

using; (6) that defendants had knowledge of these facts; (7) that, if the injury was not caused by the defects of the motor, it was caused by the want of skill of the motorman.

J. W. Bain, for defendants.

D. Urquhart, for plaintiff.

THE MASTER.—I think . . . paragraph 5 should be struck out. Rule 268 says: "Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved."

By the material facts I understand those to be meant which the party must prove in order to be fully and completely successful. There may be others which can be proved at the trial, but which are only evidence, and failure to prove which would not be fatal to the case of the party pleading.

As I have had occasion to remark before, this distinction is well illustrated by *Blake v. Albion Life Assurance Society*, 35 L. T. N. S. 269, where certain allegations of fact were struck out of the statement of claim, though proof of them was given at the trial and allowed, on motion to the contrary, by the same Court which had given the previous decision: see 4 C. P. D.

The only case which looks the other way is *Millington v. Loring*, 6 Q. B. D. 190. But there the facts brought into question were material in this respect, that, if proved, they would properly influence plaintiff's damages, and it was therefore not embarrassing, but only proper that defendant should have notice of plaintiff's intention to give them in evidence for that purpose. See on this case remarks in *Odgers on Pleading*, 5th ed., pp. 101, 102.

But nothing of that kind appears in the present case. It is not necessary to consider whether proof of the fact alleged in the 5th paragraph could be given at the trial. However that may be decided, it is reasonably clear that, even if true, it does not form any part of the cause of action. That would "still exist in undiminished vigour" if it could be shewn that the car in question had just come from defendants' works and was making its very first run on their railway when plaintiff was injured. On the other hand, if it was allowed to remain in the statement of claim, it would prejudice defendants with the jury. It would also lead to the discussion of what seems to me an entirely immaterial issue.

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