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A STUDY OF THE STATUTES WHICH CONTAIN
THE TERM "SUBJECT OF THE ACTION"
AND WHICH RELATE TO JOINDER
OF ACTIONS AND PLAINTIFFS
AND TO COUNTERCLAIMS

CARL C. WHEATON*

On various occasions I have spoken to lawyers in what are ordina-
 rally called common law states concerning pleading statutes. Almost
without exception they have said they felt fortunate that they
were not practicing or acting as judges in a code state. Whether
or not their attitude was a wise one I shall not attempt to say,
but when one reads the material, including judicial decisions, which
has been written concerning the subjects covered by this study,
he cannot wonder at the tenacity with which some lawyers in non-
 code states cling to their procedural system.

I shall confine this article almost entirely to a discussion of joinder
of actions and counterclaims which are permitted under what is so
often called the "transaction clause" of the joinder of actions and
counterclaim statutes, and to joinder of plaintiffs who have an
interest in the same subject of the action and in the relief requested.

I wish first to present the various types of statutes relating to
these subjects, then to state with thoroughness the non-statutory
law dealing therewith, following that to analyze those court decisions
and unofficial writings, and finally, with much humility, but with
conviction, to state my personal views as to what the proper results
should be.

Knowing that I am treading on ground which I should, perhaps,
if wiser, leave unexplored, I shall now proceed to the very substance
of the discussion.

The Statutes

We find the following types of statutes. First, then, as to those
dealing with joinder of actions:

"The plaintiff may unite in the same petition several causes
of action, whether they be such as have been heretofore denomi-
nated legal or equitable, or both, where they all arise out of:
First, the same transaction or transactions connected with the
same subject of action **".1

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1Mo. Rev. Stat. (1929) § 765. Statutes, almost, or quite, similar are Conn.
"SUBJECT OF ACTION"

This is the most prevalent statute. One should notice with care the differences appearing in those which follow this one.

"The plaintiff may unite several causes of action in the same complaint where they all arise out of:*****

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, *****."

Here there is no express statement that the actions joined may be legal or equitable or both.

"All actions ex delicto may be joined in the same suit, and may be joined with actions ex contractu, arising out of the same transaction or relating to the same subject matter, *****."

"The plaintiff may unite several causes of action in the same complaint when they all arise out of *****

Eighth. The same transaction. *****.

The change in this enactment is important for the subject of action is not mentioned.

In addition to these code provisions one should be cognizant of certain others so that he may know of the different developments in this general field. Especially is it important to be familiar with the Kentucky, New Jersey, and English rules, for from them, shadows, let us hope, of coming events, one gets a splendid idea of the possibilities of joinder of actions. Knowledge of them may give us an inspiration to aid in throwing off the shackles of early code provisions still extremely virile and, apparently, confusing. I give them in full as far as they are valuable to this discussion.

"A pleading may contain statements of as many causes of action, legal or equitable, ***** as there may be grounds for in behalf of the pleader."

"Subject to rules, the plaintiff may join any causes of action."


4Ala. Code (1928) § 9467.


(a) In actions for the recovery of lands, no cause of action shall be joined (without leave of court) except for mesne profits, or damages for breach of any contract under which the property, or any part thereof, was held or for injury to the property.
"Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together the court or judge may order separate trials of any of such causes of action to be had, or may make such other order, as may be necessary or expedient for the separate disposal thereof."

And then let us peruse other variations of this in the United States. In Kansas "the plaintiff may unite several causes of action in the same petition, whether they be such as have been heretofore denominated legal or equitable, or both, but the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens."

In Colorado this result is reached as to "all actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for injuries to property, person, or character, or for any two or more of these causes."

In Florida "causes of action of whatever kind by and against the same parties in the same right may be joined in the same suit, except that replevin and ejectment shall not be joined together, nor with other causes of action."

(b) Claims by a trustee in bankruptcy, as such, must not, except by leave of court, be joined with any claim by him in any other capacity.

(c) Claims by or against any executor or administrator, as such, must not (without leave of court) be joined with claims by or against him personally, unless the latter claims arose with reference to the estate of his testator or intestate.

(d) Claims by plaintiffs jointly, may be joined with claims by them, or any of them, separately against the same defendant.

(e) Claims by or against husband and wife may be joined with claims by or against either of them separately.

(f) The court may strike out causes of action which can not be conveniently tried with other causes of action joined in the same suit.

Rules of Sup. Ct. Eng. Order XVIII, Rule 1, (1896). Rules 2, 3, 4, 5, 6, and 8 and 9 taken together are substantially like subdivisions a, b, e, c, d, and f respectively of Rule 14 under the New Jersey Practice Act (1912), though rule 2 contains a provision for an order for delivery of the property to the plaintiff involved in a foreclosure action or to the defendant in a redemption procedure which wording is not found in the New Jersey law. It was added by Rules of December, 1885. Rule 8 provides that the defendant may apply to the court to confine the action to causes which can be conveniently disposed of together. This refinement is not found in the New Jersey law.

KAN. REV. STAT. ANN. (1923) § 60-601. Wisconsin has practically the same statute, except that it does not make the exception as to liens, and the causes joined must not require different places of trial. WIS. STAT. (1929) c. 263, § 4.

COLO. CODE OF CIV. PROC. (1921) § 76.

FLA. COMP. LAWS (1927) § 4225.
In Iowa "causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action on all may be brought and tried in that county, may be joined in the same petition."\(^{12}\)

In Michigan, "the plaintiff may join in one action, at law or in equity, as many causes of action as he may have against defendant, but legal and equitable causes shall not be joined; ** *** **". It is further provided that multiple plaintiffs and defendants must have joint interest, and the court may order separate trials.\(^{13}\)

It is in order now to investigate the terms of the counterclaim statutes

"The counterclaim must be an existing one in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and must be a cause of action arising out of the contract or transaction pleaded in the complaint, or connected with the subject of the action."\(^{14}\)

This is the greatly favored enactment. Mark that in this instance the counterclaim may be by one of many defendants against one of several plaintiffs, and may arise out of either the contract or the transaction pleaded by the plaintiff.

Here follow other code provisions patterned along this line, yet with distinct differences.

