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Joinder of Actions—With Special Reference to the Montana and California Practice

MONTANA'S code provisions on the joinder of causes of action¹ and of counterclaims,² derived from the California Code of Civil Procedure,³ have had an unbroken period of operation since their adoption by the territorial legislature of 1864.⁴ In the meantime, there has been a marked tendency to liberally reëxamine the entire legal attitude toward the problem of joinder. While perhaps most significant in the field of juristic writing and opinion, the tendency is also reflected in legislation and judicial decision in England⁵ since the passage of the Judicature Acts, and also in a growing number of American jurisdictions.⁶ California has effected several changes during the intervening years, and in 1927⁷ incorporated into her code some of the liberal provisions now long effective in England.

The writer believes the restricted joinder of actions at common law was based largely on the fortuity of historical accident, that it created imaginary difficulties in joinder, that this illogical arbitrary system, changed in slight particulars only, was carried over into the code, and there has existed in a condition of stalemate in most American jurisdictions for the past three-quarters century. The present article takes the position that the saving of expense to litigants, the elimination in whole or in part of the congested dockets of the courts, as well as the interests of the public, dictate a wider joinder—if not entire freedom thereof. This proposal, it is believed, can be accomplished through the enactment and operation of the principle of trial convenience, with discretion in the court to determine this criterion, and with power in the court to order separate trials upon a showing of prejudice. This

¹ MONT. REV. CODES (1921) §9130.

² MONT. REV. CODES (1921) §9138.

³ CAL. CODE CIV. PROC. §§427, 438.

⁴ BANNACK STAT., LAWS OF MONTANA 1864, pages 52 to 54.

⁵ See *infra* notes 55, 62, 64, 125.

⁶ See *infra* notes 51 to 54, incl.; 68 to 75, incl.; 99 to 105, incl.

⁷ See *infra* notes 38 to 45, incl.; 51, 52, 58 to 60, incl.; 97, 107, 119.

proposed change is to be sharply contrasted with the present system whereby starting with separation, the court may order consolidation for purposes of trial.⁸ If a plaintiff joins too many actions, it is easy to separate them for trial; while if he severs them, it may be very hard to effect a consolidation.⁹ While the presence of common questions of law and fact thus necessitating the same or similar evidence is a salutary criterion, it is not believed to be of the same importance as the principle of trial convenience as a guide. Furthermore, these tenets, of more immediate interest in the problem of joinder, will be regarded only as adjunct to the larger thesis that pleading is not an end in itself, but is only a means to the administration of justice in the courts, and that its true function is primarily to give notice to the parties and the court of the respective claims and defenses of the parties.¹⁰ The subject will be traced from the common law and equity background to the present situation in our most liberal jurisdictions, with these principles before us, and with special reference to Montana statutes and decisions where they appear to be applicable.

JOINDER AT COMMON LAW

In the common law practice, the plaintiff could combine in the same declaration any number of counts in the form of action selected, each stating a different cause of action against the defendant.¹¹ With exceptions to be hereafter noted, the converse was also true, namely, that if the various claims did not fall within the scope of the one form of

⁸ MONT. REV. CODES (1921) §9820 provides that "Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated." A similar provision is to be found in most code jurisdictions. (CAL. CODE CIV. PROC. §1048.) It had a common law background, and was perhaps the one outstanding liberal mechanism in common law joinder.

⁹ The suits may be pending in different courts; they may be brought up for trial at different times; and it is well known that there is considerable lack of initiative by courts in bringing about a consolidation. Thus, the Montana Supreme Court has said that consolidation of actions "cannot be demanded as a matter of right; the matter rests within the discretion of the court, which will not be interfered with, unless clearly abused, particularly where the consolidation is denied. The statute is permissive, not mandatory. . . . Whenever the court is of the opinion that it may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and upon the litigants alike, the order of consolidation should be made, but manifestly the conditions then before the court will determine the exercise of the court's discretion." *St. George v. Boucher* (1929) 84 Mont. 158, 161, 274 Pac. 489, 491.

¹⁰ See Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501; Pound, *Some Principles of Procedural Reform* (1910) 4 ILL. L. REV. 388, 491.

¹¹ 1 CHITTY, PLEADING (16th. Am. ed.) 229; SHIPMAN, COMMON LAW PLEADING (Ballantine 3rd ed. 1923) 201; TIDD, PRACTICE (9th ed.) 12; Sunderland, *Joinder of Actions* (1920) 18 MICH. L. REV. 571.

action, they could not be joined. Thus in *assumpsit*, plaintiff could sue on several promissory notes or several sales of goods, or for a sale of chattels, an obligation on the note, and a breach of contract to build a house, or to marry, or to manufacture goods.¹² If trespass were brought, he could claim for an assault, an unlawful entry on his land, a wrongful taking of his goods, and for carnal knowledge of his wife or daughter.¹³ If case were selected, he could claim in separate counts for slander, libel, negligence causing injury to his person or property or both, malicious prosecution, seduction of wife or daughter, maintenance of nuisance, and forcible injury to plaintiff's property in the possession of a third person.¹⁴ The guiding principle was that on selection of the form of action, plaintiff was entitled to redress any and all grievances between the same parties within the scope of the action selected.

Generally, as has been indicated, two or more forms of action could not be joined in one declaration;¹⁵ actions *ex contractu* could not be joined with those in form *ex delicto*, for instance.¹⁶ To the general rule, two exceptions were recognized; debt and detinue were joinable,¹⁷ as also were case and trover.¹⁸ Thus, one could combine in the same declaration a penalty prescribed by statute, money due by a judgment, compensation for services, a loan of money, and damages for the wrongful detention of goods. So also, slander, malicious prosecution, negligence, seduction and various conversions could be joined.

Debt was the mother of detinue; in early law a debtor owed his creditor the chattel whence arose a certain mental assimilation between the scope of these two actions.¹⁹ Trover had its origin in the action on the case, and was not given a separate existence until the sixteenth

¹² *Smith v. First Congregational Meetinghouse* (1829) 8 Pick. (Mass.) 178; *Union Cotton Manufactory v. Lobdell* (1816) 13 Johns. (N. Y.) 462; *Gray v. Johnson* (1843) 14 N. H. 414.

¹³ *Chicago West Division Ry. Co. v. Ingraham* (1890) 131 Ill. 659, 23 N. E. 350; *Parker v. Parker* (1835) 17 Pick. (Mass.) 236; *Bishop v. Baker* (1837) 19 Pick. (Mass.) 517; *Baker v. Dumbolton* (1813) 10 Johns. (N. Y.) 240.

¹⁴ *Smith v. Goodwin* (1833) 4 Barn. & Adol. 413, 110 Eng. Reprint 511; *Beebe v. Knapp* (1873) 28 Mich. 53.

¹⁵ *Selby v. Hutchinson* (1847) 9 Ill. 274; *Toledo, Wabash & Western Ry. v. Jacksonville Depot Building Co.* (1872) 63 Ill. 308.

¹⁶ *Stoyel v. Westcott* (1807) 2 Day (Conn.) 418; *Bodley v. Roop* (1842) 6 Blackf. (Ind.) 158; *Church v. Mumford* (1814) 11 Johns. (N. Y.) 479. In the absence of the transaction proviso, the same rule obtains in Montana under the code. *St. George v. Boucher* (1929) 84 Mont. 158, 274 Pac. 489.

¹⁷ SHIPMAN, *COMMON LAW PLEADING* (Ballantine 3rd ed. 1923) 203.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, pages 202-203; Howe, *Misjoinder of Causes of Action in Illinois* (1920) 14 ILL. L. REV. 581.

century.²⁰ In the meantime, a conversion was naturally joinable with other actions on the case, and after the separation this practice continued.

Some claims against the defendant might be stated either as contract or as tort at the option of the plaintiff. A conversion could be stated as constituting an implied contract to pay for the property taken.²¹ So it could be joined with other claims in assumpsit against the same defendant as money due on sales, loans, or breaches of express contracts. The facts of the conversion regarded as a tort might be redressed either by trespass or trover and the desirability of the one or other form of action might well depend on the nature of other claims by the same plaintiff against the same defendant.

Another principle operative in common law practice was that plaintiff might allege a wrong as the principal grievance and connect therewith items by way of aggravated damages;²² such matters of aggravation oftentimes were not susceptible of joinder independently in the form of action selected, but could be considered in measuring the relief to which plaintiff was entitled. Thus, for trespass on his realty, plaintiff could allege the taking of his goods, the debauching of his wife or his daughter, assault upon himself or his servant, an injury to his reputation occasioned by the manner or circumstances of the entry upon the land, detriment to his health, comfort and pecuniary condition, and any and all claims within the scope of the action of trespass. So in malicious prosecution, plaintiff could state as matter of aggravation a false imprisonment to the injury of his reputation, and detriment to his business.²³

These principles so explained, it has been said that "the practice of joining causes of action at common law did not have its origin in the statute of some wise legislator, or in the decision of some learned judge,

²⁰ Ames, *The History of Trover* (1897) 11 HARV. L. REV. 277, 374.

