imposed upon them when dealing with a minor's property through a fiduciary.

Federal tax consequences of gifts made pursuant to the Uniform Gifts to Minors Act are generally favorable, or may potentially be made so if prospective donors and custodians are properly advised. Transfers made under the act are considered completed gifts of a present interest and are entitled to the $3,000/$6,000 annual gift tax exclusion. Gifts made by a donor who designates himself as custodian and dies before the minor reaches twenty-one are includible in the decedent's gross estate for federal estate tax purposes. This is a definite disadvantage in regard to use of the custodianship device for estate planning purposes, but it may be circumvented by having the donor appoint someone other than himself as custodian. Income from gift property is taxable to the minor child, except that any part of the income used by the custodian to discharge a legal obligation of any person to support the child is taxable to such a person. Generally parents will prefer that income be taxable to the child to take advantage of income tax savings resulting from the minor's exempt status or lower tax bracket. The custodian should be warned, therefore, of the adverse tax consequences if income is expended for the support of a minor who is the legal dependent of a higher income-bracket taxpayer.[166]

THE EFFECT OF AN OMITTED SPECIAL FINDING OF FACT

In an action without a jury, when a proper motion for special findings of fact and conclusions of law has been made, the court is required by statute to find the ultimate facts, draw conclusions of law from them, state the facts and conclusions separately, and enter judgment.[1]

Counsel for the winning party is generally requested to draft these special findings of fact and conclusions of law. The judge then approves them by his signature and enters judgment accordingly. However, on appeal, the objection may be raised that some fact necessary to the appellee's case has been omitted from the special findings.

For seventy-eight years and in over one hundred cases, Indiana courts have stated the rule that where a material fact has been omitted

166. Tax consequences, as discussed, are based on the current interpretation and application of the tax code by the Commissioner and are subject, of course, to re-evaluation and changes.

1. IND. ANN. STAT., § 2-2102 (1946).

from the special findings, *that fact is presumed to have been found against the party having the burden of proof of that fact below.*[2] If appellee had the burden of proving the omitted fact, the appellate court may order the trial court to set aside its conclusions of law and enter conclusions and judgment in favor of appellant. Thus it is possible for the winning party below to suffer an adverse final judgment because of what may well have been mere oversight on the part of counsel and the judge.[3]

While such adverse final judgments are not frequently ordered by the appellate court, the possibility still remains. The language of the Indiana rule which calls for a presumption of error when a material fact has been omitted from the special findings appears to be in direct conflict with the usual presumptions in support of the trial court's decision[4] which are well founded in legal history and universal in application.[5]

Historical Derivation of the Rule

Practice under the special findings statute which was passed in 1852,[6] was at first not well understood.[7] In *Addleman v. Erwin,*[8] heard

2. The rule is stated in the recent case Fourts v. Largent, 228 Ind. 547, 552, 94 N.E.2d 448, 450 (1950), thus: "In the case of Graham v. State, 66 Ind. 386 (1879), the rule which is applicable here seems to be well stated and is to the effect that when special findings are requested and stated by the court, the findings so stated are those that are proved upon the trial and none other, and where facts proved and found fail to determine some of the issues those issues must be regarded as unproved by the party having the burden of proof resting upon him."

3. See note 41 *infra.*

4. 2 Gavit, Indiana Pleading and Practice § 436, p. 2372 (1942).

5. New York Cent. R. Co. v. Milhiser, 231 Ind. 180, 189, 106 N.E.2d 453 (1952); Wisconsin Nat. Life Ins. Co. v. Meixel, 221 Ind. 650, 654, 51 N.E.2d 78, 79 (1943); Ferrard v. Genduso, 216 Ind. 346, 348, 24 N.E.2d 692, 693 (1940). The opposite presumption is recognized in few jurisdictions; its authority is vague and its application inconsistent.

The only problem considered is that of the situation where the ultimate facts found do not support the conclusions of law. Other similar questions frequently arise, but these go to matters other than the sufficiency of the findings to support the conclusions of law; such as the distinction between ultimate and evidentiary fact, Horn v. Lupton, 182 Ind. 355, 106 N.E. 708 (1914); Coffinberry v. McClellan, 164 Ind. 131, 73 N.E. 97 (1905); Bartholomew v. Pierson, 112 Ind. 430, 14 N.E. 249 (1887); the distinction between question of law and question of fact, Brown, *Fact and Law in Judicial Review,* 56 Harv. L. Rev. 899 (1943); Phelps, *What is a "Question of Law?"* 18 U. of Cinn. L. Rev. 259 (1949); and the sufficiency of evidence to support the findings, Delaney v. Gubbins, 181 Ind. 188, 104 N.E. 13 (1914); Wolverton v. Wolverton, 163 Ind. 26, 71 N.E. 123 (1904); Daily v. Smith, 66 Ind. App. 393, 118 N.E. 321 (1918).

