

THE CAUSE OF ACTION

CHARLES E. CLARK †

Dean Gavit's spirited criticisms in the December number of this REVIEW¹ of my discussions of the code cause of action² seem to require some comments from me. I make them, however, with considerable misgivings. My purpose in my consideration of this procedural concept was to debunk it, to give it a rationalization which would make it useful and prevent it from being an arbitrary limitation on wise administrative discretion in the control of litigation. Unfortunately the articles which I have thus provoked have, I fear, quite the opposite effect, if not purpose.³ The issues may be thus summarized. With the abolition of the forms of action in modern pleading, some substitute unit of judicial action was necessary, and this was found by code makers and courts in making use of the phrase, *the cause of action*, the meaning of which was rather assumed than made explicit. Following one group of commentators and what I thought the better reasoned judicial view, I have identified the cause as a group or aggregate of operative facts giving ground or occasion for judicial action, and I suggested that the extent of a single cause, where not already indicated by past precedents, should be determined pragmatically by trial convenience, having regard to the way in which lay witnesses would present testimony of past happenings in court. Such rationalization, thoroughly supported in the announced plans of the codifiers and in the case law, permits of a highly desirable flexibility

† A. B., 1911, LL. B., 1913, M. A., 1923, Yale University; Dean of the Law School, Yale University; author of CODE PLEADING (1928), REAL COVENANTS AND OTHER INTERESTS RUNNING WITH THE LAND (1929), CASES ON PLEADING AND PROCEDURE (1930, 1933); and contributor to various legal periodicals.

¹ Gavit, *A "Pragmatic Definition" of the "Cause of Action"?* (1933) 82 U. OF PA. L. REV. 129.

² CLARK, CODE PLEADING (1928) 75-87; *cf. id.* 184, 266, 295-298, 309-315, 318-324, 451, 501-508, 513-524; Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817; Note (1925) 34 YALE L. J. 879. *Cf.* 2 CLARK, CASES ON PLEADING AND PROCEDURE (1933) 436 *et seq.* The fact that I only introduced this concept of the cause of action towards the latter end of my two-volume casebook indicates somewhat the subordinate role I think it should play in procedure.

³ McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614; *cf.* McCaskill, *Teaching Pleading so as to Meet Future as well as Present Needs* (1923) 5 AM. L. S. REV. 286; Harris, *What Is a Cause of Action?* (1928) 16 CALIF. L. REV. 459; Gavit, *The Code Cause of Action: Joinder and Counterclaims* (1930) 30 COL. L. REV. 802. The view I took is favored in Toelle, *Joinder of Actions—With Special Reference to the Montana and California Practice* (1930) 18 CALIF. L. REV. 459, 474; Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 793, 794-806; Gregory, *Vicarious Responsibility and Contributory Negligence* (1932) 41 YALE L. J. 831, 840; Arnold, *The Role of Substantive Law and Procedure in the Legal Process* (1932) 45 HARV. L. REV. 617; Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215; Bennett, *Alternative Parties and the Common Law Hangover* (1933) 32 MICH. L. REV. 36, 60; (1931) 25 ILL. L. REV. 835; Note (1931) 16 CORN. L. Q. 590; (1930) 40 YALE L. J. 310; Note (1927) 36 *id.* 853. *Cf.* C. C. Wheaton, *"Subject of the Action"* (1932) 18 CORN. L. Q. 20, 38; (1931) 30 MICH. L. REV. 154.

in court administration. My critics, while differing among themselves greatly as to details, generally identify the single cause with some single legal right, which is then defined and isolated from other rights by some indefinite general descriptive adjective such as "primary" or "substantive". An attempt to read meaning into this vague concept then leads to an attempt to define rights historically and thus in turn brings us inevitably back to the forms of action which will truly, as Maitland stated, "rule us from their graves".⁴ This result, so shocking to all interested in a modern rational pleading system dealing with twentieth and not thirteenth century problems, deserves some analysis.