²¹ SHIPMAN, *op. cit. supra* note 11, at 163.

²² *Tinker v. Colwell* (1904) 193 U. S. 473, 24 Sup. Ct. 505; *Bracegirdle v. Orford* (1813) 2 M. & S. 77, 105 Eng. Reprint 311; *Bahr v. Boley* (1895) 85 Hun. (N. Y.) 448, 32 N. Y. S. 881; *Merriman v. McCormick Harvesting Machine Co.* (1893) 86 Wis. 142, 56 N. W. 743.

²³ 2 CHITTY, *op. cit. supra* note 11, at 606-611. Causes of action due in different rights could not be joined. SHIPMAN, *op. cit. supra* note 11, at 203. "Thus a count on behalf of two plaintiffs jointly could not be joined with a count on behalf of one of them severally; counts could not be joined each of which set up a several right in a different plaintiff against the same defendant; counts setting up different causes of action in favor of the same plaintiff against different defendants could not be joined; and counts alleging the joint liability of two or more defendants could not be joined with counts alleging the several liability of any or all of them." Sunderland, *Joinder of Actions* (1920) 18 MICH. L. REV. 571, 582.

but in the laziness or carelessness of the chancery clerks.”²⁴ Whatever could be comprised in the original writ, however multifarious, might be comprised in one declaration. In later times, judges, ignoring factors of historical accident, were disposed to rationalize concerning the common law scheme of joinder. It was said, “the twelve men (the jury) are commonly rude and ignorant, and so, consequently, not proper to be troubled with too many things at one time.”²⁵

It is apparent that in truth the common law practice was both too broad and too narrow. Highly incongruous and unrelated causes could be joined in the action on the case. Causes presenting common questions of law or fact could not be joined if they must be commenced by different forms of original writs.

JOINDER IN EQUITY

While common law condemned a multiplicity of issues, equity abhorred a multiplicity of suits. What could or should be joined was accordingly within the discretion of the chancellor, and convenience of trial guided him in the exercise of such discretion. This discretion was not capricious, but was based on definite principles. First, when the court was exercising its equitable jurisdiction proper, the joinder of causes of action was encouraged if such causes presented common questions of law or fact. Whether equity should go beyond this canon and allow a joinder of separate and distinct equitable causes where one plaintiff (or joint plaintiffs) sued one defendant (or joint defendants) seems to have occasioned diversity of opinion, Chancellor Walworth in 1848 stating that there was no principle in chancery forbidding the joinder and adding that the joinder prevented the evils occasioned by a multiplicity of suits.²⁶ It was, however, well settled that equity would not allow “several plaintiffs to demand, by one bill, several matters, perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters of different natures against several defendants.”²⁷ As to these, the principle of common questions held undisputed sway. Secondly, when the court was exercising its jurisdiction to take over purely legal causes of action in order to pro-

²⁴ Blume, *A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counter Claims* (1927) 26 MICH. L. REV. 1, 4.

²⁵ STEPHEN, PLEADING (Tyler's ed. 1871) 55, note 57.

²⁶ *Newland v. Rogers* (1848) 3 Barb. Ch. (N. Y.) 432.

²⁷ *Fellows v. Fellows* (1825) 4 Cowen (N. Y.) 682, 700. The reason for this rule is said to be “that such a proceeding would tend to load each defendant with an unnecessary burden of cost, by swelling the pleadings with the statement of the several claims against the other defendants, with which he has no connection; and also to prevent confusion, and to preserve some analogy to the comparative simplicity of declaration at common law.”

vide for their adjudication in one proceeding, it was always held necessary that there be common questions of law or fact in order that equity intervene,²⁸ and according to some courts the degree or extent of this "question, relation or interest" had to be greater than when the court was exercising its equitable jurisdiction as such.²⁹ Professor Pomeroy took the contrary viewpoint.³⁰

It was further generally assumed, and rightly, that plaintiffs having effected the joinder, their interests would be promoted thereby. The same reasoning would apply if defendants made no objection to the joinder. If common questions of law or fact were present, the joinder was ordinarily upheld, only a very clear case of prejudice sufficing for its denial on a demurrer for multifariousness. While the situation where separate and distinct causes of action were joined occasioned the diversity of viewpoint already indicated, it would seem that even here, not only where one plaintiff (or joint plaintiffs) sued one defendant (or joint defendants), but also where several plaintiffs claimed several matters of one defendant, the joinder should not be condemned in advance, in view of the saving in process, docket and trial fees in which both sides would be directly interested; a showing of inconvenience and prejudice after the joinder effected constituting the proper mechanism for action in such case. This leaves the case of one plaintiff (or joint plaintiffs) suing several defendants, in which case it could ordinarily be said in advance of the filing of complaint that each defendant's interest would be jeopardized through delay and that he would be subjected to expense in regard to matters not properly of his concern.

The equity objection of multifariousness was recognized as being one which a court of equity could make at any time on its own initiative. But, says a federal court, "It has rarely if ever happened that a decree has been reversed by an appellate court of the United States upon the sole ground that the bill is multifarious."³¹ And said Judge Story, "An appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity."³²

To conclude, the aim of equity was to settle an entire controversy at one time; it was accordingly permissible to bring in all closely related matters. The rule against multifariousness applied to the im-

²⁸ 1 POMEROY, *EQUITY JURISPRUDENCE* (3rd ed. 1905) 370; *Tompkins v. Craig* (C. C. E. D. Penn. 1899) 93 Fed. 885.

²⁹ *Tribbette v. Illinois Central Ry. Co.* (1892) 70 Miss. 182, 12 So. 32; *Cloyes v. Middlebury Electric Co.* (1907) 80 Vt. 109; 66 Atl. 1039.

³⁰ 1 POMEROY, *op. cit. supra* note 28, at 370.

³¹ *Hosmer v. Wyoming Ry. & Iron Co.* (C. C. A. 8th, 1904) 129 Fed. 883.

³² *Oliver v. Piatt* (1845) 44 U. S. (3 How.) 333, 412.

proper joinder of unrelated parties or issues or both. It was largely a rule of discretion based on convenience of trial, in connection with which it was said that equity would try issues arising out of the same transaction or out of transactions connected with the subject of the action. Such a rule was frankly vague, in order that convenience of trial be promoted, and was rested on the proposition that it is impossible to decide in advance of the trial the size of the rights-bundle which can be conveniently tried therein.

By way of summary and comparison, the principal differences between common law and equity on this subject may, therefore, be stated as follows:

1. Common law joinder followed the right-duty relationship of the parties; in equity all parties with material interests had to be joined.
2. Common law gave judgments *in solido* only; in equity the decree could be molded to fit the case.
3. Common law was cautious not to perplex or confuse the jury; the Chancellor would decide multiple and complex issues.
4. Common law allowed only joinder within the same form of action (with two exceptions); in equity there was but one form of action.
5. Common law joinder was a matter of right; in equity joinder was a matter of discretion.
6. Common law made no use of the common question; equity used it largely and as a handmaid to the principle of trial convenience.
7. Common law required a general demurrer as a remedy for misjoinder; equity allowed only a special demurrer therefor.

THE CODE SYSTEM

Section 9130 of the 1921 Montana Code of Civil Procedure is substantially section 63, page 54, of the Bannack Statutes of 1864. In common with most sections of the Montana Code, it came via the California Code of Civil Procedure which in turn was derived from the original New York (Field) Code of 1848.³³ Seven classes of suits

³³ Laws of New York, 1848, c. 379, §143. Twenty-three jurisdictions have six to twelve classes fairly comparable to the Montana enumeration. The statutes are set out below (with the date of the code or statute followed by the section number); 18 jurisdictions, thus starred *, have the transaction proviso in some form; 12 jurisdictions, marked thus #, have a general provision authorizing the joinder of injury to person and property: Alaska 1900—84; #Arkansas 1921—1076; *California 1920—427; #*Connecticut 1918—5636; Indiana 1926—286; *Idaho 1919—6688; Kentucky 1895—83; *Minnesota 1923—9277; #*Missouri 1919—

are stated with the proviso that joinder may be had only within each of these classes. The section reads as follows:

"The plaintiff may unite several causes of action in the same complaint, legal or equitable, or both, where they arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon and the rents and profits of the same, and for an injunction to stay waste or injury thereto;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract or operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property;

The causes of action so united must all appear on the face of the complaint to belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered;³⁴ but an action for malicious arrest and

1221; #*Nebraska 1922—8601; *Nevada 1912—5039; #*New Mexico 1915—4105; New York 1927—258; #*North Carolina 1919—507; *North Dakota 1913—7466; #*Ohio 1929—11306, 11307, 11308; Oklahoma 1921—266, 267; Oregon 1920—94; #*South Carolina 1922—430 (14); South Dakota 1919—2371; #*Utah 1917—6567; *Washington 1922—296; #*Wyoming 1920—5606, 5607, 5608. The more liberal of the some thirty code jurisdictions are indicated in *infra* notes 67-73. Colorado has a fairly liberal three class system as follows (Colo. CODE (1921) §76): "The plaintiff may unite several causes of action in the same complaint, when they all arise out of any of the following named classes; *Provided*, They affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity; *and Provided*, They do not require different places of trial . . .

