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Charles E. Clark  
*Yale University*

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## JOINDER AND SPLITTING OF CAUSES OF ACTION.\*

BY CHARLES E. CLARK†

THE pleading rules concerning joinder and splitting of causes of action are complements of each other, though designed to achieve different objectives. The joinder rule is that separate causes cannot be "joined" or pleaded in the same suit unless they fall within one of the classes of permissible joinder specified in the codes. The purpose of the rule is to prevent too wide a field of litigation and too diverse issues in a single suit and thus to avoid a case of undue confusion and complexity. The rule against splitting is that a single cause shall not be "split" or divided among several suits. This is designed to prevent litigation of the same question in different suits. It therefore compels a certain extension of the issues in a single suit on pain of forfeiting the opportunity to litigate them elsewhere. Each rule is at least based upon reasons of common sense, though applications of each may at times seem questionable. As the terms in which they are stated indicate, their application in particular cases will depend upon the meaning given to a term of frequent use in the codes—the "cause of action", or group of operative facts giving occasion for judicial action.<sup>1</sup> The difficulties arising in applying the rules are due in the main to the fact that this term is of indefinite content, and the courts have divergent views as to its exact meaning as well as to the policy involved.

In the matter of joinder of actions generally, the tendency has been continually to allow the plaintiff more opportunity to extend the scope of a single suit. This has been achieved both by more flexible statutory provisions, which affect not merely joinder of

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†Professor of Law, Yale University.

<sup>1</sup>This concept has been discussed at some length by the writer in an article, "The Code Cause of Action," 33 *YALE L. J.* 817 (1924). For a somewhat different approach, see O. L. McCaskill, "Actions and Causes of Actions," 34 *ibid.* 614 (1924), and criticism by the writer, 34 *ibid.* 879 (1925).

causes but also joinder of parties,<sup>2</sup> and by a more liberal definition of code terms.

#### JOINDER OF CAUSES—HISTORICAL OUTLINE

*At Common Law.* Under the common law system of pleading unity of the subject matter in a suit was secured by the writ system and the forms of action. It is not entirely clear just what part of this system furnished the yard stick by which the limitation of subject matter was to be measured—whether the process, the form of action, the plea or the judgment. The various somewhat conflicting rules have been well set forth by Professor Sunderland.<sup>3</sup> In general, however, the arbitrary limitations of the forms of action necessarily operated to restrict the issues of a single action. Thus various claims falling within the legal limits of a certain form of action might be joined in different counts, even though based on widely separated groups of facts; while claims redressed in different forms of action could not be joined no matter how closely interwoven were the facts upon which they were based.<sup>4</sup> It resulted that a kind of legal similarity of claim, rather than a unity of oc-

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<sup>2</sup>See E. R. Sunderland, "Joinder of Actions," 18 MICH. L. REV. 571; 32 YALE L. J. 384; 35 *ibid.* 85.

<sup>3</sup>*Op. cit.*, note 2 *supra*. See also TIDD, PRAC. 9th ed., 11, 12; CHITTY, PL. 206; SHIPMAN, C. L. PL. (Ed. Ball.) 201, 203; KEIGWIN, CAS. EQ. PL. 430 *et seq.*; H. J. Howe, 14 ILL. L. REV. 581; 20 COL. L. REV. 712, 800 (causes of action in tort and in contract cannot be joined): cases collected, DEC. DIG. ACTIONS, Sec. 39-41; Cf. Sawyer v. Child, 83 Vt. 329, 75 Atl. 886 (trespass and trover not joinable at common law); Newton's Admx. v. Am. Car. Sprinkler Co. 87 Vt. 546, 90 Atl. 583 (so of trespass and case); Bull v. Mathews, 20 R. I. 100, 37 Atl. 536 (so of trover and common counts in assumpsit); O'Brien v. Moskol, 45 R. I. 486, 123 Atl. 508 (same); Dean v. Cass, 73 Vt. 314, 50 Atl. 1085 (so of claims on a false warranty in assumpsit and in tort); Drury v. Merrill, 20 R. I. 2, 36 Atl. 835 (claims for breach of promise of marriage and on a note are joinable); Lee v. Springer, 73 Vt. 183, 50 Atl. 809, (several distinct assaults; joinable).

<sup>4</sup>There seem to have been two exceptions, based upon the historical origins of the actions; debt and detinue, originally one action, could be joined, and trover, which developed from case, might be joined with it. Cf. KEIGWIN AND SHIPMAN, cited *supra*; Mut. Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200; Ayer v. Bartlett, 26 Mass. (9 Pick.) 156. Matter not joinable when made the subject of an independent claim might sometimes be added in aggravation of the damages; as in trespass to real property, where the taking of goods, a personal assault, seduction of the plaintiff's wife or daughter, injury to reputation and even slander, might be alleged to increase the damages. Bracegirdle v.

currence of the events relied upon, was achieved. No restriction based upon the cause of action, or group of operative facts, was used.<sup>5</sup>

*In Equity.* In equity we have a situation much more nearly approaching that now existing in code pleading. Since in equity the aim was to settle an entire controversy at one time, it was permissible to bring in all closely related matters. The rule was a broad one, resting largely in the discretion of the court. It was stated, both as to parties and subject matter, as a rule against "multifariousness." A bill might be multifarious because of a joinder of an improper number of either unrelated parties or unrelated issues or both. In accordance with the rules of equity pleading in general, these rules were not cast in definite and precise form. We do find, however, statements indicating the later code rule as to parties,<sup>6</sup> and also statements that all the issues considered should arise out of the same transaction, or out of transactions connected with the same subject matter.<sup>7</sup> These phrases will be recognized as occurring in the most famous of the code classes of joinder of causes.<sup>8</sup>

*Under the Code.* It is not surprising to find the code rules to a certain extent a combination of the common law and equity rules. Attempts have been made to deduce extensive conclusions as to the views of the codifiers not only on this subject but upon the entire code, including the union of law and equity, from what they did here.<sup>9</sup> It would seem, however, that this is to read too conscious

Oxford, 2 M. & S. 77; *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505; *Merriman v. McCormick Co.* 86 Wis. 142, 56 N. W. 743.

<sup>5</sup>Objection has been made to this statement. McCaskill, *op. cit.*, note 1, *supra*; at pp. 623-6; *cf.* KEIGWIN, CAS. CODE PL. 235n. It is thought that its point has been misunderstood. Of course the extent of the subject matter of a single case was limited at common law; but it was done by the formulary system; and the use of the cause of action as a *unit of measurement* is a device of the code, developed largely from the equity procedure. See my article, note 1, *supra*.

<sup>6</sup>See STORY, EQ. PL. (1870) Sec. 76c; *Murray v. Hay*, 1 Barb. Ch. 59; *Brinkerhoff v. Brown*, 6 John. Ch. 139; *Brown v. Guarantee Trust Co.* 128 U. S. 403, 9 Sup. Ct. 125; 32 YALE L. J. 384; 33 *Ibid.* 817-820.

<sup>7</sup>STORY, EQ. PL. Secs. 271, 272, 539; *Bolles v. Bolles*, 44 N. J. Eq. 385, 14 Atl. 593; *Gaines v. Chew*, 2 How. 619; KEIGWIN, CAS. EQ. PL. 198 *et seq.*, CAS. CODE PL. 439.

<sup>8</sup>Discussed hereinafter.

<sup>9</sup>McCaskill, *op. cit.*, note 1, *supra*, at page 624 *et seq.* and see my criticism, 34 Yale L. J. 879.

a purpose into their efforts. They apparently thought it necessary to put some limitation upon the extent of a single suit; what more natural than to work it out from what was known before? Yet the forms of action were abolished. So in the original New York Code of 1848 they stated classes of suits—seven in number—of similar forms of claims, and provided that joinder might be had within these classes.<sup>10</sup> The method is somewhat similar to that of the common law, since similarity of legal claims seems particularly to have been looked for. It is noteworthy, however, that they definitely cut across the old common law forms. Thus, as pointed out in the following section, the classes were in some respects less restricted than at common law, and in others more so; the common law action on the case for example allowing joinder of claims now appearing in several of the code classes. It appears, however, that the joinder thus permitted was not felt sufficient, for four years later in 1852 the famous provision was added, directly from the equity practice, that there might be joined causes of action “arising out of the same transaction or transactions connected with the same subject of the action.”<sup>11</sup> This illogical combination of joinder classes, some based upon similarity of legal claim and some upon unity of occurrence, has persisted to the present time in most of the codes.

*Modern Developments.* Although the joinder classes of the code were largely purely arbitrary, and not based on reasons of practical convenience, and although they have often been interpreted in such manner as necessarily to force the bringing of separate suits,<sup>12</sup> there has been less tendency to modify these provisions than in the corresponding rules of joinder of parties. In fact there has been in some places, notably in New York, a failure to realize the interrelation of the two rules. The restriction on joinder of causes may become applicable when the parties comprise only a single plaintiff and a single defendant; but it also applies, and, when narrowly construed, with startling results, when several plaintiffs or defendants

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<sup>10</sup>First Report, N. Y. 1848, Sec. 143; N. Y. Laws 1848, Ch. 379, Sec. 143. The classes are similar to the classes hereinafter stated (note 20) except that injuries to person or property by force and without force are divided into separate classes and the same transaction class does not appear. The other requirements of the modern codes as to parties and place of trial also appear in the original code.

<sup>11</sup>N. Y. L. 1852, 392, Sec. 167.

<sup>12</sup>See discussion in succeeding sections.

or both are involved. It is held that the joinder of parties and the joinder of causes requirements must both be satisfied, and hence an extension of the former rule may largely fail of its purpose if the latter rule remains unchanged.<sup>13</sup> Hence the New York Board of Statutory Consolidation, in recommending a new practice for New York, included not only the English liberal rules of party joinder, but also the almost complete freedom of joinder of causes permitted in that system of practice. The legislature, however, failed to heed the warning and adopted the former only.<sup>14</sup> It would seem sensible to hold that the attempted liberalization of party joinder should be given effect, even if the former construction of the joinder of causes section is thereby changed and extended, and such has been the decision of some of the able lower court judges in New York.<sup>15</sup> Unfortunately the court of appeals has indicated a view to the contrary.<sup>16</sup> The whole matter serves to emphasize the serious question as to the desirability of continuing the old restrictions on joinder of causes. A plaintiff may join a claim upon a judgment for money damages with a claim for the proceeds of personal property converted and sold, both being considered claims upon contract; but he cannot, under the New York view of the code, join a claim for damages for assault with a claim for damages for slanderous words uttered in connection with the assault.<sup>17</sup> Surely no reasons of practical policy justify such a distinction. On the other hand, it seems wholly desirable that all the matters at issue between two parties or

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<sup>13</sup>32 YALE L. J. 384, pointing out the difficulties to be expected under the New York C. P. A.; 35 YALE L. J. 85 dealing with such a case; see note 16, *infra*.

<sup>14</sup>Cf. N. Y. C. P. A. Sec. 258, with Report N. Y. Bd. St. Consol. 1915, vol. I, rules 180, 181. A short history of the rejection of the Board's report and the substitution of the legislative Civil Practice Act is given in my article, "History, Systems and Functions of Pleading," 11 VA. L. REV. 517, 540, 541, 5 AM. L. S. REV. 716, 782, 9.

<sup>15</sup>Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. Supp. 709; 137 E. 66 St. v. Lawrence, 118 Misc. (N. Y.) 486, 194 N. Y. Supp. 762; S. L. & Co. v. Bock, 118 Misc. (N. Y.) 776, 194 N. Y. Supp. 773. Cf. DeGroot v. People's State Bk., 183 Wis. 594, 198 N. W. 614.

<sup>16</sup>Ader v. Blau, 241 N. Y. 7, 148 N. E. 771, 41 A. L. R. 1216, discussed further below. It is criticised in 35 YALE L. J. 85 by the writer; 25 COL. L. REV. 975; 11 CORN. L. Q. 113. See also 26 COL. L. REV. 38, 20 ILL. L. REV. 533.

<sup>17</sup>See discussion *infra*

two sets of parties should be settled as shortly and speedily as possible. A provision that the trial court may order separate trials of various issues where desirable would prevent undue complexity and confusion of issues. Hence the English practice and that of a few states providing for practically unlimited joinder of causes seems highly desirable.<sup>18</sup> It may be considered one of the most immediate steps to be taken in practice reform.<sup>19</sup>

#### THE CODE PROVISIONS

*The Codes.* Except for the states noted below which have abolished the restrictions on joinder of causes, the code states all follow substantially the same course in making the joinder dependent upon a fixed classification of the code. As previously noted, the classes in general are arranged according to the nature of the subject matter but the final class turns upon unity of occurrence of the events constituting the various causes joined. The number of classes differs in the various code states; being three in Colorado and twelve in New York. The usual classes include the following in some combination: (1) contracts express or implied; (2) Injuries to the person; (3) injuries to the character; (4) injuries to property; (5) actions to recover real property with or without damages; (6) actions to recover chattels with or without damages; (7) claims against a trustee by virtue of a contract or operation of law; (8) actions arising out of the same transaction or transactions connected with the same subject of action. Often certain of the tort classes are found combined and in some codes the last class is omitted.<sup>20</sup>

The purely arbitrary nature of the classes will be noted. All

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<sup>18</sup>See notes 25, 27, *infra*.

<sup>19</sup>Certain other desirable modifications of subordinate requirements are referred to below in connection with the discussion of such requirements.

<sup>20</sup>The state statutes are as follows and all have seven classes, unless otherwise noted: Alaska, Code 1913, Sec. 916; Arizona, R. S. 1913, Sec. 427, (only such causes of action may be joined as are capable of the same character of relief; actions *ex contractu* and actions *ex delicto*, actions to recover for injuries to the person, to property, or to character cannot be joined); Arkansas, Dig. Stat. 1921, Sec. 1076; California, C. C. P. 1923, Sec. 427 (eight classes); Colorado, Code 1921, Sec. 96 (three); Connecticut, G. S. 1918, Sec. 5636; Idaho, Comp. St. 1919, Sec. 6688; Indiana, Burns Ann. St. 1924, Sec. 286; Kentucky, Carroll's Code 1919, Sec. 83 (six); Minnesota, G. S. 1923, Sec. 9277; Missouri, R. S. 1919, Sec. 1221; Montana, Rev. Code. 1921, Sec. 9130;

forms of unrelated contract claims—express contracts, quasi contracts and claims in judgments—may be joined;<sup>21</sup> while unrelated tort claims fall into three or more classes. Legal and equitable claims may be joined by express provision<sup>22</sup>—claims calling for different forms of trial and different forms of relief. And under the last class tort and contract claims may be joined. Yet in some respects the scheme is more restricted than the common law, for under that system certain claims under classes (2), (3), and (4) could have been joined as actions on the case. Professor Sunderland has noted some of the inconvenient and absurd results which the code classification may produce.<sup>23</sup> As he says, the final class may upset every other distinction in the classification since it cuts across all other classes. If causes may stand together *at times* under class (7), what policy is there which would prevent them from always doing so? Any possible inconvenience of trial is prevented

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Nebraska, Ann. St. 1922, Sec. 8601; Nevada, R. L. 1912, Sec. 5039; New Mexico, Ann. St. 1915, Sec. 4105; New York, C. P. A. 1920, Sec. 258 (twelve); North Carolina, Con. St. 1919, Sec. 507; North Dakota, Comp. L. 1915, Sec. 7466; Ohio, Gen. Code 1921, Sec. 11306 (nine); Oklahoma, Comp. St. 1921, Sec. 266; Oregon, Code 1920, Sec. 94; South Carolina, C. C. P. 1922, Sec. 430; South Dakota, Rev. Code 1919, Sec. 2371; Utah, Comp. L. 1917, Sec. 6567. Washington, Rem. & Bal. Code 1922, Sec. 296 (eight); Wyoming Comp. St. 1920, Sec. 5606. The same transaction clause appears in the statutes of the following states only: California, added in 1907; New York; Ohio and Washington (in the former it is divided into two classes, "transactions connected with the same subject of action" forming a separate class; in the latter, the second part being omitted entirely); Connecticut, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming (where injuries to person and property are included in one class—a combination appearing also in the Colorado and Ohio statutes); and, formerly, before the adoption of broader rules of joinder, Kansas and Wisconsin. For such broader provisions, found also in Iowa, see notes 25, 26, below. In the California and Idaho statute a proviso, added later, permits joinder of injuries to person and property growing out of the "same tort," or "the occurrence or transaction"; also claims for malicious arrest or prosecution with claims for injury to the character or person (the latter provision occurring also in the Nevada statute). Several of the New York classes deal with actions to recover penalties under particular laws. The codes also contain requirements as to parties, place of trial and separate statement which are noted below.

