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LEGAL CONCLUSIONS

By Bernard C. Gavit*

I

It is not true that "Hard cases make bad law." Hard cases usually make good law, and one who would subscribe to the opposite doctrine is interested in the form of the law and not in its substance; in its metaphysics and not its reality. The essence of the idea expressed in the generalization is simply that the court has used an old word or phrase for a new concept; it has put new wine in an old bottle and neglected to change the label; reality has triumphed over theory. For it is usually agreed by the exponents of the view that "Hard cases make bad law" that the result reached is a desirable and just one, and the quarrel is simply with the name the court has given to the new concept.

It has, of course, been pointed out many times that much difficulty arises out of our uses of language. Nowhere is the difficulty any more acute than in the procedural field; and it is the problem of "legal conclusions" in pleading with which this paper is ultimately concerned. But substance precedes procedure in our theoretical scheme of things, and many of our procedural rules are written in terms of the substantive law. For example, when our codes provide that "an action shall be brought by the real party in interest." they mean "the party having the substantive legal or equitable interest." When they provide that "all parties interested shall be joined" the same insertion must be made. When they provide that the pleadings shall state "the facts constituting a cause of action or defence," they mean that the facts necessary under some rule of substantive law must be stated.

The result is that the law of substance and the law of procedure are inseparable twins, and that we cannot deal intelligently with the problem of "legal conclusions" in pleadings until we have examined the judicial processes concerning the substantive law. The words which the latter uses are the words which the former uses. An understanding as to what they mean, and why they mean what they mean must precede any understanding of their use in the field of procedure.

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II

Most of our difficulty with legal language arises out of the fact that from the beginning the courts have seldom manufactured new words with which to clothe a legal concept, but they have adapted old words to the new use. Usually a legal concept has its counterpart in everyday life, as for example "real estate," "person," and "possession." The law normally does deal with human relations concerning tangible and visible objects and it was quite natural for the courts to seize upon the common words as expressions of the legal concepts concerning those same things.

But even where the legal concept is purely conceptualistic; where it has no counterpart in everyday life; where it is on a par with higher mathematics; again the courts went to the language of the common people and expressed the concept in that language. Thus the words "fee," "reversion," "remainder," "executory interest," "debt," each was undoubtedly a common word before it was a legal word.\(^1\) Few words, even in this field, will be found where that is not true.

In the closely related field of ethical and social concepts the same generalization holds good. Ethical and social conduct concepts acquire a common meaning and a common language before the law develops any concept on the subject; but when it does so it has without shame or acknowledgment borrowed the existing words on the subject. "Negligence," "adultery," and most of the language of the criminal law belong in this category. There is in such concepts an element of oughtness; of social standards; in addition to the actual conduct involved. But the law has no monopoly on the doctrine of "oughtness"; and in fact it seems more properly to have mostly an expectancy so far as new ideas in this field are concerned.

Whichever way we turn in the law we find ourselves either actually dealing with common things or concepts; or with legal concepts in terms of common language.

And on the other hand we are faced with the truth that the law itself is dealt with as a common fact. Ownership of real

\(^1\)Many assertions will be made as to the common or factual meaning of words throughout this paper, and no attempt will be made to cite or quote the dictionary definitions to sustain the assertions made. It is assumed that a good dictionary is as available to the reader as it was to the author, and that anyone interested in proving or disproving the author's assertions can consult that authority without any help from the author.
property is to us a legal concept; but most people accept their neighbor's legal ownership of his home as a fact of life; they usually respect his rights and will even aid in his defense of them. The same thing is true as to "marriage." In other words, the converse of the first proposition is true. Just as the law has borrowed common words and concepts, the layman borrows (or re-borrows) legal words and concepts, and his standard of conduct is quite often limited, both in fact and in law, by legal rules. Thus it is true that a legal word which at first is strictly new and without common meaning will tend to acquire a common meaning: and if it describes a constantly recurring situation, it inevitably will acquire much the same meaning to the layman which it has to the lawyer. Up to a certain point a layman is as capable of dealing with the concept as to what ought to be done as is the lawyer. He accepts legal rules as facts, and governs himself accordingly.

