What Is a Cause of Action?

After drawing a complaint in a civil action the lawyer very often has occasion to ask himself: "Have I stated a cause of action—have I stated a new cause of action—have I stated just one cause of action—have I stated several causes of action?" These questions arise in various ways to disturb the pleader and they involve the problems of general demurrer, amendments, res adjudicata, joining and splitting causes of action. Throughout all these questions runs the common one as to the nature of a cause of action. No adequate and satisfactory answer can be reached until one has a fairly definite understanding of the elements of a cause of action and wherein one may be set off and distinguished from another. An attempt will be made herein to discuss those elements and characteristics. This subject has been fully covered on other occasions but the writer hopes that further discussion may aid in bringing out a clearer understanding of the problem.

Attempts have been made to define a cause of action but with varying success. It may be that the concept can better be described than defined. At least no attempt is made herein to add a new definition, but this elusive concept will be further described so that possibly existing definitions may have new meanings.

What is a cause of action? Is it the right to ask and obtain judicial aid? Is it the statement of the facts showing cause for judicial action? Or does it exist independently of a judicial proceeding and consist of that group of facts upon which a claim for judicial aid can be made? Is it the unlawful invasion of a right—the wrong committed? Is it that group of facts showing a primary

4 Box v. Chicago Rock Island and Pacific Ry. (1899) 107 Iowa, 660, 78 N. W. 694.
right-duty and delict? Is it that group of operative facts showing breach of a single right giving cause for the courts to give relief to the party or parties affected? Or is it that aggregate of operative facts which gives rise to one or more legal relations of right-duty enforceable in the courts?

A cause of action has been described as containing one or more of these features, and there is an apparent conflict among these statements. No attempt will be made to criticize the various cases which purport to define or describe a cause of action, as in most of the cases the court was justified in emphasizing one element of the cause of action more than another. The error arises in attempting to find from such cases a complete description of a cause of action. These cases do demonstrate that this concept is a composite one and will have a differing aspect depending on the angle from which it is approached and an attempt will be made to observe it from the various viewpoints.

It might simplify our discussion to consider two classes of cases to which our inquiries as to the cause of action may be directed. The first class can be represented by the case of a sale of personal property where the buyer might seek (1) to rescind and get his money back, (2) to recover damages for breach of warranty, (3) to recover damages for fraudulent misrepresentation, (4) to enjoin the negotiation of a note given in payment. If the buyer brings suit on one of these theories, has he stated a different cause from that upon another theory? Or is there one cause of action for which the law gives different reliefs?

Another class of cases presenting these problems is in the field of negligence where an accident causes injury to one's person and his personal property and the wrong complained of consists of failure to guard machinery as required by statute, failure of defendant to comply with common law duty of furnishing a safe place to work or negligence of a vice-principal in giving instructions to other employees about the operation of the machines. How many causes of action has the plaintiff?

It will be noticed that these questions can arise in various ways: (1) Whether a cause of action is stated, (2) whether a new cause of action is being added by amendment after statute of limitations has run, (3) whether there is an attempt to split a cause of action.

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and sue after judgment has been obtained in a former action, (4) upon a demurrer for misjoinder of causes.

The answer in each case will depend largely upon our conception of a cause of action. But those answers will also depend upon the various rules of pleading with respect to stating causes of action, amending complaints, res adjudicata and joinder of causes. Those rules are based upon policy and have been worked out through the years for the purpose of having the legal disputes most justly determined. We are not herein concerned with the policy of those rules but they may be observed as affecting the court's conception of causes of action in different cases.

In every civil action the plaintiff is asking the sovereign power through its judicial machinery to come to his aid and require certain conduct of the defendant. This desired conduct is ordinarily designated as the relief sought. This relief is given only to those in whom the law recognizes a certain right thereto—a remedial right. This remedial right is a creature of the law and arises out of some certain relation of the parties and their conduct with reference thereto. If this is the essence of an action, we should be able to find herein our cause of action; that is, those factors which give cause for the state to act.

Our problem is to pick out those factors and describe them in such general terms that they may be applied to the various cases. Is the conduct of the defendant the distinguishing factor? Is it the relief sought? Is it the legal relation of the parties and their conduct? In our first problem case when the buyer sues for breach of the contract of sale, is the seller's refusal to perform—his wrongful act—the cause of action? Does he have four causes of action if he sues for the money paid, damages for breach of warranty, damages for fraud or for cancellation of certain instruments?