<sup>21</sup>*Infra*.

<sup>22</sup>See next paragraph of the text.

<sup>23</sup>18 MICH. L. REV. 571, 580, pointing out, among others, cases which have



by the discretionary power to order separate trials.<sup>24</sup> As pointed out hereinafter, however, some of the harsher results may be avoided by a liberal definition of the terms used in class (8).

In Kansas, Wisconsin, and Ontario the restrictions have been removed;<sup>25</sup> in Iowa and Michigan they are removed except for the division of actions into legal and equitable;<sup>26</sup> in England and New Jersey they are likewise removed except that actions for the recovery of land cannot be joined with actions not relating to land.<sup>27</sup>

*Legal and Equitable Causes.* Most of the codes provide that the plaintiff may "unite" in the same complaint two or more causes of action, "whether they are such as were formerly denominated legal or equitable, or both," where falling in one of the permitted classes

held that claims to recover on different theories of the same wrong are not joinable. See also KEIGWIN, CAS. EQ. PL. 434, 5.

<sup>24</sup>As in Iowa, Code 1924, Sec. 10961; Connecticut, G. S. 1918, Sec. 5636; Missouri, R. S. 1919, Sec. 1221; or in New York, in reference to joinder of parties, *infra*. Cf. 18 MICH. L. REV. 580. In many states, severance is permitted after demurrer sustained for misjoinder of causes. See note 101 below. See also Severance of Causes, below.

<sup>25</sup>Kansas, Rev. Stat. 1923, Sec. 60-601; (passed in 1909); Wisconsin, Stat. 1921 Sec. 2647 (passed in 1915 from the Kansas statute; the plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both; subject to the usual requirements as to parties, place of trial and separate statement); Ontario, 1 Jud. Act, 1915, Rule 69. See also U. S. Eq. Rules 1912, r. 26.

<sup>26</sup>Iowa, Code 1924, Sec. 10960 (even where there is a misjoinder the cases may be docketed separately with no further service on the parties; *ibid*, Sec. 10965); Michigan, Jud. Act. 1915, Sec. 12309; *Holmes v. Borowski*, 233 Mich. 407, 206 N. W. 374. The Iowa provision dates from the earliest codes, Code 1851, Sec. 1751, Code 1860, Sec. 2844.

<sup>27</sup>Eng. Jud. Act. O. 18, rules 1, 2; New Jersey, Jud. Act. 1915, r. 69. In many common law jurisdictions the rules of joinder have been substantially extended. See e. g. Florida, R. S. 1906 Sec. 1389, allowing practically free joinder; Alabama, Code 1907, Sec. 5329 and Georgia, Code 1911, Sec. 5521, authorizing joinder of all causes arising *ex delicto*, and all causes arising *ex contractu*; Massachusetts, Rev. L. 1921, Ch. 231, allowing joinder within the three divisions of actions; and Texas where without express permission, the joinder is based on rules of discretion and convenience. *Hudmon v. Foster*, 231 S. W. 346, reversing (Tex. Civ. App. 1919) 210 S. W. 262, and see note 64 *infra*. Under the civil law in Louisiana, plaintiff may cumulate separate causes or demands in the same action with certain exceptions and where not inconsistent. Louisiana Code Pr., Sec. 148-151; *Learned v. Tex. & C. Ry. Co.*, 128 La. 430, 54 So. 931.

of joinder.<sup>28</sup> The Connecticut provision goes further and states that the plaintiff "may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies; but where several causes of action are united in the same complaint they must" fall within one of the specified classes.<sup>29</sup> Hence it is held under the codes that legal and equitable causes can be joined. An example is the one given in the Connecticut rules, that acclaim for legal relief upon a contract may be joined with a claim for equitable relief upon an entirely unrelated contract.<sup>30</sup> It has been argued that these code provisions lead to the inference that where both legal and equitable relief is claimed upon substantially the same operative facts, there must necessarily be two causes of action.<sup>31</sup> But this is both an inconvenient usage and also one which prevents the union of law and equity aimed at by the code.<sup>32</sup> The better view is stated in many cases that one group of operative facts gives rise to but a single cause of action upon which varying claims, both legal and equitable, may be made.<sup>33</sup>

*Must Affect All Parties.* The codes also provide that all the causes joined must affect all the parties to the action.<sup>34</sup> The original

<sup>28</sup>N. Y. C. P. A. Sec. 258; N. Y. L., 1852, Ch. 392, Sec. 167 (where the provision first appeared). See, of the codes cited in notes 20, 25 *supra*, those of Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, Wyoming. This does not apply in those jurisdictions where law and equity are not united. *Smith v. Waterloo & c. Ry.* 191 Ia. 668, 182 N. W. 890; *Wellock v. Corvan*, 221 Mich. 58, 190 N. W. 677; *Metcalfe v. Johnson*, 151 Ky. 823, 152 S. W. 951.

<sup>29</sup>Note 20, *supra*.

<sup>30</sup>Conn. Prac. Bk. 1922, P. 282, Sec. 173; cases cited Dec. Dig. Actions, Sec. 46; Cf. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122.

<sup>31</sup>*McCaskill, op. cit.* note 1, at p. 632.

<sup>32</sup>See my articles cited in note 1 *supra*.

<sup>33</sup>*Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135, discussed hereinafter. *Lattin v. McCarthy*, 41 N. Y. 107; *McMahon v. Plumb*, 90 Conn. 281, 285, 96 Atl. 958, 960; *Am. Sav. & c. Ass'n. v. Burghardt*, 19 Mont. 323, 48 Pac. 391; *Whetstone v. Beloit Straw Board Co.*, 76 Wis. 613, 45 N. W. 535; *West v. Madansky*, 80 Okla. 161, 194 Pac. 439; *South Bend Chilled Plow Co. v. Geo. C. Cribb Co.*, 105 Wis. 443, 81 N. W. 675. But see *Kabrigh v. State Ins. Co.*, 48 Mo. App. 393. See other cases 34 YALE L. J. 884; Dec. Dig. Actions, Sec. 38 (2).

<sup>34</sup>Contained in all the codes except Arizona and now New York, notes

New York code held that they must affect all parties *equally*.<sup>35</sup> But this has been changed so that the parties may be *unequally* affected.<sup>36</sup> They must, however, be affected in the same capacity, so that a cause affecting one as individual cannot be joined with another which affects him only as an administrator, a cause affecting one jointly with another cannot be joined with one affecting him singly, and so on.<sup>37</sup> This restriction cuts down the extent of permissible joinder very materially since it requires identical parties to all the causes joined.<sup>38</sup> This is especially troublesome where the term *cause of action* is given a narrow interpretation, limiting it to a single legal claim, for it may even prevent the joinder of parties in the alternative.<sup>39</sup> It amounts to another limitation on joinder of parties and

20, 25, 27 *supra*; Cf. notes 41, 42 *infra*. In the U. S. Eq. Rules, 26 there is an alternative provision to this requirement of parties, viz., "or sufficient ground must appear for uniting the causes of action in order to promote the convenient administration of justice."

<sup>35</sup>Code of 1848, note 10, *supra*. The word "equally" was dropped in 1849. McCaskill, 34 YALE L. J. 627 n.

<sup>36</sup>Fegelson v. Niagara Insurance Co., 94 Minn. 486, 103 N. W. 495. All parties need not be affected in the same manner and to the same extent. Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

<sup>37</sup>Merrill v. Suffa, 42 Colo. 195, 93 Pac. 1099; Carrier v. Bernstein, 104 Ia. 572, 73 N. W. 1076; Cinn. & Ry. Co. v. Chester, 57 Ind. 297; Lucas v. N. Y. Cent. Ry. Co., 21 Barb. 245 (see note 42, *infra*); Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177; Denman v. Richardson, 284 Fed. 592. This is sometimes expressly provided in the statutes, as in Colorado and Iowa, notes 20, 26 *supra*, but the rule is adhered to generally.

<sup>38</sup>Hamilton v. Empire Gas & Fuel Co., (Kan.) 297 Fed. 422; Brooks v. Madden, 198 Ky., 167, 248 S. W. 503; Long Fork Ry. Co. v. Stumbo, 211 Ky., 46, 277 S. W. 297 (husband and wife); Calumet & Hecla Mining Co. v. Equitable Trust Co., 186 App. Div. 330, 174 N. Y. Supp. 319 (cf. note 42, *infra*); Shore v. Holt, 185 N. C. 312, 117 S. E. 165 (husband and wife); Ryder v. Jefferson Hotel Co., 121 S. C. 72, 113 S. E. 474, 25 A. L. R. 739 (same); Weaver v. Kirby, 186 N. C. 387, 119 S. E. 564; Runciman v. Brown, 223 Mich. 298, 193 N. W. 880; Southern Surety Co. v. Patterson Steel Co., 111 Okla. 39, 237 Pac. 588; Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55; Belt v. St. Louis & Ry. (Mo. App.), 190 S. W. 1002; Hawarden v. Coal Co. 111 Wis. 545, 87 N. W. 472. See Dec. Dig. Actions Sec. 50. The effect of this rule may be somewhat avoided by the assignment of several claims to the plaintiff. Kloefer v. Forch, 32 Idaho 415, 184 Pac. 477; Cullen v. Atchison Co., (Mo. App. 1924) 268 S. W. 93; Benedict v. Guardian Trust Co., 58 App. Div. 302, 68 N. Y. Supp. 1082.

<sup>39</sup>Under this view, the claim against each defendant is considered a separate cause. See McCaskill, *op. cit.*, note 1, *supra*. In DeGroot v. People's

would seem undesirable, for the party joinder rule should be a single one complete in itself.<sup>40</sup> Several codes provide that it shall not apply to a mortgage foreclosure action,<sup>41</sup> and the New York Civil Practice Act, in adopting the English rule of party joinder, did go at least to the extent of omitting this provision from the joinder of causes section.<sup>42</sup>

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State Bank, 183 Wis., 594, 198 N. W. 614, the alternative joinder statute was held to override this provision. In *Akeley v. Kinnicutt*, 238 N. Y. 466, 144 N. E. 682, claims of 193 plaintiffs for deceit by a single fraudulent stock prospectus were held joinable under the present New York statutes; a liberal view of cause of action would permit of their joinder under the old rules 34 *YALE L. J.* 192, 195; but see *Holland Oil & Gas Co., v. Holland*, 114 Kan. 863, 220 Pac. 1044; *Rural Credit Subscribers Ass'n v. Hanger*, 207 Ky. 303, 269 S. W. 342; *Same v. Jett*, 205 Ky. 604, 266 S. W. 240. Cf. *Fairfield v. Southport Nat'l Bk.* 80 Conn. 92, 67, Atl. 471 with *Warnock Uniform Co. v. Garifalas* 224 N. Y. 522, 121 N. E. 353. For cases giving a broad view of cause of action and thus permitting the freer joinder of parties, see *Capell v. Shuler*, 105, S. C. 75, 89 S. E. 813, (unlawful taking by one and detaining by others a single cause); *Am. Ry. Express Co. v. Hicks*, 198 Ky., 549, 249 S. W. 342 (duress against father and son). *Fortmeyer v. National Biscuit Co.*, 116 Minn. 158, 133 N. W. 461, 37 L. R. A. (N. S.) 569 (negligence against two persons not joint tortfeasors); *Mayberry v. Northern Pac. R. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, note (negligence against master and servant); *Barr v. Roderick*, 11 F. (2d) 984 (different grantees of fraudulent conveyances). So as to principals and sureties, *Burns v. Van Buskirk*, 163 Minn. 48 203 N. W. 608; *Black Mt. R. Co. v. Ocean Acc. & G. Co.*, 172 N. C. 636, 90 S. E. 763; but cf. *Midland Terra Cotta Co. v. Shuster & Co.*, 163 Wis. 190, 157 N. W. 785. See also *Juel v. Kundert*, 46 S. D. 314, 192 N. W. 753; *Robinson v. Williams*, 189 N. C. 256, 126 S. E. 621; *Sawers Grain Co. v. Goodwin*, Ind. (1925), 146 N. E. 837.

<sup>40</sup>Cf. articles cited in note 13, *supra*.

<sup>41</sup>See statutes of Connecticut, Kansas, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Wisconsin, in note 20 *supra*. Cf. *Leinback v. Dyatt*, 112 Kan. 782, 212 Pac. 894; *Price v. Cent. Nat. Bk.* 108 Okl. 208, 235 Pac. 1088. In the Ohio and Wyoming and the former New York statutes, the proviso is "except as otherwise provided (prescribed by law)". Other exceptions appear from time to time, as claim for damages to husband's personality allowed with claim for wife's personal injury in California, note 20 *supra*; *Farrar v. Whipple*, 65 Cal. App. 123, 223 Pac. 80; claims on successive bonds of public officers, *Mass. Bonding & Ins. Co. v. State* (Ind. 1925), 149 N. E. 377; or the broader provisions of the federal equity rules, note 25 *supra*; *Barr v. Roderick*, 11 F. (2d) 984.

<sup>42</sup>N. Y., C. P. A. Sec. 258. Cf. *Akeley v. Kinnicutt*, note 39 *supra*; *Sherlock v. Manwaren*, 208 App. Div. 538, 203 N. Y. Supp. 709; *Forbes v. City of Jamestown*, 212 App. Div. 332, 209 N. Y. Supp. 99; *Smith v. Earle*, 202 App.