The result is that common language and legal language tend to run together, and to use the same words. But confusion arises out of the truth that even so the common and legal content of the same word are seldom if ever the same. Usually there is at least a variation or refinement in the legal content which makes it mean to the lawyer more or less than it means to the layman. "Necessaries" may well mean more or less to the lawyer than it means to the layman. Of course there are almost innumerable words where the variation is great. "Possession" as a factual concept is something less, and quite different, from "possession" as a legal concept. In fact, whenever one understands the legal content of the word "possession" he can justly claim that he knows most of the law of personal and real property; that law is written in terms of "possession," but legal possession and actual possession may have little in common. The same thing is true of the word "conversion." The legal content of the word is immense, because again a considerable portion of the law of torts is written in terms of a "conversion." "Valuable consideration," "intention," "debt," "trespass," "proximate cause," and "interest" are a few more legal words and phrases with a large legal content. "Trespass" and "proximate cause" are particularly difficult because each measures a legal result in terms of "cause." Everything which has been said con-

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2See, for example, Makarell v. Bachelor. (1598) Croke, Eliz. 583. (An allegation that certain goods sold to a minor were "necessaries" was held to be a "legal conclusion.")
cerning "proximate cause" can be said about "trespass." The latter includes situations where intervening causes have contributed to an injury, and the explanation of the result as a trespass because "the defendant's act immediately caused it" is bewildering to the student or lawyer only because he fails to realize that "immediately caused it" is here legal language and not common language.

Confusion always arises whenever we fail to appreciate that words may and do have double meanings: a common or factual meaning and also a legal or technical meaning. The possible confusion seems inevitable. Even were we to follow the methods of those who deal in the biological sciences and manufacture new words, or use a dead language, to clothe a new concept, one of two things would happen. In the first place, as pointed out above, the new word would probably gradually acquire a factual or common meaning; or in the second place it might be so difficult or meaningless to the average individual that it would remain strictly a technical word. Law would then be understood only by lawyers and would be beyond the common understanding of the average person. Is that a desirable result?

It is submitted that it is not. An attempt to manufacture a new legal language, at least as far as a large portion of the law is concerned, is based on a mistaken purpose. Law is not made for the lawyers, but for the laymen. It is essential to the practical success of most legal rules that they be near the level of average standards and expressed in language intelligible to the average person. Any social science which is written in purely technical terms misses its purpose in life; it remains an academic thing, because it has placed itself beyond the understanding of the person it is supposed to aid and control. The common law judges exercised the power of wisdom when they borrowed their terminology from the common language.

It must be admitted that the resulting confusion does confuse the student of the law, and sometimes even the judge and the scholar, but that result seems inevitable. It is to be doubted, for example, whether the scholarly explanation of the development of the action of assumpsit from the tort of deceit is necessarily a proper one. The allegation was that the defendant agreed to do

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3There is an obvious distinction, for example, between the law of torts and the law of future interests. The language of the latter may well remain somewhat technical; while the language of the former ought not to be technical.
an act, and "craftily contriving to deceive the plaintiff" did not do it. But the verb "deceive" includes the meaning of "disappoint," and it may well be that it was used in that sense. It can therefore be true that the action was essentially in theory for the breach of promise, and it is not necessarily true that the courts regarded it as an anomalous kind of tortious deceit.

The word "intention" causes no end of trouble, particularly in the law of contracts. If we take, for example, the very common problem as to whether or not promises, which appear on their faces to be independent, are to be construed nevertheless as conditioned on the performance of the other, we find that the courts quite often so construe them. The result usually is reached by ascribing to the parties an "intention" which calls for that conclusion. "Intention" as so used is obviously a legal concept, at complete variance with "intention" as a common concept, and it can best be defined as "what the parties would likely have intended had they anticipated this event." In form the result is in accord with the supposed consensual foundation of the law of contracts; in substance the result is in accord with the actual non-consensual foundation of the law of torts. Professor Williston recognizes that the word "intention" in this connection is a legal concept, for he says, "It may be said that in spite of the unqualified terms of the promises, liability upon one promise is conditional or dependent on the performance of the other, in accordance with rules of construction based on the supposed or imputed, though not expressed, intention of the parties." He later calls it a "fiction." The learned author then objects to the concept because "intention real or fictitious must relate to the time when the contract was entered into." He expresses a preference for explaining some of the cases under the concept "failure of consideration," which may always be an ex post facto determination on the merits as the events which actually happen require. But why must a "fictitious intention relate to the time when the contract was entered into?" There is no reason why it should; and the only reason one would think that it should is because the word "intention," which was at first conceded to be a strictly legal concept, has now incongruously acquired a common content. If "intention" here is "imputed," or "supposed," it does not have to "relate

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4 Williston, Treatise on Contracts, Student's Edition, sec. 813. The italics are mine.
6 Williston, Treatise on Contracts, Student's Edition, sec. 826.
back”; it can, and ought to be accepted at its face value—an ex post facto thing based on conceptions of fairness. But because “intention” also has its common meaning it causes no end of confusion.

