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**Motions to Make Specific and to Resolve Conclusions**

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MOTIONS TO MAKE SPECIFIC AND TO RESOLVE CONCLUSIONS

WALTER R. ARNOLD*

I

SCOPE AND OBJECTIVE OF THE ARTICLE

The cardinal aim of this article is to provide, by formulary rules, based on the history of pleading and precepts of logic underlying the art, as precise and scientific a means as possible of determining when a motion to make more specific is, and when it is not sustainable. In the accomplishment of this objective, resort is not had to any arbitrary fiat. The intention is to demonstrate that, with a few singular exceptions to be noted, the Supreme and Appellate Courts of Indiana have quite consistently decided in accord with the answer which the formula would provide in its application to each case; but that, while such result coincided with method, the reasons postulated for the result have been, generally speaking, vague, obscure, and haphazard and of small value as precedent guides to the bench and profession. The conclusions in the decisions were generally sounder than the reasoning by which they were reached. In short, it is sought here to show that the barque of decision has almost always attained its destination without chart or compass—steering laboriously and hesitantly by instinct or intuition—whereas there lay close to the hands of the navigators all needful materials to construct the instrumentalities of accurate reckoning.

II

HISTORY

Frequently it is necessary to ponder the raison d'être for a rule of law, so that the application of the rule may be rendered effective. Hence it is deemed wise, at the outset, to attend some-

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what on the historicity of the rules of common-law pleading as useful in throwing some light on the present status, purpose, and utility of the statutory motion to make more specific and to state facts to support conclusions of fact.

It is here purposed to develop the theory that ancient forms of pleading have a controlling bearing upon the proper application in practice, of the statutes\(^1\) because

"the common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (1607) * * * which are of a general nature, not local to that Kingdom, and not inconsistent with the"

Constitution of the United States and of the State of Indiana, and statutes made pursuant thereto, continue as effective law of Indiana.\(^2\) That the statutes and usages at common law, pertaining to pleadings, were drawn into the \textit{corpus juris} of our own state, except as inconsistent with legislation, is established by precedent.\(^3\) For it is said:

"The general principles and remedies of the English Common law and British Parliament made in aid thereof prior to the year 1607, prevail in Indiana insofar as they are not inconsistent with the Constitution of the United States or of this State"

and this is especially so with relation to rules of pleadings and procedure.\(^4\) It cannot, therefore, be inappropriate to take note of those rules of common law pleading as we find them at the time of the adoption of our code in 1852.

A good pleading was required to state nothing except \textit{facts and permissible derivative factual conclusions}, viz., naught but facts as they really existed, or were, by legal fiction or presumption, deemed to exist.\(^5\)

All the material facts on either side, were required to be pleaded in positive and direct terms, and not argumentatively—that is, in a manner which kept them open to be selected by inference—or by way of recital, as under a "whereas."\(^6\)

\(^1\) Secs. 359, 360 and 403 Burns R. S. Indiana, 1926.
\(^2\) Sec. 244, Burns R. S. 1926.
\(^3\) Wabash R. Co. v. McCormick, 23 Ind. 258 (260); State, ex rel. v. Home Brewing Co., 182 Ind. 75 (80 and 81); Union Trust Co. v. Curtis, 182 Ind. 61 (68); Curless v. Watson, 180 Ind. 86 (104).
\(^4\) Atkinson v. Disher, 177 Ind. 665 (673); Yawger v. Joseph, 184 Ind. 228; Wiles v. Lambert, 66 Ind. 494.
\(^5\) Lawes Pleadings, 45 Lawes 8 Co. 155; Doug. Pleadings, 159.
\(^6\) Co. Litt. 303a; Bac. Abbr. Pleas, etc., B5 (4) I. 5; Yelv. 223; Com. Dig. Pledger, E. 3.
CERTAINTY IN PLEADINGS

Certainty in pleadings, according to My Lord Coke, as expounded at the common law, were met with in three sorts or degrees: (1) certainty to a common intent; (2) certainty to a certain intent in general; and, (3) certainty to a certain intent in every particular.7

Certainty to a common intent, the lowest degree permissible under the rules, was sufficient only in pleas in bar, rejoinders, and such other pleadings on the part of the defendant as went to the action, e.g., the general issue; payment; failure of consideration, etc., etc.8

Certainty to a certain intent in general, was required in counts, replications, and other pleadings on the part of the plaintiff.9

Mr. Justice Buller, in essaying a distinction between the first two forms of certainty, observed:

"By a common intent I understand, that when words are used that will bear a natural sense and also an artificial, one or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which are omitted; but where certainty to a certain intent in general is required, if words are used which will bear these two senses, they may be taken, it seems, either way against the party pleading; though as against the adverse party they can be understood only in their natural sense: so that if either sense will operate against the pleading, his pleading is defective. By 'certainty to a certain intent in general' is meant what, upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear."10

When the pleading was required to be "certain to a certain intent in every particular," the utmost fullness in particularity of statement as well as the highest attainable accuracy was requisite. On the one hand, nothing was to be supplied by intendment or construction, and on the other, no supposable special answer unobviated.11 The latter was required in special diliatory pleas, such as pleas in abatement, and the rule survives to the present day.12

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7 Co. Litt. 303a; Com. Dig. Pleader, C. 17.
8 Cowp. 682; Doug. 159; 2 H. Black 350.
10 2 H. Black. 530; Doug. 159.
11 Co. Litt. 352b.
12 Meedham v. Wright, 140 Ind. 180; State v. Comer, 157 Ind. 611; Knotts v. Clark Construction Co., 191 Ind. 354.
However, the requisites of certainty respected only the manner in which particulars were stated, and these were required in general to be stated distinctly and explicitly so as to exclude ambiguity and make the meaning of the averment clear and intelligible.

The only remedy open to the defendant (or to the plaintiff, in the case of a special answer) for failing to observe these common-law rules, was the general demurrer until 27 Elizabeth.\textsuperscript{13} Prior to the act of Elizabeth, \textit{supra}, a general demurrer reached a defect in substance, as well as one in form, and the act was drawn to require the demurrer to bring out and emphasize such defects more clearly, so as to avoid surprise to the opposite side. The statute, in substance, provided that in all demurrers to the pleadings on either side, all defects and imperfections merely formal, except such as are expressly and specially set down and assigned for cause of demurrer, are aided and may, by the court, be amended. A long train of decisions followed bearing on the proper construction of the statute, with particular respect as to what were “formal,” and what “substantive” defects. To render the statute more certain, another\textsuperscript{13a} was enacted, partly in explanation and partly in extension of that of Elizabeth, and also expressly specifying a variety of particular defects which, though before deemed substantial, were by the latter acts virtually converted into matters of form that were inexigible on general demurrer.\textsuperscript{13b}

Lord Hobart, in passing upon the statute of Elizabeth for the purpose of differentiating between what was “substance” and what “form,” couched the distinction in this quaint language:

“That without which the right doth sufficiently appear to the court, is form; but that by reason whereof the right appears not, is substance.”\textsuperscript{14}

It is frequently assumed that under the system of common law pleading in vogue prior to the adoption of the code, the shrewd pleader could manage to render his pleading impregnable, against a demurrer, general or special, and yet effectively conceal from his adversary the essential facts upon which he based his action or defense. That this is not true, is amply

\textsuperscript{13} 27 Elizabeth, Chap. 5, Sec. 1.
\textsuperscript{13a} 4 and 5 Anne, Chap. 16.
\textsuperscript{13b} 1 Chitt. Pl. 641-3.
\textsuperscript{14} Hob. 233.
demonstrated. Where properly exigible (in practically the same circumstances as motions to make more specific and certain) common-law courts, on special demurrer, as to matters of fact or where the form was imperfect—a lack in definiteness, certainty, or precision—ruled a pleader as quickly to amend as our courts do under the code on prayers in motions to make more definite and specific.\textsuperscript{16}

As a matter, therefore, of comparative law, it may be asserted with some show of confidence, that the remedy by motion to make more definite, certain and specific, and to state facts to support conclusions of fact, created and administered under the code, is not substantially different than, nor does it add any remedies or preclude any rights that were not in existence or were not precluded by, the special demurrer; and the analogy of the practice may, we believe, be taken as recognized that the motion, in its various stages, performs the same functions that the special demurrer did at common law.\textsuperscript{16} Although it is stated that it has a broader application.\textsuperscript{17}

III

THE INDIANA CODE PROVISIONS

In actual practice motions to make more definite, certain, and specific, and to state facts to support conclusions of fact, have been applied infinitely more frequently than the special demurrer was at common law; much of this has undoubtedly been on account of a co-ordinate section of the code,\textsuperscript{17a} which has been construed in many instances, especially by the bar, as inviting laxity and artlessness in pleading. The enactment which first gave life to motions to make more specific, was section 90 of the code, of 1852, which provided:

"In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the

\textsuperscript{16} Christmas \textit{v.} Russel, 5 Wall. 290 (307), 72 L. Ed. 475 (479); \textit{Snyder v. Croy}, 2 Johns. 428, 5 Black. 556; \textit{Stesse v. Old Colony R. R. Co.}, 156 Mass. 262; \textit{Addison v. Lake Shore, etc., R. R. Co.}, 48 Mich. 155.

