THE ELUSIVE CAUSE OF ACTION

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The drafting committee of the new Illinois Civil Practice Act found it almost impossible to avoid the use in several sections of the familiar term "cause of action." A suggestion that it be defined or described so as to convey a definite meaning caused some surprise. Many members of the committee assumed that everybody knew what a cause of action was, and that it needed no defining. One member observed that as courts and academic scholars had been unable to agree upon a meaning the committee should not become involved in an attempt to solve the problem. He suggested the impossibility of writing a statute that would not require some interpretation, and advised that the determination of the meaning of a cause of action again be left to the courts. The counsel prevailed. It is often possible for a drafting group to reach an agreement upon the use of language without agreement as to its meaning, the holders of divergent views each being hopeful that their meanings will be adopted eventually. Such compromises, though they leave problems unsolved, are inevitable. That such an important body should dodge description of a cause of action is or is not significant dependent upon whether the term has an unsettled meaning, and, if it does, whether any miscarriages of justice result from leaving it unsettled. Whether it be the task of the draftsmen or of the courts, problems of consequence must be solved.

"'Cause of action,'" says a West Virginia court, "'has a well-defined legal meaning, and the Legislature could not, if it would, make a movable feast of it.'" The problem which evoked this confident and unique expression is interesting. The charter of Richmond provided that no action should be maintained against the city for damages due to negligence unless a sworn statement of the claimant, or of the administrator of a decedent whose death was due to the city's negligence, giving the nature of the claim and the time and place of the accident, was filed with the city attorney "within sixty days after such cause of action shall have accrued." A demurrer was sustained to a declaration which set out an accident producing serious injury to plaintiff's intestate, which alleged

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1 See, for example, Ill. Civ. Prac. Act 1933, §§ 33, 43, 44, 46.
that plaintiff's intestate served the required notice within sixty days after her accident, and which alleged her death therefrom, plaintiff's appointment, and bringing of suit within sixty days following the death, but which failed to allege that the administrator had filed any notice with the city. In sustaining the demurrer the trial judge adopted the contention of the city that the cause of action accrued to the administrator upon his intestate's death, that he should have filed his notice within sixty days thereafter, and, having failed to do so, lost his right of action.

Reversing the decision below, the reviewing court held there was but one action for the benefit of the next of kin, whether brought by the injured party and revived after his death, or brought by the personal representative in the first instance, and that hence the "cause of action" accrued at the time of the accident. Giving of notice to the city was held to be no part of the cause of action, though a condition precedent to a right of action. The distinction between a cause of action and a right of action was said to be well recognized, though often confused, because both usually arise at the same time and affect or belong to the same person.

There is no difficulty in following the construction of the Richmond charter contended for. The cause of action referred to in it of necessity preceded notice to the city, and notice to the city preceded liability. But that any such meaning of cause of action is "well defined," and that a legislature could not use it with any other meaning will not readily be conceded.3

Phillips recognizes a distinction between a cause of action and a right of action, but it is not the distinction made by the Virginia court. He says:

It should be borne in mind that a right of action is a remedial right belonging to some person, and that a cause of action 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. The terms, 'right of action' and 'cause of action,' are therefore not equivalent terms, and should not be used interchangeably.4

He criticizes Bliss for saying, that as an action is a proceeding for the redress or prevention of a wrong, the cause of action must necessarily be the wrong which is committed or threatened.5 This, he claims, is a non sequitur. The wrong may be the cause for action on the part of plaintiff, but it is not the cause for action on the part of the state. Until the wrong is brought to the attention of the state in some formal way the

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3 Cf. Walters v. City of Ottawa, 240 Ill. 259, 88 N.E. 65x (1909), denying the possibility of a cause of action without a right to sue.


5 Ibid.
state does not and will not act. The "cause of action" must be looked at
from the viewpoint of the state, not that of a party injured. Phillips ad-
mits that this distinction is not observed in some of the codes, and that
some courts and text-writers have used "cause of action" and "right of
action" as synonymous.

Bliss is not alone in contending that the wrong committed is the cause
of action. I can well imagine Phillips agreeing with him, and with a West
Virginia court, in holding that the cause of action was the wrong com-
mited in the situation before the West Virginia court. A section of the
state code provided that the civil jurisdiction of a justice of the peace
should not extend to any action "unless the cause of action arose in his
county, or the defendant, or one of the defendants, resides therein."
A writ of prohibition was issued against a justice from taking jurisdiction
of an action for the recovery of money on a contract when defendant did
not reside in his county, and neither the execution nor the performance of
the contract could be connected with it. Citing Durham v. Spence,7 deal-
ing with a similar statute, the court said the cause of action must have
reference to some time as well as some place, and that the cause of action
arises when that is not done which ought to have been done, or when that
is done which ought not to have been done. The time when the cause of
action arises also determines the place where the cause of action arises.

According to Pomeroy, a cause of action consists of a primary right
in a plaintiff, with its corresponding primary duty upon defendant, and
a delict or wrong interfering with the right and violating the duty. The
primary, as distinguished from the secondary or remedial right, is the
right which exists before any wrongful act of defendant. The delict gives
a right to a remedy, perhaps several remedies, but it or they may not
yet have been invoked. Until invoked it may not be known what relief
may be sought or given. But the cause of action is complete before any
procedural move is taken. Pomeroy insists that the cause of action thus
defined is plainly distinct from the remedial right (right of action?), for
the latter is the consequence of the former. The cause of action is single,
but there may be several remedial rights. The cause of action, therefore,
is not a remedial concept at all. It is distinguished from the right of
action in that the latter is definitely associated with a single remedy. The
latter has scope, i.e., the scope sanctioned by the remedy chosen. The
cause of action has no scope.

7 L.R. 6 Ex. 46 (1870).
Dean Clark's description of a cause of action seems at first to adopt Pomeroy's assertion that it is not a remedial concept, for he says it is "such an aggregation of operative facts as will give rise to at least one right of action, but it is not limited to a single right." But he immediately goes on to say that "the extent of the cause is to be determined pragmatically by the court, having in mind the facts and circumstances of the particular case. Such extent may be settled by past precedents, but the controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules." Here is a procedural concept, introducing the thought that the cause of action has scope, although that scope is not limited by a single remedy, but is to be determined by other means. He brings it into definite contrast with a cause of action described by myself, which has a scope limited by the relief sought. Other descriptions of a cause of action introduce variables not brought out above.

The difficulty experienced by courts and text-writers in agreeing upon a single meaning for a cause of action, suitable for all situations, suggests a classification of situations with a view to ascertaining whether the meaning, chameleon like, changes color with its background. Without claiming completeness for the classification following, it may start us toward a solution of our problem.

I. THE CAUSE OF ACTION IN NOTICE PLEADING

Because of the delays and technical difficulties incident to the formation of issues in pleadings at common law, in equity, and under codes of procedure, there has been much insistence that these systems of pleading be replaced with one which places little or no emphasis upon the formation of issues, but which directs itself wholly to giving an opponent such notice of the circumstances upon which a claim or defense is based as will enable him to prepare for the trial at large. If inadequate notice for

9 Clark, Code Pleading 84 (1928).
10 Id. at 87; McCaskill, Actions and Causes of Action, 34 Yale L. J. 614, 633–34 (1925).
12 Whittier, Notice Pleading, 31 Harv. L. Rev. 509 (1918), and earlier articles by the same author in 4 Ill. L. Rev. 174 (1909) and 5 Ill. L. Rev. 257 (1910); Pound, Some Principles of Procedural Reform, 4 Ill. L. Rev. 388, 407 (1910); Willis, Procedural Reform, 8 Calif. L. Rev. 326, 330 (1920) and 5 Ill. L.Q. 17 (1922); Sunderland, The Michigan Judicature Act of 1915, 14 Mich. L. Rev. 551 (1916); Arnold, Simonton and Havighurst, Judicial Administration, 36 W.Va.L.Q. 26 (1929); Patterson, Judgment by Notice of Motion in Virginia, 13 J. Am. Jud. Soc. 167 (1930).
this purpose is given a more definite pleading may be required, but a demurrer, or its equivalent motion, for basic insufficiency has no place in this system. The time for determining the validity of a claim is postponed until the trial. There is no attempt to interrelate law and fact in the pleadings. Although a part of a legal system, statements of claim have no other legal significance than that they are intended to identify something which presently exists, but which will be fully disclosed only upon the trial.

