ADMINISTRATIVE FINDINGS OF FACT PART TWO*

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IV. SUPPORTING FINDINGS: "ESSENTIAL," "BASIC," AND "QUASI-JURISDICTIONAL" FACTS

In the very short space of time, 1931 to 1935, the Supreme Court, in cases dealing with the Interstate Commerce Commission, evolved a doctrine to the effect that "essential," "basic," or "quasi-jurisdictional" facts must be expressed in findings of appropriate definiteness, such findings, of course, to be buttressed by evidence in support thereof. These decisions repay scrutiny in their own right and as precedents for some more recent cases that will be discussed in the next section.[65] Despite the linguistic distinction which these cases draw between the *evidence* and the *findings*, one has doubts—it is difficult to determine whether the Court is more nettled by the absence of specific findings or by the absence of supporting evidence.

In *Florida v. United States*,[66] the Court, through Chief Justice Hughes, overturned an Interstate Commerce Commission order requiring a railroad carrier to increase its intrastate rates for transporting logs throughout the State of Florida, so as to make the intrastate rates correspond with the interstate rates prescribed by the Commission. Both the district court and the Supreme Court agreed that the order could not be sustained as justified by section 13(4) of the Interstate Commerce Act, permitting the increase upon a proper administrative determination of undue prejudice "as between persons or localities in intrastate commerce on the one hand and interstate * * * commerce on the other hand." The Commission had, in passing on the "interstate commerce" involved, considered only transportation from points in the northern part of Florida to points in Georgia;

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65. See p. 176 et seq., infra. For the same doctrine, in a case directly influenced by the Supreme Court precedents, see Valley and Siletz R. R. v. Thomas (1935) 151 Ore. 80, 48 P. (2d) 358.

66. (1931) 282 U. S. 194.

this was a purely potential commerce, since no actual movement from Florida to Georgia had been shown. To justify the "assumption" that the protection of this interstate commerce from unjust discrimination required the alteration of the existing intrastate rates for the transportation of logs within Florida "would not only require evidence to support it but findings of appropriate definiteness to express it,"[67] and neither evidence nor findings was present.

Accepting defeat on this issue, the Government and Commission then addressed themselves in their argument before the Supreme Court to an entirely different ground, *i. e.*, that the raising of the intrastate rates was necessary because the existing rates caused "undue discrimination against the carrier's *general* interstate commerce." This argument, likewise based on section 13(4), was also rejected by the Supreme Court. Section 13(4), by being "dovetailed" with section 15(a) of the act, was interpreted to mean that intrastate traffic should pay its fair proportionate share of the railroad's cost of maintenance, so that the insufficiency of the intrastate rates would not cast an undue revenue burden upon the interstate carrier. "It must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier * * *."[68] The mere general averment, in the language of the statute, that intrastate rates result "in unjust discrimination against interstate commerce" was insufficient "in the absence of supporting findings of fact as to the revenue from the traffic in question."[69] Nor was this basic lack supplied by the Commission's determination that the intrastate rates were not remunerative or compensatory; for the raising of rates might, by discouraging patronage, reduce total revenue.

The Court made it clear that it was doing more than criticizing the Commission for not making a suitably complete statement of the grounds upon which it based its conclusion, as it had done in *Beaumont, Sour Lake & Western Railway v. United States*,[70] decided about six weeks previously. The decision was based on[71]

67. Id. at 208.
68. Id. at 212
69. Id. at 213.
70. (1930) 282 U. S. 74.
71. Florida v. U. S. (1931) 282 U. S. 194, 215.

> the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.

The case therefore stands for the proposition that a finding is not sufficient which merely repeats *in haec verba* the language of the statute, but that the Commission must make additional findings that will corroborate the specific determination required by the statute. In appraising this case, it may be well to ponder whether the Court's attitude was tinctured by the fact that intrastate rates, customarily subject to the jurisdiction of a state regulatory commission, had been brought within the ambit of federal regulation on the basis of the alleged discrimination; the possibility of constitutional invalidity may account for the Chief Justice's hesitancy.

In *United States v. Baltimore and Ohio Railroad*,[72] the statute authorized the Interstate Commerce Commission to prescribe changes in the equipment used by railroads where such changes were required to remove "unnecessary peril to life or limb." Relying on the *Florida* case, the Court, through Mr. Justice Brandeis, asserted that the Commission's "finding to that effect is essential to the existence of authority to promulgate the rule."[73] Consequently, when the Commission, in ordering carriers to be equipped with a suitable type of power-operated reverse-gear, found only that "the safety of employees and travellers on railroads" required the change to a limited extent, and left the statutory finding as a mere inference therefrom, the Court declared the Commission's order void. Here again, the Court emphasized that while a complete statement of the grounds of the Commission's determination was desirable as a labor-saving device for a reviewing court, incompleteness was not fatal to the validity of the order and formal and precise findings were not required. However, there did exist a necessity for making, "where orders are subject to judicial review, quasi-jurisdictional

72. (1935) 293 U. S. 454.
73. Id. at 463.

findings essential to their constitutional or statutory validity."[74] This case seems to add to the doctrine set forth in the *Florida* case, for it makes it clear that orders which are subject to judicial review must contain quasi-jurisdictional findings essential to constitutional, as well as statutory, validity. Our problem now becomes: What is the nature of these quasi-jurisdictional findings?

In *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*,[75] the Interstate Commerce Commission rejected a proposed rate schedule. Acting pursuant to section 15(1) and (7) of its act, it determined that the proposed rate schedule would be unreasonable and would violate the section of the act requiring it to give due consideration to the need of adequate and efficient railway transportation and to the need of revenue sufficient to enable the carrier to provide service at the lowest cost consistent with the furnishing of such service. The Commission's finding that the proposed rates would be unreasonable could not stand unless supported by facts more particularly stated. Those facts were not found, for there was no suggestion that the rates were less than compensatory or that they would result in impaired service to the public, and the finding of unreasonableness was entirely predicated, according to the Court, on the assumption—which the Court thought illusory—that the proposed rates would disrupt the rate structure hitherto prevailing. The least that might be expected from the Commission would be findings that would indicate the expected loss of revenue to the carriers and whether that loss would be trivial or substantial.

Mr. Justice Cardozo concludes the Court's opinion with a paragraph that may be taken as indicative of the extent to which the Court wishes to be confronted with explicit quasi-jurisdictional findings:[76]

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfair-

74. Id. at 465.
75. (1935) 294 U. S. 499.
76. Id. at 510-511.

> ness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.

The facts in *Atchison, Topeka and Santa Fe Railway v. United States*[77] in which the opinion was written by Mr. Justice Butler, need not be extensively recapitulated. Suffice it to say that a shipper of cattle had attacked as unreasonable, in violation of section 1 of the Interstate Commerce Act, (a) tariff charges by the carrier applicable to the switching of live stock to its packing plant and (b) yardage charges collected by the stock yard company on livestock delivered at the stock yards. The Commission had decided that the switching charge imposed by the carrier was not unreasonable or unlawful, but that the live stock was not subject to yardage charges where delivery of the live stock was taken by the shipper at the unloading pens. The Court felt that, since the rate schedules adopted by the carriers were supposed to include everything that was incidental to transportation, it was important to determine whether transportation covered unloading and the use of property immediately subsequent to unloading; to the extent that transportation did embrace such other activities, the activities could not be subjected to charges over and above the rates fixed in the official tariffs. Furthermore, where transportation ended the Interstate Commerce Commission's jurisdiction ended and the Secretary of Agriculture's jurisdiction began. Despite the importance of this issue, "the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a

77. (1935) 295 U. S. 193.

valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained."[78] Mr. Justice Stone, in a dissent concurred in by Justices Brandeis and Cardozo, took issue as to the materiality of "the precise point in space at which delivery is complete, or where transportation ends."[79] He felt that the basic policy of the Transportation Act made it clear that all of the services in connection with transportation were to be performed for a single scheduled rate, and that the Commission was therefore correct in forbidding the yardage charge as applied to live stock taken by the consignee direct from the unloading pens.

The doctrine somewhat confusedly limned in the foregoing four cases not only elevates into a canon of *validity* of administrative action what the Court had prior thereto merely eulogized as *desirable,* but also tends dangerously in the direction of nullifying the presumption of the correctness of administrative fact finding.[80] What does the doctrine amount to? What are the "basic," "essential," and "quasi-jurisdictional" facts concerning which findings must be made?