6. Ind. Acts 1852 (R.S.), vol. 2, pt. II, c. 1, § 341, at 115. "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with a view to excepting to the decision of the court upon the questions of law involved in the trial in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

7. In Cruzon v. Smith, 41 Ind. 288, 293 (1872) the court stated that ". . . the correct practice under Section 341 does not seem to be well understood by the profession generally."

8. 6 Ind. 495 (1855).

in 1855, the court advised appellant that under the new statute a motion for special findings was required in order to assign error in the conclusions of law on appeal. The special findings were necessary to allow the appellate court to comprehend the reasoning of the trial court in order to determine whether the conclusions of law were erroneous.

If a motion for special findings has been made, and the trial judge fails to make a finding on a material fact, then the conclusions of law are erroneous, since they are not supported by the facts found. However, the *Addleman* case, although it pointed out the necessity of the motion to preserve the error for appeal, offered no indication of the proper method of presenting the question of error in the conclusions of law to the appellate court.

It was first held that error in the conclusions of law should be assigned as independent error and that an appeal from the denial of a motion for a new trial, made on the grounds that the conclusions were contrary to law, did not properly present the question.[9] However, in 1872 the court in *Cruzan v. Smith*[10] held that although a motion for a new trial would not directly present the question of the sufficiency of the special findings to support the conclusions of law; appeal from the denial of the motion might be perfected indirectly under Section 352[11] of the code which provided for a new trial where, ". . . the verdict or decision is not sustained by sufficient evidence, or is contrary to law."[12] The court reviewed the evidence and reasoned that since the special findings did not cover all the issues the trial court had applied the wrong principle of law and hence had erred in denying the motion for a new trial. The *Cruzan* case at least temporarily preserved the possibility of indirectly reaching an omission in the special findings by a motion for a new trial.

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9. The Montmorency Gravel Road Co. v. Rock, 41 Ind. 263 (1872). The court used as its major authority the cases of The City of Logansport v. Wright, 25 Ind. 512 (1865) and Luirance v. Luirance, 32 Ind. 198 (1869). In the *Logansport* case, appellant did not except to the conclusions in any manner; but simply excepted to the denial of his motion for a new trial. The court, citing Addleman v. Erwin, 6 Ind. 495 (1855) held that no question as to the conclusions of law was properly presented. In the *Luirance* case appellants made a motion for new trial on ground that the court had erred in its findings and application of the law to the facts as found. The court, citing *Addleman v. Erwin,* and the *Logansport* case, held that the proper method of presenting a question under the statute on special findings was by simple exception to the conclusions of law and not by motion for a new trial.

10. 41 Ind. 288 (1872).

11. IND. ACTS 1852 (R.S.) vol. 2, pt. II, c. 1, § 352, at 117.

12. *Ibid.*

A further complicating factor, the common law motion for venire de novo, was revived in *Bosseker v. Cramer.*[13] It was said that, "A venire de novo is granted when the verdict, . . . is imperfect by reason of some uncertainty or ambiguity, *or by finding less than the whole matter put in issue,* or by not assessing damages."[14] (Emphasis added.) By 1877 the above quoted rule had become, ". . . the well settled practice in this state,"[15] placing in Indiana law a motion which could cause a new trial merely for failure of the trial court judge to find on a matter put in issue, regardless of whether or not the conclusions of law were erroneous.[16]

In 1879 the court in *Anderson v. Donnell*[17] held that an omission of a fact in a special finding was ground for a motion for venire de novo and not for a motion for a new trial. This case expressly overruled the *Cruzan* case[18] which held that such an omission could be reached indirectly by a motion for a new trial. The court determined that a motion for a new trial reached a mistake in the special findings; but that a motion for a venire de novo reached an improper omission.

At this point the difficulty of distinguishing between a mistake and an omission rendered the proper uses of the two motions extremely vague. In addition, the range of errors reached by a motion for a new trial was not known.[19] Since a motion for venire de novo need not go directly to the merits of the case it could upset decisions when there was

13. 18 Ind. 44 (1862). In this case the complaint alleged that defendant "unlawfully detained" certain property. The jury returned a verdict which read in part, "unlawfully *take* and detain" (emphasis added) the said property. The court quoted at P. 47 from 2 TIDD'S PRACTICE 922 the following. "A venire do novo is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages." Clearly this court needed to be concerned only with "uncertainty," but the case is used as authority for the whole quotation.

14. *Id.* at 47.

15. Whitworth v. Ballard, 56 Ind. 279 (1877).

16. Bosseker v. Cramer, 18 Ind. 44, 46 (1862); ELLIOTT, APPELLATE PROCEDURE §§ 758-61 (1892); 2 GAVIT, INDIANA PLEADING AND PRACTICE (1942) § 2568; Rice, *Proposed Innovation in Civil Procedure,* 21 TEMP. L. Q. 23 (1947).