In Oregon and Alaska (in the former state, but not in the latter, reference is made only to law actions) the counterclaim must be one existing in favor of the not a defendant, but may be against a plaintiff.\(^{15}\) But in Montana and New York the counterclaim may be against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants.\(^{16}\)

The act in Kentucky states that a defendant may counterclaim a cause which he has against a plaintiff or against him and another.\(^{17}\)

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\(^{12}\)IOWA CODE (1931) § 10960. For another statute almost as broad, see 4a REV. CODE OF PRAC. (Dart. 1932) Arts. 148-150.

\(^{13}\)MICH. COMP. LAWS (1929) c. 266, § 13962.

\(^{14}\)ARIZ. REV. CODE (1928) § 3785; IOWA CODE (1931) § 11151; KAN. REV. STAT. ANN. (1923) § 60-711; MINN. STAT. (Mason, 1927) § 9254; MO. REV. STAT. (1929) § 777; NEB. COMP. STAT. (1929) § 20-813; N. M. ANN. STAT. (1929) c. 105, § 417; N. C. CODE (1931) § 521; N. D. COMP. LAWS ANN. (1913) § 7449; OKLA. COMP. STAT. (1921) § 274; S. C. CODE (1932) § 468; S. D. COMP. LAWS (1929) § 2354; WASH. COMP. STAT. (Remington, 1922) § 265; WIS. STAT. (1929) c. 263, § 14; WYO. REV. STAT. (1931) § 89-106.

\(^{15}\)ALASKA COMP. LAWS (1913) § 896; ORE. LAWS (1930) § 1-611.

\(^{16}\)MONT. REV. CODE (1921) § 9138; N. Y. C. P. ACT (1920) § 266.

\(^{17}\)KY. CIV. PRAC. CODE (Carroll, 1927) § 96 (1).
Ohio provides that the counterclaim may be an action existing in favor of a defendant against a plaintiff or another defendant, or both.18

We next turn to a set of statutes which appears to be basically different from the preceding statutes, for these enactments now to be considered all provide that the counterclaim must arise out of the transaction, not the contract or transaction set forth in the plaintiff's original pleading.19 This difference in wording has, however, ordinarily not seemed important to the courts.

It should further be observed as to these acts last mentioned that in Nevada20 the counterclaim must be in favor of the defendant and against a plaintiff, and in Colorado21 the claim shall be one existing in favor of the defendant or plaintiff and against a plaintiff or defendant.

In Indiana "a counterclaim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages".22 The Texas act, though worded a little differently, is to the same effect.23 This is likewise true in Tennessee,24 the peculiar words being that the defendant may plead by way of cross action any matter arising out of the plaintiff's "demand".

Florida has an unusual statute which deals only with equity cases. It provides that the counterclaim must be pleaded, and defines it as a claim in favor of the defendant arising out of the transaction which is the subject matter of the suit (note that transaction and subject matter of the suit seem to be treated as identical) against the plaintiff.25

This closes the list of acts which definitely suggest that there must be some connection between the counterclaim and the contract, transaction, cause of action, or subject of the action pleaded by the plaintiff with but one exception which, because of its hybrid nature, will be mentioned later. What other paths have been opened up in counterclaim statutes will next claim our attention.

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24Tenn. Code (1932) § 8768 (2).
25Fla. Dig. Laws (Bush's, 1872) § 101.
Arkansas has opened the gates almost full width to defendants in allowing a counterclaim to be "any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them".26

New Jersey varies the Arkansas rule by confining the counterclaim to causes of action held by the defendant, but by allowing the defendant to issue a summons against any third party necessary to be brought in.27

Connecticut also allows the counterclaim to be of any type, but it must be in favor of the defendant, and against the plaintiff.28

The hybrid statute which has been previously mentioned is that of Louisiana. It declares that usually the reconvention (counterclaim29) must be a demand of the defendant against the plaintiff which is necessarily connected with and identical to the plaintiff's action, but if the plaintiff resides out of the state, or in the state, but in a different parish from the defendant, the demand of the defendant may be any cause even though it is not necessarily connected with or incidental to the main cause of action.30 Here we find a combination of the type of statute demanding some connection between the main cause of action and counterclaim and the style of legislation with no such requirement.

The last group of statutes to be presented is that relating to the joinder of plaintiffs. Here there is a slavish following of the work of prior legislatures which is indeed mystifying, when one considers the variety of interpretations that has been given the almost, but not quite, universal statute, which is here quoted.

"All persons having an interest in the subject of the action, and in obtaining the relief ("judgment" in Connecticut) demanded, may be joined as plaintiffs except as otherwise provided."31

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There are four other laws relating to joinder of plaintiffs, those of California, New Jersey, New York, and Washington which seem to have been born of a broader vision than those just delineated, and which appear to have back of them a purpose to be more definite and clear. Their attempt is surely not a complete triumph, but how successful they have been in attaining breadth and clarity can only be ascertained by reading the enactments, so I present them here as examples of the results of a new school of procedural philosophy.

“All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action,” and provision is made for separate trials, if, upon motion of any party, it appears that the joinder would embarrass or delay the trial.\(^2\)

“Subject to rules, all persons claiming an interest in the subject of the action and in obtaining the judgment demanded either jointly, severally or in the alternative, may join as plaintiffs, except as otherwise provided. And persons interested in separate causes of action may join if the causes have a common question of law or fact and arose out of the same transaction or series of transactions.”\(^3\)

“All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise,” and the same provision is then made as in the California Code for a separation of the parties and their actions, if their joinder would embarrass or delay the trial.\(^4\)

To complete the story of these statutes relating to the joinder of plaintiffs one must not fail to notice that in Indiana\(^5\) the law

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\(^2\)CAL. CODE CIV. PROC. (Deering, 1931) § 378.


\(^5\)IND. ANN. STAT. (Burns 1926) § 270.
which is of the usual tenor in most respects is unparalleled in its making joinder imperative whenever a joinder is possible.

INTERPRETATION OF THE STATUTES BY THE AUTHORITIES

In this division of our study we must be prepared not to expect any consensus of opinion on most of the vitally important questions involved. If we hunt long enough, we will find an opinion in favor of almost any view. Again, we must not anticipate finding numerous well reasoned judicial decisions. There is a surprising paucity of them, but now and then we will find a real gem. With this warning, let us commence our investigation.