Analysis of the cases that have just been described points to the exclusion from this category of facts relating to jurisdiction over the person[81] and place,[82] and the inclusion of facts relevant

78. Id. at 202-203.

79. Id. at 203. This factual determination (quasi-jurisdictional or not) is still important, but one that it is now recognized must be made in the first instance by an administrative body rather than by the courts. See Armour and Co. v. Alton R. R. (1941) 312 U. S. 195.

80. See Darnell v. Edwards (1917) 244 U. S. 564, 569 (rate fixing); St. Joseph Stock Yards v. U. S. (1936) 298 U. S. 38, 53 (rate fixing); N. L. R. B. v. Waterman Steamship Corp. (1940) 309 U. S. 206, 208, 226.

81. This class of facts is what the courts usually have in mind when they refer to "jurisdictional facts." The use of words like "quasi-jurisdictional" and "essential" is probably a purposive one intended to make clear their differentiation from "jurisdictional facts." Thus, for example, in Crowell v. Benson (1932) 285 U. S. 22, Mr. Justice Brandeis in his dissent contends that the employer-employee relationship is only a "quasi-jurisdictional fact," whereas Chief Justice Hughes for the majority regards it as a "jurisdictional fact." Also, compare Ng Fung Ho v. White (1922) 259 U. S. 276 (alienage held to be a "jurisdictional fact" in deportation proceeding), with United States v. Tod (1924) 264 U. S. 131 (alien's knowledge of seditious character of printed matter held to be "essential" fact to deportation).

82. The *Atchison* case, in holding the existence of transportation to be a quasi-jurisdictional fact, is reminiscent of the *Crowell v. Benson* case's treatment of the locale of injury as a jurisdictional fact. It is significant that in the *Atchison* case three Justices dissented on the ground that transportation was an economic process and not a change in geographical situs.

In view of the recurring possibility of attacks on administrative agencies for transgressing the bounds of the federal interstate commerce power, it

to jurisdiction over the subject matter.[83] Jurisdiction over the subject matter, however, is a notorious verbal wanton, at times obscurely and tenuously distinguishable from the "merits" of a controversy.[84] The *Florida* case, on the one hand, seems to say that the "basic" or "essential" facts are those defining the evil upon the ascertainment of which the remedial administrative process goes into operation;[85] this is a dubious type of limitation, for it is evident that an evil is to a large measure co-extensive, so far as the relevant evidentiary facts are concerned, with the basis for its amelioration. The *Baltimore and Ohio* case, on the other hand, identifies these crucial facts as the statutory conditions which the issuance of an administrative order must satisfy. The *Chicago, Milwaukee and St. Paul* case uses the criteria employed in both the *Florida* and the *Baltimore and Ohio* cases; it includes both the facts that are necessary preliminaries to the inception of administrative action, and the facts necessary to its successful culmination in an administrative order or decree. If this test be accurate, very little that is material to the decision of a case falls outside the scope of "basic," "essential," and "quasi-jurisdictional" facts.

In effect, then, the problem of defining these facts becomes closely assimilated to the perennial problem of defining a court's

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has become customary for the agencies to make jurisdictional findings concerning interstate commerce. This practice has been held to be unnecessary when the jurisdictional facts appear elsewhere in the course of the administrative proceeding. See Detroit Edison Co. v. S. E. C. (C. C. A. 6, 1941) 119 F. (2d) 730, 740.

83. For the three major types of jurisdiction, see Terry v. Huntington (1669) Hardres 480, 145 Eng. Rep. 557; Black, The "Jurisdictional Fact" Theory and Administrative Finality (1937) 22 Cornell L. Q. 349, 355.

84. "Many of the erroneous determinations of jurisdiction arise from misconstruction of a statute or from mistakes of law; and it is doubtful whether a hard and fast line can be drawn between mistakes of law and mistakes of jurisdiction." Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court (1921) 35 Harv. L. Rev. 127, 133. See Brandeis, J., dissenting in *Crowell v. Benson* on the ground that the employer-employee relationship was only a "quasi-jurisdictional" fact going to the applicability of the substantive law, and not to the jurisdiction of the tribunal.

85. Accord: I. C. C. v. Northern Pacific Ry. (1910) 216 U. S. 538 (nonexistence of reasonable or satisfactory routes a jurisdictional fact for order establishing through routes); I. C. C. v. Louisville and Nashville R. R. (1913) 227 U. S. 88 (unreasonable rates); Hale, Commissions, Rates, and Policies (1940) 53 Harv. L. Rev. 1103, 1104; cf. I. C. C. v. Stickney (1909) 215 U. S. 98, 105 (unreasonable charges); Southern Pacific v. I. C. C. (1911) 219 U. S. 433 (unreasonable rates); Wyman, Jurisdictional Limitations upon Commission Action (1914) 27 Harv. L. Rev. 545, 561 et seq.

jurisdiction over the subject matter, *i. e.*, the general abstract question of whether the case belongs to the general class of cases over which the tribunal has power to act.[86] Ordinarily, in the case of statutes conferring administrative authority, that question can be resolved by direct reference to the language of the statute itself. And were this all that was involved, the doctrine so laboriously spun out by the Supreme Court in this connection would be equivalent to the simple rule, discussed in the first two sections of this article, calling for administrative agencies to repeat the ultimate findings which the statute requires them to make. The *Florida,* and *Chicago, Milwaukee and St. Paul* cases, however, go further, for they require that the ultimate statutory findings be supported by more particular findings. While such a requirement is in effect a recognition of the inanity of the enforced repetition of mere statutory language, does it contribute anything that would not have been furnished by a judicial declaration that the evidence did not support the ultimate findings? Or is it in effect a polite way of saying that the court is not disposed, where an administrative agency has compiled a slipshod and badly integrated evidentiary record, to inquire whether the evidence does in fact support these ultimate findings? The answer to these questions may perhaps become clearer after we have discussed one other effort on the part of the courts to require the making of subsidiary, as contrasted with ultimate, findings of fact.

V. Supporting Findings: The Stephens Approach

Probably the best expressed recent effort to convert the established dichotomy between evidence and findings into a tripartite hierarchy that will embrace *supporting* as well as *ultimate* findings may be found in *Saginaw Broadcasting Co. v. Federal Communications Commission.*[87] Judge Stephens there distinguishes between (1) evidence, (2) facts of a basic or underlying nature,

86. See Comment (1928) 2 Dakota L. Rev. 152.

87. (App. D. C. 1938) 96 F. (2d) 554, cert. den. (1938) 305 U. S. 613. The Federal Communications Act, as has been noted, explicitly requires findings.

A similar analysis underlies Meeker v. Lehigh Valley Ry. (1915) 236 U. S. 412; Louisville & Nashville Ry. v. Ill. Commerce Comm. (1933) 353 Ill. 375, 187 N. E. 449 ("principal issues"). Cf. also Judge Stephens' dissenting opinion in Goodacre v. Panagopoulos (App. D. C. 1940) 110 F. (2d) 716 (involving judicial findings).

and (3) ultimate facts (the determinations required by the statute, which can usually be couched in statutory language). In the *Saginaw* case, for example, the ultimate fact to be found was that the public interest, convenience or necessity would be served by the Commission's granting the radio station construction permit which had been applied for. This ultimate fact would have to be "inferred" from certain basic facts, such as the probable existence or non-existence of electrical interference, the number of other stations operating in the area, their power, wave length, etc. "Inferred" was defined to mean "that there shall be some rational or coherent relationship between the basic facts and the ultimate facts, that the latter shall flow logically from the former."[88] The basic findings need not, of course, be set out in formal style or in the technical manner customary in trial courts.

On the basis of this prepossessing logical structure, however, the case develops some dangerous implications. With respect to hours of operation, for example, the Commission had made (1) an admittedly erroneous statement, and (2) a bare finding that the needs of the area about Saginaw required the type of uninterrupted broadcast until sunset which was proposed in the aplication for the permit. The court held, with respect to the erroneous statement, that it would reverse any order of the Commission based on findings contrary to the evidence, *even if* the evidence justified other findings upon the basis of which the order could be upheld.[89] The finding with respect to the needs of the area about Saginaw was a "bare inference," and the court could not be asked to determine whether the evidence supported facts corroborating that inference. Likewise stigmatized as an inference rather than a finding of fact was the Commission's "finding" that the grantees of the permit were financially qualified.[90]

88. See Tri-State Broadcasting Co. v. F. C. C. (App. D. C. 1938) 96 F. (2d) 564, 567, with opinion delivered by Judge Stephens the same day.

