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Appeals from Equity Decrees in Montana

HOMER CLARK

Montana, like most other states, has for most purposes abolished the historic distinctions between the courts of law and equity and between actions at law and suits in equity. In spite of this attempt at simplification, however, several distinctions between actions at law and suits in equity still remain to trouble courts, lawyers and students. One of these is the difference in the power of the Supreme Court to consider the evidence and reverse the decision of the district court for error in finding the facts. It is the purpose of this paper to define the Supreme Court’s power to do this in equity, as compared with its technique in actions at law, and to question the value of the distinction between the two types of litigation.

The distinction was created by the enactment of the following sentence as part of the general statute governing the powers and duties of the Supreme Court:

". . . In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered; provided, that nothing herein shall be construed to abridge, in any manner, the powers of the Supreme Court in other cases."

This sentence came into the Codes in the late fall of 1903, under unusual circumstances. At that time the war between

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'R.C.M. 1947, § 93-216 (8805).
'The events leading to the passage of this statute are well known in Montana, at least among the older residents. Complete accounts of them can be found in the following historical studies: ROBERT GEORGE
F. Augustus Heinze and the Amalgamated Copper Company for
control of the mines of Butte was at its height, in the courtroom
and underground. As one battle in that war, John MacGinniss,
a Heinze man, having bought a few shares of stock in the Boston
& Montana Consolidated Copper & Silver Mining Company,
brought a stockholder's derivative suit against that corporation
and the Amalgamated Copper Company. The complaint in this
suit alleged that the Amalgamated Company had been organized
to secure a monopoly in the production and sale of copper, that
it had bought a majority of shares in the Boston & Montana
Company for that purpose, that it was illegally doing business
in Montana, and that the rights of minority stockholders of the
Boston & Montana Company would be injured by Amalgamated's
activities. The complaint asked that an injunction be granted
forbidding the Amalgamated from voting its stock in the Boston
& Montana Company, or from receiving dividends in the stock,
and forbidding the transfer of the stock to Amalgamated on the
books of Boston & Montana. A decree that Amalgamated was
an illegal trust, enjoining it from doing business in Montana, and
giving other relief, was also prayed.

On October 22, 1903, Judge William Clancy of Silver Bow
County, allegedly also a Heinze man, granted an injunction
pendente lite in this case. His order restrained the Boston &
Montana Company from allowing its stock to be transferred to
Amalgamated, from allowing Amalgamated to vote the stock,
and from paying any dividends to Amalgamated.

This decree was immediately followed by cessation of all of
Amalgamated's operations in Montana. Most accounts agree
that fifteen thousand men were out of work, since the stoppage
closed mines, smelters, lumber mills, and all of the connected
businesses controlled by Amalgamated. Both sides then at-
ttempted to appeal to the idle miners for support, but as the
mines and smelters remained closed, and distress and confusion
increased, Governor Toole received large numbers of letters and
telegrams demanding that something be done by the government
of the state. He and other state officers were unable to arrange
a compromise until Amalgamated's officers made an offer to re-

494; CHRISTOPHER CONNOLLY, THE DEVIL LEARNS TO VOTE (1936) pp.
283-294; HELEN F. SANDERS, A HISTORY OF MONTANA (1913) p. 369;
TOM STOUT, MONTANA (1921) pp. 460-461 ; JOSEPH KINSEY HOWARD,
MONTANA, HIGH, WIDE, AND HANDSOME (1943) pp. 73-81.

*The appeal from the granting of the injunction pendente lite appears
as MacGinniss v. Boston & Montana Consolidated C. & S. Mining Co.
(1903) 29 Mont. 428, 75 P. 89.
sume work on condition that a special session of the state legislature be called for the purpose of enacting a “Fair Trial” Bill. The legislature was called, and the mines, mills, and smelters reopened.

The legislature met on December 1, 1903, and passed this bill, one section of which gave the Supreme Court the power to review the facts in equity cases, in the language previously quoted. Two other changes were made by this bill, one providing for change of venue on certain conditions and the other for disqualification of a judge upon the filing of an affidavit by a party that he has reason to believe, and does believe, that he cannot have an impartial trial before that judge.

Before 1903 in Montana appeals in equity were considered and decided under the same rules as appeals from legal judgments. The statute then in force made no distinction between the two types of appeal and the cases made none. As much respect was paid to the findings of fact in an equity case as to the verdict of a jury. The language of the cases made this plain. One equity case said that findings of fact must stand on appeal if there is evidence to support them. To be compared with this is the action at law, typical of many, in which the Supreme Court said that the findings below would not be disturbed if there was evidence to support them. The case of Austin v. Ingalls is explicit on the subject. “... and where, as in the present case, the evidence is conflicting, the findings of fact and judgment thereon by the court will not be reversed on that account, but rests upon the same principle, as does the verdict of a jury, when the evidence is conflicting.”

This earlier Montana procedure was unlike that in many other states and unlike the English equity procedure which had

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*Proclamation, LAWS OF MONTANA, Second Extraordinary Session, 1903.
*Ch. 3, LAWS OF MONTANA, Second Extraordinary Session, 1903. This act is found in amended form in R.C.M. 1947, § 93-901 (8889).

“Story v. Black (1883) 5 Mont. 26, 1 P. 1.