17. 66 Ind. 150 (1879).

18. The case also purported specifically to overrule Schmitz v. Lauferty, 29 Ind. 400 (1868) which case really turned on the Statute of Frauds.

19. In the case of Montmorency Gravel Road Company v. Rock, 41 Ind. 263, 265 (1872) on petition for rehearing the court felt compelled to quote from the language of the brief in order to be entirely fair. A portion of that quote demonstrates the confusion. Counsel for appellant stated that "We are considerably surprised to learn that we failed to assign these conclusions of law as error. We were under the impression that when we assigned the wrongful overruling of our motion for a new trial, we thereby covered our objections to the conclusions of law."

no error in the conclusions of law, solely on the technical ground that no finding had been made on a matter in issue.[20]

Formulation of the Rule

In this confused state of affairs, due in great part to the tenacity of venire de novo, the case of *Graham v. the State ex rel the Board of Comm. of Jefferson Co.*[21] arose. Plaintiff had alleged a number of breaches of contract in his complaint. Appellant (defendant below) contended that no findings were made on two of the alleged breaches; that since these two breaches were put in issue by defendant's answer, the court had failed to find on all the issues and a venire de novo should be granted.[22] Apparently the findings of fact which had been made were sufficient to support a recovery on any of a number of breaches other than these two. To all appearances, the case had been decided correctly. If defendant's argument that the judge had failed to perform his duty to find on every fact in issue had been successful a venire de novo would have been required even though the defendant had in no way been prejudiced by the failure of the trial court to find these facts.[23]

The court began by stating that obviously only facts which have been proved can be found; thus where no facts are proved in relation to an issue such facts cannot be found. It then said, ". . . it would seem that, the issues concerning which no facts are found should be *regarded* as not proved by the party on whom the burden of the issue or issues lies."[24] (Emphasis added.)

The effect of the court's reasoning is that a failure of the trial court to make a finding on a fact put in issue is not to be considered an omis-

20. This is not to say that a motion for venire de novo never did reach a substantial error; but rather that the error need not be necessarily substantial.

21. 66 Ind. 386 (1879).

22. See note 14 *supra.*

23. The defendant could not have excepted successfully to the conclusions of law since the facts found did support the conclusions, nor could he have attacked the judgment on the grounds that the findings were not supported by sufficient evidence, nor that all the facts proved were not found.

The one way the judgment might be attacked successfully was through the motion for a venire de novo which according to *Bosseker v. Cramer* could attack the form of the judgment on the theory that the judge had a duty to find on every issue and a failure to do so was reversible error regardless of whether the conclusions of law themselves were sound.

It was important at common law that the verdict respond to every issue. Elliott, Appellate Procedure (1892) § 758. Apparently there was no question of prejudicial error.

24. *Id.* at 395. Although the court made no reference to the fact, the rule was known at common law. Sunderland, "Modern Procedural Devices," in *Field Centenary Essays* 83, 94 (1949); Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries are Waived,* 4 U Chi. L. Rev. 218, 226 (1937).

sion. Instead, it is to be regarded as a finding adverse to the party bearing the burden of the issue below. Thus there is no "omission," and a motion for venire de novo cannot be granted since the judge's "duty" has been performed.

The holding, limited to the facts of the case, is that an omitted finding of fact will be regarded as a finding adverse to the party bearing the burden of the issue below, *where the presumption is consistent with the trial court's decision.*[25] The judge will be presumed to have performed this duty when such a presumption is not inconsistent with the trial court's result.

The language of the case on the other hand indicated that the presumption could apply, regardless of whether it is consistent with the trial court's decision.

Since the court was required to decide only whether the special findings were objectionable because they did not pass on all the issues, the reasoning of the court was largely unnecessary and the language of the rule no more than dicta. The court could have construed the special findings statute as abating the usual presumptions in support of the trial court only where the findings of fact which had been made did not support the conclusions of law; and since here there was no exception to the conclusions of law themselves, the appellate court could review the case as though the findings were general and indulge all presumptions in favor of the trial court without interfering with appellant's protection under the statute.[26]

Although the motion for a venire de novo was not allowed to cause reversal, the court's language set the stage for future misinterpretation.[27]

In 1880, the year after the *Graham* case, the inherent danger of the ambiguity of the rule became evident in *Vannoy v. Duprez.*[28] In the *Vannoy* case, plaintiff had also won below. However, unlike the *Graham* case, there was an omission of a material and necessary element of the plain-

25. See note 5 *supra.* The court's holding is consistent with the usual presumptions in favor of the decision of the trial court. There was no clear evidence of an error in the trial court's decision therefore the decision was affirmed.