89. "The question is not whether a correct finding could have been made the basis for the same decision by the Commission, but whether the finding on which the decision was actually based was a correct one." Tri-State Broadcasting Co. v. F. C. C. (App. D. C. 1938) 96 F. (2d) 554, 562.

90. "The Commission's finding * * * does not disclose any facts bearing on either of the above aspects of the question of financial qualifications. * * * Even though there may be evidence in the record—upon this we do not pass—from which the Commission might have concluded that the inter-

It is doubtful whether the doctrinal approach of the *Saginaw* case still stands. The Supreme Court, in a later case likewise involving an application for a radio construction permit, seems to have repudiated the conceptualism inherent in the *Saginaw* case,[91] harking back to the temperate note of casual criticism that characterized some of its earlier decisions.[92] Also, the notion that a single invalid finding necessarily vitiates an entire administrative order, even if the ultimate conclusions of fact are supported on a total view of the evidence, is against the weight of

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venors would receive adequate commercial support in the sense above stated, this does not excuse the Commission from its duty of making a finding as the result of its consideration of that evidence." Tri-State Broadcasting Co. v. F. C. C. (App. D. C. 1938) 96 Fed. 554, 563.

91. See F. C. C. v. Sanders Bros. (1940) 309 U. S. 470. Associate Justice Miller, in the court below, had said that the Commission's decision as to the public interest, convenience and necessity could not stand unless based upon supporting findings. "Moreover, it is not the function of this Court to review the evidence for the purpose of making findings or of justifying findings not made—it is not sufficient that they be marshalled and presented in the brief on appeal. They must be prepared as findings of fact, upon which the decision of the Commission may be rested." Sanders Bros. v. F. C. C. (App. D. C. 1939) 106 F. (2d) 321, 324-326.

In addition, the court held that, since the issue of economic injury to a competing broadcasting station had been clearly presented to the Commission, the Commission had erred in not making a clear finding on this point. While the evidence supported a possible inference that the competing station would not be injured, that inference, "viewed in the light of the finding that appellant is losing money, is not a necessary one. Another possible inference is that the Commission totally disregarded the issue of economic injury to appellant; and another, that the Commission considered the issue and found it to be without merit. What actually occurred we are left to surmise. To avoid such a situation is the purpose of the rule" requiring findings of fact. Id. at 325. The Supreme Court said that no finding concerning economic injury to rival stations was necessary, since the Congressional purpose was only to protect the general public, and not to protect existing licensees against competition.

92. In dismissing the attack on the sufficiency of the findings generally, Mr. Justice Roberts merely said, "*If the findings were not as detailed upon this subject as might be desirable,* the attack upon them is not that the public interest is not sufficiently protected but only that the financial interests of the respondent have not been considered." (italics supplied) See Federal Communications Commission v. Sanders Bros. Radio Station (1940) 309 U. S. 470, 477. Cf. Beaumont, Sour Lake, and Western Ry. (1930) 282 U. S. 74, upholding an I. C. C. division of joint rates, even though "the Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this"; United States v. Louisiana (1933) 290 U. S. 70, 188.

authority,[93] although there may be situations where a single finding embraces such a large portion of the relevant evidence that its overthrow would indicate that there is lacking evidentiary support for issuance of the order. And, if the courts acquiesce in the proposition that an administrative body may, where the parties before it expressly waive their right to findings of fact, issue an order based upon the entire record without any administrative findings,[94] the importance of specific findings by administrative tribunals becomes still further minimized.

Furthermore, the attempted distinction between findings of fact and inferences is a false dichotomy, since findings of fact are necessarily inferences from the evidence.[95] Judge Stephens is simply endorsing as "findings" those inferences from the evidence which he believes valid, and is castigating as "inferences" the inferences which he believes unwarranted. Another premise, inarticulate but implicit in his position, is that the special advantage that experience gives an administrative agency in the sphere of what he calls "fact-finding" disappears in the field of "inference," and that courts have a special competence in the latter field. This premise likewise is disputable; if experience enables an administrative agency to draw inferences from a background of more or less abundant evidence (to use Judge Stephens' language, to "find facts") more accurately than an inexperienced court, it should confer a similar superiority where evidence is scant (the so-called field of "inference").[96] In short, the court's comments concerning "possible" and "necessary" in-

93. Sometimes a single valid finding will be sufficient to sustain an order, even if the others are invalid, N. L. R. B. v. Yale & Towne Mfg. Co. (C. C. A. 2, 1940) 114 F. (2d) 376, 379. See also N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co. (1939) 308 U. S. 241, 247; Kansas City P. & L. Co. v. N. L. R. B. (C. C. A. 8, 1940) 111 F. (2d) 340, 357; Bethlehem Shipbuilding Corp. v. N. L. R. B. (C. C. A. 1, 1940) 114 F. (2d) 930; N. L. R. B. v. Nat'l Casket Co. (C. C. A. 2, 1939) 107 F. (2d) 992, 998; Bd. of Trade of K. C. v. U. S. (D. C. W. D. Mo. W. D. 1941) 36 F. Supp. 865. Cf. N. L. R. B. v. Swift & Co. (C. C. A. 8, 1940) 116 F. (2d) 143, 145; Conn v. N. L. R. B. (C. C. A. 7, 1939) 108 F. (2d) 390; N. L. R. B. v. Automotive Maintenance Mach. Co. (C. C. A. 7, 1940) 116 F. (2d) 350, cert. granted (1941) 62 S. Ct. 77.

94. See N. L. R. B. v. Central Mo. Tel. Co. (C. C. A. 8, 1940) 115 F. (2d) 563, 567; N. L. R. B. v. Pure Oil Co. (C. C. A. 5, 1939) 103 F. (2d) 497.

95. Cf. Schechter Poultry Corp. v. U. S. (1935) 295 U. S. 495, 538 (finding called "a statement of an opinion").

96. It is true, of course, that inferences drawn on the basis of meager evidence are usually less reliable than those based on a substantial accumulation of evidence, regardless of who draws the inference.

ferences are apt camouflage whereby the court's conception of rationality and coherence can be made to control over that of the administrative tribunal, and cannot be reconciled with the sound *dictum* of the Supreme Court that "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts."[97]

The whole theory of reversal, rather than reprimand, for invalid findings is inconsistent with the judicial rule permitting a court to make additional findings, if the evidence conclusively points to such findings and if "it clearly appears that, in the interest of justice, the controversy should be decided without further delay."[98] In this connection, one should not be oblivious of the danger that the court may not make the same findings as the administrative body would have made, and that therefore this rule, if carried too far, will invade the proper scope of the primary jurisdiction doctrine and substitute the judiciary as the fact-finding agency in place of the administrative.[99] However, if the rule is limited to situations where the court affirms the action of the administrative body, it operates as an instrument of justice, for it seems fundamentally unjust to keep a twice-vindicated litigant in suspense merely in order that the administrative body may supply him with corrected reasons for his vindication.

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97. See N. L. R. B. v. Link-Belt (1941) 311 U. S. 584, 597; N. L. R. B. v. Penn. Greyhound Lines (1938) 303 U. S. 261, 271; N. L. R. B. v. Falk Corp. (1940) 308 U. S. 453; N. L. R. B. v. Swift & Co. (C. C. A. 8, 1940) 116 F. (2d) 143, 145.

98. F. T. C. v. Curtis Publishing Co. (1923) 260 U. S. 568, 580. Accord: International Shoe Co. v. F. T. C. (1930) 280 U. S. 291, 297; N. L. R. B. v. Nat'l Motor Bearing Co. (C. C. A. 9, 1939) 105 F. (2d) 652, 657; Detroit Edison Co. v. S. E. C. (C. C. A. 6, 1941) 119 F. (2d) 730. Cf. Ford Motor Co. v. N. L. R. B. (1939) 305 U. S. 364, 373 (court, in reviewing N. L. R. B. orders, may adjust its relief "to secure a just result with a minimum of technical requirements"). Contra: Kidder Oil Co. v. F. T. C. (C. C. A. 7, 1941) 117 F. (2d) 892.

