

lawful under Section 8, between corporations in nonregulated industries, the initial task of ascertaining the competition reducing potential of the schemes should be delegated to the FTC.⁶⁶

Competition and predatory practices cannot long coexist. Effective control of the problem posed by interlocking directorates awaits Congressional action.

INCOMPETENT EVIDENCE IN NONJURY TRIALS: OUGHT WE PRESUME THAT IT HAS NO EFFECT?

During the course of a jury trial the judge is charged with the duties of ruling on the admissibility of evidence offered by the parties¹

ing well, are used more as a label than a description of what is actually pertinent to the prohibition desired. See note 31 *supra*.

66. At present, inspection of existing interlocking is in the main superficial. For example, the conclusions of the FTC's report on interlocking directorates speaks in terms of possible use or potential results. See note 13 *supra*. These arrangements could be more critically evaluated by wiser utilization of the broad investigatory powers granted in Section 6 of the Federal Trade Commission Act. 38 STAT. 721 (1914), 15 U.S.C. § 46 (1946).

1. Disquisition with regard to the law of evidence has generally concerned its relation to litigation in the trial stage. See, e.g., *A Symposium On Evidence*, 5 VAND. L. REV. 275 (1952); HARV. L. REV., SELECTED ESSAYS ON THE LAW OF EVIDENCE (4th ed. 1949). At that level it is subject to greater notice due to its determinative effect upon what may be introduced. A case cannot be prepared or presented by an attorney until he has ascertained whether the evidence available is competent in the eyes of the law. Relevant and persuasive as facts may be, unless they meet the requirements of the law of evidence which have been established by centuries of legal proceedings, they are of no use in a court of law. "The term 'Evidence' imports the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. It embraces the rules of law governing the admissibility or rejection of proffered proof and the weight to be given to proof that is admitted." Phillips, *A Symposium On Evidence, Forward*, 5 VAND. L. REV. 275 (1952). See also 1 WIGMORE, EVIDENCE § 1 (3d ed. 1940).

These requirements permit only evidence which is thought most likely to be relied upon by "men of serious affairs" to be heard. See *Tyne Co. v. NLRB*, 125 F.2d 832, 835 (7th Cir. 1942). Through strict and rigid application they purport to keep from the jury that which is considered most likely to confuse and least likely to be true. See 1 WIGMORE, EVIDENCE § 4b (3d ed. 1940); THAYER, EVIDENCE 509 (1898). "The dominant influence of the jury upon the content of many of the traditional rules is abundantly clear. Basic in many rules is the idea that untrained jurors should not be exposed to the relevant but possibly misleading evidence." Davis, *An Approach To Problems Of Evidence In The Administrative Process*, 55 HARV. L. REV. 364, 371 (1942); Davis, *Evidence Reform: The Administrative Process Leads The Way*, 34 MINN. L. REV. 581, 584 n.17 and accompanying text (1950); Stone, *The Decline of Jury Trial and The Law of Evidence*, 3 RES JUDICATAE 144 (1947). But see Morgan, *The Jury And The Exclusionary Rules Of Evidence*, 4 U. OF CHI. L. REV. 247 (1937); Morgan, *Some Observations Concerning A Model Code of Evidence*, 89 U. OF PA. L. REV. 145, 147 (1940).

The jury, when it has heard all of the competent evidence, arrives at a verdict, and an appellate court, after being convinced that the evidentiary rules have been followed

and of making preliminary findings of fact necessary to make those rulings.² In a nonjury trial he assumes the added burden of finding the ultimate facts. The trend toward nonjury litigation raises the issue of the function of the rules of evidence in this novel context.³

In most of these actions the rules of evidence are probably followed as closely as in jury trials, due perhaps to the fact that the

or at least that any violation of them was not prejudicial to the losing party, will not reverse its verdict unless an examination of the record indicates that it is clearly erroneous. *See Echert v. United States*, 188 F.2d 336, 342 (8th Cir. 1951); “. . . [E]ffect must be given to the rule that issues depending upon the credibility of witnesses and the weight of the evidence are to be decided by the jury.” *Egan Chevrolet Co. v. Bruner*, 102 F.2d 373, 377 (8th Cir. 1939); *Tanzi v. New York Cent. Ry. Co.*, 155 Ohio St. 149, 153, 98 N.E.2d 39, 42 (1951); *McGhee v. State*, 183 Tenn. 20, 23, 189 S.W.2d 826, 827 (1945); *Burgess v. Gilchrist*, 123 W. Va. 727, 738, 17 S.E.2d 804, 810 (1941); *FED. R. CIV. P.* 52.

Since incompetent evidence that comes in unnoticed by the judge can be removed from the jury's consideration by a proper instruction where it is not “so deep, pervasive and enduring” that it cannot be effaced at the judge's direction, the losing party is not able to gain a reversal on technical grounds. “The admission of incompetent evidence is no ground for a new trial if before the case is given to the jury they are instructed to disregard it, and if there is no reason to apprehend that it finally did prejudice their minds.” *Stricker v. Scott*, 283 Mass. 12, 14, 186 N.E. 45, 46 (1932). “The general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury.” *Turner v. American Security & Trust Co.*, 213 U.S. 257, 267 (1909). *See Throckmorton v. Holt*, 180 U.S. 552, 567 (1901); *Rogers v. State*, 60 Ark. 76, 88-89, 29 S.W. 894, 898 (1894); *People v. Cheney*, 368 Ill. 131, 136, 13 N.E.2d 171, 174 (1938) (Even though the jury was told verbally to disregard certain evidence, the accused was entitled to a written instruction.). *LaFontaine v. Wilson*, 185 Md. 673, 684-685, 45 A.2d 729, 734 (1946); *State v. Lanegan*, 192 Ore. 691, 697, 236 P.2d 438, 441 (1951); *Harwell v. Mutual Ben. Health & Acc. Ass'n*, 207 S.C. 159, 164, 35 S.E.2d 160, 165-166 (1945); *Birch v. Abercrombie*, 74 Wash. 486, 497, 133 Pac. 1020, 1024 (1913) (where evidence was too prejudicial for an instruction to cure the error). One writer has summed the matter up by saying that “. . . the instruction which will accompany the subsequent striking out of the evidence must be supposed to be obeyed by the jurors; except in extreme cases which obviously call for stricter treatment.” 1 WIGMORE, EVIDENCE § 19 (3d ed. 1940).

