.2d 87 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 492 (1977), a copyright infringement case, the court of appeals made its own determination of similarity, resting its decision solely upon “a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder . . . .” 533 F.2d at 90. *Orvis* has been perceived as “[standing] for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court’s discretion, be reviewed de novo.” Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1004 (2d Cir. 1974). *See* Citizens Committee for Faraday Wood v. Lindsay, 507 F.2d 1065, 1066 n.1 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, 1093 (2d Cir. 1974) (per curiam); United States ex rel. Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973); Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315, 1317 (2d Cir. 1969) (per curiam).
77 See Porter v. Commissioner, 437 F.2d 39, 40-41 (2d Cir. 1970) (per curiam); Austin v. Commissioner, 288 F.2d 583, 584-85 (2d Cir. 1962). In Lamont v. Commissioner, 339 F.2d 377 (2d Cir. 1964), the Second Circuit affirmed a tax court finding that expenses incurred by the taxpayer were not deductible, in that the taxpayer lacked the requisite genuine profit motive which would have rendered them business expenses. The court applied the clearly erroneous test to factual inferences drawn from undisputed basic facts. *Id.* at 381 (citing Commissioner v. Duberstein, 363 U.S. 278, 291 (1960)).
tion which is apparently unique to the Second Circuit.\textsuperscript{78}

Early conflict in the Fifth Circuit has resolved itself into the adoption of a near-uniform standard of review.\textsuperscript{79} The Fifth Circuit seems to have settled on a comfortable medium, \textit{i.e.}, the clearly erroneous standard is always applied, but the rule is "somewhat modified" when some or all of the evidence upon which the findings were based is not "live" testimony.\textsuperscript{80} In \textit{Sicula Oceanica, S.A. v. Wilmar Marine Engineering \& Sales Corp.},\textsuperscript{81} the circuit's position was stated as follows:

The appellant's burden, under . . . [Rule 52(a)], of showing that the trial judge's findings of fact are "clearly erroneous" is not as heavy . . . as it would be if the case had turned on the credibility of witnesses appearing before the trial judge . . . . However, regardless of the documentary nature of the evidence and the process of drawing inferences from undisputed facts, the reviewing court must apply the "clearly erroneous" test.\textsuperscript{82}

\textsuperscript{78} See, e.g., San Filippo v. United Bhd. of Carpenters, 525 F.2d 508, 511 (2d Cir. 1975); Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 878-79 (2d Cir. 1972).

\textsuperscript{79} Early Fifth Circuit cases ranged from complete disregard of the clearly erroneous standard when undisputed testimony was involved, to strict application of the standard under all circumstances. \textit{Compare} Frazier v. Alabama Motor Club, Inc., 349 F.2d 456, 458 (5th Cir. 1965), \textit{with} Chared Corp. v. United States, 446 F.2d 745, 746 (5th Cir. 1971) (per curiam) and Commissioner v. Welch, 345 F.2d 939, 943-44 (5th Cir. 1965). Some of these earlier decisions seemed to evade the clearly erroneous rule, not by refusing to apply it, but by excepting from it questions of "ultimate fact," \textit{i.e.}, questions involving "the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts . . . ." Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954). \textit{See} notes 112-114 and accompanying text infra. However, United States v. Makris, 535 F.2d 899 (5th Cir. 1976), \textit{cert. denied}, 97 S. Ct. 1707 (1977), struck a cautionary note: [The] process of subjecting inferences or ultimate facts to a broader review is not novel . . . . We stress, however, that we by no means adopt the requirement of a de novo review. We say no more than that the clearly erroneous rule is to be limited to its proper sphere. It is not to be discarded. 535 F.2d at 907 (citations omitted). More recent cases, however, apply only one standard; the clearly erroneous rule is followed, but the burden of showing a lower court's findings to be clearly erroneous is reduced when the evidence is documentary or undisputed. \textit{See}, e.g., Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Burston v. Caldwell, 506 F.2d 24 (5th Cir. 1975); Smith v. United States, 502 F.2d 512 (5th Cir. 1974); United States v. Stringfellow, 414 F.2d 696 (5th Cir. 1969).

\textsuperscript{80} See Caradelis v. Refineria Panama, S.A., 384 F.2d 589, 593 (5th Cir. 1967). See also Galena Oaks Corp. v. Scofield, 218 F.2d 217 (5th Cir. 1954), in which the court stated: "[T]he burden of showing a finding of fact 'clearly erroneous' . . . is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous' rule is still applicable." \textit{Id.} at 219 (citations omitted).

\textsuperscript{81} 413 F.2d 1332 (5th Cir. 1969).