*Must Not Require Different Places of Trial.* This requirement, whether expressly stated or not, probably must apply so long as we have "local" and "transitory" actions, that is, certain actions which must be tried where the res is situated, and certain actions which must be tried where jurisdiction over the parties is obtained.<sup>43</sup> The effect of the provision is therefore that the venue rules are not changed by this section of the code.<sup>44</sup> These rules are being gradually limited in application and hence this restriction on joinder may be expected to be of less and less importance.<sup>45</sup>

*Must Be Consistent.* This requirement is found in a few codes and has been read in by some other courts.<sup>46</sup> A similar question arises where several defenses are contained in a single answer.<sup>47</sup> The requirement, wherever found, is an unfortunate one; for it affords opportunity to the courts to require legally consistent claims and thus operates harshly against a party who is honestly not sure of all the facts or of the court's interpretation of the law in advance of the trial.<sup>48</sup> Thus recently the New York court of appeals, which long since had achieved a reasonable definition of "inconsistent defenses," held that a claim for the death of a child as due to the negligence of a property owner in maintaining an iron fence was inconsistent with a claim for such death as due to the malpractice of the attending physician.<sup>49</sup> True the claims were legally different,

Div. 305, 195 N. Y. Supp. 342; *Fleitmann & Co. v. Colonial Finance Corp.*, 203, App. Div. 827, 197 N. Y. Supp. 125; *H. R. Medina*, 21 *COL. L. REV.* 113.

<sup>43</sup>For the codes, see notes 20, 25-27 *supra*.

<sup>44</sup>*Wilson v. Louisville Elec. Ry. Co.* 33 *Ky. L. R.* 985, 112 *S. W.* 585; *Hackett v. Carter*, 38 *Wis.* 394; *Jacobus v. Colgate*, 217 *N. Y.* 235, 111 *N. E.* 837.

<sup>45</sup>Cf. *SCOTT, FUNDAMENTALS OF PROCEDURE*, Ch. I; 34 *YALE L. J.* 560.

<sup>46</sup>Minnesota, New York, Louisiana, see notes 20, *supra*. *Seymour v. Chicago & C. Ry. Co.*, 181 *Ia.* 218, 164 *N. W.* 352; *Poland v. Chessler*, 145 *Md.* 66, 125 *Atl.* 536. See cases cited *infra*, note 56. The provision first appeared in New York in 1877.

<sup>47</sup>1 *ORE. L. REV.* 26; 10 *CALIF. L. REV.* 251; 1 *MINN. L. REV.* 94.

<sup>48</sup>35 *YALE L. J.* 85. As to stating the same cause of action in different counts, see discussion below.

<sup>49</sup>*Ader v. Blau*, note 16, *supra*, with comments there cited in criticism of it. Cf. *Heaphy v. Eidlitz*, 197 App. Div. 455, 189 *N. Y. Supp.* 431 where causes were said to be inconsistent and hence to require a separate statement. See also *Edison Elec. Co. v. Kalbfleisch Co.*, 117 App. Div. 842, 102 *N. Y. Supp.* 1039 criticised in 7 *COL. L. REV.* 625. But see *France & Canada Steamship Corp. v. Berwind*, 229 *N. Y.* 89, 127 *N. E.* 893, 10 *A. L. R.* 752. For the case

but there is no reason why all the facts could not have happened as alleged. No sound policy is apparent why such facts should not be considered as a unit, and the case disposed of at one time. The difficulty is avoided by a definition of consistency—now almost universally applied in the case of several defenses—as requiring only consistency of facts alleged, not of legal claims. It then becomes a requirement of *truth* in the pleadings; and where it appears that proof of all the facts alleged means perjury by somebody the pleadings are objectionable.<sup>50</sup> This gives a limited but practical application of the provision. It should be omitted, however, for the chance of misconception which it gives, and since all its usefulness is covered by the general requirement that pleadings must be true.<sup>51</sup>

*Must Be Separately Stated.* Each cause of action must be separately stated and numbered.<sup>52</sup> The practical interpretation of *cause of action* in this connection is considered later.<sup>53</sup>

#### THE SEVERAL CLASSES

*In General.* Of the several classes stated in the codes, the only ones of wide application are the contract class and the same transaction class.<sup>54</sup> These two classes also appear in substantially the same form in connection with the pleading of counterclaims to the causes set forth in the complaint.<sup>55</sup> The limited application of the other classes is apparent from their statement. In some states as in New York the subdivisions are quite minute.<sup>56</sup> The class, however, pro-

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of an election see *Joannes Bros. Co. v. Lamborn* 237 N. Y. 207, 142 N. E. 587; *Seggerman Bros. v. Rosenberg Bros.* 216 N. Y. Supp. 61 and discussion below.

<sup>50</sup>*Seiter v. Bischoff*, 63 Mo. App. 157; *Canellos v. Zotalis*, 145 Minn. 292, 177 N. W. 133; *Turner v. Turner*, 173 Cal. 782, 161 Pac. 980; *Friedman v. Rodstein*, 176 N. Y. Supp. 554, 556; *Burton v. Helton*, (Mo., 1923) 257 S. W. 128; *Eldridge v. Eldridge*, (Tex., App. 1924) 259 S. W. 209; *Eberbach v. Woods*, 232 Mich. 392, 205 N. W. 174. For a somewhat different view of inconsistency see *McCaskill*, 34 YALE L. J. 614, 640-643. Cf. 34 *Ibid.*, 882n; 35 *ibid.*, 90 note; 31 L. R. A. (N. S.) 158 note.

<sup>51</sup>See the writer's article, "The Complaint in Code Pleading" 35 YALE L. J. 259, 277-8.

<sup>52</sup>Codes, notes 20, 24-27, *supra*.

<sup>53</sup>*Infra*.

<sup>54</sup>Note 20, *supra*.

<sup>55</sup>Cf. N. Y. C. P. A. Sec. 266; Ohio, Gen. Code, 1926, Sec. 11317; Calif. C. C. P. 1923, Sec. 438; 34 YALE L. J. 330; L. R. A. 1916 C, 491.

<sup>56</sup>For examples under the various codes, see *Midler v. Noell*, 193 Ky.

viding for claims against a trustee—in some codes made to include claims by or against any fiduciary—seems susceptible of wide application where a trustee is involved.<sup>57</sup>

*The Contract Class.* Causes arising out of “contracts, express or implied” or “upon contract, express or implied” may be joined.<sup>58</sup> This class has been given a consistently broad interpretation, as including all manner of claims considered at common law in the contract actions. Thus causes arising upon covenants, upon debts of record or of contract, or of law, and upon express, implied and quasi-contracts, including waiver of tort, may all be joined indiscriminately.<sup>59</sup> The wide joinder here permitted with apparently

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659, 237 S. W. 373 (different utterances of slander joinable); *King v. Milner*, 63 Colo. 405, 167 Pac. 957 (so of malicious prosecution and false imprisonment); *Just v. Martin Bros. Co.*, 38 S. D. 470, 159 N. W. 44 (same and abuse of process); *Hanser v. Bieber*, 271 Mo. 326, 197 S. W. 68; but see *Greziari v. Ernst*, 169 Ky. 751, 185 S. W. 99 (libel and malicious prosecution not joinable): *Weibush v. Jefferson Canal Co.*, 68 Mont. 586, 220 Pac. 99 (injuries to real and personal property; joinder proper); *Gomez v. Reed*, 178 Cal. 759, 174 Pac. 658 (same); *Irwin v. McElroy*, 91 Ore. 232, 178 Pac. 791 (same); *Weissshand v. City of Petaluma*, 37 Cal. App. 295, 174 Pac. 955 (injuries to person and property joinable, see note 20 *supra*); but see *Grey v. Thone*, 196 Ia. 532, 194 N. W. 961; *Lennon v. City of Butte*, 67 Mont. 101, 214 Pac. 1101. In the absence of the same transaction clause, claims in contract and in tort are not joinable, *Steinberg v. Trueblood*, 124 Ark. 308, 186 S. W. 836; *Miami Co. Bk. v. State*, 61 Ind. App. 360, 112 N. E. 40; *Foy-Proctor Co. v. Marshall & Thorn*, 169 Ky. 377, 183 S. W. 940.

<sup>57</sup>The more usual form is “Claims against a trustee by virtue of a contract or by operation of law”. It has been held that claims upon an express trust and one arising by operation of law, may be joined, *Burt v. Wilson*, 28 Cal. 632 and so where all arise by operation of law, *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163 (against directors of a corporation); but not where one arises by operation of fact, as for a wrongful conversion. *French v. Salter*, 17 Hun. 546.

<sup>58</sup>The former is the California, the latter the New York form. See note 20, *supra*.

<sup>59</sup>*Hawk v. Thorn*, 54 Barb. 164; *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186; *Rausch v. Arp*, 39 Cal. App. 580, 179 Pac. 694; *Nicholas v. Hadlock*, (Mo. App. 1915) 180 S. W. 31; *Bowler v. First Nat. Bank*, 22 S. D. 71, 115 N. W. 517; *Walser v. Moran*, 43 Nev. 111, 180 Pac. 492 reversing 173 Pac. 1149; *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289; *Uecke v. Held*, 144 Wis. 416, 129 N. W. 599; *Dick v. Hyer*, 94 Ohio St. 351, 114 N. E. 251; *Sayles v. Daniels Sales Agency*, 100 Or. 37, 196 Pac. 465; *Griffin v. Armsted*, 143 N. Y. Supp. 770, 147 *Ib.* 1114 (foreclosure of several chattel mortgages). It has been held not to include the foreclosure of a real estate mortgage with a con-

complete success casts doubt upon the policy of restriction applied to tort claims to which the doctrine of waiver of tort was not applied.<sup>60</sup>

*The Same Transaction Class.* This class has been the subject of the most diverse interpretation by the courts. As we have seen, it undoubtedly came from the equity rule.<sup>61</sup> It is another example of the practice of the codifiers in laying down a rule, obtained from the discretionary practice of courts of equity, in seemingly definite and precise form to prevent the exercise of wide discretionary powers in the trial court.<sup>62</sup> The vagueness of meaning of the terms used, however, results in as uncertain a rule in actual practice as one which is frankly discretionary, but with the courts constantly attempting to make a precise definition. The result is that a court, having reached a definition which appeals to it, will demand finality for the meaning which it has decided upon; but when a new situation arises the application of this definition to it is just as much in doubt as ever, until the court has spoken.<sup>63</sup> A much sounder method of interpretation would seem to be frankly to recognize the vague extent of the rule and to apply it broadly to carry out what all procedural rules are designed to accomplish, namely, convenience and

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tract claim. *McCague Sav. Bk. v. Croft*, 80 Neb. 702, 115 N. W. 315; *City Real Est. Co. v. King*, 197 N. Y. 508, 90 N. E. 1157 aff'g 126 App. Div. 911, 110 N. Y. Supp. 1124; or a claim for absolute divorce and a claim for separation, *Conrad v. Conrad*, 124 App. Div. 780, 109 N. Y. Supp. 387. See cases collected, Dec. Dig. Actions Sec. 45 (4).

<sup>60</sup>The cases cited in the previous note indicate no confusion or inconvenience in the waiver of tort cases. Cf. *Sunderland and Keigwin*, *op. cit.* n. 23, *supra*.

<sup>61</sup>See discussion above and citations, n. 7 *supra*. The phrase included in some of the codes with reference to this class "and not included within one of the foregoing subdivisions of this section" has properly been construed not to be a restriction on this class. *Eagan v. N. Y. Transp. Co.*, 39 Misc. 111, 78 N. Y. Supp. 209; *McInerney v. Main*, 82 App. Div. 543, 81 N. Y. Supp. 539. Cf. N. Y. C. P. A., Sec. 258: "Whether or not included within one or more of the other subdivisions"—a preferable form of expression.

<sup>62</sup>Cf. 33 YALE L. J. 8.

<sup>63</sup>Thus in *Stone v. Case*, 34 Okla. 5, 124 Pac. 960 the court, having made a somewhat limited definition of terms—which, however, worked in the case at hand—concluded that from its opinion pleaders and courts could thereafter determine when causes of action might be joined.



efficiency in trials. This would result in much discretion in the trial court.<sup>64</sup>

There are at least three different terms in the code provision, to each of which a content must be given by the courts: (1) *causes of action* arising out of (2) *the same transaction*, or transactions connected with (3) *the same subject of the action*. The cases may be classified in general as giving one of three interpretations. One is to give a narrow legalistic meaning to all three terms; another is to give such meaning to the first (*cause of action*), while giving a broader, nontechnical or lay definition of the last two; while the third is to give the latter interpretation to all three terms. Thus suppose A to assault B, at the same time slandering him. At common law the assault gives rise to an action of trespass; and the slander to an action on the case.<sup>65</sup> Under the first interpretation above, there are different causes of action not arising out of the same transaction, etc., and not joinable;<sup>66</sup> under the second, different causes of action joinable as arising out of the same transaction;<sup>67</sup> under the third, a single cause of action.<sup>68</sup> The New York courts in general

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<sup>64</sup>See *N. Y. N. H. & H. R. R. Co. v. Schuyler*, 17 N. Y. 529, 595 and see the Texas cases, e. g. *Buckholtz State Bk. v. Thallman*, 116 S. W. 687, that joinder should be had on grounds of convenience, where it will not consume too much time, confuse the jury or hinder proper administration of justice; *Great So. Co. v. Dolan*, 239 S. W. 236; *Lawrence v. Cananea Consol. Copper Co.* 237 S. W. 959; *Hudman v. Foster*, note 27 *supra*.

<sup>65</sup>Cf. notes 2, 3, *supra*.

<sup>66</sup>*Anderson v. Hill*, 53 Barb. 245, 246; *Dewolf v. Abraham*, 151 N. Y. 186, 45 N. E. 455; *Raspulo v. Ragona*, 215 N. Y. Supp. 407; *Keep v. Kaufman*, 56 N. Y. 332; *Green v. Davies*, 182 N. Y. 499, 75 N. E. 536; *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75. Cf. *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. Supp. 41 and the discussions as to counter claims, note 55, *supra*. See also 36 *YALE L. J.* 148.

<sup>67</sup>*Dinges v. Riggs*, 43 Neb. 710, 62 N. W. 74; *Harris v. Avery*, 5 Kan. 146; *Scarborough v. Smith*, 18 Kan. 399; *Craft Refrigerating Co. v. Quinnepiac Brewing Co.*, 63 Conn. 551. See the Connecticut and New Jersey provisions cited, note 71 *infra*. See also *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. 1024; *France & Canada Steamship Corp. v. Berwind-White Mining Co.* 229 N. Y. 89, 127 N. E. 893. Cf. *Van Meter v. Goldfarb* 317 Ill. 620 148 N. E. 391 and *Scott v. Waggoner*, 48 Mont. 536, 39 Pac. 454, L. R. A. 1916 C. 491, with note.

<sup>68</sup>*Harris v. Avery*, *supra*; *Maisenbacker v. Concordia Soc'y.* 71 Conn. 369, 376, 42 Atl. 67; *Brewer v. Temple*, 15 How. Prac. 286; Cf. *Rosendale v. Market Sq. Dry Goods Co.* (Mo. App. 1919) 213 S. W. 169; *Dixon v. City of*

follow the first interpretation—a view reinforced by a very late court of appeals decision;<sup>69</sup> though at times they go so far as to construe the term *cause of action* very broadly. Other jurisdictions vary between the second and third interpretation.<sup>70</sup> The Connecticut and New Jersey codes require at least the second by express provision and do not prevent the third interpretation.<sup>71</sup> So far as *joining* causes is concerned, it usually makes little difference whether the second or third interpretation is followed; the distinction becomes important in connection with the separate statement hereinafter discussed.<sup>72</sup> The writer has always believed that the third interpretation is the sound one for the term “cause of action” whenever appearing in the code. This would give to it the meaning of a unit of operative facts which may give rise to different legal claims.<sup>73</sup> Under this view the three terms are not different in kind but in de-

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Reno, 43 Nev. 413, 187 Pac. 308; and *Beardsley v. Soper*, 171 N. Y. Supp. 1043; also cases cited note 39 *supra*, notes 69, 77 *infra*.

