Ancient Writs and Modern Causes of Action

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In a stimulating article recently published in this Journal Professor O. L. McCaskill condemns the conception of the code cause of action held by Pomeroy, Bliss, Phillips, and others, including the present writer, and sets forth a novel view which he frankly admits to be "utterly at variance with that of standard text writers, and at variance with what courts profess to follow."1 Space is here lacking for a full discussion of the ingenious argument, presented as it is with the

highest dialectic skill; but since it is believed that his position is quite
at variance also with desirable pleading conceptions, an immediate
caveat seems desirable.

A summary of the position of the learned author will hardly do jus-
tice to it; and yet he has, I believe, made his fundamental position clear
even if the details are not so certain. First, the concept of the cause
of action as an aggregate of operative facts, larger or smaller as con-
venience or law dictates, giving ground for judicial interference, is
arraigned as indefinite. Then constructively it is asserted that the
cause is to be determined by the right to be enforced, the right in turn is
to be determined by the remedy, and the remedy in turn by its historical
origin. And so we have the modern code cause going back directly
to the ancient writs of the common law and the former bill in equity.
Thus, to determine the extent of a cause of action for “legal” relief,
we are to look to the limits sets by the analogous old common law writ.
Further, while law and equity may touch elbows in the same lawsuit,
each is to preserve its ancient independent form within the confines
of a separate cause of action. This novel view of the code reform is
supported apparently on these grounds: that it is an immutable deduc-
tion from fixed and absolute premises, and that it makes the concept
of the cause of action definite and certain.

Since words are but counts for expressing ideas, the latter are
the more important. The words employed to convey ideas are not
themselves fixed and invariable things; they serve their purpose when
they get the ideas over to minds other than those which originated the
ideas. Hence we look not so much for a previously established or
invariable meaning to words as for the most convenient meaning to
convey our ideas. Where the words are used in a statute, we should
at least not do violence to the ideas of the statute makers and must
therefore put a reasonable meaning to the words they used. Since in
our present inquiry we do not find these ideas ascertained and settled
beyond possible question, we cannot say that the words in dispute have
an immutable meaning. We might even urge the discarding of the
term cause of action, on the ground that usage has been so variable,
except that it is employed in the code and that moreover it has become

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2 See Clark, The Code Cause of Action (1924) 33 Yale Law Journal, 817. Professor McCaskill is quite correct in pointing out the fundamental similarity of Pomeroy’s views and those of mine, as well as those of Judges Bliss and Phillips. The form of definition employed by Pomeroy seems to me objection-
able, although I accept what I think is the meaning behind it.

3 See especially McCaskill, op. cit. supra note 1, at p. 698.

4 Incidentally it is argued that flexibility is secured since the cause as thus
defined is a much smaller unit than under current definitions. If it be “flexi-
bility” to do away with the rules against splitting a cause of action and of res
adjudicata, perhaps this must be conceded. This actually seems to be his position.
See e. g., McCaskill, op. cit. supra note 1, at pp. 648-651; also discussion herein-
after.
a part of so may pleading rules as to make such discarding inconvenient. We might urge that its meaning must in each case be determined by the particular use to which it is then being put, except that, as the writers all seem to concede, there is a general idea behind all the surface variations in use. Our real problem, therefore, is to give a content to the term definite enough to indicate this general idea, flexible enough to be convenient in the various uses we make of it, and accurate enough to do no violence to the ideas and plans of the code makers.

My first objection to the suggested definition is that I believe it to be opposed to the ideas and plans of the code makers. True, they expressed these only in a broad, general way, since naturally they could not foresee all details of the operation of the change they were effecting. But broadly speaking their purpose seems clear. In fact, it was definitely expressed, as I have attempted to show elsewhere. They planned to do away with the old common law forms of action, to "blend" law and equity together by abolishing the distinctions not alone between the forms of actions at law and suits in equity, but also between the actions and suits themselves, to adopt the main features of equity pleading for the new procedure, and to provide a method of pleading facts only, leaving the application of the proper rule of law to be made by the court. The position of the learned author seems to be that they could not have intended to do these things, no matter what they said, because (a) the common law system was a good system anyhow, in the manner in which it presented the issues to court and jury, and hence they must have wanted to continue it, and (b) the constitutional right to a jury trial still obtains in "law" cases. This conclusion first being reached, the code is then carefully examined and every detail in any way backing such conclusion is emphasized and elaborated with the true skill of a trained advocate. The beauty of the argument is to be admired; nevertheless it must be recognized as an argument rather than a scientific investigation of the codifiers' plans. One example of the method must suffice. It is skillfully

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5 Clark, The Union of Law and Equity (1925) 25 Col. L. Rev. 1; Clark, op. cit. supra note 2, at p. 816, referring to First Report of the Commissioners on Practice and Pleadings, N. Y. 1848, 145; ibid. supplement, 3, and passim. Nearly all the Codes provide that the sufficiency of the pleadings shall be determined only by the rules prescribed in the Code, abolishing forms of pleading heretofore existing. First Report, N. Y. 1848, sec. 118; Calif. C. C. P. 1923, sec. 4, 421; Idaho, Comp. Sts. 1919, sec. 6684; Minn. Gen. Sts. 1913, sec. 7752.