In the ordinary case the lawyer can be satisfied that he has stated a cause of action without bothering about too much refinement of analysis and he need not answer the foregoing questions. It is only when problems arise wherein one cause of action is set off against, and compared with, another that its true and exact boundaries must be determined. These problems arise in the four situations mentioned at the beginning of this article. Upon such or similar occasions the courts have endeavored to define the cause of action and thus to determine its limits and boundaries. Such determination has been necessary for the judicial decision and as part of the process the court has endeavored to define the abstract conception of a cause of action.
At the outset it should be observed that if some test or distinguishing mark can be found whereby a cause of action can be readily ascertained, justice can be more readily administered. Too often it is amid the pressure of other legal matters that the courts encounter these occasions wherein several causes of action must be compared. It may be upon motion or demurrer which has been hastily presented by counsel as incidental to some other legal question, and no opportunity is presented for adequate consideration of the problem. Under such conditions search has been made for some rule of thumb or formula which can be mechanically applied. If it will be found impossible to find any such formula capable of mechanical application, it will still be desirable to make the test as simple and as definite as possible, capable of being properly used under the situations confronted by the courts.

What tests have been applied by the courts and text writers? How have causes of action been designated? The conceptions of a cause of action as presented by the four text writers heretofore referred to9 will be observed and discussed.

A cause of action has been defined so that the distinguishing feature consists of the wrong committed.10 If we are to find this test useful in comparing one cause with another, it is necessary that we understand the meanings of these terms. Does the wrong mean the wrongful act of the defendant? In our problem case is the wrong the seller's refusal to perform the contract—or after breach of contract, is it his refusal to return the money paid—is it his refusal to pay damages for breach of warranty, or is it the threatened negotiation of the purchase money note? This is probably not the meaning which Judge Bliss intended to give to the "wrong" about which he was talking. It has been observed that this term wrong is used in the sense of "embracing the element of right."11

When the test has been applied to contract actions, it has been found insufficient and it is necessary to examine into the nature and extent of the contractual right to determine the nature of the wrong.12

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9 Supra, notes 5, 6, 7, and 8.
10 Supra, n. 5.
12 In Jerome v. Rust (1909) 23 S. D. 409, 122 N. W. 344, an action was brought on an appeal bond conditioned upon paying a judgment and costs. The judgment had been assigned and this action was brought by original obligee and assignee. Defendant claimed an improper joinder in that there was a cause of action in favor of the assignee for the amount of the judgment and one in favor of the original obligee for amount of costs awarded on appeal. The court quoted from Bliss, "The cause of action is
This has been more strikingly the situation in actions for negligence. It would seem that the concept of legal wrong would not help us in defining and determining a cause of action. That concept is not reduced to its lowest terms, and we must find its component factors, that is, the primary right and the conduct of defendant complained of as a violation thereof.

We now come to the most frequently applied description of a cause of action. From this viewpoint we see behind the "legal wrong" and observe the legal relation of the parties and their conduct with reference thereto. This has been phrased by Professor Pomeroy in these words often quoted by the courts:

"Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as is used in the codes of the several states."

This is a formula which has been almost ineffaceably written into the reports. The ready acceptance of this phrasing comes from a desire of the courts to find some convenient test that can be readily applied to the problems that are encountered in the course of judicial proceedings. Unless this conception of a cause of action is misleading and directs the court into false paths, there is no necessity of discarding it and substituting any other. It will be well, however, to observe the criticism of this phrasing and possibly thereby we may find a broader meaning in these words. Thus without disturbing our acceptance of this language, we can give it an application that is not always given it by the courts.

Professor Clark has recently presented a conception of the cause of action in somewhat different language in his series of articles on code pleading. He concedes that his definition differs more in its phraseology than in its meaning from the definitions of Pomeroy,

the wrong" and "the wrong may be done by the refusal to respond to an obligation." While purporting to apply this test the court distinguished certain cases as "containing two entirely separate and distinct contracts." It seems this test cannot be applied without reference to the contract so that the nature and extent of the "right" involved may be ascertained.