<sup>69</sup>See cases note 66, *supra*. In the recent case of *Ader v. Blau*, note 16 *supra*, it was held that negligence of one defendant in maintaining a picket fence resulting in the death of a child was not even the same transaction with the negligence of the second defendant, a doctor, in treating the child. For cases, however, giving a broad interpretation to *cause of action* see *Cleveland Cliffs Iron Works v. Keusch*, 237 N. Y. 533, 569, 143 N. E. 731; *Payne v. N. Y. & S. Ry. Co.* 201 N. Y. 436, 95 N. E. 19; *Porter v. International Bridge Co.*, 163 N. Y. 79, 57 N. E. 174; and other cases cited in this article. Cf. note 68 *supra*.

<sup>70</sup>Cf. notes 67, 68 *supra*.

<sup>71</sup>Conn. Prac. Bk. 1922, p. 282, Sec. 172, “Where several torts are committed simultaneously against the plaintiff, as a battery accompanied by slanderous words, they may be joined, as causes of action arising out of the same transaction, notwithstanding they may belong to different classes of torts.” *Ibid.* p. 286, Sec. 187: “Transactions connected with the same subject of action may include any transactions which grow out of the subject matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault or neglect; the breach of a covenant for quiet enjoyment by the entry of the lessor, and also a trespass to goods, committed in the course of entry”. See also Sheen, N. J. Prac. Act. 1916, p. 222, Sec. 307, 222.

<sup>72</sup>On the separate statement, see below. The third view may be important, however, where different parties are involved, to avoid the restriction that causes to be joined must affect all parties; see note 39 *supra*.

<sup>73</sup>See the writer’s discussion in 33 YALE L. J. 817 and elsewhere in this article.

gree, each being a unit of facts but each one of broader content.<sup>74</sup> The exact extent of each will depend not upon the chance or historically accidental form in which our legal rights developed, but in a lay or practical view of what is a unit in point of time or occurrence. This would seem in any event the only proper view of the last two terms, the New York interpretation being wholly unjustified in view of their equity origin.<sup>75</sup> There seem substantial reasons for a like view of *cause of action*. They concern the use of the terms as meaning a group of facts, with the emphasis of the code upon pleading the facts, and are thought to reflect both the intent of the codifiers and the most convenient usage. A more restricted meaning makes the code concept a means of obstructing procedure rather than of achieving a more simple and effective court machinery.<sup>76</sup>

Some of the more suggestive cases are cited in the footnote.<sup>77</sup>

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<sup>74</sup>There has been a constant attempt to define specifically and distinctly all three phrases of the class. See for example the well known case of *McArthur v. Moffett*, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264, with comment, 9 MICH. L. REV. 345, and Cf. McCaskill, 34 YALE L. J. 614, *et seq.* criticising the writer's view on the ground that it makes no sharp distinction of kind but only one of degree between the phrases. Thus "subject of the action" is considered in *McArthur v. Moffett* to be the specific real property involved; it is often thought of as meaning a specific physical thing, or perhaps an aggregate of legal relations, such as a contract, or even a "primary right". But in different cases it is held to mean all these things, and in view of the equity origin of the rule, the use of the phrase in other analogous connections, as in joinder of parties, and the convenience of its usage, the attempt so to limit its content seems undesirable. Hence "subject of the action" should also be given a non-technical definition, meaning in general the subject matter of the action, permitting of wide joinder within the limits of trial convenience. 33 YALE L. J. 832 n.; KEIGWIN, CAS. CODE PL. 441, 2; Conn. Prac. Bk. 1922, p. 286, Sec. 187, quoted note 71, *supra*.

<sup>75</sup>Professor McCaskill although arguing for a limited legal view of cause of action, agrees with the lay view of the other phrases. *Op. cit.* note 74 *supra*. For a liberal interpretation of "transaction" by the United States Supreme Court with reference to counterclaims, see *Moore v. N. Y. Cotton Exch.* 46 Sup. Ct. 367 (1926). This court has in general taken a broad view of "cause of action". *Chicago, etc. Ry. v. Schendel*, 46 Sup. Ct. 420 (1926); *Mo. etc. Ry. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135.

<sup>76</sup>33 YALE L. J. 817; 34 *Ibid.* 879.

<sup>77</sup>The cases, while not falling into clear cut classes and being conflicting even in the same jurisdiction, in general take one of two positions, the first that of a grouping according to the occurrence of the events involved, a

## THE SEPARATE STATEMENT

*When Required.* Each cause of action must be separately stated and numbered.<sup>78</sup> It should be preceded by a heading such as "First Cause of Action," "First Count," etc. The allegations of each cause should then be paragraphed.<sup>79</sup> The allegations of one cause cannot be used to help out the allegations of another cause in the same complaint,<sup>80</sup> unless incorporated into such other cause by express and definite reference.<sup>81</sup>

The requirement of separate statement is a natural and reasonable one designed to keep the issues clear and simple. When the code ideal of stating the facts is kept in mind, and the cause of action is

grouping of fact; the second, a grouping according to the legal claims involved. The first is the one here favored. See, for example, *Boulden v. Thompson*, 21 Cal. App. 279, 131 Pac. 765; *Worth v. Dunn*, 98 Conn. 51, 118 Atl. 467; *Tsuboi v. Cohn*, 40 Idaho 102, 231 Pac. 708; *Burton v. Collins*, 118 N. C. 196, 24 S. E. 122; *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232; *Stark County v. Mischel*, 33 N. D. 432, 156 N. W. 931; *State v. P. Lorillard Co.* 181 Wis. 347, 193 N. W. 613; but cf. *N. C. Land Co. v. Beatty*, 69 N. C. 329. Claims for common law and statutory negligence, including claims under the federal Employes Liability Act and state Workmen's Compensation Acts are usually held to state but one cause of action. *Chicago etc. Ry. v. Schendel and Mo. etc. Ry. v. Wulf*, *supra* note 75, *Payne v. N. Y. S. W. Ry.*, *supra* note 69; *Chrosciel v. N. Y. Cent. Ry.* 159 N. Y. Supp. 294, 174 App. Div. 175; *Doyle v. St. Paul Union Depot Co.*, 134 Minn. 461, 159 N. W. 1081; *Hutton v. Link Oil Co.* 108 Kan. 197, 194 Pac. 925; *Ford v. Powell* (Mo. App.) 243 S. W. 366. But see *First Const. Co. v. Rapid Transit Co.*, 122 Misc. 145, 203 N. Y. Supp. 359; *St. Louis & San Francisco Co. v. Boridreaux*, 159 Ark. 684, 252 S. W. 913 and 10 MINN. L. REV. 417, 424 criticising—unjustifiably, it is thought,—*Edelbrock v. Minn. Ry. Co.* 166 Minn. 1, 206 N. W. 945. In general see cases Dec. Dig. Pl. Sec. 48; ТНРОСКМОРТОН'S CAS. CODE PL. 308.

<sup>78</sup>See codes notes 20, 25, 26, *supra*. In New York the provision now appears in C. P. A. rule 90.

<sup>79</sup>See N. C. A. P. A. rule 90; Conn. G. S. 1918, Sec. 5637; N. C. Consol. St. 1919, Sec. 506; N. J. Prac. Act. 1912, r. 17, 36. The practice of numbering the paragraphs is usually approved. *Burton v. Doyle*, 48 Okl. 755, 150 Pac. 711. *Contra*, *Kerr v. City of Bellefontaine*, 59 Ohio St. 446, 52 N. E. 1024.

<sup>80</sup>*Gertler v. Linscott*, 26 Minn. 82, 1 N. W. 579; *Liebster v. Friedman*, 180 N. Y. Supp. 322; *Ross v. Chicago etc. Ry.* 225 Ill. App. 633; *McDonald v. Hall*, 193 Mich. 50, 159 N. W. 358.

<sup>81</sup>*Curtis v. Moore*, 15 Wis. 134; *Schrade v. Camillus Cutlery Co.* 242 Fed. 523; *James Rees & Sons Co. v. Angel*, 125 Misc. (N. Y.) 771, 211 N. Y. Supp. 817; Dec. Dig. Pl. Sec. 54. The practice of incorporating by reference, while generally favored, is not permitted in a few states. Cf. *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789.

treated as a convenient unit of such facts, the provision works well. It is somewhat analogous to the division of a book into chapters, the size of the chapters depending largely on convenience in trial. This is the form of definition above suggested and followed in many cases.<sup>82</sup> Even in New York it has been often followed, and was followed recently in a case where claims for demurrage against various shippers under different contracts but in the same vessel were held to arise out of the same cause of action.<sup>83</sup> No advantage is secured by the separate statement unless the facts are substantially different, as for example, in the case of two distinct and unrelated contracts.<sup>84</sup> On the other hand to hold that there is a new cause every time a different legal interpretation is put or legal claim is made on substantially the same set of operative facts is to compel a useless and confusing repetition of the same allegations in order to make a slightly different claim of law thereon.<sup>85</sup> This is to go back to the count practice of the common law, which was designed to meet another difficulty, as noted in the next paragraph, and which has been so generally and justly criticized. Once again exception may be taken to a definition of cause of action which obstructs rather than helps.<sup>86</sup>

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<sup>82</sup>See cases and authorities cited in the preceding section of this article.

<sup>83</sup>Cleveland Cliffs Iron Works v. Keusch, 237 N. Y. 533, 569, 143 N. E. 731; 126 Court of Appeals Records 1; 33 YALE L. J. 817. Other striking examples are the union of legal and equitable claims in a single cause, Hahl v. Sugo, note 33, *supra*; different legal claims on a single cause as in Payne v. N. Y. & S. R. R. Co. notes 69, 77 *supra*; and, as in the Cleveland Cliffs case, a single cause affecting several parties, n. 39 *supra*.

<sup>84</sup>Separate contracts; see Upson Co. v. Erie R. Co. 213 App. Div. 262, 210 N. Y. Supp. 112; Royle v. McLaughlin, 195 App. Div. 413, 186 N. Y. Supp. 356; Gaddis v. Williams, 81 Okl. 289, 198 Pac. 483; and note 138 *infra*.

<sup>85</sup>Akley v. Kinnicutt, note 39 *supra*, where the pleader felt compelled to set up 193 causes shows the inconvenience of the practice; of the eighteen paragraphs of the complaint, fourteen were incorporated by reference into each count except the first, and two others were substantially identical; the complaint comprised 1090 folios covering 364 pages of the printed record. 34 YALE L. J. 195. See also the next paragraph of the text and notes 89-91 below.

<sup>86</sup>See the writer's articles, cited note 1, *supra*. See cases cited above in this article, and see the series of Stoneham cases, 206 N. Y. Supp. 900, 913, 956; 207 N. Y. Supp. 938; Packard v. Fox Film Corp. 207 App. Div. 311, 202 N. Y. Supp. 164; Rich v. Fry, 196 Ind. 303, 146 N. E. 393. Thus in Missouri the holding in McHugh v. St. Louis Transit Co. 190 Mo. 85, 88 S.

*Stating the Same Cause in Different Counts.* At common law it was forbidden to make allegations of fact in the alternative.<sup>87</sup> In order to meet the difficulty thus created, since often the pleader could not tell in advance of trial just how the evidence would develop, and in order further to meet varying theories of law upon the case as it might appear to the court, the practice of using plural counts to state the same case arose.<sup>88</sup> This led to much repetitious statement in the cases and was severely condemned by the English Common Law Commissioners<sup>89</sup> and the New York Code Commissioners. The latter said that thus "the pleadings came to be that mass of verbiage which they now are."<sup>90</sup> So under the code, where emphasis is placed upon pleading merely the facts, the use of several counts to state the same cause was strongly disapproved.<sup>91</sup> With the provision of the code that variances should be disregarded unless they have misled the opponent, there was less need of the practice, and this would be yet more true in jurisdictions allowing pleading in the alternative.<sup>92</sup> Yet as Judge Keigwin points out, the pleader may often still desire to plead his case according to two different legal theories.<sup>93</sup> It might be possible to do this in a single count and yet

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W. 853 (that claims for injury for common law negligence and breach of city ordinance constitute two causes) has been overruled. *White v. St. Louis etc. Ry.* 202 Mo. 539, 101 S. W. 14; cases cited, 33 YALE L. J. 830 n., note 77, *supra*.

<sup>87</sup>Hankin, "Alternative and Hypothetical Pleading", 33 YALE L. J. 365; Clark, 35 YALE L. J. 259, 278, 9.

<sup>88</sup>CHITTY, PL. 16 ed. 408-418; SHIPMAN, C. L. PL. (Ed. Ball.) 203-206; KEIGWIN, CAS. C. L. PL. 531 *et. seq.* giving many cases. Cf. *Miller v. Southern Ry.* 21 Ga. App. 367, 94 S. E. 619.

<sup>89</sup>In reporting the Hilary rules (1834); STEPHEN, PL. (Ed. Will.) \*LXXXII-\*LXXXVI; they said that the practice "often leads to such bulky and intricate combinations of statements as to present the case to the judge and jury in a form of considerable complexity; and it is apt, therefore, to embarrass and protract the trial, and occasionally leads to ultimate confusion and mistake in the administration of justice."

<sup>90</sup>First Report, 139.

<sup>91</sup>*Baxter v. Camp.* 71 Conn. 245, 41 Atl. 803 per Baldwin J. and *Nash v. McCauley*, 9 Abb. Pr. 159 citing cases; and other Connecticut and New York cases cited in 33 YALE L. J. 833 n. 836 n.; *Coleman v. St. Paul etc. Co.* 110 Wash. 259, 188 Pac. 532; *Lund v. Salt Lake Co.* 58 Utah 546, 200 Pac. 510. Hankin, *op. cit.* note 87, *supra*, at page 268.

<sup>92</sup>See authorities in note 87, *supra*.

<sup>93</sup>KEIGWIN, CASES CODE PL. 514, 515.

often it seems clearer to state it separately in two counts. An additional reason for so doing is that a judge, who takes the restricted view of the concept *cause of action*, may think he has stated two causes anyhow and require a separate statement.<sup>94</sup> In any event it proved impracticable and harsh to do away with the common law practice and hence generally under the code it is still permitted.<sup>95</sup> This seems the sounder practice. The objection, if any, should not be to the use of plural counts as such, but to undue verbosity and repetition which should be ordered corrected where really necessary for the clarity of the pleadings.<sup>96</sup> But where no harm is done and the pleader's meaning is clear, it is shorter and simpler not to stop to order changes to secure some possibly more perfect pleading. Particularly is this so when the pleader has more completely disclosed his case by such manner of allegation. It should be noted that a strict interpretation of the rule of "consistency" considered above may lead to injustice which is avoided under the common law practice here discussed.<sup>97</sup>

#### OBJECTIONS TO IMPROPER JOINDER

*Method of Raising Objection.* Under the formulary system of the common law, improper joinder of actions was necessarily a

<sup>94</sup>See e. g. 1st Const. Co. v. Rapid Transit Co. 122 Misc. 145, 203 N. Y. Supp. 359; Brown v. Thompson-Starrett Co. 139 App. Div. 632, 124 N. Y. Supp. 396; Crosby v. Otis Elevator Co., 141 App. Div. 369, 126 N. Y. Supp. 204 (Laughlin, J., dis.).