99. Thus, in the *Curtis* case, Chief Justice Taft doubted the wisdom of the sentence in the majority opinion quoted in the text, on the ground that "it may bear the construction that the Court has discretion to sum up the evidence *pro* and *con* on issues undecided by the Commission and make itself the fact-finding body, * * *." F. T. C. v. Curtis Publihsing Co. (1923) 260 U. S. 568,583; Justice Brandeis concurred. Likewise, in the *National Motor Bearing* case, Circuit Judge Haney dissented on the basis that "unless we insist upon precise findings there is danger that the Board may carelessly leave a progressively largen number of facts to be ascertained by inference." N. L. R. B. v. Nat'l Motor Bearing Co. (C. C. A. 9, 1939) 105 F. (2d) 652, 665. And, in the *International Shoe* case, Justice Stone dissented, in an opinion concurred in by Justices Holmes and Brandeis, on

VI. A Glance at Judicial Findings of Fact

The demand for ultimate and supporting findings of fact by administrative agencies finds a rough parallel in the large body of state legislation requiring trial courts to make general and special findings of fact.[100] It is therefore interesting to observe that critical appraisals of these two types of judicial findings coincide somewhat with what can be said concerning their respective administrative counterparts. Thus, for example, Sunderland says of general findings of fact by a court—as we have said of administrative findings of ultimate fact—that they "are purely formal requirements, which serve no substantially useful purpose and ought always to follow as a necessary inference from the judgment itself."[101] His further comment, however, that "they cause little or no trouble because they are easy to draw and can be supplied by intendment whenever the point is raised,"[102] represents, as we have seen, the ideal rather than the actual situation with respect to judicial review of administrative findings. As for special findings, Sunderland considers their only utility to be the facilitation of appellate review by clarifying the issues for the reviewing tribunal;[103] after the issues have been presented in turn by the pleadings, the evidence, and the briefs and arguments of counsel, special findings can hardly be said to add much to the information of the parties and of the trial court,

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the ground that the Commission's findings should have been sustained because supported by the evidence; he does not specifically attack the doctrine.

100. According to Clark and Stone, Review of Findings of Fact (1937) 4 U. Chi. L. Rev. 190, 206-207, in some 19 jurisdictions the court in jury-waived and equity cases must make special findings of fact in writing, and in an additional 20 the court must make such findings when requested by the parties. This requirement had its genesis as an attempt to impose upon non-jury trials a procedure comparable to the "special verdict" in trials by jury at common law. See Sunderland, Findings of Fact and Conclusions of Law in Cases Where Juries are Waived (1937) 4 U. Chi. L. Rev. 218, 221.

101. Sunderland, supra note 100, at 225. Compare the discussion of administrative findings of ultimate fact at pp. 64, 68 et seq., 72-73, Part One, supra.

See, for some cases urging that special findings aid in acquainting the parties with what was really adjudicated, Judge Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law (1940) 1 F. R. D. 25, 26, 27.

102. Thus, for example, courts will, in the absence of an affirmative showing to the contrary, presume a waiver of general findings even where no waiver has in fact taken place, Sunderland, supra note 100, at 225.

103. He definitely repudiates the notion that findings have much value in determining whether the facts found are sufficient in law to support the judgment. Id. at 230.

or to be necessary as a matter of ordinary trial practice.[104] From this conclusion, Sunderland draws the corollary that the preparation of special findings should be deferred until an appeal is entered, but it is questionable to what extent the courts agree with his view.[105] Since administrative proceedings have in effect assimilated all the judicial trappings—pleadings, the formal taking of evidence, briefs and oral argument—it would seem to follow that the proper emphasis to place on supporting findings of fact (the administrative counterpart of special findings) is that they may be a most effective, but are certainly not an indispensable, method of presenting to an appellate tribunal the factual issues involved in the administrative proceeding.

It may be desirable in this connection to take a brief glance at the experience of the federal courts with the theory of special findings. Rule 52(a) of the new Rules of Civil Procedure requires of trial courts in non-jury actions that they "find the facts specially" and that these findings are not to be set aside by a reviewing court unless "clearly erroneous."[106] The rule has never been defended as a means of giving notice to the affected parties; it exists exclusively for the purpose of facilitating judicial review[107] and was originally conceived as a means of conserving judicial time and eliminating litigious delay and expense. It was hoped, by narrowing and crystallizing the controverted questions of fact in a judicial trial, to shorten appellate records and reduce the amount of evidence which would have to be passed on by the

104. See Davis v. Boston Elevated Ry. Co. (1920) 235 Mass. 482, 494, 126 N. E. 841, 843; Sunderland, supra note 100, at 228, 230. The cases, however, sustain every type of objection to a special finding that could have been made to a special verdict. Sunderland, supra note 100, at 227.

105. Under Rule 52(a), discussed in note 106, infra, it has been held that findings of fact may be filed or amended after judgment has been entered, Reinstine v. Rosenfield (C. C. A. 7, 1940) 111 F. (2d) 892.

106. Rule 52(a) extends the scope of Equity Rule 70½, which had governed equity actions only, so as to make it applicable to *all* non-jury actions. Stonega Coke and Coal Co. v. Price (C. C. A. 4, 1939) 106 F. (2d) 411, cert. den. (1939) 308 U. S. 618; Guilford Const. Co. v. Biggs (C. C. A. 4, 1939) 102 F. (2d) 46; Ilsen and Hone, Federal Appellate Practice As Affected By the New Rules of Civil Procedure (1939) 24 Minn. L. Rev. 1. It also calls for separately stated conclusions of law.

It should be borne in mind, in generalizing from the experience of the courts under these two rules, that the parent rule itself is of recent vintage, having been effective only since October 1, 1930. See Lane, Twenty Years Under the Federal Equity Rules (1933) 46 Harv. L. Rev. 638, 644.

107. See United States v. Institute of Carpet Manufacturers of America, Inc. (D. C. S. D. N. Y. 1941) 1 F. R. D. 636.

reviewing tribunal.[108] And in situations where the parties are willing to stipulate the facts,[109] or do not object to the facts as found by the court, or where it takes only a cursory inspection of the record to establish that the findings made by the lower court were not "clearly erroneous,"[110] the rule serves to remove certain evidential areas from controversy and hence from the necessity of re-examination by an appellate court. However, it was pointed out prior to the adoption of Equity Rule 70½, and is still true, that findings of fact will not helpfully reduce the record up for review "if a controverted finding was based on all the evidence in the case, or if a finding was objected to as being unsupported by any evidence."[111] It is apparent that this latter state of affairs still exists, with painful frequency, in many important cases where administrative action is being reviewed.

Rule 52(a) has, on the whole, received a flexible and sympathetic construction at the hands of the courts that contrasts notably with the rigid application of fact-finding dogma in the case of administrative agencies. The courts, reluctant to base their decisions on procedural informalities, have explored the record even when findings have not been made by the lower court,[112] and have recognized that the lower court is "something more

108. See Griswold and Mitchell, Narrative Record in Federal Equity Appeals (1929) 42 Harv. L. Rev. 483, 513-514; Clark and Stone, supra note 100, at 205, and at 209, note 73. Special findings do have the effect of shortening the record in the case of appeals from the court of claims, for the rules governing such appeals provide that the record on review contain only the findings and no evidence; review is limited to questions of law, Union Pacific Ry. v. U. S. (1885) 116 U. S. 154; Luckenbach S. S. Co. v. U. S. (1926) 272 U. S. 533, 538.

Findings, by abbreviating the record, reduce the cost to the appellant of printing the record on appeal. See Vennell v. U. S. (D. C. E. D. Pa. 1941) 36 F. Supp. 646.

109. Paine v. Welsh (D. C. D. Mass. 1940) 33 F. Supp. 341; State Street Trust Co. v. White (D. C. D. Mass. 1940) 32 F. Supp. 122; Bradlee v. White (D. C. D. Mass. 1940) 31 F. Supp. 569; United States v. Institute of Carpet Manufacturers of America (D. C. S. D. N. Y. 1941) 1 F. R. D. 636. But cf. Nordbye, supra note 101, at 31.

