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Carl C. Wheaton

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*

PART II†

We turn, temporarily, from definitions to problems of another type which are raised by the statutes under investigation.

In order that we may have vividly before us the portions of the statutes presently to be investigated, I shall, at the expense of repetition, state them. "The plaintiff may unite several causes of action * * * * * * where they all arise out of the same transaction or transactions connected with the same subject of the action." Some acts have a comma after *transaction*. "The counter-claim must be a cause of action arising out of the * * * * * * transaction pleaded in the complaint, or connected with the subject of the action."

There has been considerable discussion as to whether or not causes of action may be joined or counterclaimed if they *either* arise out of the same transaction *or* are connected with the subject of the action. The majority of courts answer this question in the affirmative, with little or no reasoning, both as to the joinder of causes of action[150] and counterclaims.[151] This, however, is not the unanimous result. There are those who state that the causes to be joined (or, probably, counterclaimed) must be connected with the subject of the action, even though they arise out of the same transaction,[152] and there

*Professor of Law, St. Louis University School of Law.

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[150]Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856 (1893); Robinson v. Flint, 16 How. Pr. 240 (N. Y. 1858); Bruce v. Kelly, 5 Hun 229 (N. Y. 1875); Smith v. Newberry, 140 N. C. 385, 53 S. E. 234 (1906); McCullen v. Seaboard Air Line Ry. Co., 146 N. C. 568, 60 S. E. 506 (1908); Sharum v. Sharum, 101 Okla. 273, 225 Pac. 682 (1924); Panther v. McKnight, 26 Okla. 134, 256 Pac. 916 (1926); Stone v. Case, 34 Okla. 5, 124 Pac. 960, 43 L. R. A. (N. S.) 1168 (1912); POMEROY, CODE REMEDIES (5th ed. 1929) § 361.

[151]Tinsley v. Tinsley, 54 Ky. 454 (15 Mon. B. 1854); Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 117 N. W. 372, 133 Am. St. Rep. 920 (1908); BOONE, CODE PLEADING (1885) § 87.

[152]Sherwood v. Holbrook, 98 Misc. 668, 163 N. Y. Supp. 326 (Supreme Court 1917); Cline v. Southern Ry. Co., 96 S. E. 532 (S. C. 1918); VAN SANTWOOD, EQUITY PRACTICE (1874) vol. 1, pp. 99–101.

are those believing that, though the causes of actions are connected with the same subject of the action, they cannot be joined[153] or counterclaimed[154] unless they arise out of the same transaction. It should be carefully noticed that the propounders of the law, in deciding this matter, seem to pay no attention to the punctuation of the statutes. An excellent example of this is found in the cases of *Koepke v. Winterfield*[155] and *Alliance Elevator Co. v. Wells*.[156] The identical statute under inquiry was Section 2647 of *Sanborn and Berryman Ann. St. (Rev. St. 1898)*. This act in fact read, "the same transaction or transactions connected with the subject of action." In the first case the court wrote it as reading with a comma after *transactions*, and quoted the second case, which it cited as copying the statute the same way. The fact is the judge in the *Alliance Elevator Co.* decision reproduced the section there in question correctly without any comma, but in the headnote to the case in the Northwestern Reporter a comma is shown after *transaction*. The importance of punctuation will be mentioned later.

We have seen that the majority of writers interpret the statutes under inquiry as allowing joinder of actions and counterclaims which do not arise out of the same transaction if they are connected with the subject of the action.[157] This leads us, necessarily, to the meaning of *connected with* as those words appear in the enactments here involved. There are few definite statements defining this term. The language closest to a definition is that *connected with* must be considered as something different from *arising out of;* in other words, the defendant's cause of action (in case of a counterclaim) may be sufficiently connected with the subject of the action although it does not arise out of the transaction.[158]

Though statements tagged as definitions are rare, there is a variety of declarations which tell us what type of connection is necessary, and these, in turn, suggest the ordinary meaning of *connected with*, that is, linked together or associated with. Some of these suggestions are that the connection with the subject of the action must be

[153]Fish v. Chase, 114 Minn. 460, 131 N. W. 631 (1911); Adams v. Bissell & Noble, 28 Barb. 382 (N. Y. 1858) which goes so far as to say that the phrase "or transactions connected with the subject of the action" is useless and unmeaning surplus, for subject of action must not refer to the different counts, but to the action as a writ.

[154]Terre Haute & I. R. Co. v. Pierce, 95 Ind. 496 (1884) which would allow a counterclaim in tort only when the tort to be counterclaimed arose out of a contract transaction in relation to which the plaintiff sued.

[155]116 Wis. 44, 92 N. W. 437 (1902). [156]93 Wis. 5, 66 N. W. 796 (1896).

[157]*Supra* note 150. [158]POMEROY, CODE REMEDIES (5th ed. 1929) § 670.

legal, immediate, and direct;[159] immediate and direct, and in contract cases, something that the parties can be assumed to have contemplated in their dealings with each other.[160]

Other criteria used are that "transactions connected with the same subject of action were for all practical purposes limited to causes of action which were mutually related in process of causation and to general equitable relief";[161] that a counterclaim must be so connected with the subject of plaintiff's action that it will be just and equitable that the controversy between the parties should be settled in one action and by one litigation.[162]

A very important question is as to whether or not the connection between transactions and the subject of the action, when one wishes to join causes, and between the counterclaim and the subject of the action, in cases of counterclaims, has to be complete. That is, must each transaction out of which causes of action to be joined arise deal with every element of the subject of the action; must each component part of the subject of the action be present as an ingredient of every counterclaim to the plaintiff's cause of action which contains the subject of the action? There is very little authority dealing directly with this question. That existing does the expected thing. It conflicts.[163] Actually, the courts giving a narrow

[159]SUTHERLAND, CODE PLEADING (1910–1917) § 633.

