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THE CODE "CAUSE OF ACTION": ITS DEFINITION

CARL C. WHEATON

Of what does a "cause of action" consist? What are its elements? What is its breadth? For centuries those questions have been asked by lawyers, and legal writers have answered them in all conceivable ways. A new interest in the meaning of the term as it is used in pleading codes has been awakened during the last few years by the writings of Dean Charles E. Clark of Yale University School of Law, whose opinions are always worthy of consideration.

The primary purposes of this article are to state Dean Clark's conception of a "cause of action", to analyze the authorities which he cites to support his ideas as to its meaning, to determine whether or not they support his views, and to investigate the possibility or impossibility of the application of his conclusions to the present law.

As early as 1924, Dean Clark wrote:

"It was a deadly sin to plead law; what was necessary was to set forth the facts and these constituted the cause of action. . . . The cause of action is the group of operative facts giving cause or ground for judicial interference. . . . We may . . . accept the view that the cause of action is an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts."¹

In his book on *Code Pleading*, published in 1928, Dean Clark says:

"The codifiers seem to have had in mind the cause of action as consisting of facts which should afford ground or occasion for the court to give judicial relief of some kind, but as not limiting the form or amount of such relief. This is shown by their emphasis upon 'the facts' as 'constituting the cause of action' and upon their attempt to get away from the legal subdivisions of the previous systems and to keep legal theories of recovery out of the pleadings proper. And this idea seems to afford the most flexible and workable definition of the term for use on the various occasions where it is incorporated into procedural rules. The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others.) The extent of the cause is to be determined pragmati-

¹*The Code Cause of Action* (1924) 33 YALE L. J. 817.

cally 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 the procedural rules. Such purpose should be considered, not from the vantage point of the study, but from the courtroom, looking at the facts as they will be presented at the actual trial. This means a lay or non-legal grouping of the facts into a single unit, as non-professional witnesses would naturally do, will be the most practical. The cause will, therefore, comprise the material facts of the happening or affair or affairs giving rise to the dispute, or, as sometimes expressed, the 'defendant's wrongful act' to which is added also the necessary background of events showing its wrongful nature. Cause will differ from other code terms—same transaction, or transactions connected with the same subject of action—not in kind, but merely in extent."²

Do the authorities cited by the author, and existing when he gave utterance to his complete idea of the significance of "cause of action" under the codes, sustain his view? The only way in which this can properly be determined is to investigate each authority he adduces. This we may proceed to do.

The first type of case to be considered deals with representative suits. In *Commonwealth to the use of Wiggins v. Scott*,³ some taxpayers were allowed to sue for all who paid a particular tax to recover taxes paid and alleged to have been exacted illegally. The court said that "the individual right of the one to maintain his own lawsuit must yield to the greater rights of all and the public, where its treasury and common weal were so affected."^{3a} Dean Clark refers to other similar cases.⁴ These suits were not allowed on the ground that there was but a single cause of action. Rather, each of those sued or suing was treated as having a separate cause of action, but representative proceedings were permitted to avoid a multiplicity of suits. In most cases various causes of action were consolidated. The courts at no place in these decisions say anything which would lead one to believe they are adopting Dean Clark's view as to the breadth of a cause of action. But that is not the only reason why the writer believes they had no idea of enunciating such a doctrine. The fact is that for generations before these cases were decided, judges had held in similar situations that several causes of action existed, but that suits might be brought or defended by representation.

²Pp. 83-85.

³112 Ky. 252, 65 S. W. 596, 55 L. R. A. 597 (1901).

^{3a}*Id.* at 265, 65 S. W. at 599.

⁴*Carlton v. Newman*, 77 Me. 408, 1 Atl. 194 (1885); *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. App. 8 (1866).

Many cases of joint defendants demand consideration.⁵ *The Debris Case*⁶ is typical. In that suit, an owner of riparian land claimed that he was injured by several persons who were throwing débris into the river which passed his land. The court permitted the joinder of the alleged wrongdoers on the ground that they were acting jointly. Each of the cases in this group can be explained on the theory that the defendants have committed joint torts. In such situations the substantive law is that the joint tortfeasors *may* be sued together, on the ground that the injured party should be permitted to treat them as having committed one tort because they acted in unison in causing a single wrong.

*Evergreen Cemetery Ass'n v. Beecher*⁷ was a proceeding in which the plaintiff was authorized to sue several owners of separate parcels of land to get their tracts for cemetery purposes. The court said this was proper, for it was within the spirit of the practice act, as it would promote speedy, complete, and inexpensive justice without placing any obstruction in the way of any defendant in protecting his rights. The court added that each defendant carried his own burden only. This last statement, especially, tells us that the judges did not treat the plaintiff as having but a single cause of action against all of the defendants.