The truth is, of course, that it is just as easy to give the proper amount of legal content to the word “intention” as it is to give it to the phrase “failure of consideration.” “Intention” as a legal concept can mean exactly what the courts say it means, and the choice between the use of that word and the phrase “failure of consideration” is simply a matter of language. Professor Williston’s preference for the latter is understandable, for it defines the result in the technical language of contract law, and gives to it a semblance of close relationships with the “known principles of contracts.” The word “intention,” on the other hand, has been exploited to the point where it does not so well cover up the real basis upon which it rests. In either event the result is not consensual, and the simple expedient of enlarging the legal concept “consideration” to include it does not help to make it so (except in appearance).

The truth is, of course, that all of the law of contracts could be expressed in the language of the law of torts, and all of the law of torts could be expressed in the language of the law of contracts. It is the legal concept which actually counts and not the form of its expression.

It is perhaps well at this point to distinguish between a new use of legal language and a fiction. The latter is an untruth in fact; the former is a truth in law. If, for example, a court says, for the purpose of reaching a legal result, that a dog is a man, that is a fiction. If it says, however, for the same purpose, we re-define a legal man to include a dog, that is not a fiction. It is merely giving to the legal concept “man” a new legal content. There is no pretense that a dog is in fact a man; the pretense, if any, is a purely conceptualistic one. It is, of course, sometimes difficult to determine in a given case whether the court is dealing with language in its factual or legal significance. For example, what does the court mean when it says in the law of the conditional delivery of deeds that “the title relates back to the time of the original delivery?” Does it mean that it actually relates back; or that it legally relates back? It is submitted that it means the latter and that the statement is not therefore a fictitious one. It is to be doubted, too,

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6For the most valuable discussion of the subject-matter of "Fictions" see, Fuller, Legal Fictions, (1930-31) 25 Ill. L. Rev. 363, 513, 877.
whether "intention" as used in the law of contracts discussed above is now, at least, a fiction. The courts quite probably employ it as an obvious legal concept, rather than a conscious misstatement of the facts.

III

There is another element of confusion. In addition to the confusion arising out of the double common and legal content of words, there is the confusion arising out of the change in the legal content. Just as the courts used common words to clothe a new legal concept they use old legal words to clothe a new legal concept. No small part of our legal development is accomplished through the redefinition of words. Thus the law in form remains somewhat static, while its substance changes. A "contract" is something quite different from generation to generation. To a lawyer this phase of the judicial process ought to be accepted at its face value; but it often is not. It is the very genius of the common law that under the guise of a static form the law may keep pace with social and economic progress.

So it is surprising indeed that the simple expedient of pouring new content into a legal word should be confusing to the lawyer, or should be the subject of adverse criticism by the legal scholar. The confusion and the criticism have a double angle; a strictly formal one and one which appears to be substantive but which finally is also formal. They are summed up in the statement used in the beginning of this paper to the effect that "Hard cases make bad law." Such decisions are attacked because they misuse old language and are therefore "confusing" and because "they are wrong on principle," although they reach a proper result. Much text-book, law review and classroom criticism is upon this basis. That they are at best attacks as to form is proved by the fact that the courts never pay any attention to them. It has, for example, been "proved" many times by legal scholars that an agreement for the benefit of a third person is not a "contract," but in the face of that the courts have gone on calling it a contract and extending the concept of "contract" to include it.

The quarrel based on the misuse of language is strictly a matter of form. As against the court's conclusion that this new legal concept shall be called a "contract" there is the assertion by the scholar that it must not be called a "contract." The latter is simply denying the power of the court to use its own language and define its own words. But in view of the fact that the court does
have that power the court wins. The argument to the effect that
the use of the word will result in confusion, because we already
have a concept exploited under that name, is quite justly disregard-
ed by the court. The lawyer who would be confused by the use
of this word would most likely be confused by the use of any
other word. And finally, the court is not deciding the case ex-
clusively for the benefit of the lawyer; it is deciding the case
primarily for the benefit of the litigants and the public generally.
The court in effect truthfully says that there is enough of similarity
between this new situation and the old concept to permit its classi-
fication under the old name. It connotes to the defendant and
others that they are liable as if this were a "pure contract," which
is putting the matter in a manner which can be understood.

Whether or not we concede to the court the power to use its
own language and define its own terms, the result is the same; it
has the power and it uses it. If the only criticism which we can
make is that this opinion gives a new legal content to an old word,
we are simply concerned with the form of the law and not its sub-
stance. We could well wish, perhaps, that for the benefit of the
law student at least the courts would specifically explain in passing
that the word has been given a new meaning, and that the court
would even go further and give its real reasons for the decision
rather than simply stating the result. That of course is what often
happens; calling a new situation a "contract" is merely giving a
name to the result, and the reasons for the decision remain in the
breast of the court. But that is asking too much. To begin with,
the court is not concerned with law students; and to end with,
(with few exceptions) the court would be incapable of articulat-
ing any convincing reasons. If it gave anything like an accurate
expression to its real reason, it would amount simply to the state-
ment "that that looks like a just result." We ought not to ask
that the courts thus in one fell swoop do away with all the meta-
physics of the law. It might be done in an adult civilization; but
not now.