The general explanation for confidence in the jury's findings is that it has had the opportunity to determine the credibility of the witnesses and to consider only that prescribed by the law as proper; therefore, a jury and not an appellate court is best fitted to find the facts. *See Cities Service Oil Co. v. Harvey*, 148 F.2d 780, 783 (10th Cir. 1945). “The weight and sufficiency of evidence, the construction to be put upon it, and the inferences to be drawn therefrom, were matters for the trier of the facts.” *Dillard v. McKnight*, 34 Cal.2d 265, —, 209 P.2d 387, 396-397 (1949). *See also Moore v. Commonwealth*, 301 Ky. 851, 854, 193 S.W.2d 448, 449 (1946); *Smith v. Butt & Hardin*, 281 Ky. 127, 133, 135 S.W.2d 67, 70 (1940); *Long v. Forbes*, 58 Wyo. 533, 543-544, 136 P.2d 242, 244-245 (1943).

2. “It follows that, so far as the admissibility in law depends on some incidental question of fact—the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like—this also is for the judge to determine, before he admits the evidence to the jury.” 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940). For application of this rule, *see People v. Stewart*, 91 Cal. App.2d 675, 205 P.2d 412 (1949); *Brock v. State*, 206 Ga. 397, 400, 57 S.E.2d 279, 281 (1950); *People v. Feldman*, 299 N.Y. 153, 169, 85 N.E.2d 913, 921 (1949).

3. DAVIS, ADMINISTRATIVE LAW 447 *et seq.* (1951); *Davis, Evidence Reform: The Administrative Process Leads The Way*, 34 MINN. L. REV. 581 n.2 (1950).

attorneys have become so accustomed to following them that any deviation seems almost inconceivable.⁴ However, if evidence inadmissible before a jury is admitted over the objection of opposing counsel, an appellate court will presume that the trial judge, familiar with the pertinent rules, disregarded all of the incompetent evidence and based his findings solely upon that which was competent.⁵ So long as there is sufficient competent evidence present in the record to sustain the judgment or unless it can be affirmatively shown that incompetent evidence induced the court to make significant findings which would not otherwise have been made, the decision will not be reversed. This presumption, when combined with the prevailing premise that a judge may commit reversible error by excluding over objection evidence which should have been admitted, lays the foundation for litigation before a trial judge with almost no necessity for compliance with the rules of evidence. Too much time, it is argued, can be lost in determining admissibility, and with the present over crowded dockets every proper method of conserving time must be utilized. In addition, since the court is capable of ruling accurately upon admissibility in a jury trial, it is equally capable of applying the law correctly after all testimony has been received.⁶ Furthermore, findings must be based only on evidence which the law regards as competent, material, and convincing. Thus, a party will not be injured by testimony which is considered unreliable because in reality it has not been used in arriving at the decision.⁷ Just

4. "Generally, the exclusionary rules of evidence are applicable in judicial nonjury situations." Note, 46 ILL. L. REV. 915, 921 (1952).

5. "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse . . . unless all of the competent evidence is insufficient to support the judgment. . . ." *Builder's Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950). See also *Sinclair v. United States*, 279 U.S. 749, 767 (1928); *Buder v. Becker*, 185 F.2d 311, 313-314 (8th Cir. 1950); *Department of Water & Power v. Okonite-Callender Cable Co.*, 181 F.2d 375, 382 (9th Cir. 1950); *Grandin Grain & Seed Co. v. United States*, 170 F.2d 425, 427 (8th Cir. 1948); *McComb v. McCormack*, 159 F.2d 219, 227 (5th Cir. 1947); *Doering v. Beuchler*, 146 F.2d 784, 786 (8th Cir. 1945); *Thompson v. Carley*, 140 F.2d 656, 660 (8th Cir. 1944); *Thatenhorst v. United States*, 119 F.2d 567, 571 (10th Cir. 1941); *Hatch v. Calkins*, 21 Cal. App.2d 364, —, 122 P.2d 126, 129 (1942); *Keil v. Wilson*, 47 N.M. 43, 45, 133 P.2d 705, 706 (1942); *Woodruff v. Brady*, 181 Okla. 105, 108, 72 P.2d 709, 712 (1937); *Holendyke v. Newton*, 50 Wis. 635, 637, 7 N.W. 558, 559 (1880).

6. "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received. . . ." *Builder's Steel Co. v. Comm'r of Internal Revenue*, *supra* note 5, at 379, citing *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941).

