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THE SCOPE OF A CIVIL ACTION*

William Wirt Blume†

AT common law the maximum scope (outer boundary) of a civil action was determined by five unrelated principles or rules: (1) The plaintiff's statement of claim (declaration) had to agree with the original (jurisdictional) writ. (2) An action could not be grounded on two writs, and, ordinarily, one writ could not be in two forms. (3) Before an action could be tried it had to be reduced to a single issue of law or fact. (4) The courts would not deal with an action to which there were more than two parties or sets of parties. (5) One judgment had to be rendered alike for all the plaintiffs against all the defendants or for all the defendants against all the plaintiffs. The minimum scope (content) of a civil action at common law was governed by the law which determined the contents of the original writs. Whatever was sufficient to constitute the minimum substance of a valid writ was a sufficient basis for a judgment for the plaintiff. If the plaintiff's claim did not have this minimum content, judgment for the defendant had to be rendered.

None of the above principles or rules was followed by the courts of equity. These courts were willing to deal with more than two parties or sets of parties and would mould their decrees to fit the needs of the particular case. They were willing to deal with multiple issues, and were not limited by jurisdictional writs. The chief limitations on the maximum scope of the suit in equity were: (1) Lack of jurisdiction due to the existence of adequate remedies at law. (2) Multifariousness. This latter limitation was a matter which rested largely in the discretion of the court. The minimum scope (content) of the suit in equity was determined by considerations of equity jurisdiction. The plaintiff's statement of claim (bill) had to state the substantive elements of a claim over which the court of equity could take jurisdiction.

When, in New York in 1848, the forms of action were abolished and a statutory civil action was established in the place of actions at law and suits in equity, the code writers undertook to fix the scope of the new civil action by reference to a secondary procedural unit called a

* This paper, without footnotes, has been transmitted to the United States Department of State for presentation at the Tenth Chilean General Scientific Congress to be held at Santiago, early in 1944.

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"cause of action." They failed, however, to define this secondary unit. They undertook, also, to set an arbitrary limit on the maximum scope of the new action. These features of the original New York code, which have been widely copied, are now recognized as great weaknesses of the code system.

In the last fifty years the rules which deal with what Professor Millar happily has called "The Compass of the Cause" have shown "conspicuous advance."[1] This advance is clearly reflected in the *Rules of Civil Procedure of the District Courts of the United States*, effective in 1938. It is the purpose of this paper, *first*, to present a complete analysis of the concept: scope of a civil action; *second*, to show the weaknesses of the codes in dealing with this concept; and, *third*, to indicate to what extent these weaknesses have been remedied by the new federal rules (1938).

I

AFFIRMATIVE PLEADING SCOPE

A. *Minimum Affirmative Scope*

1. *Minimum Substance of a Claim*

(*a*) *At common law.* The English common-law courts, that is the great central courts, were not given jurisdiction of classes of civil actions, but of each action individually.[2] For a long period executive discretion was exercised in the granting of the writs which conferred this jurisdiction. Each writ gave the names of the parties and a statement of the substantive elements of the plaintiff's claim. After the granting of writs had become a matter of administrative routine, the courts assumed the function of determining whether the substantive elements set forth in a particular writ constituted a legal claim in view of the precedents.[3]

[1] Millar, "Notabilia of American Civil Procedure 1887-1937," 50 HARV. L. REV. 1017 at 1019 (1937).

[2] STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 3d Am. (Tyler) from 2d London ed., 40 (1924); SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING, 3d (Ballantine) ed., 17 (1923).

[3] Holdsworth writes: "It must be admitted that we know very little of the conditions under which the Chancery clerks issued their writs in the late fourteenth and fifteenth centuries. It is possible that, in the case of writs, as in the case of the written pleadings which were emerging in the fifteenth century, the advisers of the parties framed them, and then did their best to maintain them in Court if their validity were disputed; so that, when the Chancery sealed these writs, they only acted ministerially, and left the validity of the writ wholly to the Courts." Holdsworth, note, 47 L. Q. REV. 334 at 335-336 (1931). "Judges eventually can quash a new writ." GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 129 (1937).

A statement of claim (declaration) was merely an elaboration of the original (jurisdictional) writ—a statement of the substantive elements of the claim plus certain particulars.[4]

After the practice of issuing original writs was discontinued, the courts presumed that the substantive elements of a claim set forth in a particular declaration were the same as those supposedly set forth in a supposed writ.[5] If the substantive elements pleaded were not such as would have constituted a good writ, the declaration was insufficient in law.

(*b*) *In equity*. As equity jurisdiction was not conferred by original (jurisdictional) writs, it was in one sense unlimited. The courts, however, by declining jurisdiction of some claims and taking jurisdiction of others, gradually established certain definite "heads" of equity jurisdiction. "It is obvious," remarked Story, "that every Bill must have for its object one or more of the grounds, upon which the jurisdiction of a Court of Equity is founded."[6] "An original Bill," according to the same authority, is "founded upon some right claimed by the party plaintiff, in opposition to some right claimed, or wrong done, by the party defendant."[7]

[4] STEPHEN, PLEADING, 3d Am. ed., 65, 369 (1924). In the days of oral pleading one of the first steps in an action was the reading aloud of the original (jurisdictional) writ. 6 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS, Twiss ed., f. 413 (1883). Then came an oral statement of claim—the plaintiff's declaration. Id., f. 435b. According to Bracton, an exception was available to the defendant if the plaintiff stated "nothing at all" or failed to show by what right he claimed; also, if he "receded from his writ" so that his declaration was not "consonant" thereto. Id., f. 435b. In 1590 a judgment was reversed because "the writ was *quare clausum fregit*, and the count was *clausa fregit*." Edwards v. Watkin, Cro. Eliz. 185, 78 Eng. Rep. 441 (1590). In an action of detinue decided three years later "The writ was *ad valentiam* twenty pounds; the declaration *ad valentiam* forty pounds.—It was adjudged error, and the judgment reversed." Young v. Watson, Cro. Eliz. 308, 78 Eng. Rep. 559 (1593). By the time Stephen wrote in the 1820's objections on the ground of variance were rarely possible. STEPHEN, supra, 369-370. The result of the old rules against variance was still felt, however, "for its long and ancient observance had fixed the frame and language of the declaration in conformity with the original writ in each form of action." Id. 370. It thus appears that the writ, "by which the right of action ought to be set forth and expounded," Bracton, supra, f. 413, determined the minimum substance of the plaintiff's claim. "The development of writ measured the development of rights." SUNDERLAND, CASES ON COMMON LAW PLEADING, 2d ed., 3 (1932). "The writ created the right, and conformity to some writ was the test of a prima facie right to sue." Id. 4. "The scheme of 'original writs'," said Maitland, "is the very scheleton of the Corpus Juris." Maitland, "The History of the Register of Original Writs," 3 HARV. L. REV. 97 (1889) reprinted in, 2 MAITLAND, COLLECTED PAPERS 110 (1911).

