THE CODE CAUSE OF ACTION

CHARLES E. CLARK

THE DELUSIVE EXACTNESS OF THE CODES

In working out the details of the great pleading reform of 1848, the New York "Commissioners on Practice and Pleadings" attempted to employ a technique based upon two utterly inconsistent principles. The failure of the courts which have had to interpret the Code to recognize this inconsistency has been one of the prime causes of the difficulty experienced in carrying out the pleading reforms intended by the codifiers. On the one hand the codifiers intended to ameliorate the harshness and inelasticity of the common law system of pleading by the adoption of equitable principles. On the other hand they desired to make an inelastic code—a statute—so that judge or lawyer might read and see at a glance what the procedural rule was. One was a principle looking toward convenience in trial work—ease and efficiency in doing court business; the other was a principle of rigidity, and, as apparently it was hoped and expected, of clarity and definiteness. 3 The result of attempting to serve both these incongruous ideals at the same time is well shown in the matter of joinder of parties. The Commissioners say that they intend to adopt the equity principle:—2


2 First Report of the Commissioners on Practice and Pleadings (1848) 124. (Italics here and elsewhere are mine unless otherwise indicated.) The quotation indicates how far those courts and authors who favor construing the code so that former legal rules apply to legal actions, and equitable rules to equitable actions, are from the idea of the code reformers. They favored what they elsewhere referred to as a "blended" system; some of those who came after would resurrect the old outworn distinctions. Compare Report, supra, at p. 145: "The wit of man could never assimilate the action of trover and a suit in equity. The question then really comes to this: Shall the separate systems of law and equity be continued, or shall they be blended in a uniform mode of proceeding? On our part, we have no difficulty in answering, that they should be blended. We think that the present constitution of the state indicates it, that the people expect it, and that the highest policy requires it." Elsewhere they speak of the "two most prominent features" of their former report as "those relating to the abolition of the common law forms of action, and to the union of legal and equitable remedies in a common system." Supplement to Code of Procedure, Temporary Act (1848) 3. See also Cook, Equitable Defenses (1923) 32 Yale Law Journal, 645; and Comments (1953) 32 Yale Law Journal, 707, by the present writer.
"The courts of law generally administer justice between those parties only who stand in the same relation to achn (each?) other; while courts of equity bring before them various parties, standing in different relations, that the whole controversy may be settled, if possible, in one suit, and others avoided. This reasonable and just rule, we would adopt for all actions. It is for the interest neither of the suitor nor of the state, that there should be several suits to settle one controversy, so long as one will do it as well."

But in equity there was no hard and fast rule as to joinder, and the rule, so far as there was one, was one of convenience only, depending in its application upon the facts of each particular case, with much discretion allowed to the trial court. Instead of stating the rule in this fashion, the commissioners went to the statement given in certain equity cases justifying joinder where all parties plaintiff were interested in both the subject of the suit and the object to be attained. This was encrusted into the absolute requirement of "interest in the subject of the action and the relief to be demanded" as we find it in the codes.

Now the terms used did not of themselves carry a clear meaning. The most normal method of working some meaning into them would be to look at the primary purpose to be achieved by the code. This requires that we first decide which of the two somewhat inconsistent ideals above stated we are to serve. Such choice is not definitely made in the cases, but the method of approach of the judge to the particular question in issue indicates that he has already, perhaps subconsciously, made such choice. Thus we have the oft-quoted statement of Judge Comstock with reference to the provision for joinder of causes of action arising out of the same transaction or transactions connected with the same subject of the action:—

"Its language is I think well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose, and yet so comprehensive, any rules less liberal than those which have long prevailed in courts of equity."

On the other hand the Oklahoma court quotes with approval Mr. Pomeroy's criticism of this view, and says that it means the leaving of all questions to the individual opinion of the judge.

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5 See code provisions collected in Sunderland, Cases on Code Pleading (1913) 79, 80; Hinton, Cases on Code Pleading (1922) 166, 167. The rule as to joining defendants largely rested on the rule of joinder of plaintiffs.


8 Stone v. Case (1912) 34 Okla. 5, 15, 124 Pac. 966, 963.
"a principle as dangerous to the administration of justice as to have no law at all, and, perhaps, as far from legislative intent as anything ever was from any legislative body."

The court then proceeds to construct its arbitrary definition of terms, which is grouped around the idea of "one existing, primary right," and then naively concludes that with the definitions it has made,9

"it seems to us that the pleader and the courts should be able to properly determine when two or more causes of action may be joined in the same petition."

It is submitted that two lines of reasoning demonstrate that Judge Comstock was nearer the truth than were his critics. The first is the purpose of the code reform. The Commissioners themselves, the constitution and the law under which they were created, and the subsequent legislatures which followed them, all clearly indicate a desire to reform and simplify the old common law system.10 That was to be accomplished in the main by the application of the more flexible equity principles. It could not be done by rules of the rigidity of those desired by the Oklahoma court. The test of experience shows that to follow such view is to defeat the main high purpose of the code reform, to make the rules an end in themselves and not the means to an end, the mistress and not the handmaiden of justice.11

The second is that the attempted definitions are meaningless. Until we know what we are after, our definition is of no value. What is "one existing, primary right"? We might start with the right to life, liberty, and the pursuit of happiness as a broad definition and narrow it down almost to the vanishing point, and unless it was known what purpose we intended to subserv by our definition we could hardly be criticised.12

In other words the vague general terms of the code, which have a delightful air of preciseness about them, mean nothing until we construe them in the light of a purpose, either expressly recognized or

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9 Supra note 8, at p. 21, 124 Pac. at p. 964.
10 The N. Y. Constitution of 1846, Art. 6, sec. 24, directed the Legislature to "provide for the appointment of three commissioners, whose duty it shall be, to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this state," etc. The act appointing the commissioners instructed them "to provide for the abolition of the present forms of action and pleadings in cases at common law; for a uniform course of proceedings in all cases whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues so far as the same shall by them be deemed practicable and of any form and proceeding not necessary to ascertain or preserve the rights of the parties." N. Y. Laws, 1847, ch. 59, sec. 8. The commissioners themselves thought they had swept away "the needless distinctions, the scholastic subtleties, and the dead forms which have disfigured and encumbered our jurisprudence." Report, 1848, p. iv. The preamble to the Code itself expresses a like idea. N. Y. Laws, 1848, ch. 379. See also note 2, supra.
12 For discussion of primary right, see infra this article.
subconsciously felt. The code commissioners stated such purpose as
relieving "Justice from many of her shackles." We may state it as
the convenient, economical and efficient conduct of court business, the
enforcing of rules of substantive law with as little obtrusion of pro-
cedural rules as possible. More shortly we may state it as "con-
venience of trial."

