

A MIXED QUESTION OF LAW AND FACT

There has quite recently and rapidly come into use in our decisions the so-called mixed question of law and fact. This term has been used by law writers and judges for a long period of time, but not in the sense in which it is used to-day, especially in negligence cases. No good reason can be given why this modern mixed question might not be as readily and properly applied in any other case as in one involving negligence, and in view of that fact and of the radical change that has been brought about in the use and meaning of the term some consideration of the question may not be unprofitable if not desirable.

If the rule has any right to an existence it has a right in any kind of a case and is or should be of general application.

A history of the term is not within the scope of this article. In its modern form and meaning it doubtless grew out of the cases involving negligent conduct.

It is a creation of the judicial precedent. That the judicial precedent is being sorely tried in this country cannot be doubted. It had its origin in a country with but one court of last resort and that court considered but few cases. There was time for deliberation. We have two systems of courts exercising jurisdiction over the same territory, and many courts of last resort working on comparatively independent lines. They are crowded and their work must be rushed with the rapidity of legislation. They have no time to digest the questions brought before them. It is not a question of ability but of time. No age has surpassed the present in the ability of its judiciary. But in the terrible pace that is necessary in order to keep up with the march of progress, a rule of law is demanded on the moment to meet the requirements of a particular set of facts. It is hastily announced. It is given out as a general rule, the court having no time to study it out and hedge it about with the necessary limitations. Presently it is applied to a set of facts to which it has no proper application, and this improper application is made use of because the rule was not limited when first announced and it was not so limited for want of time to duly consider it.

Under these conditions, working under pressure and in great need of a time-saver, some court discovered the modern mixed

question of law and fact. Day by day its field of usefulness has been enlarged, until it has been and is being applied in ways not intended nor thought of by its original discoverers.

In its inception it was a harmless thing, meaning no more than that an ultimate fact is made up of the subsidiary facts as found by the jury and the law applicable to those facts, and which should be found by the court. In other words, the court decided from what subsidiary facts the law authorized the inference of an ultimate fact. That was the only manner of the mixing. And it may be said as a general rule, that all ultimate facts are found in that way, which argues that the mixed question never had an excuse for an existence.

So long, however, as the term was used in that way it was harmless if not scientific, and was not entirely improper. But the very modern notion and use of the term is that by a certain, to me incomprehensible process of reasoning, a certain condition of things may be evolved, whereby the burden or privilege of determining of both the law and the facts, subsidiary and ultimate are cast upon the jury.

This process of reasoning is supposed to develop a mysterious something that is neither law nor fact but a compound of the two, which cannot be separated so as to permit the court to handle one part and the jury the other. And as it is impossible to separate the two and the jury cannot be eliminated from the case, the right to pass upon this whole mixed question is in the jury.

I am unable to see the law and the fact from the same viewpoint nor at the same time. They have their origin in different sources. One is from the sovereign, the other from the subject. They arise in different altitudes. They may, and probably do flow through the same plain. They intermingle, possibly, but they never mix. That is they do not blend or unite and form a new compound any more than water and the soil through which it flows mix. The most that can be said of the mixture is that it is a hyphenated muddy water the result of a disturbed condition of things, which must settle back into its original elements of water and soil in order to become useful.

I recognize the eminent authority which has applied the doctrine of the mixed question. The courts of the United States and of most of the states apply the rule. The term "mixed question" is

not always used, but the principle involved in the mixed question is in very general use without giving it any name.¹

A few quotations will illustrate what I mean by the change that has been made in the use and meaning of the term, and of its present scope and force. I quote largely from my own state, Indiana, for the reason that the cases are ready at hand and the mixed question is recognized in all its fullness and modern acceptance.

About twenty years back, Mitchell, J., speaking of the duty of a court in arriving at the ultimate fact of negligence said: "It is said in criticism of the instructions on the subject, that the question of contributory negligence was a question of fact to be determined by the jury. It was exclusively the province of the jury to ascertain the facts, and apply them when ascertained to the law and return their general verdict accordingly. In doing this, however, they are to be guided by proper instructions from the court as to the law of the case. In that connection it was the duty of the court to instruct the jury what facts within the issues of the case, if established by the proof, would or might under the circumstances constitute contributory negligence, leaving the jury the duty of discovering whether such facts and circumstances were proved or not. Simply to have told the jury that the plaintiff must have been free from contributory negligence, without stating what facts might constitute contributory negligence would have been to leave the jury without any direction whatever in respect to the legal effect of the facts in the case.

