Denver Law Review

Volume 41 | Issue 4 Article 3

April 2021

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OPINIONS ON ULTIMATE FACTS: STATUS, TRENDS, AND A NOTE OF CAUTION

by WILLIAM B. STOEBUCK*

By way of example the problem may arise thus: In an action for personal injuries allegedly caused by a boiler explosion, the plaintiff puts on an expert witness, a boiler engineer. The expert, having stated the results of personal investigation or in response to a hypothetical question, is asked to state his opinion as to the cause of the explosion. In some jurisdictions he will not be allowed to do so, under the doctrine that an opinion may not be received on an "ultimate fact," in this case the fact of causation.[1] It may be variously stated that the testimony would be upon "the very question for the jury to decide" or that the opinion would "usurp the function of the jury" or "invade the province of the jury."[2]

The purpose here is not to show that the "ultimate facts" rule is unsound, for that has already been done by eminent authorities.[3] Rather, the purpose is to show the state of the law and the observable trends in an area which has changed rapidly in the last ten years.[4]

The mist the gods drew about them on the battlefield before Troy was no more dense than the one enshrouding the origins of the rule. Its first application in American courts appears to be in Vermont in January, 1840, in the case of *Davis v. Fuller*,[5] where it was held that witnesses could not testify to the cause of backwater in a river, on the alternate ground that this "was a mere matter of opinion, on the point on trial . . . ." Again the rule appears in Louisiana in 1856,[6] New York in 1863,[7] and Iowa in 1874.[8] Within this period of time a few other cases, though not applying the rule,

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[1] The facts are adapted from Redman v. Community Hotel Corp., 138 W. Va. 456, 76 S.E.2d 759 (1953).

[2] "Invasion of the province of the jury," though often used, does not express the ground of the objection adequately. As used in the old case of Durrell v. Bederly, Holt N. P. 283, 171 Eng. Rep. 244 (1816), the phrase may simply denote that the opinion or conclusion is one the jury itself would be as capable of reaching as the witness. Thus, "invasion of the province of the jury" does not distinguish between opinions on evidentiary facts and opinions on ultimate facts. Frequent use of the phrase has contributed to the confusion of an already confused doctrine.

[3] 7 WIGMORE, EVIDENCE §§ 1920-21 (3d ed. 1940); MCCORMICK, EVIDENCE § 12 (1954).

[4] Writing in 1954, McCormick suggested that no court had gone so far as to abandon the distinction between opinions on ultimate facts and on evidentiary facts. MCCORMICK, EVIDENCE § 12 at 26 (1954). This has now come to pass in several jurisdictions.

[5] 12 Vt. 178 (1840).

[6] Marcy v. Sun Mut. Ins. Co., 11 La. Ann. 748 (1856).

[7] Persse & Brooks Paper Works v. Willett, 24 N. Y. Super. Ct. (1 Rob.) 131 (1863) (accountant not allowed to conclude books showed firm to be "insolvent"). Not really an ultimate issue, but the court may have regarded it as one.

[8] Muldowney v. Illinois Cent. Ry., 39 Iowa 615 (1874). The case holds it was error for a medical expert to conclude the deceased would have died even with better medical care than he had. It appears to be the first to use the words "ultimate fact" in excluding evidence.

may give recognition to it.[9] After 1874 the rule is frequently encountered.

It has been suggested[10] that the American rule may have come from an 1821 English case.[11] There is no evidence of this, as the early cases discussed in the preceding paragraph cite no authority for the rule and give no indication of where they got it. In fact, they state the rule casually in a matter-of-fact way, as though it were too settled to require demonstration. However, the rule was not a part of the English common-law background,[12] despite confusing language in some cases.[13] The evidence treatises by Best and Greenleaf make statements which, though probably not so intended, are susceptible of giving rise to the "ultimate facts" rule;[14] but the early cases did not cite these volumes, and indeed the treatises were not in existence when the earliest American opinions were written. So, the origins of the "ultimate facts" rule remain a mystery. Now what of its current status?

Several jurisdictions have abolished the rule by the simple

[9] Lincoln v. Saratoga & S.R.R., 23 Wend. 425 (1840) (in personal injury action, businessmen may not give opinions on plaintiff's amount of lost profits, since this is not, like matters of science, proper subject of expert testimony); White v. Bailey, 10 Mich. 155 (1862) (medical expert may not testify directly as to testatrix's "mental capacity" to make will, because this is mixed question of fact and law); Snow v. Boston & M.R.R., 65 Me. 230 (1875) (proper for witness to testify directly to damage to property, over objection this was very question for jury).

[10] 7 WIGMORE, EVIDENCE § 1921, n. 1 (3d ed. 1940).

[11] Rex v. Wright, Russ. & Ry. 456, 168 Eng. Rep. 895 (Cr. Cas. 1821). While not reversing, some of the judges had "doubts" as to whether, in a murder trial where insanity was the defense, an expert could conclude the defendant's act was "an act of insanity." The court failed to recognize this as a mixed question of fact and law, a failure that has plagued many courts and which will be discussed later herein.

