YALE
LAW JOURNAL

VOL. VII MARCH, 1898 NO. 6

WHAT CAUSES OF ACTION MAY BE JOINED IN ONE COUNT UNDER THE CONNECTICUT PRACTICE ACT.

The following memorandum of decision was rendered by Hon. Samuel O. Prentice, Judge of the Superior Court, in February, 1898, and is now on file in the office of the Clerk at New Haven.

The action which is now pending in that Court is for the loss of goods shipped by the plaintiff over defendant's railroad. The plaintiff stated in one count that the goods were delivered to the defendant as a common carrier at common law; that at the time of the delivery of the goods certain bills of lading were also delivered to and accepted by the defendant, but that there was no consideration for the bills of lading, that they were unreasonable and unjust in their terms, and that therefore they were not binding contracts, and that the defendant had no right to the limitation of liability expressed therein. Under these circumstances, the plaintiff claimed that, in spite of the bills of lading, the defendant was liable as a common carrier at common law, and alleged the failure of the defendant to carry and deliver the goods. The plaintiff went on to say that if the bills of lading were valid, then the defendant was liable because the goods were lost through its negligence.

Defendant moved to correct the complaint by requiring the plaintiff to state upon which cause of action it relied, or to separate the causes of action. The case was argued at length plaintiff relying principally upon the decision of the Supreme Court of Connecticut in the case of Craft Refrigerating Co. Quinnipiac Brewing Co. EDITOR.

THE WINCHESTER REPEATING ARMS COMPANY
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Superior Court, New Haven County, the 9th day of February, 1898.

MEMORANDUM UPON MOTION *DE* SUBSTITUTED COMPLAINT.

This complaint in one count contains statements of divers facts, some pertinent to a right of recovery upon one ground, and some upon another. The plaintiff justifies this combination of allegations in one count, upon the authority of The Craft Refrigerating Company *v.* The Quinnipiac Brewing Company, 63 Conn. 551.

The question is thus raised as to the scope and effect of this oft-cited case. By the profession generally it has apparently been received as it has by counsel for the plaintiff as sanctioning as proper pleading the filing in court as a complaint of any leaf of history between persons which may be said to relate to any single transaction, using that term in its most comprehensive sense, however varied and many-sided that transaction may be. As necessary sequels to this manner of pleading it is conceived that the plaintiff may shift his position as often as he is pleased or forced to do so, as the case progresses, as long as he keeps under the cover of any of the averments of his complaint; that the opposite party and the court are put to the hazard of searching out at their peril for defense, trial, ruling and decision, the many causes or rights of action which may be concealed within its multitudinous allegations, and that the plaintiff has under it a *carte blanche* to recover for any cause of action which his opponent shall fail to discover or successfully defend.

Against such doctrine I must protest as being subversive of the very purpose of pleading and paving the way for all manner of uncertainty, confusion, pleading entanglement and even ultimate injustice. If we have come to the point where such pleading is permissible we have indeed taken a long step backward towards that primitive time when parties appeared in person before the magistrate and told their story in open court, and the magistrate adjudged as upon the whole seemed to him just and right. Modern conditions, I fancy, do not admit of such methods.

Phillips, in commenting upon the requirement of the codes

for separate statement of causes of action, makes the following pertinent remarks:

"Such statement of causes is clearly indispensable to an orderly system of pleading. In no other way can the legal sufficiency of any one cause be tested by demurrer; in no other way can different defenses be made to the different causes; in no other way can separate and distinct issues be made and tried; in no other way can the introduction of evidence be intelligently conducted; and in no other way can the record be made clearly to show what matters have been adjudicated and how decided. The provision for the joinder of distinct demands in one action is for the convenience and economy of litigants, and its object may be promoted by liberality in its application, but the requirement that causes of action when joined shall be separately stated is to enhance the certainty, the precision and the safety of procedure, and its object can be promoted only by enforcing it with reasonable strictness." (Phillips on Code Pleading, Sec. 202.)

Such doctrine, however, as that to which I have referred as having been drawn from the Craft case, I am confident is not supported by that case. It is doctrine which I believe to be plainly repugnant to the express provisions of our Practice Act and of all known codes, and I fail to discover what there is in the opinion in the Craft case, when properly interpreted, which warrants the conclusions which have been drawn from it.

The doctrine of that case, as I understand it, is simply and only this: that where a single inseparable state of facts gives rise to two or more rights of action, or where the plaintiff upon such statement of facts may upon differing constructions thereof be entitled to differing relief, the complaint in a single count, setting up these facts may, in the first case entitle him to demand and have any of the several kinds of relief which the facts in any aspect of them support, or in the second case, to demand alternative relief appropriate to the different constructions which the law may place upon the facts, and have such relief as the true construction warrants.