1. Actions to recover specific real property . . . any kind of claims provided they arise from the same property, for the recovery of which suit is brought.

2. Actions to recover specific personal property . . . any claims arising therefrom and if the property cannot be recovered in specie, damages for the conversion.

3. All actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for any two or more of these causes, and in all causes for which the action is brought, and in all cases equitable relief may be granted."

Some of the common law jurisdictions have almost complete freedom of joinder. See Florida 1927—4225; Georgia 1926—5521; Massachusetts 1921—c. 231, §7.

³⁴ Objections on the ground that causes of action are not separately stated and numbered cannot be taken by demurrer, a motion to make definite and certain being the proper remedy (*Fleming v. Consolidated Motor Sales Co.* (1925) 74 Mont. 245, 240 Pac. 376); the motion necessarily presupposes two or more causes of action completely stated in the complaint (*Thwing v. Weiser* (1922) 65 Mont. 28, 210 Pac. 750); causes of action for injury to real and personal property may properly be united (*Weibush v. Jefferson Canal Co.* (1923) 68 Mont. 586, 220 Pac. 99). Montana holds that the cause of action in each count must be fully

prosecution, or either of them, may be united with an action for either injury to character or to the person.”³⁵

The method is somewhat similar to that prevailing at common law. Forms of action were abolished, yet the codifiers erroneously, it is believed, deemed it necessary to put some limitation on the scope of a single suit. A kind of similarity of legal claim was provided. The classes were in some respects less restricted than at common law, in others more so; case at common law, as we have seen, permitted joinder of claims now appearing in several code classes. In New York in 1852 was added the proviso derived from the equity practice that causes of action might be joined “arising out of the same transaction or transactions connected with the same subject of action.”³⁶ The result was an illogical and arbitrary scheme of joinder based, in part upon similarity of legal claim, in part upon unity of time or occurrence. Most of the codes have copied this system from the New York legislation of 1848 and 1852. The number of classes differs, however, Colorado having three, New York twelve.

The broadest of these joinder provisos are class one (the contract class), and class eight (the transaction class). It will be noticed that class one results in a fairly wide joinder. All forms of unrelated contract claims, express contracts, whether of covenant, debts of record, of contract or of law, implied contracts, quasi contracts, including waiver of tort may be joined. Legal and equitable claims may be joined, yet unrelated tort claims fall into three or more classes; class eight cuts across the entire system of the seven preceding classes. If claims of diverse legal character may stand together at times under the transaction proviso the query naturally arises, is there a rational policy which would prevent them from always doing so?³⁷

Of high significance is it that whereas the 1864 enactment of the Montana Territorial Legislature, borrowed as it was from California, has continued without substantial interruption to the present time, many American jurisdictions, motivated by the developments of fifty years in England under the Judicature Acts, have, in the meantime, changed

alleged in that the pleader may not incorporate by reference in one count paragraphs of another count if the allegations sought to be incorporated are substantial (*Murray v. City of Butte* (1907) 35 Mont. 161, 88 Pac. 789); the contrary doctrine would seem to be better, conserving, as it does, the record as well as the labors of the pleader, as it is also the usual rule followed in code states. CLARK, CODE PLEADING (1928) 147.

³⁵ This proviso permitting joinder of personal injury claims with character claims in malicious prosecution and defamation, involves a limited recognition in the Montana Code of the tenet that there is nothing so inherently fundamental in the class system, but that it may, on occasion, be disregarded.

³⁶ LAWS OF NEW YORK 1852, c. 392, §167.

to a more liberal joinder; some practically sweeping away all restrictions whatsoever.

First, as to the California experience. Prior to 1907, California, as is still true of Montana, had no proviso for the joinder of claims arising out of the same transaction, or transactions connected with the subject of the action. This omission was the subject of comment and disapproval. In one case the Supreme Court of California said that the classification of causes of action, while intended to be founded upon manifest reason, was to some extent arbitrary and differed materially from that which prevailed in most states, in view of this omission.³⁸ In another case it said "there is no reason why all matters arising from and constituting part of the same transaction should not be litigated and determined in the same action."³⁹

In harmony with the rule that all causes of action united must belong in one class, it was originally held a misjoinder in California to unite causes of action for injuries to character, person and property. In 1895 was decided *Lamb v. Harbaugh*,⁴⁰ holding that plaintiff could not unite in one complaint claims for forcible entry on her real property and for injuries to her person and to her character associated therewith. Joinder of causes for injuries to the person and for injuries to property was held improper in *Thelin v. Stewart*,⁴¹ decided in 1893; here plaintiff had united a cause of action for forcing the noxious fumes of chemicals into plaintiff's shop, to the injury of his health, and a cause of action for breaking into the shop and removing plaintiff's personal property therefrom. In 1912, in *Schermerhorn v. Los Angeles Pacific Railway Company*,⁴² it was held improper for plaintiff to unite in one complaint a cause of action for injury to his person and to his personal property (his auto) due to a collision with defendant's railroad car. Thus, it is seen that plaintiff was often prevented from uniting claims for different injuries resulting from the same wrongful act of defendant. Whether or not this rule was affected by the enactment of the eighth transaction subdivision in California in 1907 (the 1912 decision of the intermediate appellate court not lining up with the New York decisions on the subject),⁴³ it was definitely changed by the addi-

³⁷ *Sunderland, op. cit. supra* note 11, at 580; *CLARK, op. cit. supra* note 34, at 300.

³⁸ *Stark v. Wellman* (1892) 96 Cal. 400, 31 Pac. 259.

³⁹ *Jones and Wife v. Steamship Cortes* (1861) 17 Cal. 487.

⁴⁰ (1895) 105 Cal. 680, 39 Pac. 56.

⁴¹ (1893) 100 Cal. 372, 34 Pac. 861.

⁴² (1912) 18 Cal. App. 454, 123 Pac. 351 (this case was decided in the intermediate court of appeal).

⁴³ See *infra* note 49.

tion in 1915 of a proviso to the section stating that "causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately."⁴⁴ Under this amendment it has been held that causes of action for injuries to health and for injuries to property on account of the improper grading of a street are properly united.⁴⁵

Other jurisdictions have not been altogether agreed as to the way to treat the case of injury to person and property issuing out of the same wrongful act of the defendant. New York, in *Reilly v. Sicilian Asphalt Paving Company*,⁴⁶ holds there are two causes of action, and this is also the English viewpoint;⁴⁷ in Massachusetts, Minnesota and Missouri, the contrary doctrine has been declared. Minnesota and the jurisdictions indicated look to the negligent act rather than its effect and hold injury to person and property simply different items of damage; thus invoking a "rule that will most speedily and economically bring litigation to an end if at the same time it conserves the ends of justice."⁴⁸ New York looks to the effect of the act in relation to different primary rights; *viz.*, periods of limitation, differences as to assignability and differences in the rule of survival applying to the personal and property claims, respectively. From the standpoint of joinder, however, the harsh effects of the New York rule are mitigated by allowing joinder of the personal and the property claims as separate counts in the one complaint under the transaction proviso.⁴⁹

Montana has followed New York in holding that a claim for damages for injuries suffered by the owner of real property personally by way of annoyance and discomfort is independent of a claim for damages occasioned to the property itself by its depreciation in value because of the maintenance of a nuisance.⁵⁰ Constituting, therefore, separate causes of action, it follows that they cannot be united in separate counts in the same complaint because of the omission of the transaction proviso in the Montana code; so also, separate actions must be brought by plaintiff to redress these claims. Surely, trial convenience, dispatch of litigated business, as well as economy of expense both to the parties and the public would dictate the settlement of such

⁴⁴ Cal. Stat. 1915, c. 28.

⁴⁵ *Weissband v. City of Petaluma* (1918) 37 Cal. App. 296, 174 Pac. 955.