[5] Cf. STEPHEN, PLEADING, 3d Am. ed., 88 (1924).

[6] STORY, COMMENTARIES ON EQUITY PLEADINGS, § 9 (1838).

[7] Id., § 23.

(*c*) *Under the codes.* A civil action, as defined by the original New York code (1848), "is a regular judicial proceeding, in which a party prosecutes another party, for the enforcement or protection of a right, [or] the redress or prevention of a wrong."[8] Elsewhere the code declared:

> "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."[9]

These definitions of a civil action have been widely copied, and will be found today in the statutes of most code states.[10]

In addition to the "civil action," the original New York code, and the codes patterned after it, established a secondary unit of procedure called a "cause of action." If the plaintiff is to have judgment he must plead facts sufficient to constitute a "cause of action."[11] It was the intention of the code writers that the primary unit called a "civil action" would be composed of one or more secondary units called "causes of action." This scheme has proved unsuccessful largely because the codes failed to fix the maximum scope of the secondary unit.

While experiencing great difficulties in attempting to determine the maximum scope of a "cause of action," the courts have been able to determine the minimum scope with relatively little trouble. The minimum scope of the secondary unit is held to coincide with the minimum scope of the primary unit. The latter, as defined by the codes, is a proceeding "for the enforcement or protection of a right" or "the redress or prevention of a wrong."

The definition of "cause of action" most widely accepted by the courts is that given by Pomeroy in his well-known work on *Code Remedies:*

> ". . . Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the

[8] N.Y. Laws (1848), c. 379, § 2 (cited hereafter as "N.Y. Code").

[9] Id., § 62.

[10] PHILLIPS, AN EXPOSITION OF THE PRINCIPLES OF CODE PLEADING, 2d (Viesselman) ed., § 172 (1932); BANCROFT, CODE PRACTICE AND REMEDIES, § 77a (1927).

[11] N. Y. Code (1848), § 127.

plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states."[12]

This definition is accurate in so far as it fixes the minimum scope of the code "cause of action," but is defective in that it fails to determine, or even mention, the maximum scope of the secondary unit.

The minimum substance of a "cause of action" is a single invasion of (or threat to invade) a single right. But suppose two or more rights have been invaded by the same act? Or a single right has been invaded more than once? In their failure to provide for these situations we find one of the greatest weaknesses of the code.

(*d*) *Under the federal rules.* Although fully aware of the difficulties caused by the failure of the codes to define "cause of action," the draftsmen of the new federal rules (1938) deliberately repeated the earlier mistake.[13] By substituting the word "claim" for the phrase "cause of action" they hoped to free the rules from the conflicting opinions which had interpreted the codes,[14] but must have realized that they were sowing the seeds of further conflict.

As in the case of the codes, the courts will have little trouble in fixing the minimum substance of the secondary unit now called a "claim." The difficulty will come at the other extreme. How much

[12] POMEROY, CODE REMEDIES, 5th ed., § 347 (1929).

[13] It is assumed that the omission of any definition of the term "claim" was deliberate and not due to oversight. This assumption is based on the fact that the draftsman of the rules (Dean, now Judge, Charles E. Clark) had, for a number of years, advocated what he considered to be a proper definition of the code "cause of action" and was fully aware of the difficulties which had arisen from the lack of an adequate definition of that term. See CLARK, HANDBOOK OF CODE PLEADING 75 (1928).

[14] Professor James W. Moore, who assisted in drafting the rules, says: "Nowhere in the Rules is the term 'cause of action' used. This can only mean that the draftsmen, by the use of the phrase 'claim' or 'claim for relief,' hoped that such different expressions in lieu of 'cause of action' would give the courts freedom to escape from the morass of decisions concerning a cause of action; and would adopt a pragmatic treatment of what we may for convenience still refer to as a cause of action." 1 MOORE, FEDERAL PRACTICE 145 (1938). The "pragmatic treatment" referred to was the view advocated by Judge Clark. From this statement it appears that the term "claim" was left undefined so that the "pragmatic view" might be urged upon the courts. Why the "pragmatic view" was not stated in the rules in the form of a definition does not appear. Numerous law review articles dealing with the troublesome "cause of action" are cited by MOORE, id.

more than the minimum can we have and still have a single claim? If the plaintiff recovers on a minimum and brings a second action for the excess, can he be met with the plea that he has split a claim?

2. *Attempt to State a Claim*

For an action to have any real affirmative scope it is necessary that at least one legally sufficient claim be stated. It must be noted, however, that an *attempt* to state a claim, if the attempt goes far enough to challenge the attention of the court, will invoke the jurisdiction of the court.[15] Where a claim is stated, or a sufficient attempt is made, the court may render judgment whether the defendant pleads or not. A judgment rendered for the plaintiff on a legally insufficient statement of claim is erroneous; but if the attempt is sufficient the judgment is not void.[16]

B. *Maximum Affirmative Scope*

1. *Multiple Claims*

(*a*) *Joinder of Plaintiffs*

(*i*) *At common law.* The term "joinder of plaintiffs" has two distinct meanings. (a) When two or more persons are jointly interested in a claim they must, ordinarily, join as plaintiffs in any action brought to enforce the claim. This is joinder of plaintiffs. (b) When two or more persons, each having a claim against another person, join their claims in one action, the joinder is, in reality, "joinder of claims," but is also called "joinder of plaintiffs." Joinder of the first type, which was recognized at common law, does not affect, at least directly, the scope of an action. Joinder of the second type does affect the scope of an action, but was not recognized at common law.