(1889) 8 Mont. 333, 336, 20 P. 637, 638. See also Phillips v. Coburn (1903) 28 Mont. 45, 72 P. 291; Wetzstein v. Largey (1902) 27 Mont. 212, 70 P. 717; Travis v. McCormick (1871) 1 Mont. 347; Caruthers v. Pemerton (1869) 1 Mont. 111. An early action at law often cited on this point is Ming v. Truett (1871) 1 Mont. 322, in which the court discusses at length the necessity of respecting the trial judge's decision on matters of fact.
developed by the middle of the Nineteenth Century, before the reforms of 1852 and 1875. Under the English practice of that date evidence was obtained by having witnesses answer written interrogatories, in private, and their answers recorded as depositions. When all the testimony had been taken, it was published. Appeals could be taken from the vice-chancellor or master of the Rolls to the chancellor, and from him to the House of Lords. At both stages, issues of fact could be reexamined, and the chancellor could take new evidence, although the House of Lords could not. An appeal in equity was most strikingly distinguished from the common law writ of error by its leading to a rehearing of the entire case. Such a rehearing was entirely sensible because of the method of taking evidence. Since the court of first resort decided the case on written testimony without seeing any witnesses and without an opportunity to question them, and since the appellate court had before it the same evidence, it had just as good an opportunity to judge what the facts were, weigh the evidence and form an opinion of credibility as the trial court.

The English custom of complete review of facts and law in equity was brought to this country and was adopted in most states, even though the former English equity method of taking evidence was generally abandoned in the Nineteenth Century, and oral testimony used. The same practice was carried into many codes in states adopting code procedure, although the courts in applying the codes were reluctant to engage in a complete de novo review of facts even in equity cases, and, therefore, customarily said that some more or less undefined weight would be given to the findings of lower courts on questions of fact.

It may be that these codes influenced the drafting of Montana’s 1903 statute, although in view of the circumstances surrounding the Act’s passage, that seems doubtful. The wording of the Montana statute does not resemble that of other state statutes on the subject, most of them being more specific. The

10 Id. at 365-368.
13 Pound, Appellate Procedure in Civil Cases (1941) p. 298.
14 Id. at 300-302.
15 See for example Rev. Stat. of Neb. (1943) § 25-1925, providing for trial de novo of suits in equity before the Supreme Court and requiring an independent conclusion on the facts without reference to the trial court’s decision.
Washington statute, applicable to any judge-tried case, legal or equitable, resembles that of Montana most closely, in requiring that the evidence "shall be examined" and that "the cause shall be determined by the record on appeal."\(^{10}\) In any event the Montana statute does not seem to have been copied from that of any other state, nor have the cases from other jurisdictions been persuasive in developing its meaning. Due to a vagueness in the statute which was perhaps intentional, and to difficulties inherent in appellate procedure, that meaning can be made clear only by answering two questions: (1) Did the statute change existing practice in equity appeals? (2) If so, to what extent did it allow the Supreme Court to consider and decide questions of fact?

The wording of the statute itself gives little help in answering these questions. It would seem obvious from the history of the statute and the reasons for its enactment that its proponents and the legislature which passed it intended to change existing practice. Unfortunately what was obvious in 1903 may be far from obvious in 1951. Reading the words in their context in the rest of the section leaves considerable doubt that they require the Supreme Court to substitute its judgment for that of the trial court on matters of fact, since the Supreme Court could very well "review" and "determine" questions of fact just as they always had, that is by reviewing them and determining whether there was substantial evidence in support of the findings. With such an ambiguous statute, it is surprising to find that none of the cases construing the Act refer to its history, so far as the writer has been able to discover, in spite of the fact that it has been held permissible in this state to refer to the history of the period in which the statute was passed, as an aid to construction.\(^{11}\) Even if the history behind this Act leads to the conclusion that it did accomplish a change, the statutory language and its background do not clearly define the extent of that change. Definition is difficult at best on an issue of this kind. All that can be done is roughly to describe what the attitude of the Supreme Court shall be when errors of fact are asserted, and to require either a complete and independent reexamination, or something less. This statute does not even become that explicit, leaving the Supreme Court quite free to respect the trial court's findings to whatever extent it thinks desirable.

With a statute of that kind as a starting point, a thorough investigation of the cases becomes necessary. The cases as sources

\(^{10}\) Remington, Rev. Stat. of Wash., § 1736.  
\(^{11}\) Fergus Motor Co. v. Sorenson (1925) 73 Mont. 122, 235 P. 422.
of information have their defects also here. The reason is that the question involved is one of the Supreme Court's attitude, a very nebulous question and yet a very important one. In any given case it is impossible to say certainly that a different attitude on the part of the Supreme Court would have produced a different result. No one can be sure, in other words, that on a given record the Supreme Court would affirm if required to apply the pre-1903 attitude of refusing to disturb findings supported by some evidence, but would reverse if they could have made an independent decision on the facts. Thus a reversal has no great force as a holding on this issue. That leaves the investigator to discover from the language used in the opinion what principle the Supreme Court followed in the case. As any lawyer knows, dictum is an unreliable guide if not read in very close connection with the facts of the case in which it was uttered, but for this purpose we are forced to rely on it.

The earliest cases decided after the passage of the 1903 statute are of no help to our solution because they completely ignore the statute and state the rule in the very terms used by the pre-1903 cases. The first case which discusses the effect of the statute is *Hays v. Buzard.* That case was a suit in equity to determine a water right, and presented the single question whether the interest claimed by the plaintiff passed to him under certain conveyances, as an appurtenance to his land. This question turned to some extent upon the use made of the water by

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2Hendrickson v. Wallace (1904) 29 Mont. 504, 75 P. 355: In a suit for injunction and damages the court assumed the cause of action to be equitable and affirmed upon evidence substantially in conflict. See also Landeau v. Frazier (1904) 30 Mont. 267, 76 P. 290, a suit to impose a trust on real estate and for other equitable relief, refusing to disturb findings based on conflicting evidence.