[160]Haberle-Crystal Spring Brewing Co. v. Handrahan, 100 Misc. 163, 165 N. Y. Supp. 251 (Supreme Court 1917); LcClare v. Thibault, 41 Ore. 601, 69 Pac. 552 (1902); POMEROY, CODE REMEDIES (5th ed. 1929) § 670. Professor Gavit, in *The Code Cause of Action* (1930) 30 COL. L. REV. 802, having defined subject of the action as "the factual situation", says actions joined or counterclaimed must have come into being out of factual situations connected with the factual situation that is the subject of the action. There is the necessary connection if "but for some fact in the subject of the action there would not have existed the factual situations in the other causes of action to be joined, or in the counterclaims." In this same article he defines "arising out of" as "coming into being out of".

[161](1925) 3 N. Y. L. REV. 429.

[162]Boothe v. Armstrong, 80 Conn. 218, 67 Atl. 484 (1907); Shaeffer v. O. K. Tool Co., 110 Conn. 528, 148 Atl. 330 (1929); Grange v. Gilbert, 10 Civ. Pro. R. 8 (N. Y. 1885); Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552 (1883); Moses v. Moses, 170 App. Div. 211, 155 N. Y. Supp. 1066(1st Dept. 1915); Union Ferry Co. of N. Y. and Brooklyn v. Fairchild, 106 Misc. 324, 176 N. Y. Supp. 251 (Supreme Court 1919) reversed in 191 App. Div. 639, 182 N. Y. Supp. 125 (1st Dept. 1920) on another ground; J. M. & L. A. Osborn Co. v. Kennedy, 113 Misc. 615, 185 N. Y. Supp. 75 (Supreme Court 1920); POMEROY, CODE REMEDIES (5th ed. 1929) § 652.

[163]Telulah Paper Co. v. Patten Paper Co., 132 Wis. 425, 112 N. W. 522 (1907) gives a negative answer, whereas NASH, PLEADING AND PRACTICE UNDER THE CIVIL CODE (2nd ed. 1874) p. 37, states that the general result should be in the affirmative.

interpretation to the phrase *the subject of the action* probably reach an affirmative result in the majority of instances, but those attaching to it a broad meaning most often come to the opposite conclusion.

A final, and important, proposition in relation to the meaning of *connected with* is that the mere fact that the defendant sets up acts on the part of the plaintiff which are prejudicial to the defendant, and alleges them as the reason the defendant did the acts complained of by the plaintiff does not constitute a connection between the subject of the plaintiff's cause of action and the defendant's cause of action. It merely shows a motive.[164]

Our next inquiry deals with the types of cases which may be joined because they arise out of transactions connected with the subject of the action. One problem is as to whether or not causes may be joined whether or not they are of a kind already mentioned in prior subdivisions of the act, one subdivision of which includes the phrase now under discussion. In fact, though the matter is not actually mentioned, the great majority of cases decide that actions may be joined whether or not they are spoken of in the other subdivisions. There is some authority that way which expressly considers the point.[165] In fact, this idea is so strong that the ninth subdivision of a statute, which read to the effect that causes might be joined where they were brought to recover "(9) upon claims * * * * * * not included within one of the foregoing subdivisions of this section" was interpreted to mean that there might be a joinder of causes "not included within *one only* of the foregoing subdivisions of this section."[166]

Another question that arises is: do all actions to be joined under the statute now under inspection have to belong to only one of the subdivisions mentioned therein? The answer necessitates dealing with a part of the statute not yet discussed, which reads to the effect that "all causes of action so united must all belong to one of these classes." Again we have a situation where there is little authority that definitely grapples with the proper answer, but the practical result is that all causes to be joinable must belong to one of the classes mentioned. That includes the idea, however, that actions covered by the transaction subdivision, which allows the joinder of actions arising out of the same transaction, or transactions connected with

[164]Mulberger v. Koenig, 2 Wis. 558, 22 N. W. 745 (1885). Much the same point has arisen in relation to the necessary connection between facts to make them all parts of a single transaction. See *supra* notes 77 and 78.

[165]Zimmerman v. Kunkel, 43 Hun 638, 6 N. Y. St. Rep. 768 (1887).