One of the basic rules of interpretation of statutes is that the legislative intent should be determined. This has been the method of attack by many courts and by other writers. This interpretive test is applied to the first parts of the statutes under discussion, which portion of the acts presents the question as to whether or not the joiners and pleading of counterclaims are permissive or mandatory. The word "may" is used in all but a few of the laws now under consideration, and the courts have thought that this indicates permissive, rather than mandatory, statutes.

Though the same standard of the lawmakers' intent has been applied to the explanation of the other parts of the enactments under discussion, it is enunciated in a variety of formulas. That is, instead of stating that one should look to the legislature's intent, many cases explain, rather, what that intent is.

The broadest and least involved assertion of this type is that equity should be looked to in interpreting these statutes. Ordinarily this conclusion is not supported by cited authorities. The most

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38IND. ANN. STAT. (Burns, 1926), which says proper plaintiffs must join. 39Bruce v. Kelly, 5 Hun 229 (1875); Gregory v. Hobbs, 93 N. C. 1 (1885); John L. Roper Lumber Co. v. Wallace, 93 N. C. 22 (1885).
38Heggie v. Hill, 95 N. C. 303 (1886); CLARK, CODE PLEADING (1928) p. 252, referring to FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS (1848) 124; KEIGWIN, CASES IN CODE PLEADING (1926) p. 324; POMEROY, CODE REMEDIES (5th ed. 1929) § 113; TILLINGHAST AND SHEARMAN, PRACTICE PLEADING, AND FORMS (1870) pp. 471-473; WORKS, PRACTICE, PLEADING, AND FORMS (1882) § 97. In effect, SUTHERLAND, CODE PLEADING (1910-1917) § 17, has the same idea when he says that only those who could join in equity can join under the code, as did the court in Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dept. 1923). Another writer in (1924) 2 N. Y. L. REV. at p. 369 stated that the language "upon claims arising out of the same transaction connected with the same subject of the action" was no innovation in pleading, but was used in equity pleading long before its introduction into the codes.
effective authority given for this result is that offered by Dean Clark29 when he states that the framers of the original New York Code said that in general they meant to apply equity procedure to all actions under the code. That is truly going back to the origin of the acts.

Another very valuable indication of the purpose of the legislatures as to how these statutes should be defined is found in many of the acts, for they state specifically that, for instance, causes both equitable and legal may be joined. In other cases the language of the statutes does not make this direct declaration, but suggests no distinction between the two types of cases. This legislation has often been interpreted to cover legal and equitable causes.30

The other authorities, which, in effect, arrive at the same conclusion, do it by inference. They state equitable principles which had been laid down previously as the correct test for the proper joinder of causes or plaintiffs, or for the pleading of counterclaims. One phrase which is used is that the terms of the statutes are complied with if one connected story can be told.40 Professor Keigwin appears to favor this test,41 and quotes Story as a supporting authority. Much the same idea is embodied in the wordings “one course of dealing,”42 and “one connected interest centering on the point at issue in the cause or one common point of litigation”.43

A different application of equitable principles to the problem is made by some authorities who apply the standard of avoiding a multiplicity of suits.48 The same purpose is affirmed in the thought

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29 See supra note 38.
40 Bedsole v. Monroe, 40 N. C. (5 Ired. Eq. Rep.) 313 (1848); Young v. Young, 81 N. C. 91 (1879); Heggie v. Hill, 95 N. C. 303 (1886).
41 Keigwin, Cases in Code Pleading (1926) pp. 437 et seq.
42 Story, Equity Pleading (10th ed. 1892) § 272.
45 Story and Isham Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671 (1893); Excelsior Clay Works v. DeCamp, 40 Ind. App. 26, 80 N. E. 981 (1907); Mul-
that the policy of the courts of equity is to dispose of the whole subject of a controversy in one proceeding. 48

The important principle that these laws are to be interpreted in the light of equity jurisprudence seems settled, though, as usual, there are scattered opinions the other way, which will appear as we proceed.

Our next task is to determine just what explanation has been made of the statutes involved in this discussion, and especially to note the extent to which equitable principles have in fact been applied in the process.

As will be recalled, both the joinder of actions and counterclaim acts use the term "transaction". The former allows a joinder if the claims "arise out of the same transaction" or transactions connected with the same subject of the action", and the latter allows one to counterclaim a cause of action "arising out of the contract" or transaction pleaded by the plaintiff."

It has been said that these statutes should not be defined, for they have been purposely made comprehensive in their terms. Sometimes this doctrine is stated in definite words like those preceding, 49 and, at others, the same conception has been suggested by expressions to the effect that the statute is properly obscure so that interpretations of its terms may be made which are most convenient and best calculated to promote the ends of justice. 50

One soon learns, however, that most writers believe the terms in these enactments should be defined. Sometimes we find clear


47In some statutes a comma follows "transaction".

48In a few statutes "contract or" is omitted.


statements that this should be done liberally, since they deal with remedies. Just how well this proposition is carried out we shall now discover.

In commencing the business of defining "transaction", may we not logically look to its derivation? All authorities say it comes from the Latin words "trans" and "agere". Translated, it means "to carry on". It is further said that "the notion of completed action strongly characterized the word in the Latin language, from which, through the Normans, we derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a juridical term to signify an agreement of parties in settlement of differences. Dig. II. i5, 'De Transactionibus'; Civil Code of France, art. 2044."

Little light do we gather from an etymological study, so let us proceed to definitions. Although one finds explanations of "transaction" in the legal dictionaries, they contain no original thought and are not, therefore, of interest to us. We shall, rather, examine the conclusions of the other non-judicial writers and the courts.

If, as some say, the word under review is a term from the common speech of men, it is worth our while to consult non-legal dictionaries for its meaning. They say that a transaction is "an affair; that which is done or in the process of being done; the doing or perform-

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65Excelsior Clay Works v. DeCamp, supra note 52.


67Anderson; Ballentine; Black; Bouvier.


70Webster; Century (in effect); Murray's New Oxford Dictionary (in effect).
ing of any affair,\textsuperscript{59} or business,\textsuperscript{60} a piece of business,\textsuperscript{61} the act of transacting or conducting any business, negotiation, management, a proceeding.'\textsuperscript{62}

It is clear that most courts do treat \textit{transaction} as a non-technical term, but we shall see as we go along that this is not the universal holding. It will be interesting to note how nearly the dictionary definitions quoted above coincide with those of lawyers.