7. ". . . [H]e [the party objecting to incompetent evidence] cannot be injured by the presence in the record of testimony which he [the judge] does not consider competent or material." *Builder's Steel Co. v. Comm'r of Internal Revenue*, *supra* note 5, at 379.

as in the case of a jury, the court is in the best position to evaluate the credibility of witnesses who testify before it.⁸

A first look at this nonjury procedure could lead to the belief that here the rules of evidence have no applicability and serve no useful purpose. More careful scrutiny of the appellate court's language indicates, however, that they continue, though almost unnoticed, to play an important role, at least theoretically.⁹ It is not easy to comprehend exactly how a judge's findings could be attacked as based on incompetent evidence. Since he is not required to state upon what evidence he has relied nor to make any evidentiary rulings, the possibility of rebutting this presumption, although it is perhaps technically present would seem visionary unless some means is devised to educe the inner workings of judicial minds. However, even though an attorney is not convinced that a judge will remain uninfluenced by incompetent evidence, he must

8. See *Boston Insurance Co. v. Reed*, 166 F.2d 551, 553 (10th Cir. 1948). "He [the trial judge] sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in, or shown by the written pages of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the minds eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization, of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching over-eagerness of the swift witness, as well as the honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness, that carried conviction of truth to every soul who heard him testify." *Yutterberg v. Sternberg*, 86 F.2d 321, 324 (8th Cir. 1936), citing *Creamer v. Bivet*, 214 Mo. 473, 479, 113 S.W. 1118, 1120 (1909). See also *White v. Julia K. Brennan's Adm'r*, 307 Ky. 776, 783, 212 S.W.2d 299, 303 (1948); *City of Boston v. Boston Port Development Co.*, 308 Mass. 72, 75, 30 N.E.2d 896, 898 (1941); *McGuinn v. City of High Point*, 217 N.C. 449, 456, 8 S.E.2d 462, 466 (1940).

"The practice in equity prior to the present Rules of Civil Procedure was that the findings when dependent upon oral testimony where the candor and credibility of the witnesses would be best judged [by the lower court], 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 mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "It was intended [by Rule 52], in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice." *Id.* at 394. See *FED. R. CIV. P.* 52 and note 1 *supra*.

9. "Nothing is clearer than that a trial judge in any jurisdiction will be reversed for lack of enough material and competent evidence to support his finding, no matter how much inadmissible evidence there was in his favor. . . . Thus the presumption-indulging courts swing into line with the bulk of authority in holding the trial judge bound, albeit somewhat less finically, by the rules of evidence." Maguire and Epstein, *Rules of Evidence In Preliminary Controversies As to Admissibility*, 36 *YALE L.J.* 1101, 1116-1117 (1927). Since the publication of this article it has become clear that the majority requires no compliance with the rules of evidence in a nonjury trial. The effect of the rules on appeal remains the same, however. See note 5 *supra*.

introduce enough that is competent to substantiate on appeal any material finding that might be made in his client's favor. Only one method exists by which a trial attorney or appellate judge may ascertain the competency of evidence and that is by applying the pertinent rules.

It is difficult to understand, at first blush, why clearly incompetent evidence is introduced—unless, of course, experienced attorneys have found that it does have some persuasive value. Advocates of this practice maintain that ignoring exclusionary rules at the trial permits the judge to allow incompetent but relevant facts to be introduced. However, it would seem to be one thing to argue for a liberalized set of rules that would permit the admission of certain evidence which is now excluded, though deemed to be of value,¹⁰ and something different to support a position condoning the introduction of such evidence yet preventing the judge from relying on it.¹¹ The benefit arising from admission of incompetent evidence is not clear since technically the judge must reach the same decision as he would were the relevant but legally inadmissible evidence excluded. Apparently the most important reason for using this presumption is the time saving that results due to the omission of arguments concerning evidentiary rules.¹² This saving should not, however, be the sole determinative factor.

When a reviewing court refuses to reverse findings of fact it usually places great emphasis upon the opportunity which the court or the jury had to judge the credibility of the witnesses.¹³ In fact, Rule 52(a) of the Federal Rules of Civil Procedure specifically requires that this not be overlooked.¹⁴ And, indeed, the vantage point at the trial presents the basis of a cogent argument for giving considerable weight to their findings. However, the importance attributed to the lower court's opportunity to judge the credibility of witnesses seems to be at least partially overlooked when the presumption that a judge has considered only competent evidence is employed. By requiring a

10. *E.g.*, Cleary, *Evidence As A Problem In Communicating*, 5 VAND. L. REV. 277 (1952); Davis, *Evidence Reform: The Administrative Process Leads The Way*, 34 MINN. L. REV. 581 (1950); Falkner, *The American Law Institute's Model Code of Evidence*, 18 WASH. L. REV. 228 (1943); Goodrich, *Spotlight On Evidence*, 27 J. AM. JUD. SOC'Y 113 (1943); Ladd, *Modern Thinking Upon Evidence—A Model Code*, 17 TENN. L. REV. 10 (1941); McCormick, *The New Code of Evidence of The American Law Institute*, 20 TEX. L. REV. 661 (1942); McCormick, *Tomorrow's Law Of Evidence*, 24 A.B.A.J. 507 (1938); Rubin, *Evidence*, 1947 ANNUAL SURVEY OF AMERICAN LAW 1068; Note, 34 CORNELL L.Q. 238 (1948).

11. See note 7 *supra*.

12. See *Builder's Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950); see note 5 *supra*.

13. See notes 1 and 8 *supra*. For a criticism of this practice, see Sunderland, *The Scope of Judicial Review*, 27 MICH. L. REV. 416 (1928).

14. FED. R. CIV. P. 52. See note 5 *supra*.

court to comply with the law of evidence an appellate tribunal can determine definitely that the plaintiff has introduced only competent evidence; therefore, if the findings are in his favor, the credibility of his witnesses is apparent. By use of a presumption, however, an appellate court searching a record for competent evidence could sustain a trial judge by pointing to testimony which was not brought in by witnesses whom the lower court thought credible.

Thus, reliance on the presumption forces the court, perhaps unintentionally, to violate a policy which has long been accepted as sound by the common law.¹⁵ Because of the merit of the reasons for using the credibility rule the validity of the presumption may be challenged on this ground. Where two existing legal policies are so incompatible one must give way, here a presumption which may only be serving to compound confusion.