If the scholar does not quarrel with the court's language, as
such, he usually quarrels with the result, because it "is wrong on
principle." He believes that this criticism goes to the substance of
the decision. The truth is, however, that it is finally as formal as
the other. Principles are conceptualistic. At best they are formal
expressions of generalized past experiences and results. The very
fact that they give way to a new situation proves that they had
only a mental existence, that in fact they had a pragmatic and not a metaphysical existence. Now it is as much a part of the judicial process for a court to reexamine the “principles” upon which prior decisions are based as it is to reexamine the logic of those decisions. It is, therefore, altogether surprising that there is a school of legal thought which would limit the judicial process to that later procedure. Thus, when a court departs from the old decision it is “wrong.” But, if the idea persists, it becomes “right” by the weight of authority! But what is to be gained by denying to the courts—in the face of the actual facts—the power to reexamine principles? None, except to satisfy an acquired longing for a certainty and a verity which does not exist.

But had the court when it rendered the decision either expressly repudiated the old principle or asserted that it was still intact, but this is founded on a new principle, the exponent of this school of thought would have no criticism to offer. The trouble is merely again that the court has clothed its decision in old language, and the criticism is simply as to the form of the decision. It is a good deal like the individual who gazes upon a giraffe and exclaims “Can you imagine that”! But we do not have to imagine it; we can see it. So it’s no good trying to compel a court to imagine a principle into which it can safely and logically fit each succeeding opinion. All it properly has to do is to decide the case and leave the imaginings to those who are more capable of handling them. The philosophy of the law is properly (as yet, at least) a scholarly and not a judicial process, and the courts quite properly pay little but lip-service attention to it. We might well wish again that they did clothe their decisions in language more acceptable to those to whom the “principles of the law” are a dear possession; and we might better wish that they really clothed them in a straight-forward language of pragmatism so that the real decision would be capable of exploitation and criticism. But again we ask too much. The courts are now incapable of either.

Again if we are concerned with the substance and not the form of the legal process, we find that “the principles” of the law are really pragmatic concepts and not metaphysical ones, even though they appear to be and are expressed in the language of the latter. Courts pay no more attention to “principle” than does the ordinary individual, whenever it stands in the way of what appears to be a desirable change. “Principles” are subject to reexamination and repudiation; and one who gives them any metaphysical content must shut his eyes to the facts. Although on paper they were thoroughgoing metaphysicians, the common law judges were in fact real pragmatists. And language was their principal stock in trade in their endeavors to prove themselves orthodox.
although they are more capable of the first than the second.

They do their full duty when they decide the case, and any criticism based on anything other than the practical validity of the result reached is a formal one. Whatever language the court uses, or has used, it has no bearing on the merits of the decision; once we extract the decision from the opinion, the language employed to convey the decision from the court to us is simply language and no more. It means no more than the court has decided it means, and however much we would like to have the courts employ clearer and more consistent language we must admit that our quarrel is one of language and not substance. In other words, we must interpret judicial decisions by employing a subjective test, and not an objective one.

IV

If language causes so much travail in the field of the substantive law, is there any wonder that it causes as much or more in the field of procedural law? The latter has pretensions of conservatism and a capacity for a credulity as to the certainty of things which are nothing short of miraculous. If language is a stumbling block in the path of the substantive law, we can well believe that it is a "snare and foulsome pestilence" in the path of the procedural law. For so it is.

There are at least three situations where the procedural struggle with language is acute and devastating. A pleading must state the ultimate or operative facts, as distinguished from the evidentiary facts, or a legal conclusion. The language of a special verdict or the special findings of a court is subject to the same limitations. A witness must state the facts and not his conclusions. Substantially, the problem is the same. The illustrations used and the discussion in this paper will be primarily limited to the first situation, but no reason is perceived why most of the discussion and results do not apply with equal force to the other two.

Professor Walter Wheeler Cook attacked the problem a few years ago, and there is no occasion for a new discussion of it if the conclusions he reached are correct and complete. But his conclusions are subject to some criticism and can profitably be enlarged upon. He asserts that there is no logical distinction between evidentiary and operative facts, and conclusions of law:

10 Statements of Fact In Pleading Under the Codes. (1921) 21 Colum. L. Rev. 416.
that the distinction between an evidentiary fact and an operative fact is that the first is specific and the second is generic. "What is according to accepted notions the proper way to plead is merely a mode of stating the facts generically rather than specifically." His next paragraph indicates that that is not always the distinction; that the distinction also may be in stating facts, "generically or specifically," in too great detail. And the test inferentially suggested is as to whether or not the language is the same which a witness would employ in testifying on the trial. If it is, the pleading contains the evidentiary facts and not the operative facts. He then asserts that a legal conclusion is an allegation in a generic form which is too general.