Both the common law and notice systems of pleading require that fair notice be given an opponent of the character of proof which will be adduced at the trial, but the common law system requires that all enveloping garments be stripped from the liability claimed, and that its vital parts be disclosed so that they may be made the subject of separate attacks before trial, either by challenging their legal importance, denying them, or by introducing some new factor changing their legal effect. The notice system, on the other hand, requires no such stripping for identification of parts, but only such an outline of the whole, or what is claimed to be the whole liability claimed as will enable an opponent to know in a general way what a claimant may attempt to prove. It assumes considerable knowledge in an opponent of a factual situation which may be the subject of a claim, and its object is to identify that situation.

It is not essential for the purposes of the notice system of pleading that there be any definite concept of a cause of action. Claim, liability, right of action and cause of action, for practical purposes, may mean the same thing. Unquestionably a claimant pleads with reference to a concept of liability he hopes to prove, even though he does not reveal all its parts, but no technical name has as yet attached to it. It may be called a cause of action, and the burden will be on him who asserts the contrary to establish that he does not plead a cause of action.

In a system of pleading which does not purport to set out legal relations, whatever other adverse criticism may be directed at it, there is little likelihood of confusion resulting from this use of the term cause of action. Neither the image reflected by the pleading, nor the pleading itself, is so fully proportioned as to distract attention from the object of

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13 Whittier, op. cit. supra note 12, at 516, 521.
14 Sunderland, op. cit. supra note 12. Professor Sunderland suggests that the ineffectiveness of the common law system in giving notice is shown by the necessity of supplementing it with bills of particulars. But did not the bills of particulars come as a result of relaxing common law rules and sanctioning such close approaches to notice pleading as the common counts? The general rules, if followed, gave more notice than the proposed notice system.
15 Whittier, op. cit. supra note 12, at 521; Willis, op. cit. supra note 12, at 21n.
getting to a trial quickly. When that object is attained the pleading concept fades out of sight. It is immaterial whether the cause of action be thought of as the cause for plaintiff bringing his suit, or whether it be regarded as the cause for the state to act on his behalf. Unless injected by some requirement for separation of claims, the scope of the cause of action will not be the subject of inquiry.

II. THE DEMURRER AND THE CAUSE OF ACTION

Under the common law, equity, and code systems of pleading a demurrer, or equivalent motion, is sanctioned as a means of testing the legal sufficiency of a declaration, bill, complaint or counter-claim before it is required to be answered, and herein lies their principal difference from the notice system of pleading. It is a well known principle that in determining this sufficiency courts will not look beyond the four corners of the instrument itself, except to relate the matters therein stated to known rules of law. The question is, does the pleading itself show a cause of action? What it is intended to reflect is of no consequence. While there may be a recognition that the pleading attempts to describe something which lies behind it, the description itself is the vital thing, for the description and the thing described are identical for the purposes at hand. The factual situation in the picture, whether it exists in truth or not, is placed under examination. The application of legal principles to it alone determines the right to a recovery. What may be proved under the statement is a matter for subsequent determination. Only when it is found to be insufficient, and an application is made to amend, does the court look beyond the mirror to ascertain whether it is reflecting properly. If it be conceded there should be a preliminary test of the kind described, it follows that some statement must be the subject of examination, for the court has no other means of knowing what the true situation may be. The claimant's statement is accepted for lack of a better one.

We may well imagine that Phillips was thinking of decisions upon demurrers and some similar problems when he gave his definition of a cause of action as the formal statement of claim which causes the state to act upon behalf of a claimant, distinguishing it from a right of action, which he saw as the undisclosed basis for the claimant acting if he saw fit.

We usually think of the statement of a claim as an attempt to portray the plaintiff's present right to invoke judicial assistance, by the setting out of facts which have transpired. The past tense is used in the pleading. Though we may not think of Phillips, we have in mind Phillips' right of

action. The skilled and cautious pleader, however, is looking to the future. Present or past facts are important only with reference to future proof of them at the trial. Claimant or his attorney may be misinformed, or only partially informed. They may be overly optimistic as to what the proof will show. Narratives given them by prospective witnesses may turn up with important alterations. Even if they remain constant, they may not be believed by the trier of facts. For the purposes of the trial the facts are what the triers of fact find them to be. It is not uncommon to think of these settled facts as showing the cause of action, the true cause of action, as distinguished from the supposed cause of action upon which claimant and state proceeded up to this time. If we accept Phillips' concept that a cause of action contemplates a state's cause for acting, we still have the question what acting is contemplated, first or ultimate. For the purpose of demurrer, we can have no hesitation in answering the first action. The pleader must be a prophet, and for preliminary determinations, the prophecy must be the cause of action, none other being known.

Under the issue system of pleading the prophecy must set out all the essential elements for judicial relief. If jurisdiction at law and in equity is divided, it must set out the elements essential to the jurisdiction in which the suit is brought, otherwise the state will not act for him, and a demurrer for no cause of action will be sustained.\textsuperscript{17} If it is filed in a law court maintaining the distinctions between the forms of action it is or is not required to set out the elements essential to a particular form of action chosen dependent upon whether a demurrer raises the question of a variance between the declaration and the writ. Even when such an objection is entertained as a general rule it must be raised by plea in abatement rather than by demurrer.\textsuperscript{18} In other situations the type of remedy chosen is immaterial, and the question on demurrer is not whether a right to a particular remedy is shown, but whether a right to any remedy is shown. In a jurisdiction having one form of civil action, \textit{i.e.}, which permits a free joinder of legal and equitable remedies, and of all sorts of legal remedies, the question is not whether a right to a particular type of relief is shown, but whether a right to any type of relief is shown.\textsuperscript{19}

If, therefore, our only problem is to decide a demurrer to a code complaint, we may say, with Pomeroy and Clark,\textsuperscript{20} that the relief prayed is

\textsuperscript{17} 49 C.J., Pleading § 504 (1930).
\textsuperscript{18} Id. at § 500; cf. § 492.
\textsuperscript{19} White v. Lyons, 42 Cal. 279 (1871); Clark, \textit{op. cit. supra} note 9, at 185.
\textsuperscript{20} Pomeroy, \textit{op. cit. supra} note 7, at § 349; Clark, \textit{op. cit. supra} note 9, at 184.
no part of the cause of action. Though the complaint shows claimant entitled to several reliefs, or to a relief different from that prayed, the demurrer for no cause of action must be overruled. The scope of a single cause of action is impertinent to the inquiry. Whether reliefs prayed are any part of a cause of action in other situations must be determined when the problems are presented.

For the purposes of a demurrer, what are the essential elements of the prophecy or cause of action? Issue pleading does not contemplate the setting out of legal principles in a pleading. The court is presumed to know the law. But the law is general, and the reliefs given many. Some mode must be devised for calling the court's attention to a pertinent field of the law. Remedies depend upon the existence of certain facts. When the facts pertinent to one or more remedies are set out it may be said the claimant is invoking those remedies, hence the rule that claimant must allege facts of such character as will indicate the remedies invoked. But facts themselves have no definite abstract meaning applicable to all situations, for there are several kinds of facts, and the line of demarcation between facts and law, on the one hand, and facts and evidence, on the other, is often not easy of determination. The policy sought to be established must be ascertained before the process of selection can begin. The common statement of the courts is that the pleader must avoid alike conclusions of law and evidence, and select ultimate facts.

