Procedure—Federal Rules of Civil Procedure—Relation Back of Amendments—[Federal].—The plaintiff sued the defendant corporation for breach of contract. After the statute of limitations had barred an action for conversion under the Michigan pledgor-pledgee statute,[1] the plaintiff moved to amend his previously filed complaint to state a claim under this statute as an alternative ground for relief. The defendant objected that the amendment stated a new cause of action which was barred by the statute of limitations. *Held*, under Rule 15 (c) of the Federal Rules of Civil Procedure,[2] which provides that "whenever the claim .... asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth .... in the original pleading, the amendment relates back to the date of the original pleading," an amendment will be permitted where the factual situation remains the same although a different theory of recovery is presented. Motion to amend allowed. *White v. Holland Furnace Co.*[3]

Prior to the adoption of the new rules of procedure, the federal courts had become increasingly liberal in permitting amendments and their relation back to the date of the original complaint. In the early federal cases, amendments were allowed in but few instances. While an amendment could be made to establish the jurisdiction of the court,[4] the plaintiff could not amend to change the theory of his complaint from tort to contract,[5] or from common law to statute.[6] In later decisions, however, such amendments were permitted. The statute of limitations was then held not to bar the relation back of an amendment "when a defendant has had notice from the beginning that the plaintiff .... is trying to enforce a claim against it because of specified conduct. . . . ."[7] The courts, thereafter, were increasingly concerned with the question whether the original complaint gave notice of the claim asserted in the amendment;[8] and, to that extent, the later decisions represented a shift toward notice pleading.[9] An amendment, however, which stated a new and additional claim for

[1] Mich. Comp. Laws (1929) §§ 9561, 9562.

[2] 28 U.S.C.A. following § 723 (c) (Supp. 1939).

[3] 31 F. Supp. 32 (Ohio 1939).

[4] For amendments showing diversity of citizenship, see Maddox v. Thorn, 60 Fed. 217 (C.C.A. 5th 1894); Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519 (C.C.A. 6th 1896). For an amendment alleging amount involved so as to give the court jurisdiction, see Davis v. Kansas City, S. & M. R. Co., 32 Fed. 863 (C.C. Tenn. 1887).

[5] Haas Brothers v. Hamburg-Bremen Fire Ins. Co., 181 Fed. 916 (C.C.A. 9th 1910).

[6] Union Pacific R. Co. v. Wyler, 158 U.S. 285 (1895). See also Boston & M. R. Co. v. Hurd, 108 Fed. 116 (C.C.A. 1st 1901) (denying amendment of a claim for conscious suffering to state a claim for wrongful death); Hall v. Louisville & N. R. Co., 157 Fed. 464 (C. C. Fla. 1907) (refusing amendment of a claim under a state statute to state a claim under the Federal Employers' Liability Act).

[7] New York Central & H. R. R. Co. v. Kinney, 260 U.S. 340, 346 (1922); United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933); United States v. Powell, 93 F. (2d) 788 (C.C.A. 4th 1938); cf. Missouri, K. & T. R. Co. v. Wulf, 226 U.S. 570 (1913); Seaboard Air Line R. Co. v. Renn, 241 U.S. 290 (1916); Friederichsen v. Renard, 247 U.S. 207 (1917).

[8] See United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933); United States v. Powell, 93 F. (2d) 788 (C.C.A. 4th 1938); cf. Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932). But cf. N. & G. Taylor Co. v. Anderson, 275 U.S. 431 (1928).

[9] For a discussion of notice pleading, see First Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law 14 (1851); Whittier, Notice Pleading, 31 Harv. L. Rev. 501 (1918).

relief, and not merely an alternative theory of recovery, was not permitted because it stated a "new cause of action."[10]

The drafters of the new federal rules carefully avoided using the phrase "cause of action"[11] in order to permit amendments setting forth new and additional claims for relief,[12] as well as changes in theory.[13] The limitation placed on the right to state a new and additional claim is that it must have arisen out of the group of facts constituting the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original complaint. Since the concepts "conduct," "transaction," or "occurrence" are extremely flexible, the new rules, in effect, leave the court with broad discretion in deciding whether a particular amendment should be allowed to relate back. In view of the fact that Rule 15 (c) makes an exception to statutes of limitations, the court might be guided in making its decisions by the purpose of these statutes. It seems the primary purpose of statutes of limitations is to bar actions when the lapse of time is regarded as having destroyed the sources of evidence.[14] Therefore, if an amendment raises issues that cannot be litigated without resorting to sources of evidence not required by the original complaint, the court should refuse to allow the amendment.[15]

The courts have been reluctant to give effect to the new federal rule permitting the relation back of amendments. In *Whitham Construction Co. v. Remer*,[16] the court denied an amendment which sought to add claims for personal injury and funeral expenses to the original claim for wrongful death. Although these new claims could be said to have arisen out of the same "conduct" or "occurrence," the court held that they stated a "new cause of action." The decision would be justified under the test suggested in the preceding paragraph only if the amendment compelled the parties to resort to new sources of evidence to litigate the additional claims.