There are many states of fact which give rise to more than one right of action, as for instance, one in contract, and another in tort. A complaint setting up such states of fact may contain matter pertinent to each right of action, and no matter not pertinent to both. The Craft Refrigerating Company case very properly holds, as I shall have occasion to further notice later, that such a complaint in one count is good; that the plaintiff may go to trial thereon without electing which right of action

he will pursue, and that he may thereunder be given such relief as the facts may warrant.

There, however, may be other conditions, to wit:

1. A count may contain allegations, all of which are appropriate to one right of action, while at the same time a portion of them are also appropriate to and sufficiently support, another right of action, the remainder being altogether inappropriate to such second right of action.

2. A count may contain allegations, a part of which are pertinent and appropriate, and a part impertinent and inappropriate to each of two or more rights of action.

With respect to such counts the principle of the Craft case does not apply. To so hold would be to violate the clear and express provisions of the Practice Act. Section 878 of the General Statutes provides what may be joined in a complaint, and how such joinder may be made. The pertinent requirements are, (1) That several causes of action may, under certain conditions be joined in one complaint, and (2) that such causes of action so joined must be separately stated.

Another pertinent provision is that which permits the joinder in one complaint of causes of action "arising out of the same transaction, or transactions connected with the same subject of action."

In order to arrive at a correct understanding of what the effect of this section of the statutes is, it is necessary to have a clear conception of the meaning of the terms which it employs, to wit, "right of action," "cause of action," and "transaction."

A "right of action" is the secondary right to relief which springs from the invasion of some primary right. It is the right to relief appropriate to the facts from which the right of action springs.

A "cause of action," on the other hand, to quote the language of Pomeroy, is the situation or state of facts from which a "right of action" springs. The facts from which a remedial right—that is, a right to relief—arises, constitutes the "cause of action."

Phillips, in commenting upon this distinction between a "right of action" and a "cause of action," uses this language: "From the foregoing definitions of 'right of action' and 'cause of action' it will be seen that the former is a remedial right falling to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial fact." (Phillips on Code Pleading, Sec. 31).

A "transaction" is something quite apart from a "right of action," and something more comprehensive than a "cause of action." The term is one which has been seldom defined and to which it is hard to give a definition helpful in practical applications and suited to all circumstances. Our Supreme Court in the Craft case, however, has said that a transaction "consists of an act or agreement, or several acts or agreements, having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered."

A definition in different language, but to the same general effect, might be made upon the basis of Pomeroy's anaylsis somewhat as follows: "A single continuous connected proceeding, negotiation, or conduct of business between parties, characterized by a unity of action and circumstance, and forming one affair."

Definitions aside, however, it is certain that from a single "transaction" several "causes of action" may arise, each giving to the injured party one or more "rights of action."

In this connection it ought to be observed that a "right of action" is to be distinguished from the object of the action. The object of the action is the relief which is sought. The "right of action" is the right to that relief which arises from the facts which constitute the "cause of action." In actions at law the object, whatever the "right of action" may be, is generally damages.

A "right of action" at law always arises from the existence of a right and the invasion of it by some wrong on the part of another. The "cause of action" is the facts which establish the right and the wrong. Its statement is therefore only a statement of these facts. Such statement is single if it sets up only one right invaded by one wrong. It is double if it sets up either two rights invaded by one wrong or one right invaded by two wrongs.

If now we examine Section 878 with these distinctions and principles in mind, its interpretation becomes clear, and its operation simple. Where there is a single state of facts from which a right to relief arises, there is but one "cause of action." A count, therefore, which sets up such a state of facts, and that only, states but one "cause of action" in the sense in which that phrase is used respecting the joinder of actions, no matter how many rights of action may spring from these facts. Of course, causes of action might be differentiated, not only with respect to

the facts averred, but also with respect to the nature of the relief sought upon the facts. This narrow distinction, however, is not the logical one, since the prayer for relief is no part of a count and no part of the cause of action. Neither is it the distinction contemplated by the Practice Act. The separation of causes of action is not to be determined by the relief demanded, but by the actionable facts alleged, from which the right to redress is claimed to flow. Upon this construction there can therefore be no joinder of causes of action in a count which sets up a single set of facts, all pertinent to whatever relief may be demanded upon those facts. Such a count of necessity alleges but one right and one invading wrong. Such in the opinion of the court was the single count complaint in the Craft case.