110. In other words, where the court does not have to review the evidence *de novo*. Webb v. Frisch (C. C. A. 7, 1940) 111 F. (2d) 887.

A frequent advantage of the findings of fact apparatus, for example, is that it enables a court to isolate factual determinations in respect of which the credibility of witnesses is a significant factor, and the facts as found by the lower court consequently entitled to even greater than ordinary acceptance. See the cases cited in the Annotation to Rule 52(a) in 28 U. S. C. A. 108; Clark and Stone, supra note 100, at 207-208.

111. Griswold and Mitchell, supra note 108, at 514.

112. Massachusetts Bonding & Ins. Co. v. Preferred Automobile Ins. Co. (C. C. A. 6, 1940) 110 F. (2d) 764.

than a 'whistling post' on the highway of an ultimate destination."[113] Even though the rule might have been construed to require a formal segregation of findings of fact from the court's opinion,[114] appellate courts generally have accepted fact findings as complying with the rule even when they constituted part of of the body of the opinion,[115] or amounted simply to a confirmation of a master's report.[116] Formal findings by a court have been held unnecessary where all statements of fact made by plaintiffs or defendants are admitted in documents on file in the proceeding.[117] In fact, it has been said that the effect of the rule is to make the writing of a considered opinion on the facts supererogatory;[118] formal findings and opinion are merely alternative methods of apprising an appellate court of the relevant material facts. The courts have furthermore said that precise findings on material issues were not essential where the reviewing tribunal was able to understand the basis for the determination reached below[119]

As might be expected, several difficulties of definition seem to inhere in the requirement that the special findings of the trial court be of "material," "essential," or "ultimate" facts.[120] In the

113. Sonken-Galamba Corp. v. Atchison, Topeka & Santa Fe Ry. Co. (D. C. W. D. Mo. 1940) 34 F. Supp. 15.

114. And is so construed by Judge Nordbye, see supra note 101, at 28, who takes a much more restrictive approach to the entire rule.

115. Ilsen, supra note 106. Jackson County v. Alton Rail Co. (C. C. A. 8, 1939), 105 F. (2d) 633, cert. den. 60 S. Ct. 175; Foster v. U. S. (D. C. D. Mass. 1939) 25 F. Supp. 837; Proctor v. White (D. C. D. Mass. 1939) 28 F. Supp. 161.

116. Green Valley Creamery, Inc. v. U. S. (C. C. A. 1, 1939) 108 F. (2d) 342.

117. United States Trust Co. v. Sears (D. C. D. Conn. 1939) 29 F. Supp. 643.

118. Basevi v. Edward O'Toole Co. (D. C. S. D. N. Y. 1939) 26 F. Supp. 41; Penmac Corp. v. Esterbrook Steel Pen Mfg. Co. (D. C. S. D. N. Y. 1939) 27 F. Supp. 86; Scoville Mfg. Co. v. U. S. Electric Mfg. Corp. (D. C. S. D. N. Y. 1940) 31 F. Supp. 115. Judge Otis points out, however, that an opinion is still useful in clarifying the trial judge's own mental processes, Otis, Improvements in Statement of Findings of Fact and Conclusions of Law (1940) 1 F. R. D. 83, 87.

119. Ilsen and Hone, supra note 106; Goodacre v. Panagopoulos (App. D. C. 1940) 110 F. (2d) 716 (Associate Justice Stephens dissenting); cf. Tulsa City Lines, Inc. v. Mains (C. C. A. 10, 1939) 107 F. (2d) 377. But cf. Interstate Circuit, Inc. v. U. S. (1938) 304 U. S. 55; Mayo v. Lakeland Highlands Canning Co., Inc. (1940) 309 U. S. 310; City of Sumter v. Spur Distributing Co. (C. C. A. 4, 1940) 110 F. (2d) 649.

120. Ilsen and Hone, supra note 106; Penmac Corp. v. Esterbrook Steel Pen Mfg. Co. (D. C. S. D. N. Y. 1939) 27 F. Supp. 86 ("essential"); Sonken-Galamba Corp. v. Atchison, Topeka & Santa Fe Ry. Co. (D. C. W.

first place, are "material" facts the same as "ultimate" facts? If they are, can there be any doubt as to what those facts are once one has read the language of the statute, and why republish them?[121] Furthermore, here as elsewhere, will not special findings be difficult to distinguish from conclusions of law on the one hand,[122] and from mere evidence on the other?[123] And finally, if findings need only be of facts material to the decision, does it not become impermissible to reverse a tribunal, solely on the basis that a single finding in support of the decision was erroneous, when other fact findings would independently have supported the findings of ultimate fact required by the statute?[124]

VII. Further Pragmatic Considerations Concerning Administrative Findings

Although most of the cases which require supporting findings of fact seem to do so primarily on the basis of judicial irritation at having to review a defective administrative record, the argument is occasionally noted that fact findings are necessary in order to apprise an adversely affected party of facts which may guide his future course of action.[125] How significant is this consideration? Bearing in mind the continuous and flexible nature of administrative proceedings and the continuing status of many parties (particularly public utilities) of subjection to the administrative process, party and agency alike may be said to obtain, by mere participation in the administrative proceeding, a type of "direct," "actual" or "express" notice[126] that is probably less misleading than would be given by findings of fact; findings of

D. Mo. 1940) 34 F. Supp. 15 ("material"); McGee v. Nee (C. C. A. 8, 1940) 113 F. (2d) 543 ("ultimate").

121. See pp. 64, 67, 70, 72-73, Part One, supra.

122. See Cook, "Facts" and "Statements of Fact" (1937) 4 U. Chi. L. Rev. 233, 242 et seq.; Clark and Stone, supra note 100, at 211, note 93; Otis, supra note 104, at 85; United States v. Anderson (C. C. A. 7, 1939) 108 F. (2d) 475, 479, cert. den. (1940) 309 U. S. 688; Circuit Judge Magruder concurring in Manning v. Gagne (C. C. A. 1, 1939) 108 F. (2d) 718, at 721.

123. See Luckenbach S. S. Co. v. U. S. (1926) 272 U. S. 533, 541; McGee v. Nee (C. C. A. 8, 1940) 113 F. (2d) 543, 546.

124. Cf. the Stephens approach, pp. 176 et seq. supra.

125. See Missouri Broadcasting Corp. v. F. C. C. (App. D. C. 1937) 94 F. (2d) 623, 625. The concern of the *Morgan* and *Opp* cases with what constitutes a "full hearing" to the parties affected seems to mirror the same consideration.

126. See Merrill, The Anatomy of Notice (1936) 3 U. Chi. L. Rev. 417, 418.

fact are, after all, truncated summaries of the evidence, and hence necessarily distort the evidence.[127] Or, if one cavils at saying that affected parties acquire direct notice, do they not get a kind of "implied notice," *i. e.*, the notice of facts which may be inferred from facts of which they are directly conscious, that should be equally satisfactory?[128] After all, findings of fact, whether subsidiary or ultimate, are no more than crystallizations of, and inferences from, evidentiary facts already put in the record. In the same way that the presence of supporting findings of fact implies the existence of the ultimate finding required by the statute,[129] the finding of an ultimate fact implies that the necessary supporting findings have been made;[130] surely one can assume that the relationship between evidence that has been taken and the individual facts that have to be found is also mutually implicative. What real likelihood is there that parties who have been through the turmoil of the administrative process, have been given full opportunity to tender evidence, cross-examine and rebut the evidence offered by the administrative agency, file and answer briefs, etc., are unaware of the bases of administrative action?[131]

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127. It may be noted that one of the objections to the narrative record, which condenses evidence much less than findings do, is that it does not convey a true picture of the proceedings at the trial, see Griswold and Mitchell, supra note 108, at 504; Lane, Federal Equity Rules, (1922) 35 Harv. L. Rev. 276, 299.

128. "One who does not know a fact affecting his legal position may nevertheless be conscious of other facts so strongly indicating the existence of the ultimate fact that a man of ordinary prudence would inquire concerning it or conduct his business as though it existed." Merrill, supra note 126, at 419. "* * * a policy of the law, based on that standard of reasonable conduct upon which juristic science so frequently leans, forbids people to lapse into carefree inattention." Id. at 430. Notice, as defined in the Restatement of Agency, "now enumerates knowledge, reason to know (inquiry-stimulating facts), duty to know and notification (notice based on formality)." Id. at 427.

