

## THE CAUSE OF ACTION—A REPLY

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The continuation of the argument started in the December issue of this REVIEW<sup>1</sup> and answered in the February issue by Dean Clark<sup>2</sup> is not entirely unnecessary, due to the fact that the opposition has substituted champions on me. I am sure that little is to be gained by the simple reiteration of statements previously made. Certainly the intelligent reader can take the existing evidence and determine what are the issues, and what is his choice. But something, I believe, is to be gained by an attempt to summarize the results and check up on the substance of Dean Clark's answer.

I have no illusion that anything I say may convert him, Mr. Arnold, nor anyone else wedded to the position taken. But despite the fear expressed by Dean Clark in his last paragraph, that too much talk about the subject will induce evil results I am convinced that if the various positions can be stated in intelligible terms the results will be plain gain. I find it hard to believe that Dean Clark means what he says, because I have found no evidence that either he or Mr. Arnold has been willing to submit his views on the subject to the quiet oblivion of academic circles. The implication seems to be that talk is all right if we limit it to the *right* people, and I doubt that he means that. But I see no reason to believe that the lawyers and judges of this country are going to be seriously misled by anything less than a full discussion of the problem.

As to the merits of the case, I find in Dean Clark's answer renewed evidence in support of my criticism, that is—that this "pragmatic" definition is not definition but reformation, and that it is based upon an *impossible* philosophy of legal behaviorism. There is additional evidence that it ignores the Code of Procedure. I cannot refrain from repeating at this point that I am intensely interested in procedural reform, and that I have no objection even to a peaceable revolution against the Code of Procedure. I still question the necessity of a revolution; and I question, on the merits, this proposed substitution. I see no reason to believe, and I certainly find none advanced, that the change proposed is a desirable or workable one. My opinion still is that a decent and workable system of procedure cannot be set up based on a legal philosophy which denies the validity of the procedural concept itself. I think that we shall be much better off if we do not have to talk about pro-

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

<sup>2</sup> Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354.

cedure *sub rosa*, and contradict ourselves every time we indulge in the necessity of talking about it.

Dean Clark openly accepts as true the charge that his "cause of action" is a "conglomerate procedural-substantive-functional concept" and he expressly questions the validity of the mental distinction between substance and procedure.<sup>3</sup> He persists in using the phrases "judicial action" and "cause of action" interchangeably,<sup>4</sup> thus refusing to recognize the possible conceptual distinctions between the judicial proceeding (or action, or suit) as an administrative mechanism; the facts and law with which it deals; the means governing the mechanism of their determination, and the rules governing the merits of their determination.

But that such a philosophy is impossible is shown by the subsequent necessity of talking about the "right of action" as distinguished from the "cause of action",<sup>5</sup> and his insistence that "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".<sup>6</sup> This is after all the substance of my repeated arguments, and at variance with a "conglomerate procedural-substantive-functional concept". We ought to determine the facts and the law separately, not conglomerately, and our procedural mechanisms must therefore be those which will most effectively separate them for determination. But that we cannot separate them and then repudiate the separation with anything which resembles logical consistency seems reasonably apparent. How we can proceed in logical progression from fact to law and decision with procedural equipment which denies those possibilities is a complete mystery. It is a fair criticism of Dean Clark's first position that under it we first decide what we are going to decide, and then we proceed to determine the mechanism by which we are going to decide what we have decided we will decide. Nothing less than that is a "conglomerate procedural-substantive-functional" concept. I assert again that as against that there is every advantage in beginning at the beginning, separating our functions here, and dealing with each on the basis of the policy sought to be served by each.

Dean Clark is afraid that that leads to confusion and "finespun and arbitrary differentiation of results"; that a cause of action defined in terms of substantive right "acquires specific content only if identified with rights enforced in the old forms of action".<sup>7</sup> But it is apparent that it avoids confusion. And it certainly is true that it need make only the differentiations in results which can be sustained on good policy. That they may be fine is no

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<sup>3</sup> *Id.* at 360.

<sup>4</sup> *Id.* at 354.

<sup>5</sup> *Id.* at 361.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

objection to them; nor that they are arbitrary. Apart from the necessity for them all distinctions *are* fine and arbitrary. Why it is that the "cause of action" (substantive right) acquires "specific content only if identified with" the old forms of action he does not explain. I perceive no obvious reason for that result. I suppose that it is true that courts start with a review of historical materials and accepted concepts, but it does not follow that any procedural mechanism, particularly one which emphasizes the distinction between substance and procedure, must accept the responsibility for the reactionary court which stops its enquiry there. Courts are as free to change the substantive common law as they ever were, and no intelligent court is going to be handicapped by any system of procedure. Judges have been reared in an atmosphere of legalism and I have no hope that even "pragmatic definitions" are going to make them over.

I am always pleased when my opponents indulge in the argument of alarm; when they seek to sustain their side of the argument on the value of their fears. For I know the answer to that. I am afraid of what will happen if their views prevail, and I think that my fears weigh just as heavily as do theirs. If they do not I'll increase them, and if necessary I'll call to my assistance the ninety-five *per cent.* of the American Bar who are so adept in the technic of fear.

When one extracts from Dean Clark's answer the argument of alarm, and the assertion that my suggestion means a return to common law procedure, there is little left. The substance of it is that his definition is a fair interpretation of the Code, and that it is sustained by more authority than I have been willing to concede him.