(*ii*) *In equity.* Although joinder of the second type mentioned above was recognized in equity, the extent of the joinder was limited by the principle which condemned multifariousness. According to Story, this principle "applies to an improper joinder of plaintiffs, who claim no common interest, but assert distinct and several claims."[17] If, however, the claims of the several plaintiffs were so related as to indicate that common questions of law or fact would be involved, their joinder might be allowed. The potential scope of an action brought by joined plaintiffs of type two is clearly broader than the potential

[15] Welch v. Fecht, 67 Okla. 275, 171 P. 130 (1918).

[16] Id. Also see comment, 36 YALE L. J. 549 (1937).

[17] STORY, EQUITY PLEADINGS, § 279 (1838). See CLEPHANE, HANDBOOK ON THE LAW OF EQUITY PLEADING AND PRACTICE 59 (1926).

scope of an action brought by one of the plaintiffs alone. But if *all* the questions presented to the court should turn out to be common to *all* the claims, the actual scope of the trial would be the same. With respect to the joinder of plaintiffs the maximum potential scope of a suit in equity was definitely limited by the rule against permitting "several plaintiffs to demand by one bill, several matters, perfectly distinct and unconnected, against one defendant."[18] Beyond this there was no scope-limiting rule, the matter of joinder being left to the discretion of the court to be exercised in light of equity's "abhorrence" of unnecessary suits.

(*iii*) *Under the codes.* The original New York code (1848) provided that all persons having "an interest in the subject of the action, and in obtaining the relief demanded" might join as plaintiffs.[19] This section, which appears in most of the present codes,[20] permits plaintiffs having separate claims to join them, but only when they have an interest in "the subject of the action" *and* in "the relief demanded." The quoted phrases fix the maximum potential scope of an action with respect to the joinder of plaintiffs, but in language which has been difficult, if not impossible, to apply. Due to the uncertainty of these scope-limiting phrases the courts have been inclined to hold, with respect to the joinder of plaintiffs, that the scope of an action for legal relief is the same as it was before the code, and that of an action for relief in equity is as limited as, and probably more limited than, it was before. With the adoption of the codes the discretion formerly exercised by the courts of equity disappeared.

(*iv*) *Under the federal rules.* The federal rules (1938) provide: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."[21] Two tests must be met: (a) The claims joined must be "in respect of" or "arise out of" the same transaction, etc. (b) It must appear that some question of law or fact common to all of them will arise. While these requirements definitely limit the potential scope of any action in so far as joinder of plaintiffs

[18] Fellows v. Fellows, 4 Cow. (N. Y.) 682 at 700 (1825).

[19] N. Y. Code (1848), § 97.

[20] CLARK, CODE PLEADING, 252 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 251 (1932).

[21] Federal Rules of Civil Procedure (1938), Rule 20 (a) (hereafter cited as "Federal Rules"). See 2 MOORE, FEDERAL PRACTICE, c. 20 (1938).

is concerned, they expand the scope over that allowed at common law. The scope provided is much the same as that allowed in equity before the codes. It will be noted that it is enough if "any" question of law or fact will be common to all the claims. The rules further provide that the court, "in furtherance of convenience or to avoid prejudice," may order separate trials.[22] This means that the court, in its discretion, may narrow the scope of an action, but may not expand it beyond the maximum limits fixed by the rules.

(b) *Joinder of Defendants*

(*i*) *At common law.* A person having several claims, each against a different person, could not join them in one action at common law. He could, however, join as defendants persons who were jointly liable. If such persons were sued jointly and all joined in the same defenses, the actual scope of the action was not affected by the joinder. But since these defendants could defend separately, the potential affirmative scope, in so far as it was determined by the defendants' pleadings, was multiplied by the number of defendants joined.

(*ii*) *In equity.* The principle which condemned multifariousness led the courts of equity to hold that a plaintiff could not demand "several matters of distinct natures against several defendants in the same Bill."[23] If, however, questions common to all the claims were reasonably certain to arise, joinder might be permitted, this being a matter within the discretion of the court. With respect to the joinder of defendants, the rules limiting the scope of the suit were much the same as where joinder of plaintiffs was involved.

(*iii*) *Under the codes.* The original New York code (1848) provided that any person might be made a party defendant, who had "an interest in the controversy, adverse to the plaintiff."[24] Later, this was amended by adding: "or who is a necessary party to the complete determination or settlement of the question involved therein."[25] These provisions were intended to fix the maximum scope of an action in respect to joinder of defendants, but were so vague that the courts found it necessary to follow the precedents of the older systems.[26]

[22] Federal Rule 42 (b). See 3 MOORE, FEDERAL PRACTICE, § 42.02 (1938).

[23] STORY, EQUITY PLEADINGS, § 271 (1838). See CLEPHANE, EQUITY PLEADING AND PRACTICE 61 (1926).

[24] N. Y. Code (1848), § 98.

[25] Id., as amended by N. Y. Laws (1849), c. 438, § 118.

[26] CLARK, CODE PLEADING 265 (1928). In this connection Judge, then Professor, Clark observed: "It seems that the possible scope of a single case [is] more or less delimited by the extent of the rules within which plaintiffs may be joined; and courts

(*iv*) *Under the federal rules.* "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any question of law or fact common to all of them will arise in the action."[27] The scope-limiting provisions of this rule are the same as those found in the federal rule, discussed above, which governs the joinder of plaintiffs.