"The practical result of the doctrine contended for would be to submit both the law and the facts to the determination of the jury."²

The clear meaning of this language is that it is the duty of the court, in negligence cases, to state what facts do in law amount to negligence, and that any other course is to turn the question of law as well as of fact over to the jury.

In a later case after citing and commenting on a number of decisions it is said: "These cases all belong to a class where a question of fact is controverted and that question is one necessary to plaintiff's recovery, or essential to defendant's proper defense.

¹ *Gardner v. Michigan Central R. R. Co.*, 150 U. S. 349; *Szymanski v. Blumanthal*, 4 Penne (Del.) 511; *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263.

² *Woolcry Adm'r v. L. N. A. & C. Ry. Co.*, 107 Ind. 381.

None of them hold that the jury are the exclusive judges of the existence or non-existence of negligence as an ultimate fact. A moment's reflection will show the error of a rule which would deprive the court of the right to determine whether a given state of facts—uncontroverted—does or does not constitute negligence. Where facts are submitted to the court upon demurrer to a complaint, the court exercises the power of determining whether such facts, if proved, will constitute actionable negligence. When under the practice prevailing the jury does not return a general verdict but returns findings of fact by special verdict, the court must determine whether the facts so found are sufficient to warrant the conclusion of the existence of negligence. When during the trial the court is called upon to instruct the jury there is, that we now recall, but one limitation upon the duty to charge that a given state of facts, if found by the jury to exist, does or does not authorize the findings of negligence, and that exception is when the facts clearly establish that one man impartial and of good judgment, might reasonably infer that negligence existed, while another man equally sensible and impartial, might reasonably infer that proper care had been used.”³

A little later the Appellate Court of Indiana had occasion to quote from this case as holding that the doctrine laid down by Mitchell, J., was the law up to the time of this decision and was followed in this case. The case, however, clearly deviates, *in dictum*, from the doctrine laid down by Mitchell, J. And after quoting a part of the language above quoted, the Appellate Court then says: “This I may add, was considered the rule until the decision of the same court in the case of *Cincinnati, etc., Ry. Co. v. Grimes*, 136 Ind. 39, where it was held that in cases where the facts are such that there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the inference of negligence or no negligence therefrom is for the jury as one of fact and not one for the court to be inferred as one of law.”⁴

Just what progress has been made up to this point is difficult to determine. It appears that the right to declare negligence as a matter of law when the facts are determined no longer exists. It is under certain conditions one of fact for the jury. That is a better situation than the one we are placed in by a decision of

³ *Farris v. Hoberg, et. al.*, 134 Ind. 269.

⁴ *Evansville Street Ry. Co. v. Mcad*, 13 Ind. App. 155.

the same court a little later on. The language of the court being, "one of the highest functions of an appellate court is to declare logical rules for the government of public conduct and for its own guidance.

"The following general propositions are believed to be logically accurate, and are supported by the consensus of judicial decisions.

"1. Where the established facts of a given case show, without room for divers inference that the plaintiff did not have reasonable grounds for believing that he could cross without danger, then his contributory negligence may be declared by the court.

"2. If the facts show there was no reasonable grounds upon which the plaintiff did anticipate or should have anticipated danger in attempting to cross, then his freedom from contributory negligence may be declared by the court.

"3. In cases where facts are disputed or different inferences are deducible from undisputed facts the question of contributory negligence becomes one of mixed law and fact to be decided by the jury."⁵

Note the language. If the facts are disputed or different inferences are deducible from undisputed facts the jury must determine both the law and the fact. And this is the modern mixed question of law and fact. It appears to include practically every case of negligence.

The courts come at us with different language in each case, and I might continue indefinitely to quote from the cases. One more quotation from our own Appellate Court (Indiana) will suffice to illustrate the effect of the so-called mixed question. "Appellant insists that the court erred in refusing to give to the jury instruction No. 10 requested by him. This claim cannot be allowed because the instruction undertakes to tell the jury what constitutes contributory negligence on the part of the appellant, a fact which was exclusively for the determination of the jury."⁶

If a court has no right to inform jurymen what facts if proven constitute contributory negligence it has no right to inform them what facts, if established, constitute negligence.