He bases his first proposition upon the ground that a definition may keep the function and purpose in mind<sup>8</sup> and consider its practical usefulness and results.<sup>9</sup> He also has some intimate knowledge as to the "intention" of the framers of the Code on the clause in question.<sup>10</sup> On the first score I need not repeat what I originally said about projecting a new idea under the guise of a definition of an old concept. Unless one changes the accepted meaning of the word "definition", the considerations Dean Clark suggests are improper, and in this connection they constitute a repudiation of the constitutional legislative function. I am not so naive as to assume that the courts may not and do not invade the legislative function under the guise of "interpretation" and "definition". That, however, is revolution, not definition in its common significance.

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<sup>8</sup> *Id.* at 360.

<sup>9</sup> *Id.* at 359.

<sup>10</sup> Which at best is rather inconclusive, for it was adopted by some thirty legislatures and not its framers. If one is to indulge in alarm here is a real occasion for it. If Dean Clark knows what Mr. Field had in his mind I see no reason to doubt but that Mr. James M. Beck and Mr. Clarence E. Martin know what the founding fathers had in their minds.

On the second score Dean Clark has a real advantage, for I know nothing about their intention other than as it is evidenced by what they said, not in their propaganda but in their statutes. I must suggest again that Dean Clark's definition and argument is a complete repudiation of the joinder statute. I find it impossible to believe, much less to know, that the framers of the Code intended to repudiate the common law classifications of substantive rights, and to accept the "cause of action" in the light of his definition of it, when in the joinder statute they expressly made the joinder of actions depend on the distinctions between causes of action which were "on contract"; "for injury to personal property";<sup>11</sup> "for injury to person, except libel and slander, criminal conversation or seduction"; "in ejectment"; whether "legal or equitable"; and that if actions so joined could not be conveniently tried together that they might be separated for the purposes of trial.<sup>12</sup> If they did not fall into those various classifications they might be joined if they "arose out of the same transaction". That is artificial; there are serious limitations on joinder, but there it is.

By implication, of course, Dean Clark does more than ignore the Code here. He repudiates it. He asserts<sup>13</sup> that where a decent concept of the cause of action 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." However, one should recognize, it seems to me, that the legislature determined the "extent" and "spread" of judicial proceedings when it enacted the joinder and counter-claim statutes, and that our aims on the subject are beside the point. At least what they said on the subject is material.<sup>14</sup>

I prefer an interpretation of the Code which does not repudiate or ignore it, and I doubt that one should be sent to the showers simply because he proves to be a vociferous obstacle to its replacement by revolutionary technic, particularly when the proposed substitution has the lack of merit already suggested.

Nor do I share Dean Clark's view that it is going to be easier to amend the Code through the courts than it will be through the legislature. I should expect the latter to be more responsive to change than the former.

The state of the authorities is something on which anyone may satisfy his own conscience. I am still confident that I am not "ill-advised" in my "reckless claims" on that score. Literally thousands of cases have applied

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<sup>11</sup> How Dean Clark can be sure that an injury to person and an injury to personal property ought clearly to be regarded as one Code "cause of action" (see Clark, *supra* note 2, at 359) when the Code expressly made them two is again, to me at least, a major mystery.

<sup>12</sup> Despite the fact that I have called attention to this situation in each article of mine Dean Clark has never attempted to "explain" it away.

<sup>13</sup> *Supra* note 2, at 356.

<sup>14</sup> He also asserts that the purpose of the Code was to do away with the arbitrary "grouping of legal claims". Again the conclusion ignores the joinder statute. *Id.* at 355.

the joinder statute without regard to trial convenience. I defy any one to read the thousands of cases arising on a demurrer to a complaint for insufficient facts in stating a "cause of action" and come to any honest conclusion other than that the courts have dealt with the "cause of action" on a basis involving a specific substantive right. The question passed upon was the plaintiff's substantive right impliedly asserted to have arisen under his statement of facts, *not* measured by trial convenience. There is, of course, no express repudiation of Dean Clark's definition, for except in the United States Supreme Court case<sup>15</sup> discussed in the previous articles, it has not been often mentioned.<sup>16</sup>

In this connection he asserts that to explain the case in question I require "a new rule of amendment".<sup>17</sup> But it is clear that what I said was that the better cases here construed the statutes of limitation in the light of the amendment statutes, and that they have announced a new rule in the *res judicata* cases. The new rule, if any, is the court's, not mine.

Not much is to be gained by quibbling about the proper definition of a functional philosophy. I thought I made it clear that I used the word "functional" in the sense of "behavioristic". It was intended to express a fact and not an odium. But it is still a little curious to me that Dean Clark should accept<sup>18</sup> the value of the rational side of legal science, and at the same time assert the value of conglomerate concepts. The latter seem to me to be clearly a repudiation of the analytical function. I fail to appreciate how one interested in legal science (in any scientific sense whatever) can well insist even that we must minimize the formal aspect of it, and over-emphasize the administrative side of it. I think it is a fair appraisal of this answer that its substance at best is just that.

But, of course, if we have to erect an altar to the Trial Convenience let's do a good job of it.

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<sup>15</sup> United States v. Memphis Oil Co., 288 U. S. 62, 53 Sup. Ct. 278 (1933). See Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court* (1933) 19 A. B. A. J. 215.

<sup>16</sup> The interpretation of that decision is also open to anyone. But if, as Mr. Arnold and Dean Clark assert, in it the Court "in effect" accepted his definition, why if it was material did it not actually accept it? And if it accepted it in that case did it repudiate it in the subsequent case where it applied the Statute of Limitations?

<sup>17</sup> *Supra* note 2, at 358.

<sup>18</sup> *Id.* at 360 n. 23.