A "PRAGMATIC DEFINITION" OF THE "CAUSE OF ACTION"?

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I

Much has been written on the subject of the code cause of action in the law reviews.¹ A recent publication by Professor Thurman W. Arnold in the April issue of the *American Bar Association Journal*² brings the subject into the limelight again and it is believed that a re-examination of the problem involved is not out of place. This is particularly true because Mr. Arnold deals with two specific cases, so that something can be gained by examining those cases in the light of the various contentions upon the subject. In addition, Mr. Arnold's article exemplifies the philosophical inadequacies of his school of thought, particularly as it applies to any attempted rationalization of procedural law.

II

Mr. Arnold's article deals specifically with the case of *United States v. Memphis Oil Company*.³ He asserts that this decision arrays the United States Supreme Court on the side of those wishing a "pragmatic definition" of the phrase.

Mr. Arnold does not assert that the Court expressly, or inferentially, took that stand; his assertion is that "The *effect* of the opinion throws the support of our greatest court behind the simple and common sense definition advocated by Dean Clark in the Yale Law Journal in 1925, and later incorporated in his book on code pleading."⁴ But it is submitted that this is simply an overzealous conclusion. The Court was not called upon to define the "cause of action", and certainly not the "*Code* cause of action", and with its customary and commendable judicial discretion expressly avoided the point. The *effect* of the decision on that score would seem properly to be then a complete blank.

The case presented was this: the plaintiff had filed a timely claim with the Commissioner of Internal Revenue for the refund of an excessive payment of income taxes for two designated years. Government agents found that a refund was due, and so reported. However, after the statute

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¹ Adequate reference to the articles on the subject is made in the article cited *infra* note 2.

² Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215.

³ 288 U. S. 62, 53 Sup. Ct. 278 (1933).

⁴ Arnold, *supra* note 2, at 215. The italics here and elsewhere are inserted.

of limitations had run, the Commissioner's office gave notice that the claim would be rejected solely on the ground that the statement of the claim was defective, being too general and indefinite to comply with the rules on the subject. Before an order of rejection was made the plaintiff filed an amended statement which remedied the original defective statement. The Government then urged that the statute of limitations had run, and the Commissioner found against the plaintiff on that basis. The Supreme Court affirmed a judgment of the Court of Claims for the plaintiff.

The Court said, "Both the Government and the taxpayer invoke *analogies* by pleadings in a lawsuit."⁵ The Court then went on to point out the confusion in the cases involving the problem in legal actions, and it made this reference to Dean Clark's work: "The uncertainties of the phrase have been well developed by Dean Clark with full citation of the decisions in his treatise on Code Pleading, pp. 75-87, 501-508."⁶ The Court then cites both Clark and Pomeroy at the end of the following statement: "At times and in certain contexts it is identified with the infringement of a right or the violation of a duty."⁷ Clark is also cited at the end of the following statements: "At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed."⁸

From that, one could as well argue that the Court accepted Pomeroy's definition as that it accepted Clark's. The Court is talking about the confusion concerning, and the application and the aspects of, the concept, and obviously does not attempt to discuss any definition of it. In fact, it immediately says that it "has not committed itself to the view that the phrase is susceptible of *any single definition* that will be independent of the context or of the relation governed."⁹ None the less, it has *fixed the limits of amendment* with increasing liberality."¹⁰ It cites with approval the following statement from an earlier case¹¹: ". . . when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, *the reasons for the statute of limitations* do not exist, . . ."¹²

⁵ 288 U. S. at 67, 53 Sup. Ct. at 280.

⁶ Note 3 of the Court's opinion.

⁷ 288 U. S. at 68, 53 Sup. Ct. at 280.

⁸ *Ibid.*

⁹ Which is as it should be. The Court decides cases and does not write textbooks or law review articles. Later in the opinion the Court takes the same position saying that "Choice between these meanings must avoid a doctrinaire adherence to abstract definitions. . . . Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to differences of end and aim." 288 U. S. at 69, 53 Sup. Ct. at 281.

¹⁰ 288 U. S. at 68, 53 Sup. Ct. at 280.

¹¹ N. Y. Cent. etc. Ry. v. Kinney, 260 U. S. 340, 346, 43 Sup. Ct. 122, 123 (1922).

¹² 288 U. S. at 69, 53 Sup. Ct. at 281.

The Court then states the problem and says this: "Viewing the problem thus, we must say whether a *statement* by the taxpayer of supporting facts and reasons is to be assimilated to a bill of particulars explanatory of a claim, or is something so essential that there can be no claim without it." ¹³ And finally the Court *decides* this: "The line of division must be kept a sharp one between the function of a *statute requiring the presentation of a claim* within a given period of time, and the *function of a regulation making provision as to form*. The function of the *statute*, like that of limitations generally, is to give protection against stale demands. The function of the *regulation* is to facilitate research. The Commissioner has the remedy in his own hands if the claim *as presented is so indefinite* as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a *departure from the rule*. If, however, he holds it without action until *the form has been corrected*, and still more clearly *if he hears it, and hears it on the merits*, what is before him is not a double claim, but a claim single and indivisible, *the new indissolubly welded into the structure of the old*." ¹⁴ (Certainly this means the *new statement* is welded into the *old statement*. There can be no *new* or *old* cause of action, under any definition of it.) In other words, if *the statement* of the claim is defective and there is no timely objection the amendment is *nunc pro tunc*. That is what the Court actually decided and all it decided. It talks not about the cause of action but about the *statute* of limitations and the *regulation* of the Commission as to the *statement* of the claim and its *form*.

The *decision* in the case actually bears out the proposition previously presented by the present writer that there is no call for a re-definition of the "cause of action" to explain or decide cases under the amendment and limitations statutes.¹⁵ There is not a word in the *decision* defining the "cause of action". Under any suggested definition there probably was only one "cause of action" owned by the plaintiff or attempted to be asserted by him. The simple problem was as to whether or not a formally *defective attempted statement* concerning that "cause of action" could be effectively amended after the statute of limitations had run. The Court held that it might, for the reason that the purpose of the limitation statute was not violated thereby. In other words, the Court accepts an obvious proposition; that the rules as to the amendment of pleading, and their *nunc pro tunc* effect, are modifications of the rules on limitations, where no material harm is done to the defendant, and especially where the plaintiff has committed an honest, but formal mistake, and has actually been misled by the defend-

¹³ *Ibid.* In the more recent case of Bemis Bros. Bag Co. v. United States, 289 U. S. 28, 53 Sup. Ct. 454 (1933) the Court expressly states at the beginning of the opinion that the problem is one of the amendment and limitations statutes.