Ultimate facts, as that term is used in pleading, means determinative facts, i.e., facts the presence or absence of which determines in law whether some relief shall be given. Whether one who causes injury to another is a male or female may be a fact for some purposes, but it does not determine whether there is or is not a liability to pay damages, and hence it is not an ultimate fact for pleading purposes. Whether the person, male or female, who caused the injury is a defendant in the suit is a determinative fact, for if he or she be not a defendant there is no liability in that suit. Facts tending to show identity are material for purposes of proof, for the triers of fact from them may determine the truth as to identity. For purposes of deciding a demurrer, however, there are no triers of fact and the facts selected must be of the sort which leave nothing to be determined but a question of law. They must necessarily in combination show a right to judicial relief without leaving anything else to be decided. They must be the facts which a jury or judge will decide to be true or false from evidence presented, hence the name ultimate facts. The sanction of evidentiary facts, i.e., such facts as are permitted to come from the mouths of witnesses, would not only make pleadings bulky, but would lead to
side issues of no consequence legally. Yet at times the ultimate fact may be of such simple character a witness would be permitted to declare it. In such cases the ultimate and the evidentiary fact become one.

More often the ultimate fact is made up of several subsidiary facts, and some legal conclusions mixed in, despite the injunction that legal conclusions are not to be pleaded. It is indeed rare when sanctioned ultimate facts do not embody some legal element. "Possession," "promised," "master," "servant," "corporation," "in consideration of," "warranted," and many other sanctioned allegations illustrate the falsity of any literal application of the rule against pleading legal conclusions. As has been pointed out by thoughtful scholars, the inhibition is not against all legal conclusions, but against too many and too broad and sweeping legal conclusions.21

But how are we to know when facts we contemplate using in a pleading exceed the degree of legal elements permitted? We often find that a sanctioned allegation in one case falls under the ban in another, but in this very phenomenon we find a clue to the problem. What is the likelihood of a question being raised in the litigation over the truth or falsity of the legal conclusion embodied in an allegation made? Every assertion in a pleading is not expected to be denied. The type of litigation will suggest what is likely to be contested, for litigations like pictures have their foregrounds and backgrounds, their gravamens and their inducements. The subsidiary parts, those unlikely of controversy, may be painted with bold strokes, containing much of legal assumptions; the more outstanding features, presenting the central theme, will be permitted to contain only a minimum of legal elements and these of a character not likely to be challenged. Issue pleading requires that extent of breaking up of essential elements into smaller parts as will enable an opponent to challenge, either as law or fact, what he might be supposed to desire to challenge in a particular case, without imposing impractical burdens. Judgment born of experience must be exercised in making specific application of these principles, and at times judgment of reasonable minds will differ. The cautious pleader will risk offending on the side of particularity rather than on the side of generality of statement.

If it is essential to make a close analysis of the facts by which the elements of a cause of action is disclosed, it may at least be profitable to make some analysis of the elements themselves. Whether the cause of

action be looked at as a pre-action or post-action concept, Pomeroy and Phillips are agreed that the allegations in the complaint shall show the existence of a right in plaintiff with a corresponding duty in defendant to observe that right, and an infringement of the right or breach of duty.22 A criticism made by Phillips of Bliss' definition of a cause of action raises a question whether there should be another element in the analysis than those of duty and breach.

Bliss states that since the codes define an action as a proceeding for the redress or prevention of a wrong, the wrong must be the cause of action. Phillips insists this is a misconception; that an action, properly conceived, has as its basis a right in plaintiff, and that its object is the protection of that right. Compensation for infringement is purely incidental.23 He seems to overlook the fact that a wrong necessarily includes the concept of a right to be wronged. Bliss' definition, therefore, as well as that of Pomeroy and Phillips, includes in the cause of action the elements of duty and breach. But the criticism that compensation is purely incidental suggests an element that both he and Pomeroy have overlooked. The method by which a right is vindicated in some cases may indicate whether a cause of action is complete. A mere infringement of a right will call for remedial action in some situations, as where there is a trespass to person or property,24 or where there has been a defamation using words actionable per se.25 But in other situations damage is the gist of a remedy, and hence of a cause of action, e.g., in actions for deceit,26 for defamation on words not actionable per se,27 and for negligence and nuisance.28 In any action for damages it will be necessary to plead specially damages of an unusual type, if they are to be recovered.29 It would, therefore, be necessary in some situations to take cognizance of legal injury in the form of damages, and it would be advisable to have in mind the element of injury flowing from defendant's breach of duty when drafting any complaint.30 A failure

22 Pomeroy, op. cit. supra note 7; Phillips, op. cit. supra note 4, at 188.
24 Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492 (1893); 1 Mod. 3 (1669); 3 Sumn. 189, Fed. Cas. no. 17322 (C.C.Me. 1838).
29 Heiser v. Loomis, 47 Mich. 16, 10 N.W. 60 (1881).
to include it in the analysis might cause the omission of a vital element of a particular cause of action. If a preventative remedy may be desired, the analysis will substitute threatened breach of duty and threatened injury for breach of duty and injury.

Conditions subsequent, statutes of limitations, statute of frauds, and many other affirmative defenses, have a bearing upon the facts essential to state a cause of action to withstand a demurrer, but a treatment of them lies beyond the scope of this article. Concerning them there is little controversy, and they are not a disturbing factor in an attempt to reach a common concept for avoiding confusion.

III. THE CAUSE OF ACTION IN JOINDER AND SEVERANCE PROBLEMS

Thus far we have not been disturbed by the necessity of bounding a single cause of action, and there has been no occasion to question the assertions of Pomeroy, Phillips and Clark that a single right may give rise to many remedies. When, however, procedural rules, both common law and statutory, permit the joinder of plural causes of action in one suit, requiring them to be separately stated and constitutional provisions require issues in some remedial rights to be tried in a particular manner, courts cannot escape the duty of determining scope and character of the units dealt with. The problem is entirely different from that of deciding a demurrer. The cause of action must take on a more concrete character. In dealing with these problems, particularly under the one form of civil action, the claims of Pomeroy, Phillips and Clark that singleness of rights rather than singleness of remedies determines the scope of a cause of action need careful investigation. Does it follow that because plurality of remedies is immaterial in determining whether a complaint states a cause of action for purposes of demurrer that it is immaterial in determining the scope of a single cause of action for purposes of joinder and severance? Can we determine the scope of a single right by ignoring remedies, or have remedies bounded rights as well as causes of action? I have treated this aspect of the subject in another place, and I am still of the opinions there expressed. A brief summary, with some amplifications, however, is necessary to complete the theme here being developed.

With a division of jurisdiction established between courts of law and equity, and with rigid boundaries maintained between the common law remedies, preventing unions between them, inevitably situations arose in which it was impossible for a claimant to obtain the full relief desired without resorting to two or more suits, unless he could avail himself of

some principle of merger by which courts see as a single unit things which are commonly regarded as separate and distinct. Such a principle was applied in some situations and refused in others. Sometimes the merger was compulsory, at other times optional, and discrimination was required to ascertain when, if partial relief only were obtained in one suit, further relief would be given or barred in a subsequent suit.