In the light of such a purpose it was possible to construe the pro-
visions on joinder of parties in such a way as to carry out the old
equitable rule of convenience. Our most modern rules are all in
that direction. The test stated in the English, New Jersey and New
York provisions now look distinctly toward the effect of the rule upon
court business, rather than upon the rule as merely an arbitrary prin-
cipal of law. It is better to have our code thus expressed, but nearly
if not quite the same result might have been achieved by construing
the original code in the light of its primary purpose. In dealing with
the meaning of that important term in the code, "cause of action," we
shall endeavor to keep that main purpose steadily in mind.

"CAUSE OF ACTION" AS USED IN THE CODE

The phrase "cause of action" did not become a term of art in the law
of pleading until the adoption of the code. It is true that the phrase was
sometimes used under the common law system, as when Tidd says, after
the second term only "when the cause of action is substantially the
same," may a new count be added. Again the phrase is met with in
connection with statutes of limitation, and was found in the New York
statutes by the code commissioners and continued by them in such use.
Here the expression usually is with reference to the time when the cause
of action accrues, and it is apparently not necessary to differentiate it

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28 Supra note 2, at p. 4.

29 Cf. Fairfield v. Southport National Bank (1904) 77 Conn. 423, 430, 59 Atl. 513, 515 (suit for the cancellation of several notes against the payee and the several assignees of the various notes from the payee)—"The respective rights which the defendants claim against the plaintiff, under the notes held by each, depend substantially and for all practical purposes upon the decision of the same questions of law and of fact; and no good reason appears why these rights cannot be protected and enforced in one comprehensive proceeding."

30 England, Rules under the Judicature Act, Order XVI, Rule 1; N. Y. C. P. A. sec. 209; N. J. Comp. Stats. 1915, p. 1204, the test is whether "if such persons brought separate actions any common question of law or fact would arise." See Comments (1925) 32 Yale Law Journal, 384. The experience as to joinder of causes has been similar. The equity rule was one of convenience of trial (see note 10, infra); and the rigid code rules are now tending to yield to comparative freedom of
joinder of causes. (notes 19, 24, infra).

31 Tidd, Practice (2d Am. ed. 1828) 754. Cf. (1505) Y. B. 20 Hen. VII, f. 8, pl. 18: "If the property is not in the plaintiff then he had no cause of action"); (1497) Y. B. 2 Hen. VII, f. 11, pl. 9: (certain facts "will cause the action"); (1477) Y. B. 17 Ed. IV, f. 3, pl. 2. (certain facts alone "will not give cause of action").
from right of action.  But the important use of the phrase as developed in code pleading with reference to the statement of the cause of action and the joinder of actions is not met with in common law pleading. The form of action and the rules for the production of an issue did not call for the development of the idea of a cause of action; while the principles of joinder of action depended on tests connected with the process, the form of action, the plea, the judgment—that is, tests other than the nature of the subject matter of the action.

The idea of stating the cause of action seems to have been taken over from equity pleading, where in that part of the bill known as the premises or stating part, the plaintiff is to give a narrative of the facts on which his right to relief rests. The code commissioners themselves emphasized that they proposed

"to reduce the system of pleading to one of allegation merely . . . so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable," and that

"the plaintiff shall state his case according to the facts, and ask for such relief as he supposes himself entitled to; that the defendant shall by his answer point out his defence distinctly. This form of allegation and counter allegation will make the parties disclose the cause of action and defence, so that they may each come to the trial prepared with the necessary proofs."

Accordingly it was provided that the complaint should contain, among other things,

"a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

Further, it was provided that the plaintiff

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17 In sec. 66 of their Report, p. 53, in dealing with "The Time of Commencing Actions in General," the commissioners speak of cases "where the right of action has already accrued," whereas in their note in the same section they speak of "causes of action which have accrued." In the next section, 67, they use the phrase "after the cause of action shall have accrued." For similar use of the term in the same connection, see secs. 75, 77, 80. As indicated in the notes to those sections, they are in general similar to statutes previously in force in New York.


19 Cf. Story, Equity Pleading (1870) sec. 38; Bryant, Code Pleading (2d ed. 1899) 66; Keigwin, Cases in Equity Pleading (1924) 35, 36. The idea also appeared in equity pleading in connection with the objection of multifariousness, which covered matters of joinder of causes as well as of parties. The question was one "of convenience in conducting the suit." Bolles v. Bolles (1883) 44 N. J. Eq. 385, 14 Atl. 593; Gaines v. Chew (1844, U. S.) 2 How. 619; Story, op. cit. sec. 271, 539; Keigwin, op. cit. 198 ff.

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15 Report, pp. 75, 76. (Italics theirs.)

16 Supra note 20, at pp. 141, 142.

17 Supra note 20, sec. 120, p. 147.

18 Supra note 20, sec. 143, p. 157. The classes were, 1, Contract, express or implied; 2, Injuries by force to person or property; 3, Injuries without force to
“may unite several causes of action in the same complaint, where they all arise out of” seven specified classes. “But the causes of action, so united, must all belong to one only of these classes, and must equally affect all the parties to the action, and not require different places of trial.”

The substance of these provisions continue in the codes to the present time. 24

In addition, the term was used in the original code in reference to the time of accruing of the cause, as above indicated, 25 to the survival of the cause; 26 to the venue of the action; 27 to the grounds of demurrer; 28 to the waiver of objections to pleadings; 29 to the grounds of defence in the answer, 30 to the situation resulting where the allegation of the cause of action is untrue, 31 to the privilege of amendment at any time whenever the amendment shall not change substantially the cause of action or defence, 32 and to the provisions for arrest. 33

person or property; 4, Injuries to character; 5, Claims to recover real property, with or without damages for the withholding thereof; 6, Claims to recover personal property with or without damages for the withholding thereof; 7, Claims against a trustee by virtue of a contract or by operation of law.