It will be seen that under his views, the objection to a legal conclusion is not that it has legal content, or is an allegation of law (that is, a statement of legal concepts) and not of fact, but merely that it is too general an allegation of the facts. An allegation of evidentiary facts is not generic or general enough; an allegation of a legal conclusion is too generic and general; an allegation of an operative fact is what the courts regard as the happy medium.

Professor Cook uses the word "generic" in two different senses. He first uses it in its commonly accepted meaning, that is, as "pertaining to things of the same kind or to classes of related things; characteristic of, or dealing with, natural groups rather than individuals." He makes the distinction between "a club" and "the club," and that is the common distinction between a generic thing and a specific thing. But later he asserts that the allegation that "the plaintiff is lawfully entitled to the possession of certain land" is generic in form. But if it were strictly generic in form the allegation would be that "a plaintiff is lawfully entitled to a possession of a land." The pleading is obviously bad in that form; so in a strict sense the distinction is not between a generic and a specific form of allegation. The use of the word "generic" in this connection means merely that the word has a large, a cumulative, or a diverse factual content, rather than that it refers to several things of the same kind, character or class.

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11Statements of Fact In Pleading Under the Codes, (1921) 21 Colum. L. Rev. 416, 418, 419.

12And in view of what has been said in the earlier portion of this paper it is conceded that this is a matter of form merely. He has the same power to define his own words as has a court, although in view of the fact that the article was published, partially at least, for the benefit of law students, the use of the power is less justifiable.
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It is true that a so-called “operative fact” takes the form of a generic word in some instances, but the reason is not because it is a generic word, but because it is a word of a general content, because it is also true that an allegation of a so-called “operative fact” may be quite specific and still be proper. Thus the plaintiff might today allege that “the defendant hit the plaintiff,” and the complaint would undoubtedly be held properly to charge an assault and battery. The plaintiff if he testified to those facts in those words would make out a prima facie case. And certainly the law of evidence offers no objection to his testifying in those exact words.

So it is seen that operative facts in pleading and the facts given in evidence may well be identical, and the test suggested between evidentiary facts and operative facts is not well taken.

The reason is that sometimes the simplest and commonest facts create a prima facie substantive right, as in assault and battery; whereas in other cases the facts will be cumulative and complex, as in deceit, or special assumpsit. Thus the facts pleaded will vary in given cases from the words a witness would use to describe the transaction to language which he would not be permitted to use, and which if he did use the jury at best would but imperfectly understand.

If a simple factual situation creates a legal right, the pleading will quite properly use words which have a simple, narrow or specific content. If a complex factual situation is necessary before a legal right arises, then the words used either will be more in number or if the pleading is to be as compact or concise as possible will be in words which have a general, complex or cumulative content. The requirement as to pleading the operative facts and not the evidentiary facts is simply that the pleader, if he have any choice of language, must choose and use the most compact or concise common language available. If, for example, a series of events can be summed up in one common word or phrase, that word or phrase ought to be used rather than specifically detailing the events which constitute its factual content. If we assume the facts to be that “D hit P with his fist” and that a complaint alleged the facts in those words, it might well be a good complaint; but if we had a common word which meant that, or if we suppose that the word “fisticated” meant that, the rule involved here would compel the allegation that “D fisticated P.” If the word “struck” connotes the same thing, we might use that instead.
If it were a part of a plaintiff's case that D had "murdered" X, and if we assume that the word "murdered" is not a legal conclusion, P would properly allege that "D murdered X," and he would plead "evidentiary facts" if he alleged that "D struck X over the head with a heavy club, while X, an officer of the law, was attempting to arrest D after D had failed, in the presence of X, to stop at Michigan Avenue, in the city of Chicago in violation of ordinance number 1000 of said city, which ordinance was in these words, etc."

Whatever the historical reason may have been, the present reason why, in the action of deceit, a plaintiff may not simply allege that "the defendant defrauded him," is that the common word "defraud" does not include all of the elements of a legal deceit. In common language the elements of a specific intention to deceive and a knowledge of the falsity of a representation are lacking. There is no common word which does include those elements, with the result that the plaintiff must allege them specifically.

