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THE CODE CAUSE OF ACTION; JOINDER AND COUNTERCLAIMS*

BERNARD C. GAVIT**

VIII

THE CAUSE OF ACTION AND RES JUDICATA

Is the doctrine of res judicata a part of the substantive law, or procedural law? In those cases where it is based on merger, it is apparent that it is a rule of substantive law; the old legal right is gone and a new one in the form of judgment is created.44 The first involved a right to damages, to the restoration of property, etc.; the right now is to the performance of a judgment to pay damages, etc. But suppose that the law of Washington is that if a defendant fails to set up a counterclaim permitted under the code, he is barred from prosecuting his claim in a subsequent suit.45 Would he also be barred in Oregon regardless of the Oregon law on res judicata? The answer is not free from doubt, but it is submitted that again the rights of the parties have been determined by the law of Washington, and that res judicata is substantive and not procedural law.

It involves again, however, an inquiry into what is a cause of action. The rule was that an adjudication on the merits barred

* Continued from the January number.
** See biographical note, p. 380.
44 The cases are contrary where a foreign judgment is concerned. See Note (1903) 94 Am. St. Rep. 546. Dean Goodrich explains them on the ground that they are based upon the theory that a foreign judgment was not a debt of record. The result under the "full faith and credit clause" is that merger is a rule of substantive law. See Goodrich, op. cit. supra note 5, at 474 seq.
45 See Holman v. Tjosevig, 136 Wash. 261, 239 Pac. 545 (1925) and Note (1926) 39 Harv. L. Rev. 658 for such a decision.

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a second suit on the same "cause of action" between the same parties, or their privies. It is submitted that again "cause of action" meant "specific substantive right" as a matter of substantive law.

The confusion arises out of the development of the doctrine of res judicata. The rule no longer is (if in truth it were ever so simple) that the "same cause of action" is barred, although it was not adjudicated. The amendment, joinder, counterclaim, and fusion provisions of the code have wrought havoc with the old results. The rule now is that the same cause of action and any others that might have been adjudicated are barred. If a party might have amended; might have joined; might have answered by setting up a counterclaim; might have "fused"; he is now barred by the new doctrine of res judicata. It takes no new definition of the code "cause of action" to meet that situation. Admittedly what is adjudicated is not the existence of

46 "If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only to what was decided, but of what might have been decided," per McKenna, J., in Bates v. Bodie, 245 U. S. 520, 526, 38 Sup. Ct. 182, 184 (1918).

Bates v. Bodie, supra note 46. As usual the results have not been uniform, of course, but quite clearly the tendency has been to follow the "might have been" doctrine to its logical conclusion. See Holman v. Tjosevig, supra note 45; also, Fairview-Chase Corp. v. Scharf, 225 App. Div. 232, 232 N. Y. Supp. 530 (1st Dept. 1929), commented on (1929) 42 Harv. L. Rev. 964, and Gust v. Edwards Co., 129 Ore. 409, 274 Pac. 919 (1929).

47 Bates v. Bodie, supra note 46.

48 See Dodson v. Southern Ry. Co., 137 Ga. 583, 73 S. E. 834 (1912). For a collection of the cases see Note (1921) 13 A. L. R. 1104 et seq. The older cases hold, of course, that a ruling on demurrer is not res judicata; but the tendency clearly is to say that because the plaintiff might have amended, he is barred in a subsequent suit. See Woodward v. Outland, 37 F. (2d) 87 (C. C. A. 8th, 1929).

49 See Royal Ins. v. Stewart, 190 Ind. 444, 129 N. E. 853 (1921)—Because the plaintiff might have joined an equitable action to reform an insurance policy with a legal action to recover upon the policy as reformed, an action to reform was held to be barred by a prior legal action to recover on the policy "as was." Also, King v. C. M. & St. P. R. Co., 80 Minn. 83, 82 N. W. 1113 (1900). Cf. Cook v. Conners, 215 N. Y. 175, 109 N. E. 78 (1915).

50 See the cases and notes cited in note 47, supra.


52 Again Dean Clark thinks that it does; see Clark, op. cit. supra note
the specific substantive right (or its non-existence) determined in the former proceedings; it is that plus others which "might have been."\textsuperscript{53}

It is unnecessary, therefore, to create a code cause of action to take care of those cases. And it is submitted that no good can result from such an attempt.

The inherent difficulty with the view that "cause of action" must be re-defined to mean all of the facts finally involved in any proceeding is that after all there is an attempt to change the substantive law through the laws of pleading. The quarrel, in the final analysis, is with our theories of specific substantive rights. It might lessen the problems of pleading if we had such a thing as a "code cause of action" (although that may well be doubted, for it begs the question and gives always a result and no rule), but we have no "code substantive rights." Pleading and procedure necessarily and inevitably deal with existing rights and duties and it is confusing, to say the least, to attempt to "de-classify" legal rights to fit an ideal system of procedure.

