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COMMON LAW PLEADING MODIFIED VERSUS THE FEDERAL RULES*

MARLYN E. LUGAR**

II. AMENDMENTS

ALTHOUGH the privilege of amending a declaration may not involve the obtaining of complete relief in one action, the primary objective sought by the proposal hereinbefore made to liberalize the rules on joinder of parties and causes of action,¹ it may be considered even more important where it determines whether the plaintiff will obtain *any* relief without starting another action. The problem here is whether the plaintiff shall be permitted to change his pleading to correct some mistake or to meet an unforeseen situation when it arises in order that he may have the relief to which he is entitled.

A. West Virginia "Liberality"

General statements of the law on amendments in West Virginia indicate great liberality, and one might be led to believe that no injustice could result by a mere failure originally to state the case properly. The court has often affirmed the power of trial courts, independent of any statutory authorization, to permit the pleadings to be amended "whenever justice will be promoted thereby."² A well known writer on West Virginia procedure has stated that under the West Virginia statutes, liberally interpreted, ". . . defects in the pleadings disclosed by demurrer may generally be corrected by amendment, so that if the declaration or other pleading is amended under the statutes, the demurrer has served the purpose of putting the pleadings in proper form, or of gaining a continuance, but *has not led to a final disposition of the case.*"³

*This is the second of a series of articles by the same writer on this subject. The first article concerned the joinder of parties and causes of action and appeared in 52 W. VA. L. REV. 137 (1950).

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¹ Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 52 W. VA. L. REV. 137 (1950).

² *Shires v. Boggess*, 72 W. Va. 109, 111, 77 S.E. 542, 543 (1913); *National Bank of Weston v. Lynch*, 69 W. Va. 333, 334, 71 S.E. 389, 390 (1911); *Staats v. Georgia Home Ins. Co.*, 57 W. Va. 571, 573, 50 S.E. 815, 816 (1905); *Travis v. Peabody Ins. Co.*, 28 W. Va. 583, 595 (1886). In the later decisions the court relied upon the *Travis* case which held that amendments might be allowed under this power "at any time before verdict found."

³ BURKS, PLEADING & PRACTICE § 199 n. 33 (3d ed. 1934). Italics supplied.

The statutes themselves seem to sanction this same spirit of liberality. The statute which embodies the general rules on amendments provides:

"The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant; and notwithstanding such appearance, in any action, suit, motion or other proceeding, the court, if in its opinion *substantial justice will be promoted thereby*, may . . . permit any pleading to be amended . . . *changing the form but not the cause of action* . . . and the court may allow any other amendment in matter of form or substance in any . . . pleading . . . which may enable the plaintiff to sustain the action, suit, motion or proceeding *for the cause for which it was intended to be brought* . . ."⁴

The statute permitting an amendment to cure a variance between the pleading and proof seems even more liberal in providing:

"If at the trial of any action or motion, there appears to be a variance between the evidence and the allegations or recitals, the court, if in its opinion *substantial justice will be promoted thereby*, may allow the pleading to be amended to conform to the proof."⁵

The latter does not contain either the limitation that the amendment shall not change the cause of action or the provision that an amendment may be allowed to sustain the action for the cause for which it was intended to be brought, both of which are contained in the general statute. The revisers indicated that the first limitation was inserted therein for the purpose of emphasis and to conform to court decisions.⁶ The source of the second limitation was not stated by the revisers, but it is similar to language which has been used by the court in stating whether an amendment has changed the cause of action.⁷ It has never been given any separate significance by the court. Whether these statutory limitations placed on amendments generally will be held

⁴ W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949). Italics supplied.

⁵ W. VA. CODE c. 56, art. 4, § 28 (Michie, 1949). Italics supplied.

⁶ Revisers' note to W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949).

⁷ For example, in *Snyder v. Harper*, 24 W. Va. 206, 211 (1884), the court stated the rule in this way: ". . . no amendment can be allowed, which introduces into the cause a new and substantive cause of action different from that declared upon, and different from that which the party intended to declare upon, when he brought his action. . . ." And in *Hanson v. Blake*, 63 W. Va. 560, 563, 60 S.E. 589, 590 (1908), the court stressed the original intent in this manner: ". . . the declaration herein may be amended. . . , since it is convincingly apparent from the whole proceeding that such was the original intent of the pleader. This will introduce no new cause of action, but will permit the identical cause of action evidently undertaken by the pleader to be declared upon to be properly averred in the declaration. . . ."

to apply to amendments to cure variances between the *allegata* and *probata* is not clear. However, under the earlier statutes, when neither contained the limitation of not changing the cause of action,⁸ the court applied the rule that an amendment could not be allowed to cure such variance if it introduced a new cause of action.⁹ This limitation has now been made statutory as a general principle, but it is merely declaratory of the West Virginia common law, so there is no reason to expect a different holding concerning the specific situation of a variance covered by the other statute.

B. "Changing the Cause of Action"

Since this limitation prevails over the guiding principle of allowing amendments "to promote substantial justice",¹⁰ the true scope of permissible amendments can only be determined when its meaning is ascertained. This is not a task without difficulties.¹¹ In fact, its precise meaning defies understanding in view of the manner in which the limitation has been applied. This will be shown presently. Aside from this uncertainty as to how the rule will be applied, the cases adequately demonstrate that as applied it has produced unjust results. These factors alone should be a sufficient basis for considering some modification in the rule.

The court has never attempted to give any general guide to a determination of what amounts to a change in the cause of action. The usual approach has been to decide that the amendment either does or does not involve a violation of the rule, and then either to give no reason for the decision¹² or cite in support of the conclu-

⁸ W. Va. Acts cc. 71, 120 (1882); W. Va. Acts c. 41 (1911).

⁹ Findley v. Coal & Coke Ry., 76 W. Va. 747, 87 S.E. 198 (1915); National Bank of Weston v. Lynch, 69 W. Va. 333, 71 S.E. 389 (1911); Hanson v. Blake, 63 W. Va. 560, 60 S.E. 589 (1908); Staats v. Georgia Home Ins. Co., 57 W. Va. 571, 50 S.E. 815 (1905); Kuhn v. Brownfield, 34 W. Va. 252, 12 S.E. 519 (1890).

¹⁰ Note that this guide is used in both the general statute on amendments and the statute on amendments to cure variances. It is also the basis on which the court has declared that amendments may be allowed independently of any statutory authorization, the only difference being that the word "substantial" is there omitted. On the latter, see the cases cited in note 2 *supra*.

¹¹ "This general rule may be easily stated, but sometimes not easily applied. What shall be regarded, for the purpose of determining the propriety of amendment, as the cause of action in this case?" Clarke v. Ohio River R.R., 39 W. Va. 732, 737, 20 S.E. 696, 697 (1894).

¹² Creasy v. Thomas, 106 W. Va. 24, 144 S.E. 563 (1928); Brown v. Cook, 77 W. Va. 356, 87 S.E. 454 (1915); Staats v. Georgia Home Ins. Co. 57 W. Va. 571, 50 S.E. 815 (1905); see Ritchie County Bank v. Bee, 62 W. Va. 457, 461, 59 S.E. 181, 183 (1907).

sion other cases which have also either allowed or refused to allow, as the court may have held, amendments under the general rule but involving no similarity on the facts. Where the amendment is deemed not to involve a change in the cause of action, the court is inclined to stress the liberality with which amendments should be allowed.¹³ Occasionally, the court will state what appears to be a guiding principle, but analysis indicates that the real issue has been avoided. For example, in a recent case the court stated:

"While a rule of liberality has prevailed in the matter of amendments, and a wide discretion is vested in the trial court with relation thereto, it has always been held that an amendment may not change the cause of action. . . . On the other hand, *where the identity of the cause of action is maintained throughout*, an amended pleading which does nothing more than present grounds for recovery *for the same cause of action*, though different from those stated in the original pleading, is permitted. . . . [citing many of the earlier West Virginia cases]."¹⁴

The one commentator on West Virginia procedure who attempted to determine the meaning of "a new cause of action" stated the rule generally in these words:

"So long as the form of action is not changed, and the court can see that the identity of the originally intended cause of action is preserved, the particular allegations of the declaration may be changed by amendment in order to cure imperfection and mistakes in the matter of stating plaintiff's cause. . . ."¹⁵

However, apparently in recognition of the fact that no real help could be gained from that general statement, he went further but merely to list the instances in which amendments had been permitted or denied.

Perhaps the best that can be done is to follow that procedure, but this would offer no basis for prediction except in parallel cases, and perhaps, as applied, not even in parallel cases. Accordingly, an attempt will be made to analyze the cases to find, if possible, the basic considerations which seem to have influenced the court.

¹³ *Buffa v. Baumgartner*, 58 S.E.2d 270 (W. Va. 1950); *Dempsey v. Poore*, 75 W. Va. 107, 83 S.E. 300 (1914); *Hanson v. Blake*, 63 W. Va. 560, 60 S.E. 539 (1908); *Clarke v. Ohio River R.R.*, 39 W. Va. 732, 20 S.E. 696 (1894); *Travis v. Peabody Ins. Co.*, 28 W. Va. 583 (1886).

¹⁴ *Morrison v. Judy*, 123 W. Va. 200, 204, 13 S.E.2d 751, 753 (1941). Italics supplied.

¹⁵ *Kittle, The Law of Amendments as Applied in West Virginia*, 35 W. Va. L.Q. 64, 72 (1928). Note that the first limitation mentioned in this quotation is no longer effective in West Virginia. See the present statute quoted in text at page 28 *supra*.

This analysis should also disclose whether the rule has been applied consistently with these announced objectives in mind. Only in this way can any general principles be found on which the limitation may properly be defended.

C. *Change in the Form of Action*

Under the original formulary system of the common law, it seems to have been the rule that an amendment would not be allowed if it changed the form of action.¹⁶ No case has been found in which the West Virginia court expressed this principle as the basis for its decision. This may be explained by the fact that counsel never undertook to violate this rule. In any event, it did not follow that the cause of action had not been changed merely because the form of action remained the same in the original and amended declaration.¹⁷ The statute now provides that an amendment may be permitted though it results in a change in the form of the action, but it does not provide that a change in the cause of action may not result without a change in the form of the action.¹⁸

If it can be said that the West Virginia court ever used the idea of a change in the form of an action as the basis for refusing to allow an amendment, either *Snyder v. Harper*¹⁹ or *Mankin v. Jones*²⁰ would be cited. Both cases involved the adding of a count to the original declaration by amendment. In the *Snyder* case the original declaration was for trespass, an assault and battery upon the plaintiff, and the added count would have covered the assault and battery but in addition would have included damages for taking and carrying away certain chattels. The defendant having objected to this amendment, the court refused to allow the second count to be added because it was for an entirely different cause of action, "the first count being a trespass *vi et armis*" and "the second count being *trespass de bonis asportatis*".²¹ In the *Mankin* case the declaration originally contained only the common counts in assumpsit. The plaintiff sought to amend the declaration by

¹⁶ This seems to have been the more usual rule, especially under the earlier common law. CLARK, CODE PLEADING 716 (2d ed. 1947); SHIPMAN, COMMON LAW PLEADING 296 (3d ed., Ballantine, 1923).

¹⁷ E.g., *Findley v. Coal & Coke Ry.*, 76 W. Va. 747, 87 S.E. 198 (1915).

¹⁸ See the quotation from the statute set forth in the text at page 28 *supra*.

¹⁹ 24 W. Va. 206 (1884).

²⁰ 68 W. Va. 422, 69 S.E. 981 (1910).