(*c*) *Joinder of Claims*

(*i*) *At common law.* Joinder of claims means the joinder in one action of two or more claims by one plaintiff (or joint plaintiffs) against one defendant (or joint defendants). At common law an original (jurisdictional) writ might authorize the prosecution of one claim, or it might, by enlarging a claim in point of sums and quantities, authorize the joining of any number of claims in one action.[28] On the other hand, "It was impossible," as stated by Evans, "that one action could be grounded on two writs, or that one writ could be in two forms; consequently there could be no joinder of counts, sounding, as the phrase is, in two different forms of action."[29] It must be noted, however, that this rule was subject to two exceptions: Debt could be joined with detinue, and case with trover. Aside from these two instances of double writs, each writ was limited to one form of action. As a result of this development we find that any number of claims of the same form of action could be joined in one action, but claims of different forms of action could not be joined, except debt with detinue, and case with trover. As long as the claims joined were of the same form of action there was no rule which fixed the maximum scope of an action in respect to joinder of claims, and the courts were without power to limit the scope in their discretion. When it came to joining claims of different forms, the maximum scope was one form, except as already indicated above.

(*ii*) *In equity.* Some courts of equity took the position that unrelated claims between the same parties could not be joined, holding that a common question was necessary. Other courts permitted free joinder of claims, subject to the court's control. According to the one

naturally fall into the practice of setting a limit to the joinder of defendants corresponding roughly to that set for plaintiffs."

[27] Federal Rule 20 (a). See 2 MOORE, FEDERAL PRACTICE, c. 20 (1938).

[28] Blume, "A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims," 26 MICH. L. REV. 1 at 4 (1927).

[29] EVANS, PLEADING IN CIVIL ACTIONS, 2d ed., 94 (1886).

view, the scope of a suit was limited by the rule which prohibited joinder of unrelated claims. According to the other view, the only limitation of scope in respect to joinder of claims was the discretion of the court.

(*iii*) *Under the codes.* The original New York code (1848) provided that a plaintiff might unite in one complaint against one defendant any number of claims belonging to any one of seven classes of claims. As long as the claims belonged to one class the potential scope of the action in this respect was unlimited, the court having no power to order separate trials. From the viewpoint of joining claims of different classes, the maximum scope was one class. In 1852 a new class was added: Claims may be joined "where they all arise out of the same transaction, or transactions connected with the same subject of the action."[30] This class cut across the other seven classes and fixed the maximum scope of an action in respect to the joinder of claims belonging to different classes of the original classification. The scope-limiting phrases used in the amendment have been difficult to interpret and have led to great uncertainty as to the exact location of the outer boundary of an action. In a few code states joined claims must be consistent.[31]

In one direction, however, the codes of most of the states made a significant advance. By abolishing the "distinctions between actions at law and suits in equity, and the forms of all such actions and suits," they opened the way for joining claims in equity with claims at law. The New York code, as amended in 1852, expressly provided that a plaintiff might "unite" claims, otherwise joinable, "whether they be such as have been heretofore denominated legal or equitable, or both."[32] This possibility greatly increased the potential maximum scope of the civil action.

(*iv*) *Under the federal rules.* The federal rules (1938) authorize a plaintiff to join in one action "as many claims either legal or equitable or both as he may have against an opposing party,"[33] subject to the power of the court to order separate trials. While the potential maximum scope of an action in respect to joinder of claims between the same parties is unlimited by rule, the actual scope may be limited by

[30] N. Y. Laws (1852), c. 392, § 167, amending N. Y. Code (1848), § 143.

[31] CLARK, CODE PLEADING 305 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 316 (1932).

[32] N. Y. Laws (1852), c. 392, § 167.

[33] Federal Rule 18 (a). See 2 MOORE, FEDERAL PRACTICE, §§ 18.01, 18.02 (1938).

the court in "furtherance of convenience and to avoid prejudice."[34] The plaintiff is permitted, but not required, to join as many claims as he may have against the defendant. The maximum scope is authorized, not compelled.

(*d*) *Counterclaims*

(*i*) *At common law.* No true counterclaim was developed under the common law. Recoupment was a defense. Setoff was introduced by statute. Both, however, affected the scope of actions and should be considered at this point. An act of Parliament passed in 1729 provided "that where there are mutual debts between the plaintiff and defendant . . . one debt may be set against the other."[35] Under the common law the plaintiff could include in one form of action as many claims of debt as he had against the defendant. When sued for a debt, the defendant could, under the statute, set up as many claims of debt as he had against the plaintiff. The effect of the statute was to double the potential maximum scope of actions to recover debts. Recoupment was developed so as to permit a defendant to set up as a defense any claim he might have against the plaintiff arising out of the transaction which gave rise to the plaintiff's claim. Any kind of claim at law could be used as recoupment against any kind of claim so long as the scope-limiting requirement that they arise out of the same transaction was observed.

(*ii*) *In equity.* A defendant in a suit in equity was permitted to file a cross bill against the plaintiff, or against a codefendant, or both, "touching the matters in question in the original Bill."[36] In other words, a cross bill "should not introduce new and distinct matters, not embraced in the original suit."[37]

(*iii*) *Under the codes.* The original New York code (1848) made no provision for counterclaims. A section added in 1852 authorized the defendant to set up against the plaintiff "a cause of action arising out of the contract or transaction set forth in the complaint."[38] Another clause added at the same time provided that in an action "arising on contract" the defendant might counterclaim "any other cause of action arising also on contract."[39] The scope-limiting provi-

[34] Federal Rule 42 (b).

[35] 2 Geo. II., c. 22, § 13 (1729).

[36] STORY, EQUITY PLEADINGS, § 389 (1838). See CLEPHANE, EQUITY PLEADING AND PRACTICE 308 (1926).

[37] STORY, EQUITY PLEADINGS, § 401 (1838).

[38] N. Y. Laws (1852), c. 392, § 150.

[39] Id.

sions of these sections were suggested by the rules which governed recoupment and setoff under the earlier practice. In actions on contracts, code counterclaims may be used without limit provided that they are also on contracts. The use of other code counterclaims is limited by the requirement that they must arise "out of the contract or transaction set forth in the complaint."