Delving into the conceptions of lawyers on the meaning of "trans-action", we find them stating their results in both negative and affirmative terms. It has been asserted that \textit{transaction} is not synonymous with \textit{accident} or \textit{occurrence},\textsuperscript{63} or \textit{contract}, it being broader than this last mentioned term.\textsuperscript{64} Neither, it is claimed, is it synonymous with \textit{cause of action} or \textit{subject of action}, it being more extensive than these expressions, for out of it the defendant's cause of action is said to arise, and it is also to be set forth in the complaint or petition not as the cause of action but as the transaction.\textsuperscript{65} There are several direct claims that it applies to contract and tort conceptions in both the joinder of actions\textsuperscript{66} and counterclaim\textsuperscript{67} sections. A number of judicial writers take the broad stand that a \textit{transaction} includes

\textsuperscript{59}WORCESTER.
\textsuperscript{59}WEBSTER; NUTTALL.
\textsuperscript{60}NUTTALL.
\textsuperscript{61}CENTURY; MURRAY'S NEW OXFORD DICTIONARY.
\textsuperscript{62}WEBSTER; NUTTALL.
\textsuperscript{63}WEBSTER; NUTTALL.
\textsuperscript{64}WEBSTER; NUTTALL.
\textsuperscript{65}WEBSTER; NUTTALL.
\textsuperscript{66}WEBSTER; NUTTALL.
\textsuperscript{67}WEBSTER; NUTTALL.

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\textsuperscript{59}WEBSTER; NUTTALL.
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\textsuperscript{66}WEBSTER; NUTTALL.
\textsuperscript{67}WEBSTER; NUTTALL.
any occurrence between parties that may become the foundation of an action. In further explanation of this last idea, we learn that it embraces everything connected with a contract from the commencement of the negotiations and ending with the performance of the contracts, and, as to torts, it takes in all the facts and circumstances out of which the injury complained of arose. Yet narrower tendencies are found, some saying that a contract transaction only includes the proceedings resulting in an agreement, while still another has concluded that each distinct infringement of some primary right is a transaction. Dean Clark treats a transaction as the facts of an affair or dealings between parties and says it should "be limited only where, and to the extent that, expediency of trial in the particular case outweighs the desirability of settling all controversies between the litigants in the one suit." Professor Gavit has defined transaction as the "factual situation." We have ascertained what phrases are distinguished from transaction, what types of cases may be involved therein, and have obtained a general idea of the breadth of meaning of that term.

But we have not gone far enough, for there are other principles to consider. Of these, the one of prime importance is that dealing with the unity of facts essential to the existence of a single transaction. It is the logical relation of facts which determines whether they together constitute a single transaction. The facts constituting a transaction must "be a unit, one affair, or else it would not be a

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69Adams v. Bissell & Noble, 28 Barb. 382 (N. Y. 1858); Green and Myer, Missouri Practice (1879) § 817; Tiffany and Smith, New York Practice (1864) vol. 1, pp. 394–396. Panther v. McKnight, 256 Pac. 916 (Okla. 1926) and Sutherland, Code Pleading (1910–1917) § 191 seem to be this inclusive, but do not say so specifically. Deford v. Hutchinson, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257 (1891) and (1929) 2 So. Calif. Rev. p. 315 state that the contract transaction only includes the proceedings resulting in an agreement.


72bThe Code Cause of Action (1930) 30 Col. L. Rev. 802, 823 et seq.

single transaction; and yet it must be in its nature complex for it must be the origin of two or more primary rights, and of the wrongs which violate them. In order that this may be so, the facts from which the different primary rights flow must be parts of, or steps in, the transaction, and, for the same reason, the wrongful acts or omissions of the defendant must be parts of the same transaction;¹⁷⁴ the facts composing a transaction in a contract case must have been within the contemplation of the parties during their dealings with each other.¹⁷⁵

A question, both interesting and of much consequence, arises as to the importance of the time element in determining whether or not there is the necessary unity of facts to make them all part of one transaction. It is most often said that the word transaction has not a controlling time element in it,¹⁷⁶ though the inference is that, from the very nature of things, facts occurring at about the same time are more likely to have some connection with each other than those occurring at different times. In Mulcahy v. Duggan⁷⁷ the court went so far as to say that a libel of the defendant by the plaintiff on May 8, 1920 arose out of the same transaction as an assault and battery of the plaintiff by the defendant on May 17, 1920, since the latter was the result of the former. The court says it cannot follow the logic of the decision in the case of Earl v. Times-Mirror Company,⁷⁸ which holds that "a cause of action for libel on one day could not be set up as a counterclaim to a cause of action for libel arising the next day, even though the second libel was the result of the first," for in the contemplation of the law they were entirely separate. How can the connection between the libels be granted without concluding that they arise out of the same transaction, asks the writer of the Mulcahy decision?

There has also been much conflict of opinion as to whether causes of actions based upon facts occurring at approximately the same time arose out of the same transaction. This is well illustrated

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¹⁷⁵Conner v. Winton, 7 Ind. 523 (1856); Lovejoy v. Robinson, 8 Ind. 399 (1851); Cleveland, C., C & St. L. Ry. Co. v. Partlow, 70 Ind. App. 616, 123 N. E. 838 (1919); Krause v. Greenfield, 61 Ore. 502, 123 Pac. 392, Ann. Cas. 1914B 115 (1912); Works, Practice, Pleading, and Forms (1882) § 667.


¹⁷⁷67 Mont. 9, 214 Pac. 1106 (1923).

¹⁷⁸185 Cal. 165, 195 Pac. 57 (1921).
by the cases of *Harris v. Avery*, which allowed a joinder of actions for false imprisonment and slander occurring almost simultaneously, on the ground that they arose out of the same transaction (there was no further reasoning), and that of *DeWolfe v. Abraham*, which is opposed to the view enunciated in *Harris v. Avery*. The reasons given for the result in the *DeWolfe* case are that the natures of the causes of action were different, the evidence to support the claims would not be similar, and the measure and proof of damages would be unlike.

