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Notes

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tinues the operation of an instrument dangerous *per se*, and already tarnished with disastrous rapacity. With constructive revision of flaws incidental yet detrimental to the rigidity and strength of such a statute, the responsibility act is a very desirable law to which future victims may turn for justice. It might be safe to anticipate a more or less universal adoption of some kind of automobile financial responsibility laws.

Edward C. Massa.

NOTES

PROCEDURE OF ADOPTION AND THE RIGHTS OF THE ADOPTED CHILD.
—A short explanatory statement seems fit in the discussion of this subject. Adoption is defined as the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.¹ The word thus is generally held to cover the stock situation in which a person takes a stranger as to blood, to rear, making him his legal heir. In this statement a distinction is drawn between the act of legitimation, where the parties are, really, though not legally related.² A third distinction may also be made, removing the idea of adoption from the popular concept, illustrated by the case where the children are foster children merely, without legal status in the family which cares for and supports them.³

Adoption, as a formal, or legal practice is known to have been practiced extensively in the earliest times covered by written history, by the Egyptians, and by other races having a high level of civilization, as well as by the semi-barbaric ancient Germans.⁴ Breaux, J., in *Succession of Unforsake*,⁵ cites Merlin as authority for stating that their ceremony of adoption was performed by military ceremony in a formal proceeding. Adoption was early known and recognized in the Civil Law, being treated by Justinian in his Codification,⁶ and from this law the practice became firmly rooted in the legal systems of the nations of the continent, being carried afield by colonization and conquest.

The practice of adoption was unknown to the Common Law.⁷ As a result of this, in common law jurisdictions the validity of the prac-

¹ *Albring v. Ward*, 100 N. W. 609 (1904); *Morrison v. Sessions*, 38 N. W. 249 (1888).

² *Allison v. Bryan*, 21 Okla. 557, 17 Ann. Cas. 468 (1908).

³ *Crumbley v. Worden*, 66 N. E. 318 (Ill. 1903).

⁴ See *Succession of Unforsake*, 19 So. 602 (La. 1896).

⁵ *Op. cit. supra* note 4.

⁶ See *In re Session's Estate*, 38 N. W. 249 (Mich. 1888).

⁷ *In re Session's Estate*, *op. cit. supra* note 6; *Sarazin v. Union R. Co.*, 55 S. W. 92 (Mo. 1900); *Ex parte Clark*, 25 Pac. 967 (Cal. 1891).

tice and the rights of the parties depend primarily upon statutes which have been enacted in practically every state.⁸ Massachusetts appears to have been one of the first of the common law jurisdictions to bring forward such legislation, with its statute of 1851.⁹ These statutes have been held constitutional, the statement being made that the adopted child does not deprive the adoptive parent of property, "without due process of law," since there is no deprivation of property, but merely a direction as to whom it shall descend,¹⁰ and because the right to inherit is statutory. A question and a controversy arises as to the construction of these statutes. One group of cases holds that since the whole matter is in derogation of the common law and because the rights involved are serious and far reaching they must be strictly construed and applied.¹¹ The protagonists of liberal construction of these adoption statutes give as the basis for their view, the reasons that the object of the statutes is to provide care and protection to the children of the state, and since this is a most desirable and worthy end, the means should be liberally construed, that the end may be easily attained.¹² These courts tend to establish a *prima facie* presumption that such proceedings are regular, which will stand until evidence is produced to rebut it.¹³

It may be said that there are two general methods or procedures of adoption: (1) By a judicial proceeding; and (2) By agreement, declaration, or, as it is often said, by deed, because of its similarity of operation and execution to a deed. It will do no harm to repeat that this whole matter of adoption is purely statutory, and reference to the statute of the particular jurisdiction is of primary importance. Nevertheless it is possible to discuss this subject in a general manner.

In adoption by judicial proceeding the statute usually provides for a petition to a designated court, which functions as a court, not as a judicial officer, and which may ask for facts and make a decision upon them, acting judicially. This court is generally the probate court. Of course the petition must set out the necessary parties and allegations, such as abandonment or consent of the natural parent, the residence of the parties, and the consent of the party to be adopted, but in all cases this is covered by the statute. Once this petition is before the court it may ask for the submission of evidence, may cause an investi-

⁸ *Morse v. Osborne*, 77 Atl. 403 (N. H. 1910).

⁹ *Keegan v. Geraghty*, 101 Ill. 26 (1881).

¹⁰ *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480 (1900).

¹¹ *Ex parte Clarke*, 87 Cal. 638, 25 Pac. 967 (1891).

¹² *Leonard v. Honisfager*, 43 Ind. App. 607, 88 N. E. 91 (1909); *Parsons v. Parsons*, 101 Wis. 76, 77 N. W. 147 (1898).

¹³ *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350 (1904).

gation of the parties and any circumstances of the case which it may deem pertinent, and then with the facts as a basis, it renders the decree of adoption, or not, as the court sees fit.

An adoption by contract, or written instrument or deed, is not a judicial proceeding in spite of the fact that the approval of a judicial officer is involved. This point forces us to note the distinction between the powers of a court and the powers of a judge of that court. The same person, as the court, and as the judge of the court, or as a judicial officer, may have vastly different powers. In a proceeding such as this the consent or sanction of a judicial officer is necessarily involved, yet the proceeding is in no strict sense judicial, but the act of the judge is the act of an officer, while the action of the court may be said to be the act of an institution. This process of adoption is analogous to the conveyance of real estate in that it requires the execution, acknowledgment and recording of the formal paper.¹⁴ "The adopted child is the grantee and the thing granted is the irrevocable right, capacity or qualification to inherit, or succeed to the property of the adoptive parent in case he should die intestate."¹⁵ This instrument may be a pact between the adopting parent or parents, the adopted person, and if the adopted person be a minor, the natural parents of the adopted child,¹⁶ but in other jurisdictions it needs only the execution and validation of the adopting party or parties.¹⁷ The statute of the state of New York makes use of both of these methods, prescribing the judicial process for the adoption of children where the natural parents have hitherto cared for them, and reserving the method of adoption by deed for the use of those adopting children who are wards of an institution.

A word as to who may be adopted may not be out of place in view of at least one recent case. It is generally held that adults may be adopted and that this proceeding is not confined exclusively to children or minors. If the statute specifies "minor child" the matter is at an end. But it has been held that the word "child," as used in the statute, does not refer to a minority classification, but rather to the status of that party who is to be adopted.¹⁸ The right to adopt adults has even been recognized by the statute of Louisiana.

The rights of the adopted child may extend in several directions. Naturally the most important from a legal standpoint, and the one engaged in litigation to the greatest extent is that of inheritance. Of

¹⁴ Clarkson v. Hatton, 44 S. W. 761, 39 L. R. A. 748 (Mo. 1898).

¹⁵ Abney v. De Loach, 84 Ala. 393 (1888).

¹⁶ Luppie v. Winans, 37 N. J. Eq. 245 (1883).

¹⁷ Clarkson v. Hatton, *op. cit. supra* note 14.

¹⁸ Sheffield v. Franklin, 151 Ala. 492, 44 So. 373 (1907); Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047 (1892).

course there is also the right of the adopted child to look to his foster parent for support and the necessities of life, and, as a corollary, his right to bind the parent for such items, this promise being implied from the fact of adoption.¹⁹ There is also the right to the use of the name of the adopting parent,²⁰ which, though taken as a matter of course, may become the subject of dispute more than ever today, when names are valued so highly.

The right of inheritance is comparatively simple under the civil law, for there the child is the full heir; indeed, by the civil code of France the child comes under the same rights and privileges as does a child by birth, even though there are other children, by birth, after the adoption.²¹ This settled the possibility of any controversy in so far as the civil law was concerned. However, since the common law did not recognize the act of, or the relationship created by, adoption the right to inherit must depend in the first place on a valid statute of adoption, fully complied with²² and, further, on the construction and interpretation given the statute by the courts. In the vast majority of the states²³ the interpretation placed upon the statute is to place the adopted child on the same basis as a child of the direct blood line in regard to inheritance. This gives us practically the same result as under the civil law.²⁴ Several courts have been more explicit. Thus in the District of Columbia the adopted child may not inherit from the adoptive parent, except by will.²⁵ In Mississippi the rule is slightly more relaxed so that the child does not inherit of the adoptive parent unless so provided by the decree of adoption.²⁶ And in Nebraska the rule has been recently changed so that there is a presumption that the child does inherit of the adopting parent, and this will operate unless a contrary intention clearly appears.²⁷ It is recognized that the relationship of parent and child is distinct (because of the influence of the common law) from the right to inherit, whether the child be adopted or natural; and it is also recognized that the law may and does in some instances, distinguish between children by adoption and

¹⁹ *Moncrief v. Ely*, 19 Wend. (N. Y.) 405 (1838).

²⁰ *Riley v. Day*, 88 Kan. 503, 129 Pac. 524 (1913).

²¹ *In re Nakuapa*, 3 Hawaii 342.

²² *In re Carroll*, 219 Pa. 440, 68 Atl. 1038 (1908); *Coombs v. Cook*, 35 Okla. 326, 129 Pac. 698 (1913).