It may be that lawyers who take advantage of this opportunity to introduce incompetent evidence have found that Professors Maguire and Epstein were correct when they wrote that "nature does not furnish a jurist's brain with thought-tight compartments to suit the convenience of legal theory, and convincing evidence does leave its mark."¹⁶ When, over objection and after argument, he permits evidence to come in, "it requires an appellate Pollyanna with fingers crossed and tongue in cheek to presume that the trial judge discovered and removed his error before judgment."¹⁷ One court has stated definitely that it is convinced that a judge does not have such control over his mental faculties that he can with complete confidence say whether inadmissible evidence he has heard will affect his mind in making a decision.¹⁸ As the presumption is now stated the judge is not even compelled to allow argument regarding admissibility nor specifically rule on such matters; he is presumed to have dealt with this while making his findings of fact.¹⁹

Certainly the cases that set forth this presumption do not seem to justify adequately its use. Indeed, an analogy is made to support it that cannot withstand careful scrutiny. Its advocates point to the fact that the judge would have to apply the law of evidence in a jury trial

15. See note 1 *supra*.

16. Maguire and Epstein, *supra* note 9, at 1115.

17. *Id.* at 1116.

18. See *Kovacs v. Szentes*, 130 Conn. 229, 232, 33 A.2d 124, 125 (1943). Another court speaking in the same terms pointed out: "It is hard to be sure of one's self after the evidence is introduced, even if one tries to disregard it." *Newman v. Newman*, 211 Mass. 508, 510, 98 N.E. 507, 508 (1912).

19. ". . . [M]ore time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered. . . ." *Builder's Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950).

and conclude that if he is capable of doing that, he can also apply it later when he is going through the record.²⁰ In all of their reasoning, however, no effort is made to set out the obvious distinction between the two situations. In one, the judge applies supposedly familiar rules to an offer to prove, giving the proponent of the evidence no chance to introduce it and, therefore, providing no opportunity for it to influence either himself or the jury,²¹ while in the latter case he hears the evidence, never says whether he deems it to be competent, and then hands down a decision which is presumed to be based on competent evidence.²² Further, evidentiary rulings by a trial judge in a jury case are reviewable, and error, if prejudicial, will be reversed.²³ How then can an appellate tribunal logically decide that the lower court is so expert that it can without any need for review apply those very same rules in nonjury cases? If in one there is need for review, the same necessity must exist in the other. Apparently, therefore, the argument that the expertness of the lower court judge vindicates the use of the presumption is also open to attack.

A trial judge also instructs the jury as to the law applicable to the facts,²⁴ and it would seem that the requirement that he write out his legal conclusions in a nonjury case rejects the very reasoning upon which the presumption has been based.²⁵ It might be facetiously sug-

20. See note 6 *supra*.

21. "The offer at the trial . . . is ordinarily made by the counsel's oral calling of a witness or presentation of a document or by his oral statement of a question to a witness." 1 WIGMORE, EVIDENCE § 17 (3d ed. 1940). "The general principle governing the time of the objection is that *it must be made as soon as the applicability of it is known* (or could reasonably have been known) *to the opponent*. . . ." *Id.* § 18. "An objecting opponent is ordinarily *entitled to an immediate ruling*. . . ." *Id.* § 19.

22. ". . . [H]e will base his findings upon the evidence which he regards as competent, material and convincing. . ." *Builder's Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950). The ". . . presumption is that the trial court based its findings and judgment solely upon competent evidence received and that it disregarded all incompetent evidence." *Grandin Grain & Seed Co. v. United States*, 170 F.2d 425, 427 (8th Cir. 1948). See also *Morris v. Williams*, 149 F.2d 703, 708 (8th Cir. 1945).

23. An example of court review may be found in *Krulewicz v. United States*, 336 U.S. 440, 444 (1948). See also *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *Yellow Cab Co. v. Henderson*, 183 Md. 546, 39 A.2d 546 (1944), and see *State v. Tennyson*, 212 Minn. 158, 165, 2 N.W.2d 833, 837 (1942); *Psaty & Fuhrman, Inc. v. Housing Authority*, 76 R.I. 87, 96, 68 A.2d 32, 36 (1949); *Worth v. Worth*, 48 Wyo. 441, 473, 49 P.2d 649, 661 (1935).

24. See *Morris v. United States*, 156 F.2d 525, 528-529 (9th Cir. 1946); *Lindley v. Sink*, 218 Ind. 1, 20, 30 N.E.2d 456, 462 (1940); *Lewis v. Watson*, 229 N.C. 20, 23, 47 S.E.2d 484, 486 (1948); *Kindt v. Reading Co.*, 352 Pa. 419, 428-429, 43 A.2d 145, 150 (1945). *King v. Consolidated Products Co.*, 159 Kan. 608, 610, 157 P.2d 541, 542 (1945). The judge may not, of course, instruct as to the weight to be given to evidence or comment on the credibility of witnesses. His task is to instruct as to the law applicable in the case.

25. See *Block v. D. W. Nicholson Corp.*, 77 Cal. App.2d 739, —, 176 P.2d 739, 744

gested that the trial judge say only, "you win defendant (or plaintiff)" with the reviewing tribunal presuming that he found the facts and the law in that party's favor. In this instance there could be no reversal unless the facts appearing in the record and the applicable law could not possibly substantiate his decision. But it is felt to be better practice to apprise the upper court of the exact legal foundations of the decision.

It may be readily admitted that a jurist, because of greater experience in a courtroom and an awareness of the rules of evidence and logic, is well qualified to decide what facts were proved at a trial, but the argument which leads from this premise to the conclusion that he will be unaffected by unreliable evidence is demonstrably faulty. And, although it is conceded that he is skilled in finding facts and making evidentiary rulings, it should not be inferred from this that he has attained perfection and, therefore, that there is no need for review or that better methods cannot be found to aid him in accomplishing this task.²⁶ Perhaps somewhere between the rigid application of the rules of evidence that is found in jury trials and the present practice in nonjury cases there lies a middle ground that will provide an equally expeditious and yet more efficient administration of justice.