Another angle to the meaning of *transaction* involves mutuality. As to this, the opinion is unanimous that it must be a two-sided affair; it must involve at least two persons and not be a mere act by one party. The courts seem to think that a bare statement of the proposition is sufficient. Though this is true, it should be noted that the injured party need not be physically present when his interests are injured.

And, as a final point to consider in relation to this subject, we are confronted with the question as to whether or not the plaintiff's statement of his case forms the limits of any transaction involved. The answer comes in no uncertain terms that the plaintiff can set no such boundaries. "It is for the purpose of enabling the court to render a judgment by which the rights of the parties may be finally determined in the same action, rather than to compel another action, that the Code permits a defendant to set up in his answer any new matter arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; and, if the plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court." And as a practical

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75 Kan. 146 (1869).
80 151 N. Y. 186, 45 N. E. 455 (1896).
m Lack it is called to our attention that the defendant’s cause of action, though arising out of the same transaction as that which was the source of the plaintiff’s claim, must state additional facts, for naturally the plaintiff would not state the facts entitling the defendant to a judgment against the plaintiff.84

This clear note having been sounded to the effect that the plaintiff cannot contract the extent of a transaction, we ask whether or not he may expand it by merely saying that facts are a part thereof. The answer is “No”.85 The fact situation, not the plaintiff’s statement, determines the extent of a transaction.

We next direct our attention to the meaning of the term subject of the action as it relates to the joinder and counterclaim statutes. That we may have them well in mind, I repeat their usual forms. “The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action; ***.” “The counterclaim must be *** a cause of action arising out of the contract or transaction pleaded in the complaint, or connected with the subject of the action.” “All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, ***.”

Here we find three statutes dealing with different propositions, and yet meant to be a portion of a general plan of procedure. Should similar terms in these enactments be defined uniformly? McArthur v. Moffett,86 the case presenting the greatest amount of learning on the joinder of parties statute, says “Yes”. One should notice that it goes even further than this and states that an attempt should be made to coordinate all similar terms in the statutes of a state, even though they do not all relate to a general subject. Thus the term subject of the action in the joinder and counterclaim statutes should be harmonized with the same term in venue and published service statutes.

Though not dealing with the meaning of subject of the action, the decision in Stone v. Case87 is so closely connected with the principle and phrase now under discussion that this seems to be the proper place to deal with it. It concludes that the word “transaction” found in a single subdivision of the joinder of causes section has two

84Whittelsey, Missouri Practice (1876) § 192.
85Flynn v. Bailey, 50 Barb. 73 (N. Y. 1867).
8734 Okla. 5, 124 Pac. 960, 43 L. R. A. (N. S.) 1168 (1912).
different meanings. When employed in that part of the statute allowing one to join all causes of action arising out of the same transaction, the word means all connected or dependent acts which constitute one entire system or deal; but when it is used in the phrase allowing joinder of actions arising out of transactions connected with the subject of the action it means the acts or groups of acts which constitute a \textit{cause of action}. This appears to make "transaction" and "cause of action" synonymous. I find no other similar case.

Our attention is now turned to the valuable dictionary meanings. \textit{Subject} means "a thing over which a right is exercised,\textsuperscript{87a} that concerning which anything is said or done; the thing or person treated of; matter; theme; topic,\textsuperscript{88} that which is thought, spoken, or treated of;\textsuperscript{89} something that forms a matter of thought, discourse, investigation, etc."\textsuperscript{90} \textit{Subject-matter} signifies "the matter presented for consideration in statement or discussion; subject of thought or study;\textsuperscript{91} the subject or matter presented for consideration in some written or oral statement or discussion;\textsuperscript{92} the substance of a discourse, book, writing or the like, as distinguished from its form or style; the subject or theme;\textsuperscript{93} the matter or thought presented for consideration;\textsuperscript{94} the matter in dispute."\textsuperscript{95a} \textit{Action} indicates "a legal proceeding by which one demands or enforces one's right in a court of justice; a judicial proceeding for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense;\textsuperscript{95} the taking of legal steps to establish a claim or obtain judicial remedy; legal process; a legal process or suit;\textsuperscript{95a} a proceeding instituted in court by one or more parties against another or others to enforce a right, or punish or redress a wrong;\textsuperscript{96} a legal proceeding instituted by one person against another;\textsuperscript{97} a suit or process by which a demand is made of a right."\textsuperscript{98}
As to the legal fraternity's notion of *subject of the action*, we encounter negative and affirmative conclusions, just as we did when considering *transaction*.

It is often declared that *subject of the action* is not synonymous with *cause of action* or *right of action*. Winslow, C. J., in *McArthur v. Moffett* decides as a reason for this result that to hold that these terms "mean the same thing is to make nonsense of the whole phrase", for the different words and phrases used in these acts were intended to accomplish some definite purpose. "They were not inserted to fill up space or for rhetorical effect."

Professor Keigwin in his *Cases in Code Pleading* decides that these terms are not similar in meaning because the *causes of action* to be combined are plural and different from each other, while the *subject* is single and identical, serving as the tie which connects various things.

The reasoning in *Pomeroy's Code Remedies* is that one can see this is correct by making the substitution, since the result would be that "causes of action may be united when they arise out of transactions connected with the same cause of action." This is an absurdity, a mere statement in a circle.

This result creates an interest, from the viewpoint of the interpretation of *subject of the action*, to determine the purport of *cause of action*, for once that is done we can subtract it from the possible conceptions of *subject of the action*. An additional reason for learning the meaning of *cause of action* is, of course, the fact that two of our statutes speak of joining or counterclaiming *causes of action*. Courts and others have tossed off various definitions of "cause of action."

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100*Phillips, Code Pleading* (1896) § 197.


102*Sutherland, Code Pleading* (1910–1917) § 633.

103pp. 437 et seq.

104§ 369.
the majority of which, if analyzed carefully, indicate that a cause of action must include the plaintiff's right, the defendant's corresponding duty, and the latter's breach of that duty. In this connection the United States Supreme Court in Baltimore S. S. Co. v. Phillips, says that "a cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." If these authorities are correct, subject of the action cannot be the sum of the plaintiff's right, the defendant's duty, and a breach thereof.

But in recent years there has been some very thorough, interesting, and valuable work done in which this doctrine has been questioned. Dean Clark in an article entitled The Cause of Action declares that the phrase "should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business."