26. If appellant had wished to appeal the case on its merits he should have made a motion for a new trial on grounds of insufficient evidence and assigned as error that all the facts proved were not found. Sterne v. McKinnery, 79 Ind. 577 (1881). Since appellant did not bring up the evidence in an attempt to show that all the facts proved were not found he had effectively waived any such objection.

27. The *Graham* case fairly abolished the motion for a venire de novo by removing all possibility of omission, but the motion persisted where conclusions of law and findings of fact were mixed, Kealing v. Vansickle, 74 Ind. 529 (1881); or where no conclusions of law could reasonably be drawn from the facts found, Locke v. The Merchants National Bank, 66 Ind. 353 (1879). For discussion of the *Graham* case see Maxwell v. Wright, 160 Ind. 515, 67 N.E. 267 (1903).

28. 72 Ind. 26 (1880).

tiff's case from the special findings; hence the facts found did not support the conclusions of law.[29] Stating that the omission of one of the material elements of appellee's cause of action must be regarded as an adverse finding, the court was apparently prepared to administer the rule strictly according to its terms and reverse and order final judgment for the losing party below. The court's language indicated that the presumption was conclusive even in the face of the trial court's decision for plaintiff; however, the court's final act was to order judgment entered for the defendant "without prejudice to the right of the plaintiff to prosecute another action."[30] Thus although the court could not affirm since the material facts necessary to support the conclusions of law were not present, still it was not prepared to hold the presumption conclusive as against the trial court's decision. The decree had the effect of allowing a new trial, if the plaintfif so desired, by abating the action of res judicata. Therefore, the *Vannoy* case did not furnish authority for the literal application of the rule.[31]

The theory indicated in the *Vannoy* case had begun to take more definite form by 1886. In *The Western Union Telegraph Co. v. Brown*[32] the burden was on plaintiff below to show that he was the "sender" of a telegraph message. Because that fact was not found as an ultimate fact the court followed the language of the Graham rule and ordered the trial court to change its conclusions of law and enter judgment in favor of appellant. However, on petition for rehearing the court modified its mandate by ordering the lower court to grant appellee a new trial if requested.

In the later case of *Buchanan v. Milligan,*[33] involving an appeal bond, there was again an omission of a material fact from the special findings. It was not stated in the finding that the bond which defendant had executed was the bond sued upon; nor were the terms and conditions of the bond set forth. The Graham rule appeared to be applicable and it

29. *Id.* at 31. The court stated as the Graham rule, ". . . the special finding must be deemed to embrace all the facts which were proved, and all issues not determined by the facts found must be regarded as not proven by the party bearing the burden of proof thereof."

30. *Ibid.*

31. Justices Biddle and Perkins were on the bench at the time the *Graham* case was decided, and neither of them was on the bench when the *Vannoy* case was decided. Chief Justice Worden, who wrote the opinion in the *Graham* case, was on the bench at the time the *Vannoy* case was decided, but Justice Woods who wrote the opinion in the *Vannoy* case was not on the bench when the *Graham* case was decided. The change in the court's personnel affords some insight into the awkward application of the Graham rule in the *Vannoy* case.

32. 108 Ind. 538, 8 N.E. 171 (1886).

33. 108 Ind. 433, 9 N.E. 385 (1886).

might have been expected that the trial court would be ordered to restate its conclusions of law in favor of appellant. Instead, the court recognized the unfairness of this rule and went further than either the *Vannoy* case or the *Western Union* case by ordering a new trial under Section 660, R.S. 1881 which provided that the Supreme Court "shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it." This is the practice frequently followed by appellate courts today. Where a material fact is omitted from the special findings a new trial may be ordered at the discretion of the appellate court.

Later cases have extended the Graham rule to its ultimate limit. In the case of *Metropolitan Life Insurance Company v. Bowser*[34] the appellee had been induced to purchase policies on the lives of several persons by an agent of the insurance company who represented that the insured parties need not sign them. When the insurance company later cancelled the policies appellee requested the return of premiums paid. The trial court allowed appellee to recover the premiums but failed to find that a regulation existed which would cause a policy not signed by the insured to be void *ab initio* rather than only voidable at the instance of one of the parties. The appellate court held that a failure to find on this point was a finding against the appellee on the issue and that judgment should be reversed and entered in favor of appellant insurance company.

These cases illustrate four different applications of the rule. The *Graham* case used the rule to uphold the decision of the trial court. The *Vannoy* case, faced with the situation which called for an application of the rule against the decision of the trial court, chose to allow the possibility of a new trial. The *Buchanan* case ordered a new trial. The *Metropolitan Life Insurance Company* case applied the rule literally and allowed the presumption to operate conclusively against the trial court's decision.