[166]People v. Wells, 52 App. Div. 583, 65 N. Y. Supp. 319 (4th Dept. 1900).

the same subject of the action, may be joined though they are kinds of actions mentioned in several of the other subdivisions, because they all belong to one class of cases mentioned in the statute, that is, they all pertain to the transaction subdivision. This result finds definite support,[167] but the opposite conclusion has also been distinctly reached.[168]

This completes the authorities dealing with specific portions of the statute relating to the subject of the action. It remains to consider two suggestions having to do with it as a whole. They relate, first, to what is called the *reciprocal test.* This is that one may counter-claim if the plaintiff could counter-claim, presuming that the defendant had sued as plaintiff, but, if the plaintiff could not, under such circumstances, have counter-claimed, the defendant may not do it. This appears to be a New York doctrine. The courts specifically referring to the matter are in discord.[169]

The second proposition is that merely stating that causes arise out of the same transaction or transactions connected with the same subject of the action is an insufficient allegation. The facts in the pleading must show that such is the truth.[170]

Though, in discussing the meaning of *the subject of the action,* and, incidentally thereto, that of *object of the action,* or *relief demanded,* we have considered the permissive joinder of parties statute, as far as *subject of the action* is concerned, the balance of that act has been left untouched, and must, therefore, be scrutinized, at this time. The usual wording of the law is that "all parties having an interest in the subject of the action, and in obtaining the *relief demanded,* may be joined as plaintiffs, * * * * * *." One can readily see from the terms of this enactment that the following questions are left for discussion. What is meant by *an interest in?* Must that interest be in both the *subject of the action* and in the *relief requested?* What type of interest is essential? Must the interest of each plaintiff be in all of the subject of the action and relief demanded? Must all persons who may join have an identical interest?

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[167]Polley v. Wilkisson, 5 Civ. Pro. R. 135 (N. Y. 1884).

[168]Hunter v. Powell, 15 How. Pr. 221 (N. Y. 1857); Teall v. The City of Syracuse, 31 Hun 332 (N. Y. 1884); Raynor v. Brennan, 40 Hun 60 (N. Y. 1886); McGARY, TREATISE ON PLEADING (1875) § 27 (perhaps); NASH, PLEADING AND PRACTICE UNDER THE CIVIL CODE (2nd ed. 1874) pp. 35-38.

[169]Adams v. Schwartz, 137 App. Div. 230, 122 N. Y. Supp. 41 (1st Dept. 1910); Stevenson v. Devins, 158 App. Div. 616, 143 N. Y. Supp. 916 (1st Dept. 1913); Seidman v. McCahill, 182 N. Y. Supp. 800 (Supreme Court 1920) approve this test. J. M. and L. A. Osborn Co. v. Kennedy, 113 Misc. 615, 185 N. Y. Supp. 75 (Supreme Court 1920) believes it is of little value.

[170]Flynn v. Bailey, 50 Barb. 73 (N. Y. 1867).

Taking up these questions in order, let us look to the dictionaries for the meaning of *interest*. We find that it is a right, title, share, or participation in a thing;[171] the fact or relation of being concerned in or connected with a thing through having a right or title to it, a share in it, or some claim upon it, a right to a share in something.[172] One dictionary states that in law it means, in the most general sense, the legal concern of a person in a thing or in the conduct of another person, whether it consists in a right of enjoyment in or benefit from property, or a right of advantage, or a subjection to liability in the event of conduct.[173] Cases are lacking in which unadulterated definitions of this term are to be found.

The second query seems to be answered almost unanimously to the effect that a joinder is allowed under the act now being discussed only if the plaintiffs have the essential interest in both the subject of the action and in the relief requested, though the answer seems so obvious that the point is scarcely ever specifically dealt with. But even here there is a dissenting note.[174]

Before we proceed to consider the answers to the remaining questions stated above, we should notice three problems, the discussion of which is so intertwined in judicial decisions that a person is not always certain whether or not the court had only one of them in mind. I refer to questions dealing with the *kind* of interest which is essential, that is, common, joint, and the like; with the *amount* of interest requisite, that is, in all, or less than all, of the subject of the action and relief requested; and with the necessity of *equality* of interest among the various plaintiffs. For instance, if the court says that the interest of the plaintiffs must, or need not, be common, it may not be clear whether the intention is to refer merely to the necessary type of interest. It may be touching upon the matters of amount, or of equality of interest, or with all three things.

With this interpolated warning, let us continue our search and turn our attention next to the *type* of interest that must exist in the subject of the action and in the relief requested. There are several authorities holding that the interest *need not be joint* in either the subject of the action, or in the relief requested,[175] while others deal similarly with only the subject of the action, saying nothing

[171] WEBSTER'S NEW INTERNATIONAL DICTIONARY.

[172] THE NEW CENTURY DICTIONARY; MURRAY'S NEW OXFORD DICTIONARY.

[173] THE CENTURY DICTIONARY AND ENCYCLOPEDIA.

[174] VAN SANTWOOD, EQUITY PRACTICE (1874) vol. 1, pp. 74–76.

[175] Loomis v. Brown, 16 Barb. 325 (N. Y. 1853); Schiffer v. City of Eau Claire, 51 Wis. 385, 8 N. W. 253 (1881); VAN SANTWOOD, EQUITY PRACTICE (1874) vol. 1, pp. 99–101.

about the relief requested.[176] What is meant by this is not explained, but the ordinary meaning of the term *joint* can be presumed. Another negative expression which is used in designating the requisite type of interest is that it need not be common in either the subject of the action or in the relief requested.[177] *Van Santwood's Equity Practice*[178] expresses the opposite conclusion, and *McIntosh v. Zaring*[179] may also do this, but the court merely says there may be a joinder of plaintiffs, for they had a common interest in the relief requested, and, presumably, in the subject of the action. The significance of *common* is so indefinite that I should not attempt to interpret the courts' meaning of that word with any certainty of being correct. It may refer to a joint interest, or an interest in common. It is quite probable that it does not denote the idea of separateness. And a further declaration is that persons may not join as plaintiffs when the only community of interest is in the question of law or fact.[180]

But, presuming that several persons have the proper type of interest in the subject of the action and in the relief demanded, must the interests of each one be in all of the subject of the action and in all of the relief demanded, or in the whole of either one of them? As far as this question refers to the subject of the action, the answer might depend on what the subject of the action was. If it was said to be the right of one of the plaintiffs, necessarily that one, at least, would have to have an interest in all of the subject of the action, but, if the subject of the action was tangible realty, the result might be different. I have, however, found no case which has presented this distinction. In dealing with this problem we must also observe that, from a practical viewpoint, its answer may be closely connected with the further question as to whether or not the interests of the joining plaintiffs in the subject of the action must be equal.