\textsuperscript{17a} Sec. 359, Subdiv. 2, Burns R. S. 1926.

\textsuperscript{17} Yawger \textit{v. Joseph}, 184 Ind. 228; \textit{Wiles v. Lambert}, 66 Ind. 494.

\textsuperscript{17} \textit{Wiles v. Lambert}, supra.
precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."\textsuperscript{18}

The early motions to make more specific and to state facts to support conclusions, were predicated entirely upon that section of the statute, re-enacted in 1881 as part of the code; but in 1913\textsuperscript{19} the legislature enlarged the scope of the motion, and reciprocally liberalized the pleadings to which it was to be addressed, by providing that:

"All recitals in and all statements contained in any participial expression, or following the words 'having' or 'being', shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof; and all conclusions stated therein shall be considered and held to be the allegations of all the facts required to sustain said conclusion, when the same is necessary to the sufficiency of such pleading, paper, or writing; provided, that as against such conclusions, only the following remedy is given, that a motion may be made to require the party filing such pleading, paper, or writing to state the facts necessary to sustain the conclusion alleged, said motion setting out wherein such pleading, paper, or writing is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived."\textsuperscript{20}

IV.

DISTINCTION BETWEEN MOTIONS

In practice, prayers addressed to courts nisi for details or facts in addition or extension to those set forth in the pleading, have taken the form (in nomenclature) of at least four varieties: "motion to take more specific," "motion to make more definite and certain," "motion to require facts to support conclusions," and "motion for a bill of particulars."

We regard the motion for a bill of particulars entirely apart from the motions under discussion here. The motion for a bill of particulars is not a creature of the code, although it is mentioned in the code.\textsuperscript{21} The Supreme Court of Wisconsin has declined to "draw any distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be

\textsuperscript{18} Sec. 403, Burns R. S. 1926.

\textsuperscript{19} Acts 1913, p. 50, as amended Acts 1915, p. 124, Sec. 360, Burns R. S. 1926.

\textsuperscript{20} Sec. 360, Burns R. S. 1926.

\textsuperscript{21} Burns R. S. 1926, Sec. 114.
made more definite and certain," believing the distinction has no tangible existence in reason or law.\textsuperscript{22} It is quite apparent that the framers of the code recognized the distinction, and meant the "bill of particulars" to continue in Indiana practice as the bill of particulars exigible at common law, for it has been held that where a bill of particulars is demandable, but the movant files a motion to make more definite and specific, the latter is properly overruled;\textsuperscript{23} and that the particulars, when furnished, do not control the averments of the complaint as would the particular facts as set forth in the complaint pursuant to a motion to make more specific, is also held.\textsuperscript{24} While the line of demarcation between what facts may be elicited by a motion for a bill of particulars, which is not ordinarily demandable in an action sounding in tort,\textsuperscript{24a} and facts exigible by motion to make more specific, may on occasion be tenuous, a fairly accurate statement or differentiation is that in the former instance details of analysis are demandable that the moving party is not required, as matter of either substance or form, to allege in the body of his pleading where it suffices to allege the bald aggregate or sum total, whereas in the case of a motion for facts, the aggregate itself is imperfectly defined or identified. For example: When in an action on account the plaintiff alleges that defendant is indebted to plaintiff for goods, wares and merchandise sold and delivered by plaintiff to defendant in the sum of Fifty Dollars, the body of the pleading is sufficient in substance and form, but defendant is entitled to have the aggregate "goods, wares and merchandise of the value of fifty dollars," broken up into its constituent parts by a bill of particulars, showing when and what merchandise was sold and the value of each particular item. However, if the allegation is that "defendant is indebted to plaintiff in the sum of fifty dollars," there is something in form lacking—the aggregate is not defined or identified—the transaction which gave rise to the debt is not stated and the body may be required to be made specific, definite and certain.

It is a more difficult, sometimes an impossible task, to undertake the differentiation between "motions to make more specific."

\textsuperscript{22} Conover v. Knight, 84 Wisc. 639 (642), 54 N. W. 1002.

\textsuperscript{23} Louisville, New Albany and Chicago Ry. Co. v. Henley et al., 88 Ind. 535 (537).

\textsuperscript{24} Chapman v. The Elgin, Joliet & Eastern Ry. Co., 11 Ind. App. 632 (635).

\textsuperscript{24a} City of Plymouth v. Field, 125 Ind. 323 (324).
“motions to state facts to support conclusions,” and “motions to make definite and certain.” As between the first and last of these three, an effort to differentiate would more properly belong to the realm of metaphysics than to the field of pleading. The distinction merely exists in the caption or denomination; the body certainly calls for the same relief, and they are hereinafter dealt with as identical under the appellation of “motions to make more specific.”

There is, however, merit to the contention that a formal and perhaps substantial distinction exists between the “motion to make more specific” and the “motion to state facts to support conclusions.” The distinction is based upon the fact that each has a different parentage. Motions to make more specific, as heretofore stated, derive from Section 90 of the code of 1852, whereas motions to state facts to support conclusions derive from the act of 1913. True, prior to 1913, Section 90 of the code was construed to provide a remedy against factual conclusions. Prior to the adoption of the act of 1913, it was held that the remedy to require a resolution of a conclusion into its component facts was properly attainable by motion to make more certain and definite, rather than by a special demurrer. Our courts had already generally assimilated, as a matter of practice, what was subsequently enacted. With the advent of the automobile and other means of rapid transportation, the general increase in tempo of living in the 20th century and the resulting tragedies attending the industrial revolution, and the enactment of much legislative regulation to avert disastrous consequences, the motion to resolve conclusions into facts, became of increasingly greater importance in pleading, especially with reference to the application of statutory provisions to acts and omissions alleged in negligence cases. But that the act of 1913 did work a distinction between the two motions under consideration, is apparent from the fact that for mere indefiniteness, as against factual conclusions, stated in the pleading, under section 90 of the code no duty is laid on the movant to bring into play the power of the court to “require the pleading to be made definite and certain by amendment.” And it would appear that a simple motion, without specifically calling attention to the ambiguities, imperfections, uncertainties, du-

25 Sec. 403 Burns R. S. 1926.
26 Sec. 360, Burns R. S. 1926.
27 Myers v. Jackson et al., 136 Ind. 136 (137); Doman et al v. Bedunah, 57 Ind. 219 (220); Ohio, etc., R. W. Co. v. Selby, 47 Ind. 471 (479).
plicities, or argumentation, sufficed. Under the act of 1915, it is required that “said motion shall set out wherein such pleading, paper or writing is insufficient”\(^{28}\) and it is held that under the Act of 1915, where conclusions are sought to be resolved by the motion, the motion itself must be specific and conform to the statute, or its overruling will not constitute error.\(^{29}\) So it is concluded that, notwithstanding courts nisi and of review have not drawn any apparent distinction between the two motions, there is in law and in practice a difference—each is generated by a separate statute and serves a special purpose. If this distinction were borne in mind and drawn into the decisions predicated on the two sections, respectively, it is not untoward to suggest less confusion would result in ruling on technicalities of procedure adopted for the purpose of invoking the remedy prescribed.