If now we turn to counts of the second variety heretofore specified, to wit, those containing allegations all of which are appropriate to one "right of action," while a portion of them are also appropriate to and sufficient to support another "right of action," the remainder being altogether inappropriate to such second "right of action," the situation becomes at once and radically changed, if the plaintiff is to be permitted to treat such counts as good ones for rights of action to which all their allegations are not appropriate. In such cases there is plainly a joinder of causes of action. The instant that there is combined in one count facts appropriate to one cause of action and facts inappropriate to it, but appropriate to another cause of action, there arises a joinder of causes of action. This is necessarily so since, as we have seen, causes of action are only the facts from which rights of action spring. A statement of a cause of action being only a recital of facts—a recital of the facts from which the right of action arises—the consequence is inevitable that wherever there is contained in a count material allegations inappropriate to a statement of a cause of action therein, but pertinent and appropriate to another cause of action, there is a joinder of causes of action, since there is a joinder of facts issuing independently in different rights of action.

The practical result in such a case should be that the count should be regarded as one for the right or rights of action to which all its material allegations are appropriate, and not one upon which the plaintiff might recover for a right of action to which only a part of its material allegations are appropriate. Having himself inserted the additional allegations which give character to the count as one for those rights of action which all its recitals support, he should be held to have chosen his ground as he has

stated it, and not permitted to change it by treating his own material averments as surplusage. Such a count, under such an interpretation, would not contain a joinder. It would be simply a count for a single cause of action, to wit, that cause of action which all its material averments together support.

Counts of the remaining class, to wit, those containing allegations a part of which are appropriate and a part inappropriate to each of two or more rights of action, would, for reasons already discussed and which need not be repeated, contain a joinder.

If I am correct in this interpretation of Section 878 its provisions become easily intelligible, and their application simple and satisfactory. There is no longer any mystery as to what a count may properly embrace, nor mystery as to what rights of action a count may support. A single count may contain the statement of a single cause of action, and that only. It is such a count, if all its material averments are pertinent and appropriate to the statement of any one cause of action. If its allegations are in part appropriate and in part inappropriate to each of two or more causes of action there is a joinder of causes of action. Where there is a statement of a single cause of action the plaintiff may have relief for any right of action to which it entitles him. He can have no relief for rights of action to which all the material allegations are not pertinent and appropriate.

The principles which I have thus laid down are general ones. In their application to actual conditions, however, they are not without natural and necessary limitations. Circumstances will sometimes arise under which, from necessity, or convenience amounting to a practical necessity, their strict enforcement will not be required. These circumstances will especially arise where equitable relief is sought, either as preliminary to or in connection with, legal relief, or alone, where different forms of equitable relief are demanded. Equitable causes of action are frequently not susceptible of that clear and distinct separation from each other and from the circumstances of the transaction out of which they arise that legal causes of action are. Legal rights of action are generally clearly differentiated from each other, and the facts which issue in them are generally easily separable in statement from other connected facts. Equitable rights to relief oftentimes run more closely into each other, and the facts which issue in them are frequently not conveniently susceptible of an independent and unassociated statement. The

Practice Act lays down no hard and fast rules which neither yield to necessity nor recognize that pleading is but a means to an end—the end that issues may be framed and relief demanded and given in a way most conducive to the convenient, orderly, and proper administration of justice and equity.

The Craft case calls attention to one of these limiting principles, where it says that "separate and distinct causes of action within the meaning of the rule are those which are separable from each other, and *separable by some distinct line of demarkation.*" The opinion observes that in one sense every cause of action must be separate and distinct from any other, while in another sense causes of action might differ from each other only in that distinct and separate claims for relief issue from the same state of facts.

The Practice Act seeks to require nothing impossible, nothing superfluous, nothing which occasions inconvenience without a corresponding return. It therefore does not demand separation of causes of action where the only distinction between them can be that which arises from the distinct kinds of relief which may be demanded from a given state of facts; or where a separation by some distinct line of demarkation is impossible; or where the ends of good pleading are better and more simply reached by a departure from strict requirements. The principles which I have laid down are therefore simply general ones which are to govern the pleader, unless there is some sufficient controlling reason for action otherwise. They are not to be applied in any technical spirit or with microscopic exactness, but to the end that, upon the one hand, the many and grave evils of double pleading may be avoided, and, upon the other, that parties may arrive at issue as simply, directly and distinctly as they reasonably and properly may.

Having thus discussed principles without much reference to Connecticut authority, let me now inquire if there is such authority for contrary views. I submit that there is none. The Craft case is the only one which has discussed this general question to any extent. If it be carefully studied, I believe that in its doctrines there will be found nothing subversive of the positions I have here taken. The court in that case clearly regarded the complaint as one setting up only a single inseparable state of facts from which two rights of action sprang—a single cause of action in the broad and true sense of that term—or at least two causes of action incapable of separation by any true line of demarkation.