It will be valuable, therefore, to determine what inferences should be drawn from decisions which consider the problem dealing with the *portion* of the *subject of the action* in which joining plaintiffs must

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[176]Shelton v. Harrison, 182 Mo. App. 404, 167 S. W. 634 (1914), which was an equity case; KEIGWIN, CASES IN CODE PLEADING (1926) p. 321.

[177]Loomis v. Brown, 16 Barb. 325 (N. Y. 1853); Metropolitan Trust Co. of the City of New York v. Stallo, 166 App. Div. 649, 152 N. Y. Supp. 173 (1st Dept. 1915), probably, but may refer only to the subject of the action, for it says the interest need not be common in the cause of action.

[178]Vol. 1, pp. 99–101.

[179]150 Ind. 301, 49 N. E. 164 (1898).

[180]Ballew Lumber and Hardware Co. v. Missouri Pacific Ry. Co., 288 Mo. 473, 232 S. W. 1015 (1921).

be interested, and that having to do with the necessity of the *similarity* of those interests. If it is declared that each plaintiff need have an interest in only part of the subject of the action, nothing is determined concerning the necessity of the equality of the partial interests therein, for the various plaintiffs could have such interests which would be unequal. Yet, if the conclusion is that each plaintiff must be interested in all of the subject of the action, then, by inference, each plaintiff must have a similarity of interest in it, because the entire interest essential to all must always be the same.

If the holding is that the interests of the plaintiff need not be identical, then logic forces us to say that each plaintiff need not have an interest in all of the subject of the action, for, even though one of the plaintiffs had to have an interest in the entire subject of the action, if the interests of the others therein could differ from that of this supposed plaintiff, necessarily these others could each have an interest in less than the whole of the subject of the action. But, if the decision is that the interests of the plaintiffs in the subject of the action must be identical, we get no definite information as to whether or not the plaintiffs' interests must be in all of the subject of the action, for identical interest might be partial. Again, the legal writers have not specifically called attention to these truths. What they have done is merely to state, on the one hand, that it is sufficient if the plaintiffs each have an interest in part of the subject of the action,[181] or to declare that their interests therein may differ,[182] and, on the other hand, to decide that the interests must be the same.[183]

It is next in order to determine whether or not each plaintiff must be interested in all of the relief demanded. This problem has caused more difficulty than the same one having to do with the subject of the action. This may be because of the wording of the statute. It will be recalled that it provides for the joinder of plaintiffs having "an interest in the subject of the action, and in obtaining the relief

[181]Grover v. Maratt, 192 Ind. 552, 136 N. E. 81 (1922); American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625 (1905); Shelton v. Harrison, 182 Mo. App. 404 (1914); Wilson v. Hampton, 2 Posey. Cas. 426 (Tex. 1882).

[182]Grover v. Maratt, 192 Ind. 522, 136 N. E. 81 (1922); Earle v. Burch, 21 Neb. 702, 33 N. W. 254 (1887); Loomis v. Brown, 16 Barb. 325 (N. Y. 1853); Metropolitan Trust Co. of the City of New York v. Stallo, 166 App. Div. 649, 152 N. Y. Supp. 173 (1st Dept. 1915); School-Districts v. Edwards, 46 Wis. 150, 49 N. W. 96 (1879); Schiffer v. City of Eau Claire, 51 Wis. 385, 8 N. W. 253 (1881); KEIGWIN, CASES IN CODE PLEADING (1926) p. 321; KINNE, PLEADING AND PRACTICE (1888) § 54; POMEROY, CODE REMEDIES (5th ed. 1929) § 115; SUTHERLAND, CODE PLEADING (1910–1917) § 17.

[183]WHITTAKER, NEW YORK PRACTICE (1852) p. 58.

demanded". It will be seen that the words *an interest* are not inserted before "in obtaining the relief demanded". This omission may have led some courts to decide that *an interest* did not refer to "the relief demanded," and, therefore, to conclude that each plaintiff must be interested in all of the recovery. The holdings do not, however, directly say this.

In continuing the discussion of the authorities on this subject, we must, as we did when considering the necessary interest which plaintiffs must have in subject of the action, call attention to the close connection between the questions dealing with the portion of the relief demanded in which the plaintiffs must have an interest, and that having to do with the necessity of identity of their interests therein, for the writers almost always give their decisions in terms of similarity of interest and say nothing specifically as to the answer to the other question, or *vice versa*. In doing this, have they by inference given their reply to both inquiries? The same answers to this question are reached as was the case when we discussed the identical problems in relation to the subject of the action. The reader is, therefore, referred to that discussion.[184]

As might well be expected, those who have turned their attention to the answering of the question now under discussion have reached different conclusions. Some decide that a partial interest in the relief requested is sufficient,[185] even when a portion,[186] or all,[187] of the recovery will be in the form of a money judgment. Others have reached the opposite result.[188] Then there have been those who have treated the matter from the viewpoint of the equality of interest in the relief demanded. Of these, one school of thought has determined that identity of such interest is unnecessary,[189] though only a money judgment is demanded.[190] This result has ordinarily not been reasoned out, but some authorities have put it on the ground

[184]See pages 47–50.