\textsuperscript{82} \textit{Id.} at 1333-34 (citations and footnote omitted), \textit{quoted in} Volkswagen of America, Inc. v. Jahre, 472 F.2d 557, 559 (5th Cir. 1973) (per curiam).
This formulation would seem to fulfill the desired goal of definite and uniform application of rule 52(a) as well as lend flexibility to the exercise of judicial discretion.

**Additional Factors Influencing Application of Rule 52(a)**

In recent years, the uniform application of the rule intended by the drafters has been influenced by two major factors: a review court's initial conclusion as to whether a determination is one of fact or law, and, at least in the Second Circuit, whether the factfinding relates to an application for preliminary injunctive relief. Of late, these factors often appear determinative of the scope of review undertaken by a court.

**Preliminary Injunction**

There are two alternative bases for the granting of a preliminary injunction: there must be a "clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief," in addition

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84 It is interesting to note that the Third Circuit is still struggling to develop a consistent formulation of rule 52(a). The early decisions of that circuit are typified by In re Kellett Aircraft Corp., 186 F.2d 197 (3d Cir. 1950), in which the court stated: "This court has squarely held that Rule 52(a) does not impose the clearly erroneous standard of finality on 'the inferences or conclusions drawn by the trial court from its fact findings.'" Id. at 200 (quoting Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704, 705 (3d Cir. 1941)). In a later case involving a patent infringement, the court applied the same reasoning; since all of the evidence was documentary, the court felt free to make its own findings based on the evidence. Borden Co. v. Clearfield Cheese Co., 369 F.2d 96, 101 (3d Cir. 1966). In 1968, however, rule 52(a) was applied literally to the findings of a district court which were premised upon certain expert testimony. Sverti Prods., Inc. v. Coca Cola Co., 399 F.2d 607 (3d Cir. 1968) (per curiam). A dissenting judge criticized the majority's application of the clearly erroneous standard on the ground that "[t]he District Court's opinion clearly indicates that its finding ... is premised on several patents and publications and not on oral testimony." Id. at 610 (Kalodner, J., dissenting). Two 1971 decisions of the Third Circuit, however, seem to point in opposite directions. In Butler v. Colfelt, 439 F.2d 882 (3d Cir. 1971) (per curiam), the court affirmed a district court's finding of manufactured diversity jurisdiction and refused to pursue the question of the applicability of rule 52(a), since "on an independent review of the dispositions ... [the court arrived] at the same conclusion as the district court." Id. at 884. Shortly after Butler, in Baker v. United Transp. Union, 455 F.2d 149 (3d Cir. 1971), a panel of the Third Circuit stated: "The record in this case is replete with undisputed documentary evidence that permits us to ascertain the existence or non-existence of the past practice without remanding the case to the district court." Id. at 155. Since the court never mentioned rule 52(a) expressly, however, the decision would seem not to be an affirmation of de novo review.

85 Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1358 (2d Cir. 1976)
to a "clear showing of the threat of irreparable harm." The scope of appellate review of the grant or denial of preliminary relief is generally limited to a determination of "whether the court abused its discretion." A line of recent Second Circuit decisions has departed from this standard, however, allowing de novo review of the lower court's decision to grant or deny an injunction when that decision rests solely on documentary evidence.

This trend has been examined by the Second Circuit in *State v. Nuclear Regulatory Commission,* wherein a district court's denial of a preliminary injunction was affirmed. In the course of its opinion, the court of appeals discussed two of its previous cases in which de novo review of the district courts' decisions had been justified on the ground that the lack of an evidentiary hearing permitted the appellate court to make its own findings based on purely documentary evidence. The *Nuclear Regulatory Commission* court emphasized that the expanded factual review authorized by its earlier decision in *Orvis v. Higgins* will be utilized only in the discretion of the reviewing court. The Second Circuit went on to set forth the following guidelines for the exercise of that discretion: review may be more readily expanded when a preliminary injunction, a "drastic remedy," has been granted rather than denied on documentary evidence; as the findings become more detailed and specific, the scope of appellate review should proportionally decrease; and review may be expanded where there are defects in the proceedings of the lower court not related to any of its findings.
On the basis of these criteria, the court in this instance decided not to expand its review of the lower court's denial of a preliminary injunction.\(^5\) This approach appears to establish a reasonable standard for appellate review, one which neither ignores the role of the trial court nor is overly deferential to that court's determinations. It is submitted that the Second Circuit view, like the "somewhat modified" approach generally employed by the Fifth Circuit,\(^6\) maintains the spirit of the clearly erroneous standard while lending to it a measure of discretion and flexibility.