This change has come about gradually and almost imper-

⁵ *Indianapolis Street R. R. Co. v. O'Donnell*, 35 Ind. App. 312.

⁶ *Teague v. City of Bloomington*, 40 Ind. App. 68.

ceptibly. No one case more than another can be said to mark the change. The writer of each opinion states, doubtless, what he considers to be the rule as he finds it in the latest case, but he states it in his own language and perchance unconsciously changes the meaning in a slight degree. The writer of the opinion on which he relied had done the same thing, and thus we have in a period of twenty years, without a pretense of doing so, and without legislation or overruling of a decision, passed from the rule that in arriving at an ultimate fact the court determines the law and the jury the subsidiary facts, and by applying the law to them determine the ultimate fact, to the rule that at least in negligence cases, or certain of them, through the mixed question the jury controls the law and the subsidiary facts and from them determine the ultimate fact.

And this has been accomplished by changing the meaning of the term "mixed question of law and fact."

The decisions of our courts it is said do not make law. They are evidence of what the law is.⁷ The judicial precedent presupposes legislation, that is, the promulgation of a law by some law-making power, whoever or whatever that may be. If the courts cannot find the law on a modern statute book they must go into antiquity. In any event they must find the law, not make it. When once they have ascertained what the law is and recorded it in pronouncing a judgment, we accept that result of the labors of the court as a precedent, rather than go again into the musty past. When, however, we do go again and search the records and find the law to be different from that laid down in the recorded decision, the precedent of the decision is not binding and need not be followed. If such precedent is binding upon the lower courts it should, upon the discovery that it is not the law, be overruled and removed from among the binding precedents.⁸ Such has not been the practice, however, in the march of progress from the position of twenty years ago to that of to-day, and as a consequence we have every shade and variety of opinion imaginable between the two positions.

The judicial precedent is an absolute necessity in our system of jurisprudence and the best invention in any system of jurisprudence in any age or country, and that the theory that in deciding

⁷ *Kent's Commentaries*, Third Ed., Vol. I, p. 474; *Yates v. Lansing*, 9 Johns 415; *Henry v. Bank of Salima*, 9 Hill. 534.

⁸ *Rumsey v. N. Y. & N. E. Ry. Co.*, 133 N. Y. 79.

a given case the courts must go back until they somewhere find an existing law to fit the facts of the case, is a fiction is well understood. That fiction should not be abused solely because it is a fiction. For the courts to boldly cut loose from precedent and announce the law to-day as different from that announced yesterday, and to-morrow as different from that of to-day without any pretence that the courts of yesterday or to-day were wrong or mistaken as to the law and without any legislation or change in conditions except that the courts have seen fit to make the change, is contrary to the spirit of our institutions and a grave departure from the principles of our judicial system. It would seem that the limit had been reached when the determination of both the law and the fact, in the trial of an action at law in our civil courts is turned over to the jury.

Just what is meant by a mixed question of law and fact anyway? Can there, in any case, be anything other than the determining of what the law is by the proper authority and the ascertaining of what facts exist to which the law is applicable?

In a negligence case a general statement of the law is that one who acts as an ordinarily prudent person would not act under the circumstances is guilty of negligence. And thus far the *nisi prius* court has not been deprived from going. No further step can be taken unless specific definition can be given in each case. By such definition I mean a specific statement of the acts which in law amount to negligence. Thus by statute in many states the driver of a locomotive is required to sound a certain number of blasts of the whistle on his locomotive, within a certain distance of a highway crossing which he is approaching and about to cross. A failure to observe the requirements of the statute is held to be negligence. That is the law, instead the actions of an ordinarily prudent person fixes the standard of conduct in that case, and a failure to live up to that standard is negligence. In certain cases, such as the look and listen rule where a traveler upon a public highway is approaching a railway crossing, the judicial precedent has established a fixed rule of conduct. In all other cases where we have no statutory rule or one established by precedent the mixed question applies.

Apparently the meaning of the question is that in cases where the facts are found or admitted and they are such that the minds of all reasonable men must come to the same conclusion thereon, the law fixes the standard of duty and in all other cases the

ordinarily prudent man fixes the standard. But while that may be the theory in contemplation of law the question is not just exactly that, in any of the cases, theoretically, nor does it approach it in actual practice.