To evade paying an obligation a debtor conveys his property upon secret trust to be reconveyed upon request. Except where statutes have modified the common law, the creditor cannot in one suit obtain a judgment against his debtor and set aside the fraudulent conveyance to make that judgment effective.32 No equitable attachment of the property can be had to hold it pending the obtaining of a judgment.33 Equity will not entertain jurisdiction until the legal remedy has been demonstrated to be inadequate through experimentation. Although there is no substantial difference in effect between a statutory attachment and an injunction or receivership tying up property pending suit, both requiring an indemnifying bond, the equitable remedies will not be given until the legal remedies are found wanting. Neither joinder nor merger is possible. One reason given is that a creditor can have no interest in his debtor's frauds until the debtor-creditor relationship is established by something more than an allegation. Attachment acts negate this reason. The most potent reason assigned is that the parties should not be deprived of a jury trial upon the issue of the indebtedness, and equity has no jury.34

In many situations, but not all, equity has insisted that titles, rights to possession, and other so-called legal issues be tried in courts of law. Sometimes the legal remedy has been required to precede the equitable one.35 At other times equity suspends its proceedings until the legal issues have been determined by a court of law.36

32 15 C.J., Creditors' Suits § 13 (1918); 8 R.C.L., Creditors' Bills §§ 23, 24, 27 (1915); Dewey v. Eckert, 62 Ill. 218 (1871); Trotter v. Lisman, 199 N.Y. 497, 92 N.E. 1052 (1910). By special statutes, or interpretation of the code section establishing one form of action, some jurisdictions permit these remedies to be consolidated in one suit. 15 C.J., Creditors' Suits §§ 14, 17.
34 15 C.J., Creditors' Suits § 16, note 58 (1918); Cates v. Allen, 149 U.S. 451, 456 (1892).
The maxim that equity loves to do complete justice is a familiar one, but it is sometimes difficult to harmonize it with a purely supplementary character of equity jurisdiction. The prevention of a multiplicity of suits and circuity of action has been struggling for recognition as an independent ground of equity jurisdiction and has been making headway. When some recognized ground of another type is present, the equity courts, to do complete justice, with increasing willingness have been persuaded to take jurisdiction also of issues which might have been the subject of a suit at law, sometimes in situations where previously there was an insistence upon a separate proceeding at law. New reasons are being found why the remedies at law are inadequate. But inadequacy of a legal remedy is a matter to be set up and claimed by an applicant for equitable relief and is not to be turned into a defense to a second suit in equity because the applicant saw fit to pursue it. Permissive and compulsory joinders are distinct things, and any principle that equity loves to do complete justice cannot be stretched into a denial of the privilege of separate suits. Doctrines of res adjudicata and against splitting a single cause of action are not carried to that extent. This is too sudden a shift from compulsory separation. It must be acknowledged that there were many situations in which claimants had an option to pursue a comprehensive and all inclusive remedy in equity, or to pursue distinct legal and equitable remedies in different forums. The privilege of a jury trial might be waived by a claimant, but it would not be taken from him against his will. It was enough of a concession that the chooser of the remedy and forum could under a claim of equity jurisdiction of some sort deprive a defendant of a jury trial.

In claims wholly equitable in character it has not always been desirable to insist upon a union in one suit of all possible remedies. When the subject matter is not readily divisible, and the interests of parties are closely interwoven, the doctrine of compulsory joinder has been invoked. But where the interests of parties are severable, and it is practical to make divisions, despite many elements in common, equity has permitted either a joinder of claims in one suit or the prosecution of separate equity suits, at the option of the plaintiffs. Various types of conveniences affecting

37 21 C.J., Equity § 48 (1920).
38 Id. at § 47.
39 Parties in equity fall in three classes: proper, necessary and indispensable. Indispensable parties are those without whom the court cannot proceed because their interests will be directly affected. Necessary parties are those whose interests are so closely linked together that they should be tried together. Courts will require them to be joined if practical to bring them in, but will sever their interests, and protect those of absent ones when necessary. Proper (sometimes called formal) parties are those who may join or be joined as plaintiffs.
the parties, witnesses, and the court are balanced against each other, and where the balance between joinder and separation is nearly equal equity courts will not take a hand to disturb the choice made by those who bring the suit or suits.\textsuperscript{40} A very common illustration of this optional joinder or severance is the privilege given judgment creditors to join or sever in suits to avoid a fraudulent conveyance by a common debtor.\textsuperscript{41} Many kinds of injunction suits are of the same character.

The law courts also had their rules with reference to joinder and severance of claims wholly legal in character. In early times the original writ was a jurisdictional instrument, conferring upon the court into which it was returnable jurisdiction to try only the claim mentioned in the writ. Forms of action based upon classifications in the writ register continued to remain as distinct as the old writs long after the original writ ceased to have any jurisdictional significance, and gave rise to rules that claims falling under one form of action could not be joined with those falling under another.\textsuperscript{42} Remedies became dividers of claims. One dispossessed of realty could not in an action of ejectment have restitution of the property and also damages for injuries to the property while in the possession of the disseisor. A subsequent action of trespass for mesne profits was essential.\textsuperscript{43} If chattels were wrongfully taken, some of them only being destroyed, replevin for those still in existence could not be joined with any remedy to obtain damages for those destroyed. Many other illustrations will occur to the reader.

In some situations it was possible to bridge over the boundaries between the forms of action through a doctrine of merger. Debauching of daughters, defamation, conversion of chattels, causing disease to spread by permitting diseased cattle to roam were wrongs remedied in the action


\textsuperscript{40} Story, Equity Pleading §§ 76c, 94, 96 (9th ed. 1879); White v. Macqueen, 360 Ill. 236 243-47, 195 N.E. 832, 835-36 (1935).

\textsuperscript{41} They may join: Sheldon v. Keokuk N. L. Packet Co., 8 Fed. 769 (C.C.Wis. 1881). They may sever: Ballentine v. Beall, 3 Scam. (Ill.) 203 (1841).

\textsuperscript{42} Tidd's Practice 11 (8th ed. 1824). The permission to join debt with detinue and trover with case seems at first to be an exception to the rule forbidding a joinder of the different actions, but it will be remembered these rules were devised when detinue was a part of the action of debt, and before trover sprang off from case.

\textsuperscript{43} Gill v. Patten, 1 Cranch C.C. 465, Fed. Cas. No. 5428 (1807); Livingston v. Tanner, 12 Barb. (N.Y.) 481, 486 (1852); Vandervoort v. Gould, 36 N.Y. 639, 646 (1867); Osbourn v. Osbourn, 11 S. & R. (Pa.) 55 (1824); 19 C.J. 1234, note 67 (1920).
of case, but if any of these took place in connection with a trespass to lands they might be treated as aggravating the trespass.\textsuperscript{44} It was essential in such cases that the trespass be proved, for the incidents were not independent grounds of recovery in a trespass action. Joinder of distinct causes of action was impossible because of the writ system but through the merger concept it was possible to see one right for one action. A distinction was drawn between types of aggravation. For some kinds, as for debauching daughters, converting chattels, and spreading disease, as full damages were recoverable as in independent actions for those wrongs;\textsuperscript{45} but for defamation there could be no compensatory recovery based upon plaintiff's loss. It was strictly an \textit{aliter enormia}, pertinent only to show malice as a basis for punitive damage.\textsuperscript{46} Though the cases are few which have dealt with the problem, some courts have found, in the privilege of merging in the first type, the concept of a single cause of action not only for purposes of the trespass action but also for the purpose of preventing two suits.\textsuperscript{47} Since the merger is not complete and full recovery is not permitted for a trespass and defamation in one suit, there is not the same basis for contending a single right has been violated and, presumably, two suits may be maintained.

