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Arthur W. Phelps

William & Mary Law School

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WHAT IS A "QUESTION OF LAW"?

ARTHUR W. PHELPS

Professor of Jurisprudence, College of William and Mary

The courts have for many years been developing and using a broad concept which at times has threatened to bring chaos rather than light to the solution of the legal problems it has affected. This concept enunciates the division between questions of law and questions of fact. It is broader than the question of the function of court and jury, for it has achieved significance in the determination of question of the scope of review which will be accorded by appellate courts in jury-waived cases, administrative review, and substantively with respect to mistake, fraud, warranty and the like.

It is immediately clear that a legal system which postulates norms (roughly, rules and principles of law) must make some differentiation between a norm and the question of the existence of the facts which call for its application. If this view is accepted, rather than some anarchical conception of law derived from Justice Holmes' casual observation that law is what the courts do in fact, it is of importance to formulate some sort of category to indicate that the establishment of a claim involves the proof that certain facts exist, and to the contingency of their existence the state attaches the legal consequences now asserted by the claimant.¹

Newer schools of thought in jurisprudence when dealing with the nature of law seem to place little emphasis upon the relative cohesion, symmetry, and predictability that a body of legal doctrine can acquire. The view of

¹ WIGMORE, EVIDENCE § 1 (2nd ed. 1923).

such writers is valuable for the spotlight attention given to heretofore neglected psychological and a-logical features of the judicial process. However, since there is a negation of law in its accepted sense, their reasoning with respect to such problems as the difference between questions of law and questions of fact is of scant value to those thinkers who accept the premise that law has normative significance.

It is a part of the thesis of this article that the reason some influential writers see the distinction between questions of law and questions of fact as a difference in degree only is merely a reflection of their philosophy of law which treats the normative significance of law as of little moment and regards judging chiefly as administration or policy making according to vague principles of efficient dispatch of disputes which for the safety and good order of the state must be brought to rest. They recognize the importance of the settlement of disputes but regard the rule or theory upon which the settlement is to be made as relatively unimportant.

Most writers on the subject after having made the primary distinction between questions of fact (that certain facts exist) and questions of law (to the contingency of the existence of certain facts the state attaches legal consequences) are content to let the matter drop and to turn to the narrower phases of the subject, such as the question of the division of functions between judge and jury. Professor Wigmore, before he leaves the difficulties of the broader question, and settles to the comparative security of case distinction in the narrower field, suggests:

“But the popular distinction between ‘fact’ and ‘law’ is here as accurate as the situation requires. The requirement is for phrases which shall set off in one class the

generality that the State sanctions and will habitually enforce a legal relation of a specific content, and in another class the specific occurrence constituting the contingency in which the State predicates this relation. . . . That many phenomena (events, or facts) may not at first sight be simple to classify, or easy to deal with, does not affect the reality of the distinction."²

It is apparent from this statement that Professor Wigmore believes in the reality although perhaps not in the practicality of the distinction. Holdsworth, too, takes the same view, and then adds parenthetically: "This is not the place to attempt to map out minutely the debatable boundary line between law and fact."³

In opposition to this point of view, Professor Isaacs, after a careful survey of the various situations in which the chant "law and fact" has been used, comes to the conclusion that there is generically no difference between questions of law and questions of fact.⁴ Professor Cook was, perhaps, the first to make this analysis, but his comments were restricted to the problem of the difference between conclusions of law and statements of ultimate fact in a pleading.⁵ Professor, now Judge, Charles E. Clark also takes the position that the difference between questions of fact and questions of law is one of degree.⁶ He seems to do so not so much because of a clear recognition of the philosophy inherent in this view but because of his intense desire to accomplish the important ideal of trial on the merits.

²*Supra* note 1.

³1 HOLDSWORTH, *HISTORY OF THE ENGLISH LAW* 298 (3rd ed. 1922).

⁴Isaacs, *The Law and the Facts*, 22 *COL. L. REV.* 1, 11 (1922).

⁵Cook, '*Facts*' and '*Statements of Fact*,' 4 *U. OF CHI. L. REV.* 233 (1937).

⁶Clark and Stone, *Review of Findings of Fact*, 4 *U. OF CHI. L. REV.* 190, 211 (1937).