⁴⁶ (1902) 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636.

⁴⁷ *Brunsdon v. Humphry* (1884) 14 Q. B. D. 141.

⁴⁸ *King v. Chicago, Milwaukee & St. Paul Ry. Co.* (1900) 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238.

⁴⁹ *Eagan v. New York Transportation Co.* (1902) 39 Misc. Rep. 111, 78 N. Y. Supp. 209; *McInerney v. Main* (1903) 82 App. Div. 543, 81 N. Y. Supp. 539.

⁵⁰ *Lennon v. City of Butte* (1923) 67 Mont. 101, 214 Pac. 1101.

litigation in one action. It is, therefore, believed that this is a fundamental weakness of the Montana code section on joinder.

The remedy would seem to be either the adoption of the transaction proviso (in which case interpretation as in New York would be necessary), a more specific section comparable to that adopted in California in 1915, or a thorough reëxamination of the whole class system of the code in accord with recent developments. The latter is believed the preferable approach, as will be indicated in subsequent paragraphs.

A wrongful act which injures a married woman involves two distinct wrongs, for which the law gives two distinct causes of action; one to the wife, to recover damages for her personal injury; another to the husband, to recover damages for consequential injury to him caused by the loss of the services of his wife and the expenses incurred by her injuries. For the consequential injuries to himself, the husband may sue alone. For the direct injury to the wife, she must sue. In 1913 it was enacted by way of amendment to the provision on joinder in California, "that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband."⁵¹ It is believed that this is a commendable provision and so worthy of adoption elsewhere.

The most far-reaching changes were, however, made by the 1927 California legislature in the rules relating to parties to civil actions. Section 378 of the Code of Civil Procedure as amended reads as follows:

"All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."⁵²

The new section is similar to provisions found in New York,⁵³ New

⁵¹ Cal. Stat. 1913, c. 135, amending CAL. CODE CIV. PROC. §427.

⁵² Cal. Stat. 1927, c. 386.

⁵³ N. Y. CIVIL PRACTICE ACT (1920) §209.

Jersey,⁵⁴ and England.⁵⁵ Following adoption of the act in New York, 193 plaintiffs, each claiming to have a separate cause of action, were permitted to sue several defendants whom they alleged had made common false representations to induce each plaintiff to purchase shares of stock in a corporation that defendants had organized.⁵⁶ In New Jersey, twelve plaintiffs were allowed to join in an action for injury to the separate property of each caused by fire due to defendant's negligence.⁵⁷

Section 379a of the California act provides that "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities."⁵⁸ Section 379b provides that "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."⁵⁹ Section 379c provides that "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties."⁶⁰

Statutes corresponding to these were adopted in New York in 1920.⁶¹ They in turn were based on the English Practice Act.⁶² New Jersey also has a provision similar to section 379a.⁶³ By way of interpretation, the case of *Thomas v. Moore*⁶⁴ indicates how far the English practice has advanced; the court there allowing eight plaintiffs, members of the National Union of Railwaymen, to sue six defendants, members of the Associated Society of Locomotive Engineers and Firemen, for defamation in speeches and print. Upon the verdict of a jury, judgment was given in favor of each plaintiff and against each defendant

⁵⁴ N. J. Laws 1912, c. 231, §4.

⁵⁵ Rules of the Sup. Court (Eng.) Order 16, Rule 1, THE ANNUAL PRACTICE (1927) 201.

⁵⁶ *Akely v. Kinnicutt* (1924) 238 N. Y. 466, 144 N. E. 682.

⁵⁷ *Metropolitan Casualty Insurance Co. v. Lehigh Valley R. Co.* (1920) 94 N. J. L. 236, 109 Atl. 743.

⁵⁸ Cal. Stat. 1927, c. 259.

⁵⁹ Cal. Stat. 1927, c. 260.

⁶⁰ Cal. Stat. 1927, c. 387.

⁶¹ N. Y. CIVIL PRACTICE ACT (1920) §§211, 212 and 213.

⁶² Order 16, Rules 4, 5 and 7; THE ANNUAL PRACTICE (1927) 227, 231.

⁶³ N. J. Laws 1912, c. 231, §6.

⁶⁴ [1918] 1 K. B. 555.

in a sum certain. Such a decision would be unthinkable in most of our American jurisdictions, not only because of restrictive code rules on joinder of parties, but further because of the usual holding that every publication of slander constitutes a separate cause of action, coupled with the rule, found in most of the codes, that each cause of action must affect all the parties.⁶⁵

It is unfortunate that the California legislature did not effect some change in the joinder of causes section. New York and English experience indicates an inseparable connection between joinder of parties and joinder of causes of action. Especially troublesome is the joinder of causes proviso that each cause of action must affect all the parties. In the important case of *Ader v. Blau*,⁶⁶ the New York Court of Appeals in 1925 refused, in a wrongful death action, to allow the joinder of one defendant charged with maintaining an iron picket fence attractive to children whereby the deceased was injured, causing death, with another defendant, a physician, called after injury to treat the child, whose negligence was charged to have caused the death. Cardozo, J., dissented on the ground that the proviso that each cause of action must affect all the parties dropped out of the code in 1925, now permitted the joinder, although he agreed it to be an improper one under the 1920 Civil Practice Act.

While it is believed, therefore, that the recent California legislation will not produce all the expected results because of the failure of the legislature to alter the provisions as to joinder of causes of action and especially because of failure to change the proviso to the effect that each cause of action must affect all the parties,⁶⁷ it will surely be

⁶⁵ *Cook v. Connors* (1915) 215 N. Y. 175, 109 N. E. 78, L. R. A. 1916A 1074. In this case the same libelous words published in the morning and evening editions of a newspaper under common ownership were held to constitute separate causes of action.

⁶⁶ (1925) 241 N. Y. 7, 148 N. E. 771. See, however, the case of *Sherlock v. Manwaren* (1924) 208 App. Div. 538, 203 N. Y. Supp. 709, upholding the joinder of several physicians as defendants. One was alleged to have negligently set plaintiff's injured shoulder, and the others were alleged to have successively negligently attempted to reset it. Crouch, J., took the position that what each defendant did or omitted to do constituted a common question of fact in all four causes of action.

⁶⁷ For Montana cases interpreting the proviso that each cause of action must affect all the parties, see *County of Silver Bow v. Kelly* (1923) 68 Mont. 194, 216 Pac. 1106, holding an action by a county against its assessor to recover from him money lost to it by reason of his wilful failure and neglect to assess property, was improperly joined with an action against a surety company on the official bond of the officer. Also *Baker v. Hanson* (1924) 72 Mont. 22, 231 Pac. 902, where sureties on an administrator's general bond were held improperly joined with sureties on his additional bond given upon a sale of real property where plaintiff sought to recover for a misappropriation of the proceeds of a sale of personal

found useful, as it also indicates the pronounced current tendency in the direction of a more liberal procedure as to joinder of parties and causes of action.

It is in the four or five jurisdictions that have recently been influenced by the English experience under the Judicature Acts of 1873-5 that the most enlightened policy of joinder of actions obtains. Under Order eighteen of the Rules of the British Supreme Court adopted in 1875, "plaintiff may unite several causes of action in one complaint save in actions for the recovery of land . . . but if it appear to the court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had."⁶⁸ Actions for the recovery of land constitute, therefore, the single exception to unrestricted joinder in England.

New Jersey in 1912 adopted the equity or English principles governing joinder of parties and actions. "Subject to rules, the plaintiff may join any causes of action."⁶⁹ "Persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."⁷⁰ "The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."⁷¹

Kansas and Wisconsin have removed the restrictions on joinder entirely;⁷² in Iowa and Michigan they are removed except for the division of actions into legal and equitable.⁷³ In these jurisdictions, it is usually provided upon motion showing prejudice that the court may "order a separate trial between the plaintiff, or one or more of several

property for which the realty sureties could not be held. See *Borgeas v. Oregon Short Line Ry. Co.* (1925) 73 Mont. 407, 236 Pac. 1069, holding that the rule that the negligent employee may be joined with his employer in an action for damages under the rule of *respondeat superior* does not apply to joinder of an alleged incompetent company physician with the employer railroad company, the relation of master and servant not existing between a railroad company and the physician employed by it to treat injured employees. See further, that a cause of action affecting one as an individual cannot be joined with another affecting him only as an administrator, *Fischer v. Hintz* (1920) 145 Minn. 161, 176 N. W. 177; also, that suit by plaintiff against defendant as secretary of eight corporations affects defendant in different capacities and is, therefore, an improper joinder of causes of action, see *Merrill v. Suffa* (1908) 42 Colo. 195, 93 Pac. 1099.