Let us now discuss a group of decisions in which the interests of the defendants are adverse to those of the complaining party. Since different reasons for the results are given in each opinion, we discuss them separately. In *Board of Supervisors of Saratoga County v. Deyoe*,⁸ the treasurer of Saratoga County issued notes, some authorized, others unauthorized. Over thirty of more than fifty holders of these notes had sued separately thereon, and others threatened to do likewise. The court permitted the plaintiff to join in one proceeding all of the holders of the notes issued by the treasurer to determine to whom the county owed the money, likening the proceeding to a bill of peace to prevent a multiplicity of suits. The court does state that it would allow such a suit "to determine the right of all claimants in a single action".^{8a} The decision does not definitely state that "action" means "cause of action", and "action" may well have been used to mean "suit". If that is true, this proceeding is merely one in which defendants having separate interests adverse to the plaintiff's may be joined; otherwise,

⁵The Debris Case, 16 Fed. 25 (C. C. Cal. 1883); *Howse v. Moody*, 14 Fla. 59 (1872); *Mitchell v. Bank of St. Paul*, 7 Minn. 252 (1862); *Bateman v. Forty-Second St. M. & St. N. Ave. Ry. Co.*, 5 N. Y. Supp. 13 (Common Pleas 1889); *Lynch v. Elektron Mfg. Co.*, 94 App. Div. 408, 88 N. Y. Supp. 70 (1st Dept. 1904); *Sartori v. Litchfield Construction Co.*, 149 App. Div. 241, 133 N. Y. Supp. 720 (2d Dept. 1912); *Winslow v. Dousman*, 18 Wis. 456 (1864); *Blake v. VanTilborg*, 21 Wis. 672 (1867).

⁶*Supra* note 5.

⁷53 Conn. 551, 5 Atl. 353 (1886).

⁸77 N. Y. 219 (1879).

^{8a}*Id.* at 225.

the decision by inference supports Dean Clark's view of the span of a cause of action.

Another instance of this kind is found in *N. Y. etc. R. Co. v. Schuyler*.⁹ In that case the plaintiff was allowed to join as defendants a large number of holders of false certificates having a common origin and common ground of validity, though they became owners under different circumstances and conveyances and claimed different rights. The suit was brought to have the certificates decreed illegal and void and to have them ordered surrendered and canceled. The court said this was proper because there was "a single interest in the plaintiffs directly opposed to the interest of all the defendants".^{9a}

*McHenry v. Hazard*¹⁰ is a further illustration of this doctrine. Two persons had sued the plaintiff to enforce an obligation which each claimed by assignment. The court consented to their joinder as defendants in a suit to cancel the obligation on the ground of fraud. Otherwise, the plaintiff would have to sue in different actions, for recovery against one defendant would not bar the claim of the other. This would subject the plaintiff to the expense of double litigation, to the hazard of double recovery, and to the annoyance of two trials to secure a single right. The statement that a recovery against one defendant would not bar the claim of the other one indicates that the court thought their claims separate. Of course, the plaintiff had but a single right if the obligation was invalid. That was a right not to pay anything on it, but that does not mean he had but a single cause of action against the defendants, or that they had only one cause of action against him. It is believed that these cases are all properly explained on the adverse interest doctrine, though there may be some doubt about *Board of Saratoga County v. Deyoe*.^{10a}

A single adjudication depended upon by Dean Clark rests definitely upon the avoidance of a multiplicity of actions. This is *Black v. Shreeve*¹¹, in which various parties to an agreement *each* promised that those of them who were solvent should bear equally with the complainants any loss suffered by the latter on a loan by the complainants to C Company. The court decided that all of the promisors should be sued to avoid a multiplicity of actions; it did not say, however, that the complainants had but a single cause of action against the obligors. The case may and should be explained on the theory that, though those suing had separate causes of action against each debtor, it is fair *procedural* law to clear up the whole controversy in one lawsuit.

Several cases upon which Dean Clark relies involve statutes. *Akely v.*

⁹17 N. Y. 592 (1858).

^{9a}*Id.* at 608.

¹⁰45 N. Y. 580 (1871).

^{10a}*Supra* note 8.

¹¹7 N. J. Eq. 440 (1848).