[185]KEIGWIN, CASES IN CODE PLEADING (1926) p. 321.

[186]American Plate Glass Co. v. Nicoson, 34 Ind. App. 643, 73 N. E. 625 (1905).

[187]McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164 (1898); Trompen v. Yates, 66 Neb. 525, 92 N. W. 647 (1902); Lyon v. Bertram, 61 U. S. (20 How.) 149 (1857); Schiffer, Adm'r. v. The City of Eau Claire, 51 Wis. 385, 8 N. W. 253 (1881).

[188]Hellams v. Switzer, 24 S. C. 39 (1885), apparently. The cases holding this way do not often deal with the matter definitely.

[189]Grover v. Maratt, 192 Ind. 552, 136 N. E. 81 (1922); Loomis v. Brown, 16 Barb. 325 (N. Y. 1853); KINNE, PLEADING AND PRACTICE (1888) § 54; SUTHERLAND, CODE PLEADING (1910–1917) § 17.

[190]School-Districts v. Edwards, 46 Wis. 150, 49 N. W. 968 (1879); Schiffer v. City of Eau Claire, 51 Wis. 385, 8 N. W. 253 (1881).

that the statute is broad enough to allow such a holding.[191] It has, on the other hand, been decided that there must be an equality of interests in the recovery.[192]

This completes the story of the authorities. It is now in order to proceed to a personal interpretation of the statutes. For the last time, let us set forth the usual statutes in order that they may be clear in our minds.

> "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; Second, etc.
> But the causes of action so united must all belong to one of these classes, * * * * * *."

> "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; * * * * * * *."

> "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, * * * * * * *."

These usual statutes should be treated as permissive, for the word *may*, not *must*, appears in them. That is as far as most legislatures seem prepared to go. Where *must* is found, the statutes should be treated as being mandatory.

They should be interpreted in the light of equitable principles which are applicable thereto, because their original framers had those doctrines in mind, and because the very statutes point the same way. They either state specifically that they apply to both legal and equitable cases or they make no distinction between them. That means that they deal with law and equity cases, and that they should be broadly interpreted in order to avoid a multiplicity of actions. This breadth is further suggested by the fact that these enactments are remedial.

The terms therein should be defined, for they were placed there for a purpose and were intended to have meanings which, I believe, were very definite in the minds of those originally drafting the laws, though, perhaps, in later days legislatures have sometimes, with little thought, played that childhood game of follow the leader.

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[191] POMEROY, CODE REMEDIES (5th ed. 1929) § 115 is an example of this.

[192] VAN SANTWOOD, EQUITY PRACTICE (1874) vol. 1, pp. 74–76; WHITTAKER, NEW YORK PRACTICE (1852) p. 58.

But even though that is true, their leaders' ideas should be applied to the acts.

Transaction has no technical meaning. It was a word in common use before its connection with these statutes or their progenitor, the equity practice. It means the same thing in the joinder of actions and counterclaim statutes because these laws have the same general purpose of avoiding many actions, and because they were generally enacted at the same time, and, very often, as part of a unified series of remedial laws. This word is not synonymous with *cause of action*, *contract*, or *subject of the action*, for those terms are also found in the acts in which *transaction* appears. Moreover, if one should replace *transaction* with *cause of action* or *subject of the action* the statutes would not be sensible. *Transaction* refers to any occurrence between two or more persons which may become the foundation of an action. That must be the ordinary meaning of the term when one puts it in the legal settings with which we are dealing. Therefore, it is broad enough to include situations resulting in legal, equitable, contract, and tort actions. Its scope should encompass any group of circumstances which are connected, that is, which have a bearing one upon another. It should cover acts which occur because something else has occurred. Thus, if *A* slanders *B*, and, because of this, *B* slanders *A*, these facts should be treated as comprising a single transaction. The fact that acts occur at approximately the same time does not necessarily result in one transaction, but that is, properly, the ordinary outcome, for in such a situation the acts usually do have a bearing one upon the other. Thus, if *A* assaults and batters *B* because *B* stole *A's* horse, and, at the same, or approximately the same time, calls *B* a thief, and has him arrested for the alleged theft, there is but a single transaction involved. Everyone of those acts had a direct connection with the theft. They all dealt with it. Yet, if *A* assaulted and battered *B* because the latter would not pay a note then due from *B* to *A*, and at the same meeting, had *B* arrested for an alleged theft of a horse, two transactions would have occurred, for the note and theft had nothing in common. The statement that, in contract cases, facts, to be a part of a transaction, must have been within the contemplation of the parties will be correct only if it means to give as broad an interpretation to transaction as has already been suggested. It must also be remembered that it is the actuality, not the parties' pleadings, which determine the limits of a transaction. A counterclaim, for instance, must, under our system if the plaintiff is a good pleader, show further facts than those which should be stated by the plaintiff, for he should not set forth a case against himself.