Despite the many expressions of dissatisfaction with the courts' administration of the code of procedure it may be well to urge that, on the whole, and after all, the result has been in keeping with its language and purpose. The courts, if they have been literal, merely accepted the legislature at its word when it said that it was amending the laws of pleading and practice. The code furnishes no evidence of an intention to amend the substantive law; its sole intentions, as expressed by it, was to prescribe new rules for judicial proceedings. It may appear quite certain now that there are some reforms in procedure

\textsuperscript{53} It is suggested that the cases here were originally talking about the so-called splitting of a cause of action; that all they meant when they said that what "might have been" adjudicated was adjudicated, was that the balance or remnant of a single cause of action could not be the basis of recovery in a subsequent suit. The courts have, however, seized upon the language of the cases, and are now prone to administer the "might have been" doctrine quite literally. The result is, of course, that under the present statutes on amendment, joinder, counterclaim, and fusion of law and equity it operates to bar not only part of one cause of action, but two or more causes of action. It is submitted that such an extension of the doctrine is justified; that the policy which is the basis of \textit{res judicata} includes these new situations, and that a party ought to be required to dispose of all of his litigations as expeditiously as the present procedure permits. Permission thus becomes a command.
which cannot be accomplished without a change in the substantive law and our theories concerning it. Those who would be most vehement in their denunciation of the common law system of changing the substantive law by fictions apparently are quite willing to revert to that procedure today.

The present writer is free to admit that there are a number of situations where our procedure can be improved, but it is believed that we ought to approach the problem with a true understanding of the distinctions between substantive and procedural law; and if it is necessary to change the substantive law to fit a better system of procedure, that we ought to go about the task directly, and with some apprehension as to its possible consequences.

If, for example, we are to call a right to damages to person and a right to damages to property but one right, or cause of action, because they arose out of the same automobile accident, what are we going to do if, as in some states, the burden of proof as to contributory negligence is on the defendant in the first instance and on the plaintiff in the second instance? What are we to do with the distinctions in the statute of limitations; the distinctions as to transferability. Or if a right to damages for breach of contract for the carriage of goods by a common carrier and a right to damages for negligent injury to the goods are after all to be one cause of action because they arose out of the same transaction, will the plaintiff recover the measure of damages prescribed by the law of contracts, or that prescribed by the law of torts? Unless we allow the plaintiff to say which it shall be (as we do today), do we not have to legislate as to the measure of damages for this new hybrid right? When we go about to re-arrange the substantive law to fit a new procedure, have we not cut out for ourselves an almost impossible task?

It would seem that it would be better to make some necessary amendments in the law of procedure and in general to stick to our present theories as to the distinctions between substantive rights.

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53a The problem is very aptly put, and the cases collected, in the recent case of Clancey v. McBride, 169 N. E. 729 (Ill. 1930), and note, 25 Ill. L. R. 219.
IX

THE JOINDER AND COUNTERCLAIM STATUTES

There remains the consideration of the "cause of action" involved in the joinder and counterclaim statutes, and its relation to the other provisions of those statutes. For the reasons heretofore advanced it is submitted again that the code "cause of action" here can only mean "specific substantive right" as determined by the substantive law.

The real difficulty is in determining when a "cause of action" "arises out of" the "same contract or transaction" or is "connected with the subject of the action." The authorities are little, if any, help, because confessedly they have found no rule at all, or at best one which is indefinite in the extreme.\textsuperscript{54} It is, of course, no real objection, of itself, that a rule is indefinite; it may be that the situation will not yield to a definite and easily workable rule. If so, a rule based on "substantial connections," "reasonable use," or other indefinite standards must be accepted and employed as well as may be. It is submitted here, however, that there is a definite, easily workable rule which results from a very proper, and indeed the only proper, interpretation of the language of the code.

The trouble has arisen out of misapprehensions of what were a "cause of action" and "the subject of the action" and out of an improper interpretation of "the same transaction," "arising out of," and "connected with."

Too, there has been a tendency to beg the question and say that "transaction" includes a course of dealings between the

\textsuperscript{54} "This statutory provision of law regulating practice, which has been in force more than sixty years, has frequently been the subject of judicial construction. Thus far, however, no rule has been laid down in its construction by which it can readily be decided in all cases whether or not a given counterclaim is properly interposed and as might naturally be expected it would be difficult to harmonize all of the decisions on that point." Laughlin, J., in Adams \textit{v. Schwartz}, 137 App. Div. 230, 235, 122 N. Y. Supp. 41, 45 (1st Dept. 1910). "Courts and text-writers have been busy for more than a half century drafting and re-drafting definitions of the words 'transaction' and 'subject of the action' as new cases have presented themselves, but, on the whole, it may well be doubted whether the discussions have resulted in clarity of thought." Winslow, C. J., in \textit{McArthur v. Moffett}, 143 Wis. 564, 565, 128 N. W. 445 (1910).
parties of indefinite limits, although the code in the counterclaim provision specifically limits the "transaction" to that which is "the foundation" of the plaintiff's claim.