¹⁴ 288 U. S. at 71, 53 Sup. Ct. at 281.

¹⁵ Gavitt, *The Code Cause of Action: Joinder and Counterclaims* (1930) 30 COL. L. REV. 802, 817.

ant's conduct. There is no reason why the rules on amendments and limitations ought not to be construed together, and every reason why they should. The authorities so holding are numerous.

In any event the result reached in the principal case is in accord with the great weight of modern decisions in similar situations in legal actions. For although earlier cases sometimes held that a defective statement could not be cured retroactively after the statute of limitations had run (even where there was no change in the right sought to be presented) it is conceded today in most cases that the opposite result is the more proper one.¹⁶ Courts have thus refused to construe the amendment statutes as meaningless. There is no object in amending a pleading except as to a material allegation, and it is fair inference that to that extent the amendment statutes and the limitations statutes are to be read together.

The principal case could have been based as well upon another obvious ground. Modern rules of civil procedure, whether under the Code or at common law, reach the result that a defective pleading is cured by the failure of the adversary properly to attack it. After trial a case is to be decided on the evidence, and the pleadings become largely immaterial. So in the instant case, it would have been quite proper, and in accord with accepted rules, for the Supreme Court to have held that those results were peculiarly appropriate in an administrative proceeding. The amendment was thus unnecessary and immaterial.

The decision in the principal case does not necessarily conclude all possibilities. There is no reason why the amendment rules should not be held to constitute an even larger modification of the statutes of limitation. Three general situations present themselves: first, that in which a plaintiff has two distinct rights arising out of the same transaction covering the same loss, as, for example, where a bailee, under express contract to return goods converts them;¹⁷ second, that in which a plaintiff has one of two or three possible rights, each of which is mutually exclusive of the others, as, for example, where a railroad employee is injured;¹⁸ third, that in which he has two or three rights entirely unrelated to each other, as, for example, where a mortgagor negligently (or intentionally for that matter) runs over his mortgagee.¹⁹

¹⁶ For a comprehensive collection of cases see Note (1906) 3 L. R. A. (N. S.) 259. If the amendment presents a different cause of action the situation is more difficult and the results at variance. That phase of the situation is discussed later.

¹⁷ The bailor has both a contract and a tort right to damages, but actually can collect only on one.

¹⁸ He may have a right under the federal law, the common law of the state, or a state compensation act. But he has, theoretically, only *one* of those three; the proof of any one *ipso facto* disproves the others.

¹⁹ The mortgagee has rights under the mortgage transaction and a right to damages for the personal injury.

Much could be said in favor of extending the rule of the principal case to the first and second of those situations.²⁰ The third situation should ordinarily require an application of the statute of limitations.²¹ But if a court reaches that result "the cause of action" or anyone interested in its definition is not responsible for the result. None of them had anything to do with the passage of the statute of limitations nor the court's interpretation of it, nor is that a result of a too narrow construction of pleading statutes designed to give notice to the adversary.²²

Certainly as to all of those situations neither Dean Clark nor Mr. Arnold has explained how the former's "practical definition" of the "cause of action" as "such an aggregate of operative facts as will give rise to at least one right of action" to be determined pragmatically, with the controlling factor "the matter of trial convenience", helps in the proper decision of any one of them. Define the "cause of action" as you will, the thing which confronts the court is not that, but it is what to do in the case where the plaintiff has made a defective or mistaken statement concerning it and has sought to cure that statement by amendment. Drag in the "cause of action", dissect it, and rebuild it to suit one's fancy, and one is no nearer a solution of the problem at hand than he was before. Assume that the plaintiff had *one* "pragmatically defined cause of action", what happens when he pleads it poorly and amends? For the answer to that question one can only turn to the rules on amendments and limitations. Thus in the principal case the Court, following judicial tradition, talked as courts in previous cases had talked about the "cause of action", but in actually deciding the case it threw it all out as balderdash and decided the case upon the only basis on which an intelligent court could rest, namely, that a fair interpretation and application of the rules on amendments and limitations gave retroactive effect to the amendment in question. The result could as well

²⁰ As indicated by Mr. Arnold the decided cases are not in accord upon the proposition. *Supra* note 2, at 217.

²¹ There seems no good reason why in the case put the mortgagee should be allowed to start an action to foreclose his mortgage and then later amend to state a cause of action for the personal injuries after the statute of limitations has run against the latter. A particular amendment statute might prohibit it, although, especially before trial, the usual rules on amendments do not so restrict the amendments to be made.

²² It is true, of course, as Mr. Arnold points out, that "ultimate fact" pleading quite frequently fails in its purpose. *Supra* note 2, at 216, n. 5. No one is more firmly convinced of the futility of attempting to arrive at the issues in all cases by such pleading than is the writer. (I have expressed my views on that subject in the following articles: Gavit, *Legal Conclusions* (1932) 16 MINN. L. REV. 378; Gavit, *Procedural Reform in Indiana* (1932) 7 IND. L. J. 351.) But it does not follow that because a defendant receives inadequate notice from the pleadings in some cases, he is entitled to no more than inadequate notice in all cases, or to no notice at all. And in any event the harm done him must be measured in the light of the statutes of limitations. The latter constitute an expression of a legislative policy which may not be ignored. See the subsequent case of *Daube v. United States*, 289 U. S. 367, 372, 53 Sup. Ct. 597, 599 (1933), where the Supreme Court *applies* the statute of limitations, because "High public interests make it necessary that there be stability and certainty in the revenues of government."

follow if it be assumed that the amended pleading presented a different cause of action.²³

In the light of the more modern cases it will be seen that the modification of the statute of limitations by the amendment statutes has been given an increasing scope. In view of those cases it can fairly be said that an amendment is given retroactive effect even as against the statutes of limitations in any case where a defendant was fairly notified of the factual situation out of which the plaintiff's asserted right arose, even although the original pleadings inadequately presented the plaintiff's claim. This is true even if the plaintiff ultimately recovers upon a right different from the one originally asserted, if the factual backgrounds of both rights were quite similar.

