PLEADING "MATERIAL FACTS"

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In several states, as for instance in Pennsylvania, New York and Connecticut, the word "material" is used in order to define the character of the facts which must be pleaded in an action. The official use of the word "material" in this connection started with the English pleading rule of 1875, the terms of which are closely followed in the American rules above referred to. In England, both before 1875 and since, the word "material" has had an ambiguous use which it is the object of this paper to explain. Further purposes are to explain the circumstances in which the word was introduced into the rule, its interpretation in the English courts, the reason why its meaning has been less litigated in England than in the States, as well as its logical meaning in pleading. This logical meaning turns on the fact that all law, whether defined by statutory or by judicial legislation, is universal, general, or, as the French say, abstract; that is to say, law provides for events in terms of type, and rights and duties only arise when events of the defined type happen to occur. Thus whenever any particular claim is made, it must be based on particular facts of

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1 Penna. Practice Act of 1925, § 5, P. L. 483, § 5, Pa. Stat. (West, 1920) § 17185: "Every pleading shall contain and contain only a statement in a concise and summary form of the material facts on which the party pleading relies for his claim, or defense, as the case may be, but not the evidence by which they are to be proved, or inferences, or conclusions of law . . . ."

(945)
the prescribed type. Such facts are therefore the facts material to the claim, for they are the facts which must be proved (facta probanda) in order to establish the claim. The facts which are material in this sense must therefore be ascertained by reference to the particular claim which is made in the action, and the issues raised thereon, as well as by reference to the general propositions of the law; and they must be distinguished from facts which are merely relevant to the proof (facta probantia).

It is necessary to state right away these somewhat obvious propositions because, in England at least, their fundamental importance is often overlooked, with the result that “analytical jurisprudence” fails to deal with practical difficulties and has therefore fallen into well merited disrepute. But the propositions stated will be found to solve many such difficulties and, in particular, those which beset the problem with which we are immediately concerned. The following pages will therefore deal with them somewhat fully, as well as with the ambiguities of terminology with which that problem is obscured. As there is not anywhere, I think, a history of the transition from common law pleading to “code” pleading in England, I have thought that American lawyers might be interested to know what actually happened; and though I am not competent to discuss all the American litigation which has taken place on the subject of this article, I have done my best to appreciate its effect, which seems to confirm the views here expressed. The course of the argument will be more easily followed if the reader will kindly begin by perusing the concluding paragraph to which it leads up.

The Statutory Obligation to Plead “Material Facts”

The difficulties which beset the formulation of issues for trial are common to American and to English law. They are often dealt with by rules which are on the whole very similar, and it is likely enough that such rules often operate similarly in practice, although in England, at least, it is not always found easy to apply them with great logical precision. The problem goes to the very heart of practice, for it is in reference to questions properly put in issue that discovery must be adjusted and
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the relevancy of evidence tested; and it is upon the proper determination of the issues raised that a judgment stands or falls on appeal, so that the time of an appellate tribunal is often wasted and new trials rendered necessary unless the issues have been properly formulated in the court below. The matter therefore concerns everyone who has to do with legal practice, and, although the use of common sense and experience may make it possible to avoid or postpone consideration of the fundamental difficulties, it is just these difficulties which, owing to their far-reaching importance, are best worth discussing. Recent articles in the learned publications of American lawyers suggest that there is still room for discussion of the subject, and it may therefore be of interest to consider the history, interpretation and logical implications of the English rule regulating pleading in an ordinary action in the High Court; for this rule brings to the front all the fundamental difficulties which characterize the problem. Indeed it is only in so far as it raises these difficulties that the rule will be of interest in America, and it will be sufficient for our purpose to quote that part of the rules of the Supreme Court which raises them. It runs as follows:

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved."

It will be noticed that this rule is in its essentials identical with the Pennsylvania rule quoted above, also with the New York rule of 1921, which provides that:

"Every pleading shall contain a plain and concise statement of the material facts without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved."

There must be very many of these, of which I have read the following: Whittier, Notice Pleading (1917) 31 Harv. L. Rev. 501; Cook, Statements of Fact in Pleading Under the Codes (1921) 21 Col. L. Rev. 416; Nathan Isaacs, The Law and The Facts (1922) 22 Col. L. Rev. 1; Clarke, The Complaint in Code Pleading (1920) 35 Yale L. J. 259.

Rules of the (English) Supreme Court (1883) order XIX, rule 4.

And the Connecticut rule uses the word "material" in the same way. Indeed, wherever code pleading is adopted, however the terms employed may vary, the gist of the corresponding rule is, so far as I know and so far as I can judge, usually much the same. In some cases the American rules are a good deal older than the English, although, when this is so, they do not anywhere, so far as I know, use the word "material". The English rule was made, as it stands, in 1883; but it is substantially the same as a rule schedule to the Judicature Act of 1875, which it superseded but which was then quite new. For the corresponding rule, schedule to the Judicature Act of 1873, merely required from the plaintiff "a statement of his complaint and of the relief or remedy to which he claims to be entitled," and from the defendant "a statement of his defence"—in both cases "as brief as the nature of the case will admit."