But all joinders at common law were not mergers. Another rule provided that different causes of action should be set out in separate counts. This rule was a part of the system of pleading devised for the purpose of keeping issues separate. Although it is claimed to be distinct from the rule against duplicity, which prevented the setting out in one count of two or more theories of a single liability,\textsuperscript{48} the two rules served a common purpose, as is illustrated by the case of \textit{Hart v. Longfield}.\textsuperscript{49} Plaintiff declared in one count upon an indebitatus and upon a quantum meruit for nourishing Edward Longfield for a specified period. Upon special demurrer on the ground there could not be an indebitatus and a quantum meruit for the same nourishing, one being contradictory of the other,

\textsuperscript{44} Bennett v. Alcott, 2 T.R. 166 (1787); Bracegirdle v. Orford, 2 Maul. & Sel. 77 (1813); Taylor v. Rainbow, Hen. & Mun. (Va.) 423, 441 (1808); White v. Moseley, 8 Pick. (Mass.) 356 (1839); Reed v. P. & O. R. R. Co., 18 Ill. 403 (1857); Richardson v. Milbourn, 11 Md. 340, 347 (1857); 63 C. J. 683 (1933).

\textsuperscript{45} Bennett v. Alcott, 2 T. R. 166 (1787); Anderson v. Buckton, 1 Stra. 192 (1718); Reed v. P. & O. R. R. Co., 18 Ill. 403 (1857); Savage v. French, 13 Ill. App. 17 (1883).

\textsuperscript{46} Bracegirdle v. Orford, 2 Maul. & Sel. 77 (1813); Bishop v. Baker, 19 Pick. (Mass.) 517 (1837); Reed v. P. & O. R. R. Co., 18 Ill. 403 (1857).

\textsuperscript{47} Savage v. French, 13 Ill. App. 17 (1883); Karr and White v. Barstow, 24 Ill. 581 (1868).

\textsuperscript{48} 31 Cyc. 121-22 (1909); 49 C.J., Pleading § 177 (1930); Gainesville Ry. Co. v. Austin, 122 Ga. 823, 50 S.E. 983 (1905).

\textsuperscript{49} 7 Mod. 148 (1709).
the court held the count defective for the reason urged. The proper pleading, said the court, would have been to aver a nourishing of different children, and to multiply Edward Longfield as often as plaintiff multiplied his declaration. In other words, the pleading would have been approved had plaintiff in one count alleged an indebitatus for nourishing Edward Longfield, and in another count have alleged a quantum meruit for nourishing another Edward Longfield. But why another Edward Longfield when in fact it was the same Edward? There is but one answer, and that is that for the purpose of obtaining separate issues another theory of liability must be treated exactly as though it were an entirely different transaction, leading to a distinct liability. In form, if not in fact, two rights and two liabilities were set out.

Did it matter whether the courts said in such a case that there were two counts to support one cause of action, or that there were two causes of action? Speaking as of the time of trial and judgment it would be natural for the court to adopt the first interpretation. But suppose a demurrer interposed to each count separately. As of that time the courts would and did announce that plaintiff had two causes of action, but that they were properly joined in one suit. Counts, filed for the purpose of avoiding a variance between allegations and proof and for the purpose of keeping issues distinct, for pleading purposes were distinct causes of action. Phillips' concept of a cause of action as a formal statement was the one adopted, but his statement that the prayer for relief is no part of the cause of action was not adopted. To obtain that concept necessitated a shift in time of observation and the consideration of an entirely different problem.

It has been said that inconsistent causes of action cannot be joined in one suit, but it is obvious from what has been said in the preceding paragraph that "inconsistent" is used in a restricted and technical sense, and is confined to those situations where a plaintiff does not need to protect himself against a variance because of uncertainties of proof, as where he is required to make an election of remedies.50

Returning to the situations where mergers were recognized by treating some acts as aggravations of others, setting out the additional damages in a per quod clause, the question has arisen whether damage to person and property occasioned by the same accident constitutes one or two causes of action. In the leading case of Brunsden v. Humphreys,51 decided by a


51 L. R. 14 Q. B. D. 141 (1884).
divided court, there were held to be two causes of action. Coleridge, J., in a vigorous dissent, held there was but one cause of action with two types of damage. Neither the majority nor the minority doubted that plaintiff could join the claims for both types of damage in one suit. The division was on the question whether plaintiff could have two suits. They differed on the question whether two suits were an undue vexation of the defendant under the maxim "interest reipublicae ut sit finis litum," but a close examination of the majority opinion reveals that the majority was troubled with the question of separateness of issues for purposes of pleading. It was suggested that different statutes of limitations might apply to claims for personal injuries and for injuries to property, and one plea of the statute could not be pertinent to both claims. The majority therefore would have held that although there could have been a joinder of the claims in one suit there could have been no merger. Whether the minority would have declared for a merger, or would have permitted plaintiff to set out his claims in one suit in different counts is problematical. It is evident that there was a balancing of conveniences and a difference of opinion as to where the balance lay. The same difference of opinion is noticeable in American decisions on the problem.

When we consider the proper interpretation of provisions in American codes of procedure permitting enumerated causes of action to be joined, but requiring each cause of action to be separately stated, we are confronted with the question of the meaning of a cause of action for purposes of separate statement. To what extent, if at all, is there an intent to continue the concepts of a cause of action for purposes of joinder and separate statement which prevailed formerly at law and in equity? Having in mind the abuses of the count system and desiring to avoid them, a modern critic may wish to create a new concept of a cause of action. The motive is praiseworthy but it is not the task of courts to legislate. They must confine themselves to the legitimate field of interpretation. The codes themselves furnish some internal evidence as to intent.

Section 143 of the original New York Code of 1848, dealing with joinder of causes of action, modifies only slightly the common law rules on joinder of causes of action. Seven classifications are made, none of which include


equitable actions. The annotations of the code commissioners under the sections on joinder of parties indicate it was their judgment that the sections on parties were sufficiently broad to care for any equitable joinders. Although the distinctions between actions at law and suits in equity were abolished, the section on joinder of causes of action made no provision for joining legal and equitable causes of action. It is evident that the draftsmen looked upon an equitable proceeding as a single unit in which various parties might have an interest, and this unit from their point of view was a single cause of action. There was no occasion to deal with it in the section on joinder of causes of action.

This concept, however, was not grasped by all members of the New York Court of Appeals. Comstock, J., in New York & New Haven Ry. Co. v. Schuyler, ridicules the draftsment of the first codes, pointing out that a provision for joining equitable causes of action and for joining legal and equitable causes of action was first inserted by an amendment in 1852, and that the successive codes of 1848, 1849 and 1851, "with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit indispensable to its exercise." The learned judge apparently was laboring under the impression that each claimant entitled to an equitable relief peculiar to him had a distinct cause of action, a loose concept which would require no correction for practical purposes under a system which required no separations prior to trial.

Expressions can be found in the annotations of the code commissioners condemning the excessive use of counts in the common law system, and it will be noted that their draft code, first adopted, had no provision in it for separate statements of causes of action. This came in by action of the New York legislature in 1849, whether upon or against the recommendations of the code commissioners is not known. The codes of all other states contain it. Prior to 1852 in New York there was no provision for joining causes of action arising out of the same transaction unless they fell within one of the designated classes. Thus it was impossible to join claims to recover real and personal property, or to join claims arising out of force to person or property with claims to recover real property, unless such mergers as were recognized at common law were also recognized under the code. The amendment of 1852 permitted a joinder of causes of action arising out of the same transaction, or transactions connected with the

55 17 N.Y. 592 (1858).
same subject of action, but required them to be separately stated. To
join without separation, even after this amendment, it was necessary to
invoke a doctrine of merger, with one claim taking on the character of
another.