[12] Folkes v. Chadd, 3 Doug. 157, 99 Eng. Rep. 589 (K. B. 1782), wherein Lord Mansfield held it was proper for an expert engineer to give his opinion on the cause of a harbor's filling up, which was an ultimate issue.

[13] Jameson v. Drinkald, 12 Moore C. P. 148, 22 Eng. C. L. 636 (1826), in which two justices felt expert seamen should not give opinions on who was at "fault" in a ship collision, though they might state the "cause" of the collision. Durrell v. Bederley, Holt N. P. 283, 171 Eng. Rep. 244 (1816), which says it was the "province of a jury" to decide whether the insured should have disclosed certain information to the insurer, but on the ground that this question, unlike a question of science, was conjectural and not a proper subject of expert testimony.

[14] BEST, PRINCIPLES OF THE LAW OF EVIDENCE 924-27 (1st Am. ed. 1876); GREENLEAF, EVIDENCE 491-92 (13th ed. 1876).

technique of abandoning any distinction between opinions on ultimate facts and opinions on evidentiary facts. This is the state of the law in the Fourth Circuit,[15] Alaska,[16] Colorado,[17] Iowa,[18] and Washington.[19] New Hampshire seems never to have had the rule.[20] It is probable, though less than certain, that the rule has no application in the Third Circuit[21] and Maryland.[22] In dictum, the First

[15] Meredith v. United States, 238 F.2d 535 (4th Cir. 1956): held, government expert witnesses could testify that entries in books of account were "false." Rationale: if the opinion aids the jury, it should be admitted whether or not on an ultimate fact.

[16] Oxenberg v. State, 362 P.2d 893 (Alaska 1961): held, in an arson trial, the state fire marshal could testify that the fire was "of incendiary origin." If the opinion is otherwise admissible, it is no objection that it is on an ultimate fact.

[17] Bridges v. Lintz, 140 Colo. 582, 346 P.2d 571 (1959): held, in an auto accident case, a police investigator could give an opinion that the defendant's excessive speed was the "cause" of the accident. The court says the fact that causation was an ultimate issue "does not of itself furnish a basis for its rejection." While denying it does so, the court by implication overrules its prior cases of Weng v. Schleiger, 130 Colo. 90, 273 P.2d 356 (1954) (invasion of province of jury for policeman to testify defendant guilty of "inattention to driving"); and Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966 (1892) (expert could not testify to availability of water in irrigation ditch). There is also contrary dictum in the prior case of Pueblo v. Ratliff, 137 Colo. 468, 327 P.2d 270 (1958) (cause of accident). St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952), and Herren v. People, 28 Colo. 23, 62 Pac. 833 (1900), though not facing the "ultimate facts" issue as such, hold that a pathologist may testify to the cause of death. *But see* McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962), which casts a shadow across *Bridges*. It reaches a contrary result on weak reasoning and with a similar fact pattern, though it expressly reaffirms *Bridges*. The Colorado court, having failed to deal with its prior cases in the *Bridges* case, and in view of the *McNelley* case, should take the first opportunity to make it clear that the "ultimate facts" rule is gone.

[18] Grismore v. Consolidated Prods. Co., 232 Iowa 328, 5 N.W.2d 646 (1942), the leading American case, holds that an expert may state his opinion on the cause of death of turkeys. While it might be argued that the case goes no further than to abandon the "ultimate facts" rule as to experts' testimony, the court's language expressly repudiating the rule and the authorities relied upon show complete abandonment was intended. *See also* Miller v. Miller, 237 Iowa 978, 23 N.W.2d 760 (1946) (in guardianship hearing, doctor could testify that respondent "should have someone to help him with his financial affairs"). *Cf.* In re Ransom's Estate, 244 Iowa 343, 57 N.W.2d 89 (1953), which holds that a witness could not state that the testator was "incompetent" (to make a will) on the correct ground that this was a mixed question of law and fact.

[19] Gerberg v. Crosby, 52 Wash. 2d 792, 329 P.2d 184 (1958) (cause of accident), an enlightened opinion in which the court "avoids the technical semantic argument over what is and what is not an ultimate fact." See also Lynch v. Republic Publishing Co., 40 Wash. 2d 379, 243 P.2d 636 (1952) (experts allowed to testify on ultimate fact). *Cf.* Billington v. Schaal, 42 Wash. 2d 878, 259 P.2d 634 (1953) (police officer not allowed to testify that defendant violated ordinance and was negligent, but court fails to recognize these as questions of law).

[20] Rau v. First Nat'l Stores, 97 N.H. 490, 92 A.2d 921 (1952): held, in a wrongful death action against a store, the defendant's officer could state that customers would not expect the place of injury to be an area for public use. "If the opinion expressed will be of aid to the jury and the witness is qualified to speak, 'it is admissible, even though it bears directly on a main issue.'"

[21] United States v. Augustine, 189 F.2d 587 (3d Cir. 1951): in an income tax evasion trial, federal agents could testify that certain items were not "allowable expenses" and that corporate profits should have been more than

Circuit has repudiated the "ultimate facts" rule.[23]

Another group of courts, by holding that an expert, as opposed to a lay witness, may state an opinion on an ultimate fact, has abandoned a large part of the rule. These jurisdictions typically assert the "ultimate facts" rule, then create an exception for experts. This appears to be the current view in the United States Supreme Court,[24] the Fifth Circuit, [25] the Eighth Circuit, [26] Ar-

the books showed. "But the witnesses in this case were by no means 'usurping' any jury function, whatever that means."