⁶⁸ THE ANNUAL PRACTICE (1927) 310.

⁶⁹ N. J. COMP. STAT. (Cum. Supp. 1924) §163-287.

⁷⁰ *Ibid.* §163-280.

⁷¹ *Ibid.* §163-282.

⁷² KAN. REV. STAT. ANN. (1923) 60-601; WIS. STAT. (1929) 263-04.

⁷³ IOWA CODE (1924) §10960; MICH. COMP. LAWS (1915) §12309.

plaintiffs, and the defendant, or one or more of several defendants, or between co-defendants.”⁷⁴ New York, as has been noticed, has adopted liberal provisions for the joinder of parties, but retains the twelve classes on joinder of actions; whereas, as we have seen, the proviso that each cause of action must affect all the parties was retained in 1920; this was stricken out in 1925.⁷⁵ While a step in the right direction, the anticipations of the framers of the act will probably not be realized until the arbitrary class system is also swept away.

Montana should profit by the experience of these jurisdictions. It would seem highly undesirable that one whose property and person have been injured by the same wrongful act of the defendant should be forced to bring two suits. The enactment of the transaction proviso, given a liberal interpretation by the court of “causes of action,” “transaction,” and “subject of the action,” would suffice for this class of cases, but in view of the development toward unrestricted joinder elsewhere, together with the absence of rational policy behind the seven class joinder scheme, it is believed only the part of wisdom to examine the whole matter *de novo*.

In the interpretation of “cause of action,” “transaction,” and “subject of the action,” the courts have met with no little difficulty. Seventy-five years of discussion have not clarified views on the question. Whether we regard “cause of action” a legal or a lay term, it is generally agreed that “transaction” and “subject of the action” should be given a broad lay interpretation, and recently the viewpoint is unhesitatingly expressed that all three terms may be so defined as to increase the bundle of rights settled between the parties in the same suit and so conveniently dispatch the accumulated litigious business before the courts.⁷⁶ “Causes of action” occurs nine times in the Montana Code of Civil Procedure;⁷⁷ “transaction” twice,⁷⁸ and “subject of the action” three times.⁷⁹ It might be argued that it is well to give the same meaning to these terms throughout, but it appears that the same jurisdictions have not always reached a common meaning, at any rate, for “transaction” and “subject of the action,” and the end sought

⁷⁴ N. J. Laws 1912, c. 231, rule 12, page 386.

⁷⁵ *Ader v. Blau* (1925) 241 N. Y. 7, 148 N. E. 771.

⁷⁶ CLARK, *op. cit. supra* note 34, at 311.

⁷⁷ In connection with Sections 9086 (Gen. survival statute), 9117 (Publication of summons), 9129 (Complaint—what to contain), 9131 (Demurrer for insufficient facts), 9133 (Demurrer to part of complaint), 9136 (Objections waived when), 9138 (Counterclaim), 9147 (Partial defenses), and 9156 (Demurrer to counterclaim).

⁷⁸ Sections 9138 (Counterclaim), and 9151 (Cross-complaint).

⁷⁹ Sections 9077 (Joinder of Plaintiffs), 9131 (Demurrer to jurisdiction), and 9138 (Counterclaims).

is so different in these various connections that it may well be doubted if a uniform meaning is possible.⁸⁰

The breadth of meaning given to "cause of action" may be best studied in the following cases involving: first, necessity of separate statement or of separate actions; secondly, joinder and splitting of causes of action; thirdly, necessity of duplicate statement in the complaint; fourthly, legal and equitable relief on the facts together with the problem of *res adjudicata*; and, fifthly, amendment of complaint. Always, also, it should be borne in mind that it is necessary to state a cause of action good against general demurrer.

In case one, defendant assaults plaintiff, at the same time slandering him. May plaintiff sue defendant in a single count alleging all items of damage therein? If necessary to state two counts, may they be joined together in one complaint under the transaction proviso? Must separate actions be brought for the assault and slander respectively? In such case, the authorities are split three ways; the first view that plaintiff may sue defendant in a single count for all damage issuing out of the defendant's wrongful act is believed to be preferable.⁸¹

In case two, the same wrongful act of defendant injures plaintiff's person and his property. Is defendant's act the "cause of action" or are there two "causes of action" based on the effect of defendant's act?⁸² While we have noticed that the authorities are divided, it is

⁸⁰ See the admirable but admittedly unsuccessful attempt of the Wisconsin court in *McArthur v. Moffet* (1910) 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264 to harmonize the interpretations in that jurisdiction.

⁸¹ For the first view see *Maisenbacker v. Society Concordia* (1899) 71 Conn. 369, 42 Atl. 67; *Harris v. Avery* (1869) 5 Kan. 85. For the second view see *Craft Refrigerating Machine Co. v. Quinpiac Brewing Co.* (1893) 63 Conn. 551, 29 Atl. 76; *Dinges v. Riggs* (1895) 43 Neb. 710, 62 N. W. 74. For the third view see *DeWolfe v. Abraham* (1896) 151 N. Y. 186, 45 N. E. 455; *Green v. Davies* (1905) 182 N. Y. 499, 75 N. E. 536. At common law, assault constituting trespass, and slander constituting action on the case could not be joined. See CLARK, *op. cit. supra* note 34, at 309. For a case involving a somewhat similar problem, see *American Savings & Loan Association v. Burghardt* (1897) 19 Mont. 323, 48 Pac. 391, which was a suit on a note and foreclosure of a mortgage given to secure it; Montana here holding that there is only "one cause of action" on which the plaintiff is entitled to different items of relief. See further also, *American Can Co. v. Stare* (1912) 150 Wis. 627, 138 N. E. 67. *Contra*: OHIO GEN. CODE (1921) §11306.

⁸² *King v. Chicago, Milwaukee & St. Paul Ry. Co.* (1900) 80 Minn. 93, 82 N. W. 1113, 50 L. R. A. 161 (one "cause of action"); *Lennon v. City of Butte* (1923) 67 Mont. 101, 214 Pac. 1101 (two "causes of action"); *Reilly v. Sicilian Asphalt Paving Co.* (1902) 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176 (two "causes of action"). Common law jurisdictions also have reached the result that there is one "cause of action." *Chicago, West Division Ry. Co. v. Ingraham* (1890) 131 Ill. 659, 23 N. E. 350.

thought that a rule leading to two law-suits where one will do the work is not to be favored.

In case three, the same wrongful act of defendant gives plaintiff a claim under statute and also at common law. For purposes of statement in one or more counts, is the wrongful act the "cause of action" or is there a "cause of action" under the federal employer's liability act, a "cause of action" under the state employer's liability act, a "cause of action" at common law, etc.?⁸³ Here again there is not entire harmony in the decisions, but the view that there is one "cause of action" giving rise to variable relief is the best on principle, as it is the prevailing doctrine.

In case four, defendant's wrongful act gives plaintiff a claim in equity and also for damages as at common law. Is the act the "cause of action" or does plaintiff have a "cause of action" at common law and a "cause of action" in equity?⁸⁴ Properly, it should be held, in accord with the intent of the framers of the code, that there is only one "cause of action" on which plaintiff is entitled to both types of relief.

In case five, plaintiff wishes to amend from common law to statute or *vice versa* after the statute of limitations has run. A slight addition, change or qualification regarding the nature of defendant's negligence or the allegations of plaintiff's claim will be adequate. Is the "cause of action" a not too technical conception of defendant's negligence; *i.e.*, the general aggregate of operative facts, or does plaintiff have a "cause of action" at common law, a "cause of action" under the statute, etc.?⁸⁵ A marked trend in the decisions toward the liberal viewpoint that this is only an "amplification" of the original action is noticeable.

These questions have given courts no little difficulty; it will be apparent that the answers to such questions depend on whether one

⁸³ For the preferable view and the weight of authority that there is one "cause of action," *Payne v. New York, Susquehanna & Western Ry. Co.* (1911) 201 N. Y. 436, 95 N. E. 19; *Alexander v. Great Northern Ry. Co.* (1916) 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E 852. Compare, *Harvey v. Southern Pacific Co.* (1905) 46 Ore. 505, 80 Pac. 1061. CLARK, *op. cit. supra* note 34, at 310.

⁸⁴ See *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135, 61 L. R. A. 226, holding both types of relief are proper in the one action. Note McCaskill's criticism at page 648, *McCaskill, Actions and Causes of Action* (1925) 34 YALE L. J. 614, and CLARK, *op. cit. supra* note 34, at 321, in rebuttal in what is regarded as the preferable view that there is only one "cause of action" and that the court is to be criticized only in that it does not seem to recognize the possibility of further action on the as yet unsatisfied judgment.