6 Clark, op. cit. supra note 5. Mr. McCaskill has an extended argument against the well-nigh universally accepted code principle that the remedy, the prayer for relief, forms no part of the cause of action, a principle following directly from the code provision that if the defendant has answered the court may grant the plaintiff relief other than that asked for. N. Y. C. P. A. 1921, sec. 479; First Report, sec. 231; Clark, op. cit. supra note 5, at p. 4. His position is that the right enforced in the cause is determined only by its appropriate historical remedy; a position the doubtfulness of which is hereinafter suggested.
developed that the classes of permissive joinder of code causes were apparently obtained largely by combining certain of the old common law forms. From this it is argued that there is shown a preservation of the old forms. But the really important thing is not that the codifiers worked with the mental background that they had, and that they employed old common law and equity concepts, but that they attempted to cut across them.  

My second criticism is that the claimed benefits of the new definition, even the one of definiteness and certainty, do not exist. The old equity cause is to exist as before; and here it is admitted that the extent of the equity cause was determined not by arbitrary rule but by principles of administrative convenience (that is, substantially the method urged for the code cause by the present writer in the criticised article). Further the idea that a definite and clear-cut right was isolated and enforced in each common law action is an illusion. Even the boundaries of the old actions became shadowy, as witness the attempt to established the dividing line between trespass and case. The pleader to a considerable extent had the option of determining the extent of his right as in the case of trespass quare clausum where consequential damages may also be claimed. This variableness of the common law remedies available in one action is really admitted by our author; and ultimately he comes to the conclusion that any variation in the operative facts establishes a new right and hence a new cause of action.

1 Much is made of the required separate statement of causes and defenses. This requirement, narrowly applied, is simply a nuisance. Cf. infra note 19. But applying the fact test that defenses or causes are distinct when they refer to essentially different past happenings, it does not seem improper. Thus the facts of the defense of release are entirely distinct from those of the statute of limitations and the separate statement is logical and helpful.

8 Clark, op. cit. supra note 2.

9 Cf. Loubi v. Hofner (1827, N. C.) 1 Dev. 185; Sunderland, Cases on Common Law Pleading (1914) 7, 42.

10 Ditcham v. Bond (1814, K. B.) 2 Maule & S. 426. As to trespass with a continuando for mesne profits, see Smith v. Wunderlich (1873) 70 Ill. 426.

11 In reaching this result he criticises the general view expressed by Stephen and others that the old discredited count practice of the common law infra note 19, which he desires to revive, was employed to state the same cause of action in different ways; for, so he says, due to the variation in the facts, it is not the same cause of action, but two or more different causes of action. This provides a novel method of substantially doing away with the prohibition against joining inconsistent causes. "Where, upon identical operative facts, a plaintiff seeks alternative reliefs, the plaintiff has joined inconsistent causes of action. Where, upon variable operative facts, he seeks alternative reliefs he has not joined inconsistent causes of action. . . . As the relief prayed for characterizes the causes of action, identical facts calling for different reliefs are inconsistent causes of action, but variable facts calling for the same or different reliefs are not. The variation in the facts prevents the inconsistency." McCaskill, op. cit. supra note
Here, it is submitted, we have a pretty pickle. Probably Professor McCaskill would say that the new or changed fact must at least be a material one. Immediately we have our old discussion of the materiality of the change and our illusion of certainty has gone. But at any rate we do have a cause of a very limited scope. Thereupon serious difficulties arise as to certain important and definite rules of law, such as the rule against splitting a cause of action, the closely connected rule of res adjudicata, the rule against setting up a new cause of action by amendment of the complaint after the statute of limitations has run, and so on. Of course we might so much like our definition of cause of action as to be willing to remodel all these rules, though it would be vastly inconvenient to do so. Apparently, however, Professor McCaskill contemplates incorporating his definition in these rules without changing them, for he inveighs against a leading case holding that a fact once litigated in asking for a "legal" remedy cannot be relitigated by seeking an "equitable" remedy. On his theory there would here be no improper splitting of a single cause, but there would be two separate causes. The reaches of this doctrine are startling. Facts once litigated in one common law action have been held settled for other common law actions. The same rule was applied in equity and law cases. The code tendency has, it is

1, at p. 643. You are inconsistent when you claim specific performance or damages, but not if you put the defendant in New York and Honolulu at the same moment.