It certainly cannot be contended that on its facts the *Graham* case furnishes authority for a rule which operates in some instances against the decision of the trial court; however, this is the interpretation that later courts have sometimes given it.[35] Nor can it be contended that the *Graham* case provides an authoritative interpretation of the special findings statute.[36] In all probability the statute has never been construed

34. 20 Ind. App. 557, 50 N.E. 86 (1898).
35. See note 41 *infra.*
36. No case has been found which has construed the statute on special findings in any other way than modified by the Graham rule.

because of the readiness of the courts to apply or misapply the Graham rule.

During the next twenty years, the rule was usually used, as in the *Graham* case, to affirm the trial court's decision where sufficient findings had been made to support the conclusions of law even though all facts in issue were not found[37] or where the trial court had not found specifically against an affirmative defense.[38]

Except for two cases[39] during this period, when faced with the apparent necessity of reversing, and entering judgment for the losing party below, the courts took their cue from the *Buchanan* case and resorted to their statutory powers to grant a new trial where "the justice of the case requires it."[40]

Modern Practice

Since 1900[41] there have been several more cases where the appellate court has followed the language of the Graham rule strictly and ordered

37. App v. Class, 225 Ind. 387, 75 N.E.2d 543 (1947); Shilling v. Parsons, 110 Ind. App. 52, 36 N.E.2d 958 (1941); Wiard v. Landes, 80 Ind. App. 551, 141 N.E. 519 (1923).

38. Indiana State Toll-Bridge Commissioner v. Minor, 132 N.E.2d 282 (Ind. 1956); McCoy v. Farm Bureau Mutual Ins. Co. of Indiana, 123 Ind. App. 424, 111 N.E.2d 728 (1953); Boyer v. Leas, 116 Ind. App. 502, 64 N.E.2d 38, 116 Ind. App. 502, 64 N.E.2d 591 (1946).

39. Cincinnati, Indianapolis, St. Louis & Chicago R.R. Co. v. Gaines, 104 Ind. 526, 4 N.E. 34 (1885); The Metropolitan Life Insurance Co. v. Bowser, 20 Ind. App. 557, 50 N.E. 86 (1898).

40. Ind. Ann. Stat. § 2-3234 (1946).

41. Another line of cases developed along a collateral point before 1900. Kealing v. Vansickle, 74 Ind. 529 (1881) held that where the conclusions of law included matters which should have been found as fact, the finding was imperfect and a venire de novo should be granted. In the case of Jarvis v. Banta, 83 Ind. 528, (1882) the court appears to follow the *Kealing* case by holding a finding defective because of an omission. The rule crystallized in the case of Braden v. Lennon, 127 Ind. 9, 26 N.E. 476 (1890). In that case there was a question of payment. There were strong evidentiary facts found which indicated payment, but there was no ultimate fact of payment found, rather, payment was found as a conclusion of law. The court followed the *Kealing* and *Jarvis* cases and held that a new trial must be ordered.

Apparently the rule that conclusions of law will not aid the findings of fact, and findings of fact will not aid the conclusions of law is not questioned today. Kerfoot v. Kessner, 222 Ind. 58, 84 N.E.2d 190 (1949). It is difficult to see any justification for the rule where the judge sits as trier of fact. There is justification where the jury determines questions of fact and the judge makes conclusions of law. In that case the jury should not make conclusions of law and the judge should not supply findings of fact because these functions are without their respective provinces. In the case of special findings, the judge finds both fact and law. Any distinction between the two in that situation must be, at most, a formal distinction. Certainly a finding of fact included within the conclusions of law should not be more than an error in form and as such, not a reversible error.

judgment against the winning party below.[42] In general, however, the courts have ordered a new trial.[43] A significant addition to the alternatives available to the court arose in the form of an attempt by the appellate courts, in some cases, to amend the findings rather than ordering a new trial.[44]