In order to understand the present rule we must therefore consider how matters stood as regards pleading in the courts which were consolidated by the Judicature Acts. This is briefly stated in the following terms in the First Report of the Judicature Commissioners, which was published in 1869.

"The systems of pleading now in use, both at common law and in equity, appear to us to be open to serious objections. Common law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied on by the party, with copies of extracts of deeds, correspondence, or other documents, and other particulars of evidence, set forth at needless length. The best system would be one which combined the comparative brevity of the simpler forms of common law pleading with the principle of stating, intelligibly and

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4 Statute Law Revision and Civil Procedure Act, 46 & 47 Vict. c. 49 (1883).
5 Supreme Court of Judicature Act, 38 & 39 Vict. c. 77 (1875).
6 Supreme Court of Judicature Act, 36 & 37 Vict. c. 66 (1873), Schedule, Rules of Procedure, § 18.
not technically, the substance of the facts relied upon as constituting the plaintiff's or defendant's case, as distin-
guished from his evidence. It is upon this principle that modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce. We recommend that a short state-
ment, constructed on this principle, of the facts constituting the plaintiff's complaint, not on oath, to be called the Decl-
ARATION, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short state-
ment, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply."

The Commissioners who made this report included the Lord Chancellor Cairns and Sir Roundell Palmer, who succeeded him in the chancellorship as Lord Selborne, and Lord Hatherley; common law judges such as Lord Blackburn, Chief Justice Erle, Lord Justice Bramwell and Lord Coleridge; and civilian judges such as Sir Robert Phillimore and Sir James Wilde; so that it would be impossible to have any more authoritative description of the situation, but it is necessary for our purpose to go into the matter rather more fully.

Inasmuch however as the works of Professors Thayer and Holdsworth are equally familiar on both sides of the Atlantic, and as the object of this paper is analytical rather than historical, very little need be added to what they tell us. That little will largely centre around the ambiguous use of the word "material" which is the cause of so much confusion that it seems to lie at the root of half our procedural difficulties. This ambiguity may be illustrated as follows.

**Ambiguous Use of the Word “Material”**

If a one-legged man strikes a woman and kills her, then the fact that he has only one leg is material in the sense that it is relevant to his identity, and if he is on trial for murder it is a material part of the evidence against him. But the fact that he

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has only one leg is not a material part of the offence with which he is charged. The distinction is so manifest that it would be absurd to allude to it if it were not often overlooked, and indeed there are cases in which it is so much less obvious that a somewhat striking illustration has been given in order to make the distinction clear. This is all the more necessary because the word "material" is used, and has been used for at least three hundred years, in both these senses, not only in the daily usage of bench and bar, but also in legal literature. This equivocal usage has indeed been so common and so well supported that it could not possibly be described as improper; but in connection with pleading, with which we are now concerned, the latter of the two senses above exemplified has, strictly speaking, a certain claim to be regarded as "proper". For, in the technicalities of pleading, whenever the word is used technically, it has been used almost exclusively in that sense for a very long time. Thus when Lord Coke tells us that an issue must be single, certain and material, or when in the great days of special pleading there was discussion as to whether a traverse was on a material point, or whether a variation was material, or the like, in all such cases the word is generally used, and is often expressly used, to signify a point which will be decisive of the action or one which is an essential element of some claim or right, as distinguished from that which is merely relevant to the proof thereof. But within this narrow sphere itself somewhat guarded language must be employed; for even in discussing traverse of a material fact we sometimes have "the most material fact", a phrase which by its form almost negatives a strictly technical use. Indeed it is not until we come to the English pleading rule that we have, so far as I know, what is a definitely technical use, or at least a use which is so far technical that the phrase "material facts" is specifically used in contradistinction to law, on the one hand, and to evidence on the other; a contradistinction of which the technical implications will be discussed later. Let us now consider how matters stood as regards pleading at the time when the Judicature Acts were passed.
And first as to common law. The long story of common law pleading has been told more than once—most completely and most recently by Professor Holdsworth. The fullest account of its detailed content in its palmy days is to be found in Comyn's Digest; the most systematic account of it in Stephen on Pleading; and the most perfect practical exposition of it, as it existed in its final form, in the third (1868) edition of Bullen and Leake's Precedents of Pleading. When I was called to the bar in 1893 the portly form of Mr. Bullen was still to be seen in the Temple, but to his collaborator, the author of Leake on Contracts, was attributed most of the credit for the book. It could not be bought under several times its original price, and I remember paying £3.10.0 for my copy at a sale in Chancery Lane, although everyone knows that an out-of-date law book does not often command a fancy price for purely practical purposes. But although the new system of pleading had then been in force for twenty years, no one at the common law bar, unless he had large experience of his own, felt safe with a pleading until he had seen how it would look under the old system. Furthermore, the forms scheduled to the statutory Rules of Court were found to be unsatisfactory, and one of them was judicially held to be insufficient. What actually happened was what has often happened in similar circumstances before. The most experienced juniors (for in England it is the special business of the junior bar to draw pleadings) after consulting Bullen and Leake for the old practice, and after consulting the new rules and scheduled forms for the new and authoritative idea, used their common sense and devised new forms or adapted the old ones. When these were found to work well and without difficulties arising, they were copied by pupils, some of whom became eminent and had pupils of their own who copied and added to the collection. The process was continuous and a tradition was set up. The close connection between careful pleading and professional efficiency is illustrated by the fact that nearly all of the precedents which I copied as a pupil in the way