For the sake of clarity some amplification should be made of the issues thus summarily stated. The old writ system and the forms of action had the effect of setting an arbitrary limit to the unit of possible grounds of action which might be disposed of in a single suit. This was more an accidental result of the system than any design, and some of the distinctions, considered in any way except historically, were ridiculous. Thus *A* could not join with his claim for damages for assault and battery against *B* like claims based on, say, breach of contract or even for slander occurring during the assault, but he could join therewith claims for damages for entering his house, carrying away his personal property, beating his servant, seducing his daughter, and committing adultery with his wife, and he could also join with his contract claim a claim for the value of a chattel stolen and sold by *B*.⁵ The effect of the abolition of the forms under code pleading and in general under the modified pleading of all the non-code states has been to do away with this arbitrary grouping of legal claims. Some limitation upon the extent of a single action was still felt necessary and the plan adopted by the code makers was to visualize a unit of judicial action which was not expressly defined but which was denominated the cause of action. Their model, however, was the extensive fact cause of equity pleading. The courts made use of this same unit in announcing other rules not expressly stated in the codes. The formula is therefore employed explicitly in defining principles governing joinder of causes of action and of counterclaim, splitting of causes of action, stating the cause, amendment, and *res judicata*, and is also used quite generally and loosely in discussions of various procedural topics.⁶ Text writers have attempted to do what at least the early codes and the courts in general did not, namely, to define what the cause is. There are refinements of definition as to details, but the fundamental difference is as to whether the extent

⁴ MAITLAND, *EQUITY AND THE FORMS OF ACTION* (1929) 296; *cf.* Note (1925) 34 *YALE L. J.* 879, 884.

⁵ *Ditcham v. Bond*, 2 *Mau. & Sel.* 436 (Eng. 1814); *Bracegirdle v. Orford*, 2 *Mau. & Sel.* 77 (Eng. 1813). In general, see Sunderland, *Joinder of Actions* (1920) 18 *MICH. L. REV.* 571; CLARK, *CODE PLEADING* (1928) 294.

⁶ See references to these various rules in CLARK, *CODE PLEADING* (1928) at pages given *supra* note 2.

of the cause is to be measured by some grouping of facts or by some grouping of legal rights.

It is this use of the cause as a yardstick to measure the extent of the judicial unit which is really important. This is overlooked by the commentators who think of the cause as a way of distinguishing substantive law and procedure or as achieving a variety of other purposes. Where it is useful, if at all, as well as where it is dangerous, is, however, in determining the question of *extent* or *spread* of the unit, and our definitions, if worth anything, should aim to cover this point. As a helpful, though perhaps not absolutely necessary, step, it is desirable to clarify one's view of the cause as to whether it defines and connotes facts or legal rights. The view which regards the cause as subtended, so to speak, by actual happenings—or by the "transaction" if we use a code term—tends naturally to regard the *cause*, *i. e.*, the *ground* of judicial action, as that series of acts or events which do furnish the occasion for the courts to act. The result of this is to stress the way in which the lay witnesses—who have not studied the forms of action—will relate the events which have taken place and to regard the cause as such grouping of those events as these witnesses would naturally make. This affords the possibility of extremely flexible use of the concept and of considering as single units matters which under the writ system were forced into arbitrary separate legal compartments of thought and judicial action.

The view of the cause as identical with some legal right tends to overlook or subordinate the important function of the cause as a measure of quantity. In this aspect nothing is vaguer than the conception of a right as a thing isolated from all else. Perhaps something, though not much, is added by the qualifying adjective "primary" or "substantive". The first is the expression used by Pomeroy.⁷ It is extensively criticized by Dean Gavit, who prefers the second.⁸ So far as I can see, the choice between them depends only on elaborate refinements of some distinction between primary and secondary rights or between substantive and procedural rights which may be in point as jurisprudence or on some questions in the conflict of laws or in other fields⁹ but are only confusing as to the question under consideration of extent of the judicial unit. But since one must face this latter question either openly or covertly in deciding problems of joinder, splitting, and amendment, the protagonists of this view do at least assume that their

⁷ POMEROY, CODE REMEDIES (5th ed. 1929) 526-548.

⁸ Gavit, *supra* note 3; also *supra* note 1.