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42. Where plaintiff sought to enjoin issuance of certain stock and plaintiff had burden of proof on issue of fraud and there was no finding of fraud it was held that the failure of the trial court to find fraud was a finding that there was no fraud. The trial court's decision was reversed and trial court was ordered to enter judgment for defendant. Wabash Valley Coach Co. v. Turner, 221 Ind. 52, 46 N.E.2d 212 (1943). Where employee sued to recover wages under a bonus agreement and trial court allowed recovery; the Supreme Court reversed and ordered trial court to restate its conclusions of law consistent with Supreme Court's opinion because plaintiff below had burden of proof on issue of the employer's breach and the trial court did not find on the issue of the breach. Home Equipment Co. v. Gorham, 218 Ind. 454, 33 N.E.2d 99 (1941). In Chicago, I. & L. Ry. Co. v. Ramsey, 168 Ind. 390, 81 N.E. 79 (1906), plaintiff was sued for injury done to certain farm animals by defendant's railroad train. Trial court awarded judgment to plaintiff but failed to find that animals entered tracks at place where railroad was bound to fence; nor did the trial court find facts sufficient to warrant a conclusion of negligence as a matter of law. The trial court was ordered to render judgment for defendant. Where real estate broker sought to collect commission on sale of house and trial court found against the claim, the appellate court reversed and ordered judgment for plaintiff below because there was no finding that the commission arrangement had been terminated and the burden of that issue was on the defendant below. Home Development Co. v. Arthur Jordan Land Co., 100 Ind. App. 458, 196 N.E. 337 (1935). In Kratli v. Booth, 99 Ind. App. 178, 191 N.E. 180 (1934), the burden was on appellee to show that appellant's signature was not procured by fraud. There was no finding on the issue therefore the appellate court reversed the trial court's decision and ordered trial court to restate its conclusions in harmony with the appellate court's opinion. In Abden v. Wallace, 95 Ind. App. 604, 165 N.E. 68 (1932), where one of the conclusions of law was based on a defense presented in appellee's answer, failure of the court to find on that issue was regarded as a finding against the appellee and the trial court's decison was reversed with order to restate conclusions of law in favor of appellant and render judgment accordingly. Likewise in Michigan Commercial Ins. Co. of Lansing v. Wills, 57 Ind. App. 256, 106 N.E. 725 (1914), where trial court found that auto had been taken unlawfully from plaintiff's garage and wrecked some miles distant but failed to find that the auto was "stolen," appellate court held that the failure to find was a finding that the auto was not stolen and reversed he trial court's decision.

43. The general argument is well stated in Buchanan v. Milligan, 108 Ind. 433, 434, 9 N.E. 385 (1886). After determining that the decision of the trial court could not be sustained, the court said, "There are cases where it is evident from the face of the record that injustice would result from directing a judgment on the special findings, and in such cases, we think it is not only within our power, but that it is our duty, not to direct judgment upon the facts contained in the special finding, but to remand the case for new trial. . . ."

Accord, Donaldson v. State, 167 Ind. 553, 78 N.E. 182 (1906); Coffinberry v. McClellan, 164 Ind. 131, 73 N.E. 97 (1905); Automobile Underwriters v. Tite, 119 Ind. App. 251, 85 N.E.2d 365 (1949); Sheets v. Stiefel, 117 Ind. App. 584, 74 N.E.2d 921 (1947); Burkhart v. Simms, 115 Ind. App. 576, 60 N.E.2d 141 (1945); Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E.2d 599 (1944); Neu v. Woods, 103 Ind. App. 342, 7 N.E.2d 531 (1937); Union Ins. Co. of Indiana v. Glover, 100 Ind. App. 327, 195 N.E. 583 (1935); Newark Fire Ins. Co. v. Martinsville Harness Co., 74 Ind. App. 14, 128 N.E. 616 (1920); Malon v. Scholler, 48 Ind. App. 691, 96 N.E. 499 (1911).

44. The landmark case is Marion Trust Co. v. Bennett, 169 Ind. 346, 359, 82 N.E. 782, 787 (1907). The court said, ". . . and it is true that we have no power, generally speaking, to add to a special finding. We may, however, give heed to a fact appearing

It is argued that the appellate court may do what the trial court should have done. Since the denial of the motion for a new trial by the trial court without considering an amendment of the findings is error; and since the trial court is bound to correct the error and does not; then the appellate court should do so.[45]

Although there can be no doubt that such power exists by statute[46] and that amendment by the appellate court offers a simple solution for avoiding the burden of a new trial, the question of whether the appellate court should amend the findings of fact is still open to dispute.[47]

The misunderstanding and misapplication of the Graham rule has required the appellate court to attempt the impossible task of curing "technical" defects while at the same time avoiding the fact finding function reserved to trial courts. Manifestly, no distinct separation can be drawn between technical defects and finding facts. Unless arguments in favor of appellate fact finding are to be accepted, the appellate fact finding that may occur in a hard case is a usurpation of the trial court's function by the appellate court with resulting harmful precedent. It is true that courts of equity reviewed the evidence on appeal and that courts of law,

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in the evidence which does not admit of dispute, in order to uphold the judgment." The court used as authority Dyke v. Spargur, 143 N.Y. 651, 38 N.E. 269 (1894) and Sturgeon v. Hull, 8 Ohio C.C. Dec. 269 (1894), and argued that such omission is a formal error of the type which the statute provided should be deemed amended in the Supreme Court.