129. N. L. R. B. v. National Motor Bearing Co. (C. C. A. 9, 1939) 105 F. (2d) 652, 658.

130. Manufacturers Ry. v. U. S. (1918) 246 U. S. 457; N. L. R. B. v. Ford Motor Co. (C. C. A. 6, 1940) 114 F. (2d) 905, 912.

131. Cf. Lenihan v. Tri-State Telephone & Telegraph Co. (Minn. 1940) 293 N. W. 601.

A different situation is presented when it is not known whether the finding made by the administrative body is exclusive, and evidence has been presented on which no specific findings have been made. Thus, in A. E. Staley Mfg. Co. v. Secretary of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258, the Secretary of Agriculture had found that refined sugar (sucrose) and refined corn sugar (dextrose) were saccharine ingredients in sweetened condensed milk, but did not find that they were the *only* ingredients. Peti-

Particularly in a situation where lengthy records and difficult problems are involved, an administrative agency, for reasons of internal self-discipline if for no other reason, should not rely unduly on the ability of affected parties or of the courts to draw inferences which are implicit in the evidence; it should give such inferences explicit statement.[131a] However, as has been seen, formal findings of fact are not the only device whereby such explicit statement can be achieved. Moreover, such statement should not be a strait-jacket for the administrative process but

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tioner, who manufactured corn syrup (glucose) was therefore unable to ascertain whether his product had been found to be a saccharine ingredient, and it was impossible to tell from the record whether the Secretary of Agriculture had weighed the evidence and cast it aside in the exercise of his discretion. The case was therefore remanded, so that the Secretary could either make a specific finding with reference to corn syrup, or an exclusive finding with respect to refined sugar and corn sugar.

The requirement of the *Staley* case for specificity and comprehensiveness in the making of findings is frequently impracticable. Thus, for example, in Andree & Seedman, Inc. v. Administrator of Wage and Hour Div. (App. D. C. 1941) 122 F. (2d) 634, the Administrator was required by statute to adopt the highest minimum wage which, "having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." The court decided that, even though the competition of home production was a relevant factor, a finding on that point was not necessary: "* * * probably an almost innumerable list of items relevant to economic and competitive conditions can be compiled. But the statute does not * * * require a finding on each of these supposititious factors" (p. 637).

131a. In valuation cases, for example, it has been said that the right of appeal may prove valueless to appellants unless findings of fact are made, see Northern States Power Co. v. Bd. of Railroad Comm. (N. Dak. 1941) 298 N. W. 423 (State Commission required to make separate findings concerning going concern value of utility, and allowances for increased costs of operation).

Considering their complexity, one can say the same of reorganizations. Cf., for example, In re Chicago, Milwaukee, St. Paul and Pacific R. R. Co. (C. C. A. 7, decided December 4, 1941) where the reorganization plan approved by the Interstate Commerce Commission was held to have support in the evidence and to violate none of the legal requirements set forth in the applicable case precedents, *save findings.* The case was therefore remanded for the making of findings on all "vital issues, controverted and uncontroverted," findings "so specific that the court may definitely see that in the new plan, provision for full compensation of cancelled old senior securities, and all prior preferred positions, is made." (The findings had to include the values of the properties, both separately and in the aggregate, the liens to be surrendered, and the securities to be given in exchange, and to show that fixed interest charges were included and that values were based on income-producing factors.) It is difficult to see how a court which, like this one, had a realistic perception of the bargaining elements inherent in reorganization plans, elements that make it impossible to obtain clear-cut values, could have entertained the illusion that specific findings of values would support specific amounts of compensation under the reorganization plan. Cf. also In re Western Pacific R. R. Co. (C. C. A. 9, decided November 28, 1941).

rather a clarifying adjunct. The rigid ritual with which some courts, including the Supreme Court, have surrounded findings of fact reached at the conclusion of an administrative proceeding is in marked contrast to the pragmatic approach of the Supreme Court with respect to the tentative findings of fact proposed by an agency at the initiation or during the course of a proceeding. Yet, if notice be the guiding consideration behind both types of finding, would it not follow that fact findings in the former case should be as flexible and dispensable as in the latter? In the second *Morgan* case, for example, tentative findings by the Government were acknowledged to be only one of five alternative methods of giving an adversary a reasonable opportunity to know the Government's claims.[132] Likewise, in *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, the Court decided that, although the Board had failed to find in so many words that there was a current labor dispute, nevertheless there was no misunderstanding in actual fact as to what was the basis of the Board's complaint.[133] Furthermore, although the main purpose of a pleading under the modern procedure practice is the giving of notice to the other parties to the proceeding,[134] generality of allegation is the favored trend in the drafting of pleadings,[135] and it has been said that only resultant ultimate facts should be pleaded.[136] If this trend, and the recently expressed *desideratum*

132. (1938) 304 U. S. 1; see Otis, D. J., dissenting in Morgan v. U. S. (D. C. W. D. Mo. 1940) 32 F. Supp. 546.

Another method by which the Government could have given notice in the *Morgan* case was to submit a brief setting out its claims. Compare, however, the statement in Sanders Bros. v. F. C. C. (App. D. C. 1939) 106 F. (2d) 321, that it was insufficient that facts be marshalled and presented in the brief on appeal, and that they must be prepared separately as findings of fact.

133. (1938) 304 U. S. 333. Cf. N. L. R. B. v. Phelps-Dodge Corp., discussed at p. 68 et seq., Part One, supra.

134. Pike, Some Current Trends in the Construction of the Federal Rules (1940) 9 Geo. Wash. L. Rev. 26; 4 Federal Rules Service—Commentary—8a. 24.

For the proposition that administrative findings should cover the pleaded facts, see Tesch v. Industrial Comm. (1930) 200 Wis. 616, 229 N. W. 194.

135. Pike, supra note 134, at 30; S. E. C. v. Timetrust, Inc. (D. C. N. D. Cal. 1939) 28 F. Supp. 34; Van Dyke v. Broadhurst (D. C. N. D. Pa. 1939) 28 F. Supp. 737; MacLeod v. Cohen-Erichs Corp. (D. C. S. D. N. Y. 1939) 28 F. Supp. 103; Young v. Aetna Life Ins. Co. (D. C. E. D. Pa. 1940) 32 F. Supp. 389. Cf. Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co. (D. C. W. D. Ky. 1941) 37 F. Supp. 728; Folding Furniture Works v. Wisconsin Labor Relations Board (Wis. 1939) 285 N. W. 851.

136. Maylender v. Fulton County Gas and Electric Co. (1928) 131 Misc. 514, 227 N. Y. S. 209; Mining Securities Co. v. Wall (1935) 99 Mont. 596,

that the law will abandon the distinction between "evidentiary facts" and "ultimate facts"[137] gain currency in the administrative field, the courts may cease to give subsidiary or supporting findings of fact the determinative role which they at present enjoy and view them only as convenient adjuncts to judicial appraisal of the evidence before the administrative body.

However, the conclusion that administrative bodies have methods of notice-giving to *parties* alternative and possibly superior to the machinery of "findings of fact" does not absolve these agencies from the obligation, so long as a system of judicial review prevails, of giving the *courts* some notion of the basis of their action. From this standpoint, Judge Stephens' analysis may be useful, provided one recognizes findings of fact as being in reality propositions about facts[138] and also recognizes the increasing extent to which judicial and administrative proof has become speculative and deductive in nature.[139] We are still influenced, perhaps unduly, by the prestige of the Brandeis brief, which was primarily an exercise in induction[140] and the predominant *motif* of which was the presentation of factual generalizations, derived from observation and investigation, to serve as a constitutional basis for a statute; thus, for example, statistics of economic degradation and ill-health would be cumulated in order to convince the courts of the propriety, under the due process clause, of minimum wage, maximum hour and tenement dwelling legislation. We are living, however, in an era when this type of approach is of diminishing significance.

Statistical procedures still have their place, but they are now primarily for the legislature when it wrestles with issues of constitutionality and broad policy. Administrative agencies, on

45 P. (2d) 302. The difficulty, of course, lies in distinguishing "ultimate" facts from "evidence." Cf. note 123, supra.

137. See Hughes and Kaftan, Wisconsin Code Compared with the New Federal Rules of Procedure (1938) Wis. L. Rev. 517, 521.