24 See N. Y. C. C. P. 1914, secs. 481, 484; C. P. A. 1920, secs. 255, 258; Hinton, Cases on Code Pleading (2d ed. 1923) 268-270; Sunderland, Cases on Code Pleading (1913) 194-198, 247-250. The provision that the complaint shall contain a statement of the facts constituting the cause of action seems universal, although in the C. P. A. it is shortened to a “statement of each cause of action,” perhaps because the requirement of giving “a plain and concise statement of the material facts” appears elsewhere, C. P. A. sec. 241. There is wide variance in the details of the joinder provisions of the various codes, although all speak of joining or uniting several causes of action in one complaint. Compare the broad rule in Kan. Gen. Sts. 1915, sec. 6679: “The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens.” See also Eng. Prac., order 18, r. 1; N. J. Comp. Sts. 1915, p. 212; U. S. Eq. Rules, 1912, r. 26.

On cause of action as used in the New York Codes see Noyes (1922) 22 Col. L. Rev. 61.

25 See supra note 17.


27 Report, sec. 103: “Actions for the following causes, must be tried in the county where the cause thereof arose, or in which the subject of the action or some part thereof is situated.”

28 Sec. 122 (another action pending between the same parties, for the same cause; several causes of action improperly united; and that the complaint does not state facts sufficient to constitute a cause of action).

29 Sec. 127 (all objections may be waived except that to the jurisdiction of the court over the subject of the action; and that the complaint does not state facts sufficient to constitute a cause of action).

30 Sec. 129 (these may refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished).

31 Sec. 147 (this is to be considered a failure of proof rather than a variance).

32 Sec. 149.

33 Sec. 154 (in an action for damages, on a cause of action not arising out of contract, etc.).
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In 1852 the New York Code was amended in certain aspects important to our present discussion. It was provided that the answer might contain a counterclaim, which must be:—

"one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundations of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

And in the provision for joinder of causes was inserted the clause "whether they be such as have been heretofore denominated legal or equitable, or both," and the additional class was added where the causes arise out of "the same transaction or transactions connected with the same subject of the action." It was still provided that the cause must affect all the parties to the action although the word "equally" was left out, but there was added the important provision that the causes "must be separately stated."

These provisions in substance have continued to the present time.

Of matters not expressly covered by the code the rule against "splitting a cause of action" is important. The provision as to amendments becomes most important where the amendment is offered after the statute of limitations has run, and confusion has resulted from the attempt to apply the rule that a new cause of action cannot then be set up.

VARIOUS DEFINITIONS OF CAUSE OF ACTION

The definitions of the term by text writers and courts have been numerous and discordant. Cause of action is often used interchangeably with right of action and we must expect to find such usage...
wherever no occasion arises for making a distinction between them. But careful analysis would draw such a distinction, and as a matter of fact a distinction is practically always drawn when a close definition is attempted. A right of action has been defined as "the right to prosecute an action with effect." This would signify a right against the representatives of organized society, the courts, and the term may have that significance. But more generally it is used as meaning what we often term the "remedial right," that is the particular right-duty legal relation which is being enforced in the particular legal action under consideration. Such right-duty relation always exists when the plaintiff in a legal action is entitled to a favorable judgment. It seems clear that in the pleading sections of the Code of 1848, at least, the codifiers by cause of action meant something other than this right. They continually insisted on a system of allegation of fact, where the demand for relief, whether legal or equitable, was no proper part of the cause. As the quotations above given demonstrate, they spoke of the "facts constituting the cause of action," or "facts sufficient to constitute a cause of action." It was a deadly sin to plead law; what was necessary was to set forth the facts and these facts constituted the cause of action. In fact they rather overdid the requirement of avoiding statements of law, but there surely is no question of their intent. Authority in the cases for this distinction is ample.

There has recently been stated a view which, while not purporting to follow the right of action in defining the cause, yet does apparently limit the extent of the cause of action by the extent of a particular

sions." Dunn, J., in Walters v. Ottawa (1899) 230 Ill. 259, 88 N. E. 654. The statement is made in applying the harsh and illiberal rule refusing to allow an amendment after the statute of limitations has run adding any fact necessary to be proved by the plaintiff. Perhaps it suggests an explanation why such rule was adopted. Cf. also Cardozo, J., in Jacobus v. Colgate (1916) 217 N. Y. 235, 241, 111 N. E. 837, 839.

4 See Jacobus v. Colgate, supra note 39.

5 This accords with the views of Hohfeld and Corbin (Corbin, Rights and Duties [1924] 33 Yale Law Journal, 501; Legal Analysis and Terminology [1919] 29 Yale Law Journal, 163, 167), but is believed to accord with current usage. Cf. Phillips, Code Pleading (1896) sec. 2031, hereinafter discussed. In an acute criticism of Professor Pomeroy's definitions, hereinafter discussed, Professor Hinton raises the question "can the mere liability to a judgment for damages be thought of as a duty?" It is believed that here, too, according to the most convenient usage the defendant is to be regarded as owing a duty even before the judgment. Thus he may protect himself by making and keeping alive a tender. Cf. N. Y. C. P. A. sec. 171 ff. We ordinarily speak of a "duty to perform" a contract. Does the defendant relieve himself of all duty until an action has gone to judgment by failure to perform such duty?