²¹ 24 W. Va. 206, 211.

adding a special count to show an express contract which was related to an item in the plaintiff's bill of particulars. This amendment was held proper since the subject matter could have been proved also under one of the common counts. In the same case another controverted item in the plaintiff's bill of particulars was held not provable under any of the common counts. As to the latter item, it was conceded that the plaintiff had a right to recover for a breach of the express contract covering this item, but not being provable under the original common counts the court stated that an amendment to insert the *special count* would "constitute an additional claim, and would introduce into the case a new substantive cause of action."²²

However, it is not believed that a change in the form of action was the basis of these decisions. In the first place, no case has been found in which the rule was ever applied in other jurisdictions to include a change from one division of a form of action to another division of the same form.²³ Secondly, the court in the *Snyder* case seems to have stressed as the basis for the decision the fact that the cause of action set forth in the amendment was "a new and substantive cause of action different from that declared upon, and different from that which the party intended to declare upon, when he brought his action."²⁴ This same factor of original intent seems to have been controlling in the *Mankin* case, wherein the court relied heavily upon the *Snyder* case as precedent.²⁵ The court apparently did not refuse to allow the amendments because they involved changes in the form of action. In the premises it is not believed that in discussing the West Virginia cases any further consideration need be given to the effect of the statutory provision which now permits an amendment to be made though the form of action be changed.²⁶

²² 68 W. Va. 422, 430, 69 S.E. 981, 984.

²³ Where the rule was applied, it was held to prevent an amendment which changed the form of action from assumpsit to covenant or case, or from trespass to case, or vice versa. See the authorities cited in note 16 *supra*. That the rule was not to be applied between divisions of the same form of action was recognized in one West Virginia case. In allowing an amendment, the court said, "The change does not change the form of action, for assumpsit may be maintained against a physician or surgeon upon his implied undertaking to exercise proper skill arising from his simple engagement as physician, as well as on an express contract to cure." *Kuhn v. Brownfield*, 34 W. Va. 252, 257, 12 S.E. 519, 521 (1890); *cf. Travis v. Peabody Ins. Co.*, 28 W. Va. 583 (1886) (common law declaration on policy of insurance changed to the statutory form).

²⁴ 24 W. Va. 206, 211.

²⁵ 68 W. Va. 422, 430, 69 S.E. 981, 984.

D. Change in the Pleader's Intent

Having mentioned the importance attached by the court to the intent of the pleader in his original declaration as a controlling factor in deciding whether he is asserting a different cause in the amended declaration, the application of this test may now be examined more thoroughly. Does it refer to the relief which he intended to obtain, or to the facts which he intended to make the basis of his recovery, or to the legal theory on which he intended to recover? The cases in which emphasis has been given to the pleader's intent do not make this clear.²⁷ Here again the court has used evasive language, merely referring to the amendment as either embodying or not embodying "the same cause of action" originally intended. The scope of this test can be determined only by an examination of the cases to see what in fact has or has not been permitted. A few of the cases most frequently cited by the court will be examined here for this purpose, but the question will be left open for further comment when the inconsistency of the decisions is discussed.

The *Snyder* and *Mankin* cases, discussed above, might be treated as emphasizing the relief sought.²⁸ They indicate that the pleader will be deemed not to have intended originally the same cause of action if the new facts could have been the basis of another action,²⁹ it being immaterial whether the new facts might have been the basis of another count and have been joined in the

²⁰ In other words, none of the decisions have been predicated upon the limitation which was removed by the revisers. This apparent liberalization in the rules on amendments does not reach the basis on which the right to amend has ever been denied in West Virginia.

²⁷ E.g., *Hanson v. Blake*, 63 W. Va. 560, 60 S.E. 589 (1908); *Snyder v. Harper*, 24 W. Va. 206 (1884).

²⁸ See, however, the discussion of the *Findley* case and the *Hayes* case in the text at page 47, *infra*, wherein it is pointed out that amendments were not permitted even though the same relief was sought under the amendments. Those cases indicate that in addition the theory of law on which recovery is sought may not be changed, that being deemed a change in the cause of action.

²⁹ In the *Snyder* case the plaintiff could have brought a separate action for the chattels which the defendant removed. See text page 31 *supra*. In the *Mankin* case the express contract could have been used as a basis of another action. See text at pages 31-32 *supra*. In neither case was the additional claim provable under the original declaration, but other claims were provable thereunder. This reasoning seems inconsistent with the holding in *Morrison v. Judy*, 123 W. Va. 200, 13 S.E.2d. 751 (1941) and the dicta in *Ritchie County Bank v. Bee*, 62 W. Va. 457, 461, 59 S.E. 181, 183 (1907), both of which would permit amendments where the proof fails as to the facts originally alleged and recovery for only one claim is asserted in the amended

original action.³⁰ The same result follows whether the plaintiff is seeking to combine by the amendment the several actions which he might have joined³¹ or whether he seeks merely to drop the original action and substitute by amendment the action which he might have originally joined.³²

However, this intent is not important when the plaintiff has originally joined counts or actions which cannot be joined either because the counts are in the wrong forms of action³³ or because the parties defendant cannot be joined.³⁴ In either event, the plaintiff may be permitted to amend by omitting either group of the misjoined counts.³⁵ Policy considerations might be supported here by reasoning that since the plaintiff sued for more, he will be permitted to sue for part of that which was originally included. However, the pleader's original intent has been altered.

Prolixity in pleading is encouraged by this application of the test since even if the pleader goes so far as to combine counts improperly he will be permitted to drop the ones improperly joined, and he has less assurance that he would be permitted to add or substitute a count to meet a variance in proof affecting either his factual or legal right to recover a judgment against the defendant.

The advisability of lengthy pleadings as long as the law of amendments is circumscribed by existing restrictions is demonstrated by those West Virginia cases which involve the pleader's intent concerning the legal theory on which he seeks to obtain relief. This group of cases also probably indicates as strongly as any other the hardship which the rule not permitting a change in the cause of action may produce unless the pleader takes into con-

pleading. The problem here is one of changing the cause of action and not joinder of causes. See note 99 *infra* and the text to which it refers.

³⁰ *Hayes v. Cedar Grove*, 128 W. Va. 590, 37 S.E.2d 450 (1946); *Snyder v. Harper*, 24 W. Va. 206 (1884). Other courts have held that a cause which might originally have been joined may be inserted by an amendment. *Raymond v. Bailey*, 98 Conn. 201, 118 Atl. 915 (1922).

³¹ *Mankin v. Jones*, 68 W. Va. 422, 69 S.E. 981 (1910); *Snyder v. Harper*, 24 W. Va. 206 (1884).

³² *Hayes v. Cedar Grove*, 128 W. Va. 590, 37 S.E.2d 450 (1946); *Findley v. Coal & Coke Ry.*, 76 W. Va. 747, 87 S.E. 198 (1915), read with *Shaffer v. Western Maryland Ry.*, 93 W. Va. 300, 116 S.E. 747 (1923).

³³ *O'Neal v. Pocahontas Transportation Co.*, 99 W. Va. 456, 129 S.E. 478 (1925); *Shafer v. Security Trust Co.*, 82 W. Va. 618, 97 S.E. 290 (1918); *Wells v. Kanawha & M. Ry.*, 78 W. Va. 762, 90 S.E. 337 (1916).

³⁴ *Knotts v. McGregor*, 47 W. Va. 566, 35 S.E. 899 (1900).

³⁵ Cases cited notes 33 and 34 *supra*.

sideration in his original pleadings every possible theory on which he may recover.

An excellent case for illustration is *Findley v. Coal & Coke Ry.*³⁶ Here the plaintiff sued as administrator to recover under the state statute damages for the death of his decedent by a wrongful act of the defendant. At the first trial the defendant was granted a directed verdict on the alleged insufficiency of the plaintiff's evidence. After the case on writ of error had been reversed and remanded, the defendant for the first time disclosed its defense. The defendant proved that the plaintiff's decedent was, at the time of his death, employed in the operation of a train which, although operated on an intrastate railroad, carried nine cars which had come from points outside the state under through contracts of carriage for delivery in the state. Before submission of the case to the jury, the plaintiff was permitted to amend his declaration to claim a right of recovery under the new state of facts. The Supreme Court of Appeals reversed and remanded the case for a new trial since the amendment had set forth a new cause of action. The court recognized the inability of the plaintiff to controvert successfully the defendant's evidence, so the plaintiff would be required to start a new action even after he had successfully proved his right to recover under the Federal Employers' Liability Act in the first action.³⁷

Hayes v. Cedar Grove,³⁸ decided only a few years ago, is equally illustrative. In this case the plaintiff, while employed by a municipal corporation, was injured by falling from a truck used in removing garbage from the streets. He sought to recover damages, basing his action upon alleged negligence in respect to the character of the truck so used and the manner in which it was operated. A demurrer to the declaration having been sustained on the basis of the defendant's governmental immunity, the plaintiff was

³⁶ 76 W. Va. 747, 87 S.E. 198 (1915).

³⁷ The West Virginia court has recognized that its action in the *Findley* case amounted to a denial of justice. In referring to the remand of the case after holding that the amendment changed the cause of action, the court in a later case said, "This in fact amounted to a denial of any relief to plaintiff." *Shaffer v. Western Maryland Ry.*, 93 W. Va. 300, 304, 116 S.E. 747, 749 (1923). Nevertheless, the court continues to rely heavily upon the *Findley* case in refusing to permit an amendment which would change the theory of law upon which the pleader seeks to recover. See *Hayes v. Cedar Grove*, 128 W. Va. 590, 596, 37 S.E.2d 450, 453 (1946). But cf. *Buffa v. Baumgartner*, 58 S.E.2d 270 (W. Va. 1950).

³⁸ 128 W. Va. 590, 37 S.E.2d 450 (1946).

allowed to amend the declaration by inserting language to allege a cause of action under a state statute imposing liability on municipal corporations where injury results from a failure to keep its streets in a safe condition. This inserted language was later deleted by the trial court on the basis that the amendment constituted a new cause of action. The Supreme Court of Appeals agreed.

In both of these cases considerable time had elapsed between the date the injury occurred and the time the case was decided, both cases having previously been before the appellate court.³⁹ Even with the possibility, but little probability, of being allowed an additional year to start another action.⁴⁰ the new action would involve delay and added expense, not to mention the possibility of loss of evidence.

³⁹ In the *Findley* case the injury had occurred on October 30, 1909 [Findley v. Coal & Coke Ry., 72 W. Va. 268, 78 S.E. 396 (1913)], and the case was finally decided by the Supreme Court of Appeals on October 12, 1915 [Findley v. Coal & Coke Ry., 76 W. Va. 747, 87 S.E. 198 (1915)]. In the *Hayes* case the injury had occurred in May, 1943 [Hayes v. Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944)], and the case was finally decided by the Supreme Court of Appeals on March 12, 1946 [Hayes v. Cedar Grove, 128 W. Va. 590, 37 S.E.2d 450 (1946)].

⁴⁰ W. VA. CODE c. 55, art. 2, § 18 (Michie, 1949) provides, *inter alia*, that if, in an action commenced within due time, judgment for the plaintiff should be arrested or reversed on a ground which does not preclude a new action for the *same cause*, or if there be occasion to bring a new action by reason of such cause having been dismissed for any cause which could not be pleaded in bar of an action, the action may be brought within one year after such arrest or reversal of judgment or after such dismissal, but not thereafter. This year is allowed even though the time has expired within which a new action would otherwise need to be brought.