At the present time, as for the past fifty years, the rules of evidence are under severe attack. More and more legal scholars are raising their voices and pens to state objections to the strictness of their application and to the lack of logic behind them.²⁷ Successful operation of administrative agencies, functioning in their quasi-judicial capacities without adhering to these rules, has increased the agitation for at least some alteration that will allow the courts to work more efficiently.²⁸ Indeed, the American Law Institute has condemned them,

(1947); *Automobile Underwriters, Inc. v. Tite*, 119 Ind. App. 251, 254, 85 N.E.2d 365, 366-367 (1949); *Sacre v. Sacre*, 143 Me. 80, 101, 55 A.2d 592, 603-604 (1947); *Brawley v. Anderson*, 80 Ohio App. 15, 18, 74 N.E.2d 428, 429 (1947). *FED. R. CIV. P.* 52(a).

26. "To ascertain the facts is not a mechanical act. It is difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be." *United States v. Forness*, 125 F.2d 928, 943 (2d Cir. 1942).

27. "I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . where ordinary, untrained citizens are acting as judges of fact." THAYER, *EVIDENCE* 509 (1898). Others have not been so kind in reference to their validity even in jury situations. "Despite urgent assault by learned and insistent critics, many phases of the law of evidence remain intolerably technical, artificial, illogical and outmoded." Rubin, *Evidence*, 1947 ANNUAL SURVEY OF AMERICAN LAW 1068. "A great weakness has been exposed in the law of evidence by Professors Wigmore, Davis, McCormick, Maguire, Morgan and Epstein. Logic is their ally. Tradition is their enemy." Note, 46 *ILL. L. REV.* 915, 925 (1952). See note 10 *supra*.

28. See *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945), *cert.*

saying that "the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century."²⁹

Although differing suggestions have been offered in regard to exactly what changes should be made by those most familiar with the subject, there is agreement that rigidity in applying these rules must be removed so that more relevant and material evidence can be admitted.³⁰ Evidence must be adjudged inadmissible, they insist, only for logical reasons. Before it should be excluded some logical means must be employed in order to determine that this evidence would be prejudicial or have little value or that it is not the kind of evidence by which prudent persons should be influenced in making decisions. The fact that it may or may not fit into a rule of law laid down centuries ago should not, they say, always be the sole deciding point.³¹ How much more discretion the trial judge will be given or which of these proposals will be adopted is uncertain, but that his powers will

denied, 326 U.S. 734 (1945); DAVIS, *ADMINISTRATIVE LAW* 448 (1951). "But it is the administrative process that is demonstrating through extensive experience the practical success of receiving 'any oral or documentary evidence' and of giving it such probative weight as the finder of facts thinks that it deserves in the particular record." Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581, 607 (1950). Professor Davis argued that when administrative agencies are considering public interest "irrationalities of those rules cannot be allowed to hamper the process of getting needed information." *Id.* at 587.

29. MODEL CODE OF EVIDENCE 5 (1942).

30. ". . . [T]he hard rules of exclusion will soften into standards of discretion to exclude." McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 580 (1938). "Moreover, if we are to have a better system of trial on the facts, through the adoption of the Code of Evidence, we lawyers must not only be willing to concede wide powers to the trial judge, but we must, as ministers of justice, assume greater responsibility for co-operating with the judge in the exercise of those powers. . . . 'Judges must become stronger and better equipped at the trial bench, and more liberal and more justice-seeking on the appellate bench. The rules must be treated only as a means to an end.' . . ." McCormick, *The New Code of Evidence of The American Law Institute*, 20 TEX. L. REV. 661, 673-674 (1942). "The Code would make almost all materially relevant evidence admissible and would give the trial judge a large measure of discretion in the application of its provisions." Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481 (1946); ". . . I shall refrain from expressing any personal ideas, other than one concept, which is the outgrowth of my experience of 13 years at the bar and 29 years on the bench, and which I think, may properly be emphasized. It is that, subject to the limitations imposed by well-settled basic rules of Evidence, a wide discretion should be accorded the trial judge in determining the admissibility of proffered proof." Phillips, *A Symposium On Evidence, Forward*, 5 VAND. L. REV. 275 (1952).

31. "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaption to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule." *Funk v. United States*, 290 U.S. 371, 381 (1933).

have to be broadened in order to allow for a more flexible application of any new rules of evidence seems clear.

In a jury trial an offer to introduce incompetent evidence is met by an objection by opposing counsel upon which the judge must rule setting out why he believes it should or should not be admitted.³² It has been pointed out by an opponent of the new Model Code in this connection that too much opportunity for discretion on the part of the trial judge would make preparation of a case extremely precarious because of the uncertainty surrounding admissibility.³³ This could lead to efforts to introduce clearly incompetent evidence in the hope that the more offered the greater the chance that some highly persuasive testimony or exhibit would get to the jury. The Model Code also permits the trial judge to instruct the jury as to the weight which certain evidence may be given.³⁴ But regardless of the outcome of the debate as to the judge's discretion and power under a new code, the presence of a jury means that the judge will be required to rule immediately on whether an offer to prove will be accepted. An appellate tribunal, therefore, will be in a position to examine these rulings and subsequent instructions to the jury and ascertain the propriety of the court's actions with reasonable certainty.³⁵

Although under the Model Code, it would still be possible to review the trial court's determination of what was competent in a jury trial, it would be impossible for an appellate court to do so in a non-jury trial because no evidentiary rulings or instructions are required.³⁶ Since in an appeal from such a proceeding a court would be unable to say with any degree of certainty what was competent, only supreme

32. 1 WIGMORE, EVIDENCE §§ 17, 18, 19 (3d ed. 1940).