But assuming that, it means that we have an awkward situation for the trial court. The tests for shifting from one standard to the other are unsatisfactory and impractical if not altogether meaningless. The question of what conclusion the minds of all reasonable men would reach on a state of facts found or conceded must first be disposed of on one test. That must be determined by the trial court. And in determining the question the court is disposing of a question of fact. He is doing so without evidence other than his own experience and observations. It is said by our courts that the state of a man's mind is as much a question of fact as is the state of his digestion, and the question of what one's mind would be is as much a question of fact as what his mind has been or is. In any event it is not a question of law. And what guide has a judge in passing upon such a question except the promptings of his own intellect? Witnesses would not be permitted to testify as to what they or in their opinion, others would conclude on a given state of facts. Naturally every man will consider himself normal and whatever would appeal to him with convincing force he would conclude would appeal to all normal minds. And it is only in case where he himself might be in doubt that he would decide that men might differ in their conclusions.

When the trial court has determined this question of fact and decided what all men would conclude upon the facts given, his judgment is reviewed by the higher court on appeal, which strenuously insists that it cannot review a question of fact. And the members of the court on appeal will also apply the only standard that any man is capable of applying, and conclude that all men would decide as they themselves would decide. Cases are not uncommon where the court on appeal has declared that on the facts given in the case all men would conclude one way, when in fact the trial court speaking for himself and presumably as one of that innumerable "all" has decided to the contrary. In fact in one of the cases from which I have just quoted, three justices on appeal held that on the facts proven in the case, different men might draw different inferences and that the question was therefore a mixed one for the jury, while two justices held

that on that state of facts the minds of all reasonable men would draw the same inference, and the question was therefore one of law for the court.

To my way of thinking, the two have the better argument. The case was one involving the question of contributory negligence on the part of the driver of a vehicle on a crowded street, who was injured in attempting to turn and cross a street car track just in front of a rapidly moving car, approaching from his rear. To one not used to driving under such circumstances, it would appear that the hazard was great and an ordinarily prudent person would not attempt to make the crossing, while one who was used to driving under such circumstances might just as readily conclude the hazard was not great and that a prudent person might and probably would attempt to cross in front of the car.

In a recent case it was contended on appeal, that on the facts all men would conclude negligence and that the question was therefore one for the court. The court on appeal said that a jury of twelve men had in that case decided that there was no negligence which was a sufficient answer to the contention that all men would decide that there was negligence, and the point seems to be well taken, but it only serves to illustrate the folly of the rule.

The truth is the mixed question is not a sound philosophical principle in jurisprudence, but a mere subterfuge which affords courts an opportunity to review the evidence on appeal without appearing to do so.

The second test by which it is determined whether the question is a mixed one, is that if any of the facts are controverted and there is evidence for and against the existence of a subsidiary fact, the question of inferring the ultimate fact becomes mixed and the whole question goes to the jury. This is indeed a novel proposition. At least it has the novelty of being easily detected. It requires no great learning in the law to determine when evidence is offered and admitted pro and con on a fact in issue. It is somewhat difficult, however, to see just why the question of law involved in an ultimate fact should shift from the court to the jury merely because a subsidiary fact involved in the ultimate fact is disputed. Why should the court, on a settled state of facts, be required to state as a matter of law whether those facts constitute negligence, and on the same facts simply because one or more of them are disputed, be denied the right to say whether in

law they amount to negligence, provided only they are found to exist?

It is pushing the doctrine of the judicial precedent to its full limit to require the court in each case involving negligence to say that upon a given state of facts the law is that negligence does or does not exist, and that is what is done when it is made a question of law, but the situation is not improved by turning the law question involved over to the jury, and to denominate it a mixed question of law and fact does not better matters from a theoretical standpoint, and very much complicates as a practical matter.

Cases may be found among the very latest where instructions defining negligence are approved, but the trend of authority is in the other direction. In a recent Illinois case the rule is stated thus: "Appellant complains that the court erroneously modified instructions numbered 15 and 16, offered by appellant. Both these instructions were erroneous in their original and modified form. The court should have refused both of them for the reason that they single out a state of facts, and told the jury that if that state of facts existed, appellee would be guilty of conduct precluding recovery."⁹

If we have not arrived at the point where the right to state the facts is wholly denied we are very close to it, and without any sort of an index as to when the privilege will be allowed and when denied.