To what extent, then, did the United States Supreme Court in the instant case "*clarify* the Code cause of action", and "in effect" accept Mr. Arnold's "pragmatic definition" of it? None at all. Mr. Arnold's article remains a high poetic note in the field of advocacy, but insofar as he hopes to rest his position on authority he will have to seek elsewhere.

III

The same general results follow as to the *res judicata* cases. It takes no re-definition of the Code cause of action either to explain or reach a desirable result there.²⁴

Res judicata is both the formal rationalization of a policy against the re-litigation of the same matter, and the statement of a necessary incident of the doctrine of the separation of powers which allocates to the courts the exclusive power *finally* to determine legal interests. The first is a concept of the substantive law; the judgment is *the* right between the parties. As a matter of private law, therefore, the parties are bound by the judgment. The second is a concept of the law of jurisdiction; the judgment binds not only the parties but also the legislature and the executive. These latter are without power to alter it.

The difficulties here arise out of a determination and application of the rules as to the first situation. Dean Clark and Mr. Arnold apparently believe that the rule simply is that a judgment upon a cause of action is binding in all subsequent actions²⁵ upon the same cause of action. In order

²³ As Mr. Arnold points out, the Supreme Court has permitted an amendment changing the basis of recovery from state to federal liability under the Federal Employer's Liability Act. *Supra* note 2, at 215, n. 2.

²⁴ From the beginning of this controversy this has been the position of the present writer. See the article cited *supra* note 15.

²⁵ No small measure of the confusion in the entire subject arises out of the unwarranted assumption that "cause of action" and "action" must be the same. But an "action" is a judicial proceeding—a concept of the law of procedure and administration; while the "cause of action" is a substantive right—a concept of the law of substance. The latter is that with which the former partially deals.

to reach some desirable results and to explain recent cases they find it necessary to re-define the "cause of action" as a conglomerate procedural-substantive-functional concept.²⁶

But the rule as to *res judicata* cannot (and has not) been stated that narrowly. The rule is that a judgment is binding not only in subsequent actions upon the same cause of action, but also upon others which *might have been* adjudicated. Under any one's definition of the "cause of action" sometimes more than one "cause of action" is adjudicated, even though it was not presented.

The rule apparently was stated originally in its present form to take care of the cases where a plaintiff had "split" a cause of action. He had recovered upon less than the whole. Obvious policy precluded his later recovery on the balance.²⁷ But in modern cases the courts have applied the rule literally to new situations and have reached the result that two or more causes of action were adjudicated if they *might* have been adjudicated.

Thus it is now settled that if a plaintiff might have amended (as a matter of right) after an adverse ruling on a demurrer he is barred if he does not.²⁸ There was no cause of action adjudicated by the ruling on demurrer; the ruling was to the effect that the plaintiff had not stated facts sufficient to constitute a cause of action. It was on a formal matter and not on the merits. No re-definition of the cause of action can help or properly alter that result. The question is (assuming the facts and the law to be anything one wishes) what should be the result if the plaintiff makes a mis-statement concerning them and refuses to take advantage of his right to amend after the defect has been pointed out? The problem involves questions of policy of much importance. There is something more involved than trial convenience, as a procedural proposition. Should his conduct preclude him from resort to the courts? Should it be held to constitute a destruction of his legal rights? Those problems are not procedural, and stating them in terms of procedure does not help, but hinders an intelligent and fair determination of them on the merits.

In increasing numbers courts have concluded that policy here requires a party to present all matters as expeditiously as modern procedure will permit, or be barred as to omitted matter. Thus if a plaintiff might have joined actions on separate causes of action²⁹ (even though one was legal

²⁶ Which they describe as a "practical" concept!

²⁷ Although if there had been an excusable mistake inducing the omission in the first instance a second action was not always barred. See, *e. g.*, *Stern v. Riches*, 111 Wis. 591, 87 N. W. 555 (1901).

²⁸ See *Dodson v. Southern Ry. Co.*, 137 Ga. 583, 73 S. E. 834 (1912); *Royal Ins. Co. v. Stewart*, 190 Ind. 444, 129 N. E. 853 (1921); *Woodward v. Outland*, 37 F. (2d) 87 (C. C. A. 8th, 1929); Note (1921) 13 A. L. R. 1104.

²⁹ *King v. Chicago, M. & St. P. Ry.*, 80 Minn. 83, 82 N. W. 1113 (1900). Cf. *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78 (1915). The question of joinder can always be avoided by holding that there is one and not two causes of action.

and the other equitable);³⁰ or if a defendant might have set up a counter-claim,³¹ each is barred if he fails to take advantage of his opportunity.

The most striking evidence of the increasing acceptance of the general policy involved is that the doctrine recently has been extended by the United States Supreme Court to include most jurisdictional matters.³² The jurisdiction of courts is finally a judicial question. A court of *general* jurisdiction is normally held to be invested with the super-imposed power to decide its *own* jurisdiction. Certainly if the matter is presented and passed upon the result is *res judicata*.³³ If a cause has been litigated on the merits and no question raised as to jurisdiction the question ought to be and usually is foreclosed.³⁴ Until recently a default judgment did not adjudicate jurisdictional matters.³⁵ But the last decision by the United States Supreme Court seems to reach an opposite result, and to extend the doctrine of *res judicata* to a *default* case where the defendant originally had actual³⁶ notice of the proceedings.³⁷

It seems very apparent that no good end is to be served by attempting to solve the problems in this field by a resort to procedural explanations. Any preconceptions as to the cause of action stated in terms of procedural convenience are beside the point. Assuming them to be valid, the question still is: what should be done if some portion of that cause of action has been omitted? The preconception logically applied may or may not reach a desirable result,³⁸ and it would seem that the matter should be decided on the merits with particular attention to the policy involved, rather than upon a basis which obscures the real issue. The same policy obviously cannot solve all the problems of procedure and *res judicata*, and much is to be gained by separating them.