A. The Transaction

The word "transaction" appears in both the joinder and the counterclaim statutes, but in different context. The joinder statute is that the causes of action must "arise out of the same transaction or transactions connected with the subject of the action"; the counterclaim statute is that the cause of action must arise out of the "transactions set forth in the complaint, as the foundation of the plaintiff's claim."

The struggle for a definition has been as severe as the one over the "cause of action." Professor Pomeroy says:

"In order that causes of action may arise out of a transaction, there must therefore be a negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces, as necessary results, two or more different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights."55

"It (transaction) must, therefore, be something—that combination of acts and events, circumstances and defaults—which, viewed in one aspect, results in the plaintiff's right of action and, view in another aspect, results in the defendant's right of action."56

Judge Bliss says: "The term 'transaction' is all embracing, and if a case shall arise in which the defendant is liable to the plaintiff for a wrong based upon the matter which is the foundation of the action, whether it be a contract, or tort, or anything else, such liability is covered by the provision under consideration."57

Judge Phillips says: "The term 'transaction' has no technical meaning, and was probably used in the codes for that reason. When the operative facts of one transaction create two or more primary rights in one party to the transaction, and also show violations thereof by the other party, then two or more rights of action have arisen out of such transaction."58

Dean Clark says: "This class has been the subject of the

55 Pomeroy, op. cit. supra note 1, at 559.
56 Ibid., 1056.
57 Bliss, op. cit. supra note 34, at 565.
58 Phillips, op. cit. supra note 33, at 176.
most diverse interpretation by the courts. . . . 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 efficiency in trials. This would result in much discretion in the trial court.\textsuperscript{59} . . . Conceivably, 'transaction' might include all those facts which a layman would naturally associate with, or consider as being a part of the affair, altercation, or course of dealings between the parties.\textsuperscript{60}

It seems to be agreed that "transaction" can only refer to the facts involved. This in truth appears quite plain. But if we say that it includes the facts which comprise the bases of all of the plaintiff's claims joined in one action, and all of those which form the bases of the defendants' answers on counterclaims, the proper answer to the problem and the answer in fact are co-extensive. We have begged the question; we have no means of knowing how the result was reached, and consequently we have no rule for other cases in the future.

As to the counterclaim statute there is involved in this result also a plain violation of the language of the code. It provides that the defendant's cause of action must be one "arising out of the contract or transactions, set forth in the complaint as the foundation of the plaintiff's claim." What else can "transactions set forth in the complaint as the foundation of the plaintiff's claim" mean than the factual situation alleged in the complaint? The plaintiff must plead the facts constituting his cause of action; no more and no less. He has "set forth" nothing else in his complaint than the facts upon which his substantive right is based. It is submitted that it is too clear for argument that "transaction" means only the specific factual situation alleged in the complaint. Too, such an interpretation does away with the requirement that the cause of action "arise out of" certain transactions. If the "cause of action" and the "transaction" are identical, the one can in no sense "arise out of" the other. The only fair interpretation of the language is that there is only a partial identity between the facts set out in the complaint and the facts out of which the defendant's counter-cause of action arises.

\textsuperscript{59} Clark, op. cit. supra note 36, at 308-311.
\textsuperscript{60} Ibid., at 451-452.
It is submitted, too, that the joinder statute must be construed to reach the same result. The legislature here is entitled to the presumption that it was laying down a rule of pleading and not a result. If we say that "same transaction" means a factual situation covered by all of the causes of action joined, then the totality of the facts involved are the "same transaction." Any plaintiff could join any number of dissimilar and unconnected factual situations and they become *ipso facto* the "same transaction." The other provisions of the code become meaningless, because the transaction clause allows an unlimited joinder.

It seems only fair and quite proper to say that the requirement that the cause of action "arise out of the same transaction" means that it arises out of a transaction (factual situation) which gives rise to one of the specific causes of action involved. Dean Clark argues that it must be read as follows: "arising out of facts"; which, it is submitted, again disposes of all the problems, but destroys the balance of the code provisions on joinder of actions, for it supersedes them all and allows an unlimited joinder. But certainly no such result was intended.