After stating that the distinction between fact and law is a primary one, none of the writers such as Wigmore and Holdsworth extends his observations to indicate why the distinction is basic, or why it has practicality. They seem agreed that where the problem is narrowed to a question of the division of functions between judge and jury, no aid is to be obtained by defining "law" and "fact," the inquiry being regarded in such case as one into the kinds of questions of fact which should be determined by the judge. Where the problem is one of pleading, of scope of review, of administrative review or of mistake of law, it would also seem to follow from their discussions that defining the terms "law" and "fact" does not afford a satisfactory solution for any case.⁷ Now if the distinction is primary, as has been asserted, yet of limited significance in the solution of legal problems *per se*, for what purpose is the doctrine maintained? The utility of the concept must lie not in its immediate "case-deciding" quality at all, but in the fact that the power resting in the court to classify a question as a question of fact permits a wider range of final decision by the court according to the needs of the case than would be true without its use. The actual decision of a case could not, therefore, be turned on the differentiation by definition of law from fact, but the concept would have meaning as a classification of the situations in which the court may find it necessary to vary the norm, ordinarily applicable, usually by making it more specific, to meet the needs of a particular case.

In the typical case a general standard applied by a trial court (either in a jury or a jury-waived case) is considered by the appellate court to require more specific

⁷⁵ WIGMORE, EVIDENCE § 2549 (2nd ed. 1923); THAYER, A PRELIMINARY TREATISE ON EVIDENCE 185 (1898).

exposition for the situation at hand than it has received. The division between law and fact in its broad categorical sense has been drawn by the trial court, but merely drawn on the basis of a broader principle of law than seems satisfactory to the appellate court. Always, however, is present the norm on the one hand, and the fact on the other even though the norm may be less definite where it is a broad principle of law.

If, then, the difficulty of separating functions of court and jury, determining scope of review in jury-waived cases and cases on administrative review, and determining the difference between mistakes of law and mistakes of fact, is recognized as arising not out of the distinction between law and fact, but out of the distinction between "standard"⁸ which gives the courts, both trial and appellate, very wide range in deciding and reviewing cases, and "rule" the unreliable and misleading attempts to think of each of these problems as depending on the difference by definition between law and fact, with its confusing consequences would be obviated. But more important such analysis exposes for clear examination the nihilistic philosophy inherent in considering the difference merely one of degree.

In order to furnish the basis for this thesis, it will be necessary to discuss the chief points at which confusion seems to arise in the decision of cases because of the persistent application by the courts of the law-fact formula.

Statutes in many jurisdictions provide that pleadings shall state the ultimate facts as distinguished from conclusions of law. The language of special verdicts or

⁸POUND, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TULANE L. REV. 475 (1933); HALL, READINGS IN JURISPRUDENCE 661 (1938).

special findings by courts is subject to the same limitation. In order to decide what is meant by such provisions, it is necessary to determine exactly what is meant by law and what is meant by fact in such context. Several writers have advanced solutions for this riddle. Probably the most widely quoted is that of Professor Cook who says, "the time-honored distinction between statements of fact and conclusions of law is merely one of degree."⁹

In building up to this conclusion Professor Cook concedes there is an external world of fact upon which he can bruise his shins. But when one starts to talk about this world of fact, he does not believe the events can be described as they "actually exist or occur." A pleader, for instance, will necessarily select from the "crude, raw events" the aspects of a situation which he as a pleader deems relevant and of importance in informing the court and the other party of the grounds upon which he desires the court to act in his favor. After selecting the relevant facts the pleader will have to express them under certain verbal symbols. Since the pleader is a lawyer he will select verbal symbols which have acquired a certain technical meaning for lawyers. When such verbal symbols having a technical meaning are used to describe the facts, a large part of the "concrete particularity" of a situation as it occurred will be left out. Professor Cook says that any statement would leave out some of this concrete particularity, therefore, as to the sufficiency of a pleading, it is only a question of whether so much has been left out that the court and the opposite party are not fairly apprised of what the plaintiff expects to rely upon.