6 See Cook, Statements of Fact in Pleading Under the Codes (1921) 21 Col. L. Rev. 442.

7 Cf. Phillips, Code Pleading (1896) sec. 31; and see cases hereinafter discussed; also cases collected 1 C. J. 936.
remedial right. Thus it is said that prior to the code at common law one might have several causes of action growing out of separate subject matters, and also several theories of recovery growing out of a single subject matter, each cause of action forming a separate count. (This seems not in accordance with the general view which is that the count system of the common law permitted the statement of the same cause of action in different form to avoid the prohibitions against alternative pleading and duplicity.) Further, it is said that different rules prevailed in equity, where the plaintiff's bill was in the form of one continuous narrative, and "the bundle of diverse rights which equity permitted a plaintiff to enforce in one suit might be regarded as one equitable cause of action." Under the code "nowhere is there the slightest evidence of an attempt to abolish the distinction between legal and equitable causes of action. On the contrary, there is every reason to believe that the distinction was intended to be maintained; the code provides for the joinder of causes of action, whether legal, equitable, or both." Hence, the conclusion seems to be that to every remedial right there is a separate cause of action. But it is urged with all deference that the codifiers stated in so many words their desire to blot out distinctions of this kind, to make a blended system of law and equity wherein the facts, not the remedial rights, should be stated, and to provide for joinder of causes, whatever was the former rule. In fact as hereafter noted, it has often been thought that the use of alternative counts was expressly prohibited under the codes. It is submitted that not only does the view above stated do the utmost violence to the stated intentions of the codifiers, but also that it would be most unfortunate to

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"Note and Comment" (1923) 9 Corn. L. Quart. 73. This may perhaps be termed the "Cornell school of thought." It is hoped that Professor McCaskill will develop these views at length in an article. He has referred to them passim in his valuable paper "Teaching Pleading So as to Meet Future as Well as Present Needs" (1924) 5 Am. L. Sch. Rev. 286.

9 Corn. L. Quart. 73, 74.

See authorities collected by Professor Sunderland under heading "Same Cause of Action Stated in Separate Counts," 31 Cyc. 121, 122; 1 Chitty, Pleading (16th ed. 1899) 468-418; Hankin, Alternative and Hypothetical Pleading (1924) Yale Law Journal, 365, 368.

9 Corn. L. Quart. 73, 74. The important words in the joinder section "formerly denominated" are omitted here. Cf. McMahon v. Plumb (1916) 90 Conn. 281, 285, 96 Atl. 958. 969:--"The grounds for both equitable and legal relief may properly be stated in a single count." Hahl v. Sugo, infra note 97.

"Whether formerly denominated legal or equitable or both." Cf. quotations from the codifiers given above on the union of law and equity, supra notes 2, 10, etc.

Cf. Hankin, op. cit. supra note 46:--"The evils resulting from this type of pleading require no comment in this connection. The rule under most of the codes at present is that restatements of the same cause of action or plea in different counts are not permitted, unless it would be clearly inequitable to confine the pleader to a single count"; Baldwin, J., in Baxter v. Camp (1898) 71 Conn. 245, 41 Atl. 803; see infra notes 83, 84.
resurrect old formal distinctions under the guise of some supposed need of restoring the old count practice of the common law.96

An oft-quoted definition is that of Professor Pomeroy. After stating that every action must have the elements of a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, a remedial duty on the defendant, and finally the remedy or relief itself, he says97

"Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action."

There are many able criticisms of this definition. Thus it is pointed out that this, too, makes the cause of action include law and not merely facts, contrary to the idea of the codifiers; and it is further pointed out that there is no real delict in such actions as those for partition or for probate of a will.98 Perhaps the most direct of all the criticisms is that it is hard to see what the definition means. Like the code itself, it seems to be precise, and yet upon application in practice it does not carry any exact meaning which will afford any practical test for the problem to which it should afford the solution. The definition itself is a mixture in which fact and law, operative facts and legal relations, are intertwined.

In practice the test suggested by Professor Pomeroy has seemed to revolve around the idea of the "primary right." The "primary right" seems quite elusive to the writer. Pomeroy apparently thought he was contrasting it with remedial right. It would then be a substantive as distinguished from an adjective right. Now the classification of law into substantive and adjective is perhaps convenient for pedagogical and other purposes, but after all it should be recognized that there is no fundamental opposition or distinction between the two branches of

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96 The most modern view is that pleading in the alternative should be allowed. See Hankin, op. cit.; also (1923) 33 YALE LAW JOURNAL, 109; ibid. 328. Resort is had to the old standby as an argument, the requirement of jury trials in certain cases. 9 CORN. L. QUART. 75. But this is a requirement of trial, not of pleading. See COMMENTS (1923) 33 YALE LAW JOURNAL, 707, by the present writer. From the standpoint of policy there is surely nothing to be gained by the count system in jury trials. How will the cumbering of the record with repetitions and reiterations make for improvement in such trials? Apparently we should need an entirely different count for each alternative claim and for each defendant or combination of defendants. It is submitted that far from preventing confusion in the judge's charge, it will promote it. Cf. Ellery v. People's Bank (1910, 1st Dept.) 139 App. Div. 923, 124 N. Y. S. 410. The provision for the joinder of causes formerly called legal or equitable does not refer to alternate claims for relief, but to different rights resulting from different situations, e. g. a right to damages on one contract, a right to injunctive relief on another contract.


the law. In fact it is only by straining our forms of expression that we may find a delict or wrong in the case of every cause of action. We can find a resulting right-duty relation from the cause of action; but to find the delict in cases such as those just mentioned—an action of partition or to probate a will—forces us to the absurdity suggested by Judge Bliss that the defendant's wrong is in refusing a remedy to the plaintiff without action. Perhaps it is because there is no striking antithesis between a primary right and a remedial right which serves to define and distinguish each that we find those applying this definition looking for the primary right as the principal or most important right in a group of legal relations. Thus in actions of trespass to land, ejectment and the like, my "property right in the land" is sometimes viewed as the primary right, which is over and above such subordinate and lesser rights as my right that you shall not trespass upon it and the like. The net result in practice is that the primary right, which is apparently thought of as a simple and precise thing, turns out to be complex and indefinite. It means what the person using the term makes it mean. In the case of injury to person and property at the same time, there might be two primary rights, a right to an uninjured personality, a right to uninjured property; or perhaps there is only one, a right not to be caused loss by defendant's negligence. My view of primary right may differ from yours, and we have no common ground, only the statement of our opposing views. Thus, the idea of the primary right may be of some value when we know what it is and how extensive it is. But in pleading, where our real question is the one of extent, we have not advanced anywhere by making our definition turn about such a right.

OPERAIVE FACTS AS THE CAUSE OF ACTION

There remains one further method of approach to this problem. This, it is submitted, affords the best basis for a helpful solution. It involves primarily the recognition of the distinction between operative facts and legal relations so much insisted upon in the Hohfeld system.