The truth is that the code here is talking about the joinder of actions (judicial proceedings) based on causes of action arising out of the same transaction. What the plaintiff directly joins is not causes of actions, but proceedings seeking judicial recognition of causes of action, which includes indirectly, of course, the joining of complaints and the causes of action asserted therein. The code here has as a background the established practice that fundamentally a judicial proceeding was between one plaintiff and one defendant involving a single cause of action. The provisions of the code as to joinder are really for the purpose of allowing additions to that single proceeding. The proceeding is after all the one represented by the first paragraph of the complaint. Therefore, a plaintiff is here permitted to "unite to" or "join to" or "add to" this proceeding further proceedings involving additional causes of action if they "arise out of the same transaction" set forth in the first paragraph of the complaint. We then have something to measure by; something to "unite to" or "join to."

The force of this argument is augmented by the later provision of the joinder statute that the causes of actions joined must "affect all of the parties to the action." "The action" must be specific (and not the result of the joinder statute), and can
only refer to the judicial proceedings represented by the first paragraph of the complaint.

"The same transaction" in the joinder statute and "transactions set forth in the complaint, as the foundation of the plaintiff's claim" in the counterclaim statute mean the same thing: they mean the factual situation set out in the complaint. (In the joinder statute it is the first paragraph of the complaint; in the counterclaim statute it may, of course, be any paragraph of the complaint.)

B. The Subject of the Action

The "factual situation" which constitutes the "transaction" also necessarily forms part of "the subject of the action." As we have seen heretofore, the "action" means "judicial proceeding" and has no relation to the "cause of action." The judicial proceeding (or action) is for the purpose of determining whether in law and fact the plaintiff has a substantive right to be changed into the form of a judgment. There is, therefore, an inquiry or investigation by the court into the law and the facts. Narrowly speaking the subject of the judicial proceeding is only the inquiry or investigation, but broadly speaking the subject of the judicial proceeding is the inquiry or investigation into the law and the facts. It is the latter sense in which it is used in the code. The New Century Dictionary defines it as "something which forms a matter of investigation." It is not the investigation, but the matter of the investigation; that is, here the existence in law and fact of this asserted substantive right. The "factual situation" asserted by the allegations in the complaint is properly then a part of "the subject of the action."

Again the authorities have rather assumed this; that is, that in some way the facts again were involved. But here also they have in most instances begged the question and said that the facts are all the facts finally involved in the actions the code allowed to be joined, or set up as the bases of counterclaims. Again, that is the result, and not the rule. We have no means of knowing how that result is to be reached in other cases.

Professor Pomeroy's opinion was that the subject of the action was the asserted right, rather than the controversy or possible controversy concerning it.61

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61 Pomeroy, op. cit. supra note 1, 1058. Mr. Chief Justice Winslow in the case of McArthur v. Moffett, supra note 54, comes to the conclusion that the subject of the action is not the plaintiff's "primary right," but it
Judge Bliss's opinion was that, "The subject of the action is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily, the property, or the contract and its subject-matter or other thing involved in the dispute."62

Judge Phillips' conclusion was to much the same effect.63

Professor McCaskill's opinion is that it is the totality of the facts which the code allows to be tried at the same time. He says: "A prospective look is taken at a suit properly constituted, and the subject matter of that suit is taken to be the 'subject of action' in which the parties have an interest. . . . It is the totality of operative facts which, determined by the principles of administrative convenience, can be dealt with in one suit. Within this larger mass the smaller units, the causes of action, may be found."64

This does not differ materially from Dean Clark's view. He says: "Similarly the phrase 'connected with the subject of the action' might plausibly be understood to allow, as a counter-claim, any cause of action which, although not a part of the plaintiff's transaction, would, upon trial, raise issues which are so like those raised by the complaint that justice and expediency require that they should be tried together."65

Varying support for all of these views can doubtless be found in the cases, but it is submitted that there is involved in each a misunderstanding as to the subject of the action; it is only an investigation into the law and the facts involved in the asserted right.

C. Arising out of

There are two very apparent errors in the usual interpretation of this phrase. The first is the one which says "arising out of" must mean "springing up out of." The second is that it is "facts" which "arise," rather than a "cause of action."

is the plaintiff's "main primary right." It seems apparent that this only adds a confusion to what already is a sufficient confusion.

62 Bliss, op. cit. supra note 34, at 214.
63 Phillips, op. cit. supra note 33, at 229.
64 McCaskill, op. cit. supra note 37, at 647.
65 Clark, op. cit. supra note 36, at 453-455.
Particularly in connection with the counterclaim statute, "arising out of" has been defined as "springing up out of." The result is that it depends on which party sues first as to whether or not a counterclaim is proper. That is, suppose A trespasses on B's real estate and as a result B commits an assault and battery on A. A sues B for the assault and battery. B cannot file an answer based on the trespass under this clause, because the factual situation forming the basis of B's cause of action precedes in point of time the facts forming the basis of A's cause of action. The courts say "arising out of" means "springing up out of," and forward, and not backward.66

The proper antonym is "subsiding out of." Therefore, if the legislature had wished to allow a counterclaim upon facts which preceded in point of time the facts involved in the plaintiff's claim, it would have allowed a counterclaim on a cause of action "subsiding out of the same transaction." That does not make much sense, and credits the legislature with even less than the usual amount of attributed intelligence.