²³ Ala., Cal., Conn., Ind., Iowa, Kans., Ky., La., Me., Mass., Mich., Minn., Miss., Mo., Nebr., N. H., N. Y., Pa., Ohio, Tenn., Tex., Vt. and Wash.

²⁴ *In re Cook*, 187 N. Y. 253, 79 N. E. 991 (1907); *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486 (1904).

²⁵ *Moore v. Hoffman*, Fed. Cas. No. 9764a (1854).

²⁶ *Beaver v. Crump*, 76 Miss. 34, 23 So. 432 (1898).

²⁷ *Ferguson v. Herr*, 64 Neb. 649, 90 N. W. 625 (1902), rev'd, 94 N. W. 542 (1903).

by birth, and may limit the right of the adopted child to inherit.²⁸ The right of such child to inherit is only an ordinary one and does not in any way affect the right of the adoptive parent to dispose of his property, real or personal, by will.²⁹ The general effect and interpretation of adoption statutes is to approximate as closely as possible by artificial means, the relationship of parent and child between adoptive parent and adopted child.³⁰

We have seen that the majority of the states give the adopted child the same status as a child of the blood. Where the adopting parent dies intestate, the result of such statute is to allow the child to inherit his parents' property.³¹ Under less liberal statutes such sweeping results would not occur. The words of these statutes, such as, "issue," "living issue,"³² "child," "children,"³³ have been uniformly held to include children by adoption. The Massachusetts statute covers this point, providing that the word, "child," shall include adopted children unless a contrary intention appears in the instrument. It has been held that the phrase, "heirs at law,"³⁴ would include adopted children, while the phrase, "heirs of the body,"³⁵ would not. Where the child has been adopted under a statute which merely recognized the relation of parent and child without allowing any inheritance, a revision of the statute to allow him to inherit, made before the death of the adoptive parent is binding on him, and gives the child the right of inheritance.³⁶

Where the adoptive parent leaves a will, the courts have been much more strict and less willing to recognize this unconditional absorption of the adopted child into the status of descendants of the blood, and these same words used in the statutes and used in the provisions of a will are subject to differing constructions. Thus under a gift to the testator's children there is a split of authority, but the majority of the decisions hold that adopted children do not take as children of the

²⁸ Calhoun v. Bryant, 28 S. Dak. 266, 123 N. W. 266 (1909).

²⁹ Burnes v. Burnes, 132 Fed. 485, aff., 137 Fed. 781 (1905); Austin v. Davis, 128 Ind. 472, 26 N. E. 890 (1891); Clark v. West, 96 Tex. 437, 73 S. W. 797 (1903).

³⁰ Humphries v. Davis, 100 Ind. 274 (1884); Chehak v. Battles, 133 Ia. 107, 110 N. W. 330 (1907). But see Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008 (1891).

³¹ In re Newman's Estate, 75 Cal. 213, 16 Pac. 887 (1888); Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628 (1893); Morrison v. Sessions, 70 Mich. 297, 38 N. W. 249 (1888).

³² Riley v. Day, 88 Kan. 503, 129 Pac. 524 (1913); In re Walworth, 85 Vt. 322, 82 Atl. 7 (1912).

³³ Powers v. Hafley, 85 Ky. 671, 4 S. W. 683 (1887).

³⁴ Gilliam v. Guar. Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906).

³⁵ In re Walworth, *op. cit. supra* note 32.

³⁶ Sorrenson v. Rasmussen, 114 Minn. 234, 131 N. W. 325 (1911).

testator under such a provision,³⁷ nor are adopted children generally permitted to take under gifts to issue.³⁸ Gifts to heirs have generally been held not to include adopted heirs,³⁹ and even when the will is made before the death of the testator it includes when making gifts to classes, those born⁴⁰ between making of the will and the death of the testator, but not those adopted during this period.⁴¹ Again, where the wife of the testator adopted a child subsequent to the death of the testator, a provision of his will, of a limitation over to the heirs at law of his wife, the adopted child was excluded.⁴² In Illinois, however, the adoption of a child after the making of a will brings it within the statute and entitles the child to inherit a share of the estate with the natural heirs unless an intent to disinherit appears.⁴³

As to the revocation of a will by the adoption of a child, in those states where the statute gives the child adopted all the rights of one born to the parents in wedlock, the holding has been that a prior will was revoked upon the adoption.⁴⁴ But where the mere creation of the relationship of parent and child is accomplished, and nothing more, this is not true.⁴⁵

The adopted child is also entitled to inherit from his natural parents, the right to inherit not stopping with one exercise of it, and the status of the child not limiting its exercise.⁴⁶ This right has been recognized since the time of Justinian, in the civil law, which provided that an adopted son should inherit not only from his natural father but also from his adoptive parent.⁴⁷ This has been carried so far as to allow the child to inherit from one person in a dual capacity, as when a grandfather having adopted his two granddaughters, it was held that they should inherit as his daughters by adoption, and as his granddaughters through the deceased mother, since the grandfather left

³⁷ *Wilder v. Wilder*, 116 Me. 389, 102 Atl. 110 (1917); *Parker v. Carpenter*, 77 N. H. 453, 92 Atl. 955 (1915); *Hughes Estate*, 225 Pa. 79, 73 Atl. 1061 (1909). *Contra*: *Manie v. Gruenewald*, 289 Ill. 468, 124 N. E. 605 (1919); *Mitchells Will*, 157 Wis. 327, 147 N. W. 332 (1914).

³⁸ *Blodget v. Stowell*, 189 Mass. 142, 75 N. E. 138 (1906).

³⁹ *Morrison v. Sessions*, *op. cit. supra* note 31; *Warden v. Overman*, 135 N. W. 649 (Iowa 1912); *Walcott v. Robinson*, 214 Mass. 1172, 100 N. E. 1109 (1913).

⁴⁰ *Goggins v. Flythe*, 113 N. Car. 102, 18 S. E. 96 (1893).

⁴¹ *Russell v. Russell*, 84 Ala. 48, 3 So. 900 (1888).

⁴² *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288 (1888).

⁴³ *Flannigan v. Howard*, 209 Ill. 396, 65 N. E. 782 (1902).

⁴⁴ *Hilpire v. Claude*, 109 Ia. 159, 80 N. W. 332 (1899); *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853 (1901). *Contra*: *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860 (1860).

⁴⁵ *In re Gregory's Estate*, 15 Misc. 407, 37 N. Y. S. 925 (1896).

⁴⁶ *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993 (1897). Unless there is a statute to the contrary. *Wagner v. Varner*, 50 Ia. 532 (1879).

⁴⁷ SANDARS JUSTINIAN, 113-120.

no will.⁴⁸ Massachusetts adopts a rule which allows inheritance in one capacity only, the instance being of an adopted grandchild, which was allowed to inherit as a child only.⁴⁹ Neither does a second adoption destroy the right of the child to inherit under the first, if the adoptive parent of the first adoption has died prior to the second adoption.⁵⁰ But where the first adoption has been cancelled no rights arise therefrom to be made use of by the child.⁵¹ Of course, once the property is transferred to the adopted child, his heirs, and lineal descendants succeed him, even though the property was inherited from the adoptive parents or parent.⁵² But this doctrine has been extended so that the heirs of the adopted child inherit through him a share of the estate of a deceased adoptive parent as though the child were in the direct line of the blood.⁵³

However, the right to inherit from the adoptive parent is the extent of the right, and the adopted child may not inherit from the relatives of this parent, and for good reason, since it would not be just to put it within the province of any person to vary the inheritance of another person, this person not knowing of, making provision for, or consenting to, this variation. Judge Lamm, in *Hockaday v. Lynn*,⁵⁴ says that, "The adoptive child is let in for the purpose of preserving to the full its right of inheritance from the adoptive parent, and the door to inheritance is shut and the bolt shot at that precise point." This is a personal relation between the two parties to the adoption and must not be extended,⁵⁵ or the distribution of property might be contrary to the wishes of the person whose testament it was and who did not know of the adoption so as to provide for it. A Massachusetts case states the law succinctly: The adopted child may inherit from his parent but he may not inherit in lieu of his parent by right of representation, from any of his parents kindred.⁵⁶

This treatment has, of necessity been brief as well as general. The first authority to consult is the statute of one's own jurisdiction.

Bill R. Desenberg.

⁴⁸ *Wagner v. Varner*, 50 Ia. 532 (1879).

⁴⁹ *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308 (1889); *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253 (1905).

⁵⁰ *Russell's Adm'r. v. Russell's G'd'n.*, 14 Ky. Lw. Rep. 236 (1892); *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993 (1897).

⁵¹ *Morrison v. Sessions*, *op. cit. supra* note 31.

⁵² *Paul v. Davis*, 100 Ind. 422 (1884).

⁵³ *Pace v. Klink*, 51 Ga. 221 (1874); *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, 78 N. E. 697 (1906).

⁵⁴ 200 Mo. 456, 98 S. W. 585 (1906).

⁵⁵ *Kettell v. Baxter*, 50 Misc. 428, 100 N. Y. S. 529 (1906).

⁵⁶ *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729, 731 (1887).