⁸⁵ See for the illiberal viewpoint, *Box v. Chicago, Rock Island and Pacific Ry. Co.* (1899) 107 Ia. 660, 78 N. W. 694, holding the statute of limitations a bar. The contrary view, now perhaps the weight of authority, has the powerful support of the United States Supreme Court. *Missouri, Kansas & Texas Ry. Co. v. Wulf* (1912) 226 U. S. 570, 33 Sup. Ct. 135. CLARK, *op. cit. supra* note 34, at 514.

takes a narrow technical view of "cause of action" comparable to the common law or a broader non-technical view—possibly extending to a layman's view of a unity of events based on time or occurrence; the term may well be regarded as a group of facts giving rise to one or more claims or rights of action. Thus, "cause of action" has recently been defined as an aggregate of operative facts which gives rise to one or more legal relations of right-duty enforceable in the courts.⁸⁶ Such definition is thought to produce a more workable rule in these relations as it does throughout almost the entire range of procedural problems. If it be objected that the courts will probably not yield the notion of a "cause of action" as a definite legal criterion, it may be replied that the definition is not lacking in genuine legal concepts at the same time that it provides needed elasticity.

While as already noted, Montana has not taken what is believed to be the preferable viewpoint in case two,⁸⁷ *Alexander v. Great Northern Railway Company*,⁸⁸ holding a complaint sustainable either under the employer's liability act or at common law, would seem to be commendably liberal as to case three, as also is the holding in *Clark v. Oregon Short Line Railway Company*⁸⁹ as to case five permitting a "perfecting" amendment after the statute of limitations had run (*i.e.*, addition of allegations as to defendant's legal capacity and plaintiff's ownership of the property alleged to have been injured).⁹⁰

Passing to the meaning of "transaction" and "subject of the action" which, in the absence of the transaction clause in the joinder of actions proviso in Montana, have been considered by the court in connection with the sections on counterclaim⁹¹ and cross-complaint,⁹² the following Montana interpretations are in point:

"The term 'transaction' is not legal and technical—it is common and colloquial; it is therefore to be construed according to the context and

⁸⁶ CLARK, *op. cit. supra* note 34, at 293, 503.

⁸⁷ See *supra* note 82.

⁸⁸ (1916) 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E 852.

⁸⁹ (1909) 38 Mont. 177, 99 Pac. 298.

⁹⁰ For Montana definitions of "cause of action," see *Dillon v. Great Northern Ry. Co.* (1909) 38 Mont. 485, 100 Pac. 960 ("the right to ask and obtain judicial aid"); *Lennon v. City of Butte* (1923) 67 Mont. 101, 214 Pac. 1101 ("The infallible test by which to determine whether a complaint states more than one 'cause of action' is: Does it present more than one subject of action or primary right for adjudication?"); *Fortier v. Larabie Brothers* (1925) 74 Mont. 602, 241 Pac. 237. See *Butte Electric Railway Co. v. McIntyre* (1924) 71 Mont. 21, 227 Pac. 61, to the effect that reference to the common law forms of action is frequently of aid in determining whether the plaintiff has stated a "cause of action." See also, *Maronen v. Anaconda Copper Mining Co.* (1913) 48 Mont. 249, 136 Pac. 968; *Butala v. Union Electric Co.* (1924) 70 Mont. 580, 226 Pac. 899.

⁹¹ MONT. REV. CODES (1921) §9138.

⁹² MONT. REV. CODES (1921) §9151.

to approved usage. As so construed, it is broader than 'contract' and broader than 'tort' although it may include either or both; it is that combination of acts and events, circumstances and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action, and it applies to any dealings of the parties resulting in wrong without regard to whether the wrong be done by violence, neglect, or breach of contract. When in this sense of the word a cause of action in favor of the defendant arises from the transaction set forth in the foundation of plaintiff's claim, it is pleadable as a counterclaim, no matter what its technical soundings or those of plaintiff's demand may be." ⁹³

"The phrase 'connected with the subject of the action' is found in the Codes of many of the states in the same connection in which it is employed in our own, and some diversity of opinion has arisen as to the scope of its meaning; but in every instance where a question of this character has arisen, the court has been compelled to accept the guidance of certain general rules and apply them, as best they can be applied, to the facts of the particular case: (a) There must be some legal relationship between the ground of recovery mentioned in the counterclaim, and the subject of plaintiff's action as disclosed in his complaint. (b) But if the causes of action exist independently of each other, the one need not be asserted as a counterclaim in the action upon the other." ⁹⁴ "The words 'subject of the action' have been the object of much refinement of discussion, but it has long been settled in this state that they ought to be understood, 'not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked'." ⁹⁵

Thus it is seen that Montana has broadly interpreted "transaction" and "subject of the action." If "cause of action" is also broadly interpreted, the three terms are similar in kind, the difference being only in degree, "transaction" being a little wider than "cause of action," and "subject of the action" still wider than "transaction." The main thing as to "transaction" and "subject of the action" is that our courts carefully refrain from an interpretation that takes away needed flexibility, though this means only a very loose interpretation or no definition except the one relative to "cause of action."

It is not inconceivable, therefore, that by adopting the transaction proviso and giving adequate breadth to "cause of action" with still wider scope to "transaction" and "subject of the action" as lay terms in line with the interpretations already noted, a much larger measure of freedom could be secured for joinder in Montana. At the same time, in view of the trend toward unrestricted joinder based on manifest

⁹³ Scott v. Waggoner (1914) 48 Mont. 536, 544, 139 Pac. 454, 456, L. R. A. 1916C 491, 494.

⁹⁴ Kaufman v. Cooper (1909) 39 Mont. 146, 156, 101 Pac. 969, 973.

⁹⁵ Pittsmtont Copper Co. v. O'Rourke (1914) 49 Mont. 281, 293, 141 Pac. 849, 853.

rationalism and in view of the further trend elsewhere to omit "transaction" and "subject of the action" from the counterclaim statute,⁹⁶ it is submitted that the unrestricted joinder principle is more worthy of imitation.

COUNTERCLAIMS

Significant is the 1927 change in the counterclaim section in California. It is now provided only that "The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."⁹⁷ Gone are the limitations to the effect that the counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim or that it be connected with the subject of the action; and that in suit on contract, defendant may counterclaim a contract claim if his cause of action exists at the commencement of plaintiff's action.⁹⁸ Apparently the California legislature intended that where plaintiff sues for injury due to defendant's negligence, defendant may counterclaim an entirely unconnected injury due to plaintiff's negligence, a debt, or let us say, a suit on a note.

Order nineteen, rule three, of the English Judicature Acts provides that a defendant in an action may set off or counterclaim against the claims of plaintiff any right or claim, but if, in the opinion of the court on plaintiff's application, such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, the court may refuse permission to the defendant to avail himself

⁹⁶ See *infra* note 97.

⁹⁷ Cal. Stat. 1927, c. 813. For Montana cases interpreting this canon, see *Osmers v. Furey* (1905) 32 Mont. 581, 81 Pac. 345, holding landlord's counterclaim for rent did not tend to diminish or defeat tenant's recovery in his claim and delivery action for furniture seized by the landlord. Also *Cook-Reynolds Co. v. Wilson* (1923) 67 Mont. 147, 214 Pac. 1104, holding tenant's counterclaim for a share of proceeds of a volunteer crop improper in landlord's action to enjoin tenant from interfering with its harvest. These are actions of a proprietary nature. Where plaintiff claims damages, as in *Kinsinan v. Stanhope* (1914) 50 Mont. 41, 144 Pac. 1083, L. R. A. 1916C 443 (conversion of auto by defendant taken under a chattel mortgage given to secure purchase price), defendant may counterclaim a money demand (*i.e.* the balance of the purchase price) as arising out of the transaction or connected with the subject of the action.

⁹⁸ See MONT. REV. CODES (1921) §9138. "The counterclaim . . . must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

thereof. New Jersey has enacted substantially the same provision.⁹⁹ Connecticut,¹⁰⁰ Iowa,¹⁰¹ the federal¹⁰² and Massachusetts¹⁰³ equity rules, and Arkansas¹⁰⁴ also provide wider counterclaims than those to be found in most jurisdictions.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action."