*Bullen and Leake, Precedents of Pleading* (3d ed. 1868). This was the last edition in which Mr. Leake collaborated.
above described were the work of men who, having been good pleaders in youth, became eminent judges later on, as, for instance, J. C. Bigham (now Lord Mersey), Gorrell Barnes (afterwards Lord Gorrell), W. R. Kennedy (afterwards Lord Justice), Joseph Walton (afterwards a judge), William Pickford (afterwards Lord Sterndale), J. A. Hamilton (now Lord Sumner), Maurice Hill (now a judge). Nine-tenths of my collection bear the names of these men who, although they belong to the modern period of pleading, were strongly under the influence of the old tradition which at least had the merit of producing great lawyers and a great legal system. Of course different men excelled in different departments of law; but sooner or later precedents of all kinds found their way into the modern practice books, such as the newer editions of Bullen and Leake, which in course of time superseded the great third edition of the original authors with which we are at the moment concerned.

OLD FORMS OF PLEADING AT COMMON LAW

The form of these older precedents, although they were from time to time regulated in certain matters by rules made by the judges, such, for instance, as the famous Rules of Hilary Term 1834, were not based on comprehensive rules of general application but on the common law, and were adapted in accordance with the requirements of particular decisions of the courts. Their general nature is described, in terms more sympathetic than those quoted above from the Report of the Royal Commissioners, by the editors of the fourth edition of Smith’s Leading Cases (Willes and Keating) both of whom became judges and one of them a judge of the first magnitude. They say that such pleadings should be true and perspicuous, “adopting the well known and understood formula used for the sake of brevity in cases of frequent occurrence, and, where there is no such formula, stating the material facts as they can be proved to exist in intelligible language.” The use of the words “material facts,” in the sense above described as appropriate in pleading, will be noticed; and,

10 I Smith, Leading Cases (Willes & Keating’s ed.) 103.
if comparison be made between the precedents of today and the old forms used in those cases where the material facts were set out, it will be found that the difference, although important as regards prolixity and clearness and often in other ways, is less striking than might have been expected by anyone who has been accustomed to regard the change to the modern system as revolutionary. The great change was in the abolition of the "well-known formulæ" or "common counts" and of the plea of the "general issue." The great objection to these was, of course, that they only set out what is often described as a conclusion of law, and did not specify the facts relied on. Thus, as Dr. Odgers in his well-known book on pleading\(^1\) observes, upon a count for "money had and received" there was no indication as to whether the claim was (a) against a rent collector for rents collected and not handed over; or (b) for fees collected by the defendant under claim of an office claimed by the plaintiff; or (c) for goods paid for and not supplied; or (d) for money paid to the defendant on supposing him to be someone else; or (e) etc., etc. This drawback has been removed, and the convenience of the old system, in appropriate cases, preserved, by the method known in English procedure as special indorsement of a writ. In these appropriate cases, the statement of claim is indorsed on the writ of summons and may be for "money had and received" or the like, but particulars are given which correspond more or less in extent with such particulars as are supplied (if I rightly understand it) under the system of Notice Pleading advocated by Mr. Whittier\(^2\) and adopted in the State of Michigan and the City of Chicago. Indeed, I sometimes wonder whether the inconvenience of the old common counts has not been exaggerated. For if you sue your rent collector who has not handed over your rents, he probably has a fairly good idea of what your grievance is. But, however that may be, no one now defends the common counts in their old unparticularized form. The damage that they, more than any other part of the old system, have done, and continue to do, is of a much more subtle and far-reaching character. For

\(^1\) Odgers, Pleading and Practice (9th ed. 1926) 87.
\(^2\) Whittier, supra note 2.
they have given an ambiguity to the conception and to the use of the word "evidence" which makes clear thinking about legal problems quite impossible unless it be thoroughly understood and perpetually borne in mind.