In reply to this article Professor McCaskill claims that a "cause of action" is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose rights are invaded. The singleness of the right and delict is determined by a study of the old remedies in connection with which the concepts as to singleness of rights and delicts developed. The relief sought characterizes the cause of action and the nature and scope of the action cannot be determined without a consideration of the relief sought."

Thus, a particular set of facts, which, under Dean Clark's idea, would give rise to only one cause of action in equity, would be the foundation of a legal and an equitable cause of action if Professor McCaskill's solution was applied. The two theories would lead to different results under the law relating to amendments as it applies.


105274 U. S. 316, 47 Sup. Ct. 600 (1926).

106(1924) 33 YALE L. J. 817; Borchard, Judicial Relief for Peril and Insecurity (1932) 45 Harv. L. Rev. 793, 803, in accord.

106bActions and Causes of Action (1925) 34 YALE L. J. 614.
to statutes of limitations and under the law dealing with the doctrine of res adjudicata.

Soon after the publication of Professor McCaskill's work Dean Clark replied briefly thereto\textsuperscript{104d} reasserting his view and claiming that Professor McCaskill's proposition is "opposed to the ideas and plans of the code makers".

Professor Gavit\textsuperscript{104e} differs with the two writers just mentioned. He says "cause of action" cannot refer alone to facts or the codifiers would have drafted the statute to read that one should state his cause of action and not to read that he should state the facts constituting it. He decides that a "cause of action" is the specific substantive right as a matter of substantive law. He says this substantive right consists of the "facts (which the plaintiff must plead) plus a rule of law (which he must not plead)". This substantive right he distinguishes from the combination of a primary right, its correlative duty, and the invasion of the right, or violation of the duty.

Neither, it is said, is \textit{subject of the action} the \textit{object} thereof\textsuperscript{105}, for, one writer says,\textsuperscript{106} a cause of action cannot arise out of transactions connected with the object of the action, because the object is something in the future, and could have had no being when the transactions took place out of which the causes of action arose. As the causes of action arise out of certain transactions, and as the transactions are connected with a \textit{subject of the action}, it is plain that this subject must be in existence simultaneously with the transactions themselves, and prior to the time of the birth of the causes of action. We should, however, note a strong unreasoned dissent.\textsuperscript{107}

Since, according to some authorities, the \textit{object of the action} cannot be the \textit{subject of the action}, we are forced, if we wish to follow their ideas, to discover what the former term amounts to, in order that we may do our taking away. The writers seem clearly to call the

\textsuperscript{104d}(1925) 34 \textit{Yale L. J.} 879.
\textsuperscript{104e}The \textit{Code Cause of Action} (1930) 30 \textit{Col. L. Rev.} 802.
relief demanded the object of the action. Hence the relief demanded standing by itself cannot be the subject of the action.

Another negation is that subject of the action and transaction, already thoroughly discussed, cannot be synonymous. One authority gives as a reason that both words in the statutes were put there for a reason and each meant a different thing, and to say they mean the same thing would make nonsense of the statute. A different interpreter says that the common subject cannot be a transaction for the transactions are plural and each connected with the subject as a single and distinct entity.

A final suggestion along this line is that the subject of the action is not merely the obligation of a contract. Presumably this amounts to a statement that subject of the action does not amount to merely the defendant's duty. No reasoning is given and nothing is said as to torts.

These are the authorities as to what subject of the action is not. It is next in order to discover the affirmative holdings. A statement that is frequently found is that subject of the action and subject-matter of the action are identical. One author's holding is contrary since, he says, for these terms to be synonymous, it would require the subject of the action to be common to all the several causes of action to be joined, while it cannot be common to the causes of action, but must be common to the several transactions out of which the several rights of action arise. One might well expect to gain

110 KEIGWIN, CASES IN CODE PLEADING (1926) pp. 437 et seq.
113 PHILLIPS, CODE PLEADING (2nd ed. 1932) § 313.
considerable aid from the word subject-matter, for it is a term of common speech. But usually the courts, after identifying that word with subject of the action, fail to take the next logical step of defining subject-matter. Rather, they turn back to their original phrase and struggle with it.

In addition to this line of cases, there are numerous attempts of legal writers to put their fingers on something definite which will in all cases be the subject of the action. Let us investigate this grab bag of ideas and see what we shall find. Subject of the action is the primary right of the claimant, say some. Others decide that this right alone shall be the subject of the action only in instances where no tangible property is involved, and even then there may be a question as to whether or not the right standing by itself is the subject of action. Professor Keigwin suggests that there is a serious objection to identifying subject of action and the plaintiff's primary right, but does not tell what the objection is. Phillips, in speaking of joinder of causes, comes to a like conclusion and gives as his reason that the primary rights are two degrees removed from each other by the intervention of the transactions. The rights of action are the product of different transactions, and the different transactions must be connected with the subject of action. He does not consider the matter from the viewpoint of counterclaims. This raises the question as to whether or not the difference in the form of the counterclaim and joinder of actions statutes should affect the interpretation of subject of the action. Notice that in the counterclaim statute it says the connection involved should be between the plaintiff's cause of action and the subject of the action, for it states that there may

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114For an exceptional case which does consider the meaning of "subject-matter," see McArthur v. Moffett, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (n. s.) 264 (1910).


117Keigwin, Cases in Code Pleading (1926) pp. 437 et seq.

118Phillips, Code Pleading (1896) § 197.
be a counterclaim arising out of the contract or transaction pleaded in the complaint or connected with the subject of the action. On the other hand, the joinder of actions statute says the connection involved should be between the transactions and the subject of the action, for it states that actions arising out of transactions connected with the subject of the action may be joined. Although, as already pointed out, it has been strongly suggested that the term means the same thing in the statutes under discussion, the exact distinction has not, to my knowledge, been specifically pointed out and discussed. I shall consider it further in a later division of this paper. It is also declared that the subject of the action is the plaintiff’s claim of right. This probably means the same thing as his primary right.

I find no cases saying that the subject of the action means the primary duty of the defendant, but there is one stating that it is the defendant’s duty to indemnify the plaintiff. This may be another way to express the defendant’s primary duty to the plaintiff, but it properly refers to a duty to do something after a wrong has been done by the defendants, whereas the primary duty, which is a duty not to harm the plaintiff, exists prior to the injury. Apparently the term “duty to make compensation” in chapter 13, section 2A 1 of the Contracts Restatement refers to this secondary duty in relation to contracts. But the term as here used refers to tort, as well as contract, situations.