So far as I can discover, in these codes as eventually worked out there
was no intent to depart from the common law and equity concepts of a
cause of action for purposes of joinder, merger, and separation. The author
who desires most to escape these concepts says: "The requirement of
separate statement is a natural and reasonable one designed to keep the
issues clear and simple." However, he thinks he finds in the code require-
ment of a plain and concise statement of the facts constituting the cause
of action, an escape from the former concepts, and the substitution of a
unit the scope of which depends on convenience in trial. He assumes the
old concepts of units did not work for convenience in trial. The new con-
cept he likens to the division of a book into chapters, i.e., progressive
narrative units. Each unit must show at least one right to judicial relief,
but it is not to be limited to only one such right. I find it difficult to
distinguish this unit from the layman's concept of a transaction, the shape
and boundaries of which are not determined by legal concepts but by the
beginning and end of occurrences as laymen see them. Yet the codes
expressly provide for the joinder of plural causes of action arising from a
single transaction, indicating that causes of action and transactions, for
the purposes of separate statement, are not identical.

It is not easy to find in the codes themselves any indication that differ-
ent kinds of facts are to be pleaded than those required at law and in
equity. If the design of the separate statement of the codes is to keep
issues clear and distinct it is pertinent to ask whether the layman's con-
cept of a unit in a narrative serves that end, and whether it makes for
greater convenience at the trial. The business of courts is to make deter-
minations according to legal principles, and any form of statement which
tends to obscure the pertinent principles rather than to make them stand
out tends to distract from material issues and to invite issues upon imma-
terial matters. Theoretically the trained judicial mind should be capable
of unscrambling a lay mixture, and of regrouping facts according to their
legal consequences, but the very necessity of doing this suggests that the
lay mixture is not apt for the purposes at hand, and should not be en-
couraged. At the trial, particularly if it is before a jury, the judge is under
a time pressure and he must of necessity make quick decisions. Orderly
statements, i.e., statements grouped according to pertinent legal prin-

Clark, op. cit. supra note 9, at 57.  
Id.  
Id. at 84.
principles, may seem artificial to a layman unacquainted with the business at hand but the real question is their efficiency. In cases of an equitable nature requiring no jury, in which the judge may take the time necessary for making the connection between facts and their consequences, separate statements have never been required, and there is no reason for using them under the codes. It is impossible to escape the conclusion that the jury influenced the determination of the scope of the cause of action for purpose of joinder under the former procedure. There was an idea of convenience in the trial in the formation of the units there prescribed. There is no evidence that this convenience, real or supposed, has been supplanted in the codes by some other concept of convenience.

The codes sanction the joinder of legal and equitable causes of action, but if different modes of trial are still to be preserved, and they must be preserved if constitutions are to be obeyed, convenience in the trial suggests a grouping of facts in the pleading according to the mode of trial. It has been suggested that such a grouping in the pleadings is premature, and should be made only at a post-pleading stage when the question of the mode of trial is raised. But the marshalling of facts according to their pertinent reliefs determines the character of the issues as legal or equitable. The same kind of questions are tried at law and in equity, and facts dissociated from the reliefs sought are colorless. If facts are scrambled together without reference to reliefs obtainable there is no way of telling at the post-pleading stage what manner of trial should be had. The layman's story-telling by lay chapters can have no other effect than to throw into confusion the determination of constitutional rights. The balance of convenience is against any such type of pleading. On the other hand, if a party desirous of a jury trial is required to marshal his facts in his pleading in such a way as to disclose their legal character and to form legal units, separating these from facts pertinent to equitable relief, orderly trials according to law can be had.60

As applied to equitable situations no fault is found with the concept of a cause of action as an aggregate of operative facts giving rise to at least one right of action, but not limited to a single right the scope of which is to be determined pragmatically with trial convenience in mind.61 As applied to mixed equitable and legal situations its advocates claim it to be an inconvenience and not a convenience to draw dividing lines between

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60 For a more complete refutation of the claim that there is no relation between pleadings and jury trials, see McCaskill, One Form of Civil Action, But What Procedure, For the Federal Courts, 30 Ill. L. Rev. 415, 421-27 (1935).

61 Clark, op. cit. supra note 9, at 84. Cf. pp. 76, 77.
that which is legal and that which is equitable. This is said to be a distinction which the codes have wiped out.62 A permissible joinder is converted into a forced merger. So too, a permissible joinder of older legal remedies is converted into a forced merger and all former notions of trial convenience are discarded for some new one. The judge who is to pass upon the need for separate statements of causes of action is given but one guide of a positive character, the layman’s concept of good rhetorical divisions. All others are negative. Whether this concept of a cause of action can be accepted for purposes of separate statement will depend upon the willingness of courts to accept the notion of trial convenience that is suggested. Few courts have accepted it thus far for the purpose indicated.

IV. THE CAUSE OF ACTION WHEN PLEADINGS ARE AMENDED

When an original declaration, complaint, or petition omits some element essential to judicial relief, and an amendment is sought which supplies the missing element, unless the statute of limitations is involved courts permit the amendment almost as a matter of course.63 When a demurrer to such a defective pleading is sustained the judgment is always respondeat ouster, a judgment which contemplates an amended pleading with the missing element supplied. In the absence of statutes permitting it these same courts declare that amendments which introduce new causes of action will not be permitted.64 It is obvious that in these situations courts are not thinking of the pleadings themselves as causes of action. In other words they do not accept Judge Phillips’ concept of a cause of action in dealing with amendments. A no-cause of action cannot be the same thing as a cause of action. Instead of this concept they look behind the pleadings, consider them as attempts to describe or reflect the facts relied upon by claimants as a basis for judicial relief. The defect which is to be supplied by amendment is one which affects the description, not the thing described. The privilege of amendment is the same as that accorded an officer who desires to amend a return on process to supply some omitted recital.65 The cause of action in this situation is what Phillips calls the right of action.

When the original declaration, complaint, or petition sets forth all essential elements to judicial relief, and an amendment is sought pre-

62 Id. at 46.
63 49 C.J., Pleading § 660 (1930).
64 Id. at § 671. 65 Tewalt v. Irwin, 164 Ill. 592, 594, 46 N.E. 13 (1897).
senting some other theory upon which the same relief may be had, either as a substitute for the original statement, or as an additional basis for the relief, whether the amendment is permitted depends to a considerable extent upon local statutes concerning amendments and upon whether the one form of civil action has been adopted. Almost everywhere the amendment is permitted if the amended statement could have been joined with the original statement in the first instance, and the application to amend is made in apt time to permit of adjustments. Again courts visualize a right of action behind the pleadings, and think of it as the cause of action which remains constant. A single cause of action may be presented in different aspects to avoid a variance. When, however, the different theories or aspects call for different reliefs, the privilege of amending is granted or withheld, depending largely upon whether the distinctions between the forms of action under which such reliefs might be granted have or have not been abolished. Under the codes, unless there are special circumstances, the different types of reliefs will be ignored in determining the identity of the cause of action. The cause of action has some similarity to the lay transaction. If, however, the relief sought by amendment is cumulative of that sought in the original pleading, instead of being alternative, courts generally hold that a new cause of action is introduced.

Thus, to some extent at least, reliefs sought play a part in determining the scope of the cause of action for purposes of amendment.

The extent to which new matter may be injected into pleadings by amendments is almost universally regulated by statutes, but these statutes vary considerably in language. Some do and others do not mention specifically the effect of introducing a new cause of action. Some expressly forbid it; others expressly sanction it. The latter type usually combines with the permission a qualifying clause that the change in the cause of action shall be for the purpose of enabling the plaintiff to sustain the claim for which the action was intended to be brought. Apparently such statutes use the term "cause of action" to describe an aspect of the claim not set out in the original pleading, for it is the aspect and not the claim which is new or different. The greatest difficulty has been experienced in harmonizing these statutes with statutes of limitation. The situation in Illinois is fairly typical and deserving of study.