13 Pomeroy, Code Remedies, 4 ed., § 347 (1904). Or possibly a better phrasing occurring in the same paragraph but not so frequently quoted: "The cause of action as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

Bliss and Phillips. He has defined a cause of action as "an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts." The chief object of Professor Clark is to avoid describing a cause of action as a legal concept and to give it "a broader, non-technical or lay definition" instead of one that has a "legalistic meaning." He would do this in the same way that a lay meaning has been given to the phrases "same transaction" and "the same subject of the action" as used in the statutes as to counterclaims.

It can very well be argued that a lay meaning should be given to the phrase "transaction" and that it may thus have a broad general meaning. But it is difficult to conceive of a cause of action other than as a legal concept. It is born of legal relations and exists only in legal atmosphere. It seems primarily a creature of the law. To have it transplanted into a lay environment would be to take from it all its distinctive characteristics. It would then have no form and outline. This no doubt is the ideal condition sought by Professor Clark as he maintains that as a question of policy for the effective administration of justice it would be better to have the concept vague and indefinite so that it could be shaped and formed to meet the needs of the particular case. But it seems futile to attempt a "lay definition" for the one proposed is couched in "legalistic" language. This would appear if Mr. Clark would ask the man on the street to define a "legal relation of right-duty."

This being purely a question of policy there may well be a difference of opinion. It, however, is not limited to the conception of a cause of action but involves the purpose and object of all pleadings. There are some who emphasize the factual element of the pleading; others hold important the statement of facts as they relate to certain legal problems. There may be some controversies that involve principally disputes of fact; in such a case the parties could as well call in their neighbors for arbiters; but more often the dispute involves the application of some rule of law, thus introducing a legal issue. It seems to the writer that the purpose of pleading is to inform the parties, the court, and the world of the particular facts which thus involve this legal problem. The statement of the

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15 Clark, "Ancient Writs and Modern Causes of Action," 34 Yale L. J. 879, 880.
cause of action must in some way be instrumental in bringing into being and shape the legal controversy. It does not seem desirable to remove the "legalistic meaning" from the cause of action.

How would Professor Clark determine the "aggregate of operative facts"? He says they must "give rise to one or more relations of right-duty between two or more persons," but this does not aid us in distinguishing one aggregate from another. Any analysis of cause of action which does not aid in relating one cause to another will be of no service to the courts. He suggests that "the size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business." It is doubtful if "convenient dispatch" of trial business will be secured when the procedural machinery is so indefinite. Litigation would more and more involve procedural problems. It is very questionable whether such dispatch of business would be "efficient." Our court will always operate under human limitations and we can only expect an approximation of justice. But justice will be more nearly attained by means of the rules, precedents and the machinery that have been worked out and developed through the years. To leave these is to depart from the administration of justice according to law.

If there is ever a place for definiteness and certainty in our law, it is in our procedural machinery. A lawyer may be uncertain as to the substantial rights of his client but he should be assured of the steps to be taken to present his problem before a judicial tribunal. The more definite, concrete, and simple are the procedural rules the more effective will be the system of administration of justice. There should be a minimum of dispute upon the procedural problems and the least uncertainty as to the effect of the various procedural steps. The criticism of the writ system was not its definiteness, but rather that the definiteness was too frequently made the object of litigation. If a litigant had made a procedural mistake, it was too difficult to correct it and his substantive rights were caused to suffer therefor. These objections can be eliminated without abandoning all the features of such system.

Professor Clark's conception is further presented in these words:

"The requirement of separate statement [of each cause of action] is a natural and reasonable one designed to keep the

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issues clear and simple. When the code ideal of stating facts is kept in mind, and the cause of action is 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."

It seems that the better conception of a cause of action would be expressed by treating the complaint containing the "separate statements" as analogous to a collection of short stories printed together, each one a complete unit in itself and having only a few elements in common as a common language and certain similarity in subject matter. If several causes of action are joined in one action for reasons of trial convenience, they should not be blended so that one could not define the limits of each and say here one begins and another ends.

This criticism of Professor Clark's concept of a cause of action is one based upon judicial policy. If the policy he advocates is correct, the conception of a cause of action which he presents would be unobjectionable. If his policy is unsound, as it is in the opinion of the writer, then his concept should not be accepted.

A greater change from the generally accepted conception of a cause of action is suggested by Professor McCaskill. He has criticized the statements of Pomeroy, Bliss and Phillips chiefly on the ground that they eliminate the relief element as a factor in determining the scope of a cause of action. He develops the proposition that the relief sought is an element of the cause of action and he proposes the definition that a cause of action is a "group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded."