[22] Shivers v. Carnaggio, 223 Md. 585, 165 A.2d 898 (1960): a doctor could testify to the extent of injury. The court's rationale, relying heavily on McCormick and Wigmore, appears to reject entirely any distinction between evidentiary and ultimate facts.

[23] Mutual Life Ins. Co. v. Frost, 164 F.2d 542 (1st Cir. 1947): in an action on a disability policy, an expert should have been allowed to state whether the insured "suffered any impairment of the mind"; but the court recognizes this was not an ultimate issue.

[24] Texas & Pac. Ry. v. Watson, 190 U.S. 287 (1903) (expert, in answer to hypothetical question, could state whether locomotive that allegedly started fires had "anything wrong about the operation or construction . . . . "); Transportation Line v. Hope, 95 U.S. 297 (1877) (expert allowed to state whether it would be "safe or prudent" to tow three barges abreast on Chesapeake Bay, though ultimate fact). These cases should not be, but often are, confused with United States v. Spaulding, 293 U.S. 498 (1935), a suit on a military war-risk policy of insurance. The Court held that medical experts could not testify that the plaintiff-insured was "totally and permanently disabled," since this, involving an interpretation of the words of the policy, was an opinion on a question of law.

[25] In Kennelley v. Travelers Ins. Co., 273 F.2d 479 (5th Cir. 1960), it was held that an expert could state what the "probable" result of an injury "would" have been, in response to a hypothetical question. The court said an expert was permitted by both Texas and the Fifth Circuit to answer a hypothetical question on ultimate facts. Presumably the answer would have to be in the subjunctive mood.

[26] Een v. Consolidated Freightways, 220 F.2d 892 (8th Cir. 1955): a police investigator could testify that the accident occurred in the left lane of traffic, the rule being that "'an expert witness may properly be asked his opinion on an ultimate fact.'" *Accord*, Mutual Benefit Health & Acc. Ass'n v. Francis, 148 F.2d 590 (8th Cir. 1945) (cause of death); and Builders Steel Co. v. Commissioner, 179 F.2d 377 (8th Cir. 1950), which holds corporate officers, in an action to redetermine a tax deficiency, should have been allowed to testify that their salaries were "reasonable." Does this involve a legal question of interpretation of tax law? Compare these cases with Hawkins v. Missouri Pac. Ry., 188 F.2d 348 (8th Cir. 1951) (cause of injury); Cropper v. Titanium Pigment Co., 47 F.2d 1038 (8th Cir. 1931) (cause of physical condition); and the leading case of United States Smelting Co. v. Parry, 166 Fed. 407 (8th Cir. 1909) (safety of scaffold). The latter cases state that experts may give opinions on ultimate facts, but

kansas,[27] California,[28] Idaho,[29] Michigan,[30] Minnesota,[31] Missouri,[32] Nevada,[33] North Carolina,[34] and Wisconsin.[35] Arizona has twice

add the further requirement that the opinions be ones laymen would not be capable of forming. This may be a distinction without a difference, since an expert's opinion is normally thought of as being one laymen could not form and since the two groups of cases are cited interchangeably by the Eighth Circuit.

[27] Lee v. Crittenden County, 216 Ark. 480, 226 S.W.2d 79 (1950): an expert was allowed to state that falling of the defendant's elevator shaft instead of a high wind was the cause of the collapse of the plaintiff's radio tower, "although the point covered by the inference is precisely the one on which the tribunal is to pass . . . . "

[28] People v. Martinez, 38 Cal. 2d 556, 241 P.2d 224 (1952): in a murder trial where the defense was that intoxication prevented formation of specific intent, a medical expert could state whether a person in the defendant's state of intoxication could understand his actions would cause death. People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944): in an abortion trial a medical expert could conclude that the abortion was "not performed in order to preserve her life"; the rationale is not as clear as in *Martinez*.

[29] Hayhurst v. Boyd Hosp., 43 Idaho 661, 254 Pac. 528 (1927): in a negligence suit against a hospital, a doctor could testify that the plaintiff did not receive "proper care." The court cites Wigmore, "where the fallacy of the 'usurpation' theory is discussed," suggesting it might have been willing to abandon the rule entirely. Compare Cochran v. Gritman, 34 Idaho 654, 203 Pac. 289 (1921), where the court says an expert may give his opinion on ultimate facts, but only in the subjunctive mood in response to a hypothetical question.

[30] Cabana v. City of Hart, 327 Mich. 287, 42 N.W.2d 97 (1950): an expert may state a conclusion on an ultimate fact, but only in the subjunctive mood.