**Ambiguity of the Word "Evidence"**

This ambiguity of the word "evidence" is closely related to that of the word "material" which has been alluded to above, and will best be realised by reference to the books on *Nisi Prius Evidence* from Buller (1772) down to date. In all of these it will be found that what is really an account of the law, e.g., the law relating to money had and received, is there described as the evidence by which such a count may be sustained. Thus proof that goods have been ordered, paid for, and not delivered is described as "evidence" of a count for money had and received. That is to say, what under the present rules would be described as the material facts of a case, and distinguished from the evidence by which they are proved, are, in an important class of books which are much used by the profession, described as the evidence of a legal conclusion. The cause of this description is of course historical, but the present absurdity of it did not escape the vigilant eye of Bentham. Writing in 1827, in his *Rationale of Judicial Evidence*, he says:

"The question on what facts a decision turns is a question not of evidence, but of the substantive branch of the law: it respects the probandum, not the probans."

This is obviously true. But the truth had to be rediscovered by Sir James Fitzjames Stephen fifty years later; and neither he nor Bentham nor any other writer that was, or is, or is to be, is the least likely to alter the long-established usage of the profession, however ambiguous and confusing it may be. It is found not only in the old civil and criminal practice books of days gone by, such as Buller, Starkie, and Phillipps; but also in those

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now in use, such as Roscoe’s *Nisi Prius* and Archbold’s *Pleading and Evidence in Criminal Cases*, where we find treated under separate headings “evidence in general,” meaning thereby the method of proving that something has happened; and “evidence in particular actions,” or “in particular offences,” or as may be, meaning thereby a description of the kind of facts (material facts) which if ever and whenever they happen to occur give rise to various causes of action, or as may be. The dark places of the law would indeed be illuminated if this ambiguous use of the words “evidence” and “material” were abandoned. But that is not in the least likely to occur. Even an act of Parliament must bend before an established usage of words. Thus in the *Sale of Goods Act, 1893*, a warranty is a term of the contract which is not a condition of the contract, so that a breach of it does not go to the heart of the contract; but in the *Marine Insurance Act, 1906*, a warranty is a condition on which the contract stands, so that the contract does not hold at all if it be untrue. Both acts were drafted by the same brilliant and experienced draftsman, Sir Mackenzie Chalmers, with his eyes wide open. The case we are considering is not however quite so desperate, because the ambiguous usage has no statutory support, and is inconsistent with the present statutory pleading rule, and is altogether less definite and less flatly contradictory. But the confusion is all the more insidious and dangerous on that account. It may perhaps be summarised as follows. If the words “material facts” properly signify facts which establish or modify a legal right or duty, then those words, although sometimes used to denote facts which merely go to prove the existence of material facts, are not used to the exclusion of their proper meaning. And if the word “evidence,” when applied to facts, properly means probative facts, then, although it is sometimes used to signify the material facts (*facta probanda*), it is not so used to the exclusion of its proper meaning. Of course all that is possible in this place is to point out the ambiguities and to bear them constantly in mind.

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*56 & 57 Vict. c. 71, § 62 (1893).*

*6 Edw. VII, c. 41, § 33 [3] (1906).*
USE OF THE WORD "MATERIAL" IN THE CRIMINAL, EQUITY, AND CIVILIAN COURTS

As regards the other courts which were consolidated by the *Judicature Acts*, very few words will suffice; and they will again be directed to the use of the word "material."

In the criminal courts the word is used much as in the other common law courts, often loosely, but when the meaning is specific it has what has been described above as the "proper" meaning. Thus successive editions of Archbold have, for a hundred years, told us that when the defendant in a criminal case pleads the general issue the prosecutor must prove "every fact and circumstance in the indictment which is material and necessary to constitute the offence," a sentence in which the words "material and necessary" seem to mean "material, that is to say, necessary."

Dean Langdell has described the development of chancery procedure, after it began to be formal, on the lines of the canon and civil law. But I do not think that the word "material" comes from either of those sources; first, because I have not found it there; secondly, because the method of "pleading out a clean issue," to which it seems to owe such technical use as it has, was not the method of mediæval Roman law; and thirdly, for other reasons which need not be specified, e. g., the ecclesiastical use of "material fault" for an irregularity of external conduct lacking culpable intention. When the word *materia* or *materia sufficiens* is found in Latin precedents of English common law pleading, it should be remembered that law Latin comprehends, as Lord Coke tells us, "not only that which is authorised by the grammarians, but also words of signification well known to the sages of the law." Of course the ultimate origin was the Latin word, but the immediate source is, I imagine, a common English use—perhaps no more recondite than, as we might say, "that which matters," though of course lawyers were trained in the logic which contrasted matter and form and were familiar with the distinction...

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17 Langdell, *The Development of Equity Pleading From Canon Law Procedure*, reprinted in *2 Select Essays in Anglo-American Legal History* (1908) 753.
between fallacies *in re* and *in dictione*. In its chancery connection, when the word appears in Section 10 of the *Chancery Procedure Act, 1852*, it will be noticed that it has not a very specific or technical sense, the object of the provision apparently being merely that the pleader should keep to the point. The section provides that the bill shall contain as concisely as may be “a narrative of the material facts, matters, and circumstances on which the plaintiff relies.”