This interpretation is not of any great damage in those states where the code also contains the "subject of the action" clause.67 But it is fundamentally unsound. "Arise—1. To come up from a lower to a higher position; to ascend. 2. To spring up; to come into action, being, or notice; to become operative, sensible, or visible. 3. To proceed; issue; spring."68

"Arising out of" here means "coming into being"; not by reason of any active force on its part, which causes it to "spring up," but by operation of law. And it is not facts which "come into being," but a "cause of action," that is, a substantive right.69 Here again we are dealing with a rule of pleading: the

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67 See Clark, op. cit. supra note 36, at 463: "‘Contract,’ ‘transaction,’ and ‘subject of the action’—each in succession permits a broader counter-claim than the next preceding term."
68 Webster's New International Dictionary. The New Century Dictionary defines it as follows: "To rise up; to get up; to move upward; mount or ascend; to come into view, being or action; appear; begin; originate; spring up."
69 This is the natural use of the phrase. For instance, in the Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 354, 36 Sup. Ct. 126, 127 (1915), the question being whether the plaintiff's right was created by State or Federal law, Mr. Justice Holmes said, "The cause of action arose under a
defendant is to set up in his answer "new matter" (facts) constituting a "cause of action" arising out of the transaction set forth as the foundation of the plaintiff's claim. It is the "cause of action" which "comes into being," and not the facts constituting it.

Again the code is quite incapable of any other interpretation. It says, "The counterclaim (to be set up in the answer) must be, a cause of action arising out of the contract, or transaction, set forth in the complaint, as the foundation of the plaintiff's claim." In the same way a plaintiff may join several complaints or "causes of action" (and not "facts") coming into being out of a same transaction.

Literally construed the code here means nothing. A cause of action cannot "arise out of" or "come into being of" a contract. (Contract here means contract in fact, and not the legal obligations imposed by the law as a result of the contract, because we are, again, dealing with a rule of pleading.) It is a contract in fact and a breach or threatened breach in fact which bring into being a cause of action. To mean anything, then, the code must read (and it has so been interpreted whenever it has been given any effect here) "a cause of action arising partly out of the contract set out as the foundation of the plaintiff's claims." The "foundation" of the plaintiff's claim is the contract in fact plus the breach (or threatened breach) in fact by the defendant; it is not solely the contract.

The same is true of the "transaction clause." No cause of action can arise out of the "transaction (factual situation) set forth in the complaint as the foundation of the plaintiff's claim" except the plaintiff's cause of action, 70 unless, of course, the plaintiff has violated the rules of pleading and made allegations which are not necessary, and which in fact show a right in favor of the defendant. The plaintiff necessarily only alleges the facts which show a violation of a duty owing from the defendant to the plaintiff. The facts if properly pleaded could not show a violation of a duty owing from the plaintiff to the defendant, unless

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70 The same thing is true as to the joinder statute. Properly pleaded, the first paragraph of complaint would be based upon the only cause of action which could "come into being" out of one (the same) transaction. The word "partly" (or its equivalent) must again be added.
the plaintiff is entirely mistaken as to his cause of action, or
includes in his complaint considerable surplusage.

So to mean anything at all the counterclaim provision here
must read (and has been so read in truth whenever it has been
given any efficacy at all): "A cause of action arising *partly* out
of the transaction set out as the foundation of the plaintiff's
claims," and the joinder provision here must read, "Causes of
action arising *partly* out of the same transaction" (the trans-
action set out in the first paragraph of complaint).

It is only necessary that the factual situation which is the
basis of the plaintiff's first paragraph of complaint and the fac-
tual situations alleged in the other paragraphs of complaint, or
the factual situations alleged in an answer setting up a counter-
claim, have some facts in common. If they have facts in com-
mon, the causes of action involved "come into being" (partly)
out of the same factual situation. This is the only proper inter-
pretation of these code provisions and as pointed out above it is
the interpretation which the courts have unconsciously placed
upon it.

How many facts in common must there be? The cases have
given varying answers, but for the most part have required some
more or less substantial connections in fact. Dean Clark says
the test should be as to whether or not there are enough facts
in common conveniently to try the various actions together.\(^7^1\)

One is free to make his own rule, because the code here
clearly is incomplete, and to mean anything at all must be added
to. The policy involved then becomes material, and "policy" ap-
parently forms the basis of the rules adopted by the courts and
the text-writers. Here again it is easy to take issue with them.
One purpose of the counterclaim statute is to give the defendant
the privilege of effectually destroying his liability to the plain-
tiff by the assertion and proof of a counter-liability. That is, the
code extends the old doctrine of "recoupment," and allows as a
"defense" this counter-liability; and, also, of course, it allows re-
cover of any excess. To the defendant it is a most important
right or privilege, and of more practical importance than the ad-
vantage to be gained from the saving of time and money in try-
ing two separate actions. In the same way the joinder statute
is of benefit to a plaintiff; it helps him meet a counter-liability

\(^{71}\): *Supra* note 65.
which the defendant may set up. The rights of the parties here ought to be reciprocal.