3(1904) 31 Mont. 74, 77 P. 423. An earlier case, Forrester v. Boston & Montana Consol. C. & S. Mining Co. (1904) 30 Mont. 181, 76 P. 2, conceded for purposes of argument that the 1903 statute authorized a trial de novo in the Supreme Court, but found the evidence inadequate for the purpose. It does not throw much light on the construction of the statute.

There are several later cases which seem to reach the same result as *Hays v. Buzard,* without citing it. In *Walsh v. Hoskins* (1917) 53 Mont. 198, 162 P. 960, no finding was made on a crucial issue of fact, and the Supreme Court held that it could make a finding, under the statute. *Lowry v. Carrier* (1918) 55 Mont. 392, 177 P. 756, contains language to the effect that the statute authorizes the Supreme Court to decide the case on the merits. *Harrison v. Riddell* (1922) 64 Mont. 496, 210 P. 490, says that the Supreme Court may make independent findings of fact. *State ex rel. U. S. F. & G. Co. v. District Court* (1926) 77 Mont. 564, 251 P. 1061, contains dictum to the effect that the Supreme Court must try the case on the merits. To the same effect is *In Re Connolly's Estate* (1927) 79 Mont. 445, 257 P. 418.
the parties, as to which the evidence was conflicting. The court, Justice Brantly writing the opinion, gave a complete statement of the evidence and affirmed the judgment, holding that the evidence fully supported the findings of fact, citing the law of 1903. The significant thing about the case is the expression which it contains of Brantly's understanding of the statute:

"Excluding the evidence complained of, and weighing the remainder of it in the record in order to determine the rights of the parties thereon as an original proposition, we think that the findings of the trial court should not be disturbed, as the evidence preponderates in favor of the conclusions reached by it." (Italics added)

The quoted sentence, especially the italicized clause, clearly shows that the Court in this early case believed it was required to conduct an independent retrial of the facts in equity cases, on the evidence in the record. Not only did the Court say a retrial was necessary, but the outcome plainly shows that it actually did retry the case. It found that incompetent evidence had been admitted, conceded that the incompetent evidence had probably influenced the findings, went on to examine the competent evidence in the record, and finally made its own decision based on the competent evidence alone. No weight could have been placed on the trial court's findings of fact here because those findings were concededly made on improper evidence. This case therefore is about as clear authority as can be obtained for the position that the 1903 statute not only changed the prior rule, but required a trial de novo on all factual issues. This is the position which is most strongly supported by the history of the statute, and most easily and clearly defined. There would certainly be no doubt about the extent of the Court's powers under this construction. Certainty is not the only, or even the most important, consideration in the law, however, and the fate of the Hays case can best be indicated by saying that it has not been cited on this point to this day.

In fact only a year later the Court retreated from its position, without mention of the Hays case. Bordeaux v. Bordeaux was a suit for divorce on grounds of adultery with a defense of condonation. On the appeal the Supreme Court assumed without deciding that the charge of adultery had been proved, but held that the offenses had been condoned, reversing a decree for the plaintiff. In reply to the plaintiff's assertion that the Court

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*31 Mont. at 84, 77 P. at 426.
*31 Mont. at 85, 77 P. at 427.
*(1905) 32 Mont. 159, 80 P. 6.
APPEALS FROM EQUITY DECREES

could not upset the findings below, Justice Brantly said that that rule had been changed by the statute of 1903. He went on to disclaim deciding whether the Court already had power to decide questions of fact, and contented himself with saying that the earlier cases no longer applied to equitable causes of action. At this point he departed from the Hays case, however, to say that this new duty of the Supreme Court to reach its own conclusions on the facts must be performed with "a due regard for the findings of the district court, based as they are, upon the testimony of witnesses delivered ore tenus in the presence of the court." Justice Brantly further emphasized the need for self-restraint on the part of the Supreme Court and then used the language often quoted by later cases to the effect that "where the conflict is trifling or unsubstantial or where the evidence preponderates decidedly against the finding," the Court may examine the evidence and make up its own mind on the facts. On the facts of this case there was little conflict as to what had occurred between the parties, the only real issue being whether the events proved amounted to condonation. It was on this point that the judgment was reversed.

The Bordeaux case thus meant that the Court continued to think that the statute of 1903 changed existing law in equity cases, but that the freedom to examine facts was limited to cases where the evidence decidedly preponderated against the findings. This was a definition of the Supreme Court's powers falling somewhere between the very limited definition of the pre-1903 cases and the unlimited one of the Hays case. It clearly was a recognition that the Supreme Court is not a fact-finding body and is not equipped for fact-finding. Where the evidence is in the form of written depositions, as in English equity procedure before the reforms, an appellate court can as effectively judge the facts as the lower court. Where evidence is taken orally, in the presence of the trial court, it is generally conceded that the trial court alone is able to form an accurate opinion of the facts. Some persons are skeptical of the trial court's ability to discover what happened with accuracy, but nearly all agree that the appellate court cannot form an accurate impression of the facts. The stenographic record, even if correct in every de-

*22 Mont. at 166, 80 P. at 8.
*32 Mont. at 167, 80 P. at 9.
*FRANK, COURTS ON TRIAL (1949) pp. 16-23.
*COMMENT NOTE, ADVANTAGE WHICH THE ORIGINAL TRIER OF FACTS ENJOYED OVER REVIEWING COURT FROM OPPORTUNITY OF SEEING AND HEARING WITNESSES, 111 A.L.R. 742.
tail, is a long step removed from the trial." It is this fact which no doubt led the Supreme Court in the Bordeaux case to state its attitude toward factual questions in cautious terms.