(*iv*) *Under the federal rules.* The federal rules (1938) *permit* all claims against the plaintiff to be used as counterclaims,[40] and *require* that claims arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim" be so used.[41] In "furtherance of convenience or to avoid prejudice" the court may order that any counterclaim be tried separately. It thus appears that the potential maximum scope of an action with respect to counterclaims is not fixed in advance by rules. Any limitation on scope is a matter for the court in a particular case. The compulsory counterclaim is compulsory in the sense that if it is not set up in the plaintiff's action it cannot be used later. The effect of this rule is to bring all counterclaims which "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim," within the scope of the action whether pleaded or not. If not pleaded they are not within the scope of the trial and cannot be proved, but are within the scope of the judgment and become res judicata.

(*e*) *Cross Claims against Coparties*

Cross claims against coparties were not used at common law. In equity they were limited to "matters in question in the original Bill."[42] Under the few codes which provide for them, they must arise out of the "facts" set forth in the original complaint.[43] Under the federal rules (1938):

> "A pleading may state as cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein."[44]

[40] Federal Rule 13 (b) ("Permissive Counterclaims"). See 1 MOORE, FEDERAL PRACTICE, § 13.03 (1938).

[41] Federal Rule 13 (a) ("Compulsory Counterclaims"). See 1 MOORE, FEDERAL PRACTICE, § 13.02 (1938).

[42] STORY, EQUITY PLEADINGS, § 389 (1838). See CLEPHANE, EQUITY PLEADING AND PRACTICE 308 (1926).

[43] CLARK, CODE PLEADING 471 (1928). See PHILLIPS, CODE PLEADING, 2d ed., § 379 (1932).

[44] Federal Rule 13 (g). See 1 MOORE, FEDERAL PRACTICE, § 13.08 (1938).

These provisions for cross claims increase the potential maximum scope of an action over what it was at common law, subject to the scope-limiting requirement that cross claims must arise out of the "facts," "transaction," or "occurrence" already involved in the action.

(f) *Claims against Third Persons*

The federal rules (1938)[45] and the statutes of some states[46] authorize a defendant (or a plaintiff when a counterclaim is asserted against him) to bring in as a third-party a person "who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him." This extension of the potential maximum scope of an action is limited by the requirement that the claims against the third party be directly related to the claim asserted by the plaintiff.

(g) *Claims of Intervenors*

The broader type of intervention statute permits a person to intervene who has "an interest in the matter in litigation."[47] Under the federal rules (1938) a person may be permitted to intervene when his "claim" and "the main action" have "a question of law or fact in common."[48] Although the possibility of intervention increases the potential maximum scope of an action beyond what it would be otherwise, the rules which provide that claims of intervenors must show "an interest in the matter in litigation" or must present a common question of law or fact put a definite limit on the scope in this respect.

In actions in rem claimants are warned to intervene.[49] In representative suits brought for the benefit of persons having separate claims, the persons represented may, and probably must, intervene.[50] In interpleader the parties interpleaded are required to make claims or lose

[45] Federal Rule 14. See 1 MOORE, FEDERAL PRACTICE, c. 14 (1938).

[46] CLARK, CODE PLEADING 284 (1928).

[47] Id. 288. See PHILLIPS, CODE PLEADING, 2d ed., § 262 (1932).

[48] Federal Rule 24 (b). See 2 MOORE, FEDERAL PRACTICE, c. 24 (1938).

[49] HUGHES, ADMIRALTY, 2d ed., 402 (1920). When an owner takes steps to defend seized property "he comes in rather as claimant or intervenor than as defendant." Id. The process issued warns all persons interested "to appear, and interpose their claims." Id. 406.

[50] See Blume, "The 'Common Questions' Principle in the Code Provision for Representative Suits," 30 MICH. L. REV. 878 at 898 (1932). In Stevens v. Brooks, 22 Wis. 695 (1866), the court said: "The persons not named in such cases are not parties to the suit. . . . They are so far before the court that if they neglect, after a reasonable notice to them for that purpose, to come in under the judgment and establish their claims, the court will protect the defendants and parties named from any further litigation."

them.[51] Most or all of these claims are within the scope of the action whether pleaded or not in the sense that they are concluded by the judgment.

2. *Affirmative Defenses*

(*a*) *At Common Law*

(*i*) *In abatement.* Under the common-law rule which allowed only one defense to one claim a defendant had to choose whether he would plead in abatement or in bar. An affirmative defense in abatement was one which alleged that the plaintiff's action had been brought at a wrong time or place, or in a wrong manner. If the plaintiff denied the truth of this defense and the jury found for the plaintiff, the defendant lost the case on its merits as he was never allowed to plead over and defend on the merits.[52] An affirmative defense in abatement expanded the scope of the action by bringing before the court matters not contained in the plaintiff's statement of claim.

(*ii*) *In bar.* An affirmative defense in bar is one which in effect alleges that although what the plaintiff says is true, here is new matter which under the law bars his claim. Prior to 1705[53] an affirmative defense expanded the affirmative scope of the action but did not increase the potential number of issues. After the statute of 1705 a defendant might deny the plaintiff's claim and also plead one or more affirmative defenses in bar, with leave of the court. Except for the discretion which the court could exercise in granting leave, there was, after 1705, no limit on the number of new matters in bar which could be brought in by the way of defense. The statute did not, however, authorize the pleading of defenses in abatement and in bar at the same time. If the two were filed together the defense in abatement was considered waived.[54]

(*b*) *In Equity*

(*i*) *Plea.* An affirmative plea in equity set forth some matter not apparent on the face of the bill "material to delay, dismiss, or bar the Bill."[55] As the object of a plea was to limit the trial to a single issue or point, it could not, as a general rule, be double, that is, contain more

[51] McNamara v. Provident Life Assur. Soc., (C. C. A. 5th, 1902) 114 F. 910.

[52] SHIPMAN, PLEADING, 3d ed., 402 (1923); O'DONNELL, PROCEDURE AND FORMS: COMMON-LAW PLEADING 194 (1934).

[53] Statute of 4 Anne, c. 16 (1705).

[54] SHIPMAN, PLEADING, 3d ed., 284 (1923); O'DONNELL, COMMON-LAW PLEADING 182 (1934).