Another purpose is to dispose of law suits having some common foundation in fact at the same trial, with a consequent saving of time and money. The courts and the text-writers place the emphasis on the latter policy quite exclusively; they look to the convenience in the trial of the action as the decisive test. The emphasis ought to be placed on the other. The parties ought to be allowed the widest latitude in "recoupment" of liabilities. Questions of convenience in trial can well be taken care of by the court allowing separate trials whenever expedient. And here there is a conclusive argument against the "convenience" doctrine. That is, Dean Clark and others say that the test is whether or not the actions can be conveniently tried together. This necessarily nullifies the common provisions of the code that "when several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials for the furtherance of justice," and that "the court, in its discretion, may order one or more issues to be separately tried prior to any trial of the other issues in the case." The code, therefore, specifically allows a joinder or answer on a counter-claim, even although the result be inconvenience of trial; the test, then cannot be convenience of trial. It would quite inevitably forbid the joinder of legal and equitable actions and an answer on a counterclaim where that difference arose.

If the right of "recoupment" is to be extended, the statute should be given the broadest possible interpretation. The test here should be, then, is there a common fact? That can be determined by the application of the "but for" or cause in fact test with which the courts are already familiar in the field of torts. That is, "but for" one fact common to the factual situations, forming the bases of the various paragraphs of complaint and counterclaims, would these asserted rights have come into being?

Take, for example, the following case: A is fixing his tire in the roadway; B attempts to pass in his automobile and negligently hits A, causing injuries to his person; he stops and backs up to see what has happened and negligently backs into A's car, knocking it into a ditch, and injuring the car. There is a child, C, in A's car, so far uninjured; B attempts to remove C from the car and negligently injures C. A claims to be the father of C, and B later pays to A $1000 in settlement of his cause of action
for injuries to his child, but B refuses to settle the other claims. A sues and joins actions for his personal injuries and injury to the automobile; B files an answer setting up a cause of action based on the fraudulent representations as to settlement for $1000, that is, that C in fact was not A’s child. Is the joinder proper? Is the answer proper? The parties have no means of knowing in advance; it depends on whether there are substantial connections or there is sufficient convenience, accordingly as the Supreme Court may finally decide (forgetting the “inconvenience” to B of possibly being forced to pay A’s judgments, and being unable to collect one he may obtain against A in another suit).

However, applying the “but for” test, the joinder and the answer are both proper. “But for” B’s hitting A, he would not have hit the automobile; he would not have injured C and he would not have made the settlement.72

It is to be noted that under such a rule it makes no difference which party sues first. It is the “cause of action” which must “come into being out of” a common (in part) factual situation, and not the facts which must “come into being.” There must only be a causal connection in fact. That exists no matter which cause of action is sued on first. And it would make no difference that a considerable time had transpired between the happening

72 It is necessary again to take issue with Dean Clark. He says that one must deal here with the “operative” or “material” facts; op. cit. supra note 36, at 451-452. An “operative fact” is after all only an inference of fact or a cumulative fact from so-called evidentiary facts. For example, A alleges that B killed C. That is, so it is said, an allegation of an “ultimate” or “operative” fact. What is meant is that B hit C over the head with a club, and C died as a result. It is to a certain extent true that the “operative fact” is composed of the evidentiary facts, and that one would get the same result under the “but for” test. The objection is that it adds needless confusion in any event, and really stands in the way of a solution of the problem in those actions where under the law of pleading an allegation of a so-called conclusion of law passes for an allegation of an operative fact. For example, it is settled that “negligently” and “wrongfully converted” are “operative facts.” In truth they are not facts at all, for whenever one is dealing with what “should or should not have happened” instead of “what did happen” he is dealing with law, and not fact. It is impossible to find any connection in fact between rules of law. (For the same reason “legal cause” as a test is unworkable.)

If we say the connection must be between “material” facts it might be possible to reach the same result in most cases, but again there is only added an unnecessary confusion.
of the two events, if one was in truth the cause in fact of the other.\textsuperscript{73}

D. Connected with the Subject of the Action

1. The Joinder Statute

The joinder provision in the code is that the plaintiff "may unite in the same complaint (but in separate paragraphs, that is, separately stated) two or more causes of action,—where they are brought to recover—upon claims arising out of transactions connected with the subject of the action." As we have seen, the plaintiff really unites actions having as their bases the statements of fact upon which the separate substantive rights are predicated. That is, it must be remembered that the code here is dealing with the law of procedure; it is the action which is "brought," and not the "cause of action." The code here is properly paraphrased to read: "The plaintiff may unite in the same complaint \textit{proceedings upon} two or more causes of action,—where \textit{the} \textit{proceedings} are brought to recover upon, etc."