<sup>95</sup>Astin v. Chicago etc. Ry. 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158, with note; Raymond v. Bailey, 98 Conn. 201, 118 Atl. 915; Worth v. Dunn, 98 Conn. 51, 118 Atl. 467; Russell v. John Clemens & Co. 196 Ia. 1121, 195 N. W. 1009; Carter Oil Co. v. Garr, 731 Okl. 28, 174 Pac. 498; Williams v. Nelson, 45 Utah, 255, 145 Pac. 39; Staples v. Esary, 130 Wash. 521, 228 Pac. 514; Dec. Dig. Pl. Sec. 53; THROCKMORTON, CAS. CODE PL. 242. Some cases suggest that the plaintiff should be required to elect between the counts at the trial, Manders v. Craft, 3 Colo. App. 236, 32 Pac. 836; Harvey v. S. P. Co. 46 Ore. 505, 80 Pac. 1061; but this in large measure nullifies the benefits of the practice; the correct procedure is given in Raymond v. Bailey, *supra*, where both counts are allowed to go to the jury, under instructions that, in any event, recovery may be had on only one.

<sup>96</sup>The matter is largely one of discretion, Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035; cf. note 85, *supra*; N. Y. C. P. A., rule 103.

<sup>97</sup>Cf. Heaphy v. Eidlitz, n. 49, *supra*, requiring separate statement of inconsistent claims: Roxana Co. v. Covington Bk. 98 Okla. 266, 225 Pac. 375.

fatal defect, of which advantage could be taken even after verdict.<sup>98</sup> Under the code however, the objection is to be made by demurrer which should specify the ground upon which it is based.<sup>99</sup> It will lie although the causes have been mingled together in one count.<sup>100</sup> In some jurisdictions the remedy is merely an order of severance; perhaps that the plaintiff strike out one cause or elect upon which to stand. The order for separate trials seems the most simple and convenient remedy.<sup>101</sup>

By some decisions the pleader has been forced to elect at the trial the count upon which he will proceed.<sup>102</sup> Under our modern views as to joinder generally, and under the requirements that this ground must be specified in a demurrer and that all formal objections not taken in proper course are waived,<sup>103</sup> this seems an incorrect view. Unless the defendant raises the objection seasonably by

<sup>98</sup>Sunderland, *op. cit.* note 2, *supra*; Bull v. Mathews, note 2, *supra*; Dean v. Cass, note 2, *supra*.

<sup>99</sup>See the code provisions on the demurrer, SUNDERLAND'S CAS. CODE PL. 543-546. Where the demurrer is abolished, as in New York, the objection is by motion; N. Y. C. P. A., Sec. 277, 278; where this objection does not appear on the face of the pleading, it seems it may be taken by answer, *Ibid.* cf. Coppola, v. Di Benedetto, 127 Misc. 276, 215 N. Y. Supp. 722. It has been held, however, that there is a misjoinder unless the complaint shows on its face that there may be a joinder. Flynn v. Bailey, 50 Barb. 73. For the numerous cases holding the demurrer the proper remedy, see Dec. Dig. Pl. Sec. 193 (6).

<sup>100</sup>Wiles v. Suydam, 64 N. Y. 173; Faesi v. Goetz, 15 Wis. 231; Continental Securities Co. v. Yuma Nat. Bk. 20 Ariz. 13, 176 Pac. 572; Dewing v. Dewing, 112 Minn. 316, 318, 127 N. W. 1051; Fischer v. Hintz, 145 Minn. 161, 176 N. W. 177.

<sup>101</sup>Sunderland, *op. cit.* note 1, *supra*, citing statutes. See especially Eng. Jud. Act. Order 16, r. 1; Order 18 r. 8; Iowa, Code 1924, Sec. 10962, 10963 (motion to strike is the only remedy; where granted the separate causes may be docketed without further service); Kansas, Mathes v. Shaw, 85 Kan. 162, 116 Pac. 244; Kentucky, Carroll's Code, 1919, Sec. 85; North Carolina, Consol. St. 1919, Sec. 507 (if demurrer is sustained for misjoinder, the court may order the division of the action); and Michigan and New Jersey; for the power to order separate trials, see note 24 *supra*.

<sup>102</sup>See cases in notes 95 *supra*; McHugh v. St. Louis Transit Co. note 86, *supra*; Dec. Dig. Pl. Sec. 369.

<sup>103</sup>See the general code provision, that all objections not taken by demurrer or answer are waived except lack of jurisdiction or failure to state a cause of action. N. Y. C. C. P. (1919) Sec. 499; Hinton's Cas. Code Pl., 2d ed. 432.



demurrer, specifying the reason, he should be deemed to have waived it.<sup>104</sup>

Where one of the two causes which the pleader has attempted to state is defective and states no cause, there is some question whether the objection of misjoinder can be raised.<sup>105</sup> It would seem simpler, in accordance with the more usual view, to treat the defectively stated cause as non-existent and merely reject its allegations as surplusage.<sup>106</sup>

*Same—Failure to State Separately.* Failure to make the separate statement of each cause as required is a defect of form, waived if not seasonably taken. The remedy should be only by motion to compel a separate statement.<sup>107</sup> In some jurisdictions the special demurrer may be employed for such defects of form.<sup>108</sup> It is perhaps unfortunate that courts often tend to treat this as an important issue, reversing the decision of the trial court. A liberal and flexible view of the *cause of action* would permit of much discretion in the trial court on this matter and might well be used to prevent a litigant from wasting the time of appellate courts on such comparatively trivial issues.<sup>109</sup>

#### SPLITTING A CAUSE OF ACTION

*Purpose of the Rule.* The rule against splitting a cause of action is well stated in a leading case as follows: "The principle is settled beyond dispute that a judgment concludes the rights of parties in respect of the cause of action stated in the pleadings on which

<sup>104</sup>So expressly specified in many codes, N. Y. C. P. A. Sec. 278; Iowa, Code 1924, Sec. 10964; Ky. Corroll's code 1919, Sec. 85 and generally held; cases cited Dec. Dig. Pl. Sec. 406 (8).

<sup>105</sup>That there is no misjoinder in such case, see *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721; *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75; *Flint v. Hubbard*, 16 Colo. App. 464, 66 Pac. 446; *Tew v. Wolfshon*, 176 N. Y. 272, 66 N. E. 934; *Judin v. Samuel*, 1. B. & P. N. R. 43, 127 Reprint, 374. *Contra*, *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837.

<sup>106</sup>Cases cited, note 105, *supra*; 1 C. J. 1062 n.

<sup>107</sup>*Bass v. Comstock*, 38 N. Y. 21; *Darknell v. Coeur d'Alene & St. Joe Transp. Co.*, 18 Idaho 61, 108 Pac. 536; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; Dec. Dig. Pl. Sec. 368.

<sup>108</sup>*Cf.* *Childs v. Bank of Missouri*, 17 Mo. 213, for the older rule in New York see *Durkee v. Saratoga etc. Ry.* 4 How. Pr. 226.

<sup>109</sup>*Cf.* notes 95, 96 *supra*; 33 YALE L. J. 836. In the New York cases the matter is often carried through the various appellate courts, to the court of appeals; see cases in notes 83, 85, 86 *supra*.

it is rendered, whether the suit embraced the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. But it is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. \* \* \* \* It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions."<sup>110</sup>

The rule against splitting is therefore but a part of the theory of *res judicata*, and is obviously based on sound policy to prevent the harassing of defendants and the wasting of the time of courts. The expression "splitting a cause of action" is metaphorical; what is meant is that within the limits of application of the rule the plaintiff cannot litigate in one suit a right or rights which he either did bring up or could have brought up in a suit commenced earlier. But since the test—especially under the code where all forms of rights may be litigated in a single action—centers about the *cause of action* or unit group of operative facts, the express phrasing of the rule is not undesirable.<sup>111</sup>

*Effect of the Code upon the Rule.* It has been urged that under the code, due to a liberal interpretation of the concept *cause of action*, a wide application of the rule against splitting, one unknown to the

<sup>110</sup>Secor v. Sturgis, 16 N. Y. 548.

<sup>111</sup>33 YALE L. J. 836; 33 *Ibid.* 326; 32 *Ibid.* 190; 34 *Ibid.* 677, 883-4. The objection that a cause is split can only be made in the *second* suit; it is no objection to the first suit. Martin v. Howe, 190 Cal. 187, 211 Pac. 453; Md. Cas. Co. v. Cherryvale Gas. Lt. Co. 99 Kan. 563, 162 Pac. 313; Genl. Elec. Engineering Co. v. Brumon, 218 Mich. 571, 188 N. W. 500.

common law and of harsh effect, is made.<sup>112</sup> But the rule existed at common law and must exist under any law which at length sets an end to judicial disputes between litigants.<sup>113</sup> The apparently wider application of the rule under the codes is due to two reasons. The first is that various remedies may now be secured in a single action and hence a litigant no longer need or can bring successive suits to find the remedy which should apply to his wrong. Thus at common law a litigant who brought trespass when he should have brought case is not thereby precluded from starting an action of case; whereas under the code there would be no occasion for such a rule. But the difference is more apparent than real here, for a matter once really litigated in a common law action could not be relitigated in other actions.<sup>114</sup> The second reason is that there is probably a tendency constantly to extend the limits of what is considered a "single, entire claim." This is due to a number of causes, including the greater scope of permissible remedies in the code action, the general extension of rules of joinder in the most modern systems of procedure, and, by no means least, the congested conditions of modern courts. This tendency seems to the writer on the whole desirable. Compulsion put upon a litigant to settle his disputes at one time is not merely a proper safeguard to defendants but saves time and expense to the court.<sup>115</sup> In view of modern liberal provisions as to amendment, or even for starting a new ac-

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<sup>112</sup>McCaskill, 34 YALE L. J. 614, 648 *et. seq.*

<sup>113</sup>See the common law authorities on *res judicata*, and on the defense of another action pending, e. g. SHIPMAN, C. L. PL. (Ed. Ball.) 390 n.; GOULD, PL. 4th ed. V. Sec. 122, 124; "For the law, which 'abhors a multiplicity of suits', will not permit a defendant to be harassed, by two or more actions for the same thing, where a complete remedy might be obtained by one of them. The object of the rule is to prevent *vexation*." Cf. Bein v. Blazejczyk, 213 Ill. App. 243. See also "Privity and Mutuality in the Doctrine of Res Judicata," 35 YALE L. J. 607-612, and cases cited in notes 114, 118, *infra*.

<sup>114</sup>Judgment in trover bars claims in trespass, implied assumpsit, detinue and replevin. See cases cited in 30 YALE L. J. 942, n. 8; See also Johnson v. Odom, 11 Ala. App. 364, 66 So. 853 detinue and trover; Davis & Co. v. Stukes, 122 S. C. 539, 115 S. E. 814 statutory replevin and conversion; Roberts v. Moss, 127 Ky. 657, 106 S. W. 297, quasi contract and trespass; Leler v. Guild, 71 Colo. 349, 206 Pac. 803 tort and contract; LeVasser v. Chesborough Lumber Co., 190 Mich. 403, 157 N. W. 74 *quantum meruit* and express contract; Orino v. Beliveau, 122 Me. 168, 119 Atl. 199 same; 34 YALE L. J. 883 n.

<sup>115</sup>See discussion 33 YALE L. J. 817; 35 *Ibid.* 85.

tion where a previous one has failed for reasons not going to the merits, the hardship upon a misinformed plaintiff is small.<sup>116</sup>

*Same—Legal and Equitable Claims.* The same argument is made as to causes upon which legal or equitable remedies or both may be sought, and particular criticism is made of a leading New York case, holding that a matter once litigated in an action asking for a legal remedy should not be relitigated in an action asking for an equitable remedy.<sup>117</sup> But here the same conclusions should apply. There seems no occasion for adopting the inconvenient rule that there are separate causes of action for each claim, legal or equitable. In fact to do so would be to set aside the well settled rule of *res judicata* applied before the code, namely, that matter once threshed out either at law or in equity could not be again litigated in the other tribunal.<sup>118</sup> Formerly a litigant in the wrong court was not thereby prevented from going into the other court; but there is no longer reason for that particular rule. Hence the rule against splitting a cause of action is properly applied to prevent the litigation of legal and equitable claims on such cause at different times.<sup>119</sup>

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<sup>116</sup>Cf. SUNDERLAND'S CAS. CODE PL. 697; THROCKMORTON'S CAS. CODE PL., ch. VI; Y. B. Smith, 25 COL. L. REV. 752, 756, *et seq.*, discussing N. Y. C. P. A. rule 166.

<sup>117</sup>Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 criticised by Professor McCaskill, 34 YALE L. J. 648, and 5 AM. L. SCH. R. 286. A better criticism of the case is, not that there should be a further trial of the matters already litigated there, but that the court does not seem to recognize the possibility of further action upon the as yet unsatisfied judgment. 34 YALE L. J. 536, 541, 883.

<sup>118</sup>See cases collected in 1 COOK, CASES ON EQUITY 76-88; 2 BLACK, JUDGMENTS, 2nd ed. Secs. 517, 518. See also Barnett v. Western Assur. Co. 144 Ark. 462, 220 S. W. 465; Snell v. Turner Lumber Co. (1922, C. C. A. 2d) 285 Fed. 356; Medley v. Brown, (Tex. Civ. App. 1918) 202 S. W. 137; Church v. Gallic, 76 Ark. 423, 88 S. W. 979; Fitzgerald v. Heady, 225 Mass. 75, 113 N. E. 884; McCreary v. Stallworth, 212 Ala. 238, 102 So. 52. But compare Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S. W. 374; Piro v. Shipley, 33 Pa. Super. Ct. 278. Matters which could not be put in issue of course were not *res adjudicata*. See *infra* note 119; cf. Harlow v. Pulsifer, 122 Me. 472, 120 Atl. 621.