Much of the difficulty, I fancy, which has arisen in the interpretation of Section 878, and of the Craft case, has come from a failure to distinguish a cause of action from a transaction. These terms have been used so loosely and interchangeably that the distinction between them which the codes and our Practice Act emphasizes is too often lost sight of.

The prevalent notion that all that one now needs to do is to tell his story, whatever that story may be, and leave to the opposite party and the court the duty of guessing out what his cause of action is, has, I must believe, its origin in this misunderstanding and the consequent misconception of what the Practice Act requires to be stated. The *cause of action*—that is, the facts from which the plaintiff's right or rights of action spring—are required to be set out. No semblance of authority is given for setting out a *transaction*, unless indeed the transaction in its entirety constitutes a cause of action. The plaintiff is compelled to discover from the acts and occurrences of the transaction his cause or causes of action, and set them out separately. He is not required, as the Craft case says, to construe his right under a cause of action and give it a label, as he was obliged to do in common law pleadings; but he is obliged to select his cause of action, and make known his claimed actionable facts which constitute it. The story which the Craft case says he is permitted to tell as plainly and concisely as may be is the story which makes up the cause of action, and not any longer or more comprehensive story—not the story of a transaction. The Practice Act is careful to make this distinction between a transaction and a cause of action, and to impose the duty of separate allegation. It contains express recognition of "several causes of action arising from the same transaction, or transactions, connected with the same subject of action."

Having thus laid down the rules by which counts are to be tested respecting joinder of causes of action therein, it remains to apply them to the complaint under review. It was apparently, and I believe I may fairly say, confessedly, framed to enable the plaintiff to recover thereunder upon any cause of action it might ultimately appear that it had growing out of the matters covered by its allegations. If not precisely hydra-headed, it certainly looks in at least six different directions. Within it are matters which might be held to justify a recovery under any one of the following conditions:

1. A recovery for the breach of the common law duty of a common carrier where no express agreement of carriage was made.

2. A recovery for the breach of the common law duty of such carrier receiving goods for transportation without an express agreement for carriage, which breach of duty consisted in its active negligence.

3. A recovery for the breach by such carrier of an express contract of carriage.

4. A recovery for the destruction of property delivered to such carrier under an express contract, which being unreasonable and unjust in its terms, and improperly exacted from the shipper, may not protect it from responsibility for the destruction of the goods.

5. A recovery for the breach of duty of such carrier by reason of its own negligence, notwithstanding an express contract of carriage was made.

6. A recovery for negligence pure and simple.

The plaintiff disclaims any thought of preparing the way for recovery upon the latter ground, but expresses its desire to have the count so phrased that it would support a recovery if the evidence should disclose the existence of either of the other conditions.

I need not say that in my opinion a count of this kind is improper.

The fundamental fault in the complaint is that it sets out the whole transaction. The plaintiff has not sought to gather from its incidents its cause of action and set that up, or its causes of action and set them up separately.

It is clear that under the principles I have laid down the count is not a good one for either the first, second, third, fourth or sixth causes of action enumerated. The presence therein of material averments inappropriate to either one of these causes of action, but pertinent to other causes of action, leads to this result. If the count can upon its most liberal construction be justified as an attempt running through all its allegations to set up one cause of action, it must be one for the destruction, through the negligence of the defendant carrier, of goods delivered to it for transportation for hire under a special contract, which, being unreasonable and improperly exacted, could not exempt it from responsibility for such negligent destruction.

Even in this aspect of the count it is not free from faults. If it is sought to allege the existence of a special contract of carriage, the averments are neither appropriate nor sufficiently clear. Certain evidential facts are recited, but it is nowhere apparent, much less distinctly alleged, whether it is claimed

that a contract existed or not. It is impossible to gather from the averments what the claimed state of facts, and therefore what the cause of action is. It is not possible to discover what right of the plaintiff it claims to have been invaded, or by what precise wrong it has been invaded.

Section 880 provides that all pleadings shall contain a plain and concise statement of the material facts upon which the pleader relies, but not of the evidence by which they are to be proved. Another requirement of Code Pleading is, that all allegations shall be direct and certain. Clearly these requirements are not met in the present complaint.

The defendant's motion is granted to the extent that the plaintiff is ordered:

1. To separate into distinct counts its several causes of action, if it desires to rely upon more than one.

2. To state such cause or causes of action in distinct and certain averments, which shall avoid recitals of evidential matter, allegations of facts which are not ultimate and operative facts, and averments of facts which are not material to the cause of action being stated.

Samuel O. Prentice.