V

Remedy Not Available to Reach Conclusions of Law

It is, of course, elementary that conclusions or statements of law (except a foreign law, special regulation, or a municipal ordinance) have no proper place in a complaint, answer, or reply; and a conclusion of law there interpolated is to be wholly disregarded in the pleading; hence a motion to make the pleading more definite and specific as to such a conclusion, will not lie, except the law pleaded or the conclusion averred be of that character necessarily pleaded, i.e., foreign statutes or municipal ordinances, etc. Thus, to charge that a corporation had no power to assign a promissory note, is a conclusion of law, for the powers of a corporation are determined by the law.\(^{30}\) Singularly enough, after so deciding, the same justice in the same year held that a motion was properly overruled which sought to require the court to compel plaintiff to make more specific the following material allegations in the complaint. “That the defendant took over all the assets and assumed all the liabilities of Brown & Scott,” holding that the allegation was an ultimate statement of fact, though it might be called a conclusion of fact, and that what was sought by the motion, in effect, was evidence.\(^{31}\) It is a trite observation

\(^{28}\) The act of 1913 required the motion to set “out therein the facts claimed to be necessary thereto.”

\(^{29}\) Avery Co. v. Harriot-Carithers Co., 81 Ind. App. 348.

\(^{30}\) Central Bank, etc., v. Martin, 70 Ind. App. 387 (394).

\(^{31}\) Outing Kumpfy-Kab Co. v. Ivey, 74 App. 286.
that when making up issues, the court must look to the pleadings for the facts, and to the books for the law.\textsuperscript{32} While this tenet of pleading is obvious, its application appears to be difficult—at least such a pessimistic note is justified when we review the decisions which undertake an answer to the query: when is a conclusion one of fact, and when one of law? With the extremes, we should have no difficulty, e. g., “Plaintiff says that defendant was required by statute to dim his light at the time and place aforesaid,” is purely a conclusion of law and will go out on motion to strike; and that “defendant carelessly operated his said automobile in said highway and against the plaintiff” is clearly a conclusion of fact amenable to a motion to state facts to support the conclusion. However, Justice Ewbank, in 1921, in a personal injury case under the Federal Employer’s Liability Act, held—and we think he fell into palpable error—the allegation in the complaint that the injury “was caused solely by the negligent acts and omissions of the defendant,”

“without alleging that the defendant did any negligent act, or omitted to do anything, having a tendency to cause it, might have to be disregarded as a mere statement of a conclusion of law.”\textsuperscript{33}

The case of \textit{Temple v. State}\textsuperscript{34} is cited in support of such holding, but on examination of the latter decision it appears that the allegation in the complaint was to the effect that certain official proceedings in a school township were void because “the record was not signed on the 24th day of March, 1914, as provided by law”—clearly a conclusion of law. Another authority cited by Judge Ewbank is \textit{Central Bank v. Martin},\textsuperscript{35} but there the allegation was that a corporation doing business in Indiana had no legal right to make a certain investment which is also, obviously, a legal, and not a factual, proposition. We believe Judge Enloe, in \textit{National Brew Co. v. Thrash},\textsuperscript{36} erroneously decided that the allegation:

“these plaintiffs are the owners of a certain equity in the following described real estate”

\textsuperscript{32} \textit{Union Traction Co. v. Ross}, 71 Ind. App. 473 (476).
\textsuperscript{33} \textit{Cincinnati R. Co. v. Little, Adm.}, 190 Ind. 662 (669).
\textsuperscript{34} 185 Ind. 139 (146).
\textsuperscript{35} 70 Ind. App. 387.
\textsuperscript{36} 76 Ind. App. 381 (383).
was a legal conclusion, also basing his decision on *Central Bank, etc., v. Martin, supra*. And so it was wrongly held that the averment that appellee “represented himself to be the owner of the goods, whereas he was not such owner,” was a mere conclusion of law and not a conclusion of fact.

We are conscious of the appearance of presumptuousness that must be inherent in the contradiction of such respectable authority, nevertheless, equally respectable precedents of the Indiana Supreme Court, coupled with fundamental rules of the logic of pleading, support the assertion. An allegation that “defendant negligently and carelessly injured and killed said George E. Coombs” was held to be sufficient, as a conclusion of fact; and the Supreme Court correctly said:

“It has been uniformly held by this court that a failure to state in detail the facts constituting negligence, does not render the pleading insufficient, and that a general allegation of negligence is sufficient to withstand a demurrer for want of facts, and if a more specific statement of the acts of negligence is desired, the remedy, if any, is a motion to make more specific and not a demurrer for want of facts,”

(citing a number of cases). Going to more recent cases of our Supreme Court, the charge that certain of appellee’s fellow workmen

“carelessly and negligently cut, unfastened and loosened the wires holding the logs on the cars thereby causing the logs to roll”

was held to be a conclusion of fact, and sufficient, in the absence of a motion to make more specific; and it was held, that as against a demurrer, it was sufficient to allege that defendant negligently did the act without stating particulars or circumstances. On the question of ownership of property, witnesses may testify who is or who is not the owner of property, real or personal; whether a building was within the city limits. What duties the mining boss had to perform in looking after the rooms and

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38 *Chicago, etc., R. R. Co. v. Barnes*, 164 Ind. 143 (151).
39 *Nickey v. Stouder*, 164 Ind. 189 (194).
40 *Chicago, Indianapolis & Louisville R. R. Co. v. Meadlock*, 187 Ind. 224.
41 *Cleveland, C., & St. L. Ry. Co. v. Gillespie*, 173 N. E. 708 (Ind. App.).
42 22 C. J. 534.
entries, seeing that the walls were kept the proper thickness, was not objectionable, and that the assignment of a contract for the purchase of land was the consideration or the payment of notes, was held not objectionable as calling for the conclusion of a witness.

The true criterion as to whether a statement in a pleading is a conclusion of law or whether a conclusion of fact, would appear to be, is it conceivable that the elements going into and justifying or constituting the basis or foundation of the conclusion would be elicited on examination and given in evidence before a jury? If the answer is in the negative, then it is a conclusion of law; if in the affirmative, it would be a conclusion of fact. Now it is quite obvious that in each of the cases cited and herein criticized, the facts making up the conclusion would have been properly admissible in evidence and apt material for the consideration of the jury. The allegation "the record not having been subscribed until the 25th of March, was not subscribed in accordance with law" is a pure question of law, not one of fact. The jury has nothing to do with the allegation. If the subscription of the record took place on the 24th of March, then it was for the court to say whether it was or was not in conformance to law. Negligence, however, is a question co-mingled of law and fact, and, consequently, the facts entering the conclusion are aducible before a jury for them to apply the law as delivered by the court. Ownership of property is a question of fact, the same as infancy, majority, 

VI.

MOTION NOT ALLOWED TO ELICIT EVIDENTIARY MATTERS.

Another very difficult question presented to the courts both nisi and on appeal, is the application of the rule that a motion to make more specific, definite, and certain will not be sustained where to do so would require the opposite party to plead evidence.

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44 Eureka Block Coal Co. v. Wells, 29 Ind. App. 1.
45 Baltes Land, Stone & Oil Co. v. Sutton, 32 Ind. App. 17.
46 49 C. J. 45.
It is, of course, a well established general rule that a pleading should allege only the ultimate facts to be established, and not matters of evidence tending to establish them, and the absence of an allegation of essential ultimate fact cannot be supplied by allegations of matters of evidence which may afford the inference of such ultimate facts. As stated by the Supreme Court of Alabama:

"We take occasion here to suggest to pleaders that the rules of the common law as to pleadings, which are only rules of logic, have not been abolished by the Code. Pleadings should not state the evidence, but the facts which are the conclusions from the evidence, according to their legal effect, and complaints should especially avoid wandering into matter which if traversed would not lead to a decisive issue.