I fail to find in Mr. Arnold's article any suggestion as to just how an application of his "pragmatic definition" to the recent *res judicata* case of

³⁰ *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901); *Royal Ins. Co. v. Stewart*, *supra* note 28.

³¹ *Holman v. Tjosevig*, 136 Wash. 261, 239 Pac. 545 (1925); *Fairview-Chase Corp. v. Scharf*, 225 App. Div. 232, 232 N. Y. Supp. 530 (1929); *Gust v. Edwards Co.*, 129 Ore. 409, 274 Pac. 919 (1929). See (1926) 39 HARV. L. REV. 658; (1929) 42 HARV. L. REV. 964.

³² *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 Sup. Ct. 98 (1932).

³³ *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 51 Sup. Ct. 517 (1931).

³⁴ *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430 (1895).

³⁵ See, e. g., *Atchison, T. & S. F. Ry. v. Wells*, 265 U. S. 101, 44 Sup. Ct. 469 (1924).

³⁶ There seems no reason why the rule should be stated any more broadly. In the *American Surety Co.* case, *supra* note 32, the fact of actual notice was present.

³⁷ *American Surety Co. v. Baldwin*, *supra* note 32. A party was held bound by a judgment taken in his absence, where he was deprived of the privilege of a hearing, because he might have appealed from the judgment, and thus presented the jurisdictional questions which he sought to present by collateral proceedings. At its face value the case abolishes most of the law of collateral attack on so-called void judgments.

³⁸ It is doubtful whether or not the joinder of a great many actions, and the presentation of permissible counter-claims, under the code, advance "trial convenience". As a matter of fact, they are often separated for trial purposes, particularly where one is legal and the other equitable. On the other hand many actions which might not be joined, or set up as a proper counter-claim, might be conveniently tried together. To say the least, an application of the "practical definition" would not fit the cases in this field, and it might work havoc so far as desirable results were concerned.

*Reed v. Allen*³⁹ would reach the result he desires. The facts in the case cited are as follows: an action had been brought in the federal court in the District of Columbia for an accounting for rents, wherein the result depended upon the construction of a will. A decree was rendered which afterwards was reversed on appeal with an order to vacate the decree and render a different one. In the meantime the successful party in the original action had secured a judgment in ejectment against the other party on the theory that the equitable decree was *res judicata* as to the title created by the will. The party who had secured a reversal of the equitable decree now brought an action in ejectment without making any effort to set aside the first judgment in ejectment. The Supreme Court held that the first judgment in ejectment was *res judicata* in the second. Mr. Arnold criticizes this result and apparently assumes that if the court had accepted his "pragmatic definition" of the "cause of action" a different result would necessarily have been reached. But certainly the "cause of action" was not involved. The problem before the Court was whether or not it would regard a reversal of a decree upon which a legal judgment was based as being also a vacation of the second judgment.

If there were only one suit involved and not two, as he apparently contends, there still would be no reason why the judgment in ejectment (until it was set aside in some manner) was not a valid judgment. In the first appeal that judgment was not ordered reversed; only the decree as to the accounting was reversed. It is something entirely new in procedure if the judgment in the ejectment action, or the ejectment part of the "pragmatic" action for that matter, was *ipso facto* vacated thereby. The case presented a situation where an attorney obviously had made a mistake, and the majority of the Court saw no particular policy in working out a belated remedy for him.⁴⁰ It is noteworthy that in the case of the *American Surety Co. v. Baldwin*⁴¹ no member of the Court thought there was any policy in attempting to rectify a procedural mistake which was much more excusable than was the one in the *Reed* case.

I do find in the opinion of that latter case an answer to Mr. Arnold's surprising assertion that as a result one party became entitled to the possession and another to the rents and profits. The facts disclose that the original action was for an accounting as to *past* rents in the hands of a third party.

On final analysis, of course, the majority opinion takes a defensible position. Had the losing party taken any steps to help himself he might have found the court willing to go out of its way to assist him. Certainly it is clear that the Court was unwilling to obscure the point in issue, and that

³⁹ 286 U. S. 191, 52 Sup. Ct. 532 (1932).

⁴⁰ The opinion expressly states the problem thus, and answers it in that manner.

⁴¹ *Supra* note 32.

an acceptance of a "pragmatic definition" of something which was not in issue would not have helped the actual decision. Had the Court felt called upon to reach an opposite result it could have "explained" it in terms of a "pragmatic cause of action" had it wished, but that would not add anything to the merits of the decision.⁴² The question in the case was not what constitutes one or more actions or causes of action, but it was what should be done with a valid judgment upon which one party relied. The proposition that a reversal of a judgment in one action is *ipso facto* a reversal of a judgment in another action was one which the Court was unwilling to accept.⁴³ Had it accepted it and thus written an exception into the rules on the subject of *res judicata*, the result could be explained better on that truthful basis, than it could on the fictitious basis suggested by Mr. Arnold, that is, that the two actions were "practically one", and therefore the judgment in the ejectment action was vacated or nullified by the reversal of the decree in the equitable suit.

At least the majority opinion in the *Reed* case is a straightforward statement of the real reasons for the Court's decision. There may well be a difference of opinion as to the merits of the decision. Perhaps the Court should have rectified the mistake at any cost, even that of dragging in the "code cause of action", or the unwritten constitution of Great Britain. But there is this much to be said for the opinion, it did not obscure the real issue. It states and applies the accepted rule as to *res judicata* and refuses to make an exception in favor of a party who puts on the court the entire burden of rectifying a mistake.

IV

Mr. Arnold makes other surprising assertions. Most notable of them is the one in which he deprecates the criticisms offered of Dean Clark's position because their authors sought the impossible—a "universal definition" to cover "so many completely dissimilar situations"! But the cold fact is that he and Dean Clark are the only ones who have attempted a "universal definition" of the "Code cause of action". Do they not offer this "pragmatic definition" as the only solution of the various provisions in the Code of Procedure involving the phrase the "cause of action", and also as an equally reliable solution of the amendment and *res judicata* cases? Is it not a patent cure for "many completely dissimilar situations"?