The same caution is used by courts in other states where the statutory authority is more explicit than in Montana. Although the statutes have clearly stated that a trial de novo is to be granted on appeal, the courts have just refused to follow them.\textsuperscript{56}

The doctrine of the Bordeaux case seemed to be well established after Finlen v. Heinze,\textsuperscript{60} which in effect followed it, using somewhat different language. That was an action of ejectment, with a counterclaim for specific performance of a contract to convey mining leases. There was a clear conflict in the evidence as to whether there had been an oral agreement to convey the leases. The Court's opinion discussed the evidence at great length. The effect of the 1903 statute was described as being to place on the Supreme Court the duty to review the facts rather than to try them de novo, and to require a reversal of the findings only where the preponderance of the evidence is against them.\textsuperscript{60} The Court also held the 1903 Act constitutional, in the face of an argument that it imposed an original jurisdiction on the Supreme Court which could only be given to the district courts under the constitution. The opinion did not deal with the question whether the statute might violate the constitutional provision establishing but one form of civil action. This case has been thought to be in the line of cases\textsuperscript{60} beginning with Bor-

\textsuperscript{56} Orfield, \textit{Supra}, note 16 at p. 595, states that the use of court stenographers enables appellate courts to find facts more effectively, but surely it must be admitted that the stenographic record is a very poor substitute for hearing the testimony. See also Judge Brantly's dissent in Finlen v. Heinze (1905) 32 Mont. 354, 391, 80 P. 918, 928, saying that the appellate court can try the case de novo where evidence is by deposition, but that it is under a serious handicap where evidence is taken orally.

\textsuperscript{60} \textit{Supra}, note 17. In Nebraska, which has a most explicit statutory requirement of a trial de novo, the Supreme Court still has said that it will pay considerable attention to the trial court's findings. See for example Otto v. L. L. Coryell & Son (1942) 141 Neb. 498, 3 N.W. (2d) 915.

\textsuperscript{61} (1905) 32 Mont. 354, 80 P. 918.

\textsuperscript{62} 32 Mont. at 380, 80 P. at 923.

\textsuperscript{63} The following cases seem to follow Bordeaux and Finlen. The list is not exhaustive: Delmae v. Long (1907) 35 Mont. 139, 88 P. 778; Pope v. Alexander (1907) 35 Mont. 82, 92 P. 203; Copper Mountain Mining & S. Co. v. Butte & Corbin Consol. C. & S. M. Co. (1909) 39 Mont. 487, 104 P. 540; Murray v. Butte-Monitor Tunnel Mining Co. (1910) 41 Mont. 449, 110 P. 497; O'Neil v. First National Bank of Billings (1911) 43 Mont. 505, 117 P. 889; Boyd v. Huffine (1911) 44 Mont. 306, 120 P. 228; Ferris v. McNally (1912) 45 Mont. 20, 121 P. 889; Winslow v. Dundom (1912) 46 Mont. 71, 125 P. 136; Barnard Realty Co. v. Butte
deaux v. Bordeaux, which it cited and on which it heavily relied, holding that the power of the Supreme Court to review the facts was greater than it had been before 1903 but less than a full power to exercise an independent judgment. This line of cases is strong and still important. The cases in this group decided by Justice Brantly clearly and explicitly state that the limitation on what would appear to be the meaning of this statute is solely due to the appellate court's lack of opportunity to judge credibility and observe the witnesses. His formulation of this doctrine is a compromise, made in the interests of workable judicial administration, between the requirements of the statute as construed by the Hays case and the practical necessities of the appellate court's position in the court system.

It may be suggested that this compromise is not different from the pre-1903 rule, and is in effect a nullification of the statute. One case shows that that is not so, or at least was not at the time Justice Brantly developed the compromise. In Barnard Realty Co. v. City of Butte, a suit to quiet title to real estate, the district court gave a decree for the defendant. On appeal the contention was that the evidence did not support a finding that there had been public travel over the area in dis-


*(1915) 51 Mont. 48, 149 P. 491; Yellowstone National Bank v. McCullough (1916) 51 Mont. 590, 154 P. 919. Cf. Buhrer v. Loftus (1917) 53 Mont. 546, 165 P. 601, a suit to cancel notes and a mortgage for fraud, in which, although plainly an equitable action, the Court applies the legal rule, saying that the only issue on the appeal is whether there was substantial evidence to support the findings. This appears to be inconsistent with Justice Brantley's other opinions.

*(1918) 55 Mont. 384, 177 P. 402.
pute, from 1899 to 1911, so as to give the city an easement by prescription. The Court, by Justice Brantly, thoroughly reviewed the evidence and reversed the decree, directing entry of a decree for the plaintiff. In doing this, it used the following language:

"If this were a case at law in which the evidence were in the condition disclosed in the record, we would be compelled to sustain a verdict for the defendant, because we could go no further than to determine whether the evidence introduced by the city made out a *prima facie* case. In equity cases, however, such as this, we are required to review and to determine all questions of fact as well as of law, unless for good cause a new trial ought to be ordered. . . . The rule here declared is of necessity subject to the limitation that in determining questions of fact, due allowance must be made for the more advantageous position occupied by the trial judge, in that he has had the opportunity to observe the conduct and appearance of the witnesses while testifying. [Citing cases.] After a careful examination of the large volume of evidence . . . we are constrained to the conclusion that the weight of it is decidedly against the conclusions reached by the trial court."

This is the only case the writer has found which says in so many words that on the evidence in the record the findings would have to be affirmed but for the statutory command.