The border line between appropriate ultimate facts to be stated in a pleading, and a conclusion of fact, is sometimes extremely tenuous. Confronted on the one hand with the caveat that evidence must not be pleaded, and on the other hand with the knowledge that factual conclusions are amenable to a motion to make more specific, if they have a direct bearing or formulate the gist of the action, it is sometimes a matter of deep perplexity, both to counsel preparing a pleading and the court passing upon a motion to make more specific, and motions to strike, whether the finished product falls under the ban of one or the enclave of the other. Numerous efforts have been made by courts of last resort to posit a hard and fast rule and apposite criteria. The attempts have been, in general, unsuccessful. What strikes the writer as one of the most pertinent and sagacious efforts, both in the substance of the rule and the illustration subjoined, is one excerpted from an Old English Report:

"Despite the use of the form" (answer of payment in action of debt) "for upwards of a century, the plaintiff's counsel urge that the plea is insufficient because a mere conclusion of the pleader; that the pleader must set down the circumstances and transactions which give rise to the defense, so that the allegations of his plea may be put to the legal test. Arguing ab inconvenienti, the point is hypothetically made that were the de-

47 49 C. J. 40.
48 Great So. E. R. Co. v. Cardwell, 171 Ala. 274, 55 So. 185.
49 Alabama Great S. R. R. Co. v. Cardwell, 171 Ala. 274, 281, 55 So. 185; Crump v. Mims, 64 N. C. 767, 771; Sec. 403 Burns' R. S. 1926; Kumpfy-Kab Co. v. Ivey, 74 Ind. App. 286; 125 N. E. 234; Domestic Block Coal Co. v. DeArney, 179 Ind. 592 (615).
fendant to recite in his plea that on a Sabbath morning he met the plaintiff's coachman and handed the latter five pounds ten and six pence, and told the coachman to deliver the money to plaintiff in discharge of the debt, and stopped there, no trial would be necessary, because it would be the duty of the court to hold the mode of payment bad; whereas, on the trial these very facts would be shown—that the plaintiff never got the money, and the coachman had no authority to receive any for the account of plaintiff, and that the coachman absconded therewith, and there would then be an adjudgment that the coachman was defendant's, and not plaintiff's agent, and his making off with the fund was defendant's loss, not plaintiffs. If the facts were as plaintiff's counsel put them arguendo, and full disclosure were made to that effect by defendant to his counsel, it would ill become the latter under their vows to interpose the defense, knowing the plea to be factitious; however, granted that such were the case and despite the knowledge that the defense was false, with the evidence pleaded instead of the ultimate fact of payment, if the intent to make a fraudulent defense were designed, is it not to be supposed that, by way of addenda, would be appended the statement that the coachman did deliver the money to plaintiff? Were the court to hold the argument good, it must needs carry the demurrer back to plaintiff's own declaration, where in it is alleged that the defendant, because of the sale and delivery of divers articles of merchandise by plaintiff to him, 'became and is indebted to plaintiff in the amount of five pounds, ten shillings and six pence.' Cannot the defendant with equal propriety argue that the declaration is bad because, for aught therein appearing, plaintiff made delivery thereof to defendant's servant who had no authority to receive the goods and who absconded therewith?" 

"'Tis not the ancientness of the form of the plea that alone commends itself to the court. There is the more profound and stable reason that what is said therein is an ultimate fact, and what is desired by plaintiff to see therein is evidence of the ultimate fact pleaded. A rule for distinguishing between evidence going to prove, or from which may be deduced the ultimate fact, and the statement of the ultimate fact itself as apart from a mere conclusion, is not easy of fabrication so 'twill fit all cases; but the court believes that a generality might be found useful in most instances. An ultimate fact in a plea is a compound of subsidiary facts which are compressed into it, and which is free from intermixture of the personal reflections, caprice, or arbitrary judgment of the pleader or his client; a subsidiary fact is a component part of the ultimate fact; a mere conclusion—whether of law or of fact—is a compound of judgment, caprice, notion, personal reflection, or comparison with other subsidiary facts, and sometimes with the law or the opinion of the pleader as to the law. For example, and applying the somewhat superficial definition to the case at bar: Had the defendant by
his plea averred what plaintiff contends he should have put down, he would be pleading evidence; had he averred that he had been discharged of the debt, it would have been a conclusion of law; had he averred that he owed nothing to the plaintiff he would be remissive for alleging a conclusion of fact; but by baldly averring payment, he charged an ultimate fact in which was comprehended a carrying to and surrender unto and a taking dominion of by the plaintiff of the full amount of the debt—five pounds, ten shillings and six pence, coin of the realm—whether through the agency of a servant, either for plaintiff or defendant, or in propria manu."

VII

FORMULATION OF ANCIENT RULES TO APPLY TO MODERN PRACTICE

The English judge who thus expressed himself was uttering nothing antiquated then nor superannuated now, if there but be kept in mind Mr. Justice Buller's distinctions between the different degree of certainty in pleading and appropriate application be made of the various degrees to the different parts of the plea. We here essay a solution of the problem by a tentative formula adapted, we believe, to all existing statutes and rules of practice effective in Indiana, the object being to ascribe to each of the degrees of certainty, supra, a particular area of each plea upon which it operates; the means by which we endeavor to accomplish the desideratum is by breaking up the pleading into its several formal elements. Our illustrations are confined to formal analysis of complaints.

EXPRESS AVERMENTS
(Presentation of Facts)

I. Allegations Required to be Certain to a Common Intent
Status of Plaintiff

1. Capacity in which plaintiff sues and right to maintain the action:
   (a) Fiduciary, official, statutory or conventional,
   Guardian of ward,
   Trustee of trust,
   Administrator of estate,

50 Archbl. Civ. Pl. 634 et seq.
Executor of will, 
Clerk of court, 
Resident of state, county, etc., etc., etc.

(b) Relative status of plaintiff:
Parent of child, 
Husband of wife, 
Stockholder of corporation, 
Representative of numerous others similarly situated, etc., etc.

2. Possession of right by plaintiff:
Ownership of property—real or personal. 
Tenant of land, 
Holder of license, 
Bailor of bailment, 
Passenger in automobile, 
Paid guest at inn, 
Servant of master, 
Mechanic or artisan on building, 
Insured under a policy, 
Holder of note, etc., etc.

II. Allegations Required to be Certain to a Certain Intent in General.

Inducement to Right of Action Against Defendant

3. Relationship of plaintiff to res in action
Under contract of bailment, 
Under lease, 
Under mortgage, 
Under contract of hire, 
As taxpayer, etc., etc.

4. Relationship between plaintiff and defendant
Co-user of public highway, 
Insured and insuror, 
Possessor and trespasser, 
Bailor and bailee, 
Husband and adulterer, etc., etc.

III. Allegations Required to be Certain to a Certain Intent in Every Particular
Gist of Right of Action
5. Conduct of defendant or privy constituting encroachment of plaintiff's rights:
Breach of contract,
Breach of duty—private or official, express, implied, statutory, etc.,
Breach of trust,
Trespass—to person or property—on case,
Slander of title,
Invasion of possession,
Unauthorized exercise of dominion, etc., etc.

6. Consequences of encroachment:
Collision and personal injury or property damages,
Deprivation of liberty,
Expenses in rectifying wrong,
Damages suffered, etc., etc.

IMPLIED AVERMENTS
(The Legal Effect of the Pleading)
Not to be Pleaded—
Conclusions of Law

A. Definition of right:
Entitled to have the money paid,
Had right of way,
Was entitled to distribution as heir at law,
Holds statutory lien on property,
Right to have property re-delivered,
Right to be secure against harm by defendant,
etc., etc.

B. Imposition and origin of duty:
Duty to pay,
Duty to give right of way,
Can be compelled to yield possession,
Required to refrain from injuring plaintiff,
Forced to pay liens on property,
Obliged to report to Secretary of State, etc., etc.

C. Affixation of liability:
Must respond in damages for wrong,
Must restore property,
Must not make wrongful claims,
Must pay his note, etc. etc.
Under Subdivision 1 and 2 of Category I, an ultimate fact is stated within the requisite degree when the direct averment of the end product or result is made, and not by setting forth the history or process by which the result is reached; this is true notwithstanding the same form of statement appearing in another particular area of the plea, would be regarded and treated as a factual conclusion. If the history or process appear in this category, it is treated as surplusage, and is insufficient without giving the end result or product. It must do this to be "certain to a common intent."