CHATTEL MORTGAGES—CHATTEL MORTGAGE DISTINGUISHED FROM PLEDGE.—We can understand the scope of a chattel mortgage better by comparing it with other transactions. A chattel mortgage under the *title* theory, differs from a vendor's lien in that a lienor has no title to the property.¹ It differs from a sale wherein the title is retained by the seller until the performance of some condition, in that no title passes from the debtor to the creditor. The creditor merely retains a title which the debtor never had. A chattel mortgage differs from a sale with a right to repurchase in that the latter transaction is not a security for an obligation. It differs from an assignment for the benefit of creditors, which is not a security, but implies an absolute appropriation of the property to the payment of the indebtedness.

A chattel mortgage, under the common law theory, is a sale of personal property on a condition subsequent, upon the performance of which the title reverts to the mortgagor, and upon the breach of which the mortgagee's title becomes absolute. Some jurisdictions, either by statutory enactments or decisions, regard a chattel mortgage as constituting a security only and as creating only a lien on the subject matter.² In some states that follow the lien theory the title is not regarded as passing under a chattel mortgage until after foreclosure and sale;³ while in other jurisdictions the mortgagee, after a breach of condition, is regarded as having become vested with a special property right in the subject-matter of the mortgage.⁴ Other courts hold that while the general property is regarded as passing to the mortgagee, there is a statutory right of redemption in the mortgagor existing

¹ *Metcalfe v. Fosdich*, 23 Ohio St. 114 (1877) (A leased his real estate with certain fixtures and machinery reserving in the deed of lease a "lien" upon the premises and property for the purchase money and rents but with liberty to the lessee to remove at his pleasure any portion of the machinery upon the condition that he should at time of removal substitute others equally as good. Held, reservation of lien was not in legal effect a chattel mortgage upon the movable parts of the machinery.); *Gushee v. Robinson*, 40 Md. 412 (1885).

² *Lucas v. Campbell*, 88 Ill. 447 (1878) (Debt is the principal thing, and the mortgage is a mere incident attached to the thing which has no separate and determinate value; whatever discharges the debt *eo instanti* extinguishes the mortgage.). See JONES ON CHATTEL MORTGAGES, § 503; *State v. Lepkin*, 62 N. J. Law 580, 41 Atl. 712. (1898).

³ *Marsh v. Wade*, 20 Wash. 578, 20 Pac. 578 (1899) (Where §§ 1986-1999 of the WASH. CODE treat a chattel mortgage as a mere security under which no title can possibly pass except by foreclosure and sale.)

⁴ *J. I. Case Threshing Machine Co. v. Campbell*, 13 Pac. 324 (Or. 1887) (An assignee for the benefit of creditors, of property covered by a chattel mortgage, receives it subject to the rights of the mortgagee. If he disposes of it absolutely without an attempt to redeem it, he is liable to the mortgagee in an action for conversion). See JONES ON CHATTEL MORTGAGE, chap. 10, par. 701.

until there has been a foreclosure in accordance with the statute which vests a legal right in the mortgagor limiting the right and title of the mortgagee.⁵

A pledge is a bailment of personal property securing some debt or obligation.⁶ But the word "pledge" is commonly used, as Sir William Jones defines it, "As a bailment of goods by a debtor to his creditor to be kept until the debt is discharged."⁷ The pledge secures his debt by the bailment and the pledgor obtains credit or other advantages. At common law, the words "pledge" and "pawn" were synonymous but in modern usage "pawn" generally indicates the pledging of goods with a pawnbroker. "Hypothecation" is a special form of pledge wherein the possession remains in the debtor.⁸

The Federal courts, in stating the difference between a chattel mortgage and a pledge, hold that a chattel mortgage imports a present conveyance of a legal title subject to a defeasance upon performance of an express condition subsequent contained either in the same or in a different instrument. It may or may not be accompanied with delivery of possession. On the other hand, where the title to the property is not presently transferred, but possession only is given with power to sell upon default in the performance of conditions, the transaction is a pledge and not a mortgage.⁹

The general distinction is that, in a chattel mortgage under the title theory, the title is conveyed with a condition rendering the conveyance void on the payment of a certain sum of money on or before a day agreed upon; while in a pledge, the goods bailed are deposited as a collateral security, and only a special property is transferred to the bailee, the general title in the meantime remaining with the bailor.

The difference has also been well stated thus: "A mortgage (chattel) is a pledge and more; it is an absolute pledge to become an absolute interest if not redeemed at a certain time. A pledge is a

⁵ *Weeks v. Baker*, 152 Mass. 20 (1890) (A mortgagor of personal property upon a tender of payment by him, under the Pub. Sts. c. 192, par. 6, and a non return of property, may maintain replevin therefor without bringing the money into court.)

⁶ *Bank v. Capital Saving's Bank & Trust Co.*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754 (1904); *Wetherel v. Johnson*, 208 Ill. 247, 70 N. E. 229 (1904); *Davis v. Davis*, 88 Ga. 191, 14 S. E. 194 (1891); *Wilkinson v. Mesner*, 158 Mo. App. 551, 13 S. W. 931 (1911); *Tennent v. Union Cent. Life Ins. Co.*, 133 Mo. App. 345, 112 S. W. 754 (1908); *Austin v. Hayden*, 171 Mich. 38, 137 N. W. 317 (1912).

⁷ JONES ON BAILMENTS, p. 117.

⁸ CYCLOPEDIA LAW DICTIONARY, 775; 2 WORDS & PHRASES (Second Series) p. 926 (1914).

⁹ *Dale v. Patterson*, 234 U. S. 399, 34 Sup. Ct. 785, 58 Law Ed. 1370, 52 L. R. A. (N. S.) 254 (1914).

deposit of personal property not to be taken back but on the payment of a certain sum by express stipulation or by the course of trade to be a lien upon them.'"¹⁰

A chattel mortgage, under the common law theory, is a present transfer of title to mortgaged property with a defeasance, so that upon payment of a debt or the performance of the obligation secured, the title reverts to the property. A pledge, on the other hand, is a transfer of possession of personalty, not the title, as security for the performance of some act by the pledgor with provisions for the sale of the property or other disposition thereof by the pledgee upon the pledgor's default.¹¹

In a chattel mortgage, according to the common law theory, the whole legal title passes conditionally to the mortgagee, and if the goods are not redeemed at the time stipulated, the title becomes absolute at law although equity will interpose to compel a redemption. But after default in the payment of a pledge, the property deposited does not belong to the pledgee; he cannot appropriate it to himself and his only power is that of sale, through which he must realize his debt.¹²

A mortgage of personal property is good between the parties when the mortgagor retains possession. This is not true in the case of a pledge. All the authorities agree that to constitute a pledge there must be an actual delivery of possession to the pledgee and to preserve this pledge he must retain possession.¹³

¹⁰ 11 C. J. 403, note 24.

¹¹ *Palmer v. Mut. Life Ins. Co. of N. Y.*, 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912 B, p. 957 (1911) (Where holder of a paid-up life policy delivered possession to the insurer as security for the payment of a loan, with authority to the insurer to appropriate the policy to its own use by cancellation on insured's default, transaction was not a chattel mortgage. Also, parties to a contract of pledge may, by agreement, provide the manner and method for the enforcement of the same, provided the method agreed upon be not in violation of law.). For other cases see: "Pledges," CENT. DIG. § 129, DEC. DIG. § 53. Also, see 2 WORDS & PHRASES, pp. 1098-1106.

¹² *Ottumwa Nat. Bank v. Totter*, 89 S. W. 65 (Mo. 1905).

¹³ *Raper v. Harrison*, 15 Pac. 219 (Kan. 1887); *Willard v. Monarch Elevator Co.*, 87 N. W. 225 (N. D. 1901) (Plaintiff leased a cultivated farm to one Jepson for a season under a written lease, "The second party to hold 500 bu. of first party's one-half of wheat until the plowing is done, and shall be a lien on the same for that amount; the ticket for the above 500 bu. to be deposited with Sherman." Held, that such proviso is a chattel mortgage, and not a pledge, nor an agreement for a pledge so far as the wheat is concerned.); *Commercial and Savings Bank of San Jose v. Hornberger*, 73 Pac. 625 (Cal. 1903); *Wilson v. Little*, 2 N. Y. (2 Comstock) 443 (1849); *Ward v. Sumner*, 5 Pick. (Mass.) 59 (1827) (A having indorsed for B certain promissory notes, B before the notes became due, executes a deed of his furniture to A, upon condition to be void if B pays the note. The deed and furniture are formally delivered in the presence of a witness, to whom alone the transaction is made known, but B remains in the possession and use of the furniture as before. Held, that the conveyance might be viewed either as a mortgage or a pledge,

Under the recording statutes an unrecorded mortgage is not good as to third persons unless accompanied by a delivery of the mortgaged chattel. Under these circumstances there is no difference between a chattel mortgage and a pledge. In an Arkansas case, the court said: "The transaction constitutes a verbal mortgage though possession of the property remains in the mortgagee there is no distinction between a mortgage and a pledge."¹⁴ Possession is evidence of ownership and it is for this reason the delivery of possession of personal property to the mortgagee has been universally held to validate an unrecorded mortgage and to be an effectual substitute for its record. The change of possession, however, which may have this effect must be of a character to accomplish the full purpose of the recording act. It must be designed to give notice of the claim of the mortgagee as open and as effectual as a record of the mortgage. The possession of the chattel must be open, public and actual so that the creditor or purchaser who undertakes to deal with the property would be likely to receive notice of the possession of the mortgage. Where the change in possession is doubtful due to a symbolical delivery of articles of a bulky nature, the transaction will be resolved in favor of the purchaser. The case of *Lee Wilson & Co. v. Crittenden County Bank & Trust Co.*¹⁵ shows that where there is an insufficient delivery of personal property, the courts will not treat the transaction as an oral mortgage or a pledge. A manufacturer of lumber stacked in piles on land which had been leased by him sold the lumber and leased the ground. The buyer gave a draft and a note for the price. A bank purchased them and it was agreed that the lumber should be pledged to the bank. There was no actual change of the location of the lumber nor any marks to indicate

according to the intent of the parties, and as the furniture remained in B's hand, it must be construed to be a mortgage: and there being no actual fraud, the mortgage was held valid as against creditors of B.)