A similar view of the cause has been applied in Illinois with harsh and illiberal results as to amending the declaration. *Walters v. Otis (1909)* 220 Ill. 259, 88 N. E. 651; Clark, *op. cit. supra* note 2, at p. 823, note 39, 829, note 64.

These rules are discussed in (1924) 33 *Yale Law Journal*, 817.

Hahl *v. Sugo (1901)* 169 N. Y. 109, 62 N. E. 135, criticized in (1925) 34 *Yale Law Journal*, 648-651. It is believed that a sounder view of this case is taken in *Comments* (1925) 34 *Yale Law Journal*, 536, 541. The facts should be considered as settled; but this should not prevent further action to enforce the as yet unsatisfied judgment.

That judgment in trover bars claims in trespass, implied assumpsit, detinue and replevin, see cases collected in *Comments* (1921) 30 *Yale Law Journal*, 742, note 8. See also *Johnson v. Odom (1914)* 11 Ala. App. 364, 66 So. 853 (detinue and trover); *Davis & Co. v. Shikes (1923)* 122 S. C. 530, 115 S. E. 814 (claim and delivery and conversion); *Roberts v. Moss (1907)* 127 Ky. 657, 98 S. W. 297 (quasi-contract and trespass); *Leler v. Guild (1922)* 71 Colo. 349, 206 Pac. 893 (tort and contract); *La Vasser v. Chesbrough Lumber Co. (1916)* 190 Mich. 493, 157 N. W. 74 (quantum meruit and express contract); *Orino v. Beisuge (1922)* 122 Me. 168, 119 Atl. 199 (same); but see *Meirich v. Witterman Co. (1923)* 88 N. J. L. 531, 121 Atl. 670; *Janouneau v. Wetherill (1922)* 88 N. J. L. 80, 118 Atl. 707.

to be conceded, extended this principle in the interest of shortening litigation.17 Are we to go violently to the other extreme through the device of cutting our cause of action up into molecules? The asserted definition brings uncertainty rather than certainty; it renders unsettled well-settled rules of law.18

My final criticism is the most serious. It is that this is very definitely an attempt to resurrect old technical rules of law. The forms of action will truly rule us from their graves. The only change is that we may consider them side by side in one action, rather than successively in separate actions. The old procedural subdivisions must be coned again to see whether the mystic formula applicable to our case is contained in count one or in count two. The argument made for this—outside of the one that it is a necessary deduction from the given premises—is that the busy judge and the unlearned juror can assimilate small bundles of facts more easily than large ones. This idea of the practical desirability of minute subdivisions of the case seems fundamentally unsound.19 The busy judge and the untutored jury are going to look at the whole case rather than at small details. But even if a microscopic examination of the case is to be expected, the subdivisions looked for should be logical according to the mental habits of the jurors. The common law subdivisions were not


It should be noted that inherent in the new definition of cause of action is a new and restricted definition of "right." Right is also to be tied up to, and limited by, some ancient remedy. This does not seem desirable from the standpoint of analysis or of convenience. Cf. Corbin, Rights and Duties (1924) 33 Yale Law Journal, 501; Corbin, Legal Analysis and Terminology (1919) 29 ibid. 163, 197.

Perhaps as good a criticism as any of the idea is found in the Report of the Common Law Commissioners in reporting the Hilary Rules (1834) as quoted in Stephen, Pleading (Williston's ed. 1895).*lxxxi-*lxxxvi. They said inter alia that the practice of multiplying counts and pleas "often leads to such bulky and intricate combinations of statements, as to present the case to the judge and jury, in a form of considerable complexity; and it is apt, therefore, to embarrass and protract the trial, and occasionally leads to ultimate confusion and mistake in the administration of justice." See also references Clark, op. cit. supra note 2, at pp. 825, 826; Comments (1924) 34 Yale Law Journal, 192.

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* Indicates Footnotes
logical; they grew, like Topsy. And we are asked to spend our time and energy in perfecting pleadings to preserve these illogical divisions. Has not the whole reaction from common law pleading shown both the hopelessness and the uselessness of the task? 20

The attempted resurrection seems especially unfortunate in keeping alive the old distinction between equity jurisdiction and legal jurisdiction, one of the great blemishes of the pre-code procedure. 21 Formerly we bickered over which court we should be in; now we are to engage in the same process for the yet more unsubstantial purpose of seeing under which part of the complaint we are to proceed. The right of trial by jury does not force us to any such useless task. It prescribes the form of trial, not the form of pleading. Many cases are tried now in jurisdictions which have code pleading in its truest sense where the question of form of trial is not raised at all. If it is raised by a specific motion for a jury trial, then and only then is the court called upon to decide what tribunal formerly tried this particular kind of an issue. This narrow inquiry, often not made at all, need not send us back to common law pleading. 22 True, our author says that "there is no such thing as a legal issue or equitable issue apart from a legal or equitable cause of action." Even so, many courts are doing extremely well in the belief that it is only the issue which in any event may now be termed "legal" or "equitable," and which is to determine the form of trial. 23