*Kinnicutti*¹² permitted nearly two hundred people claiming separate causes of action to join in one complaint in a proceeding against the defendants to obtain compensation for injuries caused by the alleged fraud of the defendants. This result was based on a statute providing:

"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."¹³

*Green v. Knox*¹⁴ declared that a taxpayer of a city could sue various police officers and officials of the municipality to restrain payment of the salaries of the policemen. The holding was based upon the following statutes:

"Any person may be made a defendant who has or claims an interest in a controversy, adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein. . . ."¹⁵

"The court may determine the controversy, as between parties before it, where it can do so without prejudice to the rights of others, or by saving their rights, but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."¹⁶

The court stated that these enactments authorized "the joinder as defendants of persons whose separate interests spring from a common cause, in such a way that an adjudication upon their several rights cannot be had without the determination of the fundamental question upon which the rights of all depend".^{16a} This, said the court, was a case which that idea fitted. Other cases involving adverse interest statutes¹⁷ are *Town of Fairfield v. Southport National Bank*¹⁸ and *E. B. Eames & Co. v. Mayo*.¹⁹ The final holding in this unit of cases is *Alinquist v. Wilcox*.²⁰ A Minnesota statute²¹ vested a single cause of action in the personal representative of one who was killed. The court said:

"The action is statutory and in no respect founded upon, governed, or controlled by rules of common law applicable to personal torts. . . ."

¹²238 N. Y. 466, 144 N. E. 682 (1924).

¹³N. Y. CIV. PRAC. ACT (1920) § 209.

¹⁴175 N. Y. 432, 67 N. E. 910 (1903).

¹⁵N. Y. CODE CIV. PRO. (1877, as amended) § 447.

¹⁶N. Y. CODE CIV. PRO. (1877, as amended) § 452.

^{16a}175 N. Y. at 434, 67 N. E. at 910.

¹⁷CONN. GEN. STAT. (1902) § 618 and CONN. GEN. STAT. (1918) § 5641.

¹⁸77 Conn. 423, 59 Atl. 513 (1904).

¹⁹93 Conn. 479, 106 Atl. 825 (1919).

²⁰115 Minn. 37, 131 N. W. 796 (1911).

²¹MINN. REV. LAWS (1905) § 4503.

One cause of action is created, and only one, and all persons whose wrongful act contributed to cause the death may be joined as defendants therein."^{21a}

None of the cases discussed in this paragraph sustain Dean Clark's definition of "cause of action". They all are based upon specific statutes that make no attempt to determine the *meaning* of "cause of action".

Another list of cases²² to be considered deals with the granting of various types of relief where there is a single cause of action. Two examples will suffice. In *Hahl v. Sugo*,²³ it was claimed that the defendant improperly built over onto the plaintiff's land. The court stated that there was but a single cause of action and that all relief desired must be obtained in one trial. One cannot quarrel with this, for, as the court said:

"The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore, the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action. Pomeroy's *Code Remedies*, §455."^{23a}

It is interesting to notice that this case talks of a primary right and refers to Pomeroy. This causes one to wonder why Dean Clark should have mentioned this decision as one supporting his view, for he certainly does not follow Pomeroy's idea of "cause of action". It was held in *Reichert v. Stilwell*²⁴ that only one cause of action was set forth in a suit to foreclose a mortgage, though the court was permitted by statute to render a deficiency judgment, for that decree was an incidental remedy dependent wholly upon the statute and subsidiary to the main object of the action. Such decisions lend no support to Dean Clark's conception of "cause of action". They stand for the proposition that the mere existence of a number of different kinds of relief does not prove the existence of a number of causes of action.

Next we turn our attention to a group of decisions illustrating the proposition that there is but a single cause of action for a single breach of a single right. In *Baxter v. Camp*,²⁵ the defendant gave his wife an agreement to pay her son a set sum after her decease if the son should survive her. After her death, the son sued. He pleaded in two counts. In the first, he sued on a promissory note. In the second, he set forth the circum-

^{21a}115 Minn. at 38, 131 N. W. at 796.

²²Security Loan & Trust Co. v. Mattern, 131 Cal. 326, 63 Pac. 482 (1901); McMahon v. Plum, 90 Conn. 281, 96 Atl. 958 (1916); Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901); Reichert v. Stilwell, 172 N. Y. 83, 64 N. E. 790 (1902).

²³*Supra* note 22.

^{23a}*Id.* at 114, 62 N. E. at 136.

²⁴*Supra* note 22.

²⁵71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514 (1898).

stances surrounding the making of the agreement, its delivery to him by his mother, her death, demand for payment, and failure of the defendant to meet the demand. The court declared that there should have been only one count. Whatever cause there was for bringing the suit arose out of a single transaction, and that was fully stated in the second count. The result is proper, for there is but one breach of a single right, that is, the failure to pay money to which the plaintiff was entitled. The case at no point says there is never more than one cause of action arising out of a transaction.