Although the result in the instant case is consistent with Rule 15 (c), the court's reasoning seems open to question. Instead of deciding the case by determining whether the new claim arose out of the same "conduct, transaction, or occurrence," the court based its opinion on the identity of the fact allegations in the original and amended complaint, and on the nature of the amended claim as involving merely an alternative theory and not a new and additional claim for relief. Moreover, the court's interpretation of Rule 15 (c) as expanding the concept of a "cause of action" so that it is co-extensive with "conduct, transaction, or occurrence" gives rise to problems of

[10] Baltimore & O. S. R. Co. v. Carroll, 280 U.S. 491 (1930); Seaboard Air Line R. Co. v. Renn, 241 U.S. 290 (1916); Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932). But cf. United States Shipping Board Emergency Fleet Co. v. Greenwald, 16 F. (2d) 948 (C.C.A. 2d 1927).

[11] For a discussion of the various definitions of a "cause of action," see Clark, Code Pleading 75–87 (1928).

[12] See New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio, 13 U. of Cin. L. Rev. 1, 84 (1939); cf. the interpretation by the late Professor Hinton of an Illinois Statute (Ill. Rev. Stat. (1937) c. 110, § 170 (2)) similar to Rule 15 (c), Hinton, Illinois Civil Practice Act 65 (1934). See also 1 Moore, Federal Practice 811 (1938). But cf. Whitham Construction Co. v. Remer, 105 F. (2d) 371 (C.C.A. 10th 1939).

[13] American Bar Association, Institute on Federal Rules 63 (1938).

[14] Wood, Limitation of Action § 5 (4th ed. 1916).

[15] See Ronald Press Co. v. Shea, 27 F. Supp. 857 (N.Y. 1939).

[16] 105 F. (2d) 371 (C.C.A. 10th 1939).

res judicata. If the plaintiff sues and alleges only one of several possible claims arising from a given transaction, and if the transaction constitutes the cause of action, then under the doctrine of res judicata, judgment on the pleaded claim bars suit on any other claim arising from the same transaction. This, in effect, would require a plaintiff to join in one suit all claims based on a particular transaction—a result which the drafters of the new rules apparently did not intend.[17]

Public Utility Holding Company Act—Registration of Bond Issue—Effects of Fixed Charge Financing—[Securities and Exchange Commission].—Consumers Power Company, a Maine corporation engaged in the production and distribution of electricity and gas in Michigan, and a wholly owned subsidiary of Commonwealth & Southern Corporation, filed a declaration under the Public Utility Holding Company Act of 1935[1] in regard to the proposed issuance and sale of $28,594,000 first mortgage 3¼ per cent 30-year bonds: $18,594,000 of which, together with treasury funds, were to be employed in retiring at 104½ a like amount of 3¾ per cent first mortgage bonds due 1965; the $10,000,000 remainder were to reimburse the company treasury for certain property additions.[2] The Securities and Exchange Commission permitted the issuance of the portion to be used for refunding, but, with two dissents,[3] refused to permit the declaration to become effective as to the $10,000,000 balance,[4] suggest-

[17] Rule 13 (a) compels the defendant to set up in a counterclaim every claim he has arising out of the transaction that is the subject matter of the plaintiff's claim, or be precluded from suing on it in any other proceeding. Since there is no comparable rule governing the plaintiff's joinder of claims, a desirable rule might be to require the plaintiff, as well as the defendant, to settle all claims arising out of the same transaction in one proceeding. See Jones v. St. Paul Fire & Marine Ins. Co., 108 F. (2d) 123 (C.C.A. 5th 1939).

[1] 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (Supp. 1939). The registration provisions of section 15 were held constitutional in Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938). See Buchanan, The Public Utility Holding Company Problem, 25 Cal. L. Rev. 517 (1937); Meck and Cary, Regulation of Corporate Finance and Management under the Public Utility Holding Company Act of 1935, 52 Harv. L. Rev. 216 (1938).

[2] The commission permitted to become effective another portion of the declaration which requested authority to issue 125,000 shares of no-par common stock at $28.25 per share. The stock was found conformable to section 7 (c) (1) (A) of the holding company act.

Simultaneously, the application of the Commonwealth & Southern Corporation, the holder of all the 1,686,716 shares of stock outstanding, to purchase these shares was dismissed on the ground that under the Rule U-9C-3, C. C. H. Sec. Act Serv. 2115, SEC authorization for a holding company to purchase these shares was unnecessary.

To facilitate a decision on the effectiveness of the registration statements, the commission accepted the offer of the two principal underwriters, Morgan, Stanley & Co. and Bonbright & Co., that they should receive no fees should they be found to be affiliates of the holding company within the meaning of Rule U-12F-2, C. C. H. Sec. Act Serv. 2143. Commissioners Henderson and Eicher dissented in part on the grounds that the issue of the stock failed to comply with the standards of section 7 (d) (6) of the act, and that the acquisition was not exempt under section 10.

[3] Commissioners Mathews and Healy.

[4] The commission granted the company a rehearing, Holding Co. Act Rel. 1854, at 8, (1939), but later, at the firm's request, granted permission to withdraw the declaration as to the $10,000,000 issue, Holding Co. Act. Rel. 1901 (1940). On Sept. 30, 1939, the com-