The definition of *subject of the action* seems to have been the most difficult problem connected with the interpretation of these statutes. As was the case with *transaction*, the term must mean the same thing in all of these statutes, and for the same reasons. They were enacted to avoid a multiplicity of actions, and were usually passed as different sections of the same remedial statute. It has been said that, in seeking the meaning of this term as it relates to the statutes now involved, all of the other statutes of the state, the joinder or counterclaim statutes of which are being investigated, and which contain this phrase, should be taken into consideration. It is suggested that laws relating to attachment of property and to the publication of service in the county where the subject of the action exists, and in which the subject of the action is undoubtedly a tangible thing, should be consulted in determining the meaning of the phrase in the section now involved. This is incorrect, for those types of laws have an entirely different purpose than those in which we are now interested. They were not passed to avoid a multiplicity of suits, but to allow the plaintiff to obtain a judgment in the state passing the law, which judgment could be at least partially satisfied, and which result could not have been obtained without the passage of the laws. *Subject of the action* does not mean *cause of action* since both terms are found in two of the statutes and therefore they must be intended to have different meanings. If *subject of the action* is replaced by *cause of action* in the counterclaim statute we find that the counterclaim will be connected with itself. This proves that the two terms are not identical. Therefore *subject of the action* is not the substantive right of the one suing to recover, which is, in turn, based on his primary right, the correlative duty of the person sued, and the facts involved, including the damage done (except in cases where the damage is prospective), for those things together make up the cause of action. Though statutes say one should state the facts constituting his causes of action, those words should be interpreted as meaning that he should set forth that part of his causes of action which consists of facts, and not that the facts alone make up the causes of action. He is excused from pleading the law involved in his causes. Neither are *subject of the action* and *transaction* synonymous. Both terms are found in two of the statutes and must be intended to have different meanings. If one replaces *subject of the action* with *transaction* or vice versa there is no sense in the results. Nor do *subject of the action* and *object of the action* mean the same thing. To begin with, the words *object* and *subject* are different and, in all likelihood, mean different things. Moreover, the object of the action is the

result to be obtained, the judgment and its enforcement. This object can only be realized after a cause of action has arisen. The transactions, according to the counterclaim statute, are to be connected with the subject of the action. This would be impossible if the subject of the action was the judgment and its enforcement (the object of the action), for the causes of action must arise out of the transactions, and, therefore, the transactions, as far as their connection with the causes of action involved is concerned, must have completed their existence by the time those actions came into existence. As a result, they could not have any connection with an object of the action, which would come into being after they had ceased to exist.

Further suggestions are that the subject of the action is the primary right of the party suing, the primary duty of the person sued, the wrongful action or inaction of the one defending, the bringing of the action, the things involved, whether tangible or intangible, the title to property, its possession, and combinations of these.

The *primary right* cannot be the *subject of the action*, for, if it were, there could be a joinder of those actions which must arise out of transactions connected with the subject of the action only when the connection of the transaction was with one particular right of the plaintiff. This would not under the ordinary statute be an extension of the right of joinder over the other subdivisions of the joinder statutes, for under them one may, in general, join all the actions which he has against the defendant which involve one particular type of right, such as all slander actions, or actions on contract. The same type of argument is properly used to show that *the subject of the action* is not *the duty of the defending person* not to interfere with the rights of the one suing, for, if *duty* is substituted for *subject of the action* in the joinder of actions statute, the transactions must be connected with that single type of duty. Under the other subdivisions of the statute actions connected with that duty could be joined. Thus actions involving a duty not to injure the plaintiff's reputation would be slander or libel actions, or those dealing with the duty not to break a contract would be contract actions and any number of slander or libel actions could be joined by one party against another, as could various contract actions. Combine these arguments and we conclude that the subject of the action could not consist of the right *and* duty mentioned.

Nor is the *subject of the action* the *defendant's wrong*. Actions to be joined may arise out of transactions connected with the subject of the action. If the *defendant's wrong* is substituted for *the subject*

of the action, the statute will read that the transactions should be connected with the defendant's wrong. The result would be that the transactions should be connected with part of themselves, for the defendant's wrong is one or more of the acts making up the transactions with which the causes of action are connected. To hold that the *subject of the action* is the *defendant's wrong* is to, in effect, make transaction and subject of the action synonymous. This, as has been previously shown,[193] is improper. Also, the counterclaim may be connected with the subject of the action. If the defendant's wrong is substituted for the subject of the action, we find that the counterclaims may be connected with the defendant's wrong. That is, the defendant's causes of action may be connected with his own wrong. How can such a connection exist? Combinations of this wrong with the primary right or duty already spoken of are not the subject of the action, since the right or duty cannot be a part of the subject of the action anymore than they can be the whole of it. It has been said that the *subject of the action* was the *right to be infringed and the infringement thereof*, because without the existence of these, there could be no subject of the action. This is not right, for the term subject of the action does not, on its face, seem to refer to several things. But, even if it does, the idea that a right and its infringement must come into being before something else can exist points to the existence of a *cause of action* rather than to that of a *subject of the action*, for it is true that there can be no cause of action unless there is a right and an infringement thereof by someone having a duty not to have so acted.