This raises the distinct problem as to whether the remedy should be treated as one of the distinguishing marks of the cause of action, whether the conception presented by Professor McCaskill or that presented by Professor Pomeroy and others furnishes us the better and more serviceable one for solving our legal problems.

The nature of a cause of action is largely academic and the distinctions herein pointed out are largely verbal. What viewpoint shall we take—shall we say that the plaintiff has two causes of action, one legal, another equitable, or shall we say he has a cause of action for which the law will give him legal or equitable relief?

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22 Ibid., p. 638.
These various conceptions of causes of action will only make a
difference in our procedure when being considered in connection
with the rules of law as to amendments of complaints, separate
actions upon the same or related matters or as to joinder of causes.
These rules as to amending, splitting and joining causes are expressed
with relation to causes of action, and the cause of action must be
determined to apply those rules. It would seem desirable that a
cause of action be considered the same no matter with which rule it
is being related. If a state of facts is not permitted as an amend-
ment because it states a new cause of action, then those same facts,
if sued on separately, should also be held to be a separate cause and
not adjudicated by a prior suit. Too many times the court has
encountered rules as to amendments and joinder and found them
rigid and definite and in order to reach a more just decision the
court has been compelled to make its conception of cause of action
flexible.

If we wish to avoid confusion in our decisions, we should have
our cause of action concept uniform and unchanging and it may
therefor be necessary to get more flexibility in the rules of law
with reference to the treatment of causes of action. Some legislation
with respect to the rules of joinder may be necessary but that is not
impossible.28

Before examining some of the decisions which attempt to define
a cause of action, we first inquire whether or not there are any in-
herent characteristics. The phrase “cause of action” as used before
the codes, applied to the right to recover under the form of action
selected.24 But after the codes, the phrase ordinarily means those
facts which are stated entitling a complaining party to some judicial
relief. There seems to be no answer to the case made by Professor
McCaskill that the relief is an element of the cause of action. It is
hard to conceive of a cause of action apart from some judicial pro-
ceeding and some relief sought. If the court says there is no relief,
it is idle words to say that a cause of action exists. It connotes
action and action means some movement of the judicial machinery
to affect certain relief. But to say that there can be no cause of
action without some relief does not mean that when the law permits

28 Cf. Blume, “A Rational Theory for Joinder of Causes of Action and
Defenses, and for the Use of Counterclaims,” 26 Michigan L. Rev. 1 (1927).
It is there suggested that the rules as to joinder can be and are being phrased
in terms of “convenience.”

24 In Palmer v. Lorillard (1819) 16 Johns. (N. Y.) 348, Chancellor Kent
discussed the right to recover in trover when suit was brought in assumpsit,
which he spoke of as “declaring for one cause of action and recovery for
another.”
several kinds of relief that you necessarily have several causes of action. Thus the fact that the relief is an element of the cause of action does not necessarily make it the distinguishing element.

We are confronted with the choice of framing our conception of the cause of action so that the relief will or will not be one of the distinguishing marks. Again bending before the pressure of accumulated cases we might cause less confusion if we accept the formula that has been firmly written into the reports—"the remedy is no part of the cause of action." If in applying this formula we mean that the relief will not be the distinguishing mark, we might find it unobjectionable.

Many times the phrase is used to mean the prayer for relief forms no part of the cause of action, which is different from the relief itself. The separation of the prayer for relief from part of the statement of the cause of action comes from the language of the codes, which states that a complaint shall consist of a statement of the cause of action and prayer for relief. No doubt the commissioners felt that if the cause of action was to be distinguished by the relief prayed for there would be little departure from the existing writ system.

The greatest difference between the conception of a cause of action as presented by McCaskill and that of Pomeroy appears when a certain state of facts gives rise to legal and equitable relief. In our hypothetical case previously presented, the purchaser may set forth certain facts and get a judgment for the money paid; he may also seek a decree enjoining the vendor from negotiating the note. Professor McCaskill may say there are two causes of action, one for legal relief and another for equitable relief. If one sues and recovers his money, can he bring a second suit to have the note cancelled? This involves a question of the policy, independent from the problem as to the nature of a cause of action.