It is easy to say, as in some of the cases it is said, that negligence is a question of fact under proper instructions from the court. That statement in the light of all the decisions, is no aid to a court in determining what are proper instructions. At one time it would have been proper to have said that proper instructions meant to define negligence by stating the facts. It is not so now. The intelligence of the bench and bar of the present day ought to be able to clear away the chaotic conditions now existing and formulate some systematic rules for the trial of such questions, so that courts and lawyers might know where they are going and what they should do and say. Under the present practice each negligence case stands in a class by itself and no one can say what the end will be until the end has been reached. This is not creditable to the bench or bar. The legislature could have

⁹*Jones v. Adams Co. (Ill.)*, 81 N. E. R. 4.

done as well as the courts have done in handling this question. It has been the proud boast of the bar that the judicial precedent is the salt that saves us from the work of the politician in making our laws. A study of the cases in and through which the so-called mixed question has been developed, leads almost inevitably to the conclusion that it has arisen out of the fact, that in negligence cases, for the most part, the party claiming damages on account of negligence has usually been the weaker party, and through sympathy or for some other reason, his case has been cast into the hands of the jury to deal with as it pleases.

There even appears in some of the recent cases to be a distinction between negligence and contributory negligence. While there may properly be a difference in the manner of pleading negligence and contributory negligence, there can be no distinction between the two nor in the method of their trial, but an arbitrary one.

Against the defendant the plaintiff is required to set out the facts relied on as constituting negligence, and the court is required on demurrer to say as a matter of law whether those facts, if proved, amount to negligence. The court must of necessity instruct the jury that if the plaintiff has established the facts in his complaint he is entitled to recover. Why recover? Because the law says that those facts make a case of negligence. Some law-making power has at some time so declared, and one doing or neglecting to do those things has gone counter to the standard of conduct as fixed by the law.

It would appear quite ridiculous to hold erroneous an instruction stating in detail the same things that are stated generally by reference to a complaint. It ought to be error to refuse such an instruction. And simply because acts constituting contributory negligence are sometimes admitted under the general denial is no reason why the court should dodge behind the mixed question and say that the question both of law and fact is, as an ultimate question, one for the jury.

It is easier to criticise existing conditions than to suggest a remedy.

As I see it, however, the remedy in this instance lies in one of two courses. And one of them should be followed all the time; there should be no shifting from one to the other.

The first course, the more scientific and less practical, is to, at all times, make the so-called mixed question a question of fact.

That is, in a negligence case, make the question of negligence at all times one of fact. For the purpose of advising the adversary of the facts that will be relied on as constituting negligence, set them out in the pleading, but for the purpose of the sufficiency of the pleading state negligence in general terms. On the trial let the court instruct the jury that one who acts as an ordinarily prudent person would not act under the circumstances is guilty of negligence, and leave it to the jury to say whether the acts complained of are such as an ordinarily prudent person would not do under like circumstances, and thus determine the question of negligence by the standard of the ordinarily prudent person.

When I say that this course is the more scientific, I have reference only to the fact that it would avoid the necessity of having the court sum a state of facts and say to the jury that it has been declared as a matter of law, that anyone doing the things thus summed up is guilty of negligence, when in fact no such thing has ever been enacted into a law either by statute or custom.

When I say this course is less practical, I have reference only to the fact, and I assume it to be a fact that juries would run riot, and unless trial courts would fearlessly exercise the right to grant new trials and courts of appeal would review the evidence and weigh it on appeal, great injustice would often be done.

In adopting this procedure, however, courts could not escape the responsibility of deciding as a matter of law, on the introduction of evidence, what would tend to establish negligence and what would not so tend. Such responsibility might also be cast upon the court on a motion to strike allegations from the complaint.

The second course therefore seems to be the better one: that is, to make the question of negligence always a question of law.

Let the pleader in all cases be required to set out the facts relied on as constituting negligence, and require the court to say as a matter of law, whether those facts make a case of negligence.

Likewise, require the court on the trial to specifically instruct as to what facts within the issues and evidence will authorize an inference of negligence as an ultimate fact, if the jury should find those facts established by the evidence.

No legitimate prerogative of the jury would be interfered with by such a course, nor would the right to a trial by jury be in the slightest degree abridged.

It was never intended that in the trial of a cause by the rules of the common law, that the jury should determine any part of the law. It is not now the purpose that it should do so. If the mixed question does not permit that it does nothing but work confusion and against it I enter my protest.

J. L. Clark.