The Statute of Amendments and Jeoffails contains a common provision that the court shall have power to permit amendments in pleadings

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66 49 C.J., Pleading §§ 688, 689 (1930) and cases cited.
67 Id. at §§ 673, 695 and cases cited. 68 Ill. St. Bar Stats. 1935, c. 7, § 7.
ings, either in form or substance, for the furtherance of justice on such terms as shall be just at any time before judgment. Section 23 of the Practice Act of 1872 added the following provision:

At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense. The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action.69

This section remained unamended until 1929.

It was urged that the final sentence of the above statute, providing that the adjudication of the court allowing an amendment should be conclusive evidence of the identity of the action, precluded a defendant from pleading the statute of limitations to any amendment the court might permit, although the amendment in fact brought in an entirely new claim. This contention was emphatically denied,70 as it would place in trial courts power to annul the limitation statutes. Black could not be made white because some judge saw fit to call it such. The finality of the court's adjudication was held to be applicable only when the object of the original and amended claim was the same. But this left a problem how it was to be determined when the object was the same, and attempts at its solution brought out varied concepts of a cause of action, although that term was not used in the statute.

In a suit on a fire insurance policy, after the running of the contract period of limitations, and over the objection of defendant, the trial court permitted an amendment of the declaration substituting parties plaintiff. Affirming this holding, the supreme court said:

Had some new claim or cause of action been introduced into the suit by the amendment, against which the statute of limitations had run . . . . the position of appellant would be clearly right.71

The opinion as a whole shows unmistakably that the court was trying to carry out the thought of the statute that the action should be sustained for the claim intended to be brought without letting in any new

69 Italics added.


71 Thomas v. Fame Ins. Co., 108 Ill. 91, 100 (1883).
claim. "Claim" and "cause of action" were used synonymously by the court, and the two statements, original and amended, were considered as reflections or evidence of the same thing. Emphasis was placed on the thing reflected rather than upon the reflecting devices. This emphasis seems to have shifted in subsequent cases although they have cited this precedent.

In Fish v. Farwell, a declaration consisting of the common counts only was filed within the limitation period. After the running of the statute, amended counts were filed declaring upon the breach of an executory contract, and to them defendant pleaded the statute of limitations. To plaintiff's argument that the allowance of the amendment by the trial court conclusively determined the identity of the causes of action in the declaration and amended counts, the court replied:

Counsel for appellants evidently ignore the distinction between the identity of the action and the identity of the cause of action (citing Thomas v. Fame Ins. Co., 108 Ill. 91). . . . There is a radical difference between the Massachusetts statute and that of this state. The statute of that State provides that the adjudication of the court allowing the amendment shall be conclusive evidence of the identity of the cause of action whereas our statute is that such adjudication shall be conclusive evidence of the identity of the action. The fact that this State borrowed the statute from Massachusetts and used identical language found in it, except that the word "action" was substituted for the words "cause of action" affords strong proof that the change was purposely made, in order to carry out a fixed legislative intent. The marked distinction that exists between the word "suit," "cause," or "action," and the words "cause of action" is sharply presented in Koon v. Nichols, 85 Ill. 155, where a different statute from that here involved was under consideration.

The court held that the "causes of action" set out in the additional counts were substantially different from the "causes of action" upon which the original declaration was based. Under the common counts the claim of necessity would be upon an executed contract, whereas the amended counts presented a claim upon an executory contract, but it does not follow that the same contract may not have been involved, and that liability may not have been based upon substantially the same operative facts, though different theories of liability were involved. Theoretically, an express contract and an implied one created different duties and different liabilities, but anyone familiar with the fictions employed in connection with the common counts knows how shadowy the line may become between executed and executory contracts. Suppose, for example, after part performance by plaintiff, a defendant wrongfully prevents further performance. The express contract is executory, and if

72 160 Ill. 236, 43 N.E. 367 (1896).
73 Id. at 249.
THE ELUSIVE CAUSE OF ACTION

relied on must be pleaded specially. But the plaintiff may recover the value of what he has done for defendant under the common counts, by rescinding the express contract. Except in legal theory it is impossible to distinguish the unexecuted express contract from the executed implied contract. The latter is a recognized legal fiction to escape the necessity of special pleading. In *Fish v. Farwell* evidence taken showed there was but one claim, arising out of a contract to manufacture samples from which defendant was to buy and a refusal of defendant to buy after plaintiff manufactured approved samples, but the court refused to consider the evidence, determining lack of identity by an examination of the pleadings only. The court criticized plaintiff for confusing the concepts "identity of cause of action" and "identity of claim," and then itself proceeded to confuse them by making its decision turn upon the statement of different "causes of action," an immaterial issue under the court's own premise.

*Fish v. Farwell* purports to follow *Thomas v. Fame Insurance Company* but the approach is different. In the *Thomas* case the original and amended pleadings were brought into focus, and a single intended action was seen. In the *Fish* case the court either looked first through the original pleading and then through the amended one, or looked through both at the same time without having them in focus, and two intended actions were seen. Naturally, when there is no attempt to see if the pleadings will focus, each will establish its own boundary of what is seen and thus we get what are called different causes of action. As there is no attempt to ascertain the true facts, the formal statements taking their place, we find that Phillips' general concept of a cause of action is here being used to produce artificial results. The decision injects into the statute on amendments an element not there mentioned, namely some concept of a cause of action which the court could not keep constant because it did not belong there. After the *Fish* case we find the Illinois courts often inquiring whether an amendment introduces a new cause of action, instead of inquiring whether a new action is brought. Within the limitation period they seem to have little difficulty in getting the pleadings in focus, but if the amended pleading is filed after the limitation period the range of focus is lost.

This is particularly noticeable when the court is dealing with amendments of declarations which fail to state a cause of action. As we have noticed before, a judgment sustaining a demurrer on the ground that no cause of action is stated in modern times almost always is accompanied

74 Approving this course, Heffron v. Roch. German Ins. Co., 220 Ill. 514, 520 (1906).
with a leave to amend. It makes no difference how deficient the declara-
tion may be, whether the deficiency consist in vagueness of description
of a vital element or whether it consist in a complete omission of it,
amendments within the limitation period are almost a matter of course.
The cause of action stated for the first time in the amendment is not
looked upon as a new and different cause of action from that attempted to
be set up in the original declaration, although a cause and a no-cause can
never be the same thing, and although the statute on amendments is
construed not to permit a new “cause of action” to be stated. The cause
of action, for the purpose at hand, is not found in the pleadings, except
as they reflect what lies behind them. Imperfections in the reflecting in-
struments are disregarded, however glaring they may be. The court is
interested only in good faith in carrying out an original purpose. But
make the same kind of an amendment after the limitation period, and
instantly you get a new concept of a cause of action, with a tendency to
see double. The “no-cause of action” of the original declaration attaches
not only to the statement but to what lies beyond, and they become one.
Regardless of what may be the actual situation, common law pleading
tests are applied. If the declaration would be held deficient upon a motion
in arrest of judgment as well as upon a demurrer, there simply is no cause
of action. The confusion of “cause of action” with “action” then leads
to the conclusion that no action has been started, for an action based on
nothing is no action. It follows that the amended declaration which states
a cause of action for the first time states a new cause of action, and hence
starts a new action, which is barred by the statute of limitations.75

The supreme court admits that the above reasoning is not necessitated
by the statute of limitations, but is the result of rules of common law
pleading. In a case in the Municipal Court of Chicago, where informal
statements of claim have replaced declarations, it was held that the
decisions on amendments of common law pleadings after the running of
the statute of limitations had no application, and that the court would
look behind the form and defects of the statements, treating them merely
as reflective instruments.76 Apparently the assumption is made that in
dealing with common law pleadings a cause of action must be tested by

75 Eylenfeldt v. Ill. Steel Co., 165 Ill. 185, 189, 46 N.E. 266, 267 (1897); I. C. R. R. Co. v.
Campbell, 170 Ill. 163, 166, 49 N.E. 314, 315 (1897); Doyle v. City of Sycamore, 193 Ill. 501,
505, 61 N.E. 1117, 1119 (1901); Mackey v. Northern Milling Co., 210 Ill. 137, 121, 71 N.E.
448, 450 (1904); Bahr v. National Safe Dep. Co., 234 Ill. 101, 163, 84 N.E. 717, 718 (1908);
Walters v. City of Ottawa, 240 Ill. 259, 264, 88 N.E. 651, 653 (1909); Prouty v. City of Chi-
cago, 250 Ill. 222, 226, 95 N.E. 147, 149 (1911).
common law pleading rules, and that these rules give only the test of the demurrer and the motion in arrest of judgment. The court fails to see that there may be other common law pleading tests, and that different problems in that system have required different tests.