[31] State v. Schwartz, 122 N.W.2d 769 (Minn. 1963) (in rape trial medical expert could state that complainant had intercourse); Krueger v. Knutson, 261 Minn. 144, 111 N.W.2d 526 (1961) (medical expert allowed to give opinion on extent of injuries); Albert Lea Ice & Fuel Co.v. United States Fire Ins. Co., 239 Minn. 198, 58 N.W.2d 614, 617 (1953) (expert could testify that wind caused collapse of icehouse). "Moreover, it has long been the rule in this state that the fact that the opinion of an expert bears directly upon the issue to be determined by the jury does not render it inadmissible."

[32] Eickmann v. St. Louis Pub. Serv. Co., 363 Mo. 651, 253 S.W.2d 122, 130 (1952): a doctor may testify that the plaintiff's complaint of pain "did not appear to be bona fide." "An objection that an expert opinion invades the province of the jury is not a valid one." State v. Paglino, 319 S.W.2d 613 (Mo. 1958) (expert could testify fire caused by arson); Cole v. Uhlmann Grain Co., 340 Mo. 277, 100 S.W.2d 311 (1936): dictum that it is not a valid objection that an expert opinion "invades the province of the jury." *But see* Linam v. Murphy, 360 Mo. 1140, 232 S.W.2d 937 (1950), which holds that a pilot's "buzzing" of a dam violated C.A.B. rules and regulations, on the ground that these were "ultimate facts." *Quaere*: Is this not really a question of law, upon which no witness should give an opinion?

[33] McLeod v. Miller & Lux, 40 Nev. 447, 153 Pac. 566 (1915): experts could testify whether the defendant's dam caused a river to sand and flood, but non-experts could not.

[34] Bruce v. O'Neal Flying Serv., 234 N.C. 79, 66 S.E.2d 312 (1951): flying experts could testify that a pilot's attempting to do too many spins caused the crash. The court said a witness generally may not give an opinion on ultimate facts, but that experts are an exception. State v. Powell, 238 N.C. 527, 78 S.E.2d 248 (1953), followed *Bruce*, but the question was not really on an ultimate fact, though the court treated it as so being. *Cf.* dictum in Lipe v. Guilford Nat'l Bank, 236 N.C. 328, 72 S.E.2d 759 (1952), that a witness could not conclude that a contract had been "fulfilled." The court fails to recognize it as a mixed law-fact question.

[35] Kreyer v. Farmers' Co-op Lumber Co., 189 Wis. 2d 67, 117 N.W.2d 646 (1962): in answer to a hypothetical question, an expert was allowed to testify that a barn fire "was" (not subjunctive mood) caused by faulty

stated in dictum that expert opinion will not be excluded merely because it deals with ultimate facts.[36]

As a practical matter, the cases allowing expert opinions on ultimate facts constitute a substantial deviation from the entire rule. To be sure, in theory there are two generally recognized exceptions to the so-called rule that witnesses must state observed facts and not opinions: experts may state conclusions on matters within their expert knowledge,[37] and laymen may state conclusional impressions in certain instances under the "collective facts" rule.[38] In practice, the large majority of cases involving the "ultimate facts" rule are those where the opinion is by an expert. Further, some of those courts which have relaxed the rule only as to experts have done so in terms suggesting they might, if squarely presented the problem, abandon it as to lay opinions also.[39] The exception nearly eats up the rule.

wiring. The court stated that an expert might give an opinion on an ultimate fact, "but only on a hypothetical question." However, in Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963), a malpractice case, a doctor who had examined the plaintiff was allowed to testify that his affliction was "not due to negligence or malpractice" on the defendant's part. The case goes too far. Not only does it ignore the "hypothetical question" requirement of *Kreyer* (salutary in itself if the court had recognized what it was doing), but it allows an opinion on a mixed question of law and fact.

[36] Allied Van Lines, Inc., v. Parsons, 80 Ariz. 88, 293 P.2d 430 (1956); Watson v. Southern Pac. Co., 62 Ariz. 29, 152 P.2d 665 (1944). *Parsons* states that the language in *Watson* constitutes a holding. Compare Alires v. Southern Pac. Co., 93 Ariz. 97, 378 P.2d 913 (1963), which is not necessarily inconsistent with the above cases.

[37] 7 WIGMORE, EVIDENCE § 1923 (3d ed. 1940).

[38] *Id.* § 1924.

[39] Likely candidates are California, Idaho, Missouri, and the Eighth Circuit. See nn. 28, 29, 32, and 26, *supra*.

A third group of jurisdictions has relaxed the "ultimate facts" rule by holding that an expert may state a conclusion on such facts, provided the conclusion is one laymen would not be capable of drawing. The jurisdictions are: the Sixth Circuit,[40] the Tenth Circuit,[41] Alabama,[42] Florida,[43] Illinois,[44] Kansas,[45] Maryland,[46]

[40] Peoples Gas Co. v. Fitzgerald, 188 F.2d 198 (6th Cir. 1951): in a wrongful death action, experts could testify to the cause of a gas explosion, on the ground that an expert may state an opinion "in a matter which is not one of common knowledge . . . . " *Cf.* Dickerson v. Shepard Warner Elevator Co. 287 F.2d 255 (6th Cir. 1961) (expert may state opinion on cause of accident).