I suspect that in the last analysis we are far apart as to what we expect of pleading. The true believer in the common law system, among whom apparently we must include the learned author, thought that it well performed its function of separating the real dispute from all extraneous matter before the actual trial. But many of us have had a suspicion that it did not, and the reforms of pleading have fol-

20 This reaction and the causes therefor are discussed with references by the present writer in an article, History, Systems and Functions of Pleading (May, 1925) 11 VA. L. Rev. 517.
21 So recognized by the codifiers, First Report (1848) 68-67, 145, 146. See also my article, supra note 20.
22 The problem is discussed at length with references to the procedure in several states in Clark, The Union of Law and Equity (1925) 25 Col. L. Rev. 1. See also Cook, Equitable Defenses (1923) 32 YALE LAW JOURNAL, 645; Comments (1923) 32 ibid. 707.
23 In the code states where the divisions between law and equity are still maintained, the statutes permitting "equitable defenses" in the law actions, expressly provide that "equitable issues" in "proceedings at law" shall be tried as formerly in equity. See Ark. Dig. Sts. 1921, sec. 1045; Iowa Comp. Code, 1919, sec. 7655; Carroll's Ky. Codes, 1919, par. 11 (3); Or. Code, 1920, sec. 390. Compare U. S. Comp. Sts. 1916, sec. 1251b; Plews v. Burrage (1921, C. C. A. 1st) 274 Fed. 881. How would the learned author analyze the situation in a non-code state where an "equitable defense" is permitted to a legal action? Cf. Cook, op. cit. supra note 22.
owed as a result of suspicion. We have believed that not many lawyers were clever enough to be able to do what common law pleading expected of them, and that those who possessed the requisite cleverness had likewise the ability not to do it,—not to give away their case before trial. We perhaps may even contemplate with some degree of equanimity the civil and continental ideas of pleadings of a simple informative character.24 At any rate we feel that the best results may be expected by trying merely to make the parties put on record their stories of past doings, their versions of the past happenings which led to the litigation. And hence our modern pleading properly emphasizes, not ancient legal formulae, but the stating of the facts simply as they appear to the parties. Therefore, the accepted definition of the code cause is one which makes the break from one cause to another depend not on the limits of some ancient writ, but upon some apparent break in sequence of a series of acts or events which have actually taken place.

C. E. C.

DUE PROCESS AND THE FULL FAITH AND CREDIT CLAUSE

The recent case of Egley v. P. B. Bennett & Co. (1924, Ind.) 145 N. W. 830, presents the interesting problem of when, in view of the "full faith and credit" clause of the federal constitution,4 the courts of one state are privileged to refuse to enforce a judgment rendered in another state.2 A survey of the Supreme Court decisions interpreting this clause readily reveals that it is not every decision of one state to which a sister state must give "full faith and credit."23 What, then, are the circumstances in which this clause imposes a duty upon the courts of one state to enforce a judgment of a sister state?

24See my article cited supra note 20. See also Millar, The Formative Principles of Civil Procedure (1923) 18 Ill. L. Rev. 1, 94, 159.
2U. S. Const, Art. 4, sec. 1.
2That is, when are the courts of one state under a duty to the plaintiff to recognize in him a right of action based upon a judgment rendered in another state? Ordinarily, a state court has the power to impose duties upon the state's societal agents. The "full faith and credit" clause is intended to enable such a court to impose duties upon the societal agents of sister states as well.
2Cole v. Cunningham (1890) 133 U. S. 107, 10 Sup. Ct. 269; National Bank v. Wiley (1904) 195 U. S. 257, 25 Sup. Ct. 70 (recognition denied because the plaintiff was not the holder of the note and therefore the proceedings were wanting in due process); Flexner v. Farson (1919) 248 U. S. 289, 39 Sup. Ct. 97 (full faith and credit denied a money judgment because the defendant, not domiciled within the state, was not personally served with process); Thompson v. Whitman (1873, U. S.) 18 Wall. 457 (full faith and credit clause does not prevent inquiry into the jurisdiction of the court rendering the judgment); Simmons v. Saul (1891) 138 U. S. 439, 11 Sup. Ct. 359; Old Wayne Mutual Life Ins. Co. v. McDonough (1907) 204 U. S. 8, 27 Sup. Ct. 236; Grover & B. Sewing Machine Co. v. Rodcliffe (1890) 137 U. S. 287, 11 Sup. Ct. 92.