The reasoning of these cases has not been applied without some difficulty by the Supreme Court, perhaps partly because of its reliance on a form of words without clear awareness of the problem to which the words refer. In some of the early cases it was said that findings would be upset only where a "clear preponderance" or a "decided preponderance" of the evidence was against them. Other cases picked up these phrases and applied them in such a way that it is difficult to discover what they mean. For instance several cases state that findings will be reversed where there is a preponderance of evidence against them, sometimes equating this with the statement that there must be a clear preponderance or decided preponderance of evidence contrary to the findings. But if only a preponder-

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55 Mont. at 391, 177 P. at 405.
Supra, notes 35, 36.
"Finlen v. Heinze (1905) 32 Mont. 354, 80 P. 918.
"Pope v. Alexander (1907) 36 Mont. 82, 92 P. 203.
APPEALS FROM EQUITY DECREES

ance need be shown, that is the very question which a trial court
decides, and if that is the rule the Supreme Court is making an
independent judgment on the facts without regard to the find-
ings." If the Supreme Court can reverse whenever it disagrees
with the district court about the preponderance of the evidence,
then it is in effect substituting its judgment on the facts for that
of the district court. Presumably these cases do not mean to
adopt this doctrine, but they are certainly open to that con-
struction.

Regardless of the Supreme Court's general approach, sev-
eral cases make it plain that that general approach may yield to
a case in which the evidence is in such form that the Supreme
Court can evaluate it just as well as the district court. This oc-
curs for example where the evidence is entirely documentary,
or in the form of depositions. The reason for this is of course
that when the practical difficulties preventing the full review
of facts commanded by the statute are removed, a full review
is given.

Conversely, if the record is in such condition that the Su-
preme Court cannot judge the facts as effectively as usual, it
will further limit its scope of review. This may happen when
significant parts of the evidence are left out of the record on
appeal. It has also happened when the record presented the
evidence in narrative form rather than in question and answer
form, due to counsel's violation of the Rule of Court formerly
in force.

"Exchange State Bank v. Occident Elevator Co. (1933) 95 Mont. 44, 24
P. (2d) 126; 9 WIGMORE ON EVIDENCE (3rd ed. 1940) § 2408 defines the
extent of persuasion in a civil case as the requirement that there must
be a "preponderance of evidence" in favor of the party who is to pre-
vail.

"In re Colbert's Estate (1915) 51 Mont. 455, 153 P. 1022 (Evidence con-
sisted chiefly of depositions.) See also Hoppin v. Lang (1928) 81 Mont.
330, 263 P. 421, in which the district court tried the case on the record
made in a prior trial of the same case. The Supreme Court said that
it was in as good position to evaluate the written record as the trial
court, so that the trial court's findings would not be as persuasive as in
the ordinary case.

"Yellowstone National Bank v. McCullough (1916) 51 Mont. 590, 154 P.
919.

"Koopman v. Mansolf (1915) 51 Mont. 48, 149 P. 491; Security State
Bank of Havre v. McIntyre (1924) 71 Mont. 18, 228 P. 618; Stephenson
v. Rainbow Flying Service (1935) 99 Mont. 241, 42 P. (2d) 735; Rules
of the Supreme Court, VII, 3, 87 Mont. at page xx, required testimony
to be in narrative form in the record, except that in equity cases present-
ing questions of fact for review by the Supreme Court the testimony
had to be in question and answer form. The present rule of course
requires all records to present the evidence in question and answer
form, Rules of the Supreme Court, VIII, 5, 120 Mont. at p. xi, so that
cases of this kind would no longer arise.
The Supreme Court has shown the same flexibility in adapting rules to conditions where the issue is the granting of a new trial. In *Gibson v. Morris State Bank* it held that where the motion for new trial in equity came before a judge other than the one who originally heard the case, he should follow the 1903 statute and the cases construing it, looking at the evidence with awareness that the original trier of fact was in a superior position for determining what the facts of the controversy were. This case could not come up today since the statute no longer allows a motion for new trial in equity on the ground of insufficient evidence. The case is nevertheless interesting as an example of the application of a statute dealing with practice on appeal to the new trial situation, which usually raises quite different problems.

The presence of so many cases adopting the compromise view of the 1903 statute's effect and of the Supreme Court's power to review facts does not mean that there has been no conflict upon the Court about these matters. In fact there is an almost equally numerous line of cases stoutly maintaining that the 1903 statute changed nothing, and that the scope of review of facts in equity cases is precisely the same as in actions at law where the facts are tried to a jury. This line of cases can be traced back to an early date. In *Watkins v. Watkins* for example, a quiet title suit involving water rights, the Court discussed the problem at considerable length. It started by purporting to follow the *Bordeaux* case, saying that findings may only be upset where they are contrary to the decided preponderance of the evidence, although the facts must be reviewed under the statute. It then proceeded to define "decided preponderance" in such terms that the result seems to be an affirmation where there is any substantial evidence in support of the findings below:

"It will then endeavor ... to determine whether there is any substantial support for the findings in the evidence. ... If ... we determine that the testimony furnishes reasonable ground for different conclusions, then we will hold that there is no decided preponderance in the evidence against the findings and decline to disturb them."

The chief issue of fact in this case concerned the genuine-
ness of the signature on an instrument of conveyance. The Court affirmed a judgment for the defendant, saying that there were reasonable grounds for differing conclusions as to the facts. The review of the facts is made in the same way that the Court usually reviews facts in jury cases, which is explainable only as a misapprehension of the Bordeaux case and Finlen v. Heinze, on which the Court relied.

Many cases since Watkins v. Watkins have stated the doctrine of that case in even more explicit terms, although some of them cause uncertainty by their failure to cite or refer to the 1903 statute. The cases cited all are equity cases, however, and even though the Court's attention was not directed by counsel to the statute, it would appear that they are strong authority for the limited scope of review borrowed from actions at law.