Next we may consider suits in which amendments changed parties. In *Missouri K. & T. R. Co. v. Wulf*,²⁶ the plaintiff originally based her right to recover on a Kansas statute and sued in her individual capacity. Her action could legally rest only upon the Federal Employers' Liability Act,^{26a} which required the action to be brought in the name of the personal representative of the deceased. She amended her statement of claim and sued as administrator. The judges declared that there was no new cause of action suggested by the amendment, for the change as to parties merely indicated the new capacity in which the plaintiff was to prosecute the action. In mentioning, in the amendment, the federal statute dealing with employers' liability, nothing new was added to the pleading, for the court would take judicial notice of it under the original pleading, since that enactment was the only proper basis for the plaintiff's suit. Surely, one cannot correctly claim that this decision enunciates the doctrine proposed by Dean Clark. All it says is that there is no change in claims sued upon when the same person brings suit first in one capacity and then in another, and that the court will take judicial notice of a statute essential to a cause of action. Therefore, when the petition which, because of the doctrine, of judicial notice, is treated as setting forth that enactment is amended actually to state it, no new cause of action is declared upon. *N. & G. Taylor Co. v. Anderson*²⁷ merely agrees with the doctrine of the *Wulf* case, though it decides that, under the particular facts, different causes of action were stated in the original and amended declarations.

The familiar doctrine that when one sues upon a contract there is but one cause of action for all of the breaches thereof which exist at the time of the bringing of the action, and in relation to which no suit has been previously begun, is illustrated by *Downey v. Turner*.²⁸ In this case, a real estate broker had a contract to be paid a certain percentage of the rentals or sale price if he rented or sold property belonging to the defendant. He rented the property with an option to purchase. The lessee later bought it.

²⁶226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355 (1913).

^{26a}35 STAT. 65 (1908), 45 U. S. C. §§ 51-59 (1934).

²⁷14 F. (2d) 353 (C. C. A. 4th, 1926).

²⁸28 App. Div. 491, 51 N. Y. Supp. 105 (2d Dept. 1898).

The broker sued to recover commissions due him. The holding was that the plaintiff stated but one cause of action when he sued to recover a commission for obtaining both the lease and the sale. Though the court at no place in its decision stated that the breadth of a cause of action was determined by trial convenience, the decision seems to imply some such doctrine. The cause of action includes various breaches of a single contract, and the violations of the plaintiff's right occurred at different times. These are matters which could be conveniently tried in one lawsuit. If this implication exists, the case supports Dean Clark's proposition as to the extent of a cause of action. Candor demands this admission.

Now, let us turn our attention to several proceedings in which the same claim is pleaded under various theories. *Worth v. Dunn*²⁹ considers a complaint containing two counts. One alleged common-law negligence; the other count stated that the defendants, by using dynamite in a place where many people were gathered, were engaged in an intrinsically dangerous operation. The court said:

"The union of claims for relief upon more than one issue presented in one count, where all arise out of the same transaction, is a convenient and generally satisfactory method of procedure, and also the use of two or more counts in stating the cause of action is frequently the only safe method."^{29a}

In all fairness, it must be noticed that the court uses the words "convenient and generally satisfactory method of procedure". That looks like Dean Clark's conception of the proper test of the breadth of a "cause of action". However, he can get but small consolation from this decision, for it is clearly a suit in which there is but a single injury, and two counts, not one, are pleaded. Therefore, what was said relating to the joining of claims in one count is a dictum.

*National Fuel Co. v. Green*³⁰ declares:

"There is no provision of the code requiring a plaintiff to state in separate counts the several distinct matters on which he relies to support a single cause of action; consequently, in an action for personal injuries, common-law and statutory negligence may be stated in the same count, *so long as the acts upon which the plaintiff relies produced the one injury and the one damage constituting the subject-matter of the action.*"^{30a}

Notice that here there is but one right involved and a single injury thereto. Naturally, there is but a single cause of action. This remark applies to all of the cases mentioned at the close of the next paragraph.

²⁹8 Conn. 51, 118 Atl. 467, 12 A. L. R. 328 (1920).

^{29a}*Id.* at 63, 118 Atl. at 471.

³⁰50 Colo. 307, 115 Pac. 709 (1911).

^{30a}*Id.* at 313, 115 Pac. at 711. Italics supplied.