Although there seems to be a lack of authorities holding that the subject of the action is the combination of the primary right of the plaintiff and duty of the defendant, there is a declaration that the subject of the action is the plaintiff’s right to be indemnified, and the defendant’s duty to indemnify the plaintiff.

A different group has determined that the subject of the action amounts solely to the defendant’s wrong, his infringement of the plaintiff’s right not to be injured. A bare conclusion without dis-
discussion is found in these cases. Whether or not the same idea is intended to be expressed by saying that the subject of the action is the origin and ground of the plaintiff's right is a little difficult to tell, but, since the judge who seems to have originated the expression said that the subject of the action did not relate to the thing about which the controversy arose, he may well have wished to treat the origin and ground of plaintiff's action as the injury to the plaintiff by the defendant. The use of this same term by Sutherland is still more confusing, for, after employing it as a synonym for the subject of the action, which latter expression, he adds, does not refer to the thing about which the controversy has arisen, he further declares that the subject of the action may refer to property, as in an action to set aside a deed, or to the right asserted, as in an action of trover to recover bills of exchange, in which the right to possession or the bills themselves may be the subject of the action. Just what is meant I do not certainly know.

Next our search leads us to a combination of former conceptions, and we learn that the subject of the action is the plaintiff's primary right and its infringement. Valuable reasoning is found in Stone v. Case in which the court says that unless there is a right to be infringed and an infringement thereof there can be no subject of the action.

We have dealt with the part that the defendant's acts play in the subject of the action, and now we find an authority claiming that the plaintiff's act of bringing a foreclosure action is the subject of the action. There appears to be no other similar offspring of the legal brain.

Up to this point, the drawings from our grab bag have not presented any single ideas which have been supported by many authorities, but, as we reach in and take out the propositions dealing with


12Collier v. Erwin, 3 Mont. 142 (1878); Osmer v. Furey, 32 Mont. 581, 81 Pac. 345 (1905).

13Code Pleading, § 633.


15Cola. 5, 124 Pac. 960, 43 L. R. A. (n. s.) 1168 (1912). See also Telulah Paper Co. v. Patten Paper Co., 132 Wis. 425, 112 N. W. 522 (1907) to the same effect.

16Tobin v. Smith, 1 Ohio N. P. 75 (1892).
tangible property, the situation changes. We do not find unanimity of opinion, but we get the closest approach to it that exists. Neither, of course, do we find many authorities giving any reason for their results, but it is here that we meet the most complete and careful thinking that there is on the meaning of the term which we are at the present time discussing.

Probably a majority of writers, including courts, hold that where tangible reality or personality is involved the tangible property is the subject of the action. Many courts have also determined that where there is some tangible evidence of the plaintiff's rights, such as notes or stock certificates, these tangible things are the subjects of action. Bliss may mean the same thing, but he says


\[\text{130Bannerot v. McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (n. s.) 126 (1907) (contract); Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co., 201 Fed. 617, 120 C. C. A. 45, Ann. Cas. 1915A, 637 (1912) (insurance policy); Sigler v. Hidy, 56 Iowa 504, 9 N. W. 374 (1881) (note); Revere Fire Ins. Co. v. Chamberlin, 56 Iowa 508, 8 N. W. 338 (1881) (insurance policy); Miller v. Thayer, 96 Kan. 278, 150 Pac. 537 (1915) (note); Thomson v. Baird's Exrs., 231 Ky. 574, 21 S. W. (2d) 979 (1929) (note); Allen v. Hodge, 32 Ky. Law Rep. 509 (1907) (contract); Fish v. Chase, 114 Minn. 460, 131 N. W. 631 (1911) (stock); Xenia Branch Bank v. Lee, 7 Abb. Pr. 372 (N. Y. 1858) (bills), but it should be observed this court wavered and said the subject of action might}
the subject of the action in such cases is the subject matter of the contract, its promise, the consideration, and the matter in respect to which the promise has been made. A strange result reached by Pomeroy's Code Remedies should be commented on. In his section on counterclaims the author decides that the subject of the action in all cases is the plaintiff's main primary right, as the right to possession in ejectment, replevin, trover, and trespass, and the right to the money in all cases of debt, whereas, in his discussion of joinder of causes, he declares that it is the physical facts, the things real or personal, the money, lands, chattels, and the like in relation to which the suit is prosecuted. Why there should be this difference is not disclosed.

No, lawyers are not unanimous in deciding that, when things tangible are involved in a case, those things are the subject of action. Let us proceed further with an investigation of this clash of opinion. At least three courts have concluded that in such an instance when title is involved the subject of the action is the title to the property. It may be that the same thing is meant by the expression claim of right, but that is not certain.

We shall now find several combination subjects of the action dealing with things tangible. One of them includes property and the title thereto when title is in issue. This proposition is sponsored by the Supreme Court of Wisconsin in the case of McArthur v. Moffett. This decision is so thoroughly reasoned that it deserves extended discussion, which should properly come here. The correctness of its result will be dealt with later. The court first cuts away some underbrush by saying that cause of action, transaction, and subject of the action mean different things and then undertakes to deter-
mine what subject of the action means. It says one must take into consideration all statutes in the state whose laws are under discussion and which include in them the term subject of the action. It then refers to two Wisconsin enactments, one of which provided that all actions relating to realty had to be tried in the county in which the subject of the action, or some part thereof was situated. Of course, the land was the subject of action. Another statute related to published summonses and stated that where the subject of the action is real or personal property there might be such a summons. No one would deny that here again the subject of the action is the property. From his premise the judge argues that these statutes clearly show that the subject of the action wherever found in the statute book in which these laws existed must include the tangible property, if such property is involved in a litigation. Moreover, argues the judge, equitable principles were intended to apply to the joinder and counterclaim acts. Prior to their enactment, equity treated the property as part of the subject of the action in suits in which it was involved. Q. E. D. But one can not stop there. Other cases often arise which deal with no tangible property. That situation must be cared for. One should, if possible, find something which is a part of every suit, and one need not go far to do that. Always the plaintiff must rely on his primary right. Therefore, to the primary right, which provides a subject of the action for cases not involving discernible property, add your tangible realty or personalty and you have a subject of the action when things tangible are involved. In a dictum the court is not quite sure whether or not in other instances the primary right shall alone be the subject of action, but, at any rate, it is an ingredient thereof.