[41] Francis v. Southern Pac. Co., 162 F.2d 813 (10th Cir. 1947), *aff'd on other issues,* 333 U.S. 445 (1948): a pathologist could give an opinion that the engineer was dead of a heart attack when the collision occurred, on the ground that this was a subject upon which jurors were unfamiliar. Was it an ultimate issue?

[42] Marigold Coal, Inc., v. Thames, 274 Ala. 421, 149 So. 2d 276 (1963): an expert was allowed to testify that a dynamite charge was "excessive" and that blasting was "improperly done." The court states that an expert may not testify to a matter of common knowledge. Watson v. Hardaway-Covington Cotton Co., 223 Ala. 443, 137 So. 33 (1931): without giving facts, the court says an expert may conclude on a "material issue" if the jury is not capable of doing so. *But cf.* Case v. English, 255 Ala. 555, 52 So. 2d 216 (19551): a witness could not state that the testator was "not capable of making and executing a valid will," as this was the "very issue to be submitted to the jury." It was really a mixed law-fact question.

[43] Diecidue v. State, 119 So. 2d 803 (Fla. 1960): a police officer was allowed to state his opinion that a "lottery" was going on in the defendant's home, since the jury was not qualified to recognize a lottery. *But cf.* Ippolito v.

Montana,[47] Ohio,[48] Oregon,[49] Pennsylvania,[50] Tennessee,[51] Texas,[52]

Brener, 89 So. 2d 650 (Fla. 1956), which holds, without stating the theory relied upon, that an accident investigator could not state the side of the road on which an accident occurred.

[44] Chicago Union Traction Co. v. Roberts, 229 Ill. 481, 82 N.E. 401 (1907): a doctor could testify to the cause of injury, as the jury could not form such a conclusion, even if it had the facts. Apparently, however, Illinois requires the expert to state his conclusion in the subjunctive mood. Turnbow v. Hayes Freight Lines, Inc., 15 Ill. App. 2d 57, 145 N.E.2d 377 (1957): a medical expert invaded the province of the jury by concluding "the accident is the cause of epilepsy;" he should have said it "could" have been. Compare Goddard v. Enzler, 222 Ill. 462, 78 N.E. 805 (1906): an expert was competent to testify how a lethal electrical shock "might" have occurred, since "the" ultimate question was not that but "negligence."

[45] Tovey v. Geiser, 150 Kan. 149, 92 P.2d 3 (1939): in a case where a husband and wife were asphyxiated in their home, physicians could testify which one survived the longer, since the jury's "reasoning powers" were not such that they could reach their own conclusion.

[46] Langenfelder v. Thompson, 179 Md. 502, 20 A.2d 491 (1941): a doctor could state the probable cause of injury, since the jury was not capable of a conclusion on this subject.

[47] Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919): a medical expert could testify that food poisoning caused an illness, because his conclusion depended upon professional knowledge. Compare In re Miller's Estate, 71 Mont. 330, 229 Pac. 851 (1924), where a lawyer, basing his opinion in part upon his "reading of the different law books," should not have testified that it was improbable the deceased wrote a holographic will. The court does not mention the "ultimate fact" rule, nor does it recognize the question as one of mixed law and fact.

[48] Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949): a pathologist could state an opinion on the cause of death, since a "well recognized exception" to the "ultimate facts" rule allows an expert opinion when it is one "beyond the experience, knowledge or comprehension of the jury . . . ."

[49] Oregon may have gone further. Ritter v. Beals, 225 Ore. 504, 358 P.2d 1080 (1961), holds that an architect could state that a ramp, upon which the plaintiff fell, was too steep and was "unsafe." This was an ultimate fact which could not be "equally well decided by the jury from the same evidence . . . ." Schweiger v. Solbeck, 191 Ore. 454, 230 P.2d 195 (1951), has language that it is impossible for an expert to usurp the function of the jury and purports to follow Wigmore; but strictly the case contains only a statement that it was non-reversible error to exclude an engineer's opinion on the cause of a mudslide. Goldfoot v. Lofgren, 135 Ore. 533, 296 Pac. 843 (1931), holds that a doctor could testify to the cause of abscesses, on the ground that an "expert" cannot usurp the function of the jury. Again, the court relies on Wigmore, but he would abandon the "ultimate facts" rule as to experts and non-experts alike.

[50] Commonwealth v. Nasuti, 385 Pa. 436, 123 A.2d 435 (1956): fire captains were allowed to state an ultimate fact that a fire was "of incendiary origin," since this was a subject upon which the jury could not form its own conclusion. However, the court stated that "the" ultimate fact was guilt.

[51] National Life & Acc. Ins. Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92 (1935): in a suit on an accidental death policy, doctors could testify that the accident caused death, because only an expert was qualified to form such an opinion. Casteel v. Southern Ry., 187 Tenn. 586, 216 S.W.2d 321 (1948): dictum that a railroad engineer could testify that he did everything possible to avoid running over the deceased.