In Judah v. Cheyne, 53 Ind. App. 476, 483, 101 N.E. 1039, 1042 (1913), the court modified the Graham rule by saying, "It must be remembered, however, in this connection that where the primary facts found lead to but one conclusion, or where facts found are of such a character that they necessitate the inference of an ultimate fact, such ultimate fact will be inferred and treated as found. Mayer v. C. P. Lesh Paper Co., 45 Ind. App. 250, 89 N.E. 894, 45 Ind. App. 250, 90 N.E. 651 (1910); Indiana Trust Co. v. Byram, 36 Ind. App. 6, 72 N.E. 670, 36 Ind. App. 6, 73 N.E. 1094 (1905); Depaw Plate Glass Co. v. City of Alexandria, 152 Ind. 442, 52 N.E. 608."

The court then reviewed the findings and stated that, "Under such a finding of facts it would be a legal absurdity to hold that the judgment of the trial court should be reversed because such court did not in express words find the ultimate fact of present ownership of real estate in question." *Ibid.*

This theory has been followed generally in the following cases and in the cases cited therein. Kelly, Glover & Vale v. Heitman, 220 Ind. 625, 44 N.E.2d 981 (1942); Scott v. Kell, 134 N.E.2d 828 (Ind. App. 1956); Smith v. Smith, 124 Ind. App. 618, 116 N.E.2d 548 (1953); Cooper v. Tarpley, 112 Ind. App. 1, 41 N.E.2d 640 (1942); Garrett v. Northwestern Mutual Life Ins. Co., 111 Ind. App. 515, 38 N.E.2d 874 (1942); Colonial Fire Underwriters of National Fire Ins. Co. v. German, 108 Ind. App. 601, 31 N.E.2d 68 (1941); Sputh v. Francisco State Bank, 105 Ind. App. 149, 13 N.E.2d 880 (1937); Lindley v. Seward, 103 Ind. App. 600, 5 N.E.2d 998 (1937); American Income Ins. Co. v. Kindlesparker, 102 Ind. App. 445, 200 N.E. 432 (1936).

45. 2 GAVIT, INDIANA PLEADING AND PRACTICE, § 436 (1942).

46. IND. ANN. STAT. § 2-3229 (1946).

47. Note, 8 IND. L. J. 195 (1932); Clark and Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 207 (1937); Cohen, *Reluctance of the New York Court of Appeals to Review Findings of Fact*, 49 COLUM. L. REV. 352 (1944); Orfield, *Appellate Procedure in Equity Cases; A Guide for Appeals at Law*, 90 U. PA. L. REV. 563, 594 (1942); FED. R. CIV. P. 52; 5 MOORE, FEDERAL PRACTICE § 52.06 [2].

in trial without jury, now have the same power by statute; but, when courts of equity tried de novo on appeal, all the evidence was documentary.[48] When oral testimony is involved the appellate courts are not in equal position with the trial court in passing on the credibility of witnesses.[49] For this reason the power granted to law courts is virtually academic. Although the appellate courts in cases at law now have the same power as in cases in equity, even in a case in equity an appellate court could not sit as finder of fact except where the evidence in question is documentary.[50]

Amendment also negatives the intent of the special findings statute. It would be of little effect to have a statute requiring special findings and conclusions of law in order to protect the litigants from arbitrary action by the trial court if the appellate court is free to indulge wholesale presumptions which cure all defects in the findings and conclusions.[51]

Clearly the present alternatives available to the appellate courts are not adequate. A mandate of judgment against the winning party below produces a monstrous result; likewise, ordering a new trial may place an unnecessary burden upon an appellee who has won properly on the merits. The act of amending findings in the appellate court conflicts with the fundamental division between trial and appellate courts.

Another choice has been given the courts by new Supreme Court Rule 2-30[52] effective January 1, 1958. The new rule presently allows the appellate courts to amend where there is undisputed evidence supporting the fact omitted. This aspect is not new since the undisputed evidence indicated must probably still be documentary; however, the rule alternatively allows the appellate court to remand the case to the trial

48. Orfield, *op. cit. supra* note 47 at 563.

49. *Ibid.* Pigg v. Cook, 123 Ind. App. 414, 109 N.E.2d 107 (1952).

50. See notes 45, 46 and 47 *supra.* In the case of Gilchrist v. Gilchrist, 225 Ind. 367, 75 N.E.2d 417 (1947) appellant called attention to IND. ANN. STAT. § 2-3229 (1946) which states that on appeal in non-jury cases the court shall weigh the evidence and if it appears that the judgment is not fairly supported by or is contrary to the weight of the evidence, shall award judgment accordingly. The court answered that the statute does not require the appellate court to weigh conflicting evidence. Appellant argued that the evidence was uncontradicted and hence without conflict. The court did not agree that it necessarily followed that conflicting inferences might not be drawn from uncontradicted evidence.

51. If the finding is general, all presumptions are indulged in favor of the decision of the trial court. If the same presumptions are to be used when the findings are special then the effect is to make the special findings general. As a practical matter, a motion for special findings would be of no effect.