The following 15 jurisdictions have both the "transaction" and the "contract" classes (the statutes are set out below under date of code or statute followed by section number): Arizona 1913—480, Idaho 1919—6695, Minnesota 1923—9254, Missouri 1919—1233, Montana 1921—9138, Nevada 1912—5047, New Mexico 1915—4116, N. Y. CIVIL PRACTICE ACT (1920) 266, North Carolina 1919—521, North Dakota 1913—7449, South Carolina 1922—411, South Dakota 1919—2354, Utah 1917—6576, Wisconsin 1921—2656, Washington 1922—265. Six jurisdictions have in substance the transaction proviso but instead of the contract provision a set-off statute: Kansas 1923—60-711, Kentucky 1919—96, Nebraska 1922—8617, Ohio 1921—11317, Oklahoma 1921—274, Wyoming 1920—5661. Oregon 1920—74 and Alaska 1913—896 have omitted "or connected with the subject of the action" from the transaction proviso. It will be noted, therefore, that the transaction proviso is found in a decided majority of code states.

Set-off was not recognized at common law until the passage of statutes beginning in 1705 with that of 4 Anne c. 16; recoupment based upon facts arising out of the transaction sued upon and reducing plaintiff's recovery was recognized without the aid of statutes. The code counterclaim is designed to include both recoupment and set-off, but is broader than the former in that defendant may recover an affirmative judgment if his claim is found to exceed that of plaintiff; it is also broader than the latter in that defendant's claim need not be liquidated. CLARK, *op. cit. supra* note 34, at 439. It is generally held under subdivision 2 (the contract proviso) that joint debts and separate debts cannot be set off against each other at law, King v. Wise (1872) 43 Cal. 628; 23 CAL. JUR. 258. Where several plaintiffs sue upon a "joint" claim, no counterclaim is available against one of the plaintiffs individually, Kales v. Houghton (1923) 190 Cal. 294, 212 Pac. 21; and where the statute makes no change in the common law rule that a partnership contract is "joint," in an action against a partnership, an individual claim cannot be set up as a counterclaim, Pope Manufacturing Co. v. Welch (1899) 55 S. C. 528, 33 S. E. 787; and in an action against an individual defendant to recover the price of livestock sold to him, a counterclaim for services rendered to plaintiff by a co-partnership of which defendant was a member could not be set up though the other party consented thereto, Heinrich v. Kirby (1922) 64 Mont. 1, 208 Pac. 897; and since the interest of a partnership extends to every portion of its property, a surviving partner may retain possession and control thereof *jure proprio*, and defend an action against him on a partnership obligation by setting up a counterclaim to recover the value of firm property converted by plaintiff, First National Bank of Butte v. Silver (1912) 45 Mont. 231, 122 Pac. 584; and where two defendants are both jointly and severally liable, one may set off a claim due from plaintiff to him alone, and thus satisfy the demand against both to that extent, Whittier v. Visscher (1922) 189 Cal. 450, 209 Pac. 23; 23 CAL. JUR. 260; CLARK, *op. cit. supra* note 34, at 464-5; MONT. REV. CODES (1921) §7398.

⁹⁹ N. J., THE PRACTICE ACT (1912) §163-288.

¹⁰⁰ CONN. GEN. STAT. (1918) §5635-6.

¹⁰¹ IOWA CODE (1924) §11151.

¹⁰² Federal Equity Rules (1912) Rule 30.

¹⁰³ Mass. Equity Rules (1926) Rule 6.

¹⁰⁴ ARK. DIG. STAT. (Crawford & Moses 1921) §1195-7.

This trend toward a wider counterclaim appears to be highly desirable in order to prevent unnecessary multiplication of litigation. Accordingly, it would seem only proper to allow all counterclaims to be used and in fact to require their use in a large number of situations. The latter policy already finds expression in section 9144 of the Montana Code which provides that if defendant omits to set up a counterclaim under the transaction proviso, he cannot afterwards maintain an action against plaintiff therefor, and in section 9643 applying to practice before a justice of the peace and requiring all counterclaims within the jurisdiction of the justice to be pleaded under penalty of waiver thereof. While the Montana Supreme Court has shown commendable liberality in interpretation of the usual code limitations on the propriety of counterclaims,¹⁰⁵ it is believed that the next step is to eliminate the legislative restrictions and make the rule fairly discretionary with the court, based on the dictate of trial convenience.

CROSS COMPLAINTS

The Montana statute on cross complaints, adopted in 1919¹⁰⁶ from California with the desirable addition that third parties might be

¹⁰⁵ See *Mulcahy v. Duggan* (1923) 67 Mont. 9, 17, 214 Pac. 1106, 1109, holding in an action for damages for an assault prompted by a libelous publication, a counterclaim for libel published nine days previously is permissible. The Montana court reviews two California cases holding *contra*, *McDougall v. McGuire* (1868) 35 Cal. 274, 95 Am. Dec. 98, and *Earl v. Times-Mirror Co.* (1921) 185 Cal. 165, 196 Pac. 57, and proceeds as follows: "We do not follow the logic of the California court when it expressly admits the connection existing between the two libels. We cannot approve a rule which arbitrarily uses the element of time in determining whether or not various causes of action arise out of the same transaction. If, as a matter of fact, there is such a connection that the acts complained of were the result of complainant's own acts, we think all causes of action arising therefrom must be litigated in one action." Most of the older cases were apparently *contra*. See *Sheehan v. Pierce* (1893) 70 Hun. (N. Y.) 22, 23 N. Y. Supp. 41. In another respect, the Montana procedure is not believed to be the preferable practice nor apparently is it the weight of authority; *i.e.* the holding that a class one (transaction) counterclaim must be in existence and matured for action at the time of the commencement of the suit to which it is pleaded, *Dick v. King* (1925) 73 Mont. 456, 236 Pac. 1093; *Hammond v. Thompson* (1918) 54 Mont. 609, 173 Pac. 229; *Scott v. Waggoner* (1914) 48 Mont. 536, 139 Pac. 454, L. R. A. 1916C 491. The statutory provision, on this subject, is by its language limited to counterclaims under the second or contract class as to which it may have some value by preventing defendant, upon notice of suit, from buying up counterclaims against the defendant. It is not believed a desirable limitation under class one (the transaction proviso). *CLARK, op. cit. supra* note 34, at 461. It is not necessary that the subject matter of a cross complaint be in existence and matured at the time of the commencement of the suit in which pleaded, *Callender v. Crossfield Oil Syndicate* (1929) 84 Mont. 263, 275 Pac. 273. That a counterclaim sounding in tort may be pleaded as against a demand upon contract provided it arises out of the transaction which gave rise to plaintiff's cause of action, see *Scott v. Waggoner* (1914) 48 Mont. 536, 139 Pac. 454, L. R. A. 1916C 491.

¹⁰⁶ MONT. REV. CODES (1921) §9151.

brought in,¹⁰⁷ has proved highly useful in the settlement of complicated cross demands.¹⁰⁸ As a further step, however, attention should be called to the New York Civil Practice Act, section 193, subdivision 2, as amended in 1922 and 1923, providing that when any party to an action shows that a third person not then a party to the action is or will be liable to such party wholly or in part, the court may order such party to be brought in. Under this desirable rule, an employer sued for damages for personal injuries has been permitted to bring in his employee who did the negligent act,¹⁰⁹ a maker of notes a person assuming responsibility thereon,¹¹⁰ an indorser a prior endorser,¹¹¹ and an insurer a reinsurer.¹¹²

INCONSISTENT CLAIMS AND DEFENSES

It is now generally held in code procedure that plaintiff may allege in different counts duplicate statements of the same claim, each founded on a different theory to meet the exigencies of the case as disclosed by the evidence.¹¹³ Properly also plaintiff in such case should not be required to elect on which theory of the case he will rely in advance of

¹⁰⁷ This wider type of cross complaint statute appears to be rather rare in code jurisdictions. It is found in the following jurisdictions (the date of the code or statute is indicated followed by section number): Arkansas 1921—1204, Kentucky 1908—96, Wisconsin 1919—2656a, Iowa 1924—11155, New York 1920—193-2.

¹⁰⁸ MONT. REV. CODES (1921) §9151 provides that "whenever any defendant to an action desires any relief against any party relating to or dependent upon the contract, transaction, or subject matter upon which the action is brought, or affecting the property to which the action relates, or whenever the judgment in such action may determine the ultimate rights of defendants in an action as between themselves, any defendant may, in addition to and in his answer, file at the same time, or subsequently by permission of court, a crosscomplaint against all parties to such action, and may make as additional parties to such action, and ask relief against any person, firm, association or corporation, necessary or required to permit the court to make a full determination of . . . all rights of any person, etc., dependent upon the contract, transaction, or subject-matter or affecting the property to which the action relates."

The code cross-complaint is "seemingly intermediate to the counterclaim and the former equitable cross-bill, presumably created to preserve to litigants the convenience of the cross-bill, in all situations not expressly within the counterclaim provisions." CLARK, *op. cit. supra* note 34, at 470.

¹⁰⁹ Fedden v. Brooklyn Eastern District Terminal (1923) 204 App. Div. 741, 199 N. Y. Supp. 9.