8 Bliss, Code Pleading (3d ed. 1894) sec. 113, note 1; Sibley, op. cit. sec. 22. There is no reason, however, why the right-duty relation may not exist and yet the defendant be at the same time morally spotless.

4 For different definitions of cause of action leading to contrary results in this class of cases, compare Reilly v. Sicilian Asphalt Paving Co. (1902) 170 N. Y. 40, 62 N. E. 772, with King v. Chicago M. & St. P. Ry. (1900) 80 Minn. 83, 82 N. W. 1113; and see (1922) 32 Yale Law Journal, 90. The difficulties of the definition are indicated in McArthur v. Moffett (1910) 143 Wis. 564, 128 N. W. 445, where the question was as to the joinder of a statutory cause of action to quiet title to reality with an action to recover damages for trespass and the cutting of timber on such reality. In State v. Lorillard Co. (1923, Wis.) 193 N. W. 613, Mr. Pomeroy's definition was reaffirmed. Cases employing the "primary right test" are collected in 1 C. J. 1055-1057.
of analysis," but it was well worked out in this particular connection long before Hohfeld wrote. In Judge Phillips' admirable little treatise on Code Pleading, published in 1896, there is the following:

"The question to be determined at the threshold of every action is, whether there is occasion for the state to interfere. Therefore, when a suitor asks that the public force be exerted in his behalf, he must show that there is, prima facie, occasion for the state to act in his behalf. That is, he must show a right in himself, recognized by law, and a wrongful invasion thereof, actual or threatened. And since both rights and delicts arise from operative facts, he must affirm of himself such investitive fact or group of facts as will show a consequent legal right in him, and he must affirm of the adversary party such culpatory fact or facts as will show his delict with reference to the right so asserted. The formal statement of operative facts showing such right and such delict shows a cause for action on the part of the state and in behalf of the complainant, and is called, in legal phraseology, a cause of action."

This is believed to be the sound approach to the problem. The cause of action is the group of operative facts giving cause or ground for judicial interference. The learned author continues:

"From the foregoing definitions of right of action and cause of action, it will be seen that the former is a remedial right belonging to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial right. The one is matter of right, and depends upon the substantive law; the other is matter of statement, and is governed by the law of procedure."

Here it is thought that the author has fallen into a slight error. It is the facts themselves, not the statement of them, which constitutes the cause. This is the plain language of the code itself.

Having completed this excellent analysis the learned judge then looks to Mr. Pomeroy and the idea of the primary right to ascertain the extent of a single cause of action. For the reasons given above this treatment does not seem helpful. We may, however, accept the view that the cause of action is an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts.

This definition in its essentials is recognized in many cases. It seems clearly what the code commissioners had in mind in referring to the "facts constituting the cause of action" and "facts sufficient to constitute a cause of action" in their general insistence on fact plead-

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38 Hohfeld, Fundamental Legal Conceptions (1923) 32; Corbin, op. cit. supra note 41.
40 Supra note 56, sec. 31.
41 Supra note 56, sec. 32, 33.
42 See Box v. Chicago R. I. & Pac. Ry. (1899) 107 Iowa, 660, 78 N. W. 694, for a good discussion, citing authorities; 1 C. J. 936.
ing. And it is believed also that it satisfies the pragmatic test of working in actual practice.

But we are not yet through with our need of definition. How great an aggregate of facts do we need to constitute a cause? Many have tended to isolate the cause of action as meaning only the defendant's wrongful act. This seems too restricted. It takes at least two parties to make a law suit and the code requires the whole story to "constitute a cause of action." We need all the facts—a complete history of the controversy—in our definition of cause. This is true even though we assume some of these facts or require the defendant to plead them.

But we must go still further. May a single cause give rise to several rights of action? If so, where do we set the boundaries to our group of operative facts? Where does our private history begin and where end?

It seems that a single cause may give rise to innumerable rights. And the extent of our cause and the number of persons it may affect must be determined having in mind our main purpose, above referred to—convenient, efficient trial work. So our cause should be as extensive a history as we can conveniently and efficiently handle as a single unit, and without injury to substantive rights.

It will be noted that this means that the operative facts may vary somewhat and still the cause of action be the same. This is, of course, in accordance with current usage, as shown for example in the case of amendment after the statute of limitations has run. A cause of action may consist of operative facts a, b, c, d, and e. The substitution of fact f for fact e may not make a new cause of action; while the substitution of facts f and g for facts d and e may. Our test is not absolute identity of all the operative facts, but whether the number of operative facts common to each situation is sufficiently large to make the treatment of the cause as a unit desirable for convenient and efficient trial work.

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45 See supra notes 24, 26, 29.
46 Cases are collected 1 C. J. 936, 939. This conception seems to the writer to mar the effectiveness of Judge Sibley's little book, supra note 52. The learned author follows Judge Phillips' analysis in large measure, but ultimately identifies cause of action with the defendant's wrongful act.
47 See authorities in note 59, supra.
48 This is generally admitted by those who view the cause as the set of operative facts. See supra note 59. Cf. the following: "Since the demand for relief does not constitute a part of the cause of action, as from the same cause of action there often arise several remedial rights, the singleness of a cause of action cannot be determined by an examination of whether different kinds of relief are prayed for or objects sought." 23 Cyc. 283.
49 Here many courts which properly view the cause of action as including all the operative facts, not the defendant's wrongful act alone, fall into error; for they hold that any change in the operative facts makes a new cause of action. Note the unfortunate rule as to amendments of the Illinois court. See supra note 59; (1923) 32 Yale Law Journal, 506; 1 C. J. 936, 937. So also Dennison v. Payne
As in all questions of pleading, the precedents are confused and confusing. Many of them illustrate what Chief Justice Winslow meant when he said "The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history." But the views above stated are in accord with some of the weightiest of the precedents we have. Thus it has long been recognized that Connecticut has one of the most workable of the codes. Yet it is submitted that the Connecticut cases, some of which are referred to hereinafter, cannot be understood and explained except on some view at least analogous to that herein stated. Again, Missouri is a state somewhat noted for its strictness in matters of pleading, and yet the more recent cases there require a similar test. Again, a case such as Missouri, K. & T. Ry. v. Wulf makes such an analysis necessary. There the federal supreme court held proper an amendment from a suit by a widow of a deceased employee of a railroad as sole-beneficiary under a state death-damage statute to a suit by that widow as administratrix of the estate of the deceased under the Federal Employers' Liability Act after the period of limitation had expired. The court said of the amendment "It introduced no new or different cause of action." Precedents might be multiplied, but only one more, an important one from the original code state, New York, will be referred to here. In this state, also, there are other precedents, including the case of Cleveland Cliffs Iron Co. v. Keusch, hereinafter discussed. But in the case of Payne v. N. Y. Ry. Co. there is an extended discussion by the Court of Appeals and it is held that no separate statement of causes is needed in the case of a single accident, though a claim is made of negligence under the common law, of negligence under the Employers' Liability Act of New Jersey, and of negligence under the Federal Employers' Liability Act. It is true the court does attempt to work out the idea of the primary right, but the conclusion is nevertheless that there is but a single cause of action.