"Claims" here obviously mean what the code in other places calls "causes of action."

This section then becomes quite clear; one may unite complaints on causes of action which came into being\textsuperscript{74} out of factual situations connected with the subject of the action. The subject of the action includes among other things the factual situation in the first paragraph of the complaint. It includes other things as well, but it is impossible to have any connection between them and the similar things in the other paragraphs of the complaint. Courts have been prone to call the "subject of the action" the land or the chattel "out of which" the "primary rights" arose. But as pointed out in the early portion of this article, the land or

\textsuperscript{73} For example, in Rothschild \textit{v. Whitman}, 132 N. Y. 472, 30 N. E. 853 (1892), a counterclaim was not permitted for the reason (among others) that an act in January and one in September were too remotely connected. Properly, however, the time element has little to do with cause in fact; one might light a fuse today which would explode a bomb tomorrow, or a year later, but the lighting of the fuse is as much the cause in fact of the explosion in the one case as it is in the other. See \textit{Western U. T. Co. v. Preston}, 254 Fed. 229 (C. C. A. 3d, 1918) and Smith, \textit{Legal Cause In Actions of Tort} (1911), 25 Harv. L. Rev. 103, 106.

\textsuperscript{74} "Arising out of" here means the same as it does in the counterclaim statute.
the chattel, even in proceedings *in rem*, is not involved in the proceedings; only the plaintiff's and defendant's rights and duties in connection with those material things are involved.

There can be no connection between these substantive rights which may arise out of acts in regard to the same material thing; the only connection possible is one which might exist between the facts which are involved in the creation of those rights.

For the purposes of these statutes then the only "subject of the action" involved is the factual situation. Under the joinder statute then one may unite actions on substantive rights which came into being out of factual situations connected with the factual situation set out in the first paragraph of the complaint.75

The courts and most of the text-writers have quite consistently reached this result; that is, it is a connection in fact which must exist. But they seem to require again that there must be a substantial or direct connection.76 That, however, is unwarranted; the code does not say "substantial" or "direct" connection; it says only that there must be a connection in fact. Again, the proper test is, "but for" some fact in the first paragraph would we have the factual situations which form the bases of the other paragraphs of complaint? The rule is easy to apply and is in strict accord with the very language of the code. And it reaches a desirable result. It gives again an almost unlimited "recoupment," and permits a joinder (or answer) in all cases where the present interpretations do, and in many others where

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75 One can only again properly look at the joinder as depending on the first paragraph of complaint. That is, the subject of the action must be specific, and is determined by what the plaintiff sets out in his first paragraph of complaint. Again, if the subject of the action includes anything which the plaintiff does join, there is the absurdity that this provision, too, supersedes all of the other provisions on the joinder of actions. If one says that the subject of the action is to be determined by what the courts think may conveniently be joined, the provision that the plaintiff may join other actions "connected with" that subject of the action is disregarded and is given no effect. Those supposed solutions give a result, but no rule, and are a violation of the words "connected with" and the subsequent provision to the effect that, if the actions joined cannot be conveniently tried together, there may be separate trials ordered.

76 "In respect to the phrase connected with the subject of the action, one rule may be regarded as settled by the decisions, and it is recommended by its good sense and its convenience in practice. The connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute." Pomeroy, *op. cit. supra* note 1, at 1059.
they do not. It is admitted by most authorities that an extension of the present rules on joinder and counterclaim is desirable.\textsuperscript{77}

The authorities have read into the code here the requirement that there be a substantial or direct connection in fact. The code, however, is quite specific to the effect that there need only be a connection in fact. Obviously the "cause in fact" or "but for" test solves the problem.

2. THE COUNTERCLAIM STATUTE

The answer of the defendant must contain "a statement of any new matter (facts) constituting a cause of action connected with the subject of the action."\textsuperscript{78}

We are again dealing with the rules of pleading; in fact this statute allows no doubt on that score, for it provides that the answer must contain "a statement of any new matter constituting a cause of action connected with the subject of the action." It is the new matter (facts) which go (with a rule of law) to make up a cause of action which must be connected with the subject of the action, and not the cause of action which must be connected. The subject of the sentence is "a statement of any new matter, etc."; the subject of the sentence is not "a cause of action."