⁹ The difficulties of the distinction in the conflict of laws are well known. Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333 (which also contains an excellent statement of the general problem in other fields); Note (1933) 47 HARV. L. REV. 315; Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933; Note (1933) 43 YALE L. J. 323, 328; GOODRICH, CONFLICT OF LAWS (1927) 159.

terms have meaning. Because of lack of any other isolation of separate rights, they turn instinctively to history, for the forms of action did force rights into separate categories. This result, apparently a by-product of their approach, then is found to require justification and the fundamental nature of the old chance historical distinctions is asserted with a vigor which might seem astounding if we did not recall that we are all lawyers who delight in bringing to life antiquities long after their usefulness has ended.¹⁰

In my writings on the subject I have supported the former view of the cause. This conception seemed to me to be the one obviously intended by the draftsmen of the original New York Code of 1848, who avowedly sought to abolish the forms and to adopt the principles of equity pleading,¹¹ the one which permits of a more adequate and satisfying rationalization of existing case law and the one which makes more possible the development of a simple and rational pleading system. I made no new discoveries and have been surprised to find myself treated as an innovator. I merely supported what seemed to me the preferable of two generally opposing views. If I added anything to the discussions of previous commentators supporting this same view, it was only that I tried to make somewhat clearer the nature of the problem as turning on the *extent* of the cause and that I tried to put into words a little more than earlier writers some ways of determining that extent. I admitted that in many cases—in fact all except the narrow group where the law is doubtful—past precedents will have settled the size of the cause so explicitly that it is not worth while attempting a change. Where not thus determined, the test may well be a pragmatic one, having in mind trial convenience and the manner in which the lay witnesses will present the matter to the court. There is nothing particularly original or new about this but it does fit in with the plans of the codifiers and the decisions and makes the concept usable and one which does not get in the way. In this connection I find one point of agreement, at least in objective, with Dean Gavit. He asserts that he would remove the cause of action as an element of a good many rules. So would I, if I could. But rather than modify his definition of cause, he would have the rules changed to conform.¹² Here I would not follow him. I have no hope that codes are going to be rewritten to comply with some definition which he thinks desirable or that legal decisions are going to repudiate previous analyses in terms of the cause of action. Is it not more likely that the desired results may be achieved by a common sense definition of cause to rationalize results than to set up a more or less arbitrary

¹⁰ Note (1925) 34 YALE L. J. 879, 884; see also CLARK, CODE PLEADING (1928) 47 *et seq.*

¹¹ First Report of Commissioners on Pleading and Practice, New York, 1848, pp. 68-87, 124, 141, 142, 145. See also my articles *supra* note 2; and Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1.

¹² Cf. Gavit, *supra* note 3, at 819: "The obvious remedy is not to change the definition of the 'cause of action', but it is to change the rule."

definition and then demand that courts reform their ways of thinking and legislators amend their statutes in order to conform? That is why I think that however laudable may be Dean Gavit's purpose, his methods of reaching his goal are doomed to disappointment.

Dean Gavit's detailed criticisms of the views stated above cover a wide range, much of which I am unable to follow or to find in point. His latest article is a direct reply to one by Professor Thurman W. Arnold,¹³ in which Professor Arnold found approval of these views in a recent opinion of the United States Supreme Court which discussed the cause of action with several citations to my book.¹⁴ In spite of Dean Gavit's determined assault on this conclusion, I still read the case as viewing the cause as I do. The question involved amendment, this time in a claim for an income tax refund before the Federal Commissioner of Internal Revenue. The court regarded the cause as a flexible grouping of facts and held that supplying facts after the period of limitation had run was not stating a new cause. The substantive right concept of cause, if applied to its logical conclusion, would require, as the Dean points out, a new rule of amendment to justify this natural and desirable result. I also read other cases, citing my book, as showing similar approval.¹⁵

In this matter of authorities, I think the Dean is hitting below the belt anyhow. I will state dogmatically that I regard my version as a more adequate and realistic analysis and rationalization of existing case law than the one he propounds. But he will only grant me a single case from California,¹⁶ and says that the purpose of Mr. Arnold and me "is not to elucidate an existing concept, but to repudiate one and present a new" and refers to my "proposed reformation of the Code of Procedure by revolutionary means". I might say truthfully that I know of no actual case which follows the Gavit definition. Since, however, I cannot distinguish that from the Pomeroy concept, I will gladly yield him the cases which cite Pomeroy. On his part he must know that I am following a tradition at least as well buttressed as the Pomeroy one.¹⁸ I do not have to face the difficulties, too, of opposing the intent of the codifiers in their express purpose of abolishing the forms of action and following the rules of equity procedure where, as is well

¹³ (1933) 19 A. B. A. J. 215.