33. "How any experienced practitioner, at home in his state practice, expecting a conflict of testimony, and probably somebody lying, could prepare properly for trial under this Rule 106 is hard to understand." Wigmore, *American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A.J. 23, 24 (1942). This statement in regard to Rule 106 seems also to describe Professor Wigmore's opposition to the great discretion given to the trial judge by other parts of the Code.

For the Code's answer to this criticism, see McElroy, *Some Observations Concerning The Discretions Reposed In Trial Judges By The American Law Institute's Code of Evidence*, MODEL CODE OF EVIDENCE 356, 367 (1942).

34. MODEL CODE OF EVIDENCE, Rule 8 (1942).

35. "We need not feel apprehensive as to the willingness of appellate courts to consider seriously complaints of prejudicial abuse of discretion by the trial judges. The history of courts of review demonstrates a steadfast readiness—if there by any extreme, it is an excessive readiness—laboriously to consider such complaints." McElroy, *Some Observations Concerning The Discretions Reposed In Trial Judges By The American Law Institute's Code of Evidence*, MODEL CODE OF EVIDENCE 356, 360 (1942).

"Appellate courts, too, will rely heavily on the comments and examples for guidance." *Id.* at 369.

36. See note 5 *supra*.

optimism could induce using a presumption that the trial court based its findings only on such evidence. The higher tribunal could not in those instances where admissibility and weight were allowed to depend upon the discretion of the trial court say whether evidence was permitted to come in because the judge regarded it as competent and which, therefore, affected the findings or whether he listened to it because he agrees with current appellate declarations to the effect that it would take too much time to argue its admissibility.³⁷

Under a code of evidence which allows flexibility of application at the trial level an appellate court would be compelled to give some definition of its own to "competent evidence" in order to intelligently review the findings of fact even in a cursory manner. The discretion granted the trial court by new rules, which purport to give increased weight to its evaluation, would be of little value because the reviewing judges could have no way to discover how the discretion was exercised. These appellate definitions could well become binding precedents which would bar further exercise of lower court discretion in similar situations. The framers of the Model Code of Evidence made manifest that one of their objectives was to free the trial judge from as many predetermined bonds on admissibility as possible and to allow him to work freely within broadly defined limits.³⁸ How to make use of rules which have greater adaptability in their application and yet retain competent review of lower court findings in nonjury trials presents a challenge that must be met. Some way must be found for the reviewing court to discover what evidence proved the facts and what evidence was merely laid aside by the judge as being of little or no value. If an uncertain method, such as the one used today, is retained, the judicial system will continue to sacrifice the ability of the trial judge to determine the credibility of witnesses.³⁹ The adoption of a new code of evidence contemplating more discretion at the trial level would not only force the appellate court to decide as to the credibility of witnesses for itself, but in addition would probably compel it to determine what evidence the trial judge believed competent without any indication on his part.

37. See note 19 *supra*.

38. "The keystone of our system of administering justice is the trial judge. . . .

* * *

"The Code Of Evidence therefore proceeds upon the theory that it is to be administered by an honest and intelligent judge; and that the trier of facts, whether or not a jury, has the capacity and desire to hear, consider and fairly evaluate all data which reasonable men would use if confronted with the necessity of solving a problem of like importance in their everyday life." MODEL CODE OF EVIDENCE 7, 10 (1942) (Foreword by Professor Edmund M. Morgan). See note 30 *supra*.

39. See pp. 450-451 *supra*.

The presumption that a trial judge considers only the competent evidence when he has listened to all which has been proffered is not the only available means of dealing with this problem; two alternatives are at hand. The first of these is to require that a trial court sitting as a trier of fact apply the same rules of evidence that are proper when a jury is present.⁴⁰ Theoretically, incompetent evidence which is objected to may not be used as the basis of a finding; consequently, no legitimate advantage would be lost by such a rule.⁴¹ An assertion that this would put the same restrictions on a trial judge as are put on a jury⁴² appears to be unpersuasive since use of the incompetent evidence is not permitted.⁴³ Although some inadmissible but not prejudicial evidence is entered, it could be withdrawn from consideration as in a jury proceeding.⁴⁴ If the law of evidence is too restrictive or so difficult to apply that time is consumed unprofitably, then sufficient reasons have been set forth for improving the law and not for resorting

40. Some courts have always adhered to such a rule. See *Kovacs v. Szentes*, 130 Conn. 229, 33 A.2d 124 (1943); *In re Estate of Zanette Conner*, 240 Iowa 479, 492, 36 N.W.2d 833, 841 (1949); *Walker v. Anderson*, 160 Kan. 461, 464, 163 P.2d 359, 361 (1945) (holding that unless there is a motion to strike it will be presumed that the evidence was considered); *Newman v. Newman*, 211 Mass. 508, 98 N.E. 507 (1912). The Massachusetts courts believe that free admission is not to be commended, but they no longer reverse on that ground. A recent case in that jurisdiction pointed out that: "In either case it is always desirable that the person who determines the facts, whether he be judge or juror should hear only what the law says he may hear." *Holcombe v. Hopkins*, 314 Mass. 113, 118, 49 N.E.2d 722, 724 (1943), citing *Newman v. Newman*, *supra*; see also *Weibert v. Hanan*, 202 N.Y. 328, 331, 95 N.E. 688, 689 (1911) (which did leave it possible for the trial judge to indicate that the inadmissible evidence carried no weight); *Abramowitz v. Wisch*, 159 N.Y.S. 738 (1916).

41. See note 22 *supra*.

42. ". . . [W]e, the judges, . . . are able to discern and segregate those matters by which you, the jurors, might be led astray or biased, but when we come to take your place and try the facts, we will put the same legal blinders on our own eyes, lest we be led astray or biased, though we are at all times able to discern." 36 HARV. L. REV. 193 (1922).