Professor Gavit, on the other hand, concludes that the prohibition against the use of conclusions of law in a

⁹*Supra* note 5 at p. 244.

pleading is against the use of language in its legal significance as opposed to a use of language in its factual significance.¹⁰ He considers the requirement of pleading ultimate facts is one to insure that the pleader, if he has a choice of language (since sometimes words with both legal and common currency have to be used because there are no other which adequately express the idea) must choose and use "the most compact and concise *common* language available." The difficulties of a pleader would therefore be verbal, and would be solved by the use of the proper language.

A conclusion of law under Professor Cook's analysis would differ from a statement of fact only in so far as it constituted too general a description of the facts of the case, while under Professor Gavit's analysis a conclusion of law would consist chiefly in the use of a legal word or words when a common word or words should have been used.

It is obvious that Professor Cook is not talking about "law" in a normative sense. He is merely saying that operative facts can be stated so generally that they become indefinite as an aid to the court and opposite party in reaching an issue in a case. If the word "law" as used in the phrase "conclusions of law" does not denote the concept of "law" as a norm, but merely one aspect of law as a norm, how can it be said that Professor Cook's analysis really sets off "law" against "fact" in a sufficient sense that he can arrive at any conclusions as to the difference between "law" and "fact"—yet he apparently considers law and conclusions of law synonymous terms.

¹⁰Gavit, *Legal Conclusions*, 9 *IND. L. REV.* 109 (1933).

Suppose, for instance, the allegation is that a defendant is "indebted to" a plaintiff, or that a statute is "unconstitutional and void," or that a treasurer had paid out money "unlawfully." These statements barely suggest norms and would not provide the concreteness necessary for administrative (procedural) purposes in the cases to which they relate. They contain at most a composite statement (indicating vaguely a whole group of generic operative facts) which is related by the pleader to a particular result. Since the facts are so vaguely stated, a conclusion of law is really little more than a statement of the result the pleader wants the court to reach. Modern pleading frequently accepts such "conclusions of law" *because* they postpone decision on the applicable rule of law until a full factual disclosure of the occurrence or event which is the basis of the action.

Professor Charles E. Clark in his book on code pleading accepts Professor Cook's view of the difference between conclusions of law and ultimate fact.¹¹ Considering a "conclusion of law" as an ill-expressed operative fact, it may well be that the difference is one of degree. It would be the difference between expressing an operative fact in one way and expressing it in another. Professor Clark, however, in a recent article, without any exegesis whatsoever, considers the solution of the pleading problem of the difference between statements of ultimate fact and conclusions of law as a solution of most of the law-fact problem.¹² Neither Professor Clark nor any of the other writers making this prestidigitatorial transition gives a sufficient basis for belief that this is the case. There has, nevertheless, developed a widespread belief that the

¹¹CLARK, CODE PLEADING 155 (1928); 231 (1947 ed.).

¹²*Supra* note 6.

problem of distinguishing law and fact is, in all or most of its ramifications, a question of degree.

As has been shown, however, Professor Cook, whose work is the basis for these later discussions, actually has made no comparison between law and fact. It is, therefore, misleading to use the arguments he has advanced in connection with the pleading problem as determinative of the law-fact problem in general where the distinction attempted to be made is not between two types of statements of operative facts, but an asserted difference between law in the sense of norm, and fact. Such a difference has been and is recognized by the courts where a distinction is made between the functions of court and jury, cases involving the scope of review, cases in which a distinction is drawn between mistake of law and mistake of fact, etc.

In early days before civilization had developed much beyond the stage of a peaceable ordering of society, there was little difficulty with rules of law. The substantive as well as the adjective law consisted of the rules which governed the jurisdiction and procedure of the courts. In these primitive times the decision of a case upon the facts according to some standard was impossible because society had not developed the cohesion or the mechanics necessary to accomplish this. It was not until the thirteenth century that even so fundamental a conception as that of burden of proof began to take shape. The jury evolved under the lingering influences of the secta, trial by battle, ordeal, and compurgation. There was a tendency at first to treat the jury as a formal proof substituted for these earlier modes of trial. The jury, as a body of witnesses, was the formal test to which the parties had submitted themselves, and a right judgment would be reached in a battle for instance, because the

process was directed by divine intercession. No one considered asking how the test worked, for its mysteries were not subject to the scrutiny of men. Records at this time, therefore, indicate very little concerning rules of evidence, or instructions given to juries.¹³