[55] STORY, EQUITY PLEADINGS, § 661 (1838). See CLEPHANE, EQUITY PLEADING AND PRACTICE 237 (1926).

than one defense.[56] Defenses in abatement and in bar could not be joined.[57]

(*ii*) *Answer.* By answer in equity a defendant could set forth as many affirmative defenses in bar as he had, subject to a requirement that joined defenses be consistent.[58] Consistency was required because the answer in equity was under oath and served as a deposition as well as a pleading.

(*c*) *Under the Codes*

The original New York code (1848) provided: "The defendant may set forth in his answer, as many grounds of defense as he shall have."[59] In addition to allowing any number of defenses without leave of court, this provision extended the potential affirmative scope of civil actions by allowing the joinder of legal and equitable defenses, and the pleading of defenses in abatement along with defenses in bar. In some states joined defenses must be consistent.[60] In a few, defenses in abatement and in bar cannot be joined.[61]

(*d*) *Under the Federal Rules*

Under the federal rules (1938) a party may state "as many separate . . . defenses as he has regardless of consistency and whether based on legal or equitable grounds or both."[62] Defenses in abatement and in bar may be pleaded together in the same answer.[63] In so far as affirmative defenses are concerned, all the older rules of scope-limitation have disappeared.

3. *Affimative Replies*

(*a*) *At common law.* At common law the plaintiff was never allowed more than one reply (replication) to one defense.[64] If he denied the defense an issue was formed. If he put in an affirmative reply,

[56] STORY, EQUITY PLEADINGS, § 653 (1838); CLEPHANE, EQUITY PLEADING AND PRACTICE 237 (1926).

[57] STORY, EQUITY PLEADINGS, § 708 (1838).

[58] Jesus College v. Gibbs, 1 Y. & C. Exch. 145 at 147, 160 Eng. Rep. 59 (1835).

[59] N. Y. Code (1848), § 129.

[60] CLARK, CODE PLEADING 432 (1928); PHILLIPS, CODE PLEADING, 2d ed., §§ 363-368 (1932).

[61] CLARK, CODE PLEADING 411 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 362 (1932).

[62] Federal Rule 8 (e) (2). See 1 MOORE, FEDERAL PRACTICE, § 8.12 (1938).

[63] See Form No. 20.

[64] STEPHEN, PLEADING, 3d Am. ed., 265 (1924); SHIPMAN, PLEADING, 3d ed., 367 (1923).

confessing the defense, the issue was postponed. Ordinarily there could be only one issue with respect to one defense.[65] To prevent the introduction of a new claim at the stage of the reply, the courts enforced a rule which prohibited any departure from the claim set up in the declaration.[66]

(*b*) *In equity.* Although used in equity at one time, affirmative replies were discontinued, leaving in use only a "general replication" which was "a general denial of the truth of the defendant's plea or answer."[67]

(*c*) *Under the codes.* The original New York Code (1848) provided that a plaintiff in his reply might deny "each allegation" of an affirmative defense *and* allege in avoidance "any new matter not inconsistent with the complaint."[68] When Parliament in 1705 allowed the defendant to plead an unlimited number of defenses to one claim, with leave of the court, it took a long step toward eradicating the common-law notion that the outer boundaries of actions should be fixed by rules. In allowing an unlimited number of replies to one defense, the code writers took another long step in the same direction.

(*d*) *Under the federal rules.* Replies to defenses are not allowed under the federal rules (1938) unless specially ordered by the court.[69] The number of replies which may be made to one defense is, therefore, not a matter of rule, but a matter within the discretion of the court in the particular case.

II

TRIAL SCOPE

A. *Issues Formed By Pleadings*

1. *Scope Determination*

According to the principle of "party-presentation," which long has characterized Anglo-American civil procedure, "the scope and content of the judicial controversy are to be defined by the parties."[70] Scope-

[65] A general replication known as "the traverse *de injuria*" could be used in a few situations. STEPHEN, PLEADINGS, 3d Am. ed., 179 (1924); SHIPMAN, PLEADING, 3d ed., 367 (1923).

[66] STEPHEN, PLEADING, 3d Am. ed., 354 (1924); SHIPMAN, PLEADING, 3d ed., 376 (1923).

[67] STORY, EQUITY PLEADINGS, § 878 (1838). See CLEPHANE, EQUITY PLEADING AND PRACTICE 328 (1926).

[68] N. Y. Code (1848), § 131.

[69] Federal Rule 7 (a).

[70] Millar, "The Formative Principles of Civil Procedure," 18 ILL. L. REV. 1 at 9 (1923), reprinted MILLAR, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 11 (1927).

determination is accomplished, in the first instance, by written statements of claim and defense made in advance of trial. Once the "scope and content" of the action have been defined by the parties, this scope-determination governs the trial and also the appeal. It is a fixed rule that no claim or defense not included in the scope-determination can be proved on the trial, unless the point is waived or the court allows the scope-determination to be amended. A matter outside the scope of the trial is, of course, outside the scope of review.

2. *A Single Issue*

(*a*) *At common law.* Stephen, in his classic work on pleading, states that pleadings in common-law actions "are so conducted as always to evolve some question, either of fact or law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision, and the question so produced is called *the issue.*"[71] According to Stephen, the formation of "*an issue*" is the "main object" of common-law pleading, and is peculiar to that system.[72] As Holdsworth sees it, "the settlement by the debate of the parties in court of the issue to be tried" is "the fundamental peculiarity of the English system of pleading."[73]

Where the plaintiff stated, or attempted to state, a single claim, a single issue of *law* could be formed by challenging the statement as insufficient in law. A single issue of *fact* could be formed by denying the truth of some one element of the claim. Subject to rules discussed below,[74] a decision of either issue settled the entire action. If the plaintiff lost on either issue, judgment went for the defendant as a plaintiff could not have judgment if his claim was legally insufficient or if a necessary part of it was factually untrue. If the defendant lost on either issue, judgment went for the plaintiff; in the case of the issue of law because the plaintiff's claim was legally sufficient and the defendant had not denied the facts; in the case of the issue of fact, because all elements of the plaintiff's claim except one had been admitted to be factually true, and the element denied had been found to be true. If, instead of denying, the defendant alleged new matter as a defense, he tacitly admitted the truth of all matters properly pleaded by the plaintiff as the elements of his claim. As no issue was formed by such

[71] STEPHEN, PLEADING, 3d Am. ed., 147-148 (1924). Other definitions of "the issue" will be found id., Appendix, xl, note 39.