What has been said as to chancery applies equally to the courts centred around Doctors’ Commons which have been merged in the Probate, Admiralty and Divorce Division. Without having made special search, I think it may safely be said that neither the word nor, except in a very general way, the idea of materiality is to be found in the ecclesiastical or civilian courts; and when the Acts of 1857 transferred their jurisdiction to the new courts, these adopted a new system of pleading more akin to that of the common law courts. The word “material” does not occur in those acts, nor in the rules which were made by the judge in pursuance of the powers thereby conferred upon him; but the precedents of pleadings appended to the rules do set out what are in fact the material facts in the cases provided for. The use of the word in Section 7 of the *Matrimonial Causes Act, 1860*, does not suggest that the word was one of technical significance in that court. It provides for the rescission of a decree *nisi* when it has been “obtained by collusion, or by reason of material facts not brought before the court . . . . and any person may give information of any matter material to the due decision of the case.”

**The Drafting of the Present English Pleading Rule**

These then were the circumstances in which the new rule was drafted. As regards the actual drafting of the rule, much more information than is available would be welcome. We

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15 & 16 Vict. c. 86, § X (1852).
DODD AND BROOKS, PROBATE PRACTICE (1865) 724.
25 & 26 Vict. c. 91, § 7 (1860).
I am indebted to Mr. William Geddes, of the English Chancery bar, for some of the references in this section.
know from the judgment of Lord Justice Brett in Philipps v. Philipps that "great pains were taken" to draw the rule; and that "the distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C. J., expressed it in this way. He said there were facts that might be called the allegata probata . . . and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle, C. J., that rule 4 was drawn. The facts which ought to be stated are the material facts on which the party pleading relies." Of course Chief Justice Erle was then the more important man of the two, but Lord Coleridge was also a member of the Royal Commission, and we know from the introduction to Sir James Fitzjames Stephen's book on evidence that Lord Coleridge and Sir James were at that time in conference on the draft of a bill in which, following the Indian Evidence Act, the clear and dominant distinction was made between "facts in issue" and facts relevant thereto. And furthermore, the Royal Commissioners refer to practice in the United States, meaning, I suppose, those states which had before 1869 adopted code pleading. I do not know whether the New York code of that period was typical, but it required a "statement of the facts constituting each cause of action," a phrase which seems to imply a distinction from facts merely relevant but which do not constitute a cause of action. Indeed the distinction is so radical that one is surprised that it should have presented itself as a discovery to Stephen. Hints of it go back at least as far as the Fourteenth Century, when Bartolus pointed out that one fact may be proved by another; and the application of it occurs in many contexts, so that it seems almost incredible that the clear antithesis between factum probandum and factum probans should not go further back than Bentham; but I cannot remember having come across it before then.

Nothing is said by anyone, so far as I know, as to how or why the word "material" came into the rule. But Brett, L. J.,

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22 4 Q. B. D. 127, 133, 134 (1878).
23 Stephen, op. cit. supra note 14, at i.
in the passage above quoted, seems to equate the "material facts" of the rule with the *allegata probata* (meaning, I suppose, the *allegata probanda*) referred to by Erle, C. J., and the reasons for this equation will be sufficiently clear from what has already been said.

**INTERPRETATION OF THE ENGLISH PLEADING RULE**

Let us turn now to the interpretation of the rule by the courts after it had actually come into operation. Here again my own experience must have been typical. Instruction to draw a pleading is often, as it was with me, the first professional commission of a newly called English barrister. I naturally asked the distinguished junior, now a distinguished judge, to whom I was pupil: "What is meant by the material facts which the Rules require me to plead?" He answered: "I don't know. Give me the papers and I will tell you." Perhaps the same answer would be made today, not only in England, but also in similar circumstances in the States. The practice in a matter of daily importance is bound to settle down; and convenience in practice may well be the best criterion of excellence. The courts exist to dispose of business and not to discuss metaphysical niceties. And furthermore, it may be that a strictly logical interpretation, if rigidly enforced, would produce impracticable consequences. But all the same, "great pains" were taken by very eminent men in the drafting of the rule; and it has been enacted. It has a meaning, even if the meaning is not very precise, or, if precise, not very strictly enforced. It must however be borne in mind that this rule is only one of many among which it takes its place and in relation to which its practical operation has to be considered. Demurrer is abolished, and its place is taken by an objection in point of law which may be disposed of at, or (in certain circumstances and, in fact, very rarely) before the trial. There is liberal power of amendment which is freely exercised, the cost of an adjournment, if necessary, being often the only penalty on the party seeking amendment. The power to punish prolixity in pleading by costs is practically a dead letter. The power to order "further and better particulars" of any matter alleged in the plead-
ings is daily exercised on a large scale; and on the other hand, the power to strike out any matter in a pleading which is "unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action" is rarely now invoked. In these circumstances it is perhaps hardly surprising that the number of reported cases on the construction of the rule which we are now considering is not very great, or the result of them very narrowly conclusive as to its exact meaning. If demurrers were re-established, and if the bar were set to work to attack every pleading on the ground that something more or something less than "material facts" were alleged, then the meaning of those words would be known with much greater precision than is at present common. Much credit is deservedly given to the English rule and the way in which it has worked, but this is not alone due to the magic of its terms, but also to the favourable circumstances in which it operates.