52. IND. SUPREME CT. RULE 2-30 "Special Findings of Fact on Appeal. When special findings of fact are made in an action tried by the court without a jury and the court fails to find on some material issue of fact, on appeal from the judgment the reviewing court may either affirm the judgment if it is supported by undisputed evidence, or vacate the judgment and remand the action for findings on the material issues of fact."

court for further findings. Although an important change for the better,[53] the rule might be more effective were provision made for a motion to amend special findings in the trial court before appeal. Under Supreme Court Rule 1-8[54] the possibility of amendment by the trial court is presented, but there is no motion by which the winning party, upon discovering an omission in the findings, may direct the court's attention specifically to the findings themselves and request that the trial court amend them to cure the error. A motion to amend in the trial court would give the winning party the opportunity to cure omissions in the findings after judgment and would afford all necessary protection against the burden of a new trial. If such a motion were made in the trial court, the appellate court might, upon observing that a material fact has been omitted from the special findings, remand the case to the trial court for reconsideration of the motion to amend.[55] If the omitted fact had been proved at the trial court and the same judge was on the bench, the trial court could amend and the case would be at an end. If the fact had not been proved at the trial court, the judge who had heard the case was no longer on the bench or for some other reason the trial court chose not to amend, the motion for a new trial could be granted. Under such procedure the winning party would have maximum protection against the unnecessary burden of a new trial, the practice would be simplified and appeals on technical errors would diminish.[56]

53. The new rule gives the appellate courts the opportunity to remand the case to the trial court for competent fact finding without the burden of a new trial. Without resort to amendment of the findings, this may be the only just disposition of cases where there has been an omission of a material fact from the special findings.

54. IND. SUPREME CT. RULE 1-8 "Power of Court in Cases Tried Without a Jury. On a motion for a new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment."

55. Remanding the case for further findings is not altogether new to Indiana as it has been practiced as early as 1944 in review of decisions of Industrial Boards. See Cole v. Sheehan Construction Co., 222 Ind. 274, 281, 53 N.E.2d 172, 175 (1944) where the court states that, "We think, therefore, that it was an invasion of the province of the full Board for the Appellate Court to undertake to find the ultimate facts in the first instance. The statute does not contemplate that the functions of the Industrial Board may be assumed by the courts. The better practice would appear to be to remand the proceeding to the Board with directions for it to discharge its statutory duty by finding the essential facts, and by entering an award based thereon. When that has been done any party feeling aggrieved may have a judicial review according to the established practice."

56. For a different solution of the problem see Hyde, *A Modern Substitute for Findings of Fact and Conclusions of Law*, 32 A.B.A.J. 131 (1946). For collected cases see Annot., 76 A.L.R. 1137 (1932).

CONCLUSION

The statute on special findings should be allowed to operate so as to insure that cases will be determined according to the law and the evidence. The only question presented by exception to the conclusions of law should be whether the facts found are sufficient to support the conclusions of law. In order to carry out the intent of the statute, the usual presumptions in favor of the trial court should not apply when the appellate court is considering the sufficiency of the facts found to support the conclusions of law. A suspension of the usual presumptions in support of the trial court is not the same as a presumption against the trial court; but rather, indicates that the facts found must support the conclusions of law and that blanket presumptions should not be used to supply omitted facts.

The Graham rule, holding that an omitted finding of fact must be regarded as a finding adverse to the party bearing the burden of proof below, is unfounded when applied against the trial court's decision and unnecessary when applied to support it.

Further changes are needed in the practice under the statute authorizing special findings. A motion for special findings should be granted at any time before final judgment. Provision should be made for a motion to amend specal findings, after judgment and before an appeal is taken. Where the appellate court determines that the facts found are not sufficient to support the conclusions of law, whenever possible the case should be remanded to the trial court for reconsideration of the motion to amend the special findings.[57]

Of course such procedure would not preclude the appellate courts' exercise of their power to order a new trial in cases where "the justice of the case requires it."

Nor should the procedure preclude the appellate courts from remanding a case for further findings where there has been no motion to amend. The motion to amend is simply a device to direct the court's attention to the amendment power granted under Supreme Court Rule 1-8.[58] The motion to amend should give the winning party below every opportunity to avoid the burden of a new trial where a new trial is not absolutely necessary.

Under this suggested practice a new trial would not be required unless necessary to determine the issues on the findings of fact which

57. If there was ever any doubt that the appellate courts had the power to remand a case for further findings such doubts have been resolved by SUPREME COURT RULE 2-30 which rule expressly authorizes the procedure.

58. See note 54, *supra.*

were omitted. All possibility of a mandate of judgment against the winning party below because of a technical omission would be removed and there would no longer be any necessity for the appellate court to amend special findings.