Under the 3d and 4th subdivisions (Category II) certainty of allegation to a certain intent in general, is demanded. The statute requires documents to be exhibited, when the action rests on such documents; time and circumstance must be pleaded; amount and character of the res, in proper cases, must be shown, or a bill of particulars referred to; a fair illustration of the diorism existing between this category and Category I, is afforded in the typical mechanic's lien case, where the sub-contractor sues the principal contractor and the owner: to present the requisite status of plaintiff, it is necessary, under Category I to allege that the principal contractor had contracted with the owner for the erection of the structure. This need be averred only with certainty to a common intent, e.g.,

"plaintiff says that defendant A agreed with defendant B, the owner of the real estate hereinafter described, that defendant A should erect therein a dwelling house."

It is unnecessary that the contract be specifically set forth. However, if the sub-contractor seeks to recover from defendant A on a special contract between himself and defendant A, as is usually the case, then the contract falls within the second category and must be pleaded with certainty to a certain intent in general, and must be set forth.

Carrying the illustration to Category II, a bill of particulars may be exacted to require the itemization ("with certainty to a certain intent in every particular") of the articles furnished and the dates of furnishing the same; a definite averment of value, if the price has not been fixed by contract; a specific averment that the materials were furnished for the structure; a particular allegation that the notice of intention to claim lien

51 Ogg v. Tate, 52 Ind. 159.
52 Gilman v. Gard, 29 Ind. 291; Neeley v. Searight, 113 Ind. 316.
53 Stephenson v. Ballard, 50 Ind. 176.
was filed within the statutory time and a copy of the notice, etc.; that the materials were not paid for, etc.\textsuperscript{54} We shall carry the illustrations further in analytical form:

\textbf{SOME TESTS OF APPLICATION OF THE RULE}

1. \textbf{Action: Damage to plaintiff’s sheep by defendant’s dog. Complaint:}
   
   Category I (2). Plaintiff owned five sheep.
   
   Category II (4). Defendant owned a dog.
   
   Category III (5). Defendant knowing dog would attack sheep (\textit{sci\textit{c}enter}) permitted dog to be at large.
   
   Category III (6). Dog attacked and bit plaintiff’s sheep damaging them Thirty Dollars.

2. \textbf{Action: Divorce.}
   
   Category I (1) (b) Plaintiff is and has been for two years last past a resident of Indiana.
   
   Category I (2) Plaintiff and defendant intermarried.
   
   Category II (4) Plaintiff and defendant have separated.
   
   Category III (5) Defendant has during the married life of the parties without cause, on divers occasion within the past three months beat and bruised the plaintiff.
   
   Category III (6) Defendant’s said conduct has so wrought upon plaintiff’s emotions that plaintiff cannot live with defendant any further in harmony, and prays a divorce.

3. \textbf{Action: Quiet title:}
   
   Category I (2) Plaintiff is owner in fee simple of land described.
   
   Category II (4) Defendant claims some right therein.
   
   Category III (5) Simple negative of all right of defendant therein.
   
   Category III (6) Cloud on title; prayer to quiet title against cloud.

4. \textbf{Action: To set aside will:}
   
   Category I (1) (b) Plaintiff is child of deceased.
   
   Category II (3) Deceased died leaving property, and will is probated.
   
   Category II (5) Defendants are maintaining will.

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\textsuperscript{54} Davis v. McMillan, 13 Ind. App. 424, 40 N. E. 274.
Category III (5) Purported will is not the will of decedent, because (statutory requirements of pleading).
Category III (6) Prayer that will be set aside and held for naught.

5. Action: Negligent injury to plaintiff’s infant son:
Category I (1) Plaintiff is father of son.
Category I (2) Child an infant and under control of plaintiff.
Category II (4) Plaintiff’s child and defendant were making contemporaneous use of (specifically describing) public highway, defendant immediately ahead of automobile in which plaintiff was riding sixteen feet separating them.
Category III (5) Defendant suddenly slowed down and abruptly turned to left, all without giving any signal of his intention to do so.
Category III (6) Automobile in which plaintiff child was riding collided with defendant’s automobile, throwing child through windshield of car and fracturing skull, breaking cheek-bone of left cheek, tore skin in back and displaced spinal column. Hospital, Doctor, nurses, unable to work, permanently injured, etc.

6. Action: Conversion of personalty:
Category I (2) Plaintiff was on the 5th of April, 1931, owner of cow valued $50.
Category II (4) On said day defendant without leave of plaintiff took said property into his possession.
Category III (5) Defendant thereupon converted the same to his own use.
Category III (6) Damages to plaintiff $50.00.

ILLUSTRATION OF IMPROPRIETY IN PLEADING AND WHAT CONSTITUTES PLEADING OF EVIDENCE IN FOREGOING:
First hypothetical case:
Category I (2). Plaintiff negotiated with Tom Smith, who owned sheep, for and agreed to and did pay Tom Smith $30.00 for five sheep and thereby became the owner of said five sheep.
Note: No statement that plaintiff was the owner of said sheep, and pleads evidence as to how plaintiff may have acquired them.

Category II (4). Defendant stated to plaintiff that he (defendant) was the owner of a certain dog.

Note: No statement that defendant did own the dog. Pleading evidence (admission) which would be sufficient at the trial to prove ownership, but not the allegation of an ultimate fact.

Category III (5) Defendant told plaintiff that he, defendant, had seen the dog attack a sheep a week before injury to plaintiff's sheep; and notwithstanding defendant permitted dog to roam at large.

Note: Insufficient for same reason as above.

Category III (6) Dog chased sheep around pasture five times, and when plaintiff went out to pasture shortly afterwards, found five of the sheep bleeding from wounds.

Note: Insufficient for same reason as above.

Fifth hypothetical case:

Category I (1) Plaintiff married his wife Julia in January, 1923, and in December, 1923, said wife bore plaintiff a son named Frank.

Note: The court will infer from what is said that Frank was the son of plaintiff, but unnecessarily prolix pleading of evidence. The ultimate fact is not asserted, but court will infer it.

Category II (2) Defendant moves that the plaintiff be required to state facts to support the conclusion that the child was under the control of plaintiff at the time of accident.

Note: Motion properly overruled. Not gist of action. Merely inducement. Must be sustained by proof but amounts to assertion of ultimate fact.

Category III (5) Allegation: Defendant made turn to right so negligently that collision ensued.

Note: Motion to state facts to support conclusion would be sustained. Assertion of ultimate fact, but not stated with certainty to a certain intent in any particular.
ILLUSTRATION OF LEGAL CONCLUSIONS

Case 2. Divorce. Category I (1) "Plaintiff is qualified to bring an action for divorce."
Category I (2) "Plaintiff and defendant, under the laws of Indiana, are husband and wife."
Category III (5) "Defendant brutally exceeded his legal right to correct and punish plaintiff."

Case 5. Negligence: Category III (5) "Defendant failed to give the statutory signals of his intention to turn."

Case 6. Conversion: Category III (5) "Defendant thereupon dealt with said property contrary to law."

In each of the above instances a motion to strike out should be sustained, but on demurrer the pleading will be treated as if the allegation were not in the complaint at all.

VIII

THE FORMULA IS CONSISTENT WITH PRECEDENTS

To test the formula to ascertain how consistent it is with reasoned precedents of the Supreme and Appellate Courts of Indiana, since the adoption of the code, and particularly since the "conclusion" acts of 1913 and 1915, supra, we take the liberty of examining the cases.