However, the court has uniformly held that this statute does not suspend the running of the statute of limitations if an action is dismissed by the voluntary act of the plaintiff or conduct equivalent thereto. See McClung v. Tische, 126 W. Va. 575, 29 S.E.2d 250 (1944) and the cases cited therein. Although no case has been found in which the plaintiff dismissed an action and started another in order to assert a claim which was not permitted in the former by amendment since it would change the cause of action, this appears clearly to be a voluntary dismissal so far as the claim originally asserted is concerned and the statute does not purport to suspend the running of the statute of limitations as to a cause which has never been asserted in an action. The right to amend having been denied because the amended declaration asserted a different cause of action from that originally stated, the same reasoning should bar another action on the claim after the statute of limitations has run.

On the other hand, if the plaintiff misjoins causes of action in his original declaration, he is permitted to amend the declaration to drop either group of misjoined causes. See cases cited in notes 33 and 34 *supra*. In addition, since the dropping of such causes was involuntary, being made necessary by court action, and having been asserted in one action, the statute permits such causes to be asserted within one year after the action is dismissed as

E. Avoiding the Limitation

Before examining the reasons given for not allowing an amendment which changes the cause of action, a case that shows how to avoid the difficulty may be examined to determine whether the procedure therein is more commendable than allowing greater freedom in making amendments. Is the procedure therein necessary in order to protect the defendant from inequities?

*Shaffer v. Western Maryland Ry.*⁴¹ will be used to show how the plaintiff may avoid a new action, since that case involves the same basic problem as the *Findley* case. The plaintiff received injuries in the service of the defendant and sued for the damages sustained. In his declaration he combined three counts, one on common law liability for negligence, a second based on defendant's liability under the Federal Employers' Liability Act, and a third as an elaboration of the second count. The court held that there was no misjoinder of counts. In allowing this joinder the court made some observations which ought to be kept equally in mind in considering a liberalization of the existing rules on amendments. They seem worth noting at length:

“. . . There is not in this case such an inherent difference between the cause of action arising under the common or state law and the cause of action arising under the Federal statute as will prevent their joinder in the same declaration. Whether the cause arises under the one or the other, it is based on the defendant's negligence. . . . But it is frequently impossible in advance of trial, in such cases, to determine whether the injured employee was engaged in intra-state or inter-state commerce at the time of the injury. . . . To permit this [joining counts stating a cause of action under the federal statute with counts stating a cause of action under the state statute or common law], cheapens and greatly shortens litiga-

to these causes. *Siever v. Klotts Throwing Co.*, 101 W. Va. 457, 132 S.E. 882 (1926). Thus, another reason for prolixity in pleading arises. See discussion in text at pages 34 *supra* and 37-38 *infra*.

Any doubt that may exist as to the application of the statute on the assertion in a new action of a claim which was not permitted by amendment, since it was deemed a different cause, disappears in cases similar to the *Findley* case. The statute does not extend the time for a new action for death by wrongful act where that right is given under the state statute. *Smith v. Eureka Pipe Line Co.*, 122 W. Va. 277, 8 S.E.2d 890 (1940). Nor does the saving statute apply to contractual limitations. *Duncan v. Federal Union Ins. Co.*, 114 W. Va. 219, 171 S.E. 418 (1933).

⁴¹ 93 W. Va. 300, 116 S.E. 747 (1923).

tion, frequently prevents injustice to the plaintiff, and in no sense deprives the defendant of any just right of defense. . . ."⁴²

The justice in permitting some pleading device to be used to avoid a second action and trial in these cases seems evident.⁴³ The question raised here is why should not an amendment be allowed rather than initially cluttering the record with a great amount of pleading that the pleader may never need? In addition, existing limitations on joinder of causes of action prevent a pleader from using multiple counts to meet many possible variances.⁴⁴ What then have been the reasons given by the court for not permitting an amendment which changes "the cause of action"?

F. Reasons Given for the Limitation

In the *Snyder* case, the first in which an amendment was not permitted under this rule,⁴⁵ the court was concerned only with the basic guiding principle which remains in the present statute, namely, whether substantial justice would be promoted by the amendment.⁴⁶ This case established the necessity of the defendant's objecting to prevent an amendment changing the cause of action;⁴⁷ but the court also took the position that if the de-

⁴² *Id.* at 306-307, 116 S.E. at 749.

⁴³ In other cases the court seems to have implied that even though the amendment to assert an additional claim or a different theory of recovery would not be permitted, the pleader might have originally asserted in a separate count what he desired to do by amendment. *Hayes v. Cedar Grove*, 128 W. Va. 590, 597, 37 S.E.2d 450, 454; *Snyder v. Harper*, 24 W. Va. 206, 211 (1884). The breadth of permitted joinder of counts in West Virginia by virtue of statutory modifications in the forms of action which are maintainable has been discussed in a prior issue of this *Review*. Lugar, *supra* note 1.

⁴⁴ The restrictions which now exist to prevent a pleader from originally stating his claims so that every possible contingency at trial may be met in his pleadings have been criticized in a prior issue of this *Review*. Lugar, *supra* note 1. The importance of a liberalization in those rules is emphasized by a rule as to amendments which is even more restrictive.

⁴⁵ *Per* Judge Green, in *Snyder v. Harper*, 24 W. Va. 206, 211 (1884): "There are no decisions, that I know of, in Virginia or in West Virginia indicating what amendments the court can properly allow to be made to a declaration after the appearance of the defendant." See, however, *Hart v. Baltimore & Ohio R.R.*, 6 W. Va. 336, 341 (1873).

⁴⁶ "The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance *if substantial justice will be promoted thereby.*" W. Va. Acts c. 71 (1882). Italics supplied.

⁴⁷ No further reference will generally be made in the cases discussed herein to the defendant's having objected to the amendment; it will be understood that this action was taken.

fendant objected, the court would conclude that he would be injured by the amendment and that substantial justice could not therefore be said to have been promoted. The court said there were many ways in which the defendant *might* be injured and the court had no way of knowing whether he would be injured. In other words, a mere objection without any showing of actual prejudice would suffice.⁴⁸ The court indicated only one possible injury, namely, the plaintiff might have been defeated on his original cause of action but succeed on the new cause of action, subjecting the defendant to payment of the entire costs of the action.⁴⁹ Would not this consideration be present even though the cause of action were not changed by the amendment? The reason given for not allowing the amendment is not impressive. If the defendant would be injured by the change, why should he not be required to show in what way he will be injured? The court has the power to impose such terms on the allowing of the amendment as are just, including charging to the plaintiff the costs of the proceeding to the stage at which the amendment is made.⁵⁰

In none of the other cases in which the court has refused to allow an amendment has the reasoning in this early case been used expressly. However, the court seems to have been influenced in some later decisions by considering whether the defendant would be liable under both the original and the amended declara-

⁴⁸ Note that the federal rule requires the objecting party to show actual prejudice. See text at page 61 *infra*.

⁴⁹ In addition to naming this one possible injury, the court merely added this statement: "There are many other ways, in which the defendant might be injured by such an amendment; and as the court has no possible means of knowing whether the defendant will or will not be injured, if he objects to such amendment of the declaration, the court ought not to allow it, as it is clear in such a case, that the court cannot say in the language of our statute 'substantial justice will be promoted thereby.'" 24 W. Va. 206, 213 (1884).

⁵⁰ The present statute provides that the court may permit a pleading to be amended "upon such terms as it may deem just". W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949). When the *Snyder* case was decided, the statute merely provided that the court might impose such terms upon the plaintiff as to a continuance of the cause, and the payment of the costs of such continuance, as it might deem just. W. Va. Acts c. 71 (1882). The statute then provided and now provides that where a continuance of the cause is granted because of an amendment, the continuance shall be at the cost of the party making the amendment. These differences exist: the former statute contained this provision only as to amendments to cure variances between the pleading and proof; whereas the present statute applies generally to any amendment of a pleading which results in a continuance to a subsequent term. Compare W. VA. CODE c. 56, art. 4, § 28 (Michie, 1949) with W. Va. Acts c. 120 (1882).

tion. There seems to be an inarticulate assumption that the amendment should not be allowed if it would result in a different party being liable for the costs of the proceeding.

In *Creasy v. Thomas*,⁵¹ the plaintiff sued a husband and wife for wrongful death caused by negligent operation by the wife of an automobile belonging to the husband and used by him and other members of the family for family purposes. The liability was apparently asserted against the husband on the family-car doctrine.⁵² The plaintiff was permitted to amend his declaration to allege that the automobile was owned by a third person. Without citing any case to support its conclusion, the court held that the amendment did not introduce a new cause of action, saying:

“. . . The plaintiff would have been entitled to recover under the original declaration, on the ground that the husband was responsible for the wife's tort, whether he or another was the owner of the automobile. . . .”⁵³

Perhaps a more striking illustration of this approach is found in *Dempsey v. Poore*,⁵⁴ wherein the plaintiff was permitted to amend his declaration which had alleged a joint promise by the two defendants to allege that the promise had been made by four persons, the other two of whom had died before the action was brought. No new cause of action was involved, for, *inter alia*: “. . . The death of one joint promisor does not release the surviving promisors.”⁵⁵

In *Kuhn v. Brownfield*,⁵⁶ the plaintiff in an action of assumpsit alleged that the defendant doctor promised to treat his injury in a proper manner and to cure the injury. The declaration was amended to delete the words referring to any express contract to cure the plaintiff, leaving in the declaration an action based on

⁵¹ 106 W. Va. 24, 144 S.E. 563 (1928).

⁵² The family purpose doctrine as to automobiles had been recognized in West Virginia in *Jones v. Cook*, 90 W. Va. 710, 111 S.E. 828 (1922). *Wyant v. Phillips*, 116 W. Va. 207, 179 S.E. 303 (1935), held that the doctrine applied even to impose liability on a wife, who owned the automobile, for the negligent operation thereof by the husband. The West Virginia cases in which the doctrine has been applied are cited in *Buffa v. Baumgartner*, 58 S.E.2d 270 (W. Va. 1950).

⁵³ 106 W. Va. at 26, 144 S.E. at 564. The husband is no longer liable for his wife's tortious acts unless they were done as his agent or by his actual coercion or instigation. W. VA. CODE c. 48, art. 3, § 20 (Michie, 1949). See note 52 *supra* as to the family car doctrine.

⁵⁴ 75 W. Va. 107, 83 S.E. 300 (1914).

⁵⁵ *Id.* at 108, 83 S.E. at 301.

⁵⁶ 34 W. Va. 252, 12 S.E. 519 (1890).

the implied obligation to exercise reasonable skill. It was held that no change in the cause of action had been made, for the defendant was charged with negligence and omission to use care under both the original and amended declarations.⁵⁷

The *Kuhn* case is introduced here to indicate that perhaps the writer has been too much impressed with the idea that in some cases the court has been influenced by consideration of liability for costs. Perhaps the court has been thinking only of a difference in the duty existing on the changed allegations as related to possible defenses the defendant might make. This factor has been important in many cases, which will be discussed, but it should be noted that in the *Kuhn* case there was a change from absolute liability to one for negligence.⁵⁸ The writer believes therefore that the above cases indicate a greater concern in a change in the liability for costs than in the need for different evidence to establish a defense, remembering that the latter may be directly related to the former.

That both factors may be combined in the same case is illustrated by the *Hayes* case,⁵⁹ wherein the plaintiff sought to amend his declaration charging common law negligence to one asserting statutory liability against the municipal corporation. The change would more likely have made the defendant liable,⁶⁰ but in addition different evidence would have been necessary to establish a defense.

The refusal to allow an amendment because there may be a difference as to which party is held liable for costs has been criticized.⁶¹ Should an amendment be refused because the defendant may need different evidence to establish his defense? Any amendment may involve surprise to the defendant, and it may be unfair

⁵⁷ This is a paraphrase of the court's statement that the gist of the action in the declaration, both before and after the amendment, was the defendant's "negligence and omission to exercise skill, judgment and care." *Id.* at 257, 12 S.E. at 521.