¹⁴ *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 53 Sup. Ct. 278 (1933).

¹⁵ *Harriss v. Tams & King*, 258 N. Y. 229, 179 N. E. 476 (1932); *Stafford Sec. Co., Inc. v. Kremer*, 258 N. Y. 1, 179 N. E. 32 (1931); *Covey v. England & McCaffrey, Inc.*, 233 App. Div. 332, 253 N. Y. Supp. 340 (1931); *Whalen v. Strong*, 230 App. Div. 617, 246 N. Y. Supp. 40 (1930); *cf. Bemis Bros. Bag Co. v. United States*, 289 U. S. 28, 53 Sup. Ct. 454 (1933).

¹⁶ Gavit, *supra* note 3, at 815, citing *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82 (1887).

¹⁷ *Supra* note 1, at 139, 147.

¹⁸ I am in the tradition among others of PHILLIPS, *CODE PLEADING* (1896) § 30; SIBLEY, *RIGHT TO, AND CAUSE FOR ACTION* (1902) 39, 40; Cook, *The Power of Congress under the Full Faith and Credit Clause* (1919) 28 *YALE L. J.* 421; and Judge Bliss' definition is not far away, BLISS, *CODE PLEADING* (3d ed. 1894) § 113.

known, all the facts in issue between the parties were to be set up as the equitable cause. Nor do I have to support such an abominably foolish rule, repudiated in many a wise decision, as that injury to person and property due to a single act of negligence may be separately litigated,¹⁹ or that equitable and legal claims based on the same facts are separate causes.²⁰ Moreover, I do not have to fight the trend of modern procedural reform, to make the judicial unit larger and more inclusive, well illustrated by rules adopted in Illinois on December 22d last making the cause depend on the transaction.²¹ Surely he is ill-advised in his reckless claims as to the state of the case authority.²²

Dean Gavit was apparently ruffled by Professor Arnold's joyous style and therefore much of his argument was based upon the use many times over of the words "practical" or "pragmatic" in quotation marks. How effective this is as argument, I cannot judge. But I do not understand why a definition is objectionable if it has practical usefulness. Apparently he believes that a definition should not consider at all the results which it may produce. The announcement of this singular idea (so opposed to the usual legal concession that makers of statutes did intend reasonable results which could be contemplated) gives him occasion for an entirely gratuitous assault

¹⁹ *Contra*: *Fields v. Philadelphia Rapid Transit Co.*, 273 Pa. 282, 117 Atl. 59 (1922); *King v. Chicago, M. & St. P. Ry. Co.*, 80 Minn. 83, 82 N. W. 1113 (1900); and cases from Alabama, Arizona, Connecticut, Georgia, Kentucky, Massachusetts, Mississippi, North Carolina, Ohio, Tennessee, Washington, etc. See 2 CLARK, CASES ON PLEADING AND PROCEDURE (1933) 429-435. Dean Gavit, in citing *Clancey v. McBride*, 338 Ill. 35, 169 N. E. 729- (1929) with approval, refers to the difference in rules of transferability and limitation, but these affect the *rights*, not the *cause* (just as do different elements of damage) and do not require courts to hear and witnesses to relate the same story of the accident in separate suits.

²⁰ There are many cases here to the contrary. *Cf.* *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767 (1902); *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901); and CLARK, CODE PLEADING (1928) 84, 301-2, 321-2.

²¹ "Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts may be treated as a single claim or cause of action, and set up in the same count. . . ." Rule 12, Rules of Pleading, Practice and Procedure, adopted by the Illinois Supreme Court, Dec. 22, 1933, effective January 1, 1934; see (1934) 22 ILL. B. J. 144.