It was avowedly a main object of the rules that each side should know what case he had to meet at the trial, and there are dicta which might lead one to suppose that "material" meant material for this purpose. Thus Cotton, L. J., says: 24 "The statement of claim must set out all the facts material to prevent the defendant from being taken by surprise." Such an interpretation might possibly be taken as supplementary to the main gist of the rule and might justify, if such justification were necessary, the established practice by which facts in aggravation or mitigation of damages are pleaded, though not essential to the existence of a cause of action nor affording a complete defence. But it is clear from the rule itself, and from the interpretation of it by the courts, that the material facts are the facts relied on for the claim or defence, i. e., in the words of the Royal Commissioners and of the old New York rule, as constituting the claim or defence as distinguished from the proof of it. The English cases are so few, and there appears to have been so much litigation in America, that they are perhaps equally familiar, and the decisions so far as they go equally matter of course, in both countries. I do not think that the English cases throw much light on many of

24 Philipps v. Philipps, supra note 22, at 138.
the problems that have been so much canvassed in the States. The only considerable practical problem of doubt or difficulty has been in regard to matters in aggravation or mitigation of damages, and the Court of Appeal has held that these are not mere proof of the measure of damages, but, so to speak, autonomous elements of the claim or defence and therefore to be pleaded as material facts.

There are, on the other hand, no end of English decisions as to the cases in which "further and better particulars" of facts alleged in a pleading will be ordered, and the extent to which, and the time at which, they will be ordered. But that is a matter of convenience rather than principle, and does not concern us here; for, so far as the constitution of a cause of action goes, the time and place and particular details are immaterial.

The Logical Meaning of the Words "Material Facts"

With this rather long preamble let us now turn to what is really the subject matter of this paper, namely, the principle involved in any rule which, however it may be worded, distinguishes facts from law, and facts which establish a right from those which merely prove it. Such facts may be called material facts, or constitutive facts, or ultimate facts, or issuable facts, or traversable facts, or by any other name, but it will be convenient here to adopt the description of the Pennsylvania, New York, Connecticut and English rules, and to call them material facts.

In these and other rules there is generally no explicit distinction between facts on the one hand and law on the other. But the distinction is always implicit, and I gather that it is judicially recognised in America, as it certainly is in England. It will, in any case, provide the most convenient approach to our whole problem, for the solution of it goes far to elucidate the distinction between material facts and facts which are merely probative.

What then is the essential difference between law and fact? The distinction is, as it seems to me, so confused by Austin's theory of law that it is necessary (though it seems almost

brutal to do so) to attack that discredited theory on the somewhat limited ground still remaining to it. For surely Austin goes too far when he describes as "improper" and "merely metaphorical" the perennial usage of Europe and America by which the "laws of nature" are so described. Of course, there are distinctions between the laws of a state and the laws of nature which are so radical that it is the first business of legal analysis to clearly distinguish the two. But there is a logical reason why they are both called laws, and that reason is very relevant to our present purpose. A law is always hypothetical. It is always a case of "if ever and whenever." If ever and whenever a heavy body is unsupported it will fall to the ground. If ever and whenever a man breaks a contract he will, if required, be made to pay damages. The one law is an observation and the other an observance, but in both cases it is hypothetical. The law of contract would remain in force even if all men fulfilled their contracts; but it remains merely dispositional and does not come into active operation until the fact or event for which it provides actually happens. In this respect there is the same difference between, say, the law of murder and the fact of murder that there is between the law of gravitation and being hit on the head by a falling bale of cotton. How then can provision be made in the abstract for events which may happen in the concrete?

There are only two possible ways, namely, by verbal definition in terms of type, and by authoritative concrete illustration of the type provided for. These are respectively known as statutory and judicial legislation. In the case of statutory legislation the legislature might, for instance, say: "If ever and whenever a workman meets with an accident arising out of his employment his employer shall pay him reasonable compensation." In order to bring about judicial legislation to the same effect one must imagine a court receiving proof that a workman had in fact met with an accident which in fact arose out of his employment and thereupon holding, with the force of a binding precedent, that it was an implied term of the contract of employ-

ment that the employer should pay him compensation. In the former case the abstract proposition is defined in words; in the latter an illustration is provided, and when a sufficient number of illustrations have been provided the abstract proposition may be inferred therefrom. A very simple mathematical illustration will make clear this distinction.