⁵⁸ The court seems to have recognized this difference in the duty alleged before and after amendment, but said that the question was not what duties the defendant assumed but whether an act or transaction different from that specified in the declaration had been alleged in the amendment. *Ibid.*

⁵⁹ *Supra* note 38.

⁶⁰ The court had held on the facts originally alleged that the defendant town was not liable for the acts there being performed in carrying out a governmental function. *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E.2d 726 (1944).

⁶¹ See text at page 39 *supra*.

to require him to submit his case without additional time for preparation, but this is true whether or not the amendment involves a change in the cause of action.⁶² The question of his right to a continuance should be a separate question, although there are dicta in West Virginia cases that the defendant is entitled to a continuance whenever any amendment is allowed.⁶³ That dicta has been rejected, and the defendant is now required to show good cause for a continuance after an amendment is allowed.⁶⁴ However, the effect of the West Virginia rule preventing a change in the cause of action by amendment is to separate certain cases in which the defendant need not show any reason for a continuance. If a new cause would be introduced by the amendment, the defendant by merely objecting to the change obtains a continuance in effect by requiring the plaintiff to start a new action to assert the claim. Do the cases indicate any line of distinction between these classes of cases which can be justified on the basis of fairness to the defendant? In attempting to answer this question any inconsistency between the treatment given in different cases will be noted.

⁶² For example, in the following cases the court held that the amendment did not involve a change in the cause of action, yet the defendant might well need additional time to prepare for his defense. *Morrison v. Judy*, 123 W. Va. 200, 13 S.E.2d 751 (1941) (action changed from one on a renewal note to one on the original note); *Bartley v. Western Maryland Ry.*, 81 W. Va. 795, 95 S.E. 443 (1918) (action based on failure to stop the train at a station changed to one based on a sudden starting of the train after it had stopped); *Staats v. Georgia Home Ins. Co.*, 57 W. Va. 571, 50 S.E. 815 (1905) (action on one insurance policy changed to action on another policy); *Clarke v. Ohio River R.R.*, 39 W. Va. 732, 20 S.E. 696 (1894) (action for failure to build certain structures changed to one for failure to build those structures at different places).

⁶³ ". . . the circuit courts . . . may in their discretion permit the pleadings to be amended . . . ; but in every such case if the opposite party requests it the jury should be discharged, the opposite party allowed to amend his pleadings or to plead anew to the pleadings so amended, and the cause continued." *Travis v. Peabody Ins. Co.*, 28 W. Va. 583, 595 (1886). Italics supplied. See also dictum in point 9 of syllabus to *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S.E. 258 (1907).

⁶⁴ The dictum was expressly rejected in *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S.E. 1098 (1911), and impliedly rejected, without citation of authority, in *Adams v. Adams*, 79 W. Va. 546, 92 S.E. 463 (1917). That the defendant must show that a continuance is necessary to enable him to make his defense was affirmed in *Pancake v. Hite*, 105 W. Va. 366, 142 S.E. 518 (1928). The statute expressly provides that the trial of an action at law shall not be continued to another term because of an amendment unless the defendant satisfies the court that because of the amendment he cannot safely proceed with the trial without the continuance. In addition, it provides that wherever a substantial amendment of any pleading is made, the court shall enter such order as to continuance as shall appear "fair and just". W. VA. CODE c. 56, art. 4, § 28 (Michie, 1949).

G. *Application of the Rule to Subject Matter*

Several cases already mentioned offer an interesting comparison in the application of the rule. In the *Findley* case⁶⁵ the amendment was not allowed when the plaintiff sought thereby to recover under the Federal Employers' Liability Act rather than under the state statute. Under either declaration the plaintiff was seeking the same relief, namely, damages for a death by the wrongful act of the defendant, and the defendant's duty under each was the same, namely, to refrain from wrongful or negligent acts causing injury or death to the employee.⁶⁶ The differences stressed by the court were the origin of the duties and the variance in the extent of obligation involved in each. Yet in the *Kuhn* case⁶⁷ the court permitted an amendment which changed the declaration from one on an express contract to one on an implied contract, the former imposing absolute liability and the latter liability only for negligence. Were not the duties of different origin and the extent of the obligation different? Would not the following test, applied in the *Kuhn* case, have produced a different result if applied in the *Findley* case?

"Here the question is not exactly how the surgeon was engaged, or what duties he assumed, but it is whether the wrongful act charged in the declaration, as amended, as the cause of the plaintiff's damage, is a different act from that specified in the declaration before amended. . . . Whether he engaged by special contract to cure or by implied contract to use ordinary skill, the wrongful act charged against him . . . would be a violation both of such special and implied undertakings. . . ."⁶⁸

Clearly there was no question of the defendant's being surprised by the amendment in the *Findley* case; contrariwise, it was the evidence which was introduced by the defendant which surprised the plaintiff and made the amendment necessary. Assume,

⁶⁵ *Supra* note 36.

⁶⁶ The similarity was recognized by the court. It is stated this way in the opinion: "The state statute giving a right of action for damages for death by wrongful act and the Federal Employers' Liability Act, giving a right of action for the same thing, each impliedly imposes duty upon the employer, to refrain from wrongful or negligent acts causing injury or death to the employee. This duty is, in a sense, the same under each act. It is the duty to exercise care for the protection of the servant from injury and death, while engaged in the performance of his work." 76 W. Va. 747, 752, 87 S.E. 198, 201.

⁶⁷ *Supra* note 56.

⁶⁸ 34 W. Va. 252, 257, 12 S.E. 519, 521.

however, that the amendment is the type which *might* surprise the defendant and therefore ought not to be allowed, accepting for this purpose the reasoning of the court in the *Snyder* case, which has already been criticized.⁶⁹ Is that the basis on which the amendment was not allowed in the *Findley* case? If so, the case stands in contrast with *Lawson v. Williamson Coal & Coke Co.*⁷⁰ Here the plaintiff's declaration contained common counts in assumpsit, but none of those used suggested or indicated that any evidence to sustain a claim for rent or use and occupancy of land would be introduced.⁷¹ Nevertheless, after the introduction of such evidence and the submission of the case, the plaintiff was permitted, over the objection of the defendant, to amend his declaration to add a special count stating a cause of action on a contract of lease. The court, not even considering whether this amounted to a change in the cause of action, merely relied on an earlier case which had allowed an amendment. In the *Mankin* case,⁷² decided soon thereafter, the court took the position that a change in the cause of action would be involved if the plaintiff amended his declaration to insert a special count on an additional claim that would not have been provable under any of the common counts in the original declaration. The writer is unable to distinguish the cases,⁷³ yet in the one the amendment is permitted but is not allowed in the other. If possible surprise to the defendant is the basis of the decision in the *Findley* case, the court has not consistently adhered to this test.

Perhaps the *Findley* case rests to a large degree on the idea that the plaintiff should not be permitted to change the theory of law on which he seeks to recover. In the *Hayes* case,⁷⁴ recently decided, the court relied heavily on this being the basis of the *Findley* decision. In both cases the court cited in support of its

⁶⁹ See text at page 39 *supra*.

⁷⁰ 61 W. Va. 669, 57 S.E. 258 (1907).

⁷¹ That the defendant might have been surprised seems to have been fully considered by the court, for it is expressly stated: "None of the common counts suggested or indicated that any evidence to sustain a claim for rent or use and occupancy of land would be introduced . . . The common counts set forth in this declaration did not indicate that any evidence of the kind adduced would be offered. On the contrary, they stated facts which indicated reliance upon entirely different kinds of evidence." 61 W. Va. 669, 680, 57 S.E. 258, 262.

⁷² *Supra* note 20.

⁷³ It is true that in the *Lawson* case the original declaration had contained a special count on the contract, but a demurrer thereto had been sustained. When the case was set for trial only the common counts were available.

⁷⁴ *Supra* note 38.

position the now discredited case of *Union Pacific Ry. v. Wylor*,⁷⁵ which refused to permit an amendment to change the cause of action "from law to law". The *Wylor* case involved changing the basis of the claim for damages from the common law to a state statute, and in this respect is parallel with the *Hayes* case.

Aside from the question whether a change "from law to law" should be deemed a change in the cause of action even under common law pleading,⁷⁶ which is a system of pleading ultimate facts and not law, the writer has had some difficulty finding any West Virginia decision inconsistent in this respect with the *Hayes*

⁷⁵ 158 U.S. 285 (1895). The case most often cited to show that the Supreme Court has limited and perhaps in effect overruled the *Wylor* case is *Missouri, K. & T. Ry. v. Wulf*, 226 U.S. 570 (1913). In the *Findley* case, the West Virginia court attempted to reconcile the *Wulf* case with the *Wylor* case by saying that the former had involved a petition setting forth facts which brought the case within the federal statute and was amended only as to the capacity in which the plaintiff sued. The court seems to have ignored the allegation of the original petition in the *Wulf* case, "That by virtue of the laws of the State of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death." *Id.* at 572. An amendment to assert that the defendant was liable under the Acts of Congress of the United States was held not to change the cause of action on the basis that the court was presumed to be cognizant of the enactment of the federal act and to know that on the facts alleged the state law had been superseded by the federal act. The attempt to distinguish the *Wylor* case on this basis has been criticized as meaning "little more than this: if the first legal theory is wholly fallacious then the plaintiff may change to another, while if he is not so fortunate as to have been terribly wrong at first he may not change." 3 MOORE, FEDERAL PRACTICE 818 (2d ed. 1948). In the *Wulf* case the court stressed that the amendment did not set up any different state of facts; but in the *Wylor* case the court had taken the position that such would only prevent a change in the cause of action from "fact to fact" and would not protect against a change from "law to law". Among the later Supreme Court decisions discrediting the *Wylor* case are *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938) and *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933). See also the discussion of the *Wylor* case in CLARK, CODE PLEADING 719 and in 3 MOORE, FEDERAL PRACTICE 818.

⁷⁶ Some support for the rule might be found under the common law system which generally regarded a change even in the form of action as a change in the cause of action. See text at page 31 *supra*. Such changes were regarded as attempts to recover under a different theory of law. Judge Clark, in referring to the rule that an amendment which changed the form of action was not allowed, says, "The test often stated was: Did the proposed amendment change the action 'from law to law'?" CLARK, CODE PLEADING 717. See also HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING § 305 (1897).

However, the West Virginia statute expressly provides that a change in the form of action shall not prevent the allowance of an amendment. See statute quoted in the text at page 28 *supra*. Implicit within this provision would seem to be the idea that an action should not be defeated where the amendment offered would not change any of the material facts of the claim but merely the legal theory upon which recovery is sought.

and *Findley* cases,⁷⁷ unless there could be included those cases in which the plaintiff has alleged an ultimate fact improperly through misapplication of the law involved. To the writer the degree of difference between the two classes of cases does not seem great since either involves the application of different law by an amendment to permit recovery. These cases will be discussed anon.⁷⁸

Only one West Virginia case casts some doubt, and that is very small, on the inability of the plaintiff to shift from common law to statutory liability, or vice versa, or from liability under one statute to liability under another. That case is *Twyman v. Monongahela West Penn Public Service Co.*,⁷⁹ which did not really involve a shift of the nature here discussed, but the plaintiff was permitted to amend his declaration so that a municipal ordinance might be introduced in evidence. The parties contended that the ordinance had some relation to the question of liability in the case. Presumably the plaintiff wanted to prove negligence against the defendant by showing a violation of the ordinance as the proximate cause of injury.⁸⁰ The court merely says that the trial court has a wide discretion in permitting amendments under the statute.