43. "In a non-jury case, the presumption is that the trial court based its findings and judgment solely upon competent evidence received, and that it disregarded all incompetent evidence." *Grandin Grain & Seed Co. v. United States*, 170 F.2d 425, 427 (8th Cir. 1948). A few courts, in allowing the trial court to admit all evidence without ruling, have pointed out that they do not consider this to be a good practice. See *Kovacs v. Szentes*, 130 Conn. 229, 232, 33 A.2d 124, 125 (1943); *Holcombe v. Hopkins*, 314 Mass. 113, 118, 49 N.E.2d 722, 724 (1943).

Some judges have adopted the practice of stating in their findings or opinions that they relied only on the competent evidence. See *Hatch v. Calkins*, 21 Cal. App.2d 364, —, 122 P.2d 126, 129 (1942); *Re Stockham*, 193 Iowa 823, 828, 186 N.W. 650, 652 (1922); *State v. O'Malley*, 115 La. 1095, 1106, 40 So. 470, 473 (1906); *Cannon v. Miller*, 22 Wash.2d 227, 238, 155 P.2d 500, 506 (1945). This may be considered somewhat better than the majority practice if only for the reason that it might tend to compel the trial judge to look more carefully at the record to make sure such evidence was present in sufficient quantity to uphold his decision.

44. See note 1 *supra*. Of course in a nonjury trial such action would be in the form of a statement at the close of the trial instead of an instruction.

to a presumption which only adds uncertainty. The only advantage, therefore, that the present practice can claim over this alternative is the saving in time. A plan that would avoid the need for evidentiary rulings and argument and yet elude the pitfalls of the present procedure would obviously be preferable.

The other alternative would require the trial judge to state in writing with his findings and rulings of law upon what evidence he relied. This need not be unduly burdensome because a complete re-statement of the record would not be necessary; instead, a brief report of the evidence supporting the essential findings of the case would suffice. The Model Code provides that the judge may comment on the weight to be accorded certain evidence.⁴⁵ In a nonjury trial a corresponding declaration could be included in the same report. In a case before a jury it would have to be presumed that they followed the court's instructions in regard to the weight to be given particular evidence,⁴⁶ but in a nonjury case even this is not necessary. The judge in a lucid statement would specify what affected his findings, and no presumption need exist.

It is possible for a judge to believe honestly that so called incompetent evidence has had no influence when in fact it has.⁴⁷ If, however, he is obliged to go through the record with the express purpose of considering the competence of the evidence there is a greater possibility that he will be more careful to seek out evidence which sustains his decision. Throughout the entire trial, in fact, a greater awareness of the need for competent evidence will be induced. Certainly the most efficient way to decide which evidence is really competent is to write out the findings of fact and the evidence relied on to support them, just as one of the best ways to test any impression is to try to express it on paper.⁴⁸

With this specific statement made available to an appellate court there would be no reason to rely on a presumption of what the judge did; it would be far more practicable to look at his statement in order

45. MODEL CODE OF EVIDENCE, Rule 8 (1942).

46. Just as now they must be presumed to have obeyed instructions regarding applicable law. See *Throckmorton v. Holt*, 180 U.S. 552, 567 (1900); *Husky Ref. Co. v. Barnes*, 119 F.2d 715, 717 (9th Cir. 1941); *Bessey v. Solemme*, 302 Mass. 188, 210-211, 19 N.E.2d 75, 86 (1939); *Stricker v. Scott*, 283 Mass. 12, 14, 186 N.E. 45, 46 (1933); *Woodman v. Peck*, 90 N.H. 292, 293, 7 A.2d 251, 253 (1939).

47. "A trial judge, every now and then, thus discovers that his initially contemplated decision will not jell, and is obliged to decide otherwise." Frank, *Say It With Music*, 61 HARV. L. REV. 921, 950 (1948).

48. Occasionally in setting out what he initially thought to be his decision a trial judge discovers he is wrong and must decide otherwise for ". . . 'to put an argument in syllogistic form is to strip it bare for logical inspection.'" *Id.* at 951.

to ascertain whether evidence sufficient to sustain the findings was introduced. In this situation, Federal Rule 52(a), involving credibility of witnesses, is given real meaning. Evidence which meets the requirements of the law, but which was brought in by persons whom the trial judge believed unreliable, could not be utilized by an appellate court to reverse his decision unless, of course, it knowingly chose to disregard the accompanying evaluation.⁴⁹ If part of the present adherence to the presumption has been caused by a desire on the part of jurists to be allowed to hear some incompetent evidence in order to be more certain of their findings, this plan permits that practice to continue while eliminating some of its danger. In the event the judge's discretionary power is increased by the adoption of a new code of evidence, a reviewing court will be able to understand with reasonable certainty how that discretion was exercised and to base the outcome of its review not upon a presumption which may or may not be true, but upon the statement made by the trial judge to explain his actions.⁵⁰

"The facts as 'found' are inherently guessey: but we need not be content with the present guessing techniques of our trial courts."⁵¹ Professor Sunderland, while bringing forth cogent arguments in opposition to requiring special findings of fact, does concede that they are useful in the appellate court.⁵² He concludes from this that they should only be made in answer to a motion for new trial or in preparation for an appeal.⁵³ Compelling findings of fact only in this limited situation means that they would be prepared not while the trial was fresh in the jurist's

49. "The Supreme Court may . . . in actions tried without a jury . . . reverse a finding of facts . . . where, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1947).

50. Although more certainty would be added to the law if the jury were to state what testimony it relied upon, it would be impossible to compel them to prepare such a statement. In any case, since a jury hears only competent evidence, it is permissible to assume that the witnesses for the winning party were believed credible by them.