25 Felt City Townsite Co. v. Felt Investment Co. (1917) 50 Utah, 364, 374, 167 Pac. 835, 839.
26 City of Albert Lea v. Knatvold (1903) 89 Minn. 480, 95 N. W. 309: "as often held by this court, the prayer for relief does not constitute a part of the cause of action"; Dahlquist v. Mattson (1925) 40 Idaho, 378, 233 Pac. 883.
27 Cf. Cal. Code Civ. Proc. § 426. (This is copied after the original New York code and is typical of all the early codes.)
"The complaint must contain:
"1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;
"2. A statement of the facts constituting the cause of action, in ordinary and concise language;
"3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated."
This situation is similar to the one confronting the court in the familiar case of Hahl v. Sugo,\(^2\) which decision has been characterized as preposterous,\(^2\) and based on a wrong conception of a cause of action. It is not so important whether we say there is one cause of action or two. The real problem is whether we should permit a litigant to prosecute two trials where one, properly conducted, would suffice. The law has always tried to protect a person from being unnecessarily harassed by litigation. The tendency has been ever present to use the machinery of the law to force some desired result by the mere annoyance of litigation. Our rules of law must be made to protect individuals from such a misuse of the legal machinery. Then, too, the courts have another reason for insisting upon the minimum of suits. The public expense in maintaining the open courts has become considerable and the public has a right to demand that those courts are not used unnecessarily. The courts cannot be said to be open if there is too great a congestion of suitors at the threshold. An effort must be made to thin out the crowd seeking the use of the courts. Therefore, regardless of the question of whether a set of facts involves one or two causes of action, it must be determined whether or not the law will permit two suits when the matter can be settled in one trial. If Hahl v. Sugo had decided there were two causes of action, would not there arise the further question of making some supplementary procedural rule as to compulsory joinder?

Even though the ultimate question may not be whether two causes of action are stated, when a state of facts entitles one to legal and to equitable relief, yet we desire to know the determination of the

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\(^{28}\) (1901) 169 N. Y. 109, 62 N. E. 135. The facts of the case are as follows: Plaintiff brought an action to obtain a decree to compel defendant to remove a portion of a wall of defendant’s building that encroached upon plaintiff’s land. Previously plaintiff had brought an action against defendant to recover possession of a strip of ground upon which the portion of the wall was erected. In that action, tried before the judge and jury, plaintiff had recovered and was given a judgment for possession of the land. The judgment also contained a command from the court that defendant remove all obstructions upon the land. Later that portion of the judgment was stricken out upon defendant's motion. Thereafter at plaintiff's instance an execution was issued to the sheriff. The sheriff returned the writ of execution with an endorsement that he could not execute it as the land described was occupied by a portion of a wall which was a part of defendant's building. After again unsuccessfully moving the court for an order compelling defendant to remove the wall, plaintiff brought the suit in question. It was held plaintiff could not recover, that he had only one cause of action which could not be split into several, and hence the present action could not be maintained.

courts on this question. Have the courts refused to distinguish one cause of action from another by the relief sought or granted? Can a cause of action give rise to several kinds of relief? These questions have been generally answered in the affirmative.\(^{30}\)

It seems that such an understanding of a cause of action is proper and desirable. The same cause of action—group of constitutive or operative facts, if you please—can be used by a plaintiff to obtain equitable relief or legal relief. Those facts may have to be alleged or assembled a little differently due to certain customs of pleading, but the essential facts would be the same. The same state of facts may permit one to get judgment for damages for breach of contract or for specific performance, and but one cause of action be used.\(^{31}\)

The different uses to which a cause of action can be put were clearly set out in a Kansas case.\(^{32}\) There had been a former suit for specific performance of a real estate contract. After judgment for the defendant, plaintiff brought a second suit praying damages for breach of the contract. The former judgment was pleaded as a bar. The court held that there was one cause of action and very properly distinguished the case from one of splitting a cause of action and said it was, in fact, using the cause of action for two purposes. The court said:

"While a creditor may not sue for one-half his debt at a time and thus split his cause of action, he is not compelled to pursue his remedy at law for damages for a breach of contract, but may seek to secure specific performance only. To do so is not to split his cause of action into parts but to use it for only one of two possible purposes . . .