The idea that the *bringing of a lawsuit* is the *subject of the action* is likewise incorrect. The latter term connotes that it has something to do with the existence of the action. The *subject* of anything certainly refers to that with which it deals, and an action could not have to do with anything which did not exist until after the cause of action arose. The suit is not brought until the cause of action is in being, and, therefore, it could not be the subject thereof.

We shall finally consider *things* (in both the broad and narrow meaning of that word) and the *title to*, and *possession of* them as possible subjects of the action. Title or possession thereof are not the subject of the action for there are many things to which we do not truly have title, or of which we do not have possession. Examples of such things are the body, a reputation, the marital relationship. Suppose we treat the title to, or possession of, tangible property as the subject of the action, the transaction subdivision of the usual

[193] p. 56.

joinder statute would be a repetition of its other subdivisions, for they allow a joinder of actions dealing with the title or possession of property. This result was clearly not intended. That leaves us the possibility of saying that *things* are the *subjects of actions*. My inclination is to give the term *subject of the action* the very broadest meaning that logic, the statutes, and their history will allow. I should like to say that it is everything with which one of the actions to be joined, or the plaintiff's action, where an alleged counterclaim is pleaded, deals. But I cannot. History and logic force me to say that *the thing involved is the subject of the action*. These statutes are imbedded in the environment of the equity practice which existed before the statutes came into existence. The statutes themselves clearly show that they apply to law and equity cases, and no distinction is made in them as to the treatment of both types of action. The creators of the statutes said that they intended to apply the principles of equity to them. The result is that we should look to the old rule in equity practice as to the meaning of the term. We find it stated by a great master of that subject, Story, that the thing involved was treated as the subject of the action.[194] He refers to others who had reached the same conclusion. He specifically treats only of cases involving tangible things. Can the same rule be applied to instances where no tangible things are dealt with in the cases joined or counterclaimed? Suggestions are found in which the negative answer is given because, presumably, there is nothing of a type similar to the tangible thing which can be used as the subject of the action where no tangible thing is connected with the cases. The result is that it has even been decided that, since there should be as part of every subject of the action something that could always be at least a portion of it and since, where tangible things are involved, they must be a part of the subject of the action, whenever such tangible things are dealt with in a lawsuit they, and the right of the person suing, are to be considered the subject of the action. This conclusion is not to be upheld. In every case there is some thing, tangible or intangible, which can be the subject of the action. Examples follow. Where tangible things, including human bodies, are involved, they are the subject of action. In contract actions, when tangible things not including a written contract, are not involved, the contract, written or unwritten, is the subject of the action; in libel and slander cases, the reputation of the one suing is the subject of the action; in actions brought to recover for injury to the

[194] STORY, EQUITY PLEADING, § § 260, 261, and 508.

marital relationship, the relationship of parent and child, or that of master and servant, the relationship is the subject of the action.

To conclude that the thing under consideration is the subject of the action mentioned in the statutes which are the theme of this paper is reasonable. To do so gives proper weight to the historical background of these enactments; it takes into consideration their terms by making a real difference between *cause of action*, *transaction*, and *subject of the action;* it gives to the transaction subdivision of the joinder of actions statute a broader scope than is provided for by its other subdivisions, for, under such an interpretation of that phrase, as far as it is concerned, all actions may be joined under the transaction subdivision which deal with any thing, tangible or intangible, whether they are legal or equitable, in contract or in tort.

Some question has arisen under the joinder of actions and counterclaim statutes as to whether or not the actions to be joined or counterclaimed must always have some connection with the subject of the action through transactions or directly. The wording of the statute tells us that this is unnecessary. The joinder of actions statutes provide for a joinder of actions arising out of the same transaction *or* transactions connected with the subject of the actions. This means that the actions may be joined if they arise out of the same transaction *or* if they arise out of transactions connected with the same subject of the action. Though some statutes have no commas, others have one after *transaction*, others after *transactions*, and still others after both of these words, the result should be the same. Actions arising out of the same transaction need not, to be joined, be connected with the subject of the action. This is correct because *or* is a coördinating particle that marks an alternative. It often connects a series of words or phrases presenting a choice of either.[195] Therefore all that comes after *or* is an alternative to that which precedes it. *Connected with the subject of the action* is a restrictive phrase which is inseparably connected with the word *transactions* which it modifies; to omit it would change the thought of the main phrase. They should not be set off by commas.[196] Therefore, any comma after *transactions* is improper and has no effect on the meaning of the section. Also, causes of action need not, to be joined, arise out of the same transaction if they arise out of different transactions connected with the subject of the action. The counterclaim statute permits the defendant to plead a counterclaim which arises out of

[195]WEBSTER'S NEW INTERNATIONAL DICTIONARY; MURRAY'S NEW OXFORD DICTIONARY.

[196]CENTURY HANBDOOK OF WRITING, GREEVER AND JONES, Article 91 (d).

the transaction set forth in the plaintiff's original pleading *or* to plead a counterclaim which is connected with the subject of the plaintiff's action. The word *or* shows us that he may do either, and if the action of the defendant arises out of the transaction originally pleaded by the plaintiff, it need not be connected with the subject of plaintiff's action, and vice versa.

The term *if they arise out of the same transaction or transactions* found in the joinder of actions statute and the phrase *if they arise out of the same transaction* which is embodied in the counterclaim statute mean that the facts essential to the creation of the actions to be joined or counterclaimed must be found in the transaction or transactions.