"All matters which could have been united in a single equity case prior to January 1, 1934, may thereafter be regarded as a single cause of action, and may be pleaded without being set forth in separate counts, and without the use of the term 'count' in such pleading. The same rule shall apply to answers, counterclaims and any further pleadings in such a case in so far as they could have been united in a single equity case prior to January 1, 1934. Where complaints, counterclaims or defenses combine matters at law and in equity, which could not have been united in one proceeding prior to January 1, 1934, the equitable matters may be pleaded without being set forth in separate counts, and without the use of the term 'count', but in such cases the equitable matters presented shall be set forth separately from those at law. . . ." Rule 11, *ibid.*

²² In addition to cases cited by me in the references *supra* note 2, see cases collected in I C. J. 936, 937. For the infinite variation in judicial comment, see cases in the Decennial Digests, Actions, Key No. 1. For discussions, see *Read v. Brown*, 22 Q. B. D. 128, 131 (1888); *Box v. Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 694 (1899); *Hamlin v. Johns*, 41 Ga. App. 91, 151 S. E. 815 (1930); *State v. District Ct.*, 44 Wyo. 437, 13 P. (2d) 568 (1932); *Jones v. Grady*, 62 N. D. 312, 243 N. W. 743 (1932); *Brice v. Glenn*, 165 S. C. 509, 164 S. E. 302 (1932).

on the "functionalists". Here I think he has gone far afield indeed. While I have never claimed to be a functionalist and do not know what he includes under the label (or is it epithet?) I do not object to it if by it he means one who tries to view the law in the light of its practical application and usefulness.²³ His final and apparently overwhelmingly devastating charge against me, that I have made a definition which is a "conglomerate procedural—substantive—functional concept", I can only regard as a compliment. I attempted to follow traditional methods—intent of the codifiers, natural meaning of the words used in the places where they are used, and analysis and interpretation of opinions and decisions. I will not repeat here my detailed discussion of these points made in my articles and book further than to say that they all seemed to me to justify the conception of the cause as a grouping of facts. The legal-right version of the cause breaks down continually when one comes to the procedural rules as to the kind of causes which may be joined, or that causes of action cannot be split into separate suits or that an amendment may not state a new cause at least after the statute of limitations has run.²⁴ There are only two ways out, neither of which is practically feasible. One is to apply this view to its logical conclusion of infinitely small units of judicial action with resulting absurdities, or in the amendment case, unfair harshness and this no court is going to do. Another is to expect courts and legislators to change their rules—a vain hope. Consequently I accept the label of functionalist if I must in order to support a more "practical" definition.

As to the other part of the charge that I have made a conglomerate of procedural and substantive ideas, I also cannot feel disturbed. Dean Gavit argues at length for a distinction between the two as absolutely essential. But I think here he shows most clearly the result of his failure to keep the function or the purpose of his definition in mind. To me it is only confusing when one is trying to work out a concept of quantity to go off into distinctions at best of quality having bearing only in other connections. When one is trying to determine the number and amount of grievances to be considered as a unit, a refinement between substantive and adjective law leads us only into other problems not in point with our immediate one. I am frank to say, too, that this particular refinement, except as a philosophical or juridical concept, can easily be over-emphasized in the law of remedies. A distinction between substance and procedure, when carried over into actual decisions,

²³ If classification of myself is necessary, I would state that I certainly believe in the uses of analysis and rationalization of cases. See my *Relations, Legal and Otherwise* (1922) 5 ILL. L. Q. 26; *Licenses in Real Property Law* (1921) 21 COL. L. REV. 757, reprinted in *REAL COVENANTS* (1929) 8, and my review of COHEN, *LAW AND THE SOCIAL ORDER* (1933), (1934) 23 YALE REV. 424. But I had supposed they had functional utility.

²⁴ I have attempted detailed analyses of all these points. See *supra* note 2. And I think Dean Gavit himself furnishes his own demonstration. See particularly his article, *supra* note 3.

may result in the most finespun and arbitrary differentiation of results.²⁵ Even if I thought—what I cannot see—that the Gavit definition helps to enforce the distinction, I should regard that as a very dubious ground upon which to seek support. Much more useful is the logical progression of ideas which first considers the operative facts, that is the actual acts or events which have happened, and from these draws conclusions as to the legal rights which the court will enforce. This makes a sound and workable distinction between “cause of action” and “right of action”.²⁶ This distinction is both more logical and more realistic than the attempt to distinguish between certain rights as substantive and certain rights as procedural which results only in thinking that certain rights may be more important than others. In the latter case, how may we determine those rights which are more important and deserve the imposing label? There is no way out of the morass and here the forms of action do not help us for the historical interdependence of right and remedy is proverbial.