[72] Id. 148.

[73] 3 HOLDSWORTH, HISTORY OF THE ENGLISH LAW, 3d ed., 632 (1923).

[74] Subdivision II, C, "Questions not Waived," p. 278, infra.

a defense, the plaintiff was required to reply. If new matter should be set up in the reply, a rejoinder was necessary, and so on until a party raised either an issue of law or an issue of fact. At whatever stage the issue was raised, this one issue settled the entire case. All affirmative matters of claim, defense, reply, etc., not met by denials were admitted and need not be proved. The single issue was possible only when the plaintiff stated one claim, the defendant one affirmative defense, the plaintiff one affirmative reply, etc., for if there were more lines of pleading than one, an issue had to terminate each line.

(*b*) *In equity*. In equity a defendant was expected to make a full and complete answer to the plaintiff's statement of claim. He could, however, demur on the ground that the statement (bill) "contains not any matter of equity," and thus raise an issue of law.[75] After a long period of doubt, it was held that he might, also, meet the statement of claim by a single negative plea.[76] After this development it was possible for the parties to a suit in equity to limit the suit to a single issue of law or of fact, much the same as at common law.

(*c*) *Under the codes*. The original New York code (1848) provided that a defendant might demur on one or more grounds,[77] and might answer by making a "specific denial" of "each allegation" of the complaint "controverted" by him.[78] It provided, further, that a plaintiff might deny "each allegation" of an affirmative defense.[79] These provisions, found in most if not all of the codes today, have continued in force the common-law scheme of allowing the parties by their pleadings to limit any action involving a single claim to a single issue of law or of fact.

(*d*) *Under the federal rules*. The federal rules (1938) provide that a defendant may move to dismiss on certain grounds.[80] Such a motion based on one ground may raise a single issue of law. The rules further provide that a party shall "admit or deny the averments upon which the adverse party relies."[81] Coupled with this provision is one which declares that averments not denied are "admitted."[82] Where all elements of a claim except one are admitted (whether expressly or tacitly) and that one is explicitly denied, the action is limited to a single issue of fact.

[75] STORY, EQUITY PLEADINGS, §§ 453, 455, note 3 (1838); CLEPHANE, EQUITY PLEADING AND PRACTICE 191 (1926).

[76] STORY, EQUITY PLEADINGS, § 668 (1838); CLEPHANE, EQUITY PLEADING AND PRACTICE 262 (1926).

[77] N. Y. Code (1848), § 122.

[78] Id., § 128.

[79] Id., § 131.

[80] Federal Rule 12 (b).

[81] Federal Rule 8 (b).

[82] Federal Rule 8 (d).

3. *Multiple Issues*

(*a*) *At common law.* Except in two situations, noted below, the rules of common-law pleading required that every action be reduced to one issue of law or of fact. A single issue was the maximum as well as the minimum trial scope of a civil action in so far as the pleadings determined the scope.

A single issue of fact was enforced by the rules which prohibited "duplicity." To any one claim the defendant was allowed only one defense.[83] If this defense was a denial of the truth of one of the matters alleged by the plaintiff, the only issue raised by the pleadings was this single question of fact. If, instead of denying, the defendant pleaded an affirmative defense, the plaintiff was required to reply. Under the rules against duplicity a reply was limited to one denial or one new matter of avoidance.[84] If new matter was set up in the reply calling for a rejoinder, the rejoinder was limited to one denial or one new matter of avoidance, and so on until issue was reached. The fact that no pleading could be double meant that only one line of pleading was formed.

Instead of denying the truth of some matter alleged by the opposite party or setting up new matter in avoidance, a party could allege that his opponent's claim, defense, reply, etc., was "insufficient in law," thus raising an issue of law. He could not, however, raise an issue of fact and an issue of law at the same time with respect to the same matter.[85] If an issue of law was raised at any stage, the entire action was submitted to the court on this single issue. The scheme contemplated a single line of pleading terminated either by an issue of fact or by an issue of law.

One exceptional situation was presented when a plaintiff joined two or more claims in one action. In this situation the defendant was allowed to plead a separate defense to each claim.[86] This meant that, instead of only one line of pleading, there might be as many lines as there were claims, and, as each line terminated in an issue of law or of fact, as many issues as there were lines.

A second exceptional situation was presented when a plaintiff sued two or more persons as joint defendants. As each defendant was al-

[83] STEPHEN, PLEADING, 3d Am. ed., 262 (1924); SHIPMAN, PLEADING, 3d ed., 418 (1923); 3 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 631 (1923); 9 id. 291 (1926).

[84] Supra, at note 83.

[85] STEPHEN, PLEADING, 3d Am. ed., 267 (1924); SHIPMAN, PLEADING, 3d ed., 425 (1923).

[86] STEPHEN, PLEADING, 3d Am. ed., 258 (1924); SHIPMAN, PLEADING, 3d ed., 419 (1923).

lowed to defend separately,[87] there might be as many lines of pleading, and, therefore, as many issues, as there were defendants.

The common-law scheme of limiting every action to a single issue collapsed finally because of the unfairness involved in restricting a defendant to one defense. One relaxation came by allowing the defendant to plead broad general denials (issues) which permitted the proof of more than one defense. Another relaxation came by an act of Parliament passed in 1705 which authorized the defendant, with leave of the court, to plead to one claim as many defenses as he might have.[88] This statute did not, however, permit double pleading at any stage later than the plea. With respect to one claim the number of lines of pleading was governed by the number of defenses. As the statute did not apply to pleas in abatement, the old rules continued to prohibit more than one plea in abatement to the same matter at the same time. The old rules, also, continued to prohibit the joinder of a plea in abatement with a plea in bar, and the raising of an issue of law and an issue of fact with respect to the same matter at the same time.