_Baltimore & Ohio S. W. R. R. Co. v. Beach_55 was the theme of three opinions in the Appellate Court.56 Appellee suffered personal injury in a motor rail car on which he was passenger. It was charged that the car was operated at an excessive rate of speed, to-wit: in excess of thirty miles per hour, and by reason of such excessive speed, the operator, not being able to stop the car, negligently ran the car against and over a dog causing the car to be derailed thereby injuring appellee. The motion to make more specific, as the Court says, "Called for matters of evidence." The allegation falls under Category III (5) and is an allegation certain to a certain intent in every particular, because it avers that fifteen miles an hour was a speed, prohibited by the rule of the appellant, and specifically charges that the speed of the car, in the particular exigency, caused the derailment by collision with the dog. Had the alle-

55 168 N. E. 204.
56 163 N. E. 618; 165 N. E. 82.
In an earlier case\textsuperscript{56a} the theory of the complaint was an estoppel preventing defendant from retaking possession of an automobile on a conditional sale note that had become due, the estoppel being pleaded by the following allegation:

"That when the first payments became due May 30, 1926, being short of funds, he asked for an extension of time for payment and the time was extended until June 16, 1926, and payment of $72 was made which was the May payment."

Shortly afterwards the car was retaken. The motion asked that the plaintiff be required to state specifically who sanctioned the extension of time. This was the gist of the action and falls under Category III (5). The motion was denied, denial of it was properly held reversible error.

Afterwards\textsuperscript{57} the Appellate Court considered an action by a holder on a promissory note against the maker, in the body of the note was the recital that it covered deferred installments under a conditional sale contract between the parties. The motion was to require the conditional sale contract to be set forth. Appellee was a holder in due course. The statement was merely a recital of consideration, and, therefore, was entirely irrelevant to the action.\textsuperscript{58} The motion was properly overruled, as the reviewing court held.

We do not consider herein cases where the soundness of the action of the reviewing court, in upholding the lower court in overruling a motion, is so palpably obvious as to require no further justification. Only where real difficulty of decision is apparent from the pronouncement of the court do we regard the case relevant to our thesis.

We are also omitting notice hereof statements of the court, \textit{obiter}, where a demurrer or motion, other than a motion to make more specific or to state facts to support conclusions, has been overruled, and the ruling assigned as error, and the court has pointed out, in rather broad language, that the criticised matter could have been reached by a motion to make more specific, considering those decisions in no manner controlling.

\textsuperscript{56a} Norton v. Forshan, 87 Ind. App. 352.
\textsuperscript{57} Dorbecker v. Downey et al., 88 Ind. App. 557.
\textsuperscript{58} Burns R. S. 1926, Sec. 11362.
Nor are we considering or analyzing cases where the Supreme Court or Appellate Court fail to set forth sufficient portions of the pleading to which the motion was addressed to determine therefrom what the motion sought and in what the criticism consisted.

The Supreme Court, in 1926,\(^59\) reversed the Appellate Court\(^60\) and might be understood as holding that, in an action to quiet title, it is insufficient for plaintiff to aver simply that "he is the owner of the equitable title" to the land in controversy; that the trial court should have sustained a motion to require plaintiff to set out "facts relied on as constituting ownership of an equitable title." At first blush this ruling appears to run counter to our formula, (the allegation falling under Category II (3),) but on closer examination of the allegation we find it to contain an irreconcilable contradiction in terms: "that plaintiff is the owner in fee simple of the equitable title." Thus it appears that not only is "certainty to a certain intent in general" as required under this category, lacking, but even the weakest degree of certainty, "certainty to a common intent," is absent. The allegation is most uncertain and to a dubious intent.

In 1885 a case involving an occupying claimant's complaint for recovery for improvements was considered.\(^62\) The claim was for "clearing and fencing, removing stones and putting the land in a state of cultivation, of the value of $150.00" and a motion was made to require the complaint to be made more specific, which motion was overruled. Reversing the ruling, the Supreme Court held the appellant was entitled to a statement of the character and value of the clearing and of the kind and amount of fencing as well as his specific statement of what was done in the way of putting the land in a state of cultivation; in other words, plaintiff's claim should be itemized. On applying this case to the touchstone, we find that the item of the complaint held to be subject to the relief and remedy prayed, falls under Category III (5) and (6), and the decision was proper.

An elaborate opinion by the late Presiding Judge Dausman in 1921,\(^63\) requires thoughtful consideration, especially in view

\(^{59}\) Neal v. Baker, 198 Ind. 393, loc. cit. 400.
\(^{60}\) 147 N. E. 635.
\(^{62}\) Wallace v. Brooker, 105 Ind. 598.
of the fact that a transfer to the Supreme Court was denied the appellant. Breaking up the complaint there under review, under the various categories heretofore postulated, we find

The Supreme Court fell into the same error in 1921, (Cincinnati, I. & W. R. R. Co. v. Little, 131 N. E. 762, 190 Ind. 662) as did the Appellate Court in Central Bank v. Martin, supra, and in Temple v. State ex rel., 185 Ind. 139, in holding that

"The mere charge in general terms that an injury was caused solely by the negligent acts and omissions of the defendant without alleging that the defendant did any negligent act, or omitted to do anything, having a tendency to cause it, might have to be disregarded as the mere statement of a conclusion of law."

This is inconsistent with the statute and Ohio & Miss. Ry. Co. v. McCartney, 121 Ind. 385; Ohio, etc., Ry. W. Co. v. Walker, 113 Ind. 196; Hammond, etc., Co. v. Schweitzer, 112 Ind. 246; Louisville, New Albany & Chicago Ry. Co. v. Linch, 147 Ind. 165 (168); Citizens Street Ry. Co. v. Jolly, 161 Ind. 80, wherein the court says (page 85):

"the rule is well settled by decisions of this court that a general allegation of negligence in a complaint or other pleading is sufficient to withstand a demurrer for insufficiency of facts."

Ohio, etc., R. Co. v. Walker, 113 Ind. 196, 3 Am. St. 638; Louisville, etc., R. Co. v. Bates, 146 Ind. 564; and cases there cited. In each of the paragraphs in question it is alleged and shown that the injury of which the plaintiff complains was caused "solely by the fault, carelessness, and negligence of the defendant and its servant and employes, as aforesaid." This can not be said to be a mere recital of a fact, but is a direct averment thereof, and is sufficient to disclose that the injury sustained was the direct result of the negligence imputed to appellant. Brinkman v. Bender, 92 Ind. 234, and cases there cited; Louisville, etc., R. Co. v. Kendall, 138 Ind. 313; Chicago, etc., Ry. Co. v. Barnes, 164 Ind. 143 (151); Lake Erie, etc., Co. v. Cotton, 45 Ind. App. 580 (584), which decisions preceded the acts of 1913. And the following decisions subsequent to the act of 1913: Louisville & So. Ind. Traction Co. v. Cotner, 71 Ind. App. 377 (379), wherein it was held that the bare allegation for personal injuries "that the defendant then and there by its agent and servants carelessly and negligently ran said electric car upon and against said plaintiff" is, in the absence of a statement of specific facts showing otherwise, a sufficient averment of negligence to withstand a demurrer for want of facts. Citizens Street Ry. Co. v. Lowe, 12 Ind. App. 47; Lake Erie, etc., R. R. Co. v. Moore, 42 Ind. App. 32.

It might with propriety have been said that if the statement in the complaint (under categories II (3) and (4) failed to show a duty or a right on the part of the plaintiff, then the bare allegations that plaintiff suffered injury, through the negligence of the defendant, would be insufficient; but this is far from saying that an allegation, by way of a conclusion, that the defendant negligently committed a wrong, is insufficient as against a demurrer, and has never apparently been so held on a direct decision by any court of this state, except in the case of Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Nichols, Admr., supra.
Category I (1) Plaintiff was administrator of the estate of deceased.
Category I (2) Decedent was of full age and a physician who met his death by alleged wrongful act.
Category II (4) Decedent was a wayfarer on the highway, defendant's railroad crossed the highway at an acute angle and at grade.
Category III (5) (a) Recites obstruction of view on the approach to the crossing,
   (b) "That said defendant then and there carelessly and negligently failed to operate any gate, warning travelers of the approach of trains;"
   (c) "That said defendant did then and there carelessly and negligently fail to operate a signal device warning travelers of the approach of said train;"
   (d) "That said defendant did then and there carelessly and negligently fail to operate a train going west on the south track which was then and there the track used by east bound trains;"
   (e) "That said defendant did then and there carelessly and negligently run and operate its said train at a dangerous, reckless and unusual rate of speed of from sixty to seventy miles per hour;"
   (f) "That defendant by said negligent means aforesaid did then and there carelessly and negligently run, operate and propel its said train on, across and over said highway crossing where said Joseph Ross Wilson was then and there traveling thereby killing him;"
Category III (6) That he left a widow dependent upon him, he was a physician, he had a large profitable practice and was 52 years of age. Damage $10,000.00.