It may be objected that here is no absolute definite definition, no mathematical test to be applied as a rule of thumb. None such is

(1923, C. C. A. 2d) 293 Fed. 333, discussed in (1924) 33 YALE LAW JOURNAL, 326, and (1924) 37 HARV. L. REV. 778.

McArthur v. Maffett, supra note 54, at p. 567, 128 N. W. at p. 446.

See notes 83-85 infra.


(1913) 226 U. S. 570, 33 Sup. Ct. 135.

See infra notes 76, 77.

(1911) 201 N. Y. 436, 95 N. E. 19; see also Hahl v. Sago, discussed infra note 87.
intended or thought feasible. There is no royal road to pleading for either bench or bar. Two things, however, are claimed for this analysis. First, it puts the emphasis where it should be, namely, on the operative facts. Our problems of joinder, of stating a cause, of amendment, should be decided with reference to the ease of developing the operative facts in our law trials, and our application of legal principles to such facts when developed may be expected to take care of itself. Second, it affords a test or touchstone for extending or limiting our view to meet the exact situation presented in each case. There is thus afforded a pragmatic instead of a purely arbitrary application of procedural rules. This would leave a considerable choice to the pleader himself, but still more it would leave much to the discretion of the trial judge, who after all is the one upon whom the responsibility of getting trial work done must rest.

It is objected that here is outlined a system to work well only with able judges. Surely this must be conceded. What system will do away with the personal equation, will not depend for its ultimate success upon the human instruments who work it? What is hard to understand is why it is hoped that a system of involved and confused definition will be any easier for the incompetent judge. It is submitted that this is but the old error of "delusive exactness." We think that in speaking of "one existing, primary right" we have discovered a mathematically exact test which will dispense with brains upon the part of the judge. It is submitted, however, that, even with the weaker judge, it is better policy frankly to indicate to him the problem and how he is to solve it, rather than to ask him to stumble along in the dark with seemingly precise but really meaningless legal phrases.

It is obvious that under such a test there is room for much variation between individual judges. Such has always been the case and will undoubtedly continue to be. Perhaps it is most important for judges therefore to set a standard of liberality or of strictness before themselves at the outset of their careers; for such a theory of judicial life will determine their rulings on pleading. The writer need hardly add that personally he believes the more liberal view the better. Not that a very good case cannot be made for strictness, but the finite human mind of the lawyer is unable to attain it. In practice it seems an impossible standard. Moreover, it is believed to be sound policy that where one lawsuit will do the work of two, the one ought to be favored.

Of course there is no reason why in many situations the decision of the extent of the cause should not become standardized. Thus in the case of splitting, we should decide once for all whether to consider injuries to person and injuries to property from the same accident as a single cause or as two causes, and thereafter we may apply this definition to all succeeding cases of the same kind. Even if this is done there will be many cases, especially under "the same transaction" situation, where a large measure of discretion must be exercised by the trial judge.
SOME APPLICATIONS OF THE SUGGESTED TEST

It seems desirable to indicate without expanded treatment how the suggested test of a cause of action may be applied in specific cases where the term is important under the code.

In the statement of the facts constituting the cause of action, the emphasis is placed on the recital of the acts or events which have happened and are relied on to justify societal intervention between the parties litigant. This is in line with the code ideal that the plaintiff should tell his story simply and concisely, leaving it to the court to apply the law. We still must decide how specific the plaintiff’s recital must be, and how much of the story we shall expect to hear from the defendant rather than the plaintiff. These problems, involving differences of degree only, are often confused by thinking of conclusions of law as something different from conclusions of facts, and ultimate facts as quite other than evidential facts. We are helped, rather than hindered, by thinking of our problem as simply giving a bit of past history.

In the problems of joinder of causes of action we are not actually joining causes so much as our recitals or statements of the causes. Our present test depends upon the nature of the subject matter, which is to be discovered by looking for similar groups of operative facts. So, in the famous “same transaction” class of joinder, we find our justification for joinder in the close connection in point of happening of the groups of operative facts so joined. The same situation applies to

Costigan, Spirit of Code Pleading (1917) 11 ILL. L. REV. 517, quoting a lawyer: “I shall just have my client write a letter to the judge and shall file that as the complaint.” Cf. Shipman, Code Pleading (1898) 7 YALE LAW JOURNAL, 197, 199, citing Charles O’Connor: “just as any old woman, in trouble for the first time, would narrate her grievances.”

See Cook, op. cit. supra note 42; and see COMM. (1923) 32 YALE LAW JOURNAL, 483, by the present writer.

Sunderland, op. cit. supra note 18.