In *DeWolf v. The A. & W. Sprague Manufacturing Co.*,³¹ the plaintiff held a judgment lien on realty. It was also encumbered by trust mortgages. The plaintiff sued to have those mortgages set aside or to have them declared void as against him, to have his judgment lien foreclosed, and to obtain possession of the property involved. The court declared that the law supported the right of the plaintiffs to join in one *bill* the several causes or matters which the complaint embraced, and approved the following statement of Judge Story:

“The courts [equity courts] have always exercised a sound discretion in determining whether the subject-matters of the suit are properly joined or not, as also whether the parties, plaintiffs and defendants, are or are not properly joined. And in new cases courts will be governed by those analogies *which seem best founded in general convenience and will best promote the due administration of justice*, without multiplying unnecessary litigation on the one hand or drawing suitors into needless expenses on the other.’ . . . It is stated by the same authority that multifariousness ‘is improperly joining in one bill distinct and independent matters, and thereby confounding them; as for example the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several in the same bill.’ Story, *Eq. Pl.*, §271.”^{31a}

That part of these quotations which is placed in italics does speak of “convenience”, a word used in Dean Clark’s definition of “cause of action”. However, if one reads on in Story, he learns that the author is speaking, not of the meaning of “cause of action”, but of the joinder of several causes of action in one bill. Other decisions³² relating to pleading various theories of an identical cause of action are referred to by Dean Clark to sustain his proposals now under consideration.

Several cases now claim our attention,³³ in each of which it is definitely

³¹49 Conn. 282 (1881).

^{31a}*Id.* at 285. Italics supplied.

³²*Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856 (1893); *Aaronson v. City of New Haven*, 94 Conn. 690, 110 Atl. 872, 12 A. L. R. 328 (1920); *Raymond v. Bailey*, 98 Conn. 201, 118 Atl. 915 (1922); *White v. St. Louis & Meramec River R. R. Co.*, 202 Mo. 539, 101 S. W. 14 (1906); *Thompson v. Keyes-Marshall Brothers Livery Co.*, 214 Mo. 487, 113 S. W. 1128 (1908); *Berry v. Majestic Milling Co.*, 240 S. W. 829 (Mo. App. 1922); *Ford v. Dowell*, 243 S. W. 366 (Mo. App. 1922); *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19 (1911).

³³*Purdy v. Watts*, 91 Conn. 214, 99 Atl. 496 (1916); *Root v. Connecticut Co.*, 94 Conn. 227, 108 Atl. 506 (1919); *Alfred E. Joy Co. v. New Amsterdam Casualty Co.*, 98 Conn. 794, 120 Atl. 684 (1923); *Hamnstrown v. New York Contracting Co.*, 122 App. Div. 43, 106 N. Y. Supp. 880 (1st Dept. 1907); *Smith v. Earle*, 202 App. Div. 305, 195 N. Y. Supp. 342 (1st Dept. 1922); *Fleitmann & Co. Inc. v. Colonial Finance Corporation*, 203 App. Div. 827, 197 N. Y. Supp. 125 (1st Dept. 1922); *Peacock v. Tata*

stated that they involve several causes of action. Little need be said as to them except to name and locate them. In only one of these suits, *Upson Co. v. Erie R. Co.*,³⁴ is even the barest hint given that the extent of a cause of action should be determined by trial convenience. In that case, there were failures safely to deliver goods covered by different bills of lading. The court decided that a different cause of action existed for each misdelivery. In a dictum, it stated that there might be only one cause of action for damage caused by misdelivery of goods, if a pleading showed that the articles included in different shipments were delivered to the consignee mingled in such a fashion that the particular shipment could not be separately identified or checked. As a reason for this possible result, the court declared:

"If the defendant has thus rendered it impossible to prove the particular loss on each shipment by commingling the goods in various shipments, it would be unreasonable to allow the defendant to require from the plaintiff proof as to the particular damage to each separate shipment."^{34a}

The reason given for the result seems not to be based on the idea of making trial convenience the test of the breadth of a cause of action; rather, the court wishes to free a plaintiff from difficulties imposed by a defendant.

In addition to placing reliance on the judicial authorities which have been outlined, Dean Clark says he is "in the tradition among others of Phillips, *Code Pleading* (1896) §30; Sibley, *Right to, and Cause for Action* (1902) 39, 40; Cook, "The Power of Congress under the Full Faith and Credit Clause" (1919) 28 *Yale L. J.* 421; and Judge Bliss' definition is not far away, Bliss, *Code Pleading* (3rd ed. 1894) §113."³⁵ These citations will now be considered.

Phillips says:

"And since both rights and delicts arise from operative facts, he must affirm of himself such investitive fact or group of facts as will show a consequent legal right in him, and he must affirm of the adversary party such culpatory fact or facts as will show his delict with reference to the right so asserted. The formal statement of operative facts showing such right and such delict shows a cause for action on the part of the state and in behalf of the complainant, and is called, in legal phraseology, a cause of action."

It is clear that, as far as Dean Clark claims a cause of action consists of

Sons, 206 App. Div. 145, 200 N. Y. Supp. 656 (1st Dept. 1923); *Sherlock v. Manwaren*, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dept. 1924); *Upson Co. v. Erie R. Co.*, 213 App. Div. 262, 210 N. Y. Supp. 112 (4th Dept. 1925).