<sup>119</sup>Gilbert v. Boak Fish Co. 86 Minn. 365, 90 N. W. 867; Thompson v. Myrick, 24 Minn. 4; Waldo v. Lockhard, 101 Neb. 797, 165 N. W. 154; Inderlied v. Whaley, 85 Hun, 63, 32 N. Y. Supp. 640; Yager v. Bedell, 206 App. Div. 803, 201 N. Y. Supp. 466; Naugle v. Naugle, 89 Kan. 622, 132 Pac. 164; Brice v. Starr, 90 Wash. 369, 156 Pac. 12. As to the effect of the code see

*The Test of Splitting.* Various tests for the application of the rule against splitting have been suggested. Thus there have been stated that for the rule to apply (1) the evidence in the two suits must be identical; (2) there must be a single right violated; (3) there must be a single act or contract involved, without reference to its effect; (4) there must be the same findings and judgment involved; (5) in the case of contracts the consideration must be entire.<sup>120</sup> These may be suggestive but are obviously not to be taken as conclusive tests in themselves. In fact the search for an automatic rule of thumb is illusory as in law generally, particularly procedural law. Such tests as identity of the evidence, or of the right involved, are not true, if applied in the ordinary sense of the terms, since the rule applies even though the suggested requisites do not exist. The rule would seem more general and more vague than as indicated by such tests. It would involve the same view of *cause of action* supported by the writer elsewhere in connection with other code rules—a group of operative facts giving rise to one or more rights of action.<sup>121</sup> The size of the group will depend on various conditions and considerations. In this connection previous precedents in tort and contract law, the analogy of the former equity cases, the intention of the parties in the case of contracts, may all have proper scope. Where there is no prevailing standard otherwise, the controlling consideration in determining the extent of the cause should be trial convenience, with much discretion accorded the trial court. The practical question how far witnesses and testimony in each case will be identical is important. Hence the unity of time and of occurrence of the acts relied on will be largely determinative.<sup>122</sup>

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discussion in *Perdue v. Ward*, 88 W. Va., 371, 106 S. E. 874; 22 Col. L. Rev. 180; *Royal Ins. Co. v. Stewart* (Ind. App., 1918) 121 N. E. 307. Cf. also *Yager v. Bedel*, 206 App. Div. 803, 201 N. Y. Supp. 466; 37 HARV. L. REV. 629; 34 YALE L. J. 884, notes 16, 17.

<sup>120</sup>See e. g. 1 C. J. 1109, 1116; 1 R. C. L. 344, 351.

<sup>121</sup>See discussion above in this article; also note 1, *supra*.

<sup>122</sup>Examples are given in succeeding notes. Important recent applications of the general view suggested above, particularly to cases of different legal claims upon the same cause are *Chicago, etc. Ry. v. Schendel*, 46 Sup. Ct. 420 (1926), claim by widow as administratrix under federal Employers' Liability Act for death of her husband barred by her previous recovery as claimant under a state workmen's compensation act; overruling cases such as *Denni-*

It may be thought harsh to expect a plaintiff in advance to determine how the trial court is going to react to a particular case. The answer is that this is no other or different risk than must be run by people generally with respect to legal rules, and that the statement of more seemingly precise principles is but a delusion; for it is the vaguer test which is actually employed by the court, however the rule is phrased. Moreover, practically, the burden on the plaintiff is not severe. Many cases have become thoroughly settled through precedent; and these precedents, often established in the substantive rules of torts, contracts and damages, should be followed. Where the plaintiff is in doubt, a rule compelling him always to take the course of the wider joinder is salutary.

In succeeding sections some of the more standardized situations will be somewhat briefly considered. Their relation to various substantive rules of law should be noted.

*Parties.* Under the definition of cause of action here employed, one cause may affect many parties, who may not be jointly interested and where their joinder is only permissive. The rule of joinder of parties and of splitting is not inconsistent, however, for, under all rules of *res judicata* and of another action pending, not only must the *cause* be the same, but the *parties* must be the same.<sup>123</sup>

*Waiver.* Since the rule against splitting is largely for the protection of the defendant it may be waived by him, and is waived if he fails to raise the objection in the action.<sup>124</sup>

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son v. Payne, 293 Fed. 333; 33 YALE L. J. 326, 35 *Ibid.* 1016, 37 HARV. L. REV. 778; and Luce v. N. Y. etc. Ry. 241 N. Y. 39 Mem. 52 N. E. 409 (1926) affirming 213 App. Div. 374, 211 N. Y. Supp. 184 which had reversed 124 Misc. 590, 209 N. Y. Supp. 482; claim under the same federal Act barred by previous action relying on claim under federal Boiler Inspection Act; 39 HARV. L. REV. 399.

<sup>123</sup>See Southern Ry. Co. v. King 217 U. S. 524, 30 Sup. Ct. 594, affirming 160 Fed. 332; 33 YALE L. J. 326, 35 *Ibid.* 607. Where parties are jointly interested they may be required to join in a single suit, but this right may be waived by the defendant. Carrington v. Crocker 37 N. Y. 336. While actions by the same individual in different capacities are treated as actions by different parties, it has been held, quite sensibly, that actions in form in different capacities but actually for the ultimate benefit of the same person are by the same person. Chicago etc. Ry. v. Schendel, note 122 *supra*; Mo. etc. Ry. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135.

<sup>124</sup>Carrington v. Crocker, *supra*; Vineseck v. Great Northern Ry. Co. 136 Minn. 96, 161 N. W. 494; Hardwicke Etter Co. v. Durant, 77 Okla. 202,

## CONTRACT CLAIMS

*Single or Divisible Contracts.* Where a contract contains several promises by one person it is important to determine whether it is to be considered "single" or "divisible." Where "single", separate actions cannot be instituted on the various promises; where divisible they may be sued on separately.<sup>125</sup> The test is the intent of the parties and how they regarded the promises. A method of determining such intention, where, as is usually the case, it is not definitely expressed, is to determine "the apportionability of the consideration," i.e. whether the consideration seems to have been given as a whole for all the promises, and hence they are indivisible, or whether a part of the consideration applies to each separate promise so that they were viewed separately by the parties.<sup>126</sup> The courts seem to tend to hold that, unless clearly divisible, all breaches of a single contract must be sued on at one time.<sup>127</sup> Thus while there is some conflict as to whether one or more suits will lie upon

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187 Pac. 484; *Johnson v. Prineville*, 101 Or. 119, 196 Pac. 821; *Matheny v. Preston Hotel Co.*, 140 Tenn. 41, 203 S. W. 327; *Brice v. Starr*, 93 Wash. 501, 161 Pac. 347, reversing 90 Wash. 369, 156 Pac. 12. See as to partial assignments, Clark and Hutchins, "The Real Party in Interest," 34 YALE L. J. 259, 266; as to fraud or mistake as a ground of waiver, 2 A. L. R. 530, 534-542.

<sup>125</sup>*Secor v. Sturgis*, note 110 *supra*; *Williams-Abbott Electric Co. v. Model Electric Co.*, 134 Ia. 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529 with note; *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042; *Conkle v. Laughlin*, 83 Pa. Super Ct. 468; *Helsey v. Am. Mineral Prod'n. Co.*, 118 Wash. 591, 204 Pac. 190; *Felt City Townsite Co. v. Felt Inv. Co.*, 50 Utah 364, 167 Pac. 835.

<sup>126</sup>*Bridgeport v. Scott Co.* 94 Conn. 461, 109 Atl. 162; *Kalm v. Orenstein*, 12 Del. Ch. 344, 114 Atl. 165; *Peist v. Richmond*, 97 Vt. 97, 122 Atl. 420; 29 YALE L. J. 296.

<sup>127</sup>Thus in *Secor v. Sturgis*, *supra*, it is said: "Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action." As the text shows, this is too broad a statement. Cf. *Fidelity Mut. Life Ins. Co. v. Wilkesbarre etc. Ry. Co.* 98 N. J., 507, 120 Atl. 734 (separate suits lie on detached defaulted coupons on bonds); *Gaddis v. Williams*, 81 Okla. 289, 198 Pac. 483; *Ashless Coal Co. v. Davis*, 183 Ky. 406, 209 S. W. 532. Cf. also *Johnson v. Prineville*, 100 Or. 119, 196 Pac. 821.

a penal bond conditioned on the performance of various promises, there seems a clear tendency to force a single suit only.<sup>128</sup> This should be taken subject to the qualification stated in the next paragraph, that only breaches occurring before the date of suit need be included.

*Continuing Contracts.* Where the contract is one calling for continuous or successive performance by the promisor, all breaches to the date of suit must be included; while those thereafter occurring may be claimed in a later suit.<sup>129</sup> A question may arise, however, whether the contract may not have been entirely repudiated by the breach in question so that one action must be brought for entire damages, present and prospective; or whether successive actions may be brought claiming damages only to the date of the suit. The question seems to turn upon the character of the breach viewed in the light of the intent of the parties in making the contract.<sup>130</sup> Moreover where mutual promises made by both parties are considered dependent, a breach by one may give the other party the option of treating, or according to some cases, may force him to treat, the contract as definitely and fully repudiated, so that only a single action will lie.<sup>131</sup>

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<sup>128</sup>Acc. *Commrs. of Barton Co. v. Plumb*, 20 Kan. 147; *State v. Davis*, 35 Mo. 406; *Rissler v. Ins. Co.*, 150 Mo. 366; *Fish v. Tank*, 12 Wis. 307; *Nichols v. Alexander*, 28 Wis. 118; *contra*, *Boyce v. Christy*, 47 Mo. 70.

<sup>129</sup>*Adv. Lamp Shade Cor. v. Bloom*, 125 Misc., R. 829, 211 N. Y. Supp. 568; *Thomas v. Carpenter*, 123 Me. 241, 122 Atl. 576; *Margues v. Mir.* (N. J. 1926) 133 Atl. 521; cases in notes 134-137. Many of the codes provide that successive actions may be maintained upon the same contract or transaction, whenever after the former action was brought a new cause of action has arisen; Alaska Rev. St. 1913 Sec. 1314; Arkansas, Dig. St. 1921, Sec. 1083; California C. C. P. 1923, Sec. 1047; Idaho, St. 1919 Sec. 1227, Kentucky, Carroll's Code 1919, Sec. 685; Mont. Rev. Code, 1921, Sec. 9819; Nevada, R. L. 1912, Sec. 5477; Oregon Code 1920, Sec. 525, Utah L. 1917, Sec. 7212.

<sup>130</sup>*Badger v. Titcomb*, 15 Pick. (Mass.) 409; *Breckenridge v. Lee*, 3 A. K. Marsh, Ky. 446; *Phelps v. N. H. & Northampton Co.*, 43 Conn. 453 (contract to repair fences a continuing one); *Ill. Cent. R. Co. v. Davidson* (Ky. 1909) 115 S. W. 770; *Laughlin v. Levenbaum*, 248 Mass. 170, 142 N. E. 906. Cf. CORBIN'S ANSON ON CONTRACTS, Sec. 392; "Has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed?"

<sup>131</sup>CORBIN'S ANSON ON CONTRACTS, ch. XV; 3 WILLISTON, CONTRACTS, ch. 36; *Bridgeport v. Actna Indemnity Co.*, 91 Conn. 197, 205, 99 Atl. 566; *Bridgeport Hardware Mfg. Corp. v. Bouniol*, 89 Conn. 254, 93 Atl. 674; *Pakas*



*Same—Employment Contracts.* An example of these principles is afforded by the contract for personal service. If an employee is not paid his monthly or weekly salary as agreed, he may sue for the installments as due, according to the principles stated in the next paragraph; or he may probably consider his obligation to work as dependent on the agreement to pay, and elect to treat the contract as at an end. If, however, he is definitely dismissed from his employment, the more generally followed rule is that he must sue for damages for an entire breach. The doctrine of "constructive service",—that he may still sue for each sum as it should have fallen due, had he been permitted to work,—is largely repudiated.<sup>132</sup> A further question arises where there are back wages unpaid, whether there are two causes, one for the wages due and one for the breach of contract, which may be sued on separately, or a single one, which cannot be split. The latter seems the better view.<sup>133</sup>

*Installment Contracts and Running Accounts.* On installment contracts a like rule applies, namely, that successive suits may be brought as each installment falls due, but all installments due at the time suit is brought must be claimed or are waived. The rule has been applied to various forms of such contracts, including rent under

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v. Hollingshead, 184 N. Y. 211, 77 N. E. 40 (criticised in 3 L. R. A. (N. S.) 1042; see n. 135, *infra*); Federal Life Ins. Co. v. Rascoe, 12 F. (2d) 693. Cf. also the doctrine of anticipatory breach of contract where the promisee has the option to treat the contract as totally repudiated. Corbin and Williston, *supra*. See also a similar question as to continuing trespass and nuisance, discussed below.

<sup>132</sup>Viall v. Lionel Mfg. Co., 92 Conn. 341, 102 Atl. 709; 90 Conn. 694, 700, 98 Atl. 329; Safford v. Morris Metal Products Co., 97 Conn. 650, 656, 118 Atl. 37; Harrington v. Empire Cream Sep'r Co. 120 Me. 388, 115 Atl. 89 with comment 31 YALE L. J. 441; Ogden Howard Co. v. Brand, 7 Boyce (Del.) 482, 108 Atl. 277 with comment 69 U. OF PA. L. REV. 282, 283. But cf. Strauss v. Meertief, 64 Ala. 299; Moore v. Kelly etc. Co., 111 Ga. 371, 36 S. E. 802.

<sup>133</sup>Acc. Keedy v. Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759 and note; Richardson v. Eagle Mach. Work, 78 Ind. 422; James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246; Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S. W. 750. *Contra*, Perry v. Dickerson, 85 N. Y. 345; Lezinsky v. Roulaix Mills, 210 App. Div. 102, 205 N. Y. Supp. 573; Viall and Lionel Mfg. Co. *supra*, note 132. See 1 C. J. 1115.

a lease<sup>134</sup> and contracts of sale.<sup>135</sup> There is a question whether the same rule applies to a running account where the items making up the account do not arise pursuant to a single agreement. It seems usually to be held that it does.<sup>136</sup> The rule is different, however, where credit is given for the various items.<sup>137</sup>

*Separate Contracts.* In general separate contracts, though made at the same time, are treated as independent causes of action, and hence not subject to the rule against splitting.<sup>138</sup> This would seem ordinarily a sound conclusion but should not be an invariable rule, for the facts concerning each contract and its breach may be very similar. Then, too, this might unduly emphasize form; for promises made at the same time orally might be considered separate contracts; whereas if reduced to writing in a single instrument, they would be termed a single contract. An example of a broader view is the case of the running account just considered.<sup>139</sup>

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<sup>134</sup>*Burrit v. Belfry*, 47 Conn. 323; *See v. See*, 294 Mo. 495, 242 S. W. 949, 24 A. L. R. 880, with note 885-897; *Hare v. Winfree*, 131 Wash. 138, 229 Pac. 16, with comment, 34 YALE L. J. 677. Cf. *Johnson v. Johnson*, 107 Okla. 94, 230 Pac. 480 with comment 38 HARV. L. REV. 691.

<sup>135</sup>*Simon v. Bierbauer*, 154 App. Div. 506, 139 N. Y. Supp. 327; *White v. Bean & Co.*, 16 Ala. App. 330, 77 So. 9241; *Kruse v. Lakeside Biscuit Co.*, 198 Mich. 736, 165 N. W. 609. In *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, it is held, Cullen, C. J., dissenting, that on breach of an installment contract of purchase, entire damages must be recovered; see criticism 3 L. R. A. (N. S.) 1042.

<sup>136</sup>*Acc. Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Ia. 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529 with note; *Banner Grain Co. v. Burr Farmers Elevator & Supply Co.*, 162 Minn. 334, 202 N. W. 740; *Peper Automobile Co. v. St. Louis Union Trust Co.* (Mo. App. 1916) 187 S. W. 109. *Contra* *Badger v. Titcomb*, 15 Pick. (Mass.) 409; *Phelps v. Abbott*, 116 Mich. 624, 74 N. W. 1010 (by statute). *Contra*, where the parties so intend, *Joseph T. Ryerson & Son v. Stark Inland Mach. Works*, (Mo., 1925) 270 S. W. 715; *Mayo v. Martin*, 186 N. C. 1, 118 S. E. 830.