Gradually, around the seventeenth century, with the transition in the status of jurors from that of witnesses to that of judges of the facts, the maxim took shape that the jury were to judge of the fact in the case and the judge of the law. Strictly construed, of course, the maxim was not accurate, for incidental questions of fact which are not a part of the issue of a case have always been decided by the judge. Restricted to the question actually at issue between the parties, and not extended to fields where it has no application—such as incidental matters arising before and during the trial—there is a broad descriptive sense in which it may be said that there is a separation of function between the duty of the court with respect to the norm which is to be applied in the case and the duty of the jury with respect to the discovery of the existence or nonexistence of the particular event in question.

This indicates exactly at what point the task of allocating duties between court and jury becomes confused. It is not due to a misunderstanding of the distinction between law and fact but to a difference of opinion between the trial and the appellate court over whether a "standard" or a "rule" is more properly applicable to the case. This difference of opinion may be expressed with reference to the instruction of the court or to the question of whether there should be a directed verdict or the verdict should be set aside. If the trial court applied a

¹³*Supra* note 3, p. 298 *et seq.*

broad "standard" in its instructions to the jury the appellate court can, if dissatisfied with the findings of the jury, reverse the case on the ground that the instruction did not state a definite rule of law. Or the appellate court may hold that under the facts the trial court was required to direct a verdict. In either case the argument would be that the jury was allowed to pass upon a question of law which should have been made articulate by the court.

If the norm applied by the trial court is a narrow one instead of a broad one, the appellate court can reverse the law-fact formula and say that the "rule" applied by the trial court was too narrow, that is, that the trial court passed on a question of fact. In both cases it is a false notion to think of the court as passing or failing to pass upon a question of fact. The trial court merely applied a different type of norm to the case than the appellate court thinks properly applicable. A "standard" was applied instead of the more definite "rule," or a "rule" was applied instead of a "standard." This problem is discussed and illustrated in a previous article.¹⁴

Professor Thayer, and other writers,¹⁵ seem to feel that the transfer which takes place where a broad principle is replaced by a narrower one is a transfer which turns what was fact (since the case by gratuitous assumption would be subject to wide difference in result according

¹⁴Phelps, *Appellate Court Articulation of General Standards of Conduct*, 8 OHIO ST. L. J. 173 (1942).

¹⁵THAYER, A PRELIMINARY TREATISE ON EVIDENCE 207 (1898). Speaking of the action of judges Professor Thayer says: "In exercise of never-questioned jurisdiction of declaring common law . . . there has arisen constant occasion for specifying the reach of definite legal rules, and so of covering more and more the domain of hitherto unregulated fact." This would be more accurate according to the thesis of this paper if he had said "hitherto broadly regulated fact" instead of "unregulated." Also see HOLMES, THE COMMON LAW 110-114 (1881).

to the temperament of different juries) into something new which will be called law. This seems erroneous. Fact in such case does not become law. Dean Pound's "rule" merely replaces the "standard"¹⁶ which was formerly applicable, thereby theoretically making the proper result under the law more explicit and meaningful to the jury. The change which has taken place is a change in the rule of law which is applicable to the situation—by making it more explicit—not a change whereby anything which the jury decided as fact becomes by some sleight-of-hand law.

Professor Bohlen thinks the jury has an additional duty besides that of fact finding where a broad standard is used by the court.¹⁷ He calls this an administrative function, and says the jury is neither declaring the law nor finding a fact when it is exercising this function. This is a strange additional classification which is of doubtful value.

In order to help relieve the congestion in courts today there must be a return of faith in the reliability of general standards and in the approximation of justice which can be obtained by their use. Otherwise court dockets must remain clogged with cases in which courts are trying in every conceivable fact situation to indicate specifically by "rule" what the more general policies of the law demand in the particular case. The courts must have faith in the general standard where it is adaptable to the problem to be solved (i.e., perhaps, where ethical considerations are large factors),¹⁸ where the possible situations and modifications thereof are numerous, and where the development of a vast body of detailed law will but neces-

¹⁶*Supra* note 8.

¹⁷BOHLEN, *STUDIES IN THE LAW OF TORTS* 601 (1926).