Professor Cook asserts in this connection that an operative fact is often only an inference of fact. This is commonly said to be one of its meanings. What is meant is, for example, that if P alleges that "D killed X," "killed" is an inference from the facts that "P hit D over the head with a club and D died as a result of the injuries"; that a court is interested in knowing who killed X and not the manner in which it was done; that the court cannot act until it has been decided that facts 1, 2, 3 and 4 do constitute the fact of "killing." But the result is not an inference from the evidence as that phrase is normally used; but a summation of the evidence; neither the court nor the jury would have any difficulty in deciding that the facts proved constituted a "killing" in fact. If proof of the facts is not made by direct evidence, but only by circumstantial evidence, it is true that those facts are proved by inference; but it is the facts which form the basis of the killing, and not primarily the killing which are so proved. "Killing" is still only an addition of those facts; the manner of the decision as to what the facts were has no bearing on the problem. "Killed" is an operative fact, not because it is an inference of fact, but because it is a common word of a cumulative content which rather accurately describes in concise language the series of events involved.

An operative fact, then, as distinguished from the evidentiary

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12Statements of Fact in Pleading Under the Codes, (1921) 21 Colum. L. Rev. 416, 419.
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fact, is a word of general, cumulative or complex content; it is the most concise common language available. The operative facts and the evidence may employ the same words, but the reason is either that the facts are simple, and not complex, or that the common language has no word or phrase which sums up the facts involved. If it does have such a word or phrase the rule requires it to be used. It is a rule as to conciseness merely, and it presupposes that the words employed are not "legal conclusions."

V

A "legal conclusion" is a "conclusion of law," or an allegation of law. In other words it is a use of language in its legal significance as opposed to a use of language in its factual significance. It describes legal concepts and not common concepts. The objection is not that the party has pleaded his facts too generally, but that he has pleaded law and not facts. In truth, we have seen that the rule against pleading evidentiary facts requires a party to plead as generally as common language will permit. It is believed that most certainly the courts have thought that they are condemning "legal conclusions" simply because they were allegations of law and not of facts. And the distinction is a valid one, although it is in truth one easily subject to confusion.

The confusion arises out of the facts pointed out in the first portion of this paper that legal concepts are clothed in common language and words often have two meanings, a common meaning and a legal meaning. That the confusion is real has been demonstrated by the illustrations used by Professor Cook. "Valuable consideration" is held by some states to be a legal conclusion and by others to be an operative fact. In Indiana the court has improved on the confusion and holds that it is a legal conclusion if it is contained in a complaint; but it is an operative fact if it is contained in an answer. "Ownership" is sometimes a legal conclusion and sometimes an operative fact. The same is true of "negligence." The list could easily be extended to some length.

As pointed out above there are three rather general types of

14Leach v. Rhodes, (1874) 49 Ind. 291.
15Osborne & Co. v. Hanlin, (1902) 158 Ind. 325, 63 N. E. 572. The situation is not as bad as it seems. A general denial admits the plaintiff's allegations as to consideration; the answer of no consideration is therefore only a special denial, which casts the burden of proof on the plaintiff.
16Clark, Code Pleading, sec. 49.
17Clark, Code Pleading, sec. 47.
situations involved. A legal concept may have its roots in a factual situation involving tangible objects; it may be based on conduct to which has been added ethical considerations, as in the law of negligence; it may be entirely conceptualistic, as in the law of future interests in property. So it is not entirely accurate to say that the distinction between law and fact is between what did happen and what should have happened, or should not have happened. Common ethics invades that latter field as well as does the law, and thus "negligence" is both a common and a legal concept. The only general distinction possible is purely theoretical; is the concept a legal or common one?

The words used to clothe a legal concept may likewise be placed in three general classes. There are legal words which have substantially the same content as have the same common words. "Negligence" is such a word, for while a layman might not define it in the same language which a lawyer would use, both receive substantially the same concept when the word is used. In the second place, and at the other extreme, there are legal words which have no common meaning at all, which are strictly technical. They are hard to find, because as pointed out heretofore, even though they were technical to start with they soon tend to acquire a common meaning. But "springing use" is such a phrase. In the third place, a legal word may coincide generally with a common word, although it may have also additional technical meaning. "Possession" is such a word. "Necessaries," "performance," "conversion," "trespass," and a great many others belong in this class.

It will be seen that in the first or third classes words can be used in either sense, the common or legal one. If it is strictly a technical word, the courts have little difficulty in calling it a legal conclusion. The pleader cannot escape by asserting that he has alleged the factual background which may form the basis for his legal right, because admitting that he has he has not alleged it in common language. The codes quite generally provide that the pleadings shall be "in plain and concise language, in such manner as to enable a person of common understanding to know what is intended." If the code means anything at all, or is to have any hearing on the question, it condemns the use of words having a purely technical meaning. Such words cannot be "operative facts," simply because they have no common meaning.