The general form for the equation of the circle is:

\[ x^2 + y^2 = a^2 \]

which, in so far as it is a direct definition in abstract terms, corresponds with statutory legislation. On the other hand if you put a round coin on a piece of paper and prick holes around the edge and then remove the coin, you will observe that the points fall on a curve which you will recognize as a circle of which the equation is:

\[ x^2 + y^2 = a^2 \]

This corresponds to the process of judicial legislation by which binding precedents are made and the abstract principles of the law inferred from the decided cases; although it must be admitted that the guidance of a coin is more certain in determining the pin points on a regular curve than is the logical consistency of the judicial bench in determining cases on principles which can be inferred therefrom. The analogy also suggests that the law is not only more certain but more simple than it is. I once heard Lord Sterndale observe that the common law consists of about half a dozen obvious propositions, but that unfortunately no one had yet been able to discover them. In actual practice lawyers have rarely to do with such straightforward positions as belong to a circle. The law is, so to speak, made up of all kinds and fractions of curves which the pressure of circumstances prescribes, and it is not easy to see the pattern of the whole. Let us therefore return to our practical illustration taken in a very curtailed form from the English Workmen’s Compensation Act,\(^{27}\) and see how the processes of statutory and judicial legislation work together and produce that domain of “mixed law and fact” which is the most difficult part of the problem presented by “material facts.”

\(^{27}\) 6 Edw. VII, c. 58 (1906).
Statutory provision is made in case of an accident "arising out of" employment. The type of event provided for is prescribed in those words, and the law as it left the legislature was in that form. The question whether a particular accident arose out of the employment might have been left as a pure question of fact without any more specific guidance as to the intention of those words. Some people think that it would have been as well if the matter had rested there, but heavy and well-organized interests were involved on both sides and fate decreed otherwise. The formal words of the statute became (like the common law formula of "money had and received") the subject of authoritative illustration by means of judicial decisions, and the significance of the words was thereby accurately defined as a matter of law. The type of accident provided for by the statute became increasingly specific by means of judicial legislation, and in the process the terminology of the common law was often employed. Thus just as payment for undelivered goods was described as "evidence" of money had and received, so the fact of an accident caused to himself by a young workman larking at his work might be described as "no evidence" of an accident arising out of the employment, meaning thereby that the accident lacked the material elements which would bring it into conformity with the type contemplated by the statute.

The problem presented in such cases is sometimes described as a "mixed question of law and fact"—an expression which deserves more careful analysis than it has received. Indeed the science of analytical jurisprudence would gain in credit with the profession if it addressed itself to the solution of questions such as this. In order to do so properly it would be necessary to examine more carefully than I have done the circumstances in which great judges have used this and similar phrases. But it is certain that Lord Mansfield, in 1786, when dealing with the question of probable cause in a case of malicious prosecution, observed that:

"The question of probable cause is a mixed proposition of law and fact. Whether the circumstances are true is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law."\(^{28}\)

By questions "of law" and "of fact" he probably means "for the court" and "for the jury," for that is the effect of the decision; so that perhaps "mixed proposition of law and fact" here means no more than a proposition part of which is for the court and part for the jury. But Professor Thayer has shown that the distinction between law and fact and "for the court" and "for the jury" do not coincide; and the expression "mixed question (or proposition, or averment, or conclusion) of law and fact" is now used with a different significance. If it be true, as I think it undoubtedly is, that law is abstract and fact concrete, it is certain that they cannot be "mixed," and judges who use the phrase "mixed question of law and fact" are often careful to repudiate the phrase "question of mixed law and fact." The "mixed question" may, I suppose, mean "partly of law and partly of fact", or, "involving both law and fact"; but as every judicial decision involves both law and fact it probably means a question in which law and fact are involved without being discriminated.

Now the character of involving without discriminating law and fact is the distinguishing mark of all judicial legislation. The decision is binding in all cases in which the facts are substantially identical; but the law (though often expressed by the judge in what Scottish lawyers describe as his "opinion") is technically implicit in the decision, and a large number of decisions may be necessary before the legal principles which are involved clearly emerge. If only a few pinpricks are made around a coin you cannot say, on removing the coin, whether the pattern of the points indicates a circle or some other curve.

But let us suppose that judicial legislation as to the nature of an accident "arising out of employment" has proceeded so far that a number of principles have emerged, and that if the statute were redrafted a more elaborate phrase would take its place. And let us further suppose that the ordinary pleading rule applied to workmen's compensation cases, and that it was strictly enforced. Would an allegation that the accident "arose out of the employment" still be a sufficient allegation of the relevant material fact;
or ought the description of the accident to follow the more elaborate form of the developed law? On the one hand it might be said that when the words "arising out of employment" have received elaborate judicial interpretation they become a technical legal phrase, and so allege a "conclusion of law." On the other hand, it may be said that all words carry implications more or less precise and that they retain their value as a sufficient description of what is specifically held to fall within their scope, although the ordinary meaning of them may have lost something in the process. Speaking for myself, the latter view seems to be clearly right, for in order to involve an averment of law in an averment of fact it is necessary to use language in which a legal proposition is implicit.