Several cases reach this result after a full discussion of the statute, so that they are more persuasive authorities. Bosanatz v. Ostronich was a suit to impose a trust upon a half interest in a mining claim. The Supreme Court affirmed a judgment for the defendant upon conflicting evidence of the partnership agreement which was the basis for the suit. The Court in doing so said that the findings of fact made by a trial judge in an equity case are to be treated on review exactly like the verdict of a jury, to be upheld if there is a substantial conflict in the evidence. Upon rehearing, after counsel for the plaintiff had strongly argued the effect of the statute, the Court reiterated.

52(1905) 32 Mont. 354, 80 P. 918.
53(1909) 39 Mont. 367, 102 P. 860.

It is impossible to say whether the following cases apply the foregoing line of authority or the compromise doctrine of Bordeaux v. Bordeaux. Atkinson v. Roosevelt County (1924) 71 Mont. 165, 227 P. 811; Welch v. Thomas (1936) 102 Mont. 591, 61 P. (2d) 404.

55(1920) 57 Mont. 197, 187 P. 1009.
its statement and refused to alter its holding. The value of the case as a precedent is slightly impaired by its reliance to a great extent on cases involving appeals from judgments at law, including one case decided before 1903. The equity cases which it cites, *Boyd v. Huffine* and *Winslow v. Dundom*, are cases following *Bordeaux* and *Finlen v. Heinze* and clearly do not support the statement for which they are cited.

A recent case is equally explicit in equating the "decided preponderance" language of the cases following the *Bordeaux* case with the "substantial evidence" language used where the appeal is from a judgment rendered on the verdict of a jury. This was the case of *Sanders v. Lucas*, a suit for specific performance of an option contract. The factual issue was whether one of the defendants, who had been plaintiff's attorney, had taken the option for his own benefit, or on behalf of the plaintiff. The evidence as to what had been written and said and understood by the parties was in conflict. The Court affirmed a judgment for the plaintiff. On the question of its power to review the facts it first stated the familiar rule that although the statute gives the Court power to review the facts, it will only reverse where the evidence "decidedly preponderates" against the findings, citing the *Nagle* case, which is some authority for that language. The Court then said that the evidence does not decidedly preponderate against the findings when there is substantial evidence to support them, so that there will be no reversal if substantial evidence supports the findings. The clear impression conveyed by this that law and equity are no longer to be distinguished is made all the stronger by the court's citation of an action at law to support its reasoning. Likewise it has since been cited and followed in actions at law, indicating

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*See for an example of an appeal from an action at law Ely v. Montana Federation of Labor (1945) 117 Mont. 609, 160 P. (2d) 752, an action at law for salary in which the Court says, "The function of this Court, in reviewing the evidence, is limited to a determination whether or not there is substantial evidence to support the findings."

*Dalbey v. Equitable Life Assurance Society (1937) 105 Mont. 587, 74 P. (2d) 432, an action on a life insurance policy, which states that a trial court's finding will not be reversed if evidence furnishes reasonable grounds for different conclusions.*
that some other members of the Court agree that there should be no such distinction."

Since Sanders v. Lucas" there have been a substantial number of cases following it in its narrow limitation on the scope of review in equity cases. This line of cases must be included in the number of those earlier cases which adopted the same attitude," so that the two groups of cases together make up a large body of authority for this position. One cannot help observing, however, that a very great majority of these cases do not cite the 1903 statute, whether purposely or inadvertently, it is impossible to say. Nevertheless they must be considered on this question.

In view of the foregoing, it would be very easy to conclude that it had become settled in Montana that the scope of review in equity and at law are now the same. Unfortunately such a conclusion appears to be erroneous, if the case of Miller v. Miller" is considered. In that case, a suit to quiet title to land, a decree for the plaintiff was reversed and the case remanded with directions to dismiss the bill. The majority opinion quotes from the 1903 statute, now R.C.M. 1947, Section 93-216, italicizing the portion authorizing a review of the facts, but gives the question no discussion. The plaintiff's title depended upon a deed which was in evidence but which had never been executed, and also upon his contention that a prior executed deed had been destroyed. The evidence on the latter point was oral and conflicting. The majority stated it and discussed it in great detail before holding that the plaintiff had not sustained his burden of proof, apparently assuming that in an equity case it had broad powers to review the facts.

Mr. Justice Metcalf dissented, together with Mr. Justice Gibson, partly in disagreement about the Court's power of review in equity. This dissent is important in that it is the only case the writer has been able to find in which the Court has divided on this issue, with a dissenting opinion, even though

"(1941) 111 Mont. 599, 111 P. (2d) 1041.
"Supra, note 54.
"(1948) 121 Mont. 55, 190 P. (2d) 72.
there is a wealth of conflicting authority. The dissenting judges admitted that equity cases are controlled by the statute and conceded that the statute gives the Court "more latitude in its review of the facts" than it has in an action at law. After making this concession the dissent cited the constitutional provision for only one form of civil action, and then quoted from a law review article which states that Montana has construed away the force of the statute. It is common enough knowledge that courts sometimes do nullify legislation by "construction," but it is unusually candid for a judge, even in a dissenting opinion, to concede that that is what he is advocating. Nevertheless, such a process of "construction" is open to serious objection, especially where, as in this instance, the court admits that the statute commands a different rule for equity. And even if the statute as written was not clear, apart from its history, the earlier cases which construed it as changing the scope of review should be recognized as giving it a meaning different from that contended for by Justice Metcalfe, a meaning which should not casually be overruled.