¹⁸*Supra* note 8.

sitate distinction upon distinction until the reliability of such narrow rules as just-result-producing is poor, and their predictability nil. It must be remembered that where narrow rules are used in cases lending themselves fairly well to general standards, for the element of jury unreliability will be substituted the element of court unreliability. This merits more careful consideration by the courts than it has received.

To illustrate the point some cases defining and refining a broad statutory standard set up within recent years are informative. The fact that it is a standard, much like negligence, and that it will illustrate what modern courts are doing with such standards, makes it a particularly interesting body of legal material from which to draw conclusions concerning the actual working of the judicial process in this connection. The cases are those involving the question of wanton misconduct under statutes which relieve the driver of an automobile from liability to his guest unless the driver is guilty of wilful or wanton misconduct.¹⁹

Instead of being satisfied with one or two cases in the court of last resort of a state, setting up some proper general limitations to the doctrine of what constitutes wanton misconduct, such as "a reckless disregard of the safety of others," or "To constitute wantonness there must be actual knowledge, or that which in the law is esteemed to be the equivalence of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury," an unending multitude of cases drawing fine distinctions of law concerning what under

¹⁹Notes: 74 A. L. R. 1198 (1931); 86 A. L. R. 1145 (1933); 96 A. L. R. 1479 (1935).

specific sets of facts should be said to constitute wanton misconduct have found their way to the highest court.

Cases involving speed under varying situations are without number. A few of the combinations actually passed on by appellate courts follow: mere speed, extreme speed, speed plus remonstrances by the guest, speed plus drinking, speed plus drinking plus remonstrances, speed plus remonstrances plus ice, speed plus a foggy night, speed plus racing a train plus remonstrances, speed plus driving on the wrong side of the road, speed plus driving on the wrong side of the road in the face of an approaching car, speed plus entering a blind intersection. It is easy to see that these are but a few of the combinations of speed plus other factors. Many more have been decided and are being decided every day. Each case only opens the door wider for another case, and usually imperatively demands another case. It is true that a few of the decisions merely insist upon leaving the question to the jury, but this only after an elaborate opinion exhausting the court's views on specific fact situations. The majority of appellate courts, however, cannot avoid the temptation of saying, "This does not constitute wantonness as a matter of law," or "The facts clearly show wantonness in this case." Aside from the burden such cases place upon the courts, where they develop narrow rules, an examination of the decisions in one jurisdiction, and a comparison of cases in different jurisdictions, show rather conclusively that little predictability of law is achieved by this laborious process.²⁰

²⁰*Supra* note 3 at p. 347 *et seq.* It is interesting to notice in this connection Holdsworth's remarks concerning the judge as a trier of fact. "If a clever man is left to decide by himself disputed questions of fact he is usually not content simply to decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted or developed by other clever men when such cases come before them. The

Why should appellate courts clutter their dockets with cases restricting general standards, where the predictability of the law for a particular case and the predictability of result in a particular case is not thereby enhanced? This question might be asked with especial reference to questions arising under *statutes* specifically setting forth general standards.²¹ It will be seen later that much of the difficulty involved in administrative review is caused by the desire of the court to insist upon specific standards of conduct in situations which are better cared for by general standards of conduct. The only conclusion one can make is that the courts have failed to appreciate the normative significance of general principles of law, and their fine adaptability to express the general social consciousness of what ought to be the case in a situation where "individualization of application" is a dominant consideration.²² Perhaps the result where a broad standard is applied is to some extent intuitively reached, but the appellate court may be counted upon for a substream of reasonably broad limiting rules which will insure justice yet retain the flexibility of the broad standard.

interest is likely to center, not in the dry task of deciding the case before the court, but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition or criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation."

²¹Mr. Justice Frankfurter states in *Wilkeson v. McCarthy*, 69 Sup. Ct. 413, 420 (1948): "Despite the mounting burden of the court's business, this is the thirtieth occasion in which a petition for certiorari has been granted during the past decade to review a judgment denying recovery under the Federal Employers' Liability Act in a case turning solely on jury issues."

²²*Supra* note 21 at p. 421 Mr. Justice Douglas states: "In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer . . . and so it was that a goodly portion of the relief which Congress had provided employees was withheld from them."