¹⁴ *Wilson & Co. v. Crittenden County Bank & Trust*, 98 Ark. 379, 135 S. W. 885 (1911). See "Chattel Mortgages," CENT. DIG. §§ 417-425, DEC. DIG. § 191; *Casey v. Cavoroc*, 96 U. S. 467, 24 L. Ed. 779 (1877) (Possession is the essence of a pledge; and without it, no privilege can exist as against third persons); *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147 (1890) (The delivery, as collateral security, of a bill of sale, copies of gauger's returns and warehouse receipts of whiskey held in the United States bonded warehouse, creates a pledge and not a chattel mortgage); *Thurber v. Oliver*, 26 Fed. 224 (1892) (Mere delivery on deposit of goods as security is not a mortgage of them but a pledge); *Garlich v. James*, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294 (1825) (Delivery by payee of a note undorsed as security is a pledge and not a mortgage).

¹⁵ 135 S. W. 885 (Ark. 1911). See: *Straborn-Hutton-Evans Commission Co. v. Quigg*, 97 Fed. 735 (1899) (Where mortgaged personal property is in the possession of the bailee of the mortgagor, notice to him is indispensable to a delivery of the possession to the mortgagee that will be effectual against creditors and purchasers); JONES ON CHATTEL MORTGAGES, p. 186; *Lanfear v. Sumner*, 17 Mass. 110 (1821).

the change in possession. It was agreed that the manufacturer should hold possession for the bank to secure payment of the draft and note. *Held*, there was no sufficient delivery to the bank construing the transaction to amount to an oral mortgage or a pledge as against a subsequent purchaser.

The case of *Grand Ave. Bank v. St. Louis Union Trust Co.*¹⁶ shows that the pledgee, though he has no actual possession of the property, can protect his rights by exercising control over the pledged property. Here a piano dealer obtained a loan from a bank on the agreement that it was to be secured by a pledge of pianos in a storage room. The storage room was apart from the sales room. When the loan was made the cashier of the bank took the make of each piano and checked them off on a storage receipt which had been delivered to him. A piano repairer who was employed by the dealer worked in the end of the storage room. The repairer was informed that the cashier had come to take possession for the bank and was placed in charge by him. A few days later the president of the bank went to the storage room, looked over the pianos, and told the repairer that they were the property of the bank, showing him the receipt and he said that he understood that he was taking care of them for the bank. *Held*, that as against the assignee for the benefit of the creditors of the dealer, possession had been delivered to the bank and retained by it, notwithstanding the repairer was an employee of the dealer so as to create a valid pledge.

Whether a transaction shall be treated as having the characteristics of one form of security rather than the other often must rest on the intention and conduct of the parties.¹⁷ This intention or conduct is ascertained from the whole instrument evidencing the transaction and not from particular words therein. Thus the fact that the word "pledge" is employed in an instrument evidencing a transaction does not conclusively determine the character, but the rule is that even where this word is used, if it appears that it is the clear intent of the parties that the possession of the subject matter is to remain in the debtor and the possession so remains, the transaction will be held to be a chattel mortgage.

¹⁶ 115 S. W. 1071 (Mo. 1909).

¹⁷ *Gamson v. Pritchard*, 96 N. E. 715 (Mass. 1911) (Where, though the bill of parcels named plaintiff as buyer, it contained no condition of defeasance or provision that he should hold title as collateral security for the money furnished by him to purchase the goods, the transaction did not on its face amount to a chattel mortgage in favor of the plaintiff); *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783 (1888); *Copeland v. Barnes*, 147 Mass. 388, 18 N. E. 65 (1888); *Thompson v. Dolliver*, 132 Mass. 103 (1882); *Ward v. Sumner*, 5 Pick. (Mass.) 59 (1827); *Willard v. Monarch Elevator Co.*, 10 N. D. 400, 87 N. W. 996 (1901); *Parrish v. Mahany*, 12 S. D. 278, 81 N. W. 295, 76 Am. St. Rep. 604 (1901).

It is quite easy to recognize the distinction between a chattel mortgage and a pledge where goods are held as security for a debt or for the performance of an act. In the case of a pledge title remains in the pledgor. The pledgee gets only a special property right. In the case of a chattel mortgage, title usually passes from the mortgagor to the mortgagee.¹⁸ But this distinction is not easily apprehended when there is a transfer of possession of a written instrument, such as a note, bond, or a warehouse receipt. The fact that title passes in a note or a bond does not necessarily create a mortgage.¹⁹ To constitute a mortgage title must pass, but it is not in all cases a mortgage because title has been conveyed. A transfer of stock may be absolute but still if its object is qualified by a contemporaneous paper and declares it to be a deposit of the stock as collateral security for the payment of a loan, the transaction will be regarded as a pledge. When title to a written instrument is transferred for the security of a debt or the performance of an act it is a question of intention whether the apparent transfer of title would operate as a mortgage or as a pledge. In the absence of proof of intention, the transaction is presumed to

¹⁸ *Thomas v. Couthard*, 3 Dana (Ky.) 475, 26 Am. Dec. 475 (1834) (Where an instrument states that debtor pledged, hypothecated and mortgaged his interest in a steambot but contains no words of conveyance, it creates a pledge).

¹⁹ *Gay v. Moss*, 34 Cal. 125 (1867) (Assignment of a bond and a mortgage, although absolute on its face but accompanied by a promissory note made by the assignor which gives the assignee authority to sell the bond and mortgage on default is a pledge of the bond and mortgage and not a sale of them. The assignment and delivery are necessary to give the pledgee the full authority to readily control it and afford a prompt means of making the pledge available. For these reasons, the fact that the title passes in form by the assignment, in case of a chose in action, does not necessarily make it a mortgage); *Daley v. Spiller*, 222 Ill. 421, 78 N. E. 782 (1906) (Holder of a life policy, gave one who loaned him money, a note for the amount of the loan, and an absolute conveyance of the policy, and an assignment with a defeasance, by the terms of which insured was entitled to have the policy re-assigned to him on payment of the note when due. Held, that the instruments showed that the policy was pledged, and not sold to the lender); *Dewey v. Bowman*, 8 Cal. 145 (1856) (Assignment of a lease as security for a note is a pledge. The pledgee does not take legal title by the assignment, or by failure of the pledgor to pay the note; but he has the right to collect the rents, and apply them on the note, also being responsible for the surplus); *Dycher v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87 (1844); *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307 (1849) (Deposit constitutes a pledge where the instrument is in the usual form of a note followed by the statement that certain bonds, stocks, etc., are deposited with the creditor as collateral security); *Mechanics Bldg. Assn. v. Conover*, 14 N. J. Eq. 219 (1862) (Transfer by members of partially paid building association stock to the association as security is a pledge); *Irving Park Assn. v. Watson*, 41 Or. 95, 67 Pac. 945 (1887) (Assignment and transfer of shares of stock in a corporation by a debtor as security for a debt is a pledge and not a mortgage).

be a pledge instead of a mortgage. But where the assignment of a note and a mortgage is made in the form of a mortgage and contains some kind of a defeasance, the transaction is regarded as a mortgage. Often a constructive delivery of a chattel transfers title. For example, the assignment of a bill of lading, of a mortgage of a policy of insurance, or of any chose in action as security, may be either a pledge or a mortgage according to the intent of the parties. It is often important to know whether a transaction is a pledge or a chattel mortgage. The legal effect of each is different. In case of default in a mortgage title become absolute in the mortgagee and he may either deal with the property as his own and a tender by the debtor of the amount of the debt secured does not revest title in him or give him any legal right to recover the property, although he may have an equitable right of redemption. In case of a default by a pledgor, the general property is still in the pledgor. He can recover the specific chattel if he pays his debt. If the pledgor tenders and the pledgee refuses to return the chattel, the debtor has an action for damages for its detention. Because of this difference, courts have sometimes in case of doubt, leaned towards regarding a transaction a pledge rather than a mortgage. For this reason contracts, doubtful in terms, have sometimes been construed as mortgages and sometimes as pledges, according as the court has deemed that the intention of the parties would be best effectuated and the purposes of justice best subserved. "An instrument which is in the form of a mortgage, or on its face called a mortgage, cannot be shown by parol evidence to have been intended to constitute a mere pledge or something other than a mortgage."²⁰

John M. Ruberto

²⁰ JONES ON CHATTEL MORTGAGES (4th ed. 1894) § 7.