"While the rule against splitting a cause of action is thoroughly well settled, and based largely, if not entirely, upon the ground that a defendant may not be harassed with the expense

\(^{30}\) Emory v. Hazard Powder Co. (1884) 22 S. C. 476, 53 Am. R. 730: "On the contrary, inasmuch as often times there springs from one cause of action several remedial rights, entitling the party injured to several kinds of relief, it is not only not improper to unite several demands in such cases for relief, but failing to do so, the plaintiff might fail to secure the full measure of his rights." Pomeroy, Code Remedies, 4 ed., § 353 (1904); 1 C. J. 1059.

\(^{31}\) Pomeroy, Code Remedies, 4 ed., § 348 (1904): "From one cause of action, that is from one primary right and one delict being the breach thereof, it is possible and not at all uncommon, that two or more remedial rights may arise and therefore two or more different kinds of relief answering these separate remedial rights. . . . If the plaintiff in one cause of action should state the foregoing facts constituting his cause of action, and should demand judgment in the alternative either for damages or for a specific performance, he would, as the analysis above given conclusively shows, have alleged but one cause of action."

of repeated litigation for parts of one claim, by a parity of reasoning it must be held that a plaintiff with only one cause of action cannot be permitted to use it more than once in order to recover from the defendant; otherwise the latter might be harassed with as many lawsuits as there were kinds of relief which the plaintiff deemed himself entitled to. While, speaking precisely, the question of damages was not in fact tried and determined in the former action, still the cause of action, which included a right to recover the damages, was tried out and determined and the plaintiff had his opportunity and day in court to recover on his one cause of action whatever the facts and the law warranted. So, then, the same cause of action had been litigated, and the only reason that relief by way of damages was not sought or had was the failure of the plaintiffs to use their cause of action as fully in the former action as they might have done."

It is to be noticed that we are not yet finding what factors are relied on and considered in distinguishing two causes of action. We have only observed that the fact that though, at one time equitable relief is sought, and another time legal relief, there are not on that account two causes of action. In other words, the relief sought is not a determining factor in distinguishing a cause of action. We have seen further that a cause of action may be used for several purposes. It may be used to obtain judgment for damages for breach of contract; it may be used to get one's money back on breach of contract; it may be used for specific relief as specific performance or rescission or cancellation. Only one cause of action is used for whichever purpose it may be employed. In the same way a trespass may be the basis of an action to recover damages or, in certain cases, to obtain an injunction.

It is comparatively easy to find elements which do not constitute the distinguishing elements of a cause of action, but exceedingly difficult to pick out those elements by which a cause of action can be determined. The common formula is that given by Pomeroy: "Of these elements the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term." This has been easy for the courts to chant but sometimes difficult to apply. As to what the primary right is in some cases there is wide disagreement. We have not gained a great deal by shifting our inquiry from "cause of action" to "primary right." For this reason this formula has been criticized by some text writers. However, as this is the test that has been written into the books, it should if possible be retained. The need of some test has been

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heretofore discussed. To have a judicial controversy properly determined, it seems necessary to have some core to the judicial dispute. Especially as the complexity of the problems increases, it seems increasingly necessary to be able to reduce each controversy to its lowest terms and the various issues to some common denominator. To do this it must be possible to pick to pieces the controversy and find a nucleus—a core made up of certain rather definite legal principles. Otherwise how can the boundaries of that controversy be ascertained, how can it be determined what matters have been adjudicated, how can a statute of limitation be applied, or how can the various questions of joining and splitting be answered?

We can find this core in the primary right and the violation thereof. This is satisfactory if we understand thereby that we refer to the violation of certain substantive rights which has come to be recognized as a legal wrong. We may talk about the breach of remedial rights, but that only adds more words to confuse the thought, and lawyers and courts do not think in terms of remedial rights but rather in terms of substantive rights. As these rights have been evolved with the development of the common law, they are more or less associated with the forms of action through which they were originally enforced. We think of a contractual right, a quasi-contractual right, various personal rights and various property rights.

A classification of rights upon these lines may seem arbitrary but it is rather convenient and somewhat natural, and will therefore assist in determining the boundaries of judicial disputes. That group of operative facts which shows the violation of some certain substantive obligation may be said to be the cause of action. It cannot be maintained that the right is the sole distinction as the same right may be violated on different occasions and give rise to separate causes. Nor can the sole distinction be the act which constitutes the wrong, for a single act may give rise to several causes. But in general when a distinct right has been violated a cause of action can be said to arise.