On the other hand no opponent of that definition has ventured that far. Certainly as far as the present author is concerned, as has been pointed out above, he has from the start insisted that the amendment and

⁴² It is what a court decides and not how it "explains" its decision which really counts. The views of the present author on the point are set forth in *Legal Conclusions*, *supra* note 22.

⁴³ There is apparently here again a confusion between the word "action" and the phrase "cause of action". The action is the judicial proceeding whereas the cause of action is the preconceived substantive right which the plaintiff is asserting against the defendant.

res judicata cases finally ought not to be decided under any procedural concept as to the "code cause of action".⁴⁴

If there is any lack of virtue in attempting "universal definitions" Mr. Arnold has trumped his partner's ace.

There is yet another misplay. He has led up to an obvious finesse. He asserts that Dean Clark's definition met with a chorus of dissent, but that although the dissenters agreed that Dean Clark was wrong they could not agree which of them was right. "Such dissent served to clear the air." In favor of the "practical definition" of course.⁴⁵ The argument seems to be that because everyone disagreed with him, *ergo* he was right.⁴⁶ Which seems to prove too much, for if the syllogism be correct, the converse may also be true. In other words, if any one agrees then it is proved that he was wrong. Thus it is that both Dean Clark and Mr. Arnold are completely out of the picture because they agree with each other!

V

The substance of the controversy, however, can well center upon his use of the phrase "pragmatic" ⁴⁷ or "practical definition". There is here an obvious confusion and contradiction which is indicative of the lack of substance of his position. A "definition" is "a description of a thing by its properties, or a *conception by its attributes*; a brief explanation of the meaning of a word or term; such an account as *intelligibly relates* the idea defined to analogous or related ideas." In other words, it is the restatement of a concept in other terms.

In law we deal not with things but with concepts. There is nothing "practical" about a concept. It can only be dealt with as a mental abstraction. Its validity may be *tested* by its practical workings, but the concept cannot be defined in any terms except terms of abstractions. Thus the only "helpful" or "practical" definition which is in any sense a definition is an accurate or an adequate one; one which re-pictures the concept in other words. A definition is no definition which seeks to change the concept.

It seems reasonably clear that Mr. Arnold's "practical definition" is not a definition at all. The purpose is not to elucidate an existing concept, but to repudiate one and present a new. The simple reason is that his

⁴⁴ As pointed out above the Supreme Court in the Memphis Oil Co. case, *supra* note 3, actually took this position. It decided the case without any *decision* on the "cause of action", and expressly said that it was not committed to the view that a general definition of it would help any in the decision of dissimilar situations. When one gets to an interpretation of the phrase as it is actually employed several times in the Code, the presumption at least is that it means the same thing each time it is used. It is still insisted, however, that it is not desirable to insist that the Code phrase is the only thing which is involved in the amendment and *res judicata* cases.

⁴⁵ For certainly, it did not clear the air in favor of any of the dissenters.

⁴⁶ But, *ergo*, by the same sign each of the dissenters was also right.

⁴⁷ "Pragmatic" has lost its old meaning (that of "dogmatic") and is obviously used here in its modern sense, as synonymous with "practical".

definition is neither accurate nor adequate for under it practically all of the decided cases are wrong; nor will it fit into the Code of Procedure as it is.

The contention finally is that his concept is better than the old; that his *should be* the concept on the subject; and that finally the concept is no concept at all because it can only be defined in terms of its results. The purpose after all is to reform the Code, in terms of a "functional" philosophy.

The situation illustrates the immense difficulties encountered by one committed to the philosophical view that the law can be made scientific in the same sense that the physical sciences are scientific. Because the latter can determine the truth of a postulate by experience it is commonly assumed that legal science can do the same. The rational or conceptualistic phase of legal science is thus repudiated, in favor of a so-called "functional" philosophy. Law cannot properly be stated in terms of pre-conceptions but only in terms of its results.

But the supposed analogies of the physical sciences fail. To begin with it is not true that they have no formal side. The physical scientists are continually dealing with postulates which are as yet "unproved". Over a period of time, of course, presumably they may be proved or disproved, depending upon whether or not they are finally found (that is, thought) to be isomorphic with nature. But those sciences purport to *explain* nature and not to *regulate* it.

Legal science on the other hand purports to regulate man and not explain him. That a given postulate works or does not work of itself proves nothing. The fair inference may be that man is inordinately disobedient; or that the administrative machinery has failed. It may be a fair inference that the postulate or rule is undesirable. Even so it is still a rule. In other words, proving that a legal rule does not always work out satisfactorily of itself proves nothing and it certainly does not disprove the rule.

There seems, too, at the basis of a "functional" or "behavioristic" philosophy the mistaken notion that science is an objective thing. The truth is, however, that our science of chemistry, for example, is the body of formal knowledge in that specific field. It is perfectly obvious that the human mind is the same instrument whether it is operated by a chemist or a lawyer, and that insofar as either attempts to talk about his "science" the two are on a parity. It is true that the so-called advancements of science are the result of a so-called scientific *attitude*, which means, however, that the formal rationalizations in a given field have been accepted solely as working hypotheses, subject to proof or disproof.

The view then that all pre-conceptions are inherently vicious, and that in any event they are to be exclusively tested by "practical results" is as narrow as was the old view which gave to legal concepts a natural and divine content.

One can be pragmatic in his philosophy and still accept legal concepts as working hypotheses whose validity is to be determined by an inquiry both into their formal foundations and their practical workings. The value of the formal foundations lies in the fact that therein is contained the experience and thought of the past; the value of the pragmatic test lies in the fact that the best thought and the experience of the past may in truth be insufficient for the situation at hand.

VI

The additional value of the formal aspect of legal science is that "law" can be made the subject of rational discourse. Ideas may be exchanged; new concepts may be suggested; and the chaos which would result from the absence of a common language is avoided. Speaking in terms of "practical definitions" becomes unnecessary. Concepts can be defined as concepts and not results.