**Finding of Fact or Conclusion of Law?**

Commentators have lamented the fact that there is "no litmus test for determining whether a given proposition is properly a finding of fact or a conclusion of law."\(^7\) Questions of fact are those whose resolution is "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct."\(^8\) Legal conclusions are those which are "based on application of a legal standard."\(^9\) These definitions offer sufficient guidance for cases at either end of the spectrum, but are of little assistance in less extreme situations. The determination whether a question is one of fact or law is vital to the applicability of rule 52(a), since the clearly erroneous standard is expressly applied only to "findings of fact."\(^10\) As a result, various courts have avoided the application of the rule by finding the question under consideration to be something other than one of pure fact.\(^11\) An examination of several cases serves

\(^5\) *Id.* at 753. The court distinguished the factual situation before it from that presented in *Dopp* and *San Filippo*. In *Dopp*, the trial judge granted relief solely on the basis of documents which were in direct conflict, without conducting an evidentiary hearing, and without giving any reason for his decision. *Id.* at 752. In *San Filippo*, although the court refused to grant the injunctive relief sought, it did not set forth specific findings of fact as required by rule 52(a). Thus, the appellate court was compelled to make its own findings as an alternative to reversing the entire case. *Id.* The Nuclear Regulatory Commission court found the district judge's decision to be free from "glaring infirmities" which might prompt expanded review. The court also considered the fact that the district judge had refused to grant the injunctive relief sought. *Id.* at 753.

\(^6\) See notes 79-82 and accompanying text *supra*.

\(^7\) *California Comm. on Continuing Education of the Bar, Federal Civil Practice § 839* (1961).


\(^9\) Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962).

\(^10\) *Fed. R. Civ. P. 52(a).*

\(^11\) *See* Frito-Lay, Inc. v. So Good Potato Chip Co., 540 F.2d 927, 930 n.4 (8th Cir. 1976); J. B. Williams Co. v. Le Conté Cosmetics, Inc., 523 F.2d 187, 190-91 (9th Cir. 1975), cert. denied, 424 U.S. 913 (1976); Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954); Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed*
to illustrate the diverse conclusions reached in similar factual set-
tings.

In a very recent case, *Frito-Lay, Inc. v. So Good Potato Chip Co.*, a determination that the question presented was one of mixed law and fact provided the justification for de novo review. Of interest is the fact that the evidence evaluated was documentary and undisputed. The extent of the similarity in appearance between two packages of corn chips was the precise question before the court, a question, it is submitted, which many would consider to be of fact.

Similarly, the likelihood of confusion of two trademarks has been found by one court to be a factual conclusion subject to the clearly erroneous standard, while another court has held the same question to be one of law, fully reviewable on appeal. In the first case, the likelihood of confusion between “SARDE” and “SARAH” was held to be a question of fact; the possibility of confusion between “Conti” and “Le Conté” in the second case was denominated a determination of law. Significantly, in both cases the evidence submitted at trial was entirely documentary, and both decisions were rendered by circuits which profess to apply the clearly erroneous standard without regard to the nature of the underlying evidence. Moreover, the court which found the determination to be

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*Evidence, 49 Va. L. Rev. 506, 527-30 (1963) (discussing Galena Oaks Corp. v. Scofield, 218 F.2d 217 (5th Cir. 1954)).

102 540 F.2d 927 (8th Cir. 1976).

103 Id. at 930 n.4.

104 Id. at 929.

105 The court found the district judge incorrect in holding that the packages were not confusingly similar:

We reach this conclusion by applying the same “eyeball” test as that applied by the District Court. We do not say that six eyes are necessarily apt to reach a more accurate assessment than are two, but, under the standard of review applicable in this case, our six eyes tell us that the color of the packages is similar.

Id. at 931.


107 J. B. Williams Co. v. Le Conté Cosmetics, Inc., 523 F.2d 187, 190-91 (9th Cir. 1975), cert. denied, 424 U.S. 913 (1976). The appellate court reversed the trial court's finding of no reasonable likelihood of confusion between trademarks “Conti” and “Le Conté” in an action to recover for trademark infringement and unfair competition. 523 F.2d at 193.


109 See notes 56 & 69 and accompanying text supra. *Sarah Coventry* was a case in the First Circuit; *J. B. Williams* was decided by the Ninth Circuit.
one of law indicated that where the trial court’s conclusion is derived from disputed facts, the clearly erroneous rule would apply.\textsuperscript{110} The court went on to note:

However, if the facts are not in dispute, the appellate court is “in as good a position as the trial judge to determine the probability of confusion” . . . .