THE FOLLOWING TRANSACTIONS WERE HELD TO BE MORTGAGES:

Where chattels were delivered as security under an agreement to return them if the creditors should be reimbursed for advances and the transaction was held to constitute a mortgage.: *May v. Eastin*, 2 Port. (Ala.) 414 (1831).

Where the legal title was transferred to a note with power to collect and a provision for accounting any surplus over the amount secured: *Wright v. Ross*, 36 Cal. 414 (1868).

Where instrument reads, "I hereby agree to give up all claims due to you from me . . . are not paid by a day specified": *Bunacleigh v. Poolman*, 3 Daly (N. Y.) 236 (1842).

Where an instrument gave security on a chattel and provided for sale in case of default although the words used were, "I hereby pledge and give a lien on": *Langdon v. Bull*, 9 Wend. (N. Y.) (1833).

PLEADING—JOINDER OF CAUSES OF ACTION.—In discussing the foundation and function of common law pleading, Mr. Clark observes that “The common law writ system was as well known, really a corollary, or perhaps an embodiment, of the substantive law of the time. There was no right without a writ. The pleadings, therefore, worked out in advance of the trial the law of the case. . . . The procedural reform of the nineteenth century was a reaction against this harsh system. For it was substituted the pleading of the facts. . . . Pleading was to be relegated to the position of an *aid* to the administration of justice, instead of being an end in itself.”¹

Generally, pleadings are defined by the codes as “the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.”² In other words, a statement of the facts upon which the claim or defense is based, which, in a sense, form a conduit through which the jurisdiction of the court flows over the subject-matter. The effect thus obtained is inconsistent with the common law system of pleading, wherein this flow was directed toward a writ, and the codes, in providing this change, have, in effect, expressly provided within themselves the only source of authority for pleading. So we must look to the code provisions themselves and the interpretation of them is the problem presented.

The state of New York was the leader in the reform movement in the United States and other states adopting this new system of procedure have substantially embodied the New York provisions which we will adopt as our model here. The most noticeable difference appearing in the codes is in the arrangement of classes according to their subject-matter, varying in number from twelve in New York to three in Colorado.

The main section of the New York code reads as follows: “The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows. . . .”³ At first blush this seems to present no subtle problem. It is thoroughly consistent with the purpose of the codifiers to abolish the formal distinctions between law and equity and henceforth have but one form, a “civil action.” Under the common law it was not possible to seek legal and equitable relief from the same court, so of course it could not be sought in a single declaration. Those actions that could be joined in the common law declaration arose out of a kind of legal similarity of claim, based upon the same writ or form of action,

¹ Comment (1925) 35 YALE L. J. 85, 88, 89.

² 1 BANCROFT'S CODE PLEADING (1926) § 1.

³ NEW YORK CODE CIV. PRO. (1920) § 484.

rather than an unity of occurrence or events relied upon.⁴ It has ever been the desire of equity to bring about a complete adjudication in a single suit and all matters closely related were allowed to be submitted. So with the intervention of the code, merging these two systems into one and dispensing with the common law forms of action for the "civil action," it is not surprising to find the rules of both former systems combined therein. Had the codification gone no further the equitable effect would no doubt have overshadowed the legal effect to such an extent as to place discretionary jurisdiction in all courts; for the old legal forms were no more and this obstacle to converging all the circumstances of a particular subject-matter for adjudication in a single suit would not confront the judge. This result would seem to be what was originally sought and the reason for breaking away from the old restrictions. At least it is the logical result and some of the states have reached it, or practically so, for in Kansas we find a statute to this effect: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable or both. . . ." And this stands without restrictions depending upon character or subject-matter of the causes of action.⁵ The Iowa code provides that: "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings. . ." regardless of legal or equitable nature, have no restrictions as to the joinder except as to parties and venue.⁶ Then in Michigan, "The plaintiff may join in one action, at law or in equity, as many causes of action as he may have against the defendant, but legal and equitable causes of action shall not be joined. . . ." ⁷ And by an amendment to its code Wisconsin abolished classification and framed the code to read as that in Kansas.⁸ In concluding an article on this subject, Mr. Sunderland remarks: "Accordingly, in default of any rational bases for a system of rules on joinder relating to the form, nature or subject-matter of actions, we reach the final stage of development, where it is frankly admitted that the common law created imaginary difficulties in joining actions, that the code continued them with substantial but illogical variations, that all *a priori* restrictions fail to meet the needs of practical litigation, and that only by allowing an unlimited freedom of joinder can the maximum of convenience in the trial of actions be attained."⁹ However, the legislators in New York evidently deemed some kind of limitation necessary and seven classes of suits were named in which joinder might be

⁴ CLARK ON CODE PLEADING (1928) 295.

⁵ GEN. STATUTES OF KAN. (1915) § 6979.

⁶ CODE OF IOWA (1927) § 10960.

⁷ 3 COMP. LAWS OF MICH. (1915), c. 8, § 12309.

⁸ 1 WIS. STAT. (1929) c. 263, § 263.04.

⁹ Sunderland, *Joinder of Actions*, 18 MICH. L. REV. (1920) 571, 581, 582.

had. Not deeming the effect adequate another provision was added in 1852, the most famous of all, commonly known as the "same transaction" provision. As the code stands today it is composed of 12 sub-sections:

- "1. Upon Contract, express or implied.
- "2. For personal injuries, except libel, slander, criminal conversation or seduction.
- "3. For libel or slander.
- "4. For injuries to real property.
- "5. Real property, in ejectment, with or without damages for the withholding thereof.
- "6. For injuries to personal property.
- "7. Chattels, with or without damages for the taking or detention thereof.
- "8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
- "9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
- "10. For penalties incurred under the forest, fish and game law.
- "11. For penalties incurred under the agricultural law.
- "12. For penalties incurred under the public health law."¹⁰

It is interesting to note Mr. Clark's observations upon as much of the subject as we have now encountered: "The joinder rule is that separate causes of action cannot be 'joined' or pleaded in the same suit unless they fall within one of the classes of permissible joinder specified in the codes. . . . Each rule is at least based on common sense, though applications of each may at times seem questionable. As the terms in which they are stated indicate, their application in particular cases will depend upon the meaning given to the term 'cause of action,' or group of operative facts giving occasion for jurisdiction."¹¹ Let us make clear at the outset, having confronted the first problem, that the provision has not the effect of merging various or several causes of action into a single cause of action, but it permits several causes of action to be joined in the same petition or complaint, so long as they are authorized by one of the above subdivisions.

Cases involving two or more causes of action clearly within one of the foregoing subdivisions present no serious question of permissibility of joinder,¹² but where this distinction is not clear the adjudications have been widely divergent and have led to great confusion,

¹⁰ *Op. cit. supra* note 3,

¹¹ CLARK, *op. cit. supra* note 4, at p. 293.

¹² BANCROFT, *op. cit. supra* note 2, at pp. 205-6 notes 15 and 16 and cases cited.

so much so that a few states have deemed it expedient, as we have seen, to dispense with all the restrictive sub-sections by expunging them from their code provisions,¹³ and some have gone a considerable distance in this direction through court interpretation.¹⁴ This problem centers around sub-section 9, of the New York code, for clearly if the causes of action upon which the plaintiff bases his claim are not within one of the other sub-divisions, or there is doubt about it, and he wishes to join them in a single complaint or petition, he will seek to bring them within either phase of this sub-division, it being the most equitable of the group. Let us then immediately consider what we are to understand by “. . . causes of action . . . brought to recover . . . upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing sub-divisions of this section.” The ambiguity of this sub-division arises because of the inaccuracy of interpretation of the following terms: “Causes of action”; “claims”; “transaction” and “subject of action.” We will consider them in order.

Though “cause of action” has never been crystalized into a definite meaning applicable to all circumstances and practically defies definition, it has, nevertheless, been described countless times and seems to be inevitably associated with a right or rights claimed by the plaintiff which have been violated by the defendant, and plaintiff seeks to redress such violation in law or equity or both. Thus far the authorities are fairly agreed. For example: “A cause of action cannot exist without the concurrence of a right, a duty and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused.”¹⁵ Another: A “‘cause of action is the right claimed or the wrong suffered by the plaintiff on the one hand and the duty or delict of the defendant on the other.’”¹⁶ So in determining if a cause of an action is presented we look first for a right or rights existing in the plaintiff, then a wrongful act in violation of this right or rights upon the part of the defendant, and if there be more than one right there will be more than one cause of action and plaintiff must adhere to the code provisions under consideration to join them in a single action. It may be well to note here the conclusion of Chief Justice Winslow, of the Wis-

¹³ *Op. cit. supra* notes 5, 6, 7 and 8.

¹⁴ *Infra* notes 17, 23 and 24.

¹⁵ *Bruner v. Martin*, 76 Kan. 866, 93 Pac. 165, 14 L. R. A. (N. S.) 775 (1907).

¹⁶ *Breman Mining & Mill Co. v. Brennan*, 79 Pac. 806, 812 (1905). See also: *Excelsior Clay Works v. De Camp*, 40 Ind. App. 26, 80 N. E. 981 (1907); *McKee v. Rebecca A. Dodd*, 152 Cal. 637, 93 Pac. 854 (1908); *Doyle v. Southern Pac. Co.*, 56 Or. 495, 108 Pac. 201 (1910).

consin supreme court, in the case of *McArthur v. Moffet et al.*¹⁷ "There seems no logical escape from the conclusion that the term 'cause of action' must include the facts showing (1) the plaintiff's right; (2) the defendant's corresponding duty; and (3) the defendant's breach of that duty, or, to put it more tersely, the plaintiff's right and its violation by the defendant."