It is, of course, literally true that whenever an exponent of a "functional" philosophy seeks converts he must talk in a language which will be at least partially understood. He must give the lie to his faith and talk about concepts. The best he can do is in turn immediately to give the lie to the concepts and define them in terms of results. He indulges in "practical definitions" which turn out to be no definitions at all, but suggested new concepts stated in terms of their results. No one has yet explained the substantive value of that technic, and it is quite the equivalent of a Frenchman refusing to talk to a Chinaman except in French. But in any event when one talks or writes he necessarily deals with concepts and ideas and it would clarify matters somewhat if that fact were appreciated, together with the fact that little is to be gained by refusing the services of a common language. The present language is quite adequate to express almost any concepts one may have and it adds nothing to their validity to clothe them in a strange tongue; nor do they cease to be concepts and become facts or something else by that technic.

But the propounders of "practical definitions" rebel also against the previous attempts at legal classifications; which again were simply a formal attempt to describe concepts which were similar by a single word or phrase. But that seems also to be vicious, until it has been properly re-done by members of that faith. Some improvement undoubtedly is possible, but that the only improvement possible is a contradictory repudiation of the process and a complete re-classification to suit the fancy of those engaged in the pastime seems not so obvious.

On the point in issue it has seemed necessary to repudiate the distinction between substantive law and procedural law. That is, of course, logical from that point of view because the distinction is a formal one. But the question still remains, why repudiate?

The distinction involves a legal classification based upon observable differences, which is all that is necessary to give validity to any classification. One can refuse to accept it for good reason or bad, but the simple fact that it is no more than a mental and linguistic convenience is the poorest of reasons. What is to be gained by refusing to accept a classification which puts the rules dealing with the preconceived rights of persons in one category and the rules dealing with the regulation of court procedure in another category? Both influence the final result, but does that prove anything beyond *that* fact?

In any event the classification is one in common use and there seems to be sufficient basis for it to justify its continued use. The truth is that classification is a valuable function serving an obviously useful purpose. Energy should be directed toward its improvement rather than its destruction. No one, for example, can well doubt but that Hohfeld's work in separating the concept of "right" into distinctive parts was a valuable contribution. It is not so obvious that anything is gained by lumping substance and procedure into one conglomerate concept.⁴⁸

The truth seems to be that if a problem be accurately and intelligibly stated in understandable terms it is half solved. The convenience of accurate and specific classification is apparent as an aid in that effort. Such a statement is not always easy, but it is rendered more difficult, if not impossible, by a general repudiation of all classification and the adoption of a new language.

One of the easiest tasks in the world is to manufacture new words, or to change the meaning of old ones. Almost any one can play tricks with language. Almost any lawyer could explain all of the law of contracts in terms of the law of torts and *vice versa*. An ingenious one could explain all of the law of procedure in the language of future interests in property.

But it is the concept which counts and not its clothing. The courts, it is true, are free to *explain* a decision in any language which seems most persuasive to them. They may resort to fictions,⁴⁹ or procedural devices.⁵⁰ The validity of evasive explanations is doubtful in most cases, but seems

⁴⁸ Nothing is more practical than a common language. Much is to be gained by talking to a court at least in understandable terms. Much credit for the recent acceptance by the United States Supreme Court of a state declaratory judgments statute is due to Professor Edwin M. Borchard, whose articles and briefs on the subject undoubtedly influenced the final result. See *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933). The real value of the articles lies in the fact that they disclosed the irrational foundation of the opposite view, and suggested a rational formal basis upon which the desired result could be placed. Had the author talked in a strange tongue his efforts would certainly have been wasted.

⁴⁹ See Fuller, *Legal Fictions* (1930) 25 ILL. L. REV. 363, 513, 877.

⁵⁰ See Arnold, *The Role of Substantive Law and Procedure in the Legal Process* (1932) 45 HARV. L. REV. 617. The learned author, however, makes the unwarranted assumption that because a decision can be *explained* in terms of procedure, that *therefore* procedural convenience is the most pertinent, if not the only, consideration in *deciding* the case. The conclusion, of course, does not follow. The making of a judgment and the written rationalization of it are two different things.

established in others. If, for example, a court wishes to reach the result that one spouse may not recover against the other for personal injuries, it has the choice of writing an exception into the law of torts or of explaining the case by denying the procedural capacity to sue. A right without a remedy, despite much quibbling to the contrary, is thus always a possible, often a permissible, and sometimes a desirable concept. When all is said and done nothing is more practical in a lawyer than a good healthy imagination. Attempts to treat concepts as facts or as being useless must fail; the rational and the administrative sides of the law can be developed together without serious difficulty, and it is not going to help any to state one in terms of the other, or to ignore it as non-existent.

So long as a functional philosophy is inarticulate it can observe the legal processes and while thus observing deal exclusively with the facts thus observed. But once it opens its mouth for any purpose, even that of reporting its "facts", it necessarily becomes as conceptualistic as the worst metaphysician. Thinking concerning "facts" involves the same faculties as does thinking concerning ideas.⁵¹ Mental images are all concepts, and the sole distinction is between those which have their counterpart in physical experience, and those which are pure abstractions. A legal rule may be stated in terms of either,⁵² but it is still a concept. One who wishes to escape concepts must remain unborn. It is submitted, therefore, that attempts to escape from the rational side of legal science are futile and that obvious policy dictates that those really interested in the improvement of the law devote some of their energy to that phase of it rather than to an irrational and contradictory attempt to ignore it. It simply is not true that the administrative side of legal science is the whole thing.

VII

We have in this "practical definition" an attempt to avoid previous concepts (which for some reason are inherently bad) by the contradictory presentation of a "practical" concept; an attempt to avoid pre-conceptions by the statement of an *ex post facto* concept. But the very statement of it constitutes a preconception—a rule, if you please—and its ultimate validity turns both on its rational and administrative value and not exclusively on the latter. It does not cease to be rational because it is stated in new terms.