³⁴*Supra* note 33.

^{34a}*Id.* at 263, 210 N. Y. Supp. at 112.

³⁵*The Cause of Action* (1934) 82 U. OF PA. L. REV. 354, at p. 358, n. 18.

facts, this excerpt favors him. On the other hand, the important part of Dean Clark's definition which provides a pragmatic test for the *extent* of a cause of action is not suggested by Phillips.

Sibley, referring to Pomeroy's *Code Remedies*, states:

"So far as I am aware, its conclusion as to the cause for, and right to, action constitute its one vulnerable part. That the analysis upon which they are founded is incomplete—the cases were not examined—is demonstrated by the fact that the 'right' was not discriminated from the 'cause'. About two years after the remedies appeared came the equally able treatise on Code Pleading, by Mr. Bliss. This, as against Mr. Pomeroy's view, but without discussing that, made the 'wrong' alone the cause for action, in civil cases. The right to action, however, was not particularly considered. Eight years later, the work by Judge Phillips, whose views have been discussed, was given to the profession. He marked the distinction between the right to, and cause for, action, and pointed out the confusion into which Mr. Pomeroy had fallen regarding them."

Surely, Sibley says no more than Phillips to sustain Dean Clark. It is not even clear that he is writing concerning a cause of action.

Professor Cook declares:

"Like so many words and phrases in our legal vocabulary, 'cause of action' is ambiguous. At times it is used to denote the group of operative facts to which the law attaches legal consequences which enable the person with reference to whom the facts are true to obtain legal relief through a judicial tribunal. As so used the phrase also connotes the legal relations which the law attaches to such a group of facts. At other times, however, the phrase is so used that it denotes the legal relations which result from the facts and connotes that the facts are true of the one who is asserted to have the 'cause of action'. Codes of civil procedure use the phrase in the former sense when they require a plaintiff to 'state facts constituting his cause of action' in plain and concise language. A common synonym of the phrase as used in the latter sense is 'right of action', in which case the word 'right' is obviously used in a generic sense and not in the specific sense as the correlative of 'duty'."

Again, the author cited deals only with the type of the contents of a cause of action, not with its breadth. Professor Cook, it should be remarked, says that "cause of action", as that term is used in the code, not only includes the facts but "also connotes the legal relations which the law attaches to such a group of facts". Although this quotation from Professor Cook's writings does not mention Dean Clark's trial convenience test as to the extent of a "cause of action", it cannot be said that Dean Clark did not rely on Professor Cook's ideas in announcing his principle, for Dean Clark has told the writer that conversations with Professor Cook "were perhaps as much a stimulus for my own thinking with reference to the cause of action as anything I had read".

Bliss says:

"We have defined an action to be a judicial proceeding for the prevention or redress of a wrong. The 'cause of action' then, is the 'wrong'. In a given case, the second phrase at the head of this section (facts constituting a cause of action) includes the first (a cause of action) for there can be no cause of action aside from the facts which constitute it; . . . If a right is denied, or an obligation ignored, or a duty neglected, no cause of action is shown—that is, no wrong appears—without a statement of the facts showing the right or the obligation or the duty (or the relation) as well as its denial or the neglect."

Admittedly, Bliss appears to say that facts are an essential element of a cause of action. Observe also Bliss's assertion that no cause of action appears "without a statement of facts showing the right or the obligation or the duty (or the relation)".

The writer has made an honest effort to give a thorough and accurate statement of the authorities upon which Dean Clark in his writings relies to sustain his theory of the content of a cause of action, that we might honestly determine whether or not his concept of a "cause of action" is supported by the authorities he cites. The writer's conclusion is, and always has been, that there is nothing new in that part of his definition which declares that a code cause of action involves facts. The writer believes that the opinions to which Dean Clark refers sustain his contention that facts are one of the elements of every cause of action. But do the precedents which he mentions, and which existed before he enunciated his theory in its final form in 1928, hold that the *breadth* of a cause of action should be determined "pragmatically by the court, having in mind the facts and circumstances of the particular case", and that the controlling factor in deciding the *extent* of such a cause ought to be "trial convenience"? Notice should be taken of an approved quotation from Story which is found in *DeWolf v. The A. W. Sprague Manufacturing Co.*³⁶ There Story declares that "in new cases courts will be governed by those analogies *which seem best founded in general convenience and will best promote the due administration of justice, . . .*" Story, however, is referring to the *joinder* of causes of action. It is not claimed that Professor Cook did not *in conversations* suggest to Dean Clark the test that the latter has proposed as the proper standard to be applied in determining what should be the extent of a cause of action. None of Professor Cook's *writings* cited by Dean Clark say that pragmatism and trial convenience have any place in the definition of "cause of action".