Several West Virginia cases have been liberal in allowing amendments where the plaintiff has alleged improperly the ultimate facts in his declaration through a misapplication of the law involved. The plaintiff was permitted to amend his declaration to charge that the note sued on was the joint note of the defendants instead of joint and several as charged in the original declaration.⁸¹ The court refused to follow a federal case which treated such change as one in the cause of action.⁸² In another case the

⁷⁷ In several cases where amendments have been allowed, the court has been careful to point out that there was no change from "law to law". *E.g.*, *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 371, 99 S.E. 549, 550 (1919); *Bartley v. Western Maryland Ry.*, 81 W. Va. 795, 797, 95 S.E. 443, 444 (1918). Compare these cases with *Buffa v. Baumgartner*, 58 S.E.2d 270 (W. Va. 1950), in which an amendment was permitted that would allow recovery even though the automobile causing the death was operated by a person other than the one originally alleged. Here, as in the *Findley* case, the plaintiff was surprised when the defendant introduced evidence that a fact was different from that originally alleged. But, the amendment was not allowed in the *Findley* case.

⁷⁸ The cases are discussed in the second following paragraph in the text.

⁷⁹ 118 W. Va. 330, 191 S.E. 541 (1937).

⁸⁰ *Jones v. Virginian Ry.*, 115 W. Va. 665, 177 S.E. 621 (1934).

⁸¹ *National Bank of Weston v. Lynch*, 69 W. Va. 333, 71 S.E. 389 (1911).

⁸² The court does stress the fact that in the federal case the amendment was offered during the trial, whereas the amendment was here offered before trial. However, the court then points out that the West Virginia statute authorizes such amendments even in the midst of trial.

plaintiff was permitted to change the assertion that the defendant was liable on the note as an endorser to charge that he was liable as a co-obligor.⁸³ Without giving a reason, the court merely stated that there was no change in the cause of action.

Another case also stands in sharp contrast with the *Findley* and *Hayes* cases. In both of these cases the plaintiff was seeking to recover the same thing in the original and amended declarations, namely, damages for the same injury, whether under one theory of law or another, yet the court was not influenced by this consideration. However, in *Morrison v. Judy*,⁸⁴ a recent case, the court permitted the plaintiff to change his action from one on a renewal note to one based on the original note, saying,

“. . . we are of the opinion that the identity of the cause of action has been clearly maintained throughout this litigation. What the bank's receiver sought in the first instance was to recover the money loaned. . . . No new cause of action was set up. There was only an effort to adjust the pleading to the evidence which could be produced bearing upon the liability of the defendant. . . .”⁸⁵

Essentially the same might have been said of the amendments which were not permitted in the *Findley* and *Hayes* cases. This case also permits an amendment to insert facts which could have been the basis of another action, which would seem improper by other cases.⁸⁶

An equally pertinent statement of the Supreme Court of the United States, made prior to the effective date of the Federal Rules, might be used in criticism of the *Findley* and *Hayes* cases. Mr. Justice Black, writing the opinion, said:⁸⁷

“Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. . . . Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant.”

⁸³ *Brown v. Cook*, 77 W. Va. 356, 87 S.E. 454 (1915).

⁸⁴ 123 W. Va. 200, 13 S.E.2d 751 (1941). To the same effect see *Ritchie County Bank v. Richie*, 62 W. Va. 457, 461, 59 S.E. 181, 183 (1907).

⁸⁵ 123 W. Va. 200, 204, 13 S.E.2d 751, 753. Compare the statutory provision which permits the plaintiff to sue on the original cause of action and then, in answer to a plea of the statute of limitations, by replication to state a promise which annulled the prior effect of the statute of limitations. W. VA. CODE c. 55, art. 2, § 8 (*Michie*, 1949).

⁸⁶ See note 29 *supra*.

⁸⁷ *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200 (1938).

Inconsistency also appears in cases dealing with the assertion of additional claims arising out of the same transaction. In the *Snyder* case⁸⁸ the court had refused to allow the addition of a claim for taking and carrying away personal property where the declaration originally included a claim only for the personal injury done. However, in *Mulway v. Hanes*,⁸⁹ the original declaration contained only one count which was for the loss of services of the plaintiff's wife alleged to be due to fright caused by the defendant in a personal combat between the plaintiff and him in her presence. The lower court refused to permit the plaintiff to amend to add a count averring that in the encounter the defendant struck the plaintiff's wife thereby causing the injury. The Supreme Court of Appeals reversed the ruling as *manifestly* erroneous. The court stated that both counts based the right of recovery upon injuries "arising out of the same transaction", the amendment presenting only a new element of the same "general cause of action". The court went further to state generally that the plaintiff could, as grounds of recovery, aver and prove any fright or physical injury traceable to the assault. Under the West Virginia procedure separate counts are treated as distinct causes of action whether inserted to meet variable phases of the evidence or to recover for different injuries.⁹⁰ Accordingly, these cases reach inconsistent results.⁹¹

A later case seems to support the *Mulway* case rather than the *Snyder* case, and it clearly involves the insertion of an additional claim. In *Elkhorn Sand & Supply Co. v. Algonquin Coal Co.*,⁹² a notice of motion for judgment alleged that money was due and owing to the plaintiff for sand previously sold and delivered to the defendant. During the trial it appeared that the plaintiff's claim consisted of the price of three cars of sand and a much larger item

⁸⁸ *Supra* note 19. To the same effect see *Mankin v. Jones*, 68 W. Va. 442, 69 S.E. 981 (1910).

⁸⁹ 76 W. Va. 721, 86 S.E. 758 (1915).

⁹⁰ BURKS, PLEADING & PRACTICE 895; SHIPMAN, COMMON LAW PLEADING § 79.

⁹¹ This distinction might be drawn: the *Mulway* case seems to involve an amendment to meet a possible variance in the proof, whereas the *Snyder* case seems to have involved an amendment to assert an additional claim. The court does not make this distinction, and it would be difficult before trial to determine whether the amendment was desired for one purpose or the other. The court seems never to have drawn a distinction between what will amount to a change in the cause of action before trial as contrasted with a change in the cause at trial. The cases deciding what amounts to a change in the cause are cited interchangeably whether the question involves an amendment at one time or the other. See also the discussion of the *Elkhorn Sand & Supply Co.* case which involved the assertion of an additional claim by amendment. See text above.

⁹² 103 W. Va. 110, 136 S.E. 783 (1927).

for prepaid freight on the cars of sand. The plaintiff was permitted to amend his notice to include the freight item, since, quoting the court:

"The amendment did not introduce any new cause of action, but only items not mentioned in the notice, which were closely connected with the item stated therein. . . . If the defendant conceived itself to be aggrieved or prejudiced by the amendment, it could have moved for a continuance, as provided by the statute. . . ." ⁹³

The court does not purport to apply a different rule where an amendment is made in a notice of motion for judgment rather than in an action at law, and the statute provides that in neither type of proceeding shall the cause of action be changed.⁹⁴ The court's approach in these two later cases seems to be in the right direction, as will be discussed presently. They are used here only for the purpose of contrast with other decisions which have never been questioned by the court and which continue to serve as precedents for narrow limits on amendments in the plaintiff's pleading.

Additional claims may be asserted also by amendments if the concept of a cause of action is broadened. Those cases have been discussed which held that an amendment could not be made if the new facts could have been the basis of another action.⁹⁵ The converse of this principle has been used to justify allowing an amend-

⁹³ *Id.* at 113, 136 S.E. at 784. Compare also *Shires v. Boggess*, 72 W. Va. 109, 77 S.E. 542 (1913), with *Mankin v. Jones*, 68 W. Va. 422, 69 S.E. 981 (1910). In the *Shires* case the plaintiff was permitted to amend her declaration by inserting therein in two blank spaces the figures "\$50.00" covering amounts expended by her for different purposes as a result of the defendant's alleged assault. The court did not discuss whether there was a change in the cause of action, being satisfied that substantial justice would be promoted by the amendment and having found one case from another jurisdiction which permitted a declaration to be amended by filling blanks. In the *Mankin* case, in allowing an amendment to add a special count applicable to an item provable under the original common counts, the court held that this was not a departure from the original cause if the amount of damages claimed in both the original and amended declaration remained the same. Compare, however, with the *Mankin* case, *Larzo v. Swift & Co.*, 129 W. Va. 436, 442, 40 S.E.2d 811, 814 (1946), where the court says that the amendment allowed only "added elements of damages". Increasing the damages by amendment does not change the cause of action. *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S.E. 112 (1917).

⁹⁴ In *Morrison v. Judy*, 123 W. Va. 200, 13 S.E.2d 751 (1941), the court held that W. VA. CODE c. 56, art. 4, § 24 (quoted in part in the text at page 28 *supra*), permits an amendment to a notice of motion for judgment as long as the cause of action set out in the original notice is not changed. It may be noticed in this opinion that the court relies upon cases involving actions at law to determine whether the cause of action was changed.

⁹⁵ See text at page 33 *supra*.

ment. In *Clarke v. Ohio River R.R.*,⁹⁶ a landowner sued to recover damages for failure of the defendant to build fences, cattle guards, and farm crossings on land which it had condemned. An amendment in the declaration was permitted to charge failure to build these structures at points on the land different from those specified in the original declaration. The court allowed the amendment on the basis that any of these omissions would be breaches of the same duty and only one cause of action would be involved, saying,

“. . . we consider the failure to comply with its duty by the company . . . as the cause of action, and not the failure as to each crossing separately and distinctly. I think he is bound to amend, or else ever lose damages for failures not included in the declaration; for a person cannot split one cause of action into several suits. . . .”⁹⁷

If an amendment may be made to add claims which would otherwise be lost because of the rule against “splitting a cause of action”, the court need only broaden its concept of the cause of action to permit an amendment which would not be allowed under those cases which do not permit an amendment to insert that which might be the basis of another action. This is precisely what the court did in the recent case of *Larzo v. Swift & Co.*⁹⁸ The plaintiff sued to recover damages for personal injuries sustained in an automobile collision. She was permitted to amend her declaration to add a claim for damages to her automobile. An earlier case had held that on the facts in this case claims for personal injuries and for property damage *might* be joined,⁹⁹ but in this case the court went further to support the amendment, stating:

“. . . A plaintiff who has sustained personal injuries and property damage in an automobile collision has but a single cause of action and the elements of damages, consisting of injury to the person and property of plaintiff, *must* be joined in the same action. . . . The cause of action is the negligent act and not the resulting damages. . . .”¹⁰⁰

The court could not rely on the earlier case permitting joinder of such claims, for merely being joinable would not prevent the

⁹⁶ 39 W. Va. 732, 20 S.E. 696 (1894).

⁹⁷ *Id.* at 738, 20 S.E. at 698.

⁹⁸ 129 W. Va. 436, 40 S.E.2d 811 (1946), 51 W. Va. L.Q. 71 (1948).

⁹⁹ *Thalman v. Schultze*, 111 W. Va. 64, 160 S.E. 303 (1931). For a more detailed discussion of joinder of causes of action, see Lugar, *supra* note 1.

¹⁰⁰ 129 W. Va. 436, 442, 40 S.E.2d 811, 814. Italics supplied. To support this conclusion the court cited two cases from other jurisdictions, making reference to one West Virginia case, the *Snyder* case, as “touching the liberality of amendment of a declaration.” For a criticism of the *Snyder* case, see the text at page 38 *supra*.

added claim from being a new cause of action.¹⁰¹ Only by holding that the claims or "elements of damages" *must* be joined could the amendment be allowed without overruling other cases.