The Supreme Court of the United States in 1927 held that a person who failed to stop, to get out of his vehicle, and to look up and down a railroad track at a blind crossing was contributorily negligent as a matter of law.²³ The Court said: "But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts."²⁴ Justice Holmes wrote the opinion, and it is consistent with his theory of the proper function of the court in dealing with general standards.²⁵

It was improbable that such a rule should continue in effect very long, and in 1934, after Justice Holmes had retired from the bench, the Supreme Court "limited" the *Goodman* case.²⁶ The Court held that a standard of prudent conduct declared by courts as a rule of law must be taken over from the facts of life and must be such that a failure to conform to it is negligence so obvious and certain that rational and candid minds could not deem it otherwise.

While Professor Bohlen tends to agree with the view that in general the courts properly should assume the function of fixing definite rules, he points out two dangers: one, that of undue rigidity of the standard (in spite of new inventions, new modes of living, and complete revaluation of the respective interests concerned); the other, that it enables unscrupulous practitioners to fix their witnesses by coaching them exactly what to say

²³Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24 (1927).

²⁴*Supra* note 23 at 70 and 25.

²⁵HOLMES, THE COMMON LAW 110 (1881): "It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances."

²⁶Pokora v. Wabash Ry. Co., 294 U. S. 98, 54 Sup. Ct. 580 (1934).

in order to meet the requirements of the law.²⁷ To these must be added the considerations here urged as paramount, namely, the unpredictability of the standard which results in costly litigation, and the cluttering of the court's docket.

Justice Cardozo, who wrote the opinion in the *Pokora* case which overrules the *Goodman* case, neatly put his finger upon the difficulty with the rule in the *Goodman* case. He said: "The opinion in *Goodman's* case has been a source of confusion in the federal courts *to the extent that it imposes a standard for application by the judge*, and has had only wavering support by the courts of the states. We limit it accordingly."²⁸ The word "limit" was probably used out of deference to Justice Holmes. These two cases, then, give us a striking illustration of the futility of specific standards of conduct where the jury or the fact-finding body can intelligently deal with the matter under a broad standard.

The attitude of appellate courts with respect to general standards in cases tried to a jury also causes them to follow the same procedure where no jury is involved—in reviewing cases tried by a court without a jury, and in reviewing the findings of administrative tribunals. There is a fear of misconstruction by the jury or the trial court or the administrative agency of some general principle (statutory or common law), perhaps, but added to this is the fact that the court wants, for one reason or another, to have a hand in the decision of the particular case. The law-fact formula gives them this opportunity.

²⁷*Supra* note 17: "On the whole, therefore, it may well be that the tendency of the courts to assume the function of fixing standards, whenever they feel that the jury will not give proper consideration to the social utility of the defendant's conduct, is necessary for the proper administration of the general principles by which a defendant's guilt or innocence should be determined."

²⁸*Supra* note 26 at 102.

The present form of review for law cases in most states is restricted to a review of errors of "law."²⁹ For this reason, the distinction between law and fact must be maintained in form as well as in the thinking of the court. While the new rules of civil procedure for the federal courts now extend the scope of review of equity to jury-waived cases,³⁰ and it has been suggested that this has the effect of avoiding "the somewhat arbitrary distinction between law and facts," it is far from certain that this will be the result.³¹ Modern equity review, while theoretically of the entire record on both law and facts, is not widely different from ordinary law review because of the strong presumptions in favor of the findings of the court, and because of the equity requirement that the court separately state its facts and conclusions of law thereon.

The distinction between law and fact must also be maintained where court review is had of administrative action. The ordinary rule, in the absence of statutes, and generally under prevailing statutes, is that the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall appear that the findings of the commission are arbitrary or capricious.³²

²⁹*Supra* note 6.

³⁰3 OHLINGER, FEDERAL PRACTICE § 632; 3 *ibid.* 188, A Rule 52 (1948).

³¹*Supra* note 6 at p. 208.

³²"In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence." Rep. Atty. Gen. Com. Ad. Pr.c. 88 (1941).