It is provided that actions may be joined if they arise out of transactions *connected with* the subject of the action, and one may counterclaim actions *connected with* the subject of the action. This merely means that the transactions or causes of actions must have something to do with the subject of the action. It must not be forgotten that the actual situation, not what may be pleaded, determines whether or not this connection exists.

It will be noticed that in the joinder of actions section the subject of the action is to be connected with *transactions*, whereas, in that dealing with counterclaims the connection is with the *causes of action*. This, however, should make no difference in what the subject of the action must be under the terms of these two statutes, for if the transaction is connected with the subject of the action, the latter will also be connected with the cause of action, because the factual element of the cause of action is found in the transaction. Therefore, for a subject of the action to be of a type which can be connected with the transactions mentioned, it must be of such a nature that it can be connected with the cause of action.

Under the transaction subdivision of the joinder of actions statute one should be able to join causes of actions whether or not those types of actions are mentioned in its other subdivisions, unless the statute prohibits this procedure. Statutes like that of Nevada, which says that there may be a joinder under the transaction subdivision, if the causes are not included in one of the other subdivisions thereof, should not be said to deny this privilege, but should be read to mean that the transaction subdivision is effective if the causes are not included in *only* one of the other subdivisions. Naturally, if they are all covered by another single subdivision the transaction clause is unnecessary. This broad interpretation can be used without violation to the language of the statute. The inclusion of

the words *one of* clearly shows this. If these were omitted, and the statute read, "if the causes are not included in the other subdivisions," the result might be different.

All that is meant by that part of the joinder of actions section which provides that *actions joined must all belong to one of these classes* is that all the actions joined must belong to the type of actions mentioned in a single subdivision of the statute, one of which is the transaction subdivision. Therefore, this clause in the law does not prevent the joinder of causes of actions of kinds mentioned in several subdivisions other than the transaction subdivision, if they arise out of transactions connected with the same subject of the action.

The reciprocal test mentioned by some courts, which allows a counterclaim if the plaintiff could have counterclaimed if the defendant had sued, is of no value. It gives no idea as to the meaning of the terms in the counterclaim statute and argues in a circle.

Turning now to the joinder of plaintiffs statute we find that it states that those may join as plaintiffs who have *an* interest in the subject of the action *and* in the relief requested. This means that they must have an interest in the subject of the action and an interest in the relief requested, for here *and* is the connective. According to Webster this conjunction signifies addition, and is used to connect phrases. As a result, *an interest* should modify *the subject of the action* and *the relief requested.* Some courts have, incorrectly, held that *an interest* did not modify the *relief requested*, and have concluded that though a partial interest in the subject of the action was all that was necessary, each plaintiff joining was obliged to be interested in all of the relief requested. The result should be the same in law and equity cases, or when both legal and equitable relief is requested.

By *an interest* in the subject of the action and in the relief requested is meant any type or measure of interest therein.

In closing my interpretation of this statute, I should like to consider a situation which has caused great differences in opinion. Presume that *A* and *B* own different pieces of property along a stream in which body of water they have riparian rights. *C*, who runs a factory further up the stream, pollutes it with refuse from his factory to such an extent that *A* and *B* can not get the use of the stream to which they are entitled. They join in an action against *C*, requesting an injunction against the pollution and a single sum for past injuries. Some courts have held that there could be no joinder because land was the subject of each plaintiff's action and neither had any interest in that of the other. Others have passed

over this point, but have refused to permit the joinder because each plaintiff did not have an interest in all of the relief requested, since neither had an interest in all of the damages demanded. Some of the latter courts have allowed a joinder in such cases if the relief requested was only an injunction, for then each plaintiff would have an interest in all of the relief demanded, since each wanted an entire injunction. Still others have permitted the joinder in the case stated. This view is the proper one. The water is the subject of the action, and each plaintiff had *an* interest in it and in the relief requested. The court could provide for a division of the damages recovered by leaving that to the parties or by the use of any legal proceeding provided by statute, or otherwise, if such existed.

We have surveyed the statutes, investigated the authorities interpreting them, and suggested our own idea of their meaning. Though such adventures are of interest and of some value, if passably well done, since these statutes exist today in many of the states of the union and will continue to be on the statute books for many years to come, we need something further. We need a change so that the statutory laws relating to joinder and counterclaim will be clearly and unmistakably understood by those who read them. This can best be done by legislatures providing for the making of rules of court by some body of lawyers. This is to be preferred to changes by the legislatures, for, if it is found that any alterations do not work, a further modification thereof could easily be made by a rule-making body, but not by a legislature, since legislatures are slow to move and are not always in session.

Finally, I presume that it is the duty of an advocate of changes to state what they should be. This I do with less fear and trembling than would otherwise exist, since I shall borrow from the very few pioneers who are leading the way to saner statutes. These, then, are the suggestions offered. Plaintiffs should be allowed to join any actions which they, or any of them, have against the defendants, or any of them. Defendants should be permitted to counterclaim any cause of action which they, or any of them, have against the plaintiffs, or any of them. All persons should be allowed to join as plaintiffs who claim any relief against the defendant for injuries caused them by him where, if such persons brought separate actions, the same question or questions of law and fact would arise. There should be a further law applicable to each of these statutes permitting the court on its own motion, or that of either or both of the parties, to order separate trials, or to make such other order as might be expedient, whenever, for any reason, the court believes that justice to the parties, the court, or the public demands such action.