H. Application of the Rule to Parties

Aside from the question of amendments relating to the subject matter of the action, courts have been faced with the problem of allowing amendments to change the parties to the action. This problem was previously raised in the discussion of misjoinder and nonjoinder of parties. It was there noted that parties may be added or dropped by amendment to cure a nonjoinder or misjoinder of parties plaintiff or defendant.¹⁰² However, the West Virginia court has refused to sanction the substitution of parties under the statute permitting amendments to cure misjoinder and nonjoinder of parties.¹⁰³ The question arises here whether the parties may be changed under the provisions of other statutes. One West Virginia statute permits the correct name to be inserted in the declaration and summons by an amendment in any case where a misnomer appears.¹⁰⁴ The court has applied that statute liberally, even allowing under it what might appear to be the insertion of a party by amendment when there originally was no party plaintiff to the action.¹⁰⁵ However, the court has not purported to apply the statute to permit any change in the cause of action. As the court said in a case involving misnomer of the defendant:

" . . . The cause of action is the same in both pleadings. . . . This is not a case where by amendment a different party has been substituted for the defendant actually sued; but one in which the name of the party actually sued and served with process has been corrected. . . ."¹⁰⁶

One case not involving misnomer merits consideration. In that case the change introduced a cause of action legally and technically different from the legal import of the original declaration; but since the pleader did not *intend* the legal import of the original declaration to be different from that of the amended declaration,

¹⁰¹ See text at page 33 *supra*.

¹⁰² See Lugar, *supra*, note 1.

¹⁰³ Crook v. Ferguson, 123 W. Va. 490, 16 S.E.2d 620 (1941).

¹⁰⁴ W. VA. CODE c. 56, art. 4, § 29 (Michie, 1949).

¹⁰⁵ Kingman Mills v. Furner, 89 W. Va. 511, 109 S.E. 600 (1921), 28 W. Va. L.Q. 241 (1922).

¹⁰⁶ Duty v. Chesapeake & Ohio Ry., 70 W. Va. 14, 19, 73 S.E. 331, 334 (1911). See also point 1 of the syllabus by the court to Corrick v. Western Maryland Ry., 79 W. Va. 592, 91 S.E. 458 (1917).

the amendment was allowed.¹⁰⁷ The original declaration contained allegations of personal promises by the defendant, whereas the proof showed a claim against the estate represented by the defendant as administrator; but the summons and declaration both described the defendant as administrator, and the account filed with the declaration containing the common counts showed that the services for which the action was brought had been rendered to the defendant's precedent. Here the court merely permitted the cause of action to be asserted against the defendant in a different form from that asserted in the first instance,¹⁰⁸ and there is no indication in the case that the pleading could have been amended to substitute a different party. For the reason indicated in the case refusing to allow substitution of parties by treating it as a case of misjoinder,¹⁰⁹ the court would probably hold that any amendment to substitute a different party amounts to a change in the cause of action and as such is not permitted.¹¹⁰

I. Limitations under Code Pleading¹¹¹

Free use of amendments has been hindered even in code states by similar limitations placed on the right to amend. In some states

¹⁰⁷ *Hanson v. Blake*, 63 W. Va. 560, 60 S.E. 589 (1908).

¹⁰⁸ Compare the West Virginia court's attempt to distinguish the *Wulf* case from the *Wyler* case in *Findley v. Coal & Coke Ry.*, 76 W. Va. 747, 754, 87 S.E. 198, 201 (1915), where the court seems to agree with the proposition that an amendment which merely changes the capacity in which the plaintiff sues does not change the cause of action. However, the view that a change in pleading from "law to law" results in a change in the cause of action would logically lead to the conclusion that a change in the capacity in which a party sues or is sued results in a change in the cause of action. *N. & G. Taylor Co. v. Anderson*, 14 F.2d 353 (7th Cir. 1926). For criticism of view that a change in the legal theory results in a change in the cause, see text at pages 43-47 *supra*.

¹⁰⁹ "Where suit or action is brought by a party having no interest in the subject matter, it is of no avail for any purpose." *Crook v. Ferguson*, 123 W. Va. 490, 491, 16 S.E.2d 620 (1941). It would seem to follow that any amendment to show that another party has an interest in the subject matter would be treated by the court as a new cause of action. See note 110 *infra*.

¹¹⁰ Other courts have taken this position. *Hallett v. Larcom*, 5 Idaho 492, 51 Pac. 108 (1897) (substituting another plaintiff); *Third Nat. Bank & Trust Co. v. White*, 58 F.2d 411 (D. Mass. 1932) (substituting another defendant). Although the federal rule on amendments will be discussed presently in the text, it should be noted here that the trend under the federal rule is to permit amendments involving a change in the capacity of the parties or the substitution of different parties. 3 MOORE, FEDERAL PRACTICE 832. See also CLARK, CODE PLEADING 711 n. 33.

¹¹¹ Discussion here refers to the earlier rules of code pleading and not to those codes which now contain provisions similar to those in the Federal Rules.

the limitations have been imposed by the courts, apparently without regard to more liberal statutory provisions,¹¹² and in other states the statutes have expressed a limitation.¹¹³ Often the statutory limitation is that an amendment shall not change substantially the claim or defense.¹¹⁴ However, as a result of the influence of the formulary system of the common law, the courts have treated this limitation as meaning that there shall be no change in the "cause of action."¹¹⁵ The statutes containing the restriction seem to impose the limitation only on those amendments which conform the pleadings to the proof; and where the courts have imposed the limitation without the aid of a statutory provision, they have shown a tendency to restrict the amendment in this way only at that stage of the proceeding, that is, at and after the trial. However, other courts have imposed the limitation whenever the amendment is offered.¹¹⁶

The West Virginia practice therefore has not been very different from that which has existed in code states, the court having applied the rule whenever the amendment was offered. One difference of interest is that the West Virginia court has shown no

¹¹² CLARK, CODE PLEADING 716. Note the liberal language in the statutes quoted in note 113 *infra*.

¹¹³ Statutes in the code states have one or the other of the following provisions or slight variations thereof:

[1] "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

[2] "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." CLARK, CODE PLEADING 710. Judge Clark has set forth in the footnotes to this quotation the jurisdictions having each type and the citation to the statute of each state. The states having each type are approximately equally divided.

¹¹⁴ See the second paragraph of the quotation in note 113 *supra*. Amendments to change defenses are discussed in the next section of the text.

¹¹⁵ CLARK, CODE PLEADING 717.

¹¹⁶ *Id.* at 716. The writer believes that in the eleventh line on the page cited the words "before trial" were inadvertently used instead of "at and after trial." See also PHILLIPS, CODE PLEADING §§ 475, 477 (2d ed. 1932).

tendency to be less liberal in allowing amendments offered at the trial stage than if offered prior to the trial.¹¹⁷

J. *Liberal Treatment of Defendant*

The above summary concerning code jurisdictions indicates that in some states the defendant may not be permitted to change substantially the nature of his defense by an amendment. However, the courts have generally allowed the defendant greater liberality than they have the plaintiff, since the plaintiff can sue again if he has "another cause of action" whereas the defendant must assert any defense that he has in the action brought against him.¹¹⁸ The writer has been unable to find any authority on this point concerning defenses *at law* in West Virginia, except several early Virginia cases. The breadth of the general issue in most actions at law makes an amendment unnecessary even though the defendant in fact changes his originally intended defense after the plaintiff has introduced his evidence.¹¹⁹ In any event, the early Virginia cases indicate that even where an amendment in the pleading is necessary, the defendant may set up a different defense at law, even after issue has been joined on another plea, if it is an honest and conscientious defense and the defendant has not been

¹¹⁷ In code states the courts are much less liberal in permitting amendments after a case has reached the trial stage. CLARK, CODE PLEADING § 117. In six out of the seven cases found in which the question arose at the trial stage, the West Virginia court allowed the amendment. The only test applied is whether the amendment offered changed the "cause of action", and whatever the meaning of that test may be, it seems to have the same meaning whether applied before or at the trial. Of the seven cases mentioned, the amendments were allowed in *Elkhorn Sand & Supply Co. v. Algonquin Coal Co.*, 103 W. Va. 110, 136 S.E. 783 (1927); *National Bank of Weston v. Lynch*, 69 W. Va. 333, 71 S.E. 389 (1911); *Hanson v. Blake*, 63 W. Va. 560, 60 S.E. 589 (1908); *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S.E. 258 (1907); *Staats v. Georgia Home Ins. Co.*, 57 W. Va. 571, 50 S.E. 815 (1905); and *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S.E. 519 (1890); and was not allowed in *Findley v. Coal & Coke Ry.*, 76 W. Va. 747, 87 S.E. 198 (1915). See also *Buffa v. Baumgartner*, 58 S.E.2d 270 (W.Va. 1950) where the amendment was allowed after presentation of defendant's evidence.

¹¹⁸ *Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261 (1908); CLARK, CODE PLEADING 723.

¹¹⁹ The question here involved may become more important if the tendency of the West Virginia court to curtail the scope of the general issue continues. Professor Carlin has demonstrated this tendency. Carlin, *Recent Developments in Local Procedure*, 47 W. VA. L.Q. 165 (1941). With reference to the requirement of special pleading as to the defenses discussed by Professor Carlin, the reader's attention is invited to the similarity of Federal Rule 8(c) which provides that any matter constituting an avoidance or affirmative defense must be affirmatively pleaded, specifically naming nineteen defenses which must be thus pleaded. Fed. Rules Civ. Proc., 28 U.S.C.A. (1950).

guilty of laches.¹²⁰ A similar liberal treatment accorded to the defendant in equity by the West Virginia court may be cited by analogy¹²¹ since the plaintiff in equity is not permitted to change his cause of action by amendment.¹²²

This reference to the freedom allowed the defendant in amending his pleading is not offered as a complaint against that procedure. Clearly the defendant should not be deprived of his defense if he has acted in good faith and has done no injury to the other party which the court cannot correct by the conditions imposed on allowing the amendment. Consider, however, the time, expense, and trouble imposed on the plaintiff by a rule which does not permit him the same liberal treatment. In some instances, the plaintiff may be as effectively deprived of his right to recover as the

¹²⁰ *Martin v. Anderson*, 27 Va. (6 Rand.) 19 (1827); *Tomlinson's Adm'r v. How's Adm'r*, 21 Va. (Gilm.) 1 (1820). Even code states were not inclined to allow amendments which asserted so-called unconscionable defenses, such as the statute of limitations or usury, but there is a tendency to recede from this attitude, especially where there has been accidental default or where the defense is used as an instrument of justice. PHILLIPS, CODE PLEADING 565. Unexcused delay in the offering of an amendment, resulting in expense to the other party, might be held to justify imposing that expense as a condition on which the amendment would be allowed. See *Furlow v. Corinth State Bank*, 84 F.2d 473 (5th Cir. 1936).

¹²¹ Limitations on the defendant's right to amend his answer are discussed in *McKown v. Silver*, 99 W. Va. 78, 128 S.E. 134 (1925); *State v. Central Pocahontas Coal Co.*, 83 W. Va. 230, 98 S.E. 214 (1919); *Foutty v. Poar*, 35 W. Va. 70, 12 S.E. 1096 (1891). Even within the limitations imposed, the court has been lenient in their application. In *State v. Central Pocahontas Coal Co.*, *supra*, the court took the position that, even though the defendant could have known the facts in its amendment at the time the original answer was filed if the land books had been examined, the amendment was properly allowed since the matters therein should be before the court for a fair determination of the controversy.