In support of this contention that all life has been construed out of the statute, the Miller dissent quoted from Watkins v. Watkins, which does sustain it. The dissent also stated that it has been settled by a long line of cases, starting with Ming v. Truett that findings of a trial judge can only be upset if not based upon substantial evidence. This statement can be criticized on several grounds, the most obvious of which is that it assumes, without

121 Mont. at 78, 190 P. (2d) at 83.
"Mont. Const., Art. VIII, § 28. Justice Metcalfe did not argue that the statute is unconstitutional under this section, but merely cited it to indicate that law and equity are no longer separate systems, and no longer have so many procedural differences. No case seems to have considered this particular question of constitutionality in this state. It does not appear to be a substantial question. The Constitution does not abolish all distinctions between legal and equitable actions. Frisbee v. Coburn (1935) 101 Mont. 58, 52 P. (2d) 882; 1 POMEROY, EQUITABLE JURISPRUDENCE (5th ed. 1941) § 40. Other procedural distinctions have been kept, such as in new trials R.C.M. 1947, § 93-5602 (6306). The statute therefore would appear to be constitutional.

"Hughes, THE SUPREME COURT OF THE UNITED STATES (1928) 280; See for an example of this type of "construction" by the Supreme Court, U.S. v. Elgin, J. & E.R.R. Co. (1935) 228 U.S. 422, and Mr. Justice Stone's dissenting opinion, at p. 512, to the effect that upon the majority's construction of the statute, "one is at a loss to say what scope remains for the operation of the statute." See also Frankfurter, Some Reflections on the Reading of Statutes 47 COL. L. REV. 527 (1947).
"(1909) 39 Mont. 387, 102 P. 860, Supra, notes 49 and 53.
"(1871) 1 Mont. 322.
saying so, that the statute of 1903 never did have any effect. That can hardly be the case. Justice Metcalfe's dissent itself argued that the statute's present debility was the result of the Supreme Court's treatment of it rather than of its own inherent weakness. The statute, as has been argued, apart from its history, is somewhat ambiguous, but certainly the *Hays, Bordeaux* and *Finlen* cases stand opposed to any contention that it made no change in prior law. Although it is, therefore, not true that the law had been settled on the point, this dissent clearly does have strong case law support. In fact the case" just preceding *Miller v. Miller* in volume 121 of the Montana reports seems to support Justice Metcalfe's dissent, as do many other recent cases.6

The foregoing account brings the development of this problem down nearly to the present and raises the question of what the Supreme Court's present position is. There is authority, as this paper has attempted to point out, for saying that the Supreme Court may act in any one of three ways upon an appeal from an equity decree: (1) It may examine the record in detail and make an independent decision, without regard to the trial court's findings.7 (2) It may review the record somewhat more closely than in an action at law, but still pay some attention to the findings below, reversing them only when the evidence "clearly preponderates" against them. (3) It may treat the trial court's findings just as it would the verdict of a jury, and reverse only where they are not supported by substantial evidence. The distinction between (2) and (3) is by no means perfectly plain in all the cases, but it can be discerned by a comparison, for example, of *Bordeaux v. Bordeaux*8 with *Watkins v. Watkins*9 or with *Sanders v. Lucas.*10 In view of the very large number of cases and the lack of agreement among them as to the effect of the 1903 statute it appears to the writer to be impossible to predict in a given case which of the three alternative rules would be followed by the Court.

The first alternative has only slight authority in its favor.11 It has the virtues of being in agreement with the purpose of the 1903 statute, judging from its history, and of being a clear def-

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6**Laas v. All Persons etc.** (1948) 121 Mont. 43, 189 P. (2d) 67, Supra, note 66.
7**Supra,** notes 54, 66.
8"For arguments against the broad powers of review, see Clark and Stone, Review of Findings of Fact, 4 Chi. L. R. 190 (1937).
9**T** (1905) 32 Mont. 159, 80 P. 6.
10**T** (1909) 39 Mont. 367, 102 P. 860.
11**T** (1941) 111 Mont. 599, 111 P. (2d) 1041.
12**Supra,** note 23.
inition of the Supreme Court’s power. It has the great defect of placing the trial of issues of fact before a tribunal not equipped to try such issues. It has the additional defect, also serious, of imposing a great deal of additional work on the court by requiring the full examination of long records, weighing of evidence, inspection of exhibits, judgment of credibility and all the other labor involved in deciding cases de novo. Presumably its adoption would further increase the Court’s work by inducing more losing litigants to appeal on questions of fact. At any rate, it can probably be discarded as a practicable alternative, although some very recent cases may be using this approach.4

The second alternative is the product of a much stronger line of authority. The chief difficulty with it is its vagueness, although that might in some quarters be considered an advantage, since it would allow flexibility in the Supreme Court’s review of matters of fact. It does not tell the practicing attorney much about his chances for getting a reversal, or upholding a judgment on appeal, however, since he can never be sure just how persuasive the trial court’s findings will be.