Take an ordinary claim for personal injuries caused by negligence. If the accident is due to the dangerous condition of the defendant's premises where it occurs, so that the plaintiff has no cause of action unless the defendant has a particular duty towards him, then this latter is a material fact and must be pleaded. So, too, in a case of damage to goods, if the negligence is that of a bailee for reward, from whom more is expected than from a gratuitous bailee, then the fact of reward, if relied on, must be pleaded as a material fact, and particulars of it will, if necessary, be ordered. But in all cases of negligence, whether the duty is or is not due to "all the world," and whatever the standard of diligence may be, departure from the standard of reasonable care is the material fact which is bound to be in issue, and the theoretical question of pleading is whether it is sufficiently pleaded as "negligence," (of which particulars must be given), or whether the episodes of the story causing the damage should be set out as the material facts relied upon.

It is true that the word "negligence" and the phrase "so negligently that" seem rather comprehensive, and they have certainly received much judicial interpretation. But the word "fact," like "action," is one which is more or less comprehensive according to the circumstances in which it is used. Thus we may speak of a naval engagement as an "action," and of the Great War as a
“fact,” just as well as we may describe the orator's action in thumping on the table at the end of his speech as a fact. And as regards the judicial interpretation of what may amount to “evidence of negligence” in various circumstances, this always turns on the circumstances which merely illustrate the material fact. The standard of reasonable diligence remains the abstract standard of the law, although authoritative illustration gives precision to the type of diligence contemplated thereby. And if a (comprehensive) fact be proved which does not conform to the type, instead of saying that there is no evidence of negligence, it would conduce to clarity of thought if it were said that the fact proved was not material to the claim advanced.

Considerations such as these might perhaps be brought forward in justification of the English practice whereby negligence is pleaded as the material fact (and full particulars given for the purpose of notice and convenience) in preference to the allegation of the particulars as themselves being the material facts.

American Law

I have purposely avoided reference to cases, generally arising out of averments in common law actions (such as the allegation of “valuable consideration,” “negligence,” “reasonable,” etc.) which have given so much trouble in the States, as I cannot claim any knowledge of American law; but if there is any force in what has been said as to hypothetical cases based on an English statute, I cannot see why it should not apply equally in any common law case.

It has been suggested that I should compare the American and English decisions on the points raised in this paper. But unfortunately I cannot get sight of many American reports; I am not qualified to discuss American law; and of course I should not in any case venture to debate American decisions. The following observations may however be made.

For reasons stated in the paper, the English cases are few, and (except as regards pleading matters in aggravation or miti-
gation of damages) do not bear on the American difficulties. When the present rule came into force the judges hoped that there would not be many applications for particulars, which however soon became common and are now extremely numerous. The early cases raise the question whether a pleading is "embarrassing" by its vagueness or ambiguity, not whether it is quasi-de-murrable for not stating the material facts. Nowadays practically all the cases are as to particulars, and are decided on the basis of notice and convenience rather than legal sufficiency. If a pleading is insufficient it is generally very impolitic to raise the point before the trial, when an amendment will if necessary generally be allowed, and the interlocutory point disappear. On the other hand if "evidence" is pleaded the opponent welcomes the information and, as the costs of such "prolixity" are negligible, nothing more is heard of the matter.

The American cases, on the other hand, often expressly raise the point whether a pleading is bad (1) as stating a "conclusion of law," or (2) as stating merely probative as distinguished from material facts.

As regards (1), words do not become a "conclusion of law" merely because they have been judicially defined and are to that extent technical. But on the other hand in order to know what are the material facts of any case it is all-important to know what is the matter for decision in that case. Thus in an action claiming property, ownership is a conclusion of law—the very matter to be concluded by the action; but in an action for damages, the ownership of the damaged property is generally no more than a material fact.

As regards (2), the rigour of the rule is mitigated by holding that where a material fact is to be presumed from probative facts, then an allegation of those probative facts is impliedly an allegation of the material fact; but this does not solve all the difficulty or go to the root of the matter. It would seem that a fact is material if it is an essential ingredient of the claim itself, but that it is merely probative if its importance is contingent and depends on its relation to other facts, for the importance of a fact as evidence depends on its relation to other facts so that it is not in itself an essential element of a legal right.
In conclusion I would submit the following definitions:

1. Material facts are particular facts corresponding with the type prescribed in general terms by the law as essential to the existence or extent of any legal right or duty.

2. The material facts of a case are the facts relied on as material and advanced in support of a claim submitted for judicial determination.

3. Relevant (or probative) facts, i.e., "evidence" as that word is used in the pleading rule, are facts which, according to the law of evidence, are relevant to the proof of the material facts of a case, and to which testimony may be directed in the same way as to the material facts.