Even the statute indicates that the defendant is to be accorded a more liberal treatment as to amendments than is to be allowed the plaintiff. Aside from the limitation that an amendment shall not be allowed which changes the cause of action, the statute limits the objective to enabling the plaintiff to sustain the action or suit "for the cause for which it was intended to be brought" but seems to emphasize that the defendant should be allowed to amend to enable him "to make full and complete defense." W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949).

¹²² *E.g.*, *Stealey v. Lyons*, 128 W. Va. 686, 37 S.E.2d 569 (1946). In applying the rule the court has accepted a more liberal concept of "the cause of action". For example, in *Doonan v. Glynn*, 26 W. Va. 225 (1885), the plaintiff filed a bill to enforce a vendor's lien retained on the face of the deed made by the plaintiff to the defendant, but the proof showed that no deed had ever been made to the defendant, the plaintiff having retained the title as security for payment. *Held*, that the bill should not have been dismissed but that the plaintiff should be allowed to amend the bill to conform with the proof, "in as much as the proofs showed that he had a cause of action of a similar nature to that alleged in his bill." Italics supplied. *Id.* at 228.

defendant would be of his defense. That the rule has had this effect on the plaintiff has been recognized by the West Virginia court.¹²³ No attempt here will be made to state all of the circumstances which may produce this result, but the obvious case of inability to serve the defendant again with process may be cited.

K. Equal Rights for the Plaintiff

The rule followed in West Virginia and in many code jurisdictions produces hardship on the plaintiff without considering whether to allow the amendment would be unjust to the defendant. The decisions are supported on the basis of a rule designed generally to prevent any injustice to the defendant, but without purporting to consider whether the amendment will have that effect in the case before the court. The harsh results which can flow from the application of the rule have been shown in the West Virginia cases. Where the court does allow amendments to prevent hardships, inconsistencies in the application of the rule appear.¹²⁴ That the rule has any exactness becomes a mere delusion.¹²⁵ As long as the limitation is contained in the West Virginia rule, the court will be hindered by the existing precedents in its attempt to allow amendments more freely. Even a new concept of a cause of action has been introduced to avoid the restriction.¹²⁶ While no objection is voiced to extensions in the scope of a cause of action, it appears that the tail may be made to wag the dog. It might be easier to reframe the rules concerning amendments and avoid the additional problems involved in broadening the "cause of action." In either event, the action ought to be so liberal that amendments may be allowed

¹²³ "On writ of error here on behalf of defendant, . . . we held that this amendment introduced a new and different cause of action, struck out the amendment, and remanded the case for a new trial on the original declaration. This in fact amounted to a denial of any relief to plaintiff; . . ." *Shaffer v. Western Maryland Ry.*, 93 W. Va. 300, 304, 116 S.E. 747, 749 (1923).

¹²⁴ See text at pages 43-51 *supra*.

¹²⁵ A comparable situation existed in the federal courts in actions at law prior to the adoption of the new federal rules. There was a "verbal requirement that the cause of action remain unaltered", but the courts appear to have adopted a rather broad concept of a cause of action. Cases in which amendments were allowed despite the restriction are summarized in § MOORE, FEDERAL PRACTICE 815-816. Professor Moore states that an important factor in the allowance of such amendments was the lack of prejudice to the opposing party, as demonstrated by his failure to object to the evidence as it was introduced, or by his knowledge of the true facts, or by the fact that the original pleading described the occurrence sufficiently well to put him on notice that he should be prepared to meet any claim involving it. *Id.* at 816.

¹²⁶ See text at page 50 *supra*.

in those cases where a restrictive view of a cause of action now exists, including those cases which view a change in the legal theory of recovery as a change in the cause of action.

The trend today in other jurisdictions is to allow amendments freely to permit a final adjudication on the merits if no actual prejudice to the other party is shown, irrespective of whether the amendment would formerly have been deemed a change in the cause of action.¹²⁷ Two West Virginia statutes have this effect. One permits misjoinder or nonjoinder of parties, plaintiff or defendant, to be corrected by amendment.¹²⁸ The other permits an amendment to obviate an objection that a suit or action was not brought on the right side of the court; or if the plaintiff has proceeded on the wrong side of the court, it permits an amendment to conform the pleadings to the proper practice after the case has been transferred to the proper forum.¹²⁹ Other jurisdictions have gone much further and have not restricted the liberalized rule to limited situations. The model for this movement has been Federal Rule 15.¹³⁰

L. *The Federal Rule*¹³¹

Like the West Virginia statute the federal rule is divided into parts, one of which refers to amendments generally and another refers to amendments to conform the pleadings to the evidence. Rule 15 (a), after providing for one amendment as a matter of

¹²⁷ CLARK, CODE PLEADING § 115.

¹²⁸ W. VA. CODE c. 56, art. 4, § 34 (Michie, 1949).

¹²⁹ W. VA. CODE c. 56, art. 4, § 11 (Michie, 1949).

¹³⁰ The jurisdictions having the more liberal provisions as to amendments are listed in CLARK, CODE PLEADING 710 n. 33. Citation to the statute of each state is included.

¹³¹ Rule 15 reads, in part, as follows:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;

course,¹³² if made within a specified time,¹³³ provides that otherwise a party may amend his pleading only with leave of court or by written consent of the adverse party, but that leave of court shall be freely given when justice so requires. Rule 15 (b) provides that if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby *and* the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. A continuance may be granted to enable the objecting party to meet such evidence. If issues not raised by the pleadings are tried with either express or implied consent of the parties, they are treated as if they had been raised by the pleadings, and amendments may be made upon motion of any party at any time, even after judgment, to cause the pleadings to conform to the evidence and to raise the issues tried.¹³⁴

but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Fed. Rules Civ. Proc., 28 U.S.C.A. (1950).

¹³² In this respect the rule may be more restrictive than the West Virginia procedure, for the statute contains no limitation as to the number of times that the plaintiff may of right amend his declaration or bill before the appearance of the defendant. W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949). Note, however, that the federal rule allows this privilege to *any* party if it is exercised within the time provided. See note 133 *infra*.

¹³³ The amendment may be made at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the amendment may be made within twenty days after the pleading was served.

¹³⁴ The rule provides, however, that failure to amend to cause the pleadings to conform to the evidence and to raise the issues tried does not affect the result of the trial of the issues. See the cases cited in 3 MOORE, FEDERAL PRACTICE 846 n. 17. Compare the West Virginia procedure where it does not appear that an issue has been made upon matter alleged in a pleading. The statute provides that no judgment or decree shall be arrested or reversed because of such defect when, without objection by any party, the case has been tried in the absence of such issue and it is apparent from the record and the evidence (a) that the trial was conducted as if an issue had been made upon such matter or (b) that no evidence pertaining to such matter

No distinction is made in the rule between defenses and claims; the plaintiff and the defendant have equal rights under the rule.¹³⁵

Where amendments are made *before trial*, by leave of court, the rule resembles the West Virginia procedure, but the language therein leaves no doubt that the technical restriction imposed by the West Virginia statute has been eliminated. If justice requires the amendment, leave shall be *freely* given.¹³⁶ Even the emphasis on what the court should do has been changed.¹³⁷ The effect is comparable to this modification of the West Virginia statute: after the appearance of the defendant the court shall allow any amendment if justice will be promoted thereby.¹³⁸ Under the rule the federal courts have not been hesitant to allow amendments to present the real issues of the case where the party seeking the amendment has not been guilty of bad faith, such as acting for the purpose of delay, and the opposing party would not be unduly prejudiced or the trial of the issues unduly delayed.¹³⁹ The trial court continues to be

was offered and it is reasonably apparent that the parties have treated such matter as waived or abandoned. W. VA. CODE c. 58, art. 1, § 2 (Michie, 1949). This provision was inserted by the revisers in 1931. Earlier cases resulted in reversal of judgments on these facts because of a technical rule of the common law that the record must show an issue before the case was ready for trial. For a criticism of the earlier cases, see a note by Professor Carlin in 29 W. VA. L.Q. 128 (1923).

¹³⁵ In addition to the defendant's being denied the privilege of any amendment as of right in West Virginia, note the discussion of a more liberal treatment being allowed the defendant than the plaintiff when an amendment with leave of court is sought. See text at pages 54-56 *supra*.

¹³⁶ The word "freely" was used advisedly in order to obviate any prior technical restrictions on amendments. 3 MOORE, FEDERAL PRACTICE 828. The restrictions imposed upon the allowance of amendments by code states, such as no substantial change in the cause of action or defense being permitted, are not applied under the rule. *Id.* at 831-833.

¹³⁷ "Shall" allow is used in lieu of "may" allow.

¹³⁸ *Caveat*: the writer does not intend to suggest that this language *alone* should be used in any rule designed to eliminate the restriction that an amendment may not be allowed which changes the cause of action. That limitation was originally imposed by the court when the statute read that amendments might be allowed "if substantial justice will be promoted thereby." W. Va. Acts cc. 71, 120 (1882); W. Va. Acts c. 41 (1911). The omission of the word "substantial" therefrom and the deletion of the express prohibition that the cause of action may not be changed might not alone be sufficient to avoid an interpretation similar to that in the *Snyder* case. See text at page 38 *supra*. Express language to the effect that the limitation shall no longer apply ought to be included in any rule designed to accomplish this result.

¹³⁹ 3 MOORE, FEDERAL PRACTICE 828, setting forth many illustrations of the liberality with which amendments prior to trial have been allowed under the rule. The limitations on this liberality as to amendments with leave of court *ought* also be applied to amendments made "as a matter of course". For example, if such amendments are made merely for the purpose of delay, the court on motion should have the right to strike it. See HEPBURN, *op. cit.*

vested with discretion in allowing amendments, but abuse thereof may be shown unless the refusal is based on some ground showing that justice does not require the amendment.¹⁴⁰ No longer should the court refuse to allow an amendment on the technicality that it would result in a change in the cause of action or defense or be a substantial change therein. The former restriction on amendments has been replaced by a rule of fairness. If that requirement is satisfied, the pleadings may be amended before trial so that the real issues between the parties will be presented for trial.¹⁴¹

The same liberality exists concerning amendments *at and after the trial*. The purpose is to permit the case to be decided on its merits, irrespective of the pleadings,¹⁴² as long as no injury to the opposing party will result therefrom. The cause of action, including the theory of recovery, or the defense may be changed either by amendment, where an objection to the evidence is made,¹⁴³ or by the introduction of evidence alone if no objection to its introduction is made,¹⁴⁴ an amendment thereafter being made to conform the

supra note 76, §§ 310, 311 (1897). Some statutes expressly so provide. CLARK, CODE PLEADING 708-710. The procedure suggested would be comparable to that in West Virginia where the plaintiff files his amended pleading in the clerk's office in vacation of the court subject to the right of the court to dismiss the amended pleading at the plaintiff's cost if the amendment was improper. W. VA. CODE c. 56, art. 4, § 25 (Michie, 1949).

¹⁴⁰ The wording of the rule leads to this result, namely, "leave shall be freely given when justice so requires." The cases collected by Professor Moore indicate that the courts have liberally allowed amendments under this direction but that the trial court will be supported in its refusal to allow amendments where the reason for such action is not based on a mere technicality but rather on a layman's concept of fair play. 3 MOORE, FEDERAL PRACTICE 833-841. See also CLARK, CODE PLEADING 710 n. 33.