Both in his dissent in *Crowell v. Benson*³³ and in the *St. Joseph Stock Yards Co. v. United States*,³⁴ Justice Brandeis indicated his view that the findings of fact of a commission should be conclusive on the court. A reversal should take place, accordingly, only on an error of law or an arbitrary finding without evidence to support it. The majority opinion in the *St. Joseph Stock Yards Co.* case, on the other hand, followed the formula of an equity appeal.³⁵ They would permit a review of all the facts, in certain types of cases, subject to a certain weight to be given to the findings of the administrative tribunal.

Professor Clark suggests that if we accept the formula of review which was originally advocated by Justice Brandeis in the *St. Joseph Stock Yards Co.* case and which case profoundly influenced the present Court, the review could be made as broad or as narrow as the Court chose to make it by calling what normally might be

The statutes provide several variations which are probably more in terms of words used than in ascertainable difference of application. See: 2 Ohlinger Federal Practice 808 § 2:1; 811 § 2.2.

"All of these clauses, irrespective of the words used, have been construed as embodying the substantial evidence rule—which would presumably have been applied by the courts even if specific provisions therefor had been lacking." Stern: *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, at 76 (1944). At page 75 footnote 21 the same author says, "There has been some justifiable criticism of the analysis by which the question of substantial evidence is described as one of law."

It seems hard to improve on Professor Stason's suggestion that the test for substantial evidence should be, "whether on the evidence including inferences therefrom a reasonable man acting reasonably might have reached the decision." Stason, *Substantial Evidence in Administrative Law*, 89 U. OF PA. L. REV. 1026, 1038, 1051 (1941).

³³*Crowell v. Benson*, 285 U. S. 22, 52 Sup. Ct. 585 (1932).

³⁴*St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 56 Sup. Ct. 720 (1936).

³⁵ARNOLD AND JAMES, *CASES ON TRIALS, JUDGMENTS AND APPEALS* 833, footnote 50 (1936).

thought of as fact,³⁶ law. He formulates this from his conception of the difference between law and fact as one merely of degree. As has been indicated, however, this is not a solution of the law-fact problem and it tends to hide what the court is really doing under the law-fact formula. The reason that the court could assimilate a larger review to itself, if necessary, in administrative cases under the Brandeis formula is not because the difference between law and fact is a difference in degree, but because of the fact that in most important administrative cases on appeal the questions of law being reviewed are questions as to broad standards of conduct which may either be maintained as such, or given the conciseness thought by the courts necessary to their just-result-producing effectiveness.³⁷ It is to be hoped that the future will seal a better fate for the general standards of conduct necessary in administrative regulation than the fate of many broad common law and legislative standards which are today in need of rebirth as such for a new generation in which "conduct" problems are of paramount concern.

In the field of substantive law a separation between mistakes of law and mistakes of fact did not take place until the nineteenth century.³⁸ Before that time no distinction had been made between mistakes of fact and mistakes of law. It was in *Bilbie v. Lumley*,³⁹ that Lord Ellenborough set forth a doctrine that "every man must be taken to be cognizant of the law," and set the stage

³⁶*Supra* note 6, particularly footnote 93.

³⁷For a series of cases illustrating the problem in which a rather unsatisfactory and confusing classification of the cases is attempted, see Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943).

³⁸Note, 5 U. OF CHI. L. REV. 446, 447 (1938) and authorities there cited.

³⁹2 East 469 (1802).

for one of the most artificial and unjustifiable concepts ever to gain wide currency as a rule of law, namely, that money paid under a mistake of law could not be recovered.

There is clear agreement among writers on the subject that relief should be given for mistakes of law as well as mistakes of fact, in proper cases.⁴⁰ To make a differentiation upon the basis of whether the mistake is one of law rather than one of fact appears improper not because it is not reasonably capable of ascertainment whether the mistake is one as to the norm or rule which would be applicable, but because there is no logical reason for a differentiation on the basis of law and fact.⁴¹ A layman should not be expected to understand many difficult questions of law. He might also be as completely ignorant with respect to the matter in regard to which he contracts as he might be of the existence of any fact. To take a maxim said to be necessary to the criminal law (that everyone is supposed to know the law) and to plant it in an entirely different soil—contracts for instance—seems to need more substantiation than can be found for it in any of the cases fostering the idea.