51. Frank, *supra* note 47, at 954.

52. "But the second suggestion, that findings facilitate the work of the reviewing court in an ordinary appeal, by clarifying the issues, has substantial merit. . . .

"No findings were required in any case unless and until an appeal was taken. . . .

"Unfortunately the power of the common law tradition was too great to permit this [referring to the preceding paragraph] admirable plan to become firmly established. . . ." Sunderland, *Findings of Fact and Conclusions of Law In Cases Where Juries Are Waived*, 4 U. OF CHI. L. REV. 218, 230-231 (1937).

53. "In effect it transfers the use of findings from the field of trial practice to the field of appellate review. By so doing, it eliminates, in the trial court, all the useless burdens resulting from the substitution of special findings for the common-law special verdict, and it preserves, in the appellate court, whatever advantages result from a judicial specification of the precise matters of law and fact which are challenged on appeal." *Id.* at 232.

mind, but later when he may no longer remember the witnesses' actions.⁵⁴ Indeed, in the federal system he may move on to another division within his district before receiving notice that a motion for new trial has been made and that appeal will follow if it is not granted.⁵⁵ This factor, and the increased likelihood of better consideration of the evidence discussed above, indicates that the statement of what evidence was relied upon should be prepared in every case with the findings of fact.

A trial attorney might, because of this, be better prepared to decide whether an appeal should be made, and the appellate court would be in a position to give great weight to the trial judge's evaluation of the credibility of witnesses. Provision must also be made to allow the judge to amend this statement just as he may amend his findings of fact.⁵⁶ Such a plan must not be enacted in order to become a device that will spawn reversals on technical grounds. It would perhaps be best to permit the appellate court to request any clarification that it desires from the trial court.⁵⁷ A reversal, therefore, should result only where the statement is completely inadequate.

If the rules of evidence were strictly applied in a nonjury trial, the time needed would be considerably increased. Since the court would have to hear arguments on evidentiary rules, this plan fails to utilize the capability of the trial judge to apply them when he makes findings of fact. However, if the judge were required to state what he relied on, the advantages claimed by the present practice would be retained and the disadvantages avoided. Because appellate review was not intended to be a complete reconsideration of the facts, does not mean that it should be accomplished by mere conjecture. Such a requirement would put real meaning into review of nonjury litigation.

No adequate reason has been advanced for continuing guesswork in reviewing findings of fact; rather there should be thorough examination of the exact actions of the lower court with a view toward handing down accurate and well reasoned opinions which state precisely the grounds of

54. "He cannot now vividly recall the demeanor of those witnesses whose testimony is relevant. . . ." Frank, *supra* note 47, at 947.

55. For an enumeration of districts and divisions of district courts, see 62 STAT. 874, 28 U.S.C. §§ 81-131 (Supp. 1952).

56. FED. R. CIV. P. 52(b).

57. Two methods could be used to save the question of the court's reliance on incompetent evidence for an appeal. An attorney would object at the time the evidence is introduced with no argument permitted. This would apprise the judge of the fact that he thinks the evidence is questionable. The trial judge would then consider the objection as he prepares his statement of what evidence he relied on and his findings of fact. Later, counsel could in his motion for new trial raise the point again. The objecting attorney's and the trial judge's beliefs would, therefore, be amply clear to the appellate tribunal on appeal.

affirmance or reversal. The requirement of a more complete statement by the trial judge would help achieve this result.

ALIMONY IN INDIANA: TRADITIONAL CONCEPTS v. BENEFIT TO SOCIETY

The family is a permanent institution around which our civilization has formed throughout its development.¹ Society has constantly been on guard to see that the family is protected and that, if it is dissolved, its goals are perpetuated and restoration encouraged. The law of alimony necessarily plays a major role in this endeavor to save, if possible, the community's stake in the family unit even after it has disintegrated.² To accomplish this the rights and duties of ex-spouses should be assigned with a clear conception of the impact they will have on the community's interest in the family. Unfortunately, however, great confusion exists in Indiana in the law of permanent alimony. While the courts have declared the alimony policy of the State to be primarily a determination of property rights between the parties,³ close analysis of the cases reveals that several contradictory theories are being applied under the guise of property division. In an effort to establish a method of alimony payment, the Legislature has attempted to remedy the inadequacies of previous law with a new statute the language of which is so inconsistent that it demands clarification by the courts or, perhaps, amendment.⁴

1. "It is not wholly improbable . . . that the family in some form must be accepted as the initial society, possibly among all the races of mankind." 1 HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 10 (1904). See also 1 WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (5th ed. 1925).

2. "The far ramifications of the law of persons and of property aim to safeguard the institution of the family. . . ." Kelso, *The Changing Social Setting of Alimony Law*, 6 *LAW & CONTEMP. PROB.* 186, 187 (1939).

3. ". . . [T]he institution of a divorce suit . . . conferred upon the court in which the divorce was pending complete jurisdiction of all matters pertaining to the property in controversy." *Gray v. Miller*, 122 Ind. App. 531, 539, 106 N.E.2d 709, 712 (1952). In the same case the court, in considering the judicial function in the determination of alimony, quoted from *Muckenbarg v. Holler*, 29 Ind. 139, 141 (1867), that "'all questions of property between the parties, like that in controversy here, are thus in litigation in a suit for divorce, and must there be settled.'" *Ibid.*

4. "The court shall fix the amount of alimony and shall enter a judgment for such sum, and shall specify the method and character of payment, which in his discretion he deems to be just and proper under all the evidence, including any valid separation agreement which may have been introduced into evidence. In determining the character of the payments of the alimony the court may require it to be paid in money, other property, or both, and may order the transfer of property as between the parties, whether real, personal or mixed and whether the title at the time of trial is held by the parties jointly or by one of them individually. In determining the method of payment of the