But again the authorities require some more or less substantial connection. This again is a plain violation of the language of the code; the only requirement is that there be a connection, which means and can only mean a causal connection in fact. Again the proper test ought to be the "but for" test, for the reasons advanced in connection with the similar provision in the joinder statute.

E. The Contract Clause

The contract clause\textsuperscript{79} has caused little difficulty. Upon the basis of the foregoing discussion it can be paraphrased to read as follows: "The defendant's answer must contain a statement of any new facts constituting a substantive right, if the plaintiff's judicial proceeding is based on a substantive right, which

\textsuperscript{77} See, for example, Clark, \textit{op. cit. supra} note 36, at 297-298 and 455.

\textsuperscript{78} "Subject of the action" means identically what it does in the joinder statute.

\textsuperscript{79} "In an action on contract, any other cause of action on contract, existing at the commencement of the action."
as a matter of substantive law is classified as a contract right, and if also the (counterclaim) substantive right is classified as a contract right.” It deals with the traditional classifications of rights.

X

It must be admitted that there is an argument of some little apparent force against these conclusions. In the counterclaim statute the “transaction” clause and the “subject of the action” clause mean the same thing and reach the same result. They are in the disjunctive and the presumption would ordinarily be that they were not identical in result; that one added something to the other; that the latter provision was not mere surplusage. But that rule of statutory construction is only a rule as to construction and it has its exceptions and limits. In truth, courts have always felt free to give a fair interpretation to one portion of a statute although the result be to make the balance of the statute mere redundancy. Redundancy is not such a rare phenomenon that it can be said in every case that the legislature has not perchance employed it. The truth is that redundancy is a vice peculiarly a part of legal language. It is submitted that it is quite proper to say here that the legislature and the drafters of the code said the same thing over in different language, and that that fact alone is no objection to any proper interpretation placed upon both phrases involved.

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80 See, for example, Van Dyke v. Cordova Copper Co., 234 U. S. 188, 34 Sup. Ct. 884 (1914); also, Miller v. Union Indemnity Co., 209 App. Div. 455, 458, 204 N. Y. Supp. 730, 733 (4th Dept. 1924): “Our experience has not shown so careful a use of language in statutes or legal documents as to allow us to give weight to such an argument. The redundancy and tautology of legal phraseology is proverbial.”

In a somewhat similar situation Mr. Justice Holmes said this: “We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean.” Roschen v. Ward, 279 U. S. 337, 49 Sup. Ct. 336 (1929).

81 It is admitted that there is little, if any, authority for all of the exact results reached by the present author. It is quite hopeless to find anything like an adequate rule in, or from, the cases. The author’s position is that the rules contended for by him will permit every satisfactory result so far reached, and that in addition we will have simple, workable rules, easy of application, and with, desirable results.
It is submitted that the following meaning must be ascribed to the various terms used in the Code of Civil Procedure:

1. **Cause of Action**: Specific substantive right as a matter of substantive law ("right" is here used in its broadest sense).

2. **Claim**: Specific substantive right as a matter of substantive law.

3. **Counterclaim**: Specific substantive right as a matter of substantive law.

4. **Arising Out Of**: Coming into being out of.

5. **Transactions**: Factual situation.

6. **Foundation Of**: Factual situation.

7. **Connected With**: A causal connection in fact with (that is, "but for" one fact, would the other factual situations have existed?).

8. **Subject of the Action**: Factual situation, involved in the controversy or possible controversy between the parties as to the law or the facts, or both.


The various code provisions can be paraphrased to read as follows:

1. The complaint shall contain a plain and concise statement of the facts, which under a rule of law go to make up (or constitute) a specific substantive right as a matter of substantive law.

2. A plaintiff may add to his original action, or complaint, one or more actions, or complaints based on specific substantive rights which rights came into being partly out of the same factual situation, or whose factual situations have a causal connection in fact with the factual situation set out in the first paragraph of the plaintiff's complaint.

3. The defendant may file an answer containing a statement of the facts which under a rule of law go to make up (or constitute) a specific substantive right as a matter of substantive law, and which right came into being partly out of the contract or factual situation set forth in the complaint as the factual situation of the plaintiff's substantive right, or which facts stated
in the answer have a causal connection in fact with the factual situation set out in the complaint.

4 Whether an amended pleading states a new cause of action depends on whether it states a factual situation which as a matter of substantive law gives rise to a different substantive right. (This assumes that the rule on amendments and the statute of limitations is, or ought to be, as narrow as that set out at the beginning of this article. As has been urged herein, the correct rule cannot be expressed in those terms, although this is the rule in its common form.)

5. Whether a subsequent action is barred by the doctrine of res judicata depends on whether or not the inquiry in the first action was into the same factual situation creating the same specific substantive right as a matter of substantive law. (This assumes that the rule of res judicata is as narrow as stated above. As has been urged herein, the present rule on res judicata cannot be expressed in those terms.)