138. I. e., administrators and judges never find facts, but only state propositions about facts. See Michael and Adler, The Trial of an Issue of Fact (1934) 34 Colum. L. Rev. 1224, 1249, 1259, 1268.

139. See Michael and Adler, supra note 138, at 1278. The generally held, but fallacious view is that all judicial proof is inductive in nature. See, e. g., Wigmore, *The Science of Judicial Proof* (3rd ed. 1937) 22. Wigmore makes the strange concession that reasoning concerning the credibility of witnesses may, however, be put into deductive form, id. at 315.

140. Peirce defines induction very simply as "where we generalize from a number of cases of which something is true, and infer that the same thing is true of a whole class." See *Chance, Love, and Logic* (1923) 135.

the other hand, must continuously grapple with economic and engineering problems where fresh paths must be broken, and statistics are either non-existent, irrelevant, or misleading. Formerly, the biography, statistical or otherwise, of an evil supplied the clue for its amelioration, which was largely the process of setting in motion a negative trend. Our concern now is with the capacity of expert administrative bodies possessing insight, a knowledge of economic theory, and an aptitude for speculative thinking, correctly to interpret the basic legislative mandates, and to apply those mandates to more or less unprecedented fact situations and unanticipated evils. One indication of this trend is the current revival of interest in the doctrine of the "equity of a statute," *i. e.*, the notion that the basic purpose of a statute may be applied to situations not expressly set forth in the statute.[141] When administrative agencies are confronted with problems such as oil, milk, security and watershed regulation, it is delusive for them to clothe assumptions which must of necessity be speculative in the guise of formal findings of fact.[142] Facts no longer are required to be found inductively; rather propositions of fact have to be arrived at deductively.[143]

To the extent that what has just been said is a true picture of the contemporary administrative regulative field, the following by an agency of some articulate deductive pattern in rendering its factual conclusions seems desirable. To convert any specific logical pattern into mandatory procedure, as Judge

141. In the field of action, see United States v. Hutcheson (1941) 61 S. Ct. 463, 467; Johnson v. United States (C. C. A. 1, 1908) 163 Fed. 30, 32; and the general policy of the Antitrust Division of the Department of Justice with respect to labor unions. For theoretical discussions of the concept, see De Sloovère, The Equity and Reason of a Statute (1936) 21 Cornell L. Q. 591; Landis, Statutes and the Sources of Law (1934) Harvard Legal Essays 213, 216, 235; Davies, The Interpretation of Statutes in the Light of Their Policy by the English Courts (1935) 35 Colum. L. Rev. 519; Thorne, The Equity of a Statute and Heydon's Case (1936) 31 Ill. L. Rev. 202.

142. See Railroad Commission of Texas v. Rowan and Nichols Oil Co. (1941) 311 U. S. 570; Oklahoma v. Guy F. Atkinson Co. (1941) 313 U. S. 508.

143. Since the significant and currently embarrassing problems of administrative regulation lie in the economic field, the words of an eminent economist, Karl Bücher, quoted in Morris R. Cohen, *Reason and Nature* (1931) 373, are particularly apposite: "The only method of investigation which will enable us to approach the complex causes of commercial phenomena is that of abstract isolation and logical deduction. The sole inductive process that can likewise be considered, namely, the statistical, is not sufficiently exact and penetrating."

Stephens has done, is, however, to ignore several factors. For one thing, logical patterns are not necessarily descriptions of the way in which tribunals have arrived at their conclusions, *i. e.*, of their investigative processes, but purely a method of determining the correctness or incorrectness of the conclusions that they have reached, *i. e.*, of their processes of proof.[144] The responsibility for seeing to it that the administrative agency reaches correct conclusions should be regarded as a cooperative enterprise, and the administrative agency as the moving partner; the courts, therefore, do not discharge their responsibility by stipulating that the administrative agency, at the risk of reversal (*i. e.*, the partial undoing of already accomplished partnership business) follow a logical pattern arbitrarily prescribed by them.[145] A large part of what underlies administrative decision is experience acquired in the course of similar investigations and hearings (and hence uniquely the property of the agency); even as the specific hearing in question progresses, the agency may become aware of new matters through extra-logical means.[146] Nor is it anti-rationalistic to point out that, while knowledge, once attained, may be cast into a discursive and communicable pattern, it originates largely in intuition.[147] Intuition,

144. Cohen, op. cit. supra note 143, at 50.

145. Thus, for example, although the Wisconsin courts have repeatedly urged the importance and necessity of specific administrative findings, they have held that their absence is not necessarily reversible error. See Buhler v. Dept. of Agri. and Markets. (Wis. 1938) 280 N. W. 367, 370, and cases there cited. Cf., however, Twin City Milk Producers Ass'n v. McNutt (C. C. A. 8, 1941) 123 F. (2d) 396, 398, conceding that a finding was a formal recitation "not necessary, as a matter of statutory prescription, to give validity to the promulgating order; that it is simply a judicial requirement, imposed as a convenience in a review proceeding, to aid in satisfying legal conscience and in lightening judicial responsibility," but approving reversal of the Administrator for failure to make such a finding.

146. As Aristotle has said, it would be strange indeed if one were to *know* a thing in the precise manner in which one is *learning* it. *Posterior Analytics*, Bk. 1, c. 1.

147. As Aristotle puts it, the "intuitive reason" apprehends both the universally axiomatic truths which deductive reasoning presupposes, and the particular facts of life which form the materials of induction. *Nicomachean Ethics*, Bk. 6, c. 6, 12. Intuition and induction apprehend the primary premises from which scientific knowledge springs. *Posterior Analytics*, Bk. 2, c. 19.

One must beware, of course, of using intuition as a substitute for discursive logical patterns when the latter are available. Cf. the statement of the Court in Chicago B. & Q. R. R. v. Babcock (1907) 204 U. S. 585, 598, that many administrative judgments "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions, impressions which may lie beneath consciousness without losing their worth."

experience and judgment are at a premium when dealing with, for example, such problems as whether control is being exercised over a corporate enterprise,[148] or stock trading is engaged in for the purpose of raising stock prices,[149] or a railroad has "dominated" municipal action,[150] or how consumers will react to a specific labelling of a commodity's inferiority,[151] or when a railroad is a "producer" of coal.[152]

Particular scope must be given "potent imponderables" in passing on such administrative determinations as a Labor Board decision that an employer has interfered with the collective bargaining process.[153] Since this power of intuition and judgment is a function of experience, and a judge does not have the same opportunity for the accumulation of experience in a specific field as an

148. See Rochester Tel. Corp. v. U. S. (1939) 307 U. S. 125; Detroit Edison Co. v. S. E. C. (C. C. A. 6, 1941) 119 F. (2d) 730.

149. In the Matter of Harold T. White (1938) 3 S. E. C. 466, 509, where the Commission said:

"Judgment as to what were the purposes for which transactions were effected in the past is a human undertaking involving inescapable subjective factors in the minds of those who pass judgment and is therefore not safeguarded against error. Accordingly, as best we can, we must 'balance' one factor in the record against another with adequate humility and awareness that we may err in a matter gravely affecting the lives of other human beings."

Commissioner Healy, relying on a different experiential reaction to the partnership relation but on no materially different findings of fact, dissented from the decision of the Commission's majority that the partner of a person found guilty of raising security prices was not himself guilty of the same offense.

150. Union Pacific R. R. v. U. S. (1941) 313 U. S. 450 (holding the Elkins Act prohibition of rebates in connection with transportation applicable in a situation where a city had made various adjustments in rental, paid moving expenses, etc., in order to encourage shippers to relocate their business at a new terminal). Mr. Justice Roberts dissented, in an opinion concurred in by Justices Black and Douglas, on the ground that the Elkins Act was never intended to reach others than carriers.

151. See Fuchs, The Formulation and Review of Regulations under the Food, Drug, and Cosmetic Act (1939) 6 Law and Contem. Prob. 43, 55.