[52] Welch v Shaver, 351 S.W.2d 588 (Tex. Civ. App. 1961): in a malpractice action, a physician could testify that the defendant should not have performed surgery on the plaintiff, since the opinion was one laymen could not intelligently form. *Cf.* White v. State, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957), which holds that a pathologist could testify that the cause of death of a murder victim was "asphyxia by strangulation"; but the court says the ultimate issue was whether she died from "strangulation with a wire." *But* see Cordero v. State, 164 Tex. Crim. 160, 297 S.W.2d 174 (1956)

and Utah.[53] In Oregon and Utah, there is some reason to think the courts might be willing wholly to abandon the "ultimate facts" rule.[54]

The group of courts just listed states that an expert may give an opinion on ultimate facts, provided the opinion is one the jury is not qualified to form. The group preceding it allows an expert to give an opinion on ultimate facts, without this proviso. Strictly analyzed, the two groups are enunciating the same rule. The justification for an expert's giving an opinion at all, even on evidentiary facts, is that he can add something beyond what the jury can determine for itself.[55] Thus, the courts which add the proviso are only stating the reason for the expert opinion rule and are not adding a qualification to it. This ought to be the analysis and probably is in some jurisdictions; just which ones is conjectural.

In a fourth group of jurisdictions, the courts have relaxed the "ultimate facts" rule to some degree, but the cases evade classification. Maine,[56] Mississippi,[57] Nebraska,[58] North Dakota,[59] and Ver-

(beating and kicking "would" be "calculated" to cause severe injury); the witness must answer in the subjunctive mood. See Morton Inv. Co. v. Trevey, 8 S.W.2d 527 (Tex. Civ. App. 1928): where the ultimate issue was the cause of an elevator's falling, an expert could testify to the cause and could state that the condition of certain fittings "would show negligence." Apparently unintentionally, the court goes too far in allowing an opinion on the law-fact question of negligence. See generally NORVELL, INVASION OF THE PROVINCE OF THE JURY, 31 Texas L. Rev. 731 (1953), a good discussion of the "ultimate facts" rule, with emphasis on Texas law. Judge Norvell felt the rule in Texas allowed an expert to state a conclusion on ultimate facts when the jury would not be qualified to reach such a conclusion.

[53] Joseph v. W. H. Groves Latter Day Saints Hosp., 7 Utah 2d 39, 318 P.2d 330 (1957): in a wrongful death action against a hospital, a nurse could testify that the deceased received "good nursing care." The rationale is that the opinion was beyond the knowledge of laymen, but the court also states the broader proposition that it is no objection that an expert's testimony is on "the very issue before the jury." Other even more sweeping language gives the impression that it may have been the court's intention to abolish the "ultimate facts" rule entirely. *Cf.* Hooper v. General Motors Corp., 123 Utah 515, 260 P.2d 549 (1953): held, an expert could testify to the ultimate fact of cause of an accident, but the court expressly limits its opinion to expert opinions on causation.

[54] See nn. 49 and 53, *supra.*

[55] This principle is best expressed in 7 WIGMORE, EVIDENCE §§ 1918, 1923 (3d ed. 1940).

[56] State v. Wardwell, 158 Me. 307, 183 A.2d 896 (1962): where the accused was charged with murder by strangulation, a pathologist could testify that death was caused by strangulation. Without a general discussion of the "ultimate facts" rule, the court simply says the testimony was "a proper expression of opinion."

[57] Mississippi Power Co. v. Harrison, 247 Miss. 400, 152 So. 2d 892 (1963): experts should have been allowed to give opinions on the cause of a fire. The court's reasoning is inadequate and does not recognize an "ultimate facts" issue.

[58] Petracek v. Haas O. K. Rubber Welders, Inc., 176 Neb. 438, 126 N.W.2d 466 (1964): experts properly testified that loose lug bolts caused an auto accident. The court says it is "ordinarily" error to permit experts to state opinions on the ultimate fact, but that an exception exists "if the case is one to be wholly resolved by such evidence." The reasoning is singular: the justification for the "ultimate facts" rule seems to be that, though an expert might give an opinion on an evidentiary fact, he does more harm when he "usurps the jury's function" on the "very question for the jury to resolve."

[59] State v. Maresch, 75 N.D. 229, 27 N.W.2d 1 (1947): in a murder trial experts were allowed to conclude that the victim's injuries could not have

mont[60] have decisions allowing experts to state conclusions on the cause of an event or condition. However, the language of the cases is such that they should not be extended beyond their own facts. Oklahoma presents a confusing situation, apparently generally applying the "ultimate facts" rule, but allowing expert opinions on speed of automobiles, though not on the cause of accidents.[61] The District of Columbia Court of Municipal Appeals has held, in a trial for driving under the influence of alcohol, that a police officer could testify the accused was intoxicated; however, the court did not discuss the "ultimate facts" issue.[62] In Louisiana an accountant has been allowed to testify that a defendant, accused of knowingly making false entries in bank books, did make "false" entries, on the theory that his conclusion did not cover the entire question of guilt.[63] A psychiatric opinion on "sanity" was permitted in a Massachusetts murder case, the court finding no objection to its being "the precise point to be determined by the jury."[64] Finally, the Seventh Circuit, without discussing the "ultimate facts" issue,

been sustained by falling on some inanimate object. The court says this was an ultimate fact (was it?) and that, though expert opinions are not generally allowed on such facts, they may be as to cause of an injury.