On the other hand, *Downey v. Turner*,³⁷ as will be recalled, holds that at any particular time one has but a single cause of action for various breaches

³⁶*Supra* notes 31, 31a. Italics supplied.

³⁷*Supra* note 28.

of a contract in relation to which suit has not previously been brought. By inference, this adopts the "trial convenience" test of the breadth of a cause of action. A dictum in *Worth v. Dunn*³⁸ that "the union of claims for relief upon more than one issue presented in one count, where all arise out of the same transaction, is a convenient and generally satisfactory method of procedure", surely sustains the trial convenience standard. To the writer, of the precedents already examined, only the two cases last mentioned can properly be said to support Dean Clark's ideas concerning the extent of a cause of action.

Therefore, though most of the documentary proof cited in Dean Clark's writings demonstrates that he is an originator rather than a disciple in defining "cause of action", it is certain that since his *Code Pleading* appeared in 1928 he has acquired a small following of the most flattering nature. *Stafford Security Co., Inc., v. Kremer*³⁹ and *Covey v. England and McCaffrey, Inc.*,⁴⁰ cite with approbation that part of Dean Clark's book which defines "cause of action", but do not quote it or give a similar explanation of the phrase in their own language. In *Harriss v. Tams*,⁴¹ the court goes further and says:

"Perhaps the judicial formulation of a definite test in determining what constitutes a different obligation or liability might hamper rather than guide the courts. Perhaps to some extent the determination must be made pragmatically based on considerations of fairness. See *Clark on Code Pleading*, pp. 75, 83, 513."^{41a}

Without question, the court in this decision was referring to the meaning of "cause of action", for it was dealing with an amendment of the plaintiff's complaint after the Statute of Limitations was said by the defendant to have run against the cause of action which the amendment would set forth, if permitted. The supreme compliment is paid Dean Clark in *United States v. Memphis Cotton Oil Co.*⁴² There the question was whether an amended statement of claim alleged a cause of action different from the one originally set forth. In the decision, Mr. Justice Cardozo cited Dean Clark's *Code Pleading* at pages 83, 84, 504, and 505. At these points Dean Clark states his definition of a cause of action, using the terms "aggregate of operative facts", "trial convenience", and "aggregate of operative facts of convenient size". It is certain that Mr. Justice Cardozo agrees in part with Dean Clark, for he declares that at times, though not always, a cause of action is "something separate from writs and remedies, the group of operative facts out of which a grievance has developed".^{42a} Whether or not

³⁸*Supra* notes 29, 29a.

³⁹258 N. Y. 1, 179 N. E. 32 (1931).

⁴⁰233 App. Div. 332, 253 N. Y. Supp. 340 (4th Dept. 1931).

⁴¹258 N. Y. 229, 179 N. E. 476 (1932).

^{41a}*Id.* at 242, 179 N. E. at 482.

⁴²288 U. S. 62, 53 Sup. Ct. 278, 77 L. ed. 619 (1933).

^{42a}*Id.* at 68, 53 Sup. Ct. at 280.

the Supreme Court approves Dean Clark's idea that trial convenience is to determine the extent of a cause of action it is difficult to say, for at no point in this decision are the words "trial convenience" or their equivalent used, although reference is made to those pages of Dean Clark's book on Code Pleading which do use that terminology.

Having completed an analysis of cases, the writer desires, courteously and without "missionary fervor", to present personal ideas of the correct meaning of "cause of action" as that term is used in the ordinary code. No attempt will be made to cite authorities, as that has been done often enough already.

Of what does a cause of action consist? Ordinarily, the codes declare that the plaintiff's initial pleading shall contain "a plain and concise statement of the facts constituting a cause of action".⁴³ There can be no question that the enactment says one must plead the facts involved in a cause of action. The cases usually hold that operative, not evidentiary, facts must be alleged. However, the writer does not see why evidentiary facts may not be stated. At times, to make matters clear, their allegation is essential, and the statute merely says *facts* are to be set forth. It does not state what type of facts are to be alleged. Now, the assertion that facts are to be pleaded does not necessarily mean that a cause of action consists only of facts. The lack of reference in this legislation to statements of law merely excuses one from setting forth any of such averments, even though they are part of a cause of action. If the statute had directed that one "plead his cause of action, which shall consist of facts", the result would at least have suggested that the legislatures said they believed that facts alone constituted a cause of action. But even their opinion embodied in a legislative enactment could not make a cause of action have fewer component parts than, in the very nature of things, it must have. By no stretch of the imagination can a cause of action exist without a combination of facts and legal rights and duties. If the legal aspect of a cause of action is wanting why should courts and sheriffs, which exist largely to enforce rights and duties, be interested in acting? This reasoning applies if one believes that the law theoretically determines that certain rights and duties exist to be applied to facts occurring later, or if he thinks that facts take place and that because of such happening rights and duties come into existence.