152. Gray v. Powell (1941) 62 S. Ct. 326.

153. "Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." In such a situation "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" must yield to "a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." International Ass'n of Machinists v. N. L. R. B. (1940) 311 U. S. 72, 78. Accord: Consumer's Power Co. v. N. L. R. B. (C. C. A. 6, 1940) 113 F. (2d) 38, 44; N. L. R. B. v. Ford Motor Co. (C. C. A. 6, 1940) 114 F. (2d) 905, 911. Contra: Conn v. N. L. R. B. (C. C. A. 7, 1939) 108 F. (2d) 390.

administrative agency exclusively dedicated to work in that field, insistence on a mode of expression that may not recapture these impalpable determinants is unwise. Language being the uncertain medium of expression that it is, different people may mean the same thing although they use different words.[154] Furthermore, insistence on the faithful following of a set phraseology may serve purposes entirely unrelated to observance of the mandate of the statute.[155]

The superior expertness of administrative agencies has been urged as ground for relaxing the conditions under which they *reach* their results, *i. e.*, for permitting them to take official notice of facts not specifically introduced into the record,[156] to rely on hearsay evidence,[157] and otherwise to depart from technical com-

154. Thus, for example, in N. L. R. B. v. Virginia Electric and Power Co. (United States Sup. Ct., decided December 22, 1941) the Supreme Court was evidently of the view that the Board had found that certain utterances by officers of the employer company, *standing alone*, amounted to coercion of its employees and interferences with their right to organize. The Circuit Court, however, was apparently of the belief that the utterances had been considered *in the context of surrounding circumstances*, see (C. C. A. 4, 1940) 115 F. (2d) 414, 420, 421, and the language used by the Board could, in the author's opinion, have been thus interpreted. It was clear from the Board's decision that the prior background and circumstances surrounding the employer's utterances had in fact been taken into account by the Board, even if not formally recapitulated with precise accuracy in the ultimate findings of the Board. The case was nevertheless remanded so that the Board might have the opportunity of issuing an explicit finding that these utterances, in the *context of surrounding circumstances*, amounted to coercion and interference with employee bargaining.

155. The result reached in the *Virginia Electric* case, discussed in note 154, supra, may have been due to unwillingness on the part of the Court to decide whether the employer's utterances, *standing alone*, constituted coercion and interferences with union organization. The case is difficult to understand, for it seems self-evident that, since the Board had found that the utterances, standing alone, constituted coercion and interference, it would be even more likely to find that the same utterances, in the context of the prior labor history of the employer and other surrounding circumstances, constituted coercion. It would seem that the Court in this case disregarded the sound admonitions quoted from the *International Association of Machinists* case, in note 153, supra, and is pursuing the path of captiousness initiated by the *Phelps-Dodge* case, see p. 68, Part One, supra, but this may be attributable to a desire on the Court's part to bypass the constitutional free speech issue raised by the employer.

156. See Gellhorn, *Federal Administrative Proceedings* (1941) 84 et seq.

157. See Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197, 229; International Ass'n of Machinists v. N. L. R. B. (1940) 311 U. S. 75; Cudahy Packing Co. v. N. L. R. B. (C. C. A. 8, 1940) 116 F. (2d) 367, 375; Administrative Procedure Hearings, 498.

Wigmore points out that "all Commerce and Industry are based on hearsay assertions, intermediate or ultimate," Wigmore, *The Science of Judicial Proof* (3rd ed. 1937) 723; cf. Smith v. Olson (1926) 50 S. Dak. 81, 208 N. W. 585. The increasing preoccupation of administration with the regula-

mon law rules of relevancy and competency in the consideration of evidence.[158] Why not a like measure of tolerance for them when they *recapitulate* the results which they have reached in the form of fact findings?

The vice of nullifying an administrative order because of individual incorrect findings without taking a view of the evidence as a whole should be apparent regardless of whether the evidence relied on is of the testimonial or circumstantial variety. Assuming that testimonial evidence is involved, such evidence is generally *cumulative* in nature; anybody studying the text of court opinions reviewing the actions of the National Labor Relations Board, for example, will be struck by the extent to which specific items of testimony are set forth *in extenso* as leading severally to the ultimate statutory finding of interference with union organization, or discriminatory discharge, without being summarized or subsumed under any more general, but still subsidiary, finding. If the proof relied on is circumstantial (and a large measure of the difficulty with judicial treatment of administrative proof lies in the failure to recognize the decreasing importance of testimonial proof in many administrative matters)[159] *alternative* chains of reasoning leading to the same result

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tion of industry and commerce is therefore a further argument for administrative reliance on hearsay. If hearsay is admissible on questions of family relationship and marriage, see McCormick, The Borderland of Hearsay (1936) 39 Yale L. J. 489, 496, why not also for the economic relationships and "business marriages" that are such vital matters of governmental regulatory concern and so difficult of proof?

158. See Stephan, The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence (1938) 24 A. B. A. J. 630, 635, 636.

159. This declining importance is evidenced by the tendency on the part of some courts not to insist on cross-examination and other guarantees for the veracity of testimonial proof. California Lumbermen's Council v. F. T. C. (C. C. A. 9, 1940) 115 F. (2d) 178, 184; cf. cases cited in note 157, supra. Contra (and to the author's mind wrongly decided) Powhatan Mining Co. v. Ickes (C. C. A. 6, 1941) 118 F. (2d) 105.

The declining significance of cross-examination in rate- or price-fixing cases, for example, becomes apparent when one considers the factors which cross-examination was designed to elicit, i. e., "the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives." 1 Starkie, *Evidence* (Gerhard's 7 Am. ed. 1842) 23. Obviously an expert's ability to ascertain facts is dependent upon the character of his research and the nature of his sources; his ability to acquire the requisite knowledge is a function of his academic training and prior experience; his powers of memory are replaced by "the cold figures found in the reports, showing the volume of business, cost of operation, and earnings, [which] tell the same story to all," see In re Chicago, Milwaukee, St. Paul and Pacific R. R. Co. (C. C. A. 7, decided Decem-

are possible.[160] The mere fact that one of the cumulative or alternative lines of reasoning has proven, upon judicial scrutiny, to be defective, affords no reason that the chains of reasoning which remain unimpugned cannot carry the administrative agency safely over from the evidence before it to the factual determinations which the statute requires it to reach.

One may add to these various logical considerations an impelling substantive argument. The processes of logical articulation such as are involved in the machinery of fact findings, while valuable intellectual discipline for the agency, consume considerable time, particularly when the administrative agency knows, as it frequently does, that its findings will not be viewed in a broad and understanding light, but will be dissected and scrutinized as occasions for litigation by captiously-minded adversaries.[161] The courts should therefore not reverse an administrative body on the basis of failure to set forth ultimate or subsidiary findings of fact, unless the administrative determination does not meet some *statutorily* prescribed formula with respect to the evidence itself,[162] or is an excursion into the realm of non-existent fact or arbitrary inference. If the use of such concepts as subsidiary and ultimate findings aids in that type of judicial operation, little harm is done by using them, but danger lies in taking verbal *formulae* as reality rather than as guides to reality.

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ber 4, 1941); and his motives and situation with respect to the parties are clear, once it becomes apparent for which side he is testifying. What more can cross-examination elicit?

Even the otherwise shrewd dissenting opinion of Otis, D. J., in Morgan v. U. S. (D. C. W. D. Mo. 1940) 32 F. Supp. 546, 557, over-emphasizes the importance of testimonial evidence.

160. See Michael and Adler, supra note 138, at 1298.

161. See Mr. Justice Brandeis, concurring in St. Joseph Stock Yards v. U. S. (1936) 298 U. S. 38, 93; Administrative Procedure Hearings, 478.

162. Failure to apprehend the logical nature of so-called "findings of fact" may well becloud the operation of the rules governing judicial review of the evidence taken by the administrative body. For example, the fear of one of the proponents of the "substantial evidence" rule that the rule, although applied to *underlying facts*, will not be applied to the *inferences* drawn from them to the ultimate facts (see Stason, "Substantial Evidence" in Administrative Law (1941) 89 U. Pa. L. Rev. 1026, 1051) becomes largely groundless once the inferential nature of the "fact-finding" is properly appreciated.

For a case which says that Rule 52(a) does not intrench inferences from the findings with the same finality as the findings themselves, see Kuhn v. Princess Lida of Thurn and Taxis (C. C. A. 3, 1941) 119 F. (2d) 704.