In Bliss on Code Pleading the author says that the subject of the action is the property, or contract and its subject matter, or other thing involved in the dispute, and, in actions to recover the possession of land, the realty, and usually its title, are the subjects of the action. As to why there should be a difference in situations in which tangible property plays a part so that in some instances the title thereto should be a part of the subject of the action and in others it should not, and especially why this distinction should be made in different actions to recover possession of land, does not appear.

As a forerunner to another multiple subject of action where tangible property is involved, and there is a question as to who has rightful possession thereto, we learn that some believe the subject of the action under such a circumstance is the right to the pos-
session of such property. This might also be considered under the general head of primary right, but a suggestion of the holding at this point seems more valuable. Following this, we discover that under such circumstances this possession coupled with the title to the property has likewise been understood to make up the subject of the action.

Our attention is turned next to cases involving intangibles, in which the courts treat these imperceptible things much as tangibles have been dealt with in cases we have but recently examined. They say that the thing is the subject of the action. To make this clear, it may be well to give a few concrete examples of the idea. Where the plaintiff sued for the value of goods sold, the debt was treated as the subject of the action, and the same result has been reached though the action was on a note. Work has been considered the subject of the action where suit was brought to recover for the value of it. In Bliss on Code Pleading we also find some examples which throw considerable light on the working out of this theory. It is there said that in actions of libel and slander the subject of the action is the character or occupation of the plaintiff, in suits by an employer for an injury to his servant, it is the employees’ service, in proceedings to recover damages for the seduction of the plaintiff’s wife, it is the marital relation. We even find that in an action for false imprisonment it is the plaintiff’s liberty. It should be observed that in the last case a tangible thing, the plaintiff’s body, had a place in the facts. A variation of this idea says the subject of action is the intangible thing as work, and failure to compensate the plaintiff for it.

So far the courts have followed rather narrow limits in defining subject of action, but our research has finally led us to a broad highway, if we take the expression of the decisions now considered at their face value. I refer to the idea advanced by certain courts.
and other lawyers that the subject of the action consists of the facts constituting the plaintiff's cause of action.\textsuperscript{145} This must, according to some, make the cause of action and the subject of the action synonymous, which we have found, is a proposition that many will not admit is correct.\textsuperscript{146} Upon a careful reading of these cases we do not always find that they mean what is said. One example of this should suffice to illustrate this truth. \textit{Hall v. Werney}\textsuperscript{146a} was a proceeding in which the plaintiff sued the defendant for trespass upon the plaintiff's land which, it was claimed, resulted in injury to the realty and the crops thereon. The defendant attempted to counterclaim by alleging a right to use the property as a highway, claiming an interference with that right by the plaintiff, and demanding damages therefor. The court said, "The words 'subject of action' mean the facts constituting the plaintiff's cause of action," and then continued, "The obstruction of the highway by the plaintiff cannot be said to have arisen out of the subject of the plaintiff's action, which was the destruction of the plaintiff's crops, and the injury to his land." Is it not clear that the court has really made the alleged injury committed by the defendant the subject of the action? And is it not just as certain that this alone does not constitute the plaintiff's cause of action? Must there not exist in addition to the injury a right in the plaintiff not


\textsuperscript{146} Supra note 99.

to be harmed by the defendant, and the corresponding duty of the defendant not to harm the plaintiff before a cause of action exists in favor of the plaintiff? Must not facts be alleged by the plaintiff from which this right and duty can be spelled out before he can be said to have stated a cause of action? If this is so, the court here first said the subject of action was the facts constituting the plaintiff's cause of action and then said it amounted to something less than that.

In following the story of authority on the meaning of the subject of the action, we have found utter confusion among the courts. But that isn't all of the picture, for we discover that same thing as to different causes of action in single cases decided, naturally, by the same judge, or set of judges, at one time. In closing the research on the definition of the subject of the action, let us consider some examples of this mental storm. In *Mayerus v. Hoscheid*,\(^{147}\) the plaintiff sued to recover damages for the conversion of wheat by the defendant. The latter attempted to counterclaim for breach of a replevin bond given by the plaintiff who had replevied the wheat. It was decided that the subject of action in the first case was the wheat, the tangible thing involved, while in the counterclaim it was the breach of the replevin bond and the alleged taking and conversion of the wheat by the plaintiff, that is, the wrong done by him. Thus in the same case the court in one instance says the subject of action consists of two different types of things, yet in both causes of action a tangible thing, the wheat, played a part, and, if one thinks that the wheat was not involved in the counterclaim, the replevin bond was available as a *thing* which could be the subject of the action, thus making the subjects of action similar in type. Another instance of this same situation is found in *Hulce v. Thompson*.\(^{148}\) The plaintiff wished to join one action to eject the defendant from the house and dooryard of a farm and another to recover damages for trespasses to other parts of his farm. The court declared that this was impossible, not on the ground that the causes dealt with different subjects of the action of the same kind, which might have been logical, but because the types of subjects of the action were different. In the first cause of action, the subject of the action, so the court said, was the reality, a tangible thing, and in the second the trespasses, the wrongs done by the defendant,

\(^{147}\)11 Minn. (Gil. 160) 243 (1866).

\(^{148}\)9 How. Pr. 113 (1854).
the infringement of the plaintiff's primary right. And still other cases of this kind exist.\footnote{Downing v. Wilcox, 84 Conn. 437, 80 Atl. 288 (1911); McClelland v. Remsen, 14 Abb. Pr. 331, 36 Barb. 622, 23 How. Pr. 175 (1862); Sweet v. Ingerson, 12 How. Pr. 331 (1856); American National Bank v. Grace, 64 Hun 22, 18 N. Y. Supp. 745 (1892); Starr Cash Carrier Co. v. Reinhardt, 2 Misc. 116, 20 N. Y. Supp. 872 (1892).}

\footnote{This is the first instalment of Professor Wheaton's article. The second and concluding instalment will appear in the February, 1933 issue of THE CORNELL LAW QUARTERLY.}