[60] Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338 (1917): in a malpractice action, a medical expert could testify that the manner in which the defendant splinted a leg "would" have caused a deformity. The court recognizes the "familiar rule" but holds that an exception allows experts to give opinions on the cause of a "condition." Although the answer was in the subjunctive mood, the decision does not express a preference for this form.

[61] Kelso v. Independent Tank Co., 348 P.2d 855 (Okla. 1960): an accident investigator may not testify to the cause of a collision, since this "invades the province of the jury." Andrews v Moery, 205 Okla. 635, 240 P.2d 447 (1951) (expert may testify to speed, based upon skid marks). *Cf.* Washita Valley Grain Co. v. McElroy, 262 P.2d 133 (Okla. 1953): an expert could not give his conclusion that the plaintiff was not "negligent," because an expert cannot state an opinion on "facts in issue." The court fails to identify the mixed question of law and fact. *But see* Auten v. Livingston, 201 Okla. 467, 207 P.2d 256 (1949), which held it was error, but non-reversible, for a witness to testify that the plaintiff was injured through his own "negligence." *But see* Fidelity-Phenix Fire Ins. Co. v. Board of Educ., 201 Okla. 250, 204 P.2d 982 (1948), which contains dictum that "expert" testimony is admissible on ultimate facts. Oklahoma needs to clarify its law.

[62] Woolard v. District, 62 A.2d 640 (D.C.Mun. App. 1948).

[63] State v Cloutier, 181 La. 222, 159 So. 330 (1935).

[64] Commonwealth v. Chapin, 333 Mass. 610, 132 N.E.2d 404 (1956). The court, relying on 7 WIGMORE, EVIDENCE § 1921 (3d ed. 1940), which urges abandonment of the "ultimate facts" rule, creates the impression that it might further relax the rule.

has held in a personal injury action that a physician could state his opinion on the extent of injuries suffered by the plaintiff.[65]

Some conclusions seem justified at this point. First, from an actual count of the jurisdictions cited above, it is clear that a majority of the American courts do not apply the "ultimate facts" rule in full force. It would be more accurate to state the general rule thus: A qualified expert may state an opinion on an ultimate fact if the subject is one upon which laymen would be unable to form an intelligent opinion. This is not to say the "ultimate facts" rule has no application, for it seems to be in full sway in a few jurisdictions.[66] A minority does apply the rule that a witness, expert or lay, may not state an opinion on an ultimate fact.

Second, an examination of the dates of the cases cited above indicates that the trend is toward relaxation or abandonment of the rule. With the exception of New Hampshire, which seems never to have had it, the jurisdictions abolishing the rule have done so since the *Grismore* case[67] in 1942. Indeed, it may be tentatively said that the modern tendency is toward complete abandonment and that this is an accelerating movement.

Since at least 1821[68] the courts have been plagued with a confusion of ultimate facts with questions of law or of mixed fact and law. This may occur where the witness testifies that a party was "negligent,"[69] "incapable of making a will,"[70] or "competent to make a gift."[71] One court failed to recognize whether a contract was

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[65] Greer v. Hendrix, 69 F.2d 404 (7th Cir. 1934).

[66] See for example Willoughby v. Safeway Stores, Inc., 198 F.2d 604 (D.C.Cir. 1952) (unsafe condition); Smith v. Hardy, 228 S.C. 112, 88 S.E.2d 865 (1955) (cause of accident); Redman v. Community Hotel Corp., 138 W.Va. 456, 76 S.E.2d 759 (1953) (cause of boiler explosion); and Macy v. Billings, 74 Wyo. 404, 289 P.2d 422 (1955) (cause of accident).

[67] Grismore v. Consolidated Prods. Co., 232 Iowa 328, 5 N.W.2d 646 (1942).

[68] Rex v. Wright, Russ. & Ry. 456, 168 Eng. Rep. 895 (Cr. Cas. 1821): a witness testified in a murder trial that the defendant's act of drowning his son was "an act of insanity." Several of the judges thought this "the very point the jury were to decide."

[69] Auten v. Livingston, 201 Okla. 467, 207 P.2d 256 (1949) (court says "negligence" was ultimate fact); Pointer v. Klamath Falls Land & Transp. Co., 59 Ore. 438, 117 Pac. 605 (1911) (court held "careless, reckless, or negligent" was ultimate fact); Morton Inv. Co. v. Trevey, 8 S.W.2d 527 (Tex. Civ. App. 1928) ("negligence" not identified as question of mixed law and fact); Billington v. Schaal, 42 Wash. 2d 878, 259 P.2d 634 (1953); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) ("negligence or malpractice," in malpractice action, not identified as law-fact question). Compare these cases with Grismore v. Consolidated Prods. Co., 232 Iowa 328, 5 N.W.2d 646 (1942), where the court discusses the problem and identifies "negligence" and other questions of mixed law and fact.

[70] Case v. English, 255 Ala. 555, 52 So. 2d 216 (1951) ("not capable of making and executing a valid will"). Compare with In re Rich's Estate, 79 Cal. App. 2d 22, 179 P.2d 373 (1947); Smoot v. Alexander, 188 Ga. 203, 3 S.E.2d 593 (1939); In re Ransom's Estate, 244 Iowa 343, 57 N.W.2d 89 (1953); White v. Bailey, 10 Mich. 155 (1862); and In re Tatum's Will, 233 N.C. 723, 65 S.E.2d 351 (1951); where the question was identified as one of law or of mixed law and fact.