The defendant moved the court to require plaintiff to state facts to show what duty the defendant owed to decedent with respect to each averment of negligence; and to show how the duty arose. The motions were overruled. We proceed on the assumption, as the Appellate Court did, that the motions were sufficient to request a resolution of conclusions into facts. As to several matters falling in category III (5), the court held that whether a duty to maintain gates at that crossing rested upon
the defendant, was a *question of law*. Later in the opinion the learned Judge in effect says that, there being no statute making such a requisition, the question would be one of fact for the jury under the evidence, provided there were some circumstances alleged which disclosed

"a peculiarly hazardous condition, and that the absence of gates constituted a violation of duty to use due care which may ultimately become a question for the jury under proper instructions."

With every respect for the learning and caliber of Presiding Judge Dausman, we must confess that this is, in effect, a contradictory statement—to say in one breath that whether there is a duty to maintain gates at a crossing is a question of law, and in the next that it may be a question of fact where the conditions are shown to be hazardous. Then, further on in the opinion, the court brushes the conclusion of negligence (absence of gates) entirely aside and holds the allegation is wholly insufficient "to constitute a case of amenable negligence based on the failure to maintain gates." The Court evidently holds differently as to the question of a failure to maintain signals or warning devices. After determining that there is no statute requiring maintenance of such signal or warning devices, it is said

"if the facts were properly pleaded, it might have been a question for the jury, under proper instructions, to determine whether the defendant ought to have maintained some warning device at that particular crossing in order to discharge its duty to exercise care and diligence commensurate with the obvious danger."

Then it is said that this averment likewise fails to state a ground of amenable negligence and must fall for the same reason that the first assignment of negligence must be disregarded.

As to the charge of operating trains west on the south-bound track, instead of the north-bound track, we concur with the court's statement that the railroad company had the right to run its train in either direction on either track, and no fact is shown which could militate against that right. As to the fourth charge of negligence (Category III (5)

"that said defendant then and there carelessly and negligently ran and operated its train at a dangerous, reckless, and unusual rate of speed, from sixty to seventy miles per hour."
we are also in agreement with the Court's holding it to be a question of fact for the jury, only after the plaintiff has by his pleading, shown conditions and surroundings,

"so that the court may determine whether the jury can legitimately draw therefrom the conclusion that the particular crossing was one of such peril to travelers on the highway as that the rate of speed would constitute a violation of duty to exercise due care for the public safety. * * * From that premise it follows logically, as a matter of good pleading, that the facts which make a particular crossing extraordinarily hazardous must be averred in the complaint and the broad averment that the defendant carelessly and negligently ran its train at a high and dangerous, reckless and unusual rate of speed of from sixty to seventy miles per hour was not sufficient."

But we are in utter disagreement with the learned judge in holding that a motion to make more specific was not the proper (and the only) mode of reaching the insufficiency.

As to the fifth ground of negligence, (Category III (5), that the defendant operated the train without sounding a whistle or ringing a bell, or in any other manner warning persons traveling upon said highway of the approach of said train, it was properly held to be a correct averment of negligence under the statute.

The Court held that counsel for the defendant were mistaken in their remedy by motion to make definite and specific.

"That motion is appropriate where the averment is sufficient to withstand a demurrer, but is indefinite, because ambiguous. * * * On the defendant’s theory of the complaint, the appropriate method of attack would have been by motion to strike out. * * * Counsel contend, however, that each averment states a conclusion, and that therefore, he pursued the remedy prescribed by statute. This contention is rather indefinite, but we gather from the briefs and argument that they mean to say that whether or not an act was done negligently is a conclusion. * * * The terms ‘negligence,’ and ‘negligently’ signify that which is within the realm of fact * * * when the pleader relies on a negative tort, he usually avers that it was done negligently, carelessly or recklessly. In either case the averment states an ultimate fact—nothing more or less.”

It is then declared that the defendant should have moved to separate the first paragraph of complaint into further paragraphs so as to present but one theory in each paragraph, and then should have tested each paragraph by a demurrer. Or, to have required the plaintiff to elect a particular theory of negli-
gence on which he desired to go to trial; then the court proceeds to announce that neither of these remedies was available, because each of the several allegations is interdependent with the others and connected therewith.

This unfortunate tergiversation and deflexure make a very sorry mess of the decision, largely nullifying its utility as a precedent; and our research has not revealed any decision that supports the ultimate conclusion on either ruling and we have examined with care those cited by the learned Judge. The mutually self-destructive pronouncements, preliminary and finally made, are impossible of comprehension in totality. In the first place it has never before or since been held that in averring the gist of the action the statement of the doing of an act negligently, carelessly or recklessly is the statement of an ultimate fact. All the holdings are that such epithetical qualifications stated in relation to a gistal averment make of the latter a factual conclusion—both at common law as well as under the code,—unless the particular acts or omissions are conjointly stated, in which case it properly characterizes the ultimate fact. The cases cited by Judge Dausman to support the holding, appear to hold directly to the contrary.

It evidently did not occur to Judge Dausman that a demurrer may be directed to a specific part of a complaint containing a distinct averment of breach of duty, and that it is not necessary that the same be separated into paragraphs in order to render a demurrer proper.

We proceed to consider other cases of similar nature. In another railroad crossing case it was held that a complaint alleging

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65 Louisville, etc., R. R. Co. v. Schmidt, 106 Ind. 73.

66 Mustard et al. v. Hoppes et al., 69 Ind. 324 (326); Sheet v. Longlois, 69 Ind. 491 (495); Nowlin v. Stats, 30 Ind. App. 277 (279).

664 Ohio, etc., R. R. Co. v. Craycraft, 5 Ind. App. 332, 32 N. E. 297.
was sufficiently specific, in the absence of a motion, and by inference this holding was approved by the Supreme Court.67

An exception to the exigibility of the rule as to factual conclusion is to be noted. Where a statute is the foundation of the action or prescribes the remedy, and gives grounds in the form of factual conclusions, pleading the grounds in the language of the statute seems sufficient, e.g., pleading unsoundness of mind, undue influence, and undue execution in a will contest in the language of the statute, will not render the complaint amenable to a motion to make it more specific.

A good example of an important point lost in a judicial shuffle appears in a case finally decided by the Supreme Court in 1920.68a The cause was at first decided in the Appellate Court68b where it was held, and we think rightly, that where the allegations in the complaint falling under Category III (6), charged generally that the plaintiff, who was suing his master for injuries received by a car upon which he was working, had sustained divers broken bones, injured muscles, ligaments, tendons and other parts of plaintiff’s leg and foot and to his spine and back, “and other sickness, soreness, lameness and disorders” the defendant should have been granted its motion to require the plaintiff to specify in particular “what sickness and soreness, lameness, and disorders the plaintiff suffered.” The motion was overruled and the Appellate Court held this to be error. When the cases came to the Supreme Court on transfer, this portion of the complaint was entirely ignored and the duty of the Supreme Court, under the Constitution,68c was not fulfilled, as the opinion by the Supreme Court is entirely silent on this point. The complaint under Category III (6) also charged that the car under which plaintiff was working was moved “without reasonable or sufficient notice or warning to the plaintiff.” The court held that

67 Faubre Coal Co. v. Kushnet, 188 Ind. 314.
68 Phillips v. Gammon et al., 188 Ind. 497.
68a Haskell & Barker Car Co. v. Strzob, 190 Ind. 35.
68b 123 N. E. 182.
68c Sec. 5, Art. VII, Indiana Constitution.
"In cases where the facts to be alleged are peculiarly within the knowledge of or presumed to be known to the opposite party, sound reason does not require the certainty and particularities usually necessary in ordinary cases."