The different tests applied to a declaration upon demurrer and on a motion in arrest of judgment, and the assigned reasons for them, are well known. When issues are yet to be formed the plaintiff must not only tender an issue on every essential element of liability but he must state the issuable facts in a clear and unambiguous manner. If he fails to do the latter the construction is against him, for the demurrer is a device for compelling clear statements. If the defendant does not see fit to demur but takes issue upon an obscure form of statement, it is presumed that he saw through the obscurity. It is also presumed that the trial judge saw through it and submitted the proper issues to the jury. After verdict the presumptions are in favor of the pleading and a motion to arrest the judgment will be denied. If, however, the declaration entirely omits a vital element and fails to tender an issue upon it in any form, obscurely or otherwise, there is no presumption that an issue was formed on it or that it was tried, and a motion to arrest the judgment is granted. In both of these tests the court looks only at the elements set out in the declaration, for it is concerned only with the formation and trial of issues. The problem of ascertaining the true nature of plaintiff’s claim, except as it is presented and tried, is not before the court.

But the demurrer-motion in arrest tests of a cause of action have led to a nice distinction in determining whether the statute of limitations bars a liability set up in an amended declaration. It is said that if an original declaration touches upon all the elements of a liability, however vaguely, and although it would be bad upon a general demurrer, it is merely a defective statement of a good cause of action which will be corrected by a clarifying amendment, and the amendment relates back to the time of filing the original. If, however, the original declaration, although perfectly clear in all other respects, omits a single vital element so that an issue is not tendered upon it, it is not a defective statement of a good cause of action but the statement of a defective cause of action, and a defective cause of action cannot be converted into a good cause of action after the running of the statute of limitations. Both types of pleadings


78 See notes 75, 77 supra.
present defective statements which may be treated differently for purposes of demurrer and motion in arrest of judgment, but it is difficult to see how these differences shed any light whatever on the character of the action intended to be brought. In the opinions making these distinctions the courts seem to have lost perspective.

Presumably for some purpose, and probably for the purpose of obtaining a more satisfactory application of the amendment statute than the courts had given it, the Illinois legislature in 1929 added the following paragraph to it:

Any amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended, and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted, or the defense interposed in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact, or some other matter or matters, which are necessary conditions precedent to the right of recovery or defense asserted when such conditions precedent have in fact been performed.  

Following this amendment a case arose under the wrongful death statute in which the original declaration set up facts which, strictly construed, showed plaintiff's intestate to have been guilty of contributory negligence. The statute, construed as a statute of limited liability, required an action for wrongful death to be brought within one year after the death. After the expiration of a year following death the declaration was amended to allege that plaintiff's intestate was in the exercise of due care. The supreme court, citing the decisions before 1929, held that this amendment would not relate back under the amendment of 1929 and that a new cause of action had been stated, which was the equivalent of starting an action after the expiration of the year permitted by the statute. The court pointed out, however, that in this case there was not a mere omission of a vital element in the original declaration but an affirmative allegation showing no liability, a distinction which was evidently made to avoid the language of the amendment: "even though the original pleading was defective in that it failed to allege the performance of some act, etc." A construction which confines the meaning of a statute to an "even though" clause seems questionable. The illustration was probably

79 Cahill's Ill. Rev. Stats. 1929, c. 110, § 39.
aimed at a larger class of cases than that to which it was confined by this decision, but the court could not see that a cause of action stated in an amendment after the limitation period was "substantially the same" as a no-cause of action stated in the original declaration, even with the illustrations of identity given in the amendment. This was due, of course, to a concept of a cause of action as something in the pleading rather than something which lies behind the pleading, confusing the evidence with the thing evidenced.

The statute on amendments was further changed by the Civil Practice Act of 1933. That amendment continues the paragraph added in 1929, but makes an important alteration in the original paragraph, authorizing a change by amendment of the "cause of action" instead of in the "form of action," as formerly. But as this change in the cause of action is qualified by the provision that it is to enable a plaintiff to sustain the claim for which it was intended to be brought, it is evident that it will not permit the introduction of an entirely new claim. This limitation gives the "cause of action" a particular meaning for the purposes of the statute on amendments of pleadings. It is not the "claim," but a description of the claim. As there are two descriptions, one in the original and one in the amended pleading, there are two causes of action, assuming each statement contains all the elements of a liability. If either statement is deficient there may be but one cause of action. But for the purpose of determining whether an amendment will relate back to the time of the filing of the original, the second paragraph of the statute requires the court to look through both pleadings to ascertain whether behind them lies a common transaction or occurrence, which is to be distinguished from the cause of action. The fact that the newer form of the statute is a part of a new system of pleading created by the Civil Practice Act offers some hope of escape from the traditional mode of reading "cause of action" into the statutes of limitations as a substitute for "actions."

CONCLUSION

There has been no attempt in the foregoing discussion to exhaust the situations in which the term "cause of action" is used, nor to give a complete treatment of the use of the term in any one situation. Instead my purpose has been to discuss a few of the uses with sufficient completeness to show the futility of attempting a single comprehensive definition or description which will meet all problems. Although it might be desirable to limit the use of this term to one meaning, creating a new termi-

nology to take care of the other usages, there is no general authority by which this can be done, and courts are reluctant to adopt a new terminology of their own volition. A better course would seem to be to classify the uses, attempting to bring into the foreground the nature of the problem in each class, and its relation to problems in other classes, so as to question the advisability of extending a use in one situation to another unless the problems are similar in kind. With such a process courts are familiar, and it may not be so difficult to obtain its more general adoption when the courts once realize that there are different meanings.

Even by such a process it may not be possible to obtain a universal meaning for a cause of action within a single class but the probabilities of approximating it are more favorable the narrower the lines are drawn. Differences of opinion as to policy there will be, but when attention is focused upon a problem and the need for a consistent policy there will be less vacillation and fumbling around. If language is construed with reference to policies, instead of shaping policies to meet preconceived meanings of language, and if in choosing a policy for one procedural situation care is exercised to maintain perspective on other situations and the policies they may invoke, the cause of action may not be so elusive. Until their values are disproved old policies, as revealed in the precedents, should not lightly be cast aside but there must be discrimination in reading the precedents. In a desire to be up-to-date and forward looking we must not forget to be practical. In determining the character and scope of a cause of action for a particular situation our pragmatism should not be so ephemeral as to leave us only to speculation to ascertain where we are going. The problem of legislative draftsmen is not dissimilar from that of courts. They, too, should recognize that there is no single meaning for the term "cause of action," and should indicate a particular meaning for each situation dealt with instead of shifting the burden of interpretation to the courts.