This brings us to a consideration of the term "claims" which would seem to admit of the interpretation that plaintiff's "claims" are his assertions demanding redress for a violation of his right or rights, his "cause or causes of action." Directly in point we find the following in *Bancroft's Code Pleading*: "It is a rule among many of the codes that causes of action may be united in the same complaint when they arise out of the same transaction, or transactions connected with the same subject of action. This code provision is most comprehensive in character, and, except where otherwise limited by statute, allows the joinder of causes, whether legal or equitable, or both; and ex contractu or ex delicto, or both."¹⁸ It is to be noted that "claims" and "causes of action" are herein used synonymously. This full statement is set out to bring before the reader the extension of "claims" in this respect to include legal claims and equitable claims, tort claims and contract claims.¹⁹

The term "transaction" is next before us. It is defined in *Pomeroy's Code Remedies* as follows: "A negotiation, or a proceeding, or a conduct of business, between the parties of such a nature that it produces as necessary results a primary right or rights in favor of the plaintiff and wrongs done by the defendant which are violations of such right or rights."²⁰ The supreme court of Connecticut has defined it thus: "A transaction is something which has taken place whereby a cause of action has arisen. It must . . . consist of an act or agreement or several acts or agreements having some connection with each other in which more than one person is concerned and by which the legal relations of such persons between themselves is (are) altered."²¹ In *Emerson v. Nash*²² the supreme court of Wisconsin arrived at this interpretation: "Any event in which two or more persons are actors involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating a redressable wrong, is a transaction within the meaning of the statute." The supreme court

¹⁷ 128 N. W. 445, 447 (Wis. 1910).

¹⁸ BANCROFT, *op. cit. supra* note 2 at § 104.

¹⁹ See also: *Eagan v. N. Y. Trans. Co.*, 39 Misc. Rep. 111, 78 N. Y. S. 209 (1902).

²⁰ POMEROY'S CODE REMEDIES (4th ed.) § 473.

²¹ *Craft Refrigerator Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76 (1894).

²² 124 Wis. 369, 389, 102 N. W. 921, 928 (1905).

of Kansas gives us this succinct statement: "The word 'transactions' . . . probably means whatever may be done by one person which affects another's rights, and out of which a cause of action may arise."²³ The ensuing quotation is of great interest for the new element it presents that "transaction" should undergo a change of meaning between its use in the first and second phases of the sub-section, it is from the supreme court of Oklahoma: "It must be observed, however, that the term has two distinct meanings in law; that it is used for two distinct purposes: One, when used as expressive of an entire scheme, system, project, or business deal; the other, when used to encompass the acts, and only such acts, or groups of acts as constitute a cause of action. All the connected or dependent acts which constitute one entire system or deal may properly be referred to as a 'transaction' in one sense of the term, in the sense it is used in the first clause of the statutes, and yet within that one transaction may be several acts, or groups of acts, which constitute a cause of action, and each such act or group of acts may properly be referred to as a 'transaction' in the other sense of the term, in the sense it is used in the second clause of the statute."²⁴ Though the writer cannot concur with the foregoing construction of the term "transaction" and its division into two different meanings, undeniably it has been of great worth in breaking down the narrow bounds of the sub-section as frequently construed in cases before this decision. It has introduced with some firmness the idea that "transaction" need not give rise to a cause of action, but *may* give rise to it. A survey of this and the other definitions would at first seem to confuse rather than clarify the situation, but when broken down to essentials they divulge several common elements; first, and most important, a "transaction" does or may *give rise to a cause of action*; second, they all involve two or more parties; and third, there must be an *occurrence* involving these parties, though what amounts to an occurrence is not the same in all the definitions; for example, the Wisconsin case states "two or more persons are *actors*"; Mr. Pomeroy would have "A negotiation, or a proceeding or a conduct of business, between the parties"; the Connecticut case: "in which more than one person is *concerned*"; and finally the Kansas case: "whatever may be done by one party which affects another person's rights." Clearly the first quotation requires more than do the others, it would mean the parties would have to be physically present to the "transaction" and be taking an active part therein, yet this meaning was certainly not adopted by the subsequent Wisconsin case of *McArthur v. Moffet*,²⁵ which attempted to explain the rule to fit an

²³ Scarborough v. Smith, 18 Kan. 399, 406 (1877).

²⁴ Stone v. Case, 124 Pac. 960, 965 (Okla. 1912).

²⁵ *Op. cit. supra* note 17 at p. 448.

interpretation which it clearly does not allow. It is thus: "If the act of one person wrongfully involves or infringes upon the right of another, there is undoubtedly a 'transaction,' though the injured party be not physically present. He may, in such case, truly be called a participant in the act because he is represented by his right which is invaded or violated by his adversary's act." By what stretch of logic this conclusion was reached we venture no opinion, for it is obvious that one whose right is violated, especially in his absence, is being acted upon and not active, hence passive. However, we may concur with the result reached by this court and disregard the reasoning, for we find it holding in accord with the other interpretations. Mr. Pomeroy supports the decision found objectionable here for in explaining his definition of "transaction," in his work on *Remedies and Remedial Rights*, he states: "Transaction implies mutuality, something done by both in concert, in which each takes some part."²⁶ It may be noted however, that the word "proceeding" is interposed in his definition. Its meaning could create a distinction for it appears with two other words that imply the mutuality, Mr. Pomeroy speaks of, but "proceeding," the performance of an act, would not imply this, of itself, as would the other two, it depends upon whether the phrase "between the parties" was purposely supplied to overcome the lack of implication of "mutuality" in this term, or whether it was merely an appendage because of the implication given by the other words. The eagerness to bring about a broader interpretation springs from a desire to permit the joinder of such a case as is here hypothetically set out: A is the owner in fee of Blackacre situated in the state of New York; A is, and for the past two years has been, living in the state of Indiana. During A's absence from New York, B has gone upon Blackacre, as an adverse possessor, and has cut down valuable fruit trees. A returns and seeks to eject B and recover damages for injury to the real estate. Now the pertinent sub-sections of the code are 4 (injuries to real property) and 5 (for ejection). It is obvious that the two causes of action cannot be joined unless they can be brought within sub-section 9. If Mr. Pomeroy's definition of "transaction" is to apply, the writer fails to see how this may be brought about as there has been no "mutuality" "between the parties,"—hence these transgressions would fail to come within the scope of "transactions." According to the other definitions, or at least the interpretations put upon them, there would be no serious question as to the application of "transaction" to A's claim.

In view of the attitude of the courts in extending the scope of the term "claims" to include law, equity, tort and contract, it is only reasonable to allow that "transaction" should be at least co-extensive to

admit of the relations, two or more, between the parties which can come within the allotted field. If so, "transaction" must not be limited by "mutuality," it must not require the plaintiff to be asserting his rights and the defendant to interfere with these assertions by a violation of them, it should be enough that the defendant transgress the plaintiff's rights, even though they are dormant at the time, in such a manner as may evolve into a cause of action. Then we can admit of a transaction occurring in the absence of the plaintiff, or arising out of an accidental tort.

Our next topic is the "subject of action," particularly as it is used in the second clause of the code "transactions connected with the same subject of action." An examination of cases in which this problem has presented an issue leads one into a maze of varied assertions relative to general interpretation and a skillful avoidance of definition, backed by many remarks as to the intention of the legislators, which one is apt to conclude is a matter even as mysterious as the terms they compiled into this sub-section. In speaking of this amendment to the code, Judge Comstock remarked in 1858: "Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity."²⁷ In 1875 Chief Justice Church, of the New York Court of Appeals, said: "This language is very general and very indefinite. I have examined the various authorities upon this clause, and am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the 'same transaction' means, and when a cause of action shall be deemed to 'arise out' of it, and what the 'same subject of action' means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions."²⁸ The policy of these judges has been followed in New York and some of the other code states and each case determined as it presented itself. The result is very depressing when such venerable courts are seen to draw hair-line distinctions

²⁷ *The New York & New Haven R. Co. v. Schuyler, Cross, & Co.*, 17 N. Y. 592, 604 (1858).

²⁸ *Wiles v. Suydam*, 64 N. Y. 173, 177, 178 (1876).

throwing out what appeared an inevitable breach from ancient tradition to return once more to the narrowness, that seems to be especially characterized in the New York courts, which is nothing more than an heirloom of the former common law system. Such a policy has proved distasteful to the sense of justice of many jurists in states which have adopted codes modeled after that of New York and the problem has been directly confronted and very ably handled with a recognition of a new era in which the importance of facts has been substituted for skillfulness in selecting writs or forms of action. Two decisions are outstanding, *viz.*, *McArthur v. Moffett*²⁹ and *Searborough v. Smith*.³⁰ Considering the former, we find Chief Justice Winslow, after reviewing the three attempts of Mr. Pomeroy to define the term in his work on *Code Remedies*,³¹ arriving at this conclusion: "If some essential basic element can be found which inheres in all causes of action, local as well as transitory, real as well as personal, which, in actions involving specific property, can be joined with the specific property, both together forming the subject, and which in the other actions can stand alone or in connection with the intangible thing involved, like the character in slander, and form the subject, it would seem that this might be said to solve the problem. . . ."