¹⁴¹ Amendments to accomplish this objective have been allowed in England for many years. The rules under the Judicature Act of 1873 provided in part that all such amendments should be made as might be necessary for the purpose of determining the real questions or question in controversy between the parties. CLARK, CODE PLEADING 706. See also the statement by Bramwell, L. J., in *Tildesley v. Harper*, 10 Ch. D. 393, 396 (1878), quoted in CLARK, *supra*, at page 707 n. 26, to the effect that his practice had always been to give leave to amend unless the party applying was acting *mala fide* or by his blunder had done some injury to the opposing party which could not be compensated by costs or otherwise.

¹⁴² See note 141 *supra*.

¹⁴³ 3 MOORE, FEDERAL PRACTICE § 15.14. Professor Moore states: "The party opposing the amendment should not succeed by arguing a technical change in the 'cause of action' or 'defense', since that merely means 'legal' and not 'actual' surprise. He must show that he would be prejudiced in maintaining his action or defense on the merits by the admission of the evidence." *Ibid.* See Rule 15(b) quoted in note 131 *supra*. Note the breadth of the illustrations shown in note 144 *infra*.

¹⁴⁴ 3 *id.* § 15.13. Professor Moore gives these examples of what may be accomplished under this rule, so long as the opposing party has not been prejudiced in presenting his case. "Thus a plaintiff may sue on one contract and

pleadings with the issues which were in fact tried.¹⁴⁵ If there be an objection to the admission of evidence, which goes to the merits of the controversy between the parties, an amendment to raise the issues should be allowed unless the objecting party can show that he will be *actually* prejudiced thereby,¹⁴⁶ not merely that the amendment would involve a different claim or defense but that he is not prepared and could not have been expected to be prepared to meet the evidence offered.¹⁴⁷ Even if he can make this showing, the court may allow the amendment and grant a continuance so that the objecting party may be able to meet the evidence.¹⁴⁸ Allowing the amendment with a continuance seems desirable even where the objecting party is actually surprised if the person seeking to amend has acted in good faith and is assessed with the costs to that stage of the proceeding.¹⁴⁹ Several times in allowing amendments the West Virginia court, though using the test of whether the cause

recover on another; may sue on the theory of respondeat superior and recover on the theory of the vicarious liability of an employer of an independent contractor; or may sue for patent infringement and also recover for unfair competition." *Ibid.* He has collected other examples in the notes to the cited section, such as suing for a tort and recovering for breach of a contract.

If the parties have not expressly consented to try issues not raised by the pleadings, implied consent thereto may be shown. See Rule 15 (b) quoted in note 131 *supra*. Consent may be implied where evidence on the issue was introduced without objection. *El Paso Electric Co. v. Surrency*, 169 F.2d 444 (10th Cir. 1948); *Vernon Lumber Corp. v. Harcen Const. Co.*, 155 F.2d 348 (2d Cir. 1946). In a note citing the latter case, Professor Moore calls attention to the cases which refused to permit an amendment after judgment which brought into the case some extrinsic issue or changed the theory on which the case was actually tried, even though there was evidence in the record (introduced as relevant to another issue) which would support the amendment. He approves of these decisions on the basis that consent to try an issue should not be implied "where the parties do not squarely recognize it as an issue in the trial." 3 MOORE, FEDERAL PRACTICE 847, 848 n. 23.

¹⁴⁵ Note that although the rule requires issues tried by consent to be treated as if raised by the pleadings and provides for amendments of the pleadings to raise such issues, the result of the trial of the issues is not affected by a failure to amend the pleadings. The effect of this provision has been called an automatic amendment of the pleadings. CLARK, CODE PLEADING 712; 3 MOORE, FEDERAL PRACTICE 805. Judge Clark includes in a note a list of the states having rules to the same effect with citations to the applicable statutes. See the West Virginia analogy in note 134 *supra*.

¹⁴⁶ CLARK, CODE PLEADING 712; 3 MOORE, FEDERAL PRACTICE 805, 849.

¹⁴⁷ See CLARK, CODE PLEADING 723 n. 70, quoting Fullerton, J., in *Bowers v. Good*, 52 Wash. 384, 386, 100 Pac. 848, 849 (1909) as follows: "The fact that the amendment may introduce a new issue is not alone ground for denying it. The true test is found in the answer to the question, is the opposing party prepared to meet the new issue."

¹⁴⁸ See authorities cited in note 146 *supra*.

¹⁴⁹ Compare the view of Bramwell, L. J., summarized in note 141 *supra*.

of action was changed, seems to have considered the real problem to be whether the objecting party needed a continuance.¹⁵⁰

The liberality permitted by these parts of the rule needs one limitation. So far nothing has been mentioned which would limit the amendment to the transaction or occurrence set forth in the original pleadings.¹⁵¹ Perhaps it usually would involve the same matter. However, even though there may be no reason to limit the amendment to the same transaction or occurrence originally set forth, there ought to be some device to prevent a party from using an amendment to recover on a stale claim. The West Virginia court has repeatedly held that the amended pleading relates back to the time of filing the original pleading.¹⁵² No difficulty has been encountered as to claims not growing out of the transaction asserted in the original pleading, for the court has applied an even more restrictive meaning to a "cause of action" and an amendment has not been permitted if it involved a new cause of action.¹⁵³

All would agree that a different claim, against which the statute of limitations has run at the time the amendment is made, should not become the basis for recovery. However, the restrictive meaning given to a "cause of action" by the West Virginia court has prevented amendments which asserted a right to recover on the original claim under a different theory of law or which asserted claims growing out of the same general facts involved in the original pleading. These should not be treated as stale claims. If the amendment does set up a wholly different factual basis for recovery, the amendment ought not to relate back to the time of filing the original pleading.

Rule 15 (c) contains the needed limitation. It provides that whenever the claim or defense asserted in the amended pleading

¹⁵⁰ *Buffa v. Baumgartner*, 58 S.E.2d 270, 279 (W. Va. 1950); *Larzo v. Swift & Co.*, 129 W. Va. 436, 441, 40 S.E.2d 811, 814 (1946); *Eikhorn Sand & Supply Co. v. Algonquin Coal Co.*, 103 W. Va. 110, 114, 136 S.E. 783, 784 (1927); *Shires v. Boggess*, 72 W. Va. 109, 111, 77 S.E. 542, 544 (1913). The similarity in effect between refusing to allow an amendment and the granting of a continuance has been discussed in the text at page 42 *supra*. Of course, the problem of whether a continuance shall be allowed arises even where an amendment is allowed.

¹⁵¹ Nothing in Rule 15 (a) or (b) places this limitation on amendments. See the quotation in note 131 *supra*; also 3 MOORE, FEDERAL PRACTICE 845.

¹⁵² *Morrison v. Judy*, 123 W. Va. 200, 13 S.E.2d 751 (1941); *Corrick v. Western Maryland Ry.*, 79 W. Va. 592, 91 S.E. 458 (1917); *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S.E. 519 (1890); *Lamb v. Cecil*, 28 W. Va. 653 (1886); *Hart v. Baltimore & Ohio R.R.*, 6 W. Va. 336; see *Shires v. Boggess*, 72 W. Va. 109, 112, 77 S.E. 542, 544 (1913).

¹⁵³ See discussion in the text at pages 43-51 *supra*.

arose out of the "conduct, transaction, or occurrence" set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.¹⁵⁴ This prevents recovery on stale claims but avoids a restrictive construction of the term "cause of action." The approach here is not greatly different from that involved where an amendment is made in a case transferred from equity to law or vice versa.¹⁵⁵ Also, the *Larzo* case,¹⁵⁶ which permitted by amendment the addition of a claim arising out of the same occurrence, illustrates the concept. In both cases an amendment which relates back is now permitted in West Virginia,¹⁵⁷ though one represents a change in the legal theory of recovery and the other permits an additional claim to be asserted. Even though the amendment relates back, recovery is not being permitted on stale claims. Rule 15 (c) is merely based on the theory that "... a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limita-

¹⁵⁴ See quotation of the rule in note 131 *supra*. In effect the West Virginia rule means that amendments which involve the same cause of action relate back to the filing of the original pleading, for these are the only amendments which are allowed. See text accompanying notes 152, 153 *supra*. The federal rule here has the same effect except that (1) the amendment may be allowed even though the amended pleading does not relate back to the date of the original pleading, and (2) a broader concept of a "cause of action" is adopted in determining whether the amended pleading shall relate back than is adopted by the West Virginia court in deciding whether an amendment shall be allowed. For a detailed discussion of this concept of a cause of action, see CLARK, CODE PLEADING § 19.

¹⁵⁵ Such amendments in the pleadings would be deemed changes in the causes of action and would not be permitted in the absence of an exception to the rule. *Gibbons v. Denver Brokerage & Construction Co.*, 17 Colo. App. 167, 67 Pac. 913 (1902); but see *Friederichsen v. Renard*, 247 U.S. 207, 211 (1918). Compare the express statutory prohibition against an amendment changing a proceeding by motion into a formal action at law, or vice versa. W. VA. CODE c. 56, art. 4, § 24 (Michie, 1949). See, however, note 157 *infra*.

¹⁵⁶ Discussed in the text at page 50 *supra*.

¹⁵⁷ W. VA. CODE c. 56, art. 4, § 11 (Michie, 1949) permits such amendments as are necessary to conform the pleadings to the practice proper in the forum to which the case is transferred. See also note 155 *supra*. This section was inserted in 1931 and was taken verbatim from the Virginia Code. Revisers' note. The Virginia court had held prior to this adoption that such amendments, unless they make out a new case, relate back to the date of the filing of the original pleading. *Thomas Branch & Co. v. Riverside and Dan River Cotton Mills, Inc.*, 147 Va. 522, 137 S.E. 614 (1927). The court in reaching this conclusion relied heavily upon the leading case for this proposition, namely, *Friederichsen v. Renard*, 247 U.S. 207 (1918). Under the federal rule an amendment which asserts an entirely new claim will not relate back. 3 MOORE, FEDERAL PRACTICE 852.

Although the question of relation back was not raised in the *Larzo* case, many cases have held that amendments which are allowed relate back to the time the original pleading was filed. See note 152 *supra*.

tion than one who is informed of the precise legal description of the rights sought to be enforced."¹⁵⁸

There may be practitioners in West Virginia who have been astounded by the suggestion that the evils in our present law on amendments be eliminated by the adoption of a rule similar to the federal rule. Their amazement is understandable. The basic approach in West Virginia procedure has been to view pleadings as an end in themselves. Rule 15 is merely representative of the difference in the objective of the federal rules. In federal courts pleadings are viewed only as a means to a proper presentation of the case on its merits. The pleadings are to assist and not to deter in the accomplishment of this purpose.¹⁵⁹ If that viewpoint is used, and the writer believes that any other is difficult to justify, there is nothing startling about the proposal.

(Continued in a forthcoming issue of this Review.)

¹⁵⁸ 3 MOORE, FEDERAL PRACTICE 851. Many examples of amendments which have been held to relate back are collected by Professor Moore. *Id.* at 853-854. Among these are listed amendments which change the theory of the action from one in contract to one in tort, which change the action from one in equity to one at law, and which change the theory of recovery from negligence of the defendant's employees in the use of equipment to negligence in its construction. With these illustrations, the West Virginia cases refusing to allow amendments and thus requiring a new action should be contrasted. See text at pages 43-51 *supra*. However, one case discussed by Professor Moore refused to allow relation back of an amendment which merely added claims growing out of the same occurrence set forth in the original pleading. This decision is criticized as having been based on a conceptualistic notion of a cause of action. The approach used by the West Virginia court in the *Larzo* case accomplished a more liberal result and allowed such claims or "elements of damages" to be asserted by amendment. See text at page 50 *supra*.

¹⁵⁹ See quotation in text at page 47 *supra*, *per* Mr. Justice Black, in *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200 (1938).