18 The various code provisions are collected in Sunderland, Cases on Code Pleading 247-250. The last phrase is not always included.
When words of the first class are used, the pleader can truthfully say that he has alleged the facts in common language. The fact that the words used have also a similar meaning in legal language does not in any sense impair the truth of his assertion. It decides no case here to say that the words used do have a legal meaning, for the question still is do they also have a common meaning of similar import? Thus there is a logical distinction between an operative fact and a conclusion of law, and it arises from the truth that there is an actual distinction between the common and legal meanings of words. If it has a common meaning, it is an operative fact; if it has none, it is not.

The real difficulty is in dealing with words in the third class, where the common meaning is only partially, although generally, the legal meaning also. The dividing line between the three groups must of course be a broad one; there will be fine distinctions, and few words could be said to fall patently within either class. The most available preliminary test is an up-to-date dictionary. An old dictionary will not do, for quite clearly words change in content; and so although fifty years ago “valuable consideration” might well be defined as a purely technical concept, it may well be that today it has acquired sufficient common meaning to pass for an operative fact.

It is true that sometimes the courts seem to decide the problem on the basis of the intention of the pleader, and rather arbitrarily assert that he intended to use a word in its legal and not its common meaning. Properly, however, the pleader's intention ought to have no bearing on the problem.

It will be seen that in this last class, where there is more or less variation between the common and the legal meaning of words, a pleader may actually and materially come short of giving expression to all of his facts if he is allowed to use such a word. But that does not appear until the trial is reached. On paper he has a good statement of operative facts. If he, for example, alleges “possession” of a certain chattel, and he is allowed to prove only a “constructive” or legal possession, that will be true. “Possession” has sufficient common meaning to be an operative fact, and thus the complaint is prima facie valid; and the situation proved is unusual, and is in truth a variance. There are a number of situations, however, where that result is approved. A pleader may, for example, allege “performance” of the conditions of a contract and prove “waiver of performance.” He may al-
lege "knowledge," "intention" or "notice" and prove a "constructive knowledge, intention or notice."

It is believed that such cases possibly are, after all, but hangovers of the common law rule that the pleader plead "according to legal effect." It is another instance where the courts have consciously, or unconsciously, refused to follow the code and have followed the common law. Under the common law rule in some instances the pleader really properly pleaded technical words in their technical senses. It may be, therefore, that those cases really permit the pleading of legal conclusions.

But that is not a necessary concession, because in any event where the variations in meaning are slight, or are legal refinements upon the usual situation, the law can well disregard them under the general rule that a party need only allege a prima facie case and is not compelled in any event to give all the material facts. It cannot be said truthfully that any pleading (except in rare instances) gives all the material facts and gives the adverse party exact and complete notice. In truth, the language of the code is broad, and a party quite generally has satisfied the burden of pleading when he has stated the usual operative facts in general common language. Thus if the language of the code were strictly applied, a plaintiff in a contract action would negative the infancy of the defendant, duress, fraud, release, and an innumerable number of other facts which are commonly regarded as defense material. So, although the code literally requires much of the plaintiff, it has been construed to mean merely that the plaintiff shall allege what the law defines as a prima facie case. The notice required is thus rather general, and seldom is it actually very specific.

On its face the pleading supposed is good because "possession" in fact and "performance" in fact are alleged. The objection is that the notice given is not specific and that the evidence produced is a variance. But the code, as construed, really does not require specific notice. The rule against variance is a rule of practice and evidence and not a rule of pleading. It has its root in the theory that the pleadings ought to give notice, but the answer is that if the pleadings conform to the rules of pleading the theory has been satisfied and the defendant has been sufficiently (and legally) notified. The word is an operative fact, and what the defendant really is insisting on is a rule of practice.

There is necessarily much latitude involved in the decision of
the question as to whether or not a given word or phrase is a
legal conclusion or an operative fact and does or does not give a
sufficient notice. One court may fairly say that it is the first;
another which held the opposite would not thereby ipso facto be
convicted of error. What the common meaning of a word is is
sometimes a point upon which reasonable men may reasonably
differ, and even an up-to-date dictionary is not always conclusive,
nor is it always so clear as to be an infallible guide. There are
few words in this field which the courts have held to be operative
facts where one could not rather convincingly urge that they did
have common content practically the equivalent of their general
legal content. The legal variations and refinements are as a prac-
tical matter to be overlooked, even should they in a given case be
actually involved.