"It seems to us that this basic and fundamental element is to be found in the plaintiff's main primary right, for the invasion of which the action is brought. Thus in controversies involving conflicting claims for the specific real or personal property the property itself plus the right, title, interest, claim or lien upon that property which the plaintiff alleges and which gives him his standing in the court is to be considered as together forming the subject of action."³² Now let us look to the latter case in which the plaintiff asserts three causes of action: (1) Ejectment; (2) Rents and profits; and (3) For partition, involving certain real estate. We quote from Justice Valentine's opinion as follows: "These three causes of action are in fact all founded upon, or, in other words, 'arise out of,' three classes of infringements upon one single right of the plaintiff Said single right of the plaintiff in this action, consists in his right to use and enjoy, in the manner he chooses, his said interest in said real property, with all the proceeds and avails thereof. This right is the 'subject of action' in this case. It is the basis and foundation of the whole action it does not include the several 'transactions' 'connected with' it, and out of which the several causes of action arise; for the 'subject of action' (the 'same' subject of action) must be common to

²⁹ *Op. cit. supra* note 17.

³⁰ *Op. cit. supra* note 23.

³¹ POMEROY, *op. cit. supra* note 20, at §§ 369, 384, 651.

³² *Op. cit. supra* note 17, at pp. 453, 454.

all the several causes of action which are united, while the several 'transactions' cannot be thus common. Each transaction or class of transactions must ordinarily belong to a different cause of action. and of course, the 'subject of action' is not the 'cause of action' or the cause of *any* action, or *any cause* of action." ³³ From the Supreme Court of Connecticut we have the following adjudication: "Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from each other; that is, separable from each other 'by some distinct line of demarcation.'" ³⁴ This was an action for personal injury and breach of contract and the two were held joinable as transactions connected with the same subject of action. Let us now look to the interpretation of this term as applied in the state of New York and note the characteristic of narrowness previously referred to. In the case of *Ador v. Blau* ³⁵ in which the plaintiff seeks to recover in a single action for the negligent acts of two defendants, one for the wrongful maintenance of an iron fence upon which the plaintiff's son sustained injuries that resulted in death, and the other for the negligence of the other defendant, an attending doctor, in his treatment of the deceased, the court said: "The 'subject of action' in this action is the negligent *act* resulting in injury causing the death of the intestate. . . . But, of course, the two causes of action were not connected with the same subject of action, for we again come back to the different negligent *acts* alleged in the two causes of action. In the one case the subject of action is the wrongful act of the defendant in maintaining a fence, and in the other cause of action it is the wrongful act of the defendant in negligently treating the intestate. The two causes of action, each against a different defendant, do not arise out of a transaction, connected with the same subject of action." (Italics supplied.) There is a dissenting opinion to this conclusion by Judge Cordozo to this effect: ". . . each of the defendants has thus contributed to a single casualty, which is the subject of action, *i. e.*, the death of the child, to the pecuniary damage of the parents, that a death so occasioned supplies a unifying center which 'connects' the subject of action in one count with the subject of action in the other . . ." ³⁶ From his comments upon this case, we find Mr. Clark in accord with this dissenting view: "The court thinks of the legal labels to be applied in deciding the case and says, two, one for the *negligence* or *nuisance* of the owner, one for the *malpractice* of the physician. Yet the non-legal witnesses are not going to divide up their testimony along these lines. They are there to tell what they

³³ *Op. cit. supra* note 23, at p. 406.

³⁴ *Muisenbacker v. Society of Danbury*, 42 Atl. 67, 69 (Conn. 1889).

³⁵ 148 N. E. 771, 775 (N. Y. 1925).

³⁶ *Op. cit. supra* note 35.

know concerning the facts leading to the death of the child. This is the ground or occasion of the suit, and hence, in the practical and legal sense, is the cause of action. Since pleading is to give a fore-taste of the facts which in turn come from law witnesses, and since it is the shortening of trials, rather than instruction of the court in the process of legal labeling which the pleadings are designed to assist, the latter is the proper content for the phase in this connection."³⁷ Under the circumstances of this case the decision is probably correct because of the defective pleading on the part of the plaintiff's council, he having assigned each defendant's wrongful act as the sole cause of action. But the court adopted reasoning in reaching this decision that fails to give the code its full import. Their investigation did not carry the cause of action into the "subject of action," it stopped at the *act* which is no more than part of the transaction that gave rise to the cause of action as a result of the violations of the primary right in two particular aspects. These last two elements, the primary right and its particular aspects, constitute the "subject of action." Let us analyze the facts we have here and see if our contention is not correct. The primary right involved is personal bodily security, its particular aspects, among others, include freedom from injury by negligent acts and freedom from injury to a nuisance maintained by another, all of this is the subject of action, by virtue of which, as between the two defendants and the deceased, there were rights and corresponding duties; next there occurred two series of facts relative to these rights and duties by which the legal relations of the parties were altered and which culminated in malpractice in one instance, and maintenance of a nuisance in the other—here were the transactions and they gave rise to two causes of action for breaches of one defendant's duty not to injure the deceased's person in a negligent way, malpractice, and of the other defendant's duty not to physically injure the deceased by maintaining a nuisance. Thus appears the second clause of the sub-section in its full effect—"causes of action arising out of transactions connected with the same subject of action." Judge Cordozo obtains this result but loses sight of the significance of "transactions," and while they played no distinctive part here, in many cases they will, so should never be lost sight of.

Now that we have investigated all of these disputed terms what can we say of sub-section 9 of the New York code? The writer submits that an interpretation is possible and that rightly understood this sub-section gives to an otherwise arbitrarily restricted power of joinder of causes of action that extension which carries out the purpose of the code; the breaking away from prior common law restrictions and centralizing law and equity into a single channel of jurisdiction,—

³⁷ Comment, *op. cit. supra* note 1, at p. 89.

the civil action. Considering the first clause of the sub-section, "claims (causes of action) arising out of the same transaction." We conclude from the foregoing treatment of the term "claims" or "cause of action" that there is a right in the plaintiff, a corresponding duty upon the defendant, and that a breach of this duty has occurred. Now all of this arises out of a "transaction" so before the full import can be disclosed we have to construe this term. Our previous treatment of "transaction" brought to light these common elements running through the definitions: it does or may give rise to a cause of action, it is an occurrence between the parties. Now just what do we mean by that which will give rise to a cause of action and is an occurrence? As we have seen where two parties are in any way concerned one with the other, rights and corresponding duties spring up and are "labeled," to borrow Mr. Clark's term, according to the specific aspect of the primary right that they involve, now the mere existence of the right and duty between these two, or more, parties alters their legal relationship, a "transaction" alters the legal relationship as we have seen; then we inquire, what meanings have these rights and duties, what is their significance, how are they handled or treated? They are recognized as "facts"; further we know that a "transaction" does or may give rise to a cause of action. To have a cause of action there must be a breach of duty by the defendant, and how will this be established? It must rest upon "facts" and be a "fact" itself. So we may say that these "occurrences" between the parties are the "facts" that alter the legal relations of one party in respect to the other, and if these facts are sufficient to amount to a breach of the defendant's duty owed to the plaintiff, then there is a cause of action.

In conclusion, then, we may say that a "transaction" is a cumulative term denoting all those facts bearing on the legal relations of the parties in connection with the particular aspect of the primary right that their conduct involves. Now our first clause declares that when these facts constituting the transaction are so conducted as to result in two or more violations of the defendant's duty owed the plaintiff the causes of action arising therefrom may be joined in the same complaint or petition.

Before we determine the meaning of the second clause we must crystalize "subject of action." From our previous treatment we find "subject of action" involves two elements, the primary right in the plaintiff and the particular aspect of that primary right, or the sub-primary right, which has acquired a corresponding duty from the defendant. Now we may consider this clause "transactions connected with the same subject of action" and it must be thus interpreted: The primary right and the particular aspect thereof involved plus all those facts altering the relationship of the parties in respect to the

sub-primary right (the particular aspect) and the corresponding duty, and as the clause uses the plural, "transactions," there must be two or more such particular aspects of the primary right with which are connected, severally, these surrounding facts. In its entirety this clause should read: "Causes of action arising out of transactions connected with the same subject of action" for without the introduction given here no causes of action would necessarily arise and there would be nothing to join in the complaint or petition.

A lengthy and intensive discussion of the other sub-sections of the sample code employed in this article is hardly necessary as they specifically set out their limits. In general it can be said of all of them that when two or more causes of action arising in their specific fields between the same parties and otherwise comply with the final section of the code, which will be next considered, whether they be legal or equitable or both, they may be joined in the same complaint. Of these the first, "Upon contract, express or implied," is by far the broadest and is the only one that need be individually considered, for as to the others there is no question of boundaries, they are specifically stated in the provision itself. In treating the first sub-section, Mr. Clark observes: "This class has been given a consistently broad interpretation, as including all manner of claims considered at common law in the contract actions. Thus causes arising upon covenants, upon debts of record or of contract, or of law, and upon express, implied, and quasi contracts, including waiver of tort, may all be joined indiscriminately."³⁸

These arbitrarily "chosen few" sub-sections seem to have been selected and arranged according to their subject-matter and it is somewhat strange that having grouped all contract claims within one division that such fundamental classification should not have been applied to the other divisions of the law, but the legislature did not deem this advisable from all that appears, no doubt because of the old common law influence, and so started the new code, and the freedom it seemed to offer, on its career after encumbering it with serious burdens, some of which still remain.