It may be urged that the view of cause of action as an aggregate of operative facts does not sufficiently set the term apart from “transaction” in the expression “cause of action arising out of the same transaction.” But it is thought that both were intended to refer to groups of facts, and since the whole purpose of this section—including the remaining portion, “transactions connected with the same subject of the action”—is to extend the rule of joinder, the difference is in extent and number of the facts. We decide that a limited portion of the group of facts constituting a transaction, i.e. a series of connected acts or events—or of transactions connected with the subject of the action, i.e. “subject matter” of the action, a broader concept than primary right including at times physical objects, such as land—should be treated as a unit giving the cause for societal action; but then we may add to this other units having close connection therewith. The term “arising out” seems apt in this connection; it would not be so apt if for cause were substituted right, since the legal relation is considered to result from, rather than arise out of, the facts. This then becomes, as was intended, an omnibus class, providing for a wide class of joinder. It might properly apply to a case such as Natoma Mining Co. v. Clarkin (1860) 14 Calif. 545, ejectment with an application for an injunction to stay waste, pending the action. The dissimilarity in the important operative
the counterclaim provision, and ought to render impossible, or at least improbable, such unfortunate decisions as that when the plaintiff sues the defendant because of a collision of their respective automobiles, the defendant cannot counterclaim in the same action.\footnote{15}

The separate statement of causes so joined has caused difficulty which, it is believed, is unnecessary under the suggested test. Courts which make a limited definition of cause of action then find themselves under the necessity of separately stating each cause so defined. This involves a mass of repetition which is simply absurd, and which the courts in practice \textit{will not require}. Pragmatically the definition does not work. This is well illustrated by a very recent case from New York where Rule 90 has been rather unfortunately applied in certain other recent cases.\footnote{16} This is a case where the proper result was reached with apparently some hesitation. A steamship company brought suit against several defendants to recover damages for unreasonable detention of a ship in unloading a cargo of wheat. There were consignments of different amounts under six different bills of lading, and certain of the defendant consignees only delayed unloading for eight days, while others delayed for thirteen days and the remainder for sixteen days. The claim was for damages in the nature of demurrage charges, but facts would justify a holding that there were two causes of action in that case. For consideration of the meaning of the terms “transaction” and “subject of the action” see \textit{Comments} (1924) 33 \textit{Yale Law Journal}, 862, infra; also \textit{Sherlock v. Manwaring}, supra note 1; \textit{Shaffer v. Chicago, R. I. & Pac. Ry.} (1923, Mo.) 254 S. W. 257, 263.


since the bills of lading contained no express provision therefor, the
obligation was one of implied contract only. It was alleged that the
value of the use of the ship was $1,000 per day, and appropriate amounts
were claimed from each defendant according to the delay caused, the
total, as well as the largest amount, being sixteen thousand dollars.
A motion for separate statement was refused, and this decision was
affirmed by the Appellate Division, and ultimately without opinion and
by a divided court in the Court of Appeals, the majority holding that
only one cause of action was stated. Cleveland Cliffs Iron Co. v.
Keusch.\textsuperscript{77}

Now it is obvious that the most important factual issue is that in
connection \textit{with the delay in unloading}, where the facts are common to
all. To cause these facts to be repeated against each defendant seems
absurd, and yet clearly the plaintiff has a different right against each
defendant. A view of the law \textit{in operation} would require a definition
of cause of action otherwise than according to the separate rights. Our
pragmatic test would take into consideration the fact that the group
of facts concerning the delay was common and would hold with the
majority that there was only one cause of action.

Another case, recently decided by the same Appellate Division which
decided the Cleveland Cliffs case, takes up the same matter. This was
a case of alleged malpractice against four physicians who successively
set the plaintiff’s shoulder, the last operation being almost eight months
after the first. Sherlock v. Manwaren.\textsuperscript{78} Now the time element here
is so long that it is possible to argue that the situation is too extensive
to be handled as a single unit. And yet in practise the facts are so
related that they cannot be separated even on separate trials. “What
each defendant did or omitted to do is essential to the proof of the
liability of each and of the extent of such liability.” Hence the court,
in an able opinion by Mr. Justice Crouch, held that there was a common
question of fact so that all the doctors might properly be joined.
And while, as was pointed out, the Civil Practice Act provides for a
larger measure of discretion in the trial judge, yet as the court below
had apparently ruled as a \textit{matter of law} that separate actions would be
necessary, its decision was reversed. The learned judge well states
the present system of joinder of parties and of causes in New York as
“a complete and flexible system . . . the purpose of which is the prompt
dispatch of litigated business and the limits of which should be only
the convenience of trial without prejudice to substantial rights.”

This is a most excellent statement of the proper pleading ideal to be
followed.

\textsuperscript{77} (1923) 237 N. Y. 29 (mem.) affirming (1923, 4th Dept.) 206 App. Div. 787,
201 N. Y. Supp. 893; Hiscock, C.J., Cardozo and McLaughlin, dissenting; see
(1923) 126 Court of Appeals Records, 1.
\textsuperscript{78} (1924, App. Div. 4th Dept.) 203 N. Y. Supp. 709; the third operation was
performed by two of the doctors together.
The court did, however, go on to say that there were separate causes of action against the various doctors, which under Rule 90 must be separately stated. This part of the opinion is not as carefully worked out as the other portions. It is said simply that there is nothing to show that the doctors were joint tort feasors, and hence it is "reasonably clear" that there were separate causes, citing cases that a doctor is not liable for the acts of a substitute whom he sends in his place. But if a joint liability is necessary before there can be a single cause against more than one defendant, the court's decision in the Cleveland Cliffs case must have been wrong, for there the liability of each defendant rested on implied contract, arising where there had been separate and individual contracts of carriage. Such a test of a cause, it is submitted, cannot be employed, and we must look to the similarity of the operative facts against each doctor. Under the circumstances, especially since the operations were made at somewhat widely separated intervals, it is perhaps not objectionable to rule that there are separate causes; but here too the court might well have held there was but a single cause, stated. The latter view seems to the writer the preferable one from the practical point of view.

In these two cases joinder of parties was permissible because of the new "common question of law or fact" test of the Civil Practice Act. Such joinder would have been much more doubtful, if not impossible, under the old code provision. Justice Crouch well points out that "transaction" as used in the joinder of causes section is to be given a more extended meaning with the extension of the joinder of parties section. This seems sound, but the same reason is applicable to the other term, cause of action. Removal of pleading shackles may well extend the meaning of cause of action. Such flexibility of usage is, it is submitted, a necessary part of a proper empirical view of pleading.