Professor Isaacs seems to believe that the difficulty of drawing the line between the two types of questions is

⁴⁰*Supra* note 38.

⁴¹WOODWARD, *QUASI CONTRACTS* 12 (1913). At page 59: "Assuming then that it is not true that one is presumed to know the law, and further assuming that the danger of the abuse of the right is not a grave one, is there any other ground, any reason in justice or public policy, which justifies the rule of no recovery? It is believed that there is not. On the contrary, it is believed that to permit a recovery, with limitations the same or similar to those with which the right to recover in cases of mistake of fact is hedged about, would sensibly diminish the area of human rights at present beyond the reach of the law."

insurmountable.⁴² This is a part of his thesis that there really is no generic difference between questions of law and questions of fact. The distinctions which Professor Isaacs mentions as developed by the courts to escape the doctrine—i.e., ignorance of law, mistakes of public law and of private rights, mistakes in choice of terms and mistakes in substance, mistakes of law and mistakes as to the legal effect of a law—were developed to get around the whole unjustifiable theory that the courts would not relieve for mistakes of law, and were not developed because the courts could not distinguish norm from fact. Professor Isaacs recognizes this himself when he says, “It is true that courts have attempted to call all kinds of mistakes mistakes of fact rather than mistakes of law because of the palpable injustice of this rule.”⁴³

A “functional” use of the distinction between law and fact which is frequent in the courts—a use which all the writers mentioned have recognized as a futile one—is made either because the courts expect too much of the concept, because they do not understand its character, or because the courts want to reach a desired result and need a sufficiently meaningless ground upon which to do so—a ground which they believe will not commit them to too much in the future. All too frequently, as has been shown, courts unwittingly commit themselves to cluttered

⁴²*Supra* note 4 at 1, footnote 1: “Other discussions, in which the absence of a difference between the two types of questions is found to make the book-rules utterly useless in the really difficult cases, are those connected with mistake of law and mistake of fact, and misrepresentations of law and misrepresentations of fact.”

⁴³*Supra* note 4 at 9 and 13: “In the law of mistake and representations (fraud and warranty) the undoubted tendency of the day to abolish the distinction between conclusions of law and propositions of fact is supported by the conclusion that we are not here dealing with a generic difference, but merely with a catalogue of questions placed in one column or the other on the basis of procedure.”

dockets and to unpredictability of law. If the courts did not mumble "This is a question of law for the court," but frankly asked, "What type of principle broad or narrow is the best for the decision of this case?" a great advance would be made both in achieving justice in the particular case and in streamlining the law.

To call the difference between questions of law and questions of fact a matter of degree is to give a false aspect to a primary and necessary "structural" division of law. In each case the broad separation of law from fact is not only possible but proper. If the court can see that the law-fact formula is not a *reason* for taking a case from a jury, reviewing a case, or deciding whether money paid under mistake is recoverable, etc., the court can make a careful examination in each controversy into the nature of the norm which it is advisable to promulgate or continue.

The body of law which faces the modern law student is unrivaled in the history of the world from the standpoint of its bulk and intricacy. Unquestionably the complexity of modern life has been in part responsible for this fact, as has also the philosophy of the time which compels the regulation of a vast number of human activities. The only way out of this predicament seems to be by some process of simplification and classification of legal concepts. It may be well for sciences to develop discourses which are incomprehensible to any but the most astute, where significant values are thereby achieved, but law must ever find its focal point at the level of the average man in every day life. This is certainly necessary in a democratic society, for the continuation of such a society depends upon the education of all in the processes of such a society.

The fundamental difficulty with a great many of our rules of law lies in the fact that they do not procure the certainty and precision of result their enunciation seems to assure. They are detailed, to be sure, and explicit, but the result of their application is not thereby foretold with accuracy. The average man can channel his conduct according to a general principle with fair accuracy and can be reasonably sure when he is skimming close to the line, but if it is necessary for him to master a set of details, especially a set of details which have warped or skewed the policy of the standard or crystallized it according to the dictates of a preceding era, then he finds himself unable to comprehend the standard to which he must conform. A substantial step will be taken in the direction of a simplification of law when the courts cease to rationalize decisions on the basis of the law-fact formula and find more defensible grounds for their action.