The pat inquiry is suggested by this dictum whether it isn't true that in almost every personal injury case the defendant has as much, generally more, knowledge as to how the accident happened than the plaintiff, and particularly as to the movements made by the defendant in an automobile accident case, and would that excuse the plaintiff from making any allegation of specific act of negligence? This charge falls under category III (5) and the Supreme Court should have denied a transfer from the Appellate Court which required that charge to be made specific as part of the *gist of the action*. Had it been alleged that no warning was given, then, of course, the motion would have been properly overruled. This we believe is a very unfortunate precedent.

In 1916, in an action by a mechanic to foreclose his lien against the owners, who were tenants by the entireties, the owners sought to have made more specific the following allegation, "the principal contract was made with Herman Haehnel" for the construction of the building and

"The buildings were constructed with the knowledge, consent and acquiescence of the defendant Catherin Haehnel and that in all things herein mentioned said Herman Haehnel acted for himself and also for his said wife as her agent."

This allegation clearly fell under Category II (4) and, therefore, not within Lord Coke's rule requiring it to be certain to a certain intent in any *particular*, but certain only to a certain intent *in general*. The general averment, therefore, that the contractee's wife had knowledge and acquiesced in the construction of the buildings, and that her husband was her agent and acted for herself and himself in making the contract, was properly held to satisfy the rule of pleading.

In a case decided by the Appellate Court in 1921, an action against a street railway company for fraudulently procuring a release from liability for personal injuries to a passenger, the allegation in the complaint, material to the consideration of the matter under treatment, is that

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"defendant, through its agents and servants entered into plan, after the injury to plaintiff, to cheat and defraud plaintiff out of the cause of action and damages."

There were other allegations concerning the acts of the defendant, through its agents and servants, in making misrepresentations thereby procuring the receipt and release. The defendant filed a motion to require the plaintiff to give the names of the "agents and servants" who were implicated. The court overruled the motion, and the Appellate Court held that it was error because plaintiff did not aver nescience as to the identity of such agents and

"the position they held with reference to appellant, and appellant was certainly entitled to be advised in the allegations of the complaint who were the alleged agents and servants who perpetrated the fraud upon appellee."

(Note the inconsistency of this holding with that observed in the Haskell & Barker Car Co. case, supra.) The court cites as supporting this Chicago etc. R. R. Co. v. Nixon, 76 Ind. App. 86. We believe the cited authority is not a precedent, because in the Nixon case the matter sought to be made more specific had reference to Category III (5) and (6) which were stated by way of conclusion, whereas in this case the matter fell under Category III (4) and under that category, it will be observed, the certainty of the pleading must be of a degree only to a certain intent in general, and not, as under Category III, certain to a certain intent in every particular. That an allegation in a complaint that the defendant corporation did or omitted to do certain things, suffices, and that it is unnecessary to set forth that the acts were done by the agents or servants of the corporation or to name such agents, was theretofore well settled in Indiana, as in other states, thus:

"A corporation can act only through an officer or agent, and when a corporation is charged with having done an act, such allegation will be held to mean that the act was done by an officer or agent. Appellant knew what officers and agents it had, and the extent of the authority of each, and the rule has long been established that a plaintiff is not bound to plead facts which are peculiarly within the knowledge of the defendant."

The Supreme Court in the last mentioned case cited by the Appellate Court, supra, held it proper to overrule a motion to

71 Indiana Bicycle Company v. Willis, 18 Ind. App. 525.
72 Louisville & Nashville R. R. Co. v. Crunk, 119 Ind. 542 (545-546).
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make more specific which sought to have plaintiff set forth the names of the agents and servants by whom defendant's train, inflicting injuries, was operated. These two decisions were cited with approval as precedents on analogous questions, and in some instances on the identical question, in later decisions. So it appears that Judge Nichol's opinion stands conspicuously alone in holding exigible on motion by defendant corporation, against whom a tort is alleged, a statement of the specific names of the agents of the defendant claimed to be involved in the transaction on which the cause is grounded.

In another mechanic's lien case, the lower court, erroneously overruled a motion to make more specific a matter in the complaint falling under Category II (4) of the above outline because the allegation dealt with the relationship between plaintiff and defendant and was not pleaded with "certainty to a certain intent in general," it not appearing definitely, as the reviewing court determined in reversing the action of the lower court in overruling the motion, therefrom

"whether the plaintiff relied on an implied or express contract, and whether the work was done on the request of the defendant, or as shown in the notice of lien that the work was performed and material furnished pursuant to a contract between plaintiffs and other sub-contractors, and contracts with the owner of the right-of-way"

notwithstanding a personal judgment was sought against the defendant. In the same case, anent other matter falling under Category II (4), the Court held it unnecessary to specifically recite the terms of an oral contract forming the basis of a mechanic's lien.

It is, of course, never error to overrule a motion to make more specific an averment not a necessary part of the statement of the alleged cause of action.

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73 119 Ind. 542 and 18 App. 525.
74 Knickerbocker Ice Co. v. Gray, 107 Ind. 395 (401); Singer Sewing Machine Co. v. Phipps, 49 Ind. App. 116 (120); Feighner v. Delaney, 21 Ind. App. 36 (37); P. & A. Dispatch, Inc. v. McDougall, 91 Ind. App. 181 (184).
75 Terre Haute, etc., Traction Co. v. Holland, supra.
76 Yawger & Company v. Joseph, 184 Ind. 228.
Procuring Improper Ruling on Motion Precludes Introduction of Evidence to Sustain Conclusion

An interesting development growing out of the act of 1913 is the holding—supported by logic and justice—that where a motion has been overruled to state facts to support a conclusion, it is deemed a decision, procured by and binding on the pleader resisting the motion, that all the facts known to and relied on by him to support the general averment are already stated in the pleading, and he will not be permitted to introduce any evidence resting upon the indefinite averments, where they fall under Category III.78

There appears to be no precedent for this holding, and Judge Ewbank, in the initial opinion inaugurating the rule, cites none. It may now be taken as thoroughly engrafted on Indiana rules of pleading and practice, and no careful practitioner can justify criticism of it.

XI

Necessity for a Definite Rule of Decision

So frequently do we meet in opinions, in passing upon the action of the lower court in overruling a motion to make more definite and specific or to resolve a conclusion, the trite and indefinite generality:

"It is essential that the issuable facts alleged in the complaint be stated in a sufficiently certain or definite manner so as fully to inform the defendant of what is alleged against him, and thereby prepare him to meet the charge of his defense. Beyond this, the pleader is not required to go."79

How little aid can the bench, the bar and the student gain from this to determine whether or not there is a sufficient pleading of the facts "so as to fully inform defendant of what is alleged against him", and how to frame a plea which will square with the edict? It is begging the question. Uniformity of rule in


decision can never be thus achieved. Every repetition of the
pronouncement, except as a preface or after-thought, in the
official opinions of our courts of review, but tends to strengthen
the thought held in many quarters, that the code practice courts
here face a problem the difficulty of which verges on insolubility.
The need of some finite formula or working rule becomes vocifer-
ers when we read, on a related question, thus from the reports
of our Supreme Court:

"It sometimes happens that facts are so close to the line dividing
inferential facts from evidentiary facts that the only safe plan
is to put them in the special verdict, where they can do no
harm if they should turn out, in the opinion of the court, to be
evidentiary facts, and where their absence might be fatal if
they should turn out to be inferential facts".\footnote{Republic Iron & Steel Co. v. Jones, 69 N. E. 191, 192, 32 Ind. 189 (quoting Louisville, N. A. & C. Ry. Co. v. Miller, 37 N. E. 348, 141 Ind. 550).}

It is not anticipated that the correct ruling on every motion
will gravitate to the court through the operation of the proposed
formula as fundamentally and irresistibly as the workings of
the law of molecular attraction; nor is it even pretended that
the proposal is sound in all of its features, nor that it is insus-
ceptible to improvement. As declared in the prefatory chapter,
the purpose is to essay a means to the desideratum, not to dictate
a procrustean bed. We endeavor to be of aid, we deplore the
idea of \textit{ipsi dixit}. Without such constant endeavors, we should
be ridden by the tyranny of fixed opinion, or hedged in by obscur-
antism, or warped out of touch with the living, scientific present.