Our next desire is to consider the *extent* of a cause of action. If the writer could be mentally honest and do it, he would be happy to think of the breadth of a cause of action in terms of trial convenience. The reason for this is that it would be an easy way to avoid difficulties thrown in the path of the pleader by the law which does not permit one to set forth a new cause of action in an amended statement of claim, and by enactments

⁴³For a list of these statutes, see Wheaton, *Manner of Stating Cause of Action* (1934) 20 CORNELL L. Q. 185, n. 1.

which relate to joinder. If this test of the range of a cause of action existed, one would not have to try to get courts or legislators to permit amendments to state new causes of action. This effort must be expended to avoid great losses of time, energy, and money in some cases, if a narrower view of the extent of a cause of action is taken. It is very largely this idea, it is believed, that leads disciples of the trial convenience theory to adopt it.

But, as serviceable as that doctrine is, the terms of the usual law prevent one from adopting it. All lawyers are familiar with the statutes which permit a joinder of causes of action which arise out of the same transaction.⁴⁴ Legislators passing these laws could scarcely have conceived a cause of action as covering all matters which can be conveniently tried together, for they clearly intimate that several causes of action may arise out of the same transaction. Yet, surely all matters arising out of the same transaction can, ordinarily be advantageously dealt with in one law suit.

Some statutes make no mention of causes of action arising out of the same transaction.⁴⁵ They merely state, sometimes with exceptions, that the plaintiff may join any causes of action which he has against the defendant. In those states the argument used against the standard of trial convenience in the commonwealths having statutes providing for joinder of causes of action arising out of the same transaction is unavailable. But even in the jurisdictions providing for the joinder in a single suit of all the actions one may have against another, as well as in those containing same-transaction statutes, the law often provides different statutes of limitation for different types of injuries. Moreover, in many of those states tort actions for personal injuries die with the person, whereas other actions do not. The first class of laws indicates that the different statutes of limitations deal with different causes of action; the second implies that there are separate causes of action involved, some of which survive and some of which do not. Suppose, for instance, that A, in the presence of a crowd, should call B a thief, assault and batter him, destroy some of B's personalty, and have B arrested. All of these occurrences and the legal rights and duties connected with them could be tried together conveniently in one lawsuit. It is doubtful, however, that there is a state in this country in which the claimant has the same time in which to begin a proceeding to recover for all these different types of injuries and in which the right to obtain damages for each of them survives the death of the person harmed. It is clear, therefore, that the legislatures of this country have definitely indicated that the courts are not to apply the test of trial convenience in determining the extent of a

⁴⁴For a list of these statutes, see Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action" &c.* (1932) 18 CORNELL L. Q. 20, nn. 1, 2, 4, 5.

⁴⁵Wheaton, *supra* note 44, nn. 6-13.

cause of action. These statutes bind the courts, for they cannot define the extent of a cause of action in disregard of such legislative enactments.

Now suppose there is a jurisdiction having the usual statute relating to the manner of stating a cause of action, but no statute limiting its courts' ideas of the proportions of a cause of action. In such a situation, the writer sees no reason why trial convenience should not be the proper yardstick by which to measure the span of a cause of action. It would be practical, and the necessity of a long battle with legislatures to free clients from losses caused by their lawyers' mistakes in pleading, and to obtain a greater freedom of joinder of causes of action, would be eliminated. That different types of legal rights and duties might be involved in a single cause of action need not bother. Ancient history should not permanently fetter legal progress.

The writer's final conclusion, then, is that a cause of action, under the customary statutes, consists of facts, and legal rights and duties. One must state the facts involved in his cause of action. One should be permitted to set forth both ultimate and evidentiary facts. One may not state legal conclusions—a limitation, as is elsewhere argued at length,⁴⁶ which should be eliminated because of the great confusion existing in the minds of lawyers as to what is law and what is fact. The breadth of a cause of action, if not limited by statutes, might well be determined by trial convenience as long as the facts included were connected in some way. But where legislative enactments relating to joinder, limitation, and survival of actions exist, they indicate that there can be but one type of legal right connected with a single cause of action, and thus they prevent the application of the trial-convenience test of the extent of a cause of action. The result is that those who want the law to provide a pragmatic definition of a cause of action must roll up their sleeves and fight for that result. Legislators and rule-making bodies as well as judges must be convinced of the inadequacy of the present concept of a cause of action. Many will struggle for its retention, but the change can and will be made if enough intelligent thought and effort are devoted to securing it.

⁴⁶Wheaton, *loc. cit. supra* note 43.