<sup>137</sup>*Ryan v. Waukesha Spring Brewing Co.*, 63 Ill. App. 334. Where, however, all the terms of credit have expired, all must be included in the same action. *Williams-Abbott Elec. Co. v. Model Elec. Co. supra*. Cf. *Clay v. Meadows*, 100 W. Va. 487, 130 S. E. 656; 26 Col. L. Rev. 634.

<sup>138</sup>*Millard v. Mo. K. & T. R. R. Co.*, 86 N. Y. 441; *Rex v. Herefordshire*, 1 B. & A. 672; *Upson Co. v. Erie R. Co.*, 213 App. Div. 262, 210 N. Y. Supp. 112. See note 84, *supra*.

<sup>139</sup>Cases cited, notes 134-137, *supra*. Cf. *Townsley v. Niagara Ins. Co.*, 218 N. Y. 228, 112 N. E. 924 (the contracts were held severable, but four judges dissented); *Loomis v. Lehigh Valley Ry. Co.*, 114 Misc. 480, 186 N. Y. Supp. 700.

*Partial Assignments.* A creditor cannot by assigning part of his claim to another, subject the debtor to two suits. By the more usual procedure, the defendant may compel joinder of assignor and assignee, but this right is waived where no objection is raised.<sup>140</sup>

#### TORT CLAIMS

*Single Act or Several Closely Connected Acts.* Many interesting cases arise where the defendant's tortious conduct is in question and the plaintiff has suffered two or more forms of damages. The test here also seems as before suggested, the consideration of the group of facts dealing with the defendant's breach of duty and the limitation of the size of a single cause to a unit of convenient extent. Thus where the defendant takes away two or more kinds of personal property at one time,<sup>141</sup> or where a train strikes the plaintiff's cattle at distances only slightly apart,<sup>142</sup> or where a fire spreads to different premises of the plaintiff,<sup>143</sup> in these and similar cases it is held that there is a single cause of action. Examples of this kind may be greatly multiplied.<sup>144</sup>

<sup>140</sup>See Clark and Hutchins, *op. cit.*, note 124, *supra* and Dickinson v. Tyson, 125 App. Div. 735, 110 N. Y. Supp. 269; Porter v. Lane Constr'n Corp., 212 App. Div. 528, 209 N. Y. Supp., 541; Kinart v. Seabury Co., 191 Ia. 937, 183 N. W. 586; U. S. F. & G. Co. v. Great S. W. Petrol Co., 97 Okla. 79, 222 Pac. 560; City of Pueblo v. Dye, 44 Colo. 35, 96 Pac. 969. Cf. Carville v. Mirror Films Inc., 178 App. Div. 644, 165 N. Y. Supp. 676, *aff'd* 226 N. Y. 683, 123 N. E. 858.

<sup>141</sup>Farrington v. Payne, 15 Johns, 432; O'Neal v. Brown, 21 Ala. 482; cf. Phillips v. Berryman, 3 Dougl. 286.

<sup>142</sup>Brannenburg v. Ind. P. & C. Ry, 13 Ind. 103; Chicago etc. Ry. v. Ramsey, 168 Ind. 390, 81 N. E. 79 (200 feet apart); but see Mo. P. R. Co. v. Scaniman, 41 Kan. 521, 21 Pac. 590 (500 feet apart).

<sup>143</sup>Knowlton v. R. R. 147 Mass. 606, 18 N. E. 580; Trask v. Hartford, etc. R. Co., 2 Allen, (Mass.) 331.

<sup>144</sup>Dellard v. St. Louis, etc. R. Co., 58 Mo. 69 (injury to the plaintiff's horse and harness); Cracraft v. Cochran, 16 Iowa 301 (slander in a single conversation); Hazard Powder Co. v. Volger, 3 Wyo. 189, 18 Pac. 636 (injury to plaintiff's wife, house and furniture); cf. Smith v. Warden, 86 Mo. 382, 399; Pierro v. St. Paul etc., R. Co., 37 Minn. 314, 34 N. W. 38 (action for use and possession of land bars recovery for injury to the estate during the occupation). As to different claims upon the same acts of negligence, see note 77, *supra*. Repeated publications of same libel held separate causes, Woods v. Pangburn, 75 N. Y. 495; Cook v. Connors, 215 N. Y. 175, 109 N. E. 78, L. R. A. 1916 A, 1074; so of different trespasses, De La Guerra v. Newhall, 55 Cal. 21; or of recovery of different tracts of land, Roddy v. Harah, 62 Pa. 129.

*Continuing Trespass or Nuisance.* A difficult question has arisen in the law of torts and of damages as to the situation where the defendant's acts are of a continuing nature, as is often the case where there is trespass or nuisance injuring the plaintiff's realty. Should the injury be considered permanent, the plaintiff compelled to sue once and for all, and the damages be the lessened market value of the land? But then the defendant may cease the wrongful act at any time, in which case the plaintiff has already been recompensed for a permanent loss which does not exist. Should the injury be considered merely temporary, recovery allowed only to date of suit, and the damages considered as merely the lessened rental value of the premises? This is to allow successive suits in cases where from the practical standpoint the injury will never be repaired. There have been diverse rules suggested, some of them based upon the physical character of the defendant's act and whether it appears to be one likely to be undone or not.<sup>145</sup> But this is rightly considered an uncertain test. The prevailing rule is to hold only injuries permanent where the defendant would have to commit a fresh wrong to undo them, (as in the case of a structure on the plaintiff's land, necessitating a fresh entry by the defendant to take it down),<sup>146</sup> or where legally permitted by the state, as a railroad right of way.<sup>147</sup> Thus a nuisance on the defendant's own land would be considered temporary.<sup>148</sup> Professor McCormick has recently advocated a possibly more satisfactory rule, perhaps somewhat in line with the Iowa cases, to the effect that if the defendant does not cease his acts within a

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<sup>145</sup>*Cole & Crane v. May*, 185 Ky. 135, 214 S. W. 885, *Smith v. Dallas Utility Co.*, 27 Ga. App. 22, 107 S. E. 381; cf. *Irvine v. City of Oelwein*, 170 Ia. 653, 150 N. W. 674; *City of Ottumwa v. Nicholson*, 161 Ia. 473, 143 N. W. 439; and complete annotation, L. R. A. 1916 E. 958-997 (cases), 997-1074 (annotation).

<sup>146</sup>*Uline v. N. Y. C. etc. R. Co.*, 101 N. Y. 98, 4 N. E. 536; *Stoops v. Pistachio*, 70 Cal. App. 772, 234 Pac. 423; *Pahika v. Chicago etc. Ry.*, 62 Okla. 223, 161 Pac. 544; *Wilkerson v. St. Louis etc. Ry.* (Mo., App. 1920) 224 S. W. 72; *Trinity Portland Cement Co. v. Horton* (Tex. Civ. App. 1919), 214 S. W. 510; 29 YALE L. J. 204; 25 *ibid.* 82; 18 MICH. L. REV. 679. Cf. *Town of Marlboro v. Sisson*, 31 Conn. 332.

<sup>147</sup>*Shaffer v. Penna. Co.*, 265 Pa. 542, 109 Atl. 284; *Schlosser v. Sanitary Dist.* 299 Ill. 82, 132 N. E. 291; 17 ILL. L. REV. 244; authorities note 146 *supra*.

<sup>148</sup>See *Seven Lakes Reservoir Co. v. Majors*, 69 Colo., 590 196 Pac. 334; *City of Mangum v. Sun Set Field*, 73 Okla., 11, 17 Pac. 50; cases in note 146 *supra* and the L. R. A. note cited in note 145 *supra*.

reasonable time, the plaintiff should have the option of treating the injury either as temporary, or as permanent. In the latter case he practically forces the defendant to buy him out by paying the damages awarded.<sup>149</sup>

*Single Injury to Person and Property:* Where one act of the defendant causes injury to both persons and property, (e.g. the negligence of the defendant injuring both the plaintiff and his vehicle) the courts are in conflict as to whether there is a single cause of action which cannot be split or more than one. It would seem, following the principles above stated, that since the acts involved and much the greater part of the testimony are identical, there is but a single cause; and this is the holding of many courts.<sup>150</sup> On the other hand, the courts of England and New York, among others, have held otherwise.<sup>151</sup> The reasons given are not those of trial convenience but technical objections concerning the resulting *rights*. Thus, it is said that different periods of limitation apply, and that one right is assignable and survives death of either party while the other is not assignable and does not so survive.<sup>152</sup> But this presents no insuperable reason why all the rights such as they are cannot be adjusted at one time. The argument of convenience in favor of

<sup>149</sup>C. T. McCormick, "Permanent Injury, Nuisance and Trespass," 37 HARV. L. REV. 574. Cf. *Thompson v. Ill. Cent. R.* 191 Ia. 35, 179 N. W. 191; 19 MICH. L. REV. 342, but see 11 HARV. L. REV. 118; *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 115 S. E. 457, 28 A. L. R. 54, 61 with note; *L. R. A.* 1916 E. 1068. See also H. F. Goodrich, "Permanent Structures and Continuing Nuisance: The Iowa Rule," 4 IA. L. BULL. 67.

<sup>150</sup>*Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *King v. C. M. & St. P. R. Co.*, 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161 and note; *Kimball v. L. & N. R. Co.*, 94 Miss. 405, 48 So. 230; *Cassidy v. Berkovitz*, 169 Ky. 785, 185 S. W. 129; *Jenkins v. Skelton*, 21 Ariz. 663, 192 Pac. 249; *Fields v. Phila. Rapid Transit Co.*, 273 Pa. 282, 117 Atl. 59; 32 YALE L. J. 190; *THROCKMORTON'S CAS.*, CODE PL., 216, 217, 218, 219.

<sup>151</sup>*Reilly v. Sicilian Asphalt Pav. Co.*, 170 N. Y. 40, 62 N. E. 772, rev'g 31 App. Div. 302, 52 N. Y. Supp. 817; *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Lord Coleridge, C. J. dis.*; *Ochs v. P. S. R. Co.*, 81 N. J. L. 661, 80 Atl. 493, 36 L. R. A. N. S. 240 and note; 12 COL. L. REV. 261; *Watson v. Tex. & P. R. Co.* 8 Tex. Civ. App. 144, 27 S. W. 924. Cf. *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837 (injury to realty and at same time to personalty results in two causes of action), but see *Van Ommen v. Hogeman*, (N. J. 1924) 126 Atl. 468; 34 YALE L. J. 560.

<sup>152</sup>*Reilly v. Sicilian Asphalt Pav. Co. supra.*

the latter course seems much more potent.<sup>153</sup> Again it is said in the same case that in the present New York code at least, injuries to the person form a different class for the purpose of joinder of causes from injuries to property. But these classes deal with entirely separate and independent causes, not with the question of what is the extent of a cause. Furthermore even if there are two causes they are joinable under the same transaction class—a joinder which shows that the difficulties raised by the court are not insurmountable.<sup>154</sup> A rule leading to two lawsuits where one will accomplish the same results is not to be favored.<sup>155</sup>

#### CONSOLIDATION AND SEVERANCE OF ACTIONS

As to the quotation from *Secor v. Sturges*, given above,<sup>156</sup> shows, if the plaintiff avoids the rule against splitting and is held to have two distinct causes of action, it is in general entirely at his option whether to join them or not. The only exception seems to be one coming from the common law, that the court on motion of the defendant may at its discretion order two or more suits consolidated in one,—as separate counts therein—in order to avoid undue hardship upon the defendant.<sup>157</sup> The cases must be of the kind which could originally have been joined, and the court need

<sup>153</sup>See 32 YALE L. J. 190. Cf. *Lloyd's Underwriters v. Vicksburg Traction Co.*, 106 MISS. 244, 63 SO. 445; 27 HARV. L. REV. 490.

<sup>154</sup>See cases cited note 61, *supra*. The statement in the Reilly case is somewhat criticised in *McInerney v. Main*, note 61, *supra*.

<sup>155</sup>In a thoughtful article, "Writs v. Rights", 18 MICH. L. REV. 255, Professor L. P. Wilson argues against the emphasis often placed upon tests based upon procedural history or ancient writs. With this very desirable premise he reaches the conclusion that the English and New York rule is to be supported, a conclusion which seems to the writer at variance with the premise. See also PHILLIPS, CODE PL. SECS. 30, 31, 440, 441; cf. *Loyd*, 60 U. OF PA. L. REV. 531; *Rossman*, 2 ORE. L. REV. 106; 57 AM. LAW REV. 532; 8 ST. LOUIS L. REV. 51; 24 HARV. L. REV. 492; L. R. A. 1916 B. 743; ANN. CAS. 1912 D. 255.

<sup>156</sup>P. 417 *supra*.

<sup>157</sup>GOULD, PL., IV 103; *Secor v. Sturges*, note 110, *supra*; *Trook v. Crouch* 82 IND. APP. 309, 137 N. E. 773. There seems to be a conflict as to whether such power existed in equity. For denial of the power, see *Bouldin v. Taylor*, 152 TENN. 97, 275 S. W. 340, criticised in 39 HARV. L. REV. 1094; for cases *contra*, see 1 C. J. 1123. The term consolidation is often used in three senses: (1) where several actions are combined into a single one wherein a single judgment is rendered—the situation here considered; (2) where several actions are tried together, each remaining a separate action; (3) where all but one of several actions are stayed until one is tried. *Azinger v. Pa. R. Co.* 252

not order the consolidation if it does not approve.<sup>158</sup> Most of the codes contain provisions of a similar nature.<sup>159</sup>

Under the statutes of some states, however, the provisions for consolidation have been greatly extended. In Arkansas the statute is used by a plaintiff to extend the rules as to joinder of parties, and the principles of consolidation have had the result of greatly liberalizing the party joinder rules.<sup>160</sup> In New York consolidation may be had wherever it can be done without prejudice to a substantial right; and it is had where the actions are pending in different counties. The causes must still be such that they might originally have

Pa. 242, 105 Atl. 87; *Lumianski v. Tessler*, 213 Mass. 182, 99 N. E. 1051; *Lee v. Kearney Tp.* 42 N. J. L. 543. Where there is a true consolidation the allegations of the various complaints may be taken together and treated as one pleading, so that the allegations in one complaint will remedy the defects or omissions in another. *Tyler v. Metrovich Bldg. Co.*, 47 Cal. App. 59, 190 Pac. 208.

<sup>158</sup>*Shooters Island Shipyard Co. v. Standard Shipbldg. Corp.*, 4 F (2d) 101; *R. R. Comm. of Ga. v. So. Ry. Co.*, 154 Ga. 297, 114 S. E. 335; *Trook v. Crouch*, note 157, *supra*; *Tenenbaum v. Dunlop*, 200 App. Div. 604, 193 N. Y. Supp. 407; *Bond v. Nat'l Fire Ins. Co.*, 77 W. Va. 757, 88 S. E. 389; *Thompson v. Mitchell*, 128 Wash. 192, 222 Pac. 617.