. . . Since no issue of material fact arises from the affidavits, exhibits and stipulated facts, the determination by the trial judge, as to whether in light of those undisputed facts there existed a “likelihood of confusion” between Conti and Le Conte is a question of law, readily reviewable by this Court.\textsuperscript{111}

This language, coupled with the two differing results, gives rise to an inference that the labels “law” and “fact” have been used, perhaps inadvertently, to mask what is in reality application of rule 52(a) on the traditional basis of the nature of the underlying evidence.

Some courts have exempted findings of “ultimate fact” from the strict application of rule 52(a). In justification of this position, the Fifth Circuit has reasoned:

Insofar . . . as the so-called “ultimate fact” is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is “subject to review free of the restraining impact of the so-called ‘clearly erroneous’ rule.”\textsuperscript{112}

Carried to its logical conclusion, this approach would exempt all but the most basic factual determinations from review under the clearly erroneous standard, since almost every question presented in an action involves some measure of legal reasoning or interpretation. Nonetheless, this concept of ultimate fact, under which a broad factual inference may be reviewed as a question of law,\textsuperscript{113} is used

\textsuperscript{110} J. B. Williams Co. v. Le Cont6 Cosmetics, Inc., 523 F.2d at 190.
\textsuperscript{111} Id. at 190-91 (citations and footnotes omitted).
\textsuperscript{112} Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954) (quoting Lehmann v. Acheson, 206 F.2d 592, 594 (3d Cir. 1953)).
\textsuperscript{113} See Frito-Lay, Inc. v. So Good Potato Chip Co., 540 F.2d 927 (8th Cir. 1976), wherein the court noted:

The factual determinations underlying the issue of “similarity” remain subject to the clearly erroneous standard of review. The “similarity” determination is itself more a mixed question of law and fact. The distinction may be elusive in a case such as this, where, upon the narrow determination of similarity, we are in truth expressing our definite and firm conviction that a mistake has been made.

\textit{Id. at 930 n.4 (citation omitted).}
regularly by circuit courts which purport to apply strictly the clearly erroneous rule.114

CONCLUSION

Although rule 52(a) seems clear on its face and its drafters intended it to apply in all cases, its application in cases where the evidence is documentary or undisputed has been anything but uniform. The initial evasion of the rule by many circuit courts, characterized as a "misunderstanding" of the rule by one student commentator,115 may have been in fact attributable to judicial dissatisfaction with a rule perceived as overly restrictive of the power of the appellate court to make a necessary and proper review of all the factors leading to a lower court decision. Most of the excesses of the past have been rectified, however, and a clear majority of the circuits now apply the clearly erroneous test in all cases,116 notwithstanding the character of the evidence. Nonetheless, at least one subtle method of evading application of the rule has recently emerged: the courts are beginning to shade fact into law in instances involving documentary evidence, apparently in an effort to render findings more freely reviewable at the appellate level.

There is little doubt that from a purely rational standpoint, there is sound justification for de novo review where the evidence is wholly documentary or undisputed. The appellate court is in as favorable a position as the trial court to draw inferences from a written record and make its own findings.117 In concentrating on the competence of an appellate court to decide factual issues on the basis of the record, however, the argument in support of de novo review neglects the other aspect of appellate review, i.e., the proper function of an appellate court. The primary function of such a tribunal is not to find facts; rather, it is to interpret the law. The consequences of appellate courts serving as the "ultimate trier of fact issues" are said to be disorder in the administration of justice, diminished public confidence in the decisions of lower courts, and

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116 See notes 56, 69-70 and accompanying text supra.

117 See notes 12-14 and accompanying text supra.
an increased number of appeals. 118

The notion of broadened authority to review factual findings has been perceived as stemming from a desire to "do justice" in a particular case, while disregarding the consequences of increased appellate power. 119 It is true that an enhanced scope of review can lead to a multiplicity of appeals and derogation of the function of the trial court, but the consequences of severely limiting review in nonjury cases can be equally unsatisfactory. Unfair and unjust holdings which are impervious to reversal could lead to contempt for the entire judicial system. 120

Rather than devising subtle techniques by which the clearly erroneous rule may be avoided, would it not be better to simply admit to the "rational and practical distinction between demeanor and non-demeanor testimony?" 121 The approach adopted by the Fifth Circuit seems to recognize this distinction; it applies the rule in all cases, but lightens the burden of showing a lower court finding to be clearly erroneous when that finding is based upon documentary or undisputed evidence. 122 Adoption of such an approach might eliminate the inclination of some courts to express adherence to rule 52(a) while avoiding its strict application. It is hoped that the courts of appeals will follow the lead of the Fifth Circuit, and squarely confront the question of the applicability of rule 52(a).

Susan R. Petito

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120 See note 24 supra.
121 Moore, supra note 9, ¶ 52.01[8], at 2610.
122 See notes 79-82 and accompanying text supra.