With the restricted view stated in some of the recent New York cases may be compared the view of many courts discouraging the use of separate counts, and specifically refusing to permit alternate statements of the same cause in different counts. The Connecticut experience is somewhat instructive. Judge Baldwin, who was largely responsible for the Connecticut code, early ruled that a claim for damages for breach of contract in refusing to accept goods ordered

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9 For cases holding that there is a single cause against several defendants, see notes 76, 83.
10 It may be urged that the omission from the C. P. A. of the requirement that causes joined must affect all parties (see supra note 85) is important here. While it was desirable to omit this phrase as likely to cause trouble, yet it is believed that the real obstacle previously was usually the joinder of parties provision, and its expansion automatically led to an expansion of the cause of action. Nevertheless the omission of this restriction may operate helpfully at times not to prevent joinder of separate causes.
11 See supra note 76.
12 See supra notes 46, 49.
might be set up in the same count with a claim for damages for the conversion of the same goods. 63 Thereafter he and other members of the court took occasion frequently to criticize the bar for "dividing the statement" of a "single cause of action" into two or more counts. 64 But this, too, was an insistence on formalism which did not work in practice, and the court now substantially leaves the matter to the pleader. 65 The proper rule would seem to be that while a separate statement is not required unless the operative facts are separate and distinct, yet that it is not error to continue the old common law practice, subject to the usual power of the court to correct unduly repetitious pleading. 66

With reference to "splitting a cause of action," our real problem is perhaps a little different than mere convenience of trial, for it is the one of policy how far we shall go in compelling a person to litigate his difficulties in one action. But here, too, we have no better way of deciding our question of policy than comparing the operative facts asserted in the former with those asserted in the present suit. If they are, in large measure, identical, there is an attempt to split a cause of action which is not permissible. In other words, we are using the same test used in the other cases. 67 Here again the writer favors the policy which will lead to compelling all related questions to be tried in one action.

63 Craft Refrigerating Co. v. Quinipiack Brewing Co. (1893) 63 Conn. 551, 29 Atl. 76. For a like decision see Eames v. Mayo (1919) 93 Conn. 479, 106 Atl. 825 (claims against defendants only liable in the alternative); Fairfield v. Southport National Bank, supra note 14 (claims against defendant not holding different notes); Fairfield v. Southport National Bank (1907) 80 Conn. 92, 67 Atl. 471; Root v. Conn. Co. (1909) 94 Conn. 227, 232, 108 Atl. 506, 507; McMahon v. Plumb, supra note 47; cf. Joy v. New Amsterdam Casualty Co. (1923) 98 Conn. 794, 120 Atl. 684; Purdy v. Watts (1916) 91 Conn. 214, 99 Atl. 496. The view of Judge Prentice in the Superior Court in a case stated in (1808) 7 Yale Law Journal 245 was contrary, but in view of the cases cited in this and the next note was clearly not law in Connecticut.

64 Baxter v. Camp, supra note 49; Eames v. Mayo, supra note 83; Oley v. Miller (1901) 74 Conn. 304, 50 Atl. 744; Brown v. Wilcox (1900) 73 Conn. 100, 46 Atl. 827; Palmer v. Hartford Dredging Co. (1900) 73 Conn. 182, 187, 47 Atl. 125, 127; Finken v. Elm City Brass Co. (1900) 73 Conn. 423, 47 Atl. 670; Brockett v. Fair Haven & W. R. R. (1900) 73 Conn. 428, 452, 47 Atl. 763, 765.

65 Raymond v. Bailey (1922) 98 Conn. 201, 118 Atl. 915; Aaronson v. New Haven (1920) 94 Conn. 660, 110 Atl. 872; Worth v. Dunn (1922) 98 Conn. 51, 118 Atl. 467.

This is believed to be a more accurate statement than that quoted from Professor Hankin, supra note 49. Compare Phillips on Code Pleading, sec. 206-208. In Astin v. Chicago M. & St. P. R. R. (1910) 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158, with note, two counts were allowed.

66 For application see (1922) 32 Yale Law Journal 190; (1924) 33 Yale Law Journal 326; cf. supra note 54. Professor McCaskill, op. cit. supra note 42, has criticized Hahl v. Sugo (1901) 169 N. Y. 109, 64 N. E. 135, where the plaintiff, having obtained a judgment for possession of land where defendant's building encroached several inches, was later refused an injunction to compel the defendant to remove
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On the question of amendment stating a new cause of action we would apply the same process, a process of matching up the operative facts stated in the original complaint with those stated in the proposed amended complaint.93 The process is similar in the case of the plea of another action pending or the plea of res adjudicata.94 It should be noted, however, that in these situations not only the “same” cause of action is necessary but also an identity of parties is required by the terms of the governing legal rule. Thus a cause of action may remain the same though an amendment has added a new defendant as a party; but such new defendant cannot be brought in after the statute of limitations has run in his favor. Identity of the cause alone is not enough.

CONCLUSION

The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.

It is not advocated that no further attempt be made to restate our codes so as more clearly to set forth the procedural, the incidental, nature of the rules. On the contrary all attempts, such as that of England, New Jersey and New York, to state in more accurate language what we are now in a more or less blundering fashion attempting to do,95 are highly desirable. And the removal of useless shackles, such as that on joinder of causes of action, may well be favored.96 Meanwhile, as we go along, we need to restate the concepts we already have so as to make our procedural rules the means, and not the end, of suits at law.

the obstruction. As Professor McCaskill has suggested, it is not clear why the injunction could not be obtained as a supplemental remedy upon an unsatisfied judgment. But to go further and say that the court is wrong in not holding that there were two separate causes of action which could be split, seems not only erroneous under the blended system of the code, but unfortunate in its policy of unnecessary suits. Cf. accord, Notes (1922) 22 Col. L. Rev. 180, arguing for the same view as “more sensible.” In Professor McCaskill’s criticism of another case, Di Menna v. Cooper & Evens Co. (1917) 220 N. Y. 391, 115 N. E. 993, it is suggested that there is overlooked the situation that it is legal or equitable issues, not necessarily causes, which are to be tried by jury or court as the case may be. See Cook, op. cit. supra, note 2; (1923) 32 Yale Law Journal, 707.

93 For application see (1923) 32 Yale Law Journal, 505; cf. note 64, supra.
94 (1924) 33 Yale Law Journal, 326.
95 See supra note 24; Sunderland, op. cit. supra note 18; Comments (1923) 32 Yale Law Journal, 384.