The final section of the code reads: "But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing sub-divisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action: and it must appear upon the face of the complaint, that they do not require different places of trial." The only troublesome parts of this section are the meanings of "that they are consistent with each other," "must not require

³⁸ CLARK, *op. cit. supra* note 4, at pp. 307, 308 (See cases cited in note 59 on p. 308).

different places of trial," and "that they affect all the parties to the action." We will take them in order.

"That they are consistent with each other." Some dispute arose over what had to be consistent, facts or claims. In New York the latter element is deemed the key, whether or not the causes of action arose out of the same sub-division is not the ultimate question then, if they do they must still be consistent with each other, in other words a claim in contract could not be joined with a claim in tort, despite the fact that the facts that brought about the causes of action arose out of the same transaction. In the majority of the states whose codes include this section, and it might be well to add that it is found only in those states where the causes of action arose out of the same sub-division is not the ultimate question then, a few, thirty-five, and read in by a few courts where it is not included in the code, the courts only require that there be a consistency of the facts alleged, and this seems far more just, and as a matter of fact is always true if section 9 is involved. Mr. Clark's remarks upon the consistency of facts are interesting: "It then becomes a requirement of *truth* in the pleadings, and where it appears that proof of all the facts alleged means perjury by somebody the pleadings are objectionable. This gives a limited but practical application of the provision. It should be omitted, however, for the chance of misconception which it gives, and since all its usefulness is covered by the general requirement that pleadings must be true."³⁹

"Must not require different places of trial." Thus joinder of causes of action must depend upon whether the court has jurisdiction over the res in some instances and over the parties in other. It is a question of "local" and "transitory" actions and of course must be adhered to. It is obvious from this provision that the codes have not affected the venue rules of the common law.

"That they affect all the parties to the action." It was formerly held that all the parties had to be affected *equally* but this strict rule has been broken away from and now, while the effect may be unequal it must be in the same capacity. So one could not sue as real party in interest when he is a "next friend," nor could a cause affecting one as individual be joined with another affecting him as administrator. This has a material effect upon joinder of causes of action. Mr. Clark's opinion is adverse to this requirement: "It amounts to another limitation on joinder of parties and would seem undesirable, for the party joinder rule should be a single one complete in itself. Several codes provide that it shall not apply to a mortgage foreclosure action, and the New York Civil Practice Act, in adopting the English rule of party joinder did go at least to the extent of omitting this provision from the joinder of causes section."⁴⁰

³⁹ CLARK, *op. cit. supra* note 4, at pp. 305, 306.

⁴⁰ CLARK, *op. cit. supra* note 4, at p. 304 (See cases cited in notes).

In the research connected with this article the writer was somewhat forcefully impressed with the universality of the expression that the shackles preventing the widespread joinder that the code section, apart from its restrictions, are appendages of common law heredity, that the experience of the legislators and jurists at the time the code was first enacted was so fundamentally common law they were unable to set it aside and endow their reform movement with the freedom it would logically demand. The writer has observed that as the newer states in the western part of our country adopted the code and began to interpret it the broader privileges thereunder began to grow. This fact seems to bear out the truth of common law influence upon early decisions involving the code provisions, for it was the absence of this influence that enabled these newer judicial bodies to see the full import of the provisions and give them that effect. This traditional element accompanied with the characteristic reticent attitude of the bar toward a change in that with which it is familiar, accounts for the failure of the code to attain its fullest effect even though it has been constantly litigated for more than seventy-five years. Deeper impressions are constantly being made, however, and very probably it is only a question of time before the remaining impediments are left by the wayside and the era the codes sought to attain rises to its full import.

Edward L. Barrett.

(With sincerest appreciations to Mr. F. W. Brown.)

ARE YOU A CRIMINAL?—Criminal Law is interesting to everyone. In the first instance, it involves the frailties and imperfections of the human race, and in the second place every day that you read a newspaper you are getting a miniature legal education along the line of criminal law. In your daily discourse you very probably use the word "crime" because crime is and has been for centuries a much discussed phase of our lives. In fact, there has been so much discussion of crime in recent years that perhaps you have wondered on occasions whether or not you are a criminal, intentionally or otherwise. The answer, of course, depends on whether or not you have ever committed a crime, but this answer is not very enlightening unless you know what is meant by the word "crime." If I were to ask you to define the word "crime" I would probably receive as large a variety of definitions as Mr. Heinz has food products. However, instead of asking you to define what is meant by "crime" I am going to analyze the word for you and point out the various elements of a crime, hoping thereby to

*This address was broadcast over radio station WGN on Sept. 24, 1931, by Professor William M. James of the Chicago Kent College of Law.

give you a keener appreciation of the enormous amount of study which has been devoted by jurists, lawyers and laymen to the elements involved in crime; also answer the question as to whether or not you are a criminal and incidentally enable you to better understand some of our judicial decisions.

One of the most satisfactory definitions of the word "crime" is as follows: A crime is a wilful act or omission for which the law prescribes a penalty enforced by the State in its own name, the act or omission being by a person who is criminally responsible and who has, in doing an act, or omitting the duty, a criminal intent.

An analysis of this definition discloses first of all that a crime involves a wilful act or omission to act. By wilful, however, is meant voluntary, or to put it in another way, merely the free exercise of one's conscious volition. A rather homely example is found in the case of where one person seizes the hand of another in which is a weapon and in spite of resistance kills a third person with it. The act not being the voluntary act of the person who had the weapon, he would not be guilty of a crime, but the act being the voluntary act of the person who seized the innocent participant's hand would render the assailant guilty of murder if the other elements of the crime of murder were present. Even this requirement of voluntariness, however, is subject, of course, to the well recognized exception that one cannot take the life of an innocent person to save his own life.

Delving further into our definition, we find the words "act or omission." Act is here used in the sense of doing or saying something which does or might produce an effect on a person or thing. That is to say, it means more than a mere purpose or intent which finds no expression for mere purpose or intent which finds no expression can never constitute a crime against human law. To illustrate you might say to yourself "that neighbor of mine exasperates me and I would like to give him a first class licking." Thus far you have committed no crime, but if you should permit yourself the indulgence of carrying your thought into execution you would be guilty of assault and battery. On the other hand, an omission to act may result in criminal responsibility. Thus neglecting to provide food or medicine for one who is helpless by one whose duty it is to so provide may render the omitting party criminally responsible, or the negligent omission of a switchman to close a switch may render the switchman criminally responsible if death results from the omission to act.

Pursuing our definition further, we notice it contains the phrase "A wilful act or omission for which the law prescribes a penalty enforced by the state in its own name." A crime then contemplates the inflic-

tion of a penalty. This penalty may result from a law adopted by the Congress of the United States, the Legislatures of the several states or by the common law, but regardless of the source of the penalty, in order to render the act or omission a crime, the law must affix a vindictive punishment to it.

Inasmuch as a crime is punished for the protection of society at large and not merely because of an injury to the individual, it is contemplated that the punishment therefor shall be brought about by the Sovereign, hence it is that in Illinois, for example, a criminal case is entitled: "People of the State of Illinois vs. John Doe" or whatever the defendant's name may be.

We come now to a very interesting and important element in our definition, namely "the act or omission must be by a person who is criminally responsible and who has in doing the act or omitting the duty a criminal intent." It is extremely difficult to explain what is meant by a "criminal intent." It is not to be confused with "motive" or "purpose" for with the best motives in the world one may commit a criminal act with a criminal intent and yet be innocent of any purpose to do wrong or violate the law. This is well illustrated by the celebrated case of a certain unduly enthusiastic lady who, prior to the day of Woman's suffrage, cast her vote at an election for the sole and only purpose of testing the law hoping thereby that the Supreme Court would construe the law to mean that women as well as men could vote. She obviously had no intention of being a criminal or of doing a wrongful act. However, the court held that the reason why she did the act was merely her motive that the law prohibited her from voting; that she had voted contrary to law and therefore had a criminal intent. Generally speaking, it may be said that by criminal intent is meant, the intention to do a wrongful act or an act prohibited by law, or the negligent doing of an act, or indifference to duty or to consequences so that the participant is regarded by his conduct to have had a criminal intent. This doctrine that one must have a criminal intent is subject to the well recognized exception that the legislature in adopting a statute may make an act a crime without a criminal intent being present in the mind of the violator. Familiar types of this class of legislation are some pure food and drug acts, narcotic laws, bigamy laws and laws prohibiting the sale of cigarettes to minors. However, as a general rule, a criminal intent must be present and therein lies the reason why insanity, or drunkenness in certain cases only, or infancy and sometimes marriage, insofar as the wife's criminal responsibility is concerned, will often excuse one from punishment.

Take for instance the case of a six year old child. The law presumes that he is incapable of a criminal intent, and as a consequence if