This compromise doctrine does seem preferable to the view that the Supreme Court can exercise an unfettered, independent judgment on matters of fact, because it takes account of the Supreme Court’s lack of opportunity to form such a judgment. That lack of opportunity is recognized in most other states having similar statutes, where the appellate courts have limited their own powers of reviewing facts to a similar extent.5 It is also recognized in the federal courts, where on review of judge-

4Higby v. Hooper ....Mont...., 221 P. (2d) 1043 reverses the findings after a thorough review of the evidence, citing, but not commenting upon, R.C.M. 1947 § 93-216 (8805). Hart v. Barron (1949) ....Mont...., 204 P. (2d) 797 is a similar case, reversing a judgment for the plaintiff and directing entry of a judgment for the defendant. Justice Metcalf, concurring specially, adhered to his dissent in Miller v. Miller, Supra, note 63. Here again the statute was cited by the majority without comment. Query as to Hanson v. Lancaster, (1951) .....Mont.... 226 P. (2d) 105, in which a decree was also reversed for error in finding the facts. The question of the scope of review was not discussed, and the Court may have felt that the findings could not be supported on any theory. Bauer v. Monroe (1945) 117 Mont. 306, 158 P. (2d) 485 also seems to review the facts independently, as the dissent evidently thought.

tried cases the appellate court may only upset findings of fact where they are "clearly erroneous." 104

The third alternative would seem superior to either of the other two, however, if the statute of 1903 did not stand in the way. Its strength is its simplicity, of course. If either of the other two doctrines is used, complexities are caused in a field already more complex than it should be. For instance, in any appeal the Supreme Court would have first to decide whether the case was legal or equitable, which is not always a simple matter. If the main suit were legal, but an equitable cross-complaint had been filed, presumably the Court would have to review one phase of the case narrowly and the other broadly. 105 If a single cause of action involved both legal and equitable remedies, perhaps the Court would try to decide which of the two was crucial, or predominant, and characterize the action accordingly. 106 The fact that courts seldom bother to discuss these technicalities leads to the inference that they sensibly recognize the futility of such discussion. Yet the technicalities are there and should be dealt with if the statutory distinction is to be observed, and it should be observed so long as the statute remains in the code, unless a strong line of cases is to be overruled. As long as it is in the code, therefore, it would seem that appeals in equity should be treated differently from appeals at law, unless the Court wishes to adopt the dubious expedient of repealing the statute by construction.

Enough has been said to reveal the writer's conviction that the statute ought to be repealed so that the Court may be free to apply the substantial evidence rule and to end the conflict in the cases. It does not have that freedom at present, because of the statute, but rather is faced with a dilemma created by the con-

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105 This was the case in Higby v. Hooper (1950) Mont., 221 P. (2d) 1043, where the plaintiff sued for damages for breach of a building contract and the defendant filed a cross-complaint for foreclosure of a mechanic's lien. Both the trial court and the Supreme Court treated this as a suit in equity, but the main suit was clearly an action at law. Even the suit to foreclose a mechanic's lien has been held in Montana to be a blend of law and equity. Wertz v. Lamb (1911) 43 Mont. 477, 117 P. 89. Such a case presents a preliminary problem of characterization which just cannot be solved in a satisfactory manner. In White v. Chastain (Mo. App., 1939), 123 S.W. (2d) 548, the court apparently did attempt to distinguish between the main case and the cross-complaint, but actually treated them alike in reviewing the facts.

106 That was done in Crowley v. Ballard (1939) 279 Ky. 484, 131 S.W. (2d) 463. See also Carroll v. Bullock (1913) 207 N. Y. 567, 101 N.E. 438; Di Menna v. Cooper (1917) 220 N. Y. 391, 115 N.E. 993.

http://scholarship.law.umt.edu/mlr/vol12/iss1/3
Conflict between the statute and the necessities of appellate procedure. Two other observations can be made. One relates to the effect of such needless technicalities upon public opinion. If an informed person should ask why it is that the Supreme Court in one case was able to upset the trial judge's findings, but was not able to do so in another, although both cases came up from the same judge and were tried by precisely the same procedure, the only possible answer would be that it is because in 1903 the Amalgamated Copper Company could not get a fair trial in Butte, and because in the Eighteenth Century English legal history had occurred in such a way as to develop a distinction between the two cases. And if this person were then to comment that such reasons are interesting to an antiquarian but hardly satisfactory to justify an appellate procedure in 1951, we could only agree. It is perhaps this sort of useless legal distinction which helps to account for the impression of many persons that the law is not primarily concerned with the sensible adjustment of disputes.

The writer is well aware that cynical persons may argue that any discussion of appellate court opinions on this issue is futile because the court will act about in the same way, regardless of whether it has before it an equity suit or an action at law, and regardless of what its opinions may say on the subject. With the more or less unfounded belief that this is not so, that there is a distinction, and that the difference in the attitude of the Court toward the two types of case, even though not capable of any precise definition, would be reflected in a difference in the outcome of cases, an investigation was made of cases in this state, beginning with Volume 29 of the Montana reports and concluding with Volume 225 Pacific (2d), number 4. The cases looked at were those in which the opinions indicated that a contention had been made on appeal that the evidence did not sustain the findings or the verdict. A count was kept of actions at law and suits in equity, and of the number of cases in which this contention was upheld or denied by the Court in each kind of action. Where a single important finding was held unsupported the case was counted as one in which the contention was sustained. The count is not claimed to be complete, but it contains a large enough proportion of the total cases to be reliable as showing what the Court has done since the 1903 statute was enacted.

One hundred and forty-four appeals from actions at law were counted, in nineteen of which the claim of no substantial evidence to sustain the verdict was upheld, and in one hundred
twenty-five of which it was denied. This means that in 13.20% of these cases the verdict was held unsupported by substantial evidence, or the findings of the judge were reversed, in jury-waived cases.

The count for equity cases was one hundred and thirty. Of these, findings were reversed as unsupported by evidence in thirty-two cases, and affirmed in ninety-eight cases. The percentage of reversals here is 24.62%, or nearly twice as large as in actions at law. Although of course that figure is of no help in deciding what the Court will do in a specific case, it does support the argument of this paper that the 1903 statute has not been entirely repealed by construction. It also is some evidence of the need for repeal of that statute if the scope of review is to be the same in suits in equity as it now is in actions at law, a result which would seem to be highly desirable.