The least helpful of definitions is one in terms of results. It really is no definition. If, of course, that is the only possibility the reason is that there was no concept to start with; for had there been it could be described

⁵¹ One of the principal exponents of a functional philosophy, Mr. Jerome Frank, is himself authority for this proposition. For has he not devoted a large part of his valuable book to proving that the "facts" are as elusive as the "law"? FRANK, *LAW AND THE MODERN MIND* (1930) *passim*.

⁵² Rules as to ownership of property are thus partially stated in terms of possession and other physical attributes, but may also be stated in terms of abstractions, as in the law of future interests.

in intelligible language. If there were a concept to start with it could be defined in terms other than its results.

Thus, when we get to the possible definitions of the "Code cause of action" how accurate and adequate is this "practical definition"? It is proper to point out at this time that a proper definition of the "Code cause of action" is also a proper definition of the common law or equity "cause of action". The phrase was one in common use at the time of its adoption in the Code; one runs across it in the common law reports where it is used in the same setting as in the Code. In truth today common law states find it necessary to define it.⁵³ The Federal Equity Rules use the phrase.⁵⁴ There is thus a common concept running through the entire body of the law.

But in the light of what has been said above it is patent that Dean Clark's definition is not an accurate one, nor does it finally purport to be. He says that "The cause of action must, therefore, be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically. . . . Such extent may be settled by past precedents, but the controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules."⁵⁵

It is to be noted first that he slips into the vernacular and talks about "a single right", meaning obviously the substantive concept of "right". But immediately he repudiates the slip by denying the possibility of isolating "one such right from others". What concept then does this portion of the definition re-picture? None at all. It sets up a contradiction of concepts but that is all.

The real reason is, of course, that he wishes to escape the historical background involved here, and he can only do so by finally refusing to talk in common terms. It is perfectly obvious that it is as possible to isolate "rights" as it is to amalgamate or repudiate them. A man's imagination is of a low order if, for example, he finds any more difficulty in conceiving of two distinct rights arising out of an automobile accident where both person and property are injured, than he finds in conceiving of one right thereby arising. It may be that he *ought* to conceive of the latter rather than the former, but that is a different proposition. The situation illustrates how slender after all is the margin between pragmatism and dogmatism; how easy it is to slip from the "ought not" to the "cannot".

⁵³ See, e. g., *Clancey v. McBride*, 338 Ill. 35, 169 N. E. 729 (1930), where the Illinois court was called upon to decide whether an accident causing injury to one's person and property gave rise to one or two causes of action.

⁵⁴ Rule 26 deals with the "Joinder of Causes of Action" and provides that "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. . . . If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

⁵⁵ CLARK, *CODE PLEADING* (1928) 84.

Finally, of course, he repudiates all preconceptions on the subject for the "cause" is to be determined "pragmatically", that is, *ex post facto*, and the real test of the result is trial convenience. Ultimately, of course, there is no definition, but a suggested reformation. Certainly, again, what little there is of definition is inaccurate.

It is a fair test of a definition to substitute it for the word or phrase defined. If we substitute this "practical definition" for the phrase "cause of action" where it appears in the Code we get the following illuminating results.

A plaintiff's complaint contains "a plain and concise statement of the facts constituting such an aggregate of operative facts as will give rise to at least one right of action, *etc.*" A defendant demurs to a complaint for the reason that "such aggregates of operative facts as will give rise to at least one right of action, *etc.*, have been improperly united" or for the reason that "the complaint does not state facts sufficient to constitute such an aggregate of operative facts as will give rise to at least one right of action (if it is ever possible to separate one right from others)".

Re-defining the "cause of action" to be the facts thus produces a redundancy of no value and makes the demurrer for improper joinder meaningless. In the first of those instances the Code had already dealt with the fact feature of procedure and it is a fair inference that it used "cause of action" not in any factual sense, but in a substantive one. At least no one can well doubt but that the complaint statute and the demurrer for insufficient facts statute have been applied in thousands of cases on the basis that the test of sufficiency was by reference to the substantive law, not defined in terms of operative facts grouped for the purposes of trial convenience. And certainly not in total disregard to a formal and rational (as distinguished from a functional) science of the law.

As has been pointed out above the quarrel with the rational side of legal science is futile in any event, and it is certainly true that the statutes in question have been written, interpreted and administered on the basis of preconceived legal rights. The theory has been that a plaintiff comes into court seeking recognition of an "existing" right. Mr. Justice Cardozo has aptly put the theory thus: "None the less, as in other cases of contested right, the judgment does not create the title which it registers."⁵⁶ The pleading statutes here require the plaintiff to state the facts showing the existence of some legal right to which the plaintiff is entitled to judicial recognition as against the defendant. Whether they are sufficient for that purpose is a question not of pleading but of substantive law.

⁵⁶ *In re Melrose Ave.*, 234 N. Y. 48, 54, 136 N. E. 235, 237 (1922). The theory will most aptly rationalize the Declaratory Judgments Acts. See the articles by Professor Borchard cited in *Nashville etc. Ry. v. Wallace*, *supra* note 48.

The fact that a rule of pleading here, or elsewhere, is stated in terms of the substantive law does not alter the character of either. When framing the complaint statute the choice lay between explicit rules as to the possible situations, or a very general rule covering all situations. The latter could most properly be stated in terms of that with which it dealt, with the result that in applying the general rule reference must be made to the specific substantive law involved.

Instead of such a theory being impossible it not only is possible but has been the basis for the decisions on this point. A definition which repudiates it is thus inaccurate. Whether or not it ought to be repudiated is beside the point. But on that score it is submitted again that the classification and concepts distinguishing between substance and procedure are valid. Among other things they make it possible to decide the rules as to each on the merits, and do not require the application of one general policy to diverse situations. Obviously rules of procedure should be framed upon different considerations from rules as to substantive rights.

If we substitute this definition in the joinder statute the result is chaos. Thus "the plaintiff may unite in the same complaint two or more such 'aggregates of operative facts as will give rise to at least one right (if it is ever possible to isolate one such right from others) *etc.*' whether they were such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows: 1. Upon contract, express or implied; 2. For personal injuries; 3. For libel and slander, *etc.*"

There is no such concept as a legal as distinguished from an equitable fact; there is a distinction between legal and equitable rights. The joinder statute is based upon specific classifications of rights, for it distinguishes between a contract right and a right for injury to property, for example. In fact Dean Clark's definition instead of defining here completely destroys. There is nothing quite so useless as a joinder statute if there is never more than one right. The complaint statute amply takes care of the situation. It may be that there should be no restrictions on joinder, but that is here a new idea and not a definition of an old one.