[71] No confusion existed in Holton v. Ellis, 114 Vt. 471, 49 A.2d 210 (1946), where the court recognized "competent to make a gift" as a law-fact question. *Cf.* Miller v. Miller, 237 Iowa 978, 23 N.W.2d 760 (1946), where, in a guardianship action, the court held that "he should have someone to help him with his financial affairs" was a question of fact.

"fulfilled" as being a law-fact question,[72] but another noted that testimony about an "intention or purpose to defraud" might involve such a question.[73] Similarly, the opinions sometimes fail to distinguish between law and fact when witnesses give opinions on statutory violations.[74] Borderline questions exist when a witness states a conclusion in language that is both a legal word of art and a term used by laymen, such as "fault"[75] or "proximate result."[76]

A witness cannot be allowed to give an opinion on a question of law,[77] and this upon considerations quite different from the supposed objection to opinions on ultimate facts. In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. This may rest upon a legal fiction, but one more vital to the system and no more contrived than, say, the presumption of innocence. To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.

Witnesses should not state the law; neither should courts confuse ultimate facts with questions of law. Confusion there has been aplenty, and it has produced two kinds of odd results. First, many cases have found fault with testimony on "ultimate facts" when the testimony was actually on a question of law or of law and fact.[78] Such cases reach the right result on the wrong ground. Courts relaxing or abandoning the "ultimate facts" rule should not compound the confusion by sweepingly overruling cases involving testimony on legal questions. Second, a few courts, perhaps in their eagerness to forsake the "ultimate facts" rule, have labeled opin-

[72] Lipe v. Guilford Nat'l Bank, 236 N.C. 328, 72 S.E.2d 759 (1952).

[73] Hathaway v. Brown, 22 Minn. 214 (1875).

[74] *E.g.*, Builders Steel Co. v. Commissioner, 179 F.2d 377 (8th Cir. 1950) ("reasonable" corporate expenses under Internal Revenue Code); Williams v. Gurwitz, 99 Cal. App. 2d 801, 222 P.2d 673 (1950) (whether party in accident "violated the right of way"); Gulf Oil Corp. v. City of Philadelphia, 357 Pa. 101, 53 A.2d 250 (1947) ("machinery" and "manufacturing" under tax statute; possible confusion). *Cf.* Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937) (whether defendant was driving in "careful, lawful and prudent manner").

[75] Dermott Grocery & Comm'n Co. v. Meyer, 193 Ark. 591, 101 S.W.2d 443 (1937) ("fault" was "the very question to be determined by the jury"); Giamattei v. DiCerbo, 133 Conn. 139, 62 A.2d 519 (1948) ("at fault;" apparently not properly identified).

[76] Underwood v. Smith, 262 Ala. 181, 73 So. 2d 717 (1954) ("proximate result" stated to be mixed law-fact question).

[77] Except of course where the law of a foreign jurisdiction is to be proved.

[78] See nn. 67-74, *supra*. Also see, for example, Case v. English, 255 Ala. 555, 52 So. 2d 216 (1951) (capacity to make will); Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937) ("careful, lawful and prudent"); Williams v. Gurwitz, 99 Cal. App. 2d 801, 222 P.2d 673 (1950) ("violated the right of way"); Pointer v. Klamath Falls Land & Transp. Co., 59 Ore. 438, 117 Pac. 605 (1911) ("negligent"; often cited and great source of confusion); Billington v. Schaal, 42 Wash. 2d 878, 259 P.2d 634 (1953) (statutory violation).

ions on the law opinions on ultimate facts and have sanctioned them.[79] Here too the courts should be sedulous to observe the distinction, keeping out the bad as well as letting in the good evidence. In the borderline situations, of which examples were given above, it might do to require the witness to define his terms, to make it clear no statement of the law was intended.

The probability is that more and more jurisdictions will abandon or drastically relax the "ultimate facts" rule. Courts considering a modernization of their law might profitably adopt the rationale of the pathfinder case, *Grismore v. Consolidated Prods. Co.*,[80] where a lengthy, scholarly examination of the rule is undertaken. For a model of clarity and brevity, recourse should be had to *Oxenberg v. State*,[81] which performs the cleanest surgery yet on the rule. Finally, it is to be hoped that the courts will not confuse ultimate facts with questions of law, neither overruling decisions which prohibit opinions on the law nor allowing witnesses to state such opinions.

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[79] *E.g.*, Builders Steel Co. v. Commissioner, 179 F.2d 377 (8th Cir. 1950) ("reasonable" corporate expenses under Internal Revenue Code); Morton Inv. Co. v. Trevey, 8 S.W.2d 527 (Tex. Civ. App. 1928) ("negligence"); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963) ("negligence or malpractice").

[80] 232 Iowa 328, 5 N.W.2d 646 (1942).

[81] 362 P.2d 893 (Alaska 1961). The case states simply that it is no ground for objection that an opinion is on an ultimate issue.