<sup>159</sup>The statutes provide for consolidation by order of the court on motion; usually where the actions are pending in the same court between the same parties and on causes of action which might have been united; though in some states simply where the actions might originally have been joined; Alaska, R. S. 1913, Sec. 1315; California, C. C. P. 1923, Sec. 1048; Colorado, C. C. P. 1921, Sec. 20; Idaho, R. S. 1919, Sec. 7228; Iowa, code 1924, Sec. 11226; Kansas, Rev. St. 1923, Sec. 60-765; Minn. G. S. 1923, Sec. 9264; Missouri, R. S. 1919, Sec. 1221 (actions between the same parties on liquidated demands), Montana, Rev. Code 1921, Sec. 9820; Nebraska, Comp. St. 1922, Sec. 8603, 4; Nev. R. L. 1912, Sec. 5478; North Dakota, Comp. L. 1913, Sec. 7965; Ohio, Gen. Code 1925, Sec. 11368; Okla. Comp. St. 1921, Sec. 324, 325; Oregon, Code 1920, Sec. 526; Utah, R. L. 1917, Sec. 7219; Washington, Rem. & Ball. Code 1922, Sec. 396; Wyoming, L. 1920, Sec. 5713; Wisconsin, Stat. 1921, Sec. 2792. The tendency is therefore to restrict consolidation to actions between the same parties, *N. Y. Jobbing House v. Sterling Fire Ins. Co.*, 54 Utah, 394, 182 Pac. 361; *Farmers etc. Bk. v. Foster*, 132 S. C. 410, 129 S. E. 629 (saying that the rule is otherwise as to equity cases); but see *Central States Gas Co. v. Parker Russell Mining Co.*, 196 Ind., 163, 142 N. E. 119; *Winnek v. Moore*, 164 Wis. 53, 159 N. W. 558.

<sup>160</sup>Ark. Dig. 1921, Sec. 1081, passed in 1905, providing that where causes are pending of a like nature or relative to the same question, the court may consolidate them when it appears reasonable. Under this statute a husband and wife may join in a suit for personal injuries to each. *Little Rock Gas*

been joined.<sup>161</sup> The provisions apply to matter which is the subject of counterclaim so that if A sues B in X county and B sues A in Y county, the court may order consolidation, directing the county in which it thinks the venue should be laid.<sup>162</sup>

Somewhat similar provisions apply to the severance of actions, which under the most modern codes may be ordered where it may be done without prejudice to a substantial right of the parties.<sup>163</sup>

Provisions of this kind seem highly desirable. They give the trial court discretion to prevent injustice to any party but yet permit it to cause one lawsuit to take the place of two or three. This is not only a saving in time, trouble and expense to the parties and the state, but a preventive of the injustice which may result from divergent decisions in each separate case.

#### ELECTION OF REMEDIES

The traditional statement of the rule of election remedies is that "the choice of one among inconsistent remedies bars recourse to the others."<sup>164</sup> This seemingly harsh rule has been the subject of care-

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& Fuel Co. v. Coppedge, 116 Ark. 334, 172 S. W. 885. See also New Mexico, Ann St. 1915, Sec. 4212, that when actions of a like nature or relative to the same question are pending, they may be consolidated.

<sup>161</sup>N. Y. C. P. A. Sec. 96, 97; *Cowles v. Eidlitz & Son, Inc.*, 121 Misc. 340, 201 N. Y. Supp. 254 (1923) with note 24 COL. L. REV. 208. While the parties need not be the same, it is held that the actions must arise out of the same transaction. *Brady v. Madison Lunch, Inc.*, 199 App. Div. 640, 192 N. Y. Supp. 10; cf. *Levine v. Products Mfg. Co.*, 216 N. Y. Supp. 433 (1926). See *Brennan v. Nat'l Eq. Investment Co. Inc.*, 210 App. Div. 426, 206 N. Y. Supp. 280, motion by one plaintiff where not all the others consent. Cf. *Dexter Sulp. & Paper Co. v. Hearst*, 206 App. Div. 101, 200 N. Y. Supp. 413, Sec. 97 A of the C. P. A. provides for the consolidation of actions of libel.

<sup>162</sup>*Gibbs v. Sokol*, 216 App. Div. 260, 214 N. Y. Supp. 533 (1926): Cf. *Borzilleri v. Brockway Motor Truck Corp.* 124 Misc. 905, 210 N. Y. Supp. 17; *White v. Richmond Lt. & R. Co.*, 211 App. Div. 861, 206 N. Y. Supp. 872.

<sup>163</sup>N. Y. C. P. A. Sec. 96; *Gould v. Gould*, 124 Misc. 240, 207 N. Y. Supp. 137. The section is permissive only, *Sherlock v. Manwarens*, 208 App. Div. 538, 203 N. Y. Supp. 709. Cf. *Rohloff v. Folkman*, 174 Wis. 504, 182 N. W. 735; *Rich v. Fry*, 196 Ind. 303, 146 N. E. 393 and statutes in note 24, *supra*. No severance can be had where there is only a single cause of action stated. *Valentine v. Perlman*, 216 App. Div. 548, 215 N. Y. Supp. 338.

<sup>164</sup>*Deinard v. Deinard*, 6 MINN. L. REV. 341, 480; See also Hine, "Election of Remedies, a Criticism," 26 HARV. L. REV. 707; Comment, "Modern Views of the Election of Remedies," 34 YALE L. J. 665; 36 HARV. L. REV. 712; W. H. Griffith, 16 L. Q. R. 160; J. F. W. Galbraith, 16 L. Q. REV. 269; 3 COOK'S CAS. EQUITY, 145, 535; KEENER, QUASI CONTRACTS (1893) 203-213.



ful discussion by learned writers who have pointed out that while the rule is currently stated as applying to *remedies*, it is almost wholly limited to *election* as a choice of substantive *rights*. Thus, there may be election between properties (as between dower or other property interest and devise) or election between termination and continuation of contractual relations (affirmance or disaffirmance of contracts). In fact it has been asserted that there are only two situations where a true choice of remedies has been compelled,—the choice on conversion of a chattel of suing for the conversion or waiving the tort and suing in assumpsit, and the choice, in a suit against a co-tenant, of suing in assumpsit for rents and profits, or in ejectment with a claim for damages for mesne profits,—and that both of these are of doubtful validity under code pleading.<sup>165</sup> Outside of such anomalous cases it is ordinarily stated that not the bringing of the action, not even the judgment, but only its satisfaction, bars further remedy. Thus it is the satisfaction of the judgment, not the judgment itself, which is said to pass title to a chattel to the defendant in an action for its conversion.<sup>166</sup> Furthermore, the privilege of the plaintiff to dismiss a suit he has begun, before a judgment on the merits, and to start another, is well recognized.<sup>167</sup> In general, therefore, there is no compulsion to choose one remedy in place of another, where there is a real choice.<sup>168</sup>

In connection with the joinder of actions, discussed above, ref-

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<sup>165</sup>Deinard v. Deinard, *supra*, at pp. 359-362, 495-507. Cf. A. L. Corbin, "Waiver of Tort," 19 YALE L. J. 221, 239; 28 YALE L. J. 409, criticising Shonkweiler v. Harrington, 102 Neb. 710, 169 N. W. 258.

<sup>166</sup>See cases such as Brinsmead v. Harrison, L. R. 6 C. P. 584, 7 C. P. 547; Miller v. Hyde, 161 Mass. 472, 37 N. E. 769; and other cases cited in the writer's comment "Judgment or Satisfaction as Passing Title," 30 YALE L. J. 742; see also J. B. AMES, LECTURES IN LEGAL HISTORY 209. As pointed out, however, in the comment, the effect of the doctrine of *res judicata* should be carefully considered in these cases.

<sup>167</sup>See Carson v. Greeley, 107 Neb. 609, 187 N. W. 47; Brown v. Ball, 43 N. D. 314, 174 N. W. 629; Navajo-Apache Bank & Trust Co. v. Desmond, 19 Ariz. 335, 170 Pac. 789, and cases cited, 34 YALE L. J. 668, n. 18.

<sup>168</sup>In 36 HARV. L. REV. 712, the origin of the rule of election of remedies is found in the rule that a plaintiff should not get a double satisfaction or an unfair advantage beyond securing his legal claim and it is said that in modern English law no such rule obtains. The rules of merger, estoppel, satisfaction, *res judicata* are sufficient to prevent a plaintiff from obtaining an unjust advantage.

erence was made to the practice of making alternate, and perhaps conflicting, statements of the same cause of action in separate counts, and that some courts have forced the plaintiff to elect which count he shall stand upon.<sup>169</sup> This also is not a true case of election of remedies. The fundamental reason for forcing a choice is not to compel the plaintiff to choose between inconsistent remedies but to compel him to state the true facts; and the courts which permit the plaintiff to make allegations in the alternative do so in the belief that he is stating the facts just so far as they are clear to him.<sup>170</sup> The modern liberal doctrine of amendment, even at trial, also shows there is no real *election* in this situation.<sup>171</sup>

But even if there is practically no true election of *remedies*, the doctrine as it applies to substantive law is important from the standpoint of pleading. Assume one has a choice of two substantive rights, as in the case of a contract procured by fraud, where the contract may be either affirmed or disaffirmed, when does he finally and irrevocably make his choice? Now it may be decisively made before action is brought;<sup>172</sup> or at any time the plaintiff may be held estopped by his actions from asserting one of the rights.<sup>173</sup> But if the free choice still remains open to him when he starts suit, does

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<sup>169</sup>See notes 88-97, *supra*.

<sup>170</sup>See Clark, "The Complaint in Code Pleading," 35 YALE L. J. 259, 277-279; Hankin, 33 YALE L. J. 365. Under this head fall cases such as *Joannes Bros. v. Lamborn*, note 49, *supra*, holding that a complaint claiming rescission of a contract does not justify a judgment for damages for its breach.

<sup>171</sup>Authorities cited, note 116, *supra*.

<sup>172</sup>Usually there will be elements of estoppel, but there may be cases of a simple choice already made, by express act or by reason of a binding statute. Thus under many statutes election to take dower or statutory share must be expressly filed in the probate court within a certain period or else the claimant is held to have waived the claim and elected to take under the will. Conn. G. S. 1918, Sec. 5053, 5055; *Deinard v. Deinard*, *supra* note 165, at p. 346, referring to the Minnesota statute.

<sup>173</sup>In 34 YALE L. J. 665 are considered situations giving rise to estoppel, criticising *Frederickson v. Nye*, 110 Ohio St. 484, 144 N. E. 299. Cf. Cardozo, J., in *Schenck v. State Line Tel. Co.*, 238 N. Y. 308, 312, 144 N. E. 592, 593, 35 A. L. R. 1149: "Indeed it is probable that some element either of ratification or of estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality." Approved *Richard v. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926); 34 YALE L. J. 104; 37 HARV. L. REV. 914 (on the decision below).

the form of suit show a final election? From the procedural standpoint, this is probably the most important question as to election. In fact, the statement of the rule given at the beginning of this action appears to refer to this question and to signify that an affirmative answer is to be given. Such has been the view of many cases, especially the older.<sup>174</sup> But this is to attach finality to the allegations of the complaint, and as a practical matter, we know that is now rarely done in code pleading. Suppose the plaintiff to begin his suit on one theory, may he never thereafter shift to another theory? Obviously he should not if there has been any real misleading of the defendant, which cannot be cured by an amendment and a continuance. But in default of this it would seem more consistent with code practice generally and in fact with modern ideas of pleading, to hold that the plaintiff may shift his position from that stated in the declaration. This is now the holding of many cases.<sup>175</sup>

When should the election become final? As indicated above, the answer may be given by substantive rules of law or by the application of the doctrine of estoppel. But if not so answered, it would seem that from the procedural standpoint there is no declaration of a final election by the mere form in which the pleadings are cast and that the plaintiff may shift his ground, within the liberal rules of amendment referred to above, at least until the trial and judgment.<sup>176</sup>

<sup>174</sup>Among other cases, see *Ireland v. Waymire*, 107 Kan. 384, 191 Pac. 304 (criticized in 30 YALE L. J. 206); *Belding v. Whittington*, 154 Ark. 561, 243 S. W. 808; *Van Scherpe v. Ulberg*, 232 Mich. 699, 206 N. W. 323 (1926), crit. 39 HARV. L. REV. 722; *Maturi v. Fay* (N. J. 1925), 129 Atl. 185, rev'g 96 N. J. Eq. 472, 126 Atl. 170; *Rose v. Buckley* (N. J. 1925), 130 Atl. 527. See also *United States v. Oregon Lumber Co.*, 260 U. S. 290, 43 Sup. Ct. 100, criticized 23 COL. L. REV. 380, 36 HARV. L. REV. 592, 17 ILL. L. REV. 614, 7 MINN. L. REV. 244, 71 U. OF PA. L. REV. 178. Cf. *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, with later New York cases, note 173, *supra*.

<sup>175</sup>*Fast v. Judy* (Ind. 1925), 147 N. E. 728; *Sauer v. Bradley*, 87 Okla. 277, 210 Pac. 726; *Tracy v. Aldrich* (Mo. 1921), 250 S. W. 381; *Morlon v. Lucey Mfg. Corp.*, 7 F. (2d) 494; *Abbadessa v. Puglisi*, 101 Conn. 1, 124 Atl. 838. See also authorities cited in note 164, *supra*; *Clarke, J.*, in *Friedrichsen v. Renard*, 247 U. S. 207, 211, 38 Sup. Ct. 450. This should clearly be so where the first remedy sought is non-existent; authorities *supra*; *Schenck v. State Line Tel. Co.*, note 173, *supra*; but see *United States v. Oregon Lumber Co.*, note 174, *supra*.

<sup>176</sup>For references to the rules as to amendments, see note 116, *supra*. Of course the states vary as to the freedom with which they permit amendment, though the tendency is to ever greater liberality. Cf. *Y. B. Smith*, note 116.

Thereafter he will probably be forced in most cases, under the rules of *res judicata*, to proceed only upon the unsatisfied judgment,<sup>177</sup> but he should be at liberty to pursue the defendant in some manner until satisfaction. The doctrine that the form in which suit is instituted constitutes an irrevocable election operates to penalize a litigant—in favor of a wrongdoer—for merely choosing a wrong strategy of attack in his complaint. This may have been the sporting concept of common law pleading, but it is not, or at least, should not be, the theory of modern pleading.<sup>178</sup>

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*supra*; 32 YALE L. J. 506; 21 COL. L. REV. 289. "It is apparent that the measure of consistency required of a litigant in any jurisdiction must depend a good deal on the character of its rules of procedure." Beach, J., in *Abbadessa v. Puglisi*, note 175, *supra*.

<sup>177</sup>See note 166, *supra*, and compare the English rule, note 168, *supra*; also the discussions of *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135, referred to in note 117, *supra*. As to pursuing "co-existing and consistent" remedies, see *Standard Sewing Machine Co. v. Owings*, 140 N. C. 503, 53 S. E. 345; cf. *Sibert v. McAvoy*, 15 Ill. 106; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498.

<sup>178</sup>"The doctrine of election is inherited from the inexorable logic of the formulary system of the common law. Modern procedure, more or less libellary in character, sacrifices consistency so far as is necessary to the attainment of substantial justice." Beach, J., in *Abbadessa v. Puglisi*, note 175, *supra*. For criticism of the analogous doctrine of "the theory of a pleading," see the writer's article, "The Complaint in Code Pleading," 35 YALE L. J. 259, 280-285.