In the counterclaim statute the result is much the same as in the complaint statute. That statute, as defined, would read that a counterclaim consists of "a statement of new matter constituting 'such an aggregate of operative facts as will give rise to at least one right, *etc.*' arising out of the same transaction or connected with the subject of the action." The defendant states facts (new matter) constituting an "aggregate of facts" giving rise to a pragmatic, trial-convenient right. Again the definition betrays itself and becomes reformation and not explanation. It may be, again, that there should be no restrictions on counterclaims, but that is here a new idea, and not the definition of an old one.

I do not deny that the code provisions on joinder and counterclaims are somewhat artificial and that in some cases their application at best may not reach a wholly desirable result. On the other hand the difficulties are easily exaggerated. A proper interpretation of those statutes could well repudiate the common requirement that there be a substantial connection, rather than a simple connection in fact between the factual situations presented, so that their application might be enlarged and simplified.⁵⁷ But in any event actions which cannot be properly joined or presented as a counterclaim can be tried together under the doctrine of consolidation of actions.⁵⁸ Existing procedure thus in fact permits most desirable results.

Much could be said in favor of a simplification of those rules. I do not quarrel with Dean Clark and Mr. Arnold in their objectives on that score. The need for reformation is rather apparent.

VIII

But on final analysis two questions present themselves. What can be said for this method of reformation? What can be said for the exalted station given to "trial convenience"?

No one should care to deny that reformation is both a scholarly and a judicial function. If a court is dealing with common law rules theoretically and actually it has the power to make the rules anything it wishes and to state the rules in any terms it wishes. On the other hand legislative rules present a new factor. Again the court has the actual power to declare and apply, directly or indirectly, the rule as it sees fit. In the usual situation substantial opinion seems to dictate that new law in that field be left to the legislature. In cases of extreme importance and unusual hardship one could well defend a court, however, which assumed the responsibility for a new rule. The instance at hand seems to fall within the first situation rather than the second.⁵⁹ Much could be said, therefore, against an acceptance of Dean Clark's proposed reformation of the Code of Procedure by revolutionary means. But even so, I should have no particular quarrel with a court which accepted it with its eyes open as to what it was really doing. I should think that no court is going to do that. We have not reached the point where we are willing to abolish all attempts to regulate even the law of procedure by a statement of "existing" rules. In choosing between order and chaos it is quite likely that we shall continue to choose the former.

On the merits much can be said against it. From a rational standpoint it leaves much to be desired, for it is based upon the "functional" philosophy criticized above. On the merits is it so obvious that "trial convenience" is

⁵⁷ The proposition is developed in detail in the article cited *supra* note 15.

⁵⁸ See 1 C. J. 1121 *et seq.*

⁵⁹ Assuming, of course, that we have not taken the rule-making power as to procedure from the legislature and given it to the courts.

the paramount consideration in determining all legal rules? Certainly there is no common acceptance of such a doctrine. Codes commonly provide that if a joinder of actions, or issues of any sort, results in trial inconvenience, the actions or issues may be tried separately. For the most part accepted doctrine insists on the decision of substantive rights on their merits without regard to the rules or machinery for their recognition and enforcement. It insists on the decision of procedural rules on the basis of the policy served by them; and it insists upon trial convenience as a problem of practice and not of either substance or pleading. The concepts accepted in those fields can be tested pragmatically and changed to meet the results of those tests,⁶⁰ but it is not apparent that there is anything "practical" in attempting to define all of those different concepts in terms of a policy of trial convenience, or actually deciding them on that basis.

It is indeed a little difficult to understand just what is meant by that in any event. Applied literally it reaches some peculiar results. Suppose, for example, that a plaintiff brings an action of deceit; may he omit allegations as to the defendant's knowledge of the falsity of his statement and his intention to deceive because such facts do not promote trial convenience, in view of the obvious difficulty of proving and deciding them? Are all complex situations to be thus simplified in order to promote trial convenience? If not, when *is* it that trial convenience is to determine substantive rights? Is a plaintiff prohibited from joining legal and equitable actions because they cannot be conveniently tried together? Is a defendant prohibited from asserting an equitable counterclaim in a legal action for the same reason? Or does Dean Clark really mean simply that there are no restrictions on the joinder of actions or counterclaims, and the writing of complaints; that the discretion of the trial judge is to be substituted for all attempts to state and enforce rules of procedure? If it is that, he has employed a most round-about method of stating it. Even so, it should be said for what it is and not as a "definition" of something else. What justification is there (if legal science is truly scientific) for a complete reversion to the common law technic of never doing directly what can be done indirectly?

It is patently true that the propounders of this "practical definition" have left much to surmise. If they really offer it as a definition it most certainly is inaccurate. If they offer it as a new concept it reaches some startling results (because substantive rights are determined by trial convenience), or it is a total lack of a definition (substituting judicial discretion for rules of procedure).

⁶⁰ The author of the definition wishes in particular to escape the historical specific classifications of substantive rights. Most objections on that score would be removed, however, by an intelligent restatement of procedural rules. The balance could be taken care of by an intelligent decision on the merits. Courts must accept responsibility for re-examination of the merits of common law concepts.

In conclusion it is suggested that the situation results from the confusion necessarily incident to a functional philosophy which in one breath repudiates legal concepts and attempts to deal with all phases of legal science in terms of facts and results, and in the next breath attempts to talk about (that is, rationalize) itself. One can reform the law, or formulate new law with an eye to the practical consequences; he can, and should, give weight to all available knowledge, including the *speculations* of law professors and the professors of other social sciences. He can, too, re-classify law on much the same basis and thus re-group legal concepts with a view to their practical teachableness (in particular). But one can only re-state or define old law in terms of preconceptions. It does not prove either proposition to deny the other. They are not contradictory. The contradiction here arises out of attempts at "practical definitions".