¹¹⁰ Williams v. Edward DeV. Tompkins (1924) 211 App. Div. 17, 206 N. Y. Supp. 637.

¹¹¹ Kleinman v. Chase National Bank (1924) 124 Misc. Rep. 173, 207 N. Y. Supp. 191.

¹¹² Travlos v. Commercial Union of America (1926) 217 App. Div. 352, 217 N. Y. Supp. 459.

¹¹³ Neuman v. Grant (1907) 36 Mont. 77, 92 Pac. 43; Blankenship v. Decker (1906) 34 Mont. 292, 85 Pac. 1035; Sharp v. Sharp (1923) 66 Mont. 438, 213 Pac. 799.

the trial,¹¹⁴ but both counts should be allowed to go to the jury under instructions that plaintiff may recover on one only.¹¹⁵ Only a few of the American codes expressly require that the causes of action or defenses be consistent.¹¹⁶ Some jurisdictions have read in the requirement.¹¹⁷

The problem is similar, whether one of inconsistent causes of action or defenses. Some two or three rules with various qualifications are to be found in code states.¹¹⁸ As to defenses, California has taken the position that each defense must be consistent with all parts of the same defense but need not be consistent with other separate defenses.¹¹⁹ Montana, in line with what is said to be the prevailing doctrine, holds that such defenses must not be factually incompatible (there may be a legal inconsistency) in that the proof of one defense must not disprove the truth of another defense.¹²⁰ Under this latter theory, it is necessary to qualify to the extent of allowing the joinder of denials with pleas of confession and avoidance, this involving only a "logical" or "seeming inconsistency," it is said.¹²¹ Further, pleadings are interpreted according to their legal effect, thus allowing denial of the "execution" of an instrument and at the same time admission of "signing" it through fraud in the *factum* (as distinguished from fraud in the prior

¹¹⁴ *Astin v. Chicago, Milwaukee & St. Paul Ry. Co.* (1910) 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158; *Sharp v. Sharp* (1923) 66 Mont. 438, 213 Pac. 799. *Contra*, *Harvey v. Southern Pacific Co.* (1905) 46 Ore. 505, 80 Pac. 1061.

¹¹⁵ CLARK, *op. cit. supra* note 34, at 315.

¹¹⁶ N. Y. CIVIL PRACTICE ACT (1920) §258; MINN. GEN. STATS. (1923) §9277.

¹¹⁷ *Seymour v. Chicago & N. W. R. Co.* (1917) 181 Ia. 218, 164 N. W. 352; *Poland v. Chessler* (1924) 145 Md. 66, 125 Atl. 536; *Lowry v. Carrier* (1918) 55 Mont. 392, 177 Pac. 756 (title by grant from the federal government and by prescription held incompatible, but the case being in equity, the court disposed of the cause on the merits).

¹¹⁸ SUNDERLAND, CASES ON CODE PLEADING (1913) 436.

¹¹⁹ *Banta v. Siller* (1898) 121 Cal. 414, 53 Pac. 935.

¹²⁰ *O'Donnell v. City of Butte* (1911) 44 Mont. 97, 119 Pac. 281 (on general denial of plaintiff's allegation that his land was in the City of Butte and affirmative plea by defendant alleging plaintiff's land in the city—held not necessary that plaintiff prove the point); *Advance-Rumely Thresher Co. v. Terpening* (1920) 58 Mont. 507, 193 Pac. 752 (the buyer cannot insist that the contract has been rescinded and yet recover on the contract); *International Harvester Co. v. Merry* (1921) 60 Mont. 498, 199 Pac. 704 (general denial of making of note coupled with affirmative plea of admission of making and plea of fraud held inconsistent). The early cases of *Potter v. Lohse* (1904) 31 Mont. 91, 77 Pac. 419, and *Bail v. Gussenhoven* (1904) 29 Mont. 321, 74 Pac. 871, would indicate that the court was then influenced by the preferable California doctrine on the subject. The later cases are, however, in line with the weight of authority.

¹²¹ *Day v. Kelly* (1915) 50 Mont. 306, 146 Pac. 930; *Nelson v. Northern Pacific Ry. Co.* (1915) 50 Mont. 516, 148 Pac. 388; *Lewis v. Steele* (1916) 52 Mont. 300, 157 Pac. 575.

treaty negotiations¹²²). So a general denial and defense of contributory negligence are generally held sufficient, as are also a general denial and defense of payment,¹²³ and a general denial and the defense of the statute of limitations.¹²⁴ Inconsistent defenses are allowed in New Jersey¹²⁵ and have been in England "for generations."

It is believed undesirable to insist upon a requirement of consistency. Plaintiff or defendant should not be required to elect which theory he will stand upon early in the case. All we should ask is that he be as truthful as his knowledge of the circumstances will permit. Rules of abstract logic should have only a subordinate place in pleading, the prime purpose being to give notice to the parties and the court. As long as plaintiff or defendant is honestly in doubt as to what the exigencies of the evidence may bring forth, he should be allowed to urge alternative theories, it is believed, until such time as all doubt in the matter disappears. No sane man, of course, would expect to go before the jury with proof calculated to sustain each of inconsistent theories, and a definite rule requiring consistency seems counter to the growing tendency to permit pleading in the alternative.

SUMMARY

This résumé of tendencies as well as rational policy would indicate that the arbitrary restrictive class system of joinder now operative in most of our states is destined ultimately to disappear. It is rather surprising that it has flourished this long when one considers that England has had a thoroughly simple rational joinder since the enactment of the Judicature Acts. If it were announced that an Englishman had discovered a sure cure for cancer or other dangerous malady, American physicians would at once desire to regulate their practice accordingly; American business men are quick to take advantage of the latest mechanistic invention, but large portions of the American Bar and public are still in the blood-letting and buggy-riding days as far as the device of effective procedural joinder is concerned. True, Montana dockets are not now congested as are those of larger industrial jurisdictions, but the press of litigation will uniformly become greater, and

¹²² *Boxberger v. New York, New Haven & Hartford Ry. Co.* (1923) 237 N. Y. 75, 142 N. E. 357; CLARK, *op. cit.*, *supra* note 34, at 423, 433.

¹²³ *Steenerson v. Waterbury* (1893) 52 Minn. 211, 53 N. W. 1146.

¹²⁴ *Spahr v. Liebeck* (1922) 119 Wash. 80, 204 Pac. 1049.

¹²⁵ *Rossi v. Benedict* (1922) 98 N. J. L. 81, 118 Atl. 713. At common law, after the statute of Anne, the defendant was permitted to file several defenses which might be inconsistent with each other. The prevailing code doctrine was developed from the rule that the code required the pleading of facts; the equity doctrine was the same. CLARK, *op. cit.*, *supra* note 34, at 433.

there is no good reason why the parties litigant should not have the advantage of a liberal rational joinder immediately.

The only guiding rule in a new system would appear to be trial convenience. Of secondary importance is the rule of common questions of law and fact. It should not follow that in all cases where common questions are lacking should joinder be denied. Such a rule, we have noticed, would have the effect of denying some joinders now permitted in equity. Cross complaints other than counterclaims, *i.e.*, against co-defendants and third parties, should no doubt be restricted by the rule of common questions, but as to counterclaims, *i.e.*, against plaintiffs, as well as joinder of causes, it is believed the wider rule of convenience should be applied. Freedom of joinder both of causes and of defenses should be the rule in order that parties may fairly present the claim or defense and thus have it fully adjudicated on the merits. No doubt ultimately also, instead of joinder being permissive only, it will be regarded desirable to impose certain penalties on the parties for failure to set up claims which might conveniently have been adjudicated in a prior proceeding.

Perhaps we are not yet ready to advance fully to the English mechanism whereby the court tried in one action for slander a suit of eight plaintiffs against six defendants; possibly also there are limitations as to the size of the rights-bundle which juries can effectively try which are not present when trial is before the court.¹²⁶ Given, however, unlimited freedom of joinder, with power in the court to order separate trials upon a showing of prejudice, it is believed by scientific experimentation through the method of trial and error, our courts will shortly be able to find the limits of effective trial in these and similar cases. The dictate of trial convenience is thoroughly rational. It works to the pecuniary advantage of the parties. It economizes the time of the courts; in its enactment and operation, not only members of the legal profession, but the public generally, should, therefore, be interested. Finally, such a mechanism would provide the elasticity needed for gradual adaptation through court decision to future problems as they arise.

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¹²⁶ See Professor McBaine's proposal for a wider joinder where trial is before the court without a jury than in jury trial cases, McBaine, *Recent Pleading Reforms in California* (1928) 16 CALIF. L. REV. 362, 382, 383.