This analysis is more easily applied in actions upon contracts, as in such cases the nature of the right is more definite. When a contractual right has been violated or when the contract is said to be broken, there arises a cause of action. There may be several breaches of the contract but there is still only one cause of action. Each

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34 And also there cannot be a cause of action until the right has been violated as has been decided in various cases involving the statute of limitations. See Bruner v. Martin (1907) 76 Kan. 862, 93 Pac. 165, 14 L. R. A. (N. S.) 775.
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breach may be alleged as part of a cause of action, but it is the same cause of action and suit for one breach bars any subsequent suit as to matters that may have been determined at that time. Successive breaches may be sued upon at different times.35

There is greater difficulty in determining a cause of action when personal or property rights are violated. This has been partly due to the historical development of the distinctions between such rights. But these same distinctions make a convenient and natural classification and may therefore be retained even after the influence of the historical growth is no longer felt. A typical illustration of the problems arising out of these distinctions is given in our second problem case where the wrongful act of defendant caused injury to the person of the plaintiff and to his property. Does this create two causes of action? This question has frequently arisen when a person has from the same wrongful act received personal injury and property damage. The courts have divided as to whether there are two causes of action. Judging the question analytically, one would say that two separate and distinct substantive rights have been invaded and if we are to distinguish causes by the rights and the invasion thereof, we would say that two causes of action have here arisen.36 Other courts have taken the position that there is only one wrongful act—one tort and there can therefore be only one cause of action.37 The controlling principle underlying the latter decisions is one of trial policy frankly set forth by some text writers.38 It can be conceded that it is desirable to try at one time all the questions involving the same general transaction. But that can better be accomplished by a direct regulation therefor as is done by some statutory enactments,39 rather than by warping the conception of a cause of action. Although it may be urged that the cases requiring joinder reach a proper result in those cases, yet they should not be taken as guides as to the nature and character of a cause of action.

Another class of cases making some confusion in the reports is where instead of a diversity of rights as in the previous cases there

35 1 C. J. 1112.
38 Clark, "Joinder and Splitting of Causes of Action," 25 Michigan L. Rev. 393, 428-9. "The argument of convenience in favor of the latter course seems much more potent ... A rule leading to two lawsuits where one will accomplish the same result is not to be favored."
39 Idaho Comp. Stats. 1919, § 6688.
is a diversity of acts. A case before the Iowa Court is a typical one considering this problem. The action was first brought upon the charge of negligence in the use of the improper system of draw bars and bumpers. By amendment, other negligence was charged with respect to the manner of using the draw bars. The amendment was made more than two years after the accident, which was the statutory period of limitation. The question was whether or not a new cause of action was introduced. The court quoted several orthodox definitions but failed to apply them, and determined that a new cause of action was set up because the facts of negligence were so distinct that each could be tried without reference to the other. The court suggested the reason for its decision in these words:

"The thought obtains throughout the cases that, even though the amendment might otherwise be allowable, it will not be permitted when the effect will be to make the state of facts pleaded relate back so as to avoid the statute of limitations, if the new cause of action would be otherwise barred."

The decision of the case is no doubt proper upon the ground of trial policy as a litigant should not be allowed to inject a new and distinct issue into the case after the period of the statute has run, especially when there is a showing of prejudice. The method of proof may be different, and a defendant might be prejudiced by being confronted with an issue when the evidence as to it has slipped from his grasp. This rule of trial policy could better be distinctly stated as such, rather than have that policy made effective through a confused analysis of a cause of action. It could be established that the court be given a discretion in rejecting new issues in the case to the prejudice of the other party. It is doubtful if the Iowa court when confronted with the problem of joinder would hold that two causes of action were alleged and must be separately stated.

When the court speaks of two causes of action does it mean to apply that literally? Would not a judgment upon one be a bar to suit upon the other? Would the court permit separate actions at the same time? Would it not be better to say, as has been said in the contract cases, the several breaches constitute the same cause of action and may be sued on separately but may be sued on only once? It seems in fact to be a different statement of the same cause of action.