So far as I can see, in ultimate essence Dean Gavit's argument comes down to the not unusual one of legal discussion, that my definition is erroneous because it is not in accord with his own. As previously indicated, his definition is an identification of the cause with the substantive right, which is essentially no different from Pomeroy's primary right and which in turn acquires specific content only if identified with rights enforced in the old forms of action. And he offers no compelling reason for such a reversion so foreign to modern procedural ideas.

All this linguistic dispute would be quite good fun, did it have no bearing upon or connection with the actual trial of cases or the reform of the administration of justice. Unfortunately it does have an importance which may

²⁵ Compare articles cited *supra* note 9; and see 1 CHAMBERLAYNE, EVIDENCE (1911) § 171, with comments thereon by Cook, *supra* note 9. In a generous review of Volume 2 of my Cases on Pleading and Procedure, in (1934) 20 A. B. A. J. 41, Dr. Magdalene Shock of the University of Hamburg questions my doubts as to the value of the distinction and suggests a growing conviction of continental jurists of its necessity. It seems to me probable that we are thinking about different problems. I have in mind the teaching of the law of remedies and its application in ordinary litigation, and recognize, as Professor Cook points out, that the distinction, however vague and shifting, is a part of various legal rules, notably in the conflict of laws, and must be operated as best we can. Even so, I should be interested to know more specifically what form this trend of continental jurisprudence is taking and whether it is being reflected in the actual decisions of courts. Dr. Schock has clearly misinterpreted Professor Lorenzen's views in thinking he supports the emphasis upon the distinction. See Lorenzen, *supra* note 9.

²⁶ HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 32, 36-38; Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163, 164, 167; Corbin, *Rights and Duties* (1924) 33 YALE L. J. 501, 516; Cook, *supra* note 18; CLARK, CODE PLEADING (1928) 78, 82, 84, 158.

Dean Gavit, *supra* note 1, at 142, pays tribute to Professor Borchard for his work in support of the declaratory judgment and ascribes it to the fact that Mr. Borchard talked to the court “in understandable terms”. “Had the author talked in a strange tongue his efforts would certainly have been wasted.” But Mr. Borchard uses the analysis of “cause” and “right” here followed, see Borchard, *supra* note 3, and in the brief *amici curiæ* filed by Mr. Borchard and me in the case cited with approval by Dean Gavit, Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345 (1933), we developed the analysis at some length.

well make us theorists aghast at what we are doing by our word play. Court procedure, to be workable, must be treated as a means to an end, not an end in itself. Instead of being controlled by formidable rules whose arbitrary character is only concealed and tempered by their vagueness, it should be operated flexibly by wise administrators exercising wide discretion. The leading reformers of the bar have come to see this and to advocate it with clarity and effectiveness. It is being accepted as the guiding principle of changes, of which the Illinois reformation effective at the beginning of the year is the most recent.²⁷ Law professors ought to be leaders in this movement, as many of them are. They should not hold back this vigorous movement by scholastic refinements. The danger that we may do just that should give us pause when we try to make the cause of action over into a kind of club to be held over the trial judge to force him back into the straitjacket of the old forms of action.

²⁷ See *supra* note 21. Among many examples, reference may be made to the emphasis on the rule-making power, now a particularly live issue in New York under the leadership of Presiding Justice Finch of the Appellate Division of the Supreme Court of the First Department. See *Extension of the Rule-Making Power, Spec. Rep. of the Com. on Court Rules* (1933) YEAR BOOK OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK; Finch, *Fifth Federation Speech* (1933) 5 N. Y. ST. B. A. BULL. 355; Harley, *The Argument for Judicial Rule-Making* (1933) 167 ANN. AM. ACAD. OF POL. AND SOC. SCI. 91. Cf. also Boies, *The Executive Judge*, *id.* at 12; and Powell, *The Cleveland Court of Common Pleas*, *id.* at 24.