In other words, once it is determined that a word does have a
general common meaning it is an operative fact. Whether or not
it can also be held to satisfy the burden of pleading where the
party actually relies upon a specific situation which is at variance
with or an exception to the general common meaning is a question
which arises after the pleadings are settled. Decisions sustaining
proof of “constructive possession” under a general allegation of
“possession” do not necessarily decide that the complaint is good
because “constructive possession” is an operative fact. All they
decide is that the plaintiff need merely allege a prima facie case
and that the defendant must accept the risks incident to the ex-
ceptional case.

There is, therefore, a logical distinction between operative
facts and legal conclusions. It is the distinction between the
common and legal meaning of words, and the distinction is not
between allegations which are specific enough and those which are
too general. The general problem of the sufficiency of the notice
conveyed is a general question of the law of pleading quite apart
from the form of the allegation. The requirement that the
pleadings contain operative facts and not legal conclusions is
purely a matter of form. Whether good pleading requires more
or less facts, and thus more or less specific notice, is a broad
question of policy based upon the problem as to how the burden
of pleading is to be divided between the parties, and how de-
sirable it is to allow a plaintiff to make general statements and
prove exceptional situations. There is a noticeable tendency to
favor a rather general statement, and that such a result is a possi-
ble construction of the code provision is proved by the fact that the courts have so construed it. And that construction proves the undesirability, if not the impossibility, of the ideal originally incorporated in the code, that it was desirable or possible to state all of the facts and give exact written notice of the facts constituting a legal cause of action or defense.

But it does give a general effect to the requirement that the statement of facts be in such "plain and concise language as to enable a person of common understanding to know what was intended."

VI

We do have, of course, too much faith in the certainty of language and the efficacy, therefore, of written pleadings. When we get a prima facie case on paper, we often find that when we get into the trial of the case one party or the other and likewise the judge gathered incongruous understandings from the language used. The result is that the rule on amendments is the rule of pleading which the pleader needs to know best. We finally discover that the pleadings have as a practical matter become inmaterial and that the case ought to be and usually is decided on the evidence without regard to the pleadings. The reasons for our present situation in the codes states is due to many causes, but the result certainly is that written pleadings quite often fail in practice to serve the ends desired.

It indicates that after all we may be and likely are pursuing a false god. It may be too much to expect that written language can here, even if conscientiously used, properly fulfill the office

19There are three principal causes. We proceed upon the mistaken notion that the burden of pleading should be exclusively upon the parties, and that the judge is simply a referee, and uninterested in the result except in that capacity. Under our present procedure we compel the adverse party to assist his opponent in writing his pleadings (if he does not point out the defects they are waived), but we prohibit the disinterested judge from taking a hand in the proceedings! In the second place, much of the law of pleading is written in terms of the substantive law, and most failures of the pleadings to state the facts constituting a cause of action or defense can be laid at the door of the pleader's ignorance of the substantive law. There is no cure for that misfortune except more learned and better prepared lawyers. In the third place, our ethical standards and our code permit an attorney to be an advocate during the pleading stage of the proceedings, whereas he ought strictly to be only an officer of the court. He ought properly to have no concern with anything except fearlessly and honestly coming to an agreement as to the issuable facts in the case. Any other attitude is actually an attempt to manufacture a cause of action out of something other than the facts. There is no cure for this misfortune except a new race of lawyers.
assigned to it. There is much to be said in favor of limiting the written pleadings in some cases to the legal conclusions. There is little use requiring pleadings to be couched in common language. Although the theory is to the contrary, the truth is that the pleadings are not for the parties but for the attorneys. The parties seldom see the pleadings. If we wrote them so that the attorneys could understand them, we would have done all that was necessary. The attorney would then cease to regard them as a complete statement of the facts the adverse party was intending to prove (which in most cases they are not), and regard them merely as a technical statement of the legal claim. If he really were interested in learning what the claim as to the facts was, the law could provide for a preliminary oral, but official, examination of the parties. In truth, the matter is now taken care of by the common provision for a conditional examination of the parties or a bill of discovery. And it is an observable fact that few good lawyers any longer rely upon the pleadings, but resort to the conditional examination and get the adverse party's real position under oath, or else command an exhaustive investigation as to the facts.

The fact is that common sense requires that the adverse attorneys know exactly what the other side claims as to the facts. An attorney ought never to rely on a general impression as to the factual situation. A preliminary examination would settle or decide many a law-suit, and would remove most of the element of surprise from any trial.

Until we amend our codes, however, we probably will have to deal with evidentiary and operative facts, and legal conclusions. The problem is as broad as the substantive law because it deals with our entire legal language. The solution of a given case cannot always be simple, and seldom can it be easy, nor as certain as mathematics. Much of the difficulty will be removed, however, if we keep in mind that legal language and common language use the same words. A word may be both an operative fact and a legal conclusion, and the confusion which results when we call two things by the same name is inevitable.