If there is only one cause of action, what is the primary right

41 Supra, n. 32.
and what is the delict? Is the primary right in one case, the right to have the employer furnish him with reasonably safe tools and in the second statement the right to have the employees use the tools without negligence? Such an interpretation of the primary right is unsatisfactory. The "primary right" in the Iowa case already referred to can be said to be a bundle of rights growing out of the relation of master and servant, and the delict is the breach of one or more of the corresponding obligations. From what has been heretofore said we are justified in conceiving of our cause of action as the group of operative or constitutive facts which show a legal relation between the parties which requires certain conduct on the part of either or both of those parties together with those facts showing their conduct with reference thereto. This is a long way from simplifying our cause of action concept. But we may reach a more simple statement by several further illustrations:

1. A plaintiff may show a contractual relation between P and D which requires certain conduct of D, and by showing that, together with the conduct of D other than that required of him, we can say that a cause of action is set forth. (2) He may show the relation between P and D of master and servant, which requires certain conduct of the parties. If P shows that relation together with the conduct of D other than that required of him, a cause of action is stated. In this connection there seems to be no difficulty from the fact that this bundle of obligations imposed on D is added to or cut down by some statutory enactment. (3) Again it may be that P is suing because D has not conducted himself reasonably toward P under the particular circumstances. In such case the conduct required of P under those circumstances and that occurring is said to be a cause of action. (4) It may be that P is suing because of some conduct required of D, not inhering in P personally but as the owner or possessor of some material thing. P's relationship to that thing and D's conduct with reference thereto may be said to be the cause of action. The difficulty arises in determining what conduct is required of a defendant in the various relations suggested. We get no assistance from procedural rules, but must turn to the rules of substantive law.

The foregoing is only another way of saying, as has been oft repeated, that the core of a cause of action consists of a primary

42 Cf. Baltimore S. S. Co. v. Phillips, supra, n. 5: "In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right to bodily safety, whether the acts constituting such invasion were one or many, simple or complex."
right and corresponding duty together with a breach of that duty. However, our conception may be broadened by looking beyond this customary phrasing and observing that the primary right-duty relation is a composite one and often involves secondary and thus separate duties. That the wrongful conduct may not merely consist of a single act but may be a series of acts, all more or less related to the general conduct required of the actor under the circumstances.

It is submitted that the conception of a cause of action is thus sufficiently identified so that we can look here for the core of the cause of action for which the courts are continually searching. True, the concept is not very definite but it has such flexibility that would make it applicable to varying circumstances, and yet is definite enough to furnish a measuring device whereby one cause of action can be set off and compared with another.

A liberal conception of the cause of action is set forth in a recent New York case.43 An action was first commenced for the death of an employee of a common carrier engaged in interstate commerce. The case was first tried under the theory of a violation of the federal Boiler Inspection Act and the action was dismissed. Later the present suit was commenced for negligence under the federal liability act. The former action was held to be an adjudication on the ground that two causes of action against the same person and in favor of the same person cannot arise from one personal injury. That the federal Employers Liability Act creates a new ground of negligence but not a new cause of action and one may bring the case within the Liability Act by amendment even after the statute had run without introducing a new cause of action. This case accepts a broader and safer conception of a cause of action—that involving the bundle of obligations arising out of a specific relation.

There has been nothing new added by way of definition of the cause of action. In the description of that concept, we have endeavored to show that it represents a thing which is the creature of the law and should be dealt with as a legal concept. That the same cause of action may be set forth in different ways and include somewhat different facts, as the statements of two breaches of the same contract, or two grounds of liability for the same personal injury. That the same cause of action may be used for different purposes as when it is used for legal or equitable relief. That it has rather definite limitations or boundaries. That it consists of im-

proper conduct in the breach of obligations arising out of the relationships for which improper conduct the substantive law has authorized certain relief. That this general conception has frequently been described by the formula, the cause of action consists of a primary right and corresponding duty and a wrong or delict, and that the remedy or relief forms no part thereof. We have observed that this formula generally serves the purpose when the statement of the cause is being related to some judicial relief and also when one cause of action is being compared or related to another cause of action. That it better serves the purpose if a broad conception of primary rights is read into this definition. That a primary right may be sometimes thought of in the singular but at other times collectively as a "bundle of rights," the result of a legal relation and that the delict may be one or more acts or a series of acts contrary to the conduct required by law of that legal relation.

That in this way confusion and uncertainty will be avoided by not attempting to reject existing definitions; and comparative certainty and definiteness, desired in procedural rules, will be secured. Yet there is allowed a sufficient flexibility and adjustment which will make those rules instruments for the administration of justice rather than an ultimate product of the law.

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