(*b*) *In equity*. In equity a defendant might meet the plaintiff's statement of claim by a plea or by answer. If he chose to meet it by plea he was required to limit his plea to one affirmative matter or to one denial so as to reduce the cause to a single point.[89] Although the courts of equity were "anxious to preserve some analogy to the comparative simplicity of proceedings at the common law,"[90] they never undertook to limit a suit to a single point if the defendant was willing to put in an answer as distinguished from a plea.

(*c*) *Under the codes*. By allowing as many defenses to each claim as the defendant might have and as many replies to an affirmative defense as a plaintiff might have, the writers of the original New York code (1848) clearly repudiated the common-law scheme of limiting every action to a single issue. They did not, however, expressly provide that an issue of fact and an issue of law might be raised at the same time with respect to the same matter. Due to this omission, the common-law rule is still followed under the codes, except in a few states where the raising of the two issues has been expressly authorized.[91]

[87] STEPHEN, PLEADING, 3d Am. ed., 246 (1924); SHIPMAN, PLEADING, 3d ed., 424 (1923).

[88] 4 Anne, c. 16 (1705).

[89] Note 56, supra.

[90] STORY, EQUITY PLEADINGS, § 271 (1838).

[91] CLARK, CODE PLEADING 350 (1928).

The general code practice in this respect has been characterized by Hepburn as a "remarkable survival" of a common-law restriction.[92]

(*d*) *Under the federal rules.* The federal rules (1938) follow the practice of the exceptional code states in allowing issues of law and of fact to be raised at the same time to the same matter.[93] In these jurisdictions the last vestige of the celebrated common-law scheme has disappeared. Any limit on the scope of an action comes, not from rules which purport to limit the number of issues, but from rules which purport to limit the action's affirmative scope.

B. *Issues Formed by Evidence*

Under the common law it was necessary to file successive pleadings until issues of law or of fact were reached on all branches of the case. Special names were given to the pleadings through *seven* stages of pleading on the assumption that some lines of pleading might extend that far.[94] Most codes, commencing with the New York code of 1848,[95] limit pleadings to *three* stages—complaint, answer, and reply. If new matter is set up in the reply, no issue of fact is reached by the pleadings. "But the allegation of new matter in a reply, shall not in any respect conclude the defendant, who may on the trial avail himself of any valid objection to its sufficiency, or may countervail it by proofs, either in direct denial or by way of avoidance."[96] The federal rules (1938) allow only two stages of pleading—unless otherwise ordered by the court.[97] "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."[98] Issues of fact which might, but for the limited number of pleading stages, be formed by pleadings can be formed by the evidence in the course of the trial.

As pointed out at the beginning of Part II of this discussion, claims and defenses not pleaded cannot be proved unless the point is waived. It happens not infrequently that a party will plead one claim or defense and then undertake to prove a somewhat different one. If instead of objecting to this evidence, the opposing party forms an issue by intro-

[92] HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING 240 (1897).

[93] See Form No. 20.

[94] The names were: declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter.

[95] N. Y. Code (1848), § 132.

[96] Id., § 144.

[97] Federal Rule 7 (a).

[98] Federal Rule 8 (d).

ducing opposing evidence, the issue thus formed is properly within the scope of the action.[99] Some courts, however, require that the pleadings be amended to conform to the proof before an issue thus formed will be decided.[100]

C. *Questions Not Waived*

1. *At common law.* In so far as the parties controlled the matter by their pleadings, a single issue of law or of fact was the minimum trial scope of a civil action. It must be observed, however, that certain questions of law were involved in every action whether raised by the pleadings or not. Discussing writs of error, Stephen said:

> ". . . the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law.* This may be by having *wrongly decided an issue in law brought* before them by demurrer, but it may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, *to examine the whole record,* and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties."[101]

A striking illustration of the principle stated by Stephen is found in the case of default. Even though the defendant fails to appear, the court, before it may enter judgment for the plaintiff, must find (1) that it has jurisdiction over the person of the defendant;[102] (2) that the plaintiff's claim is sufficient in law;[103] and (3) that the court has jurisdiction of the class of claims to which the plaintiff's claim belongs.[104] If the plaintiff seeks damages, the court, or some agency acting for it, must determine the amount of the damages.[105]

Another illustration of the principle stated by Stephen is found in

[99] Hansen v. Kline, 136 Iowa 101, 113 N. W. 504 (1907). Also see 2 BANCROFT, CODE PRACTICE AND REMEDIES, § 1488 (1927).

[100] Budd v. Hoffheimer, 52 Mo. 297 (1873). In Schwaninger v. E. J. McNeeley & Co., 44 Wash. 447, 87 P. 514 (1906), the court held that pleadings are "deemed" amended to conform to proof.

[101] STEPHEN, PLEADING, 3d Am. ed., 143-144 (1924).

[102] 6 ENCYC. PLEADING & PRACTICE 24 (1896).

[103] Id. 45.

[104] Id. 45.

[105] Id. 132.

the common-law practice, still followed, of "searching the record."[106] If a party at one of the later pleading stages challenges a pleading as insufficient in law, the court, instead of examining the pleading attacked, examines the plaintiff's statement of claim to see if it is sufficient in law. If it is not, the court orders that the defendant have judgment. If the plaintiff's claim is found sufficient, the court then examines the defendant's defense to see if it is sufficient in law. If it is not, the court orders that the plaintiff have judgment. If the defense, too, is sufficient, the court examines the reply, and so on until it reaches the pleading which was expressly attacked. Under this practice, there are as many questions of law as there are pleadings in the line up to and including the one attacked or found insufficient in law.

From the viewpoint of a judgment for the defendant, an action may consist of a single question. If, for example, the court finds that it has no jurisdiction over the person of the defendant, it may dismiss the action without considering any other question. Where the plaintiff sues on a single claim and the defendant appears, the court may enter judgment for the defendant by finding either that the plaintiff's claim is insufficient in law or that the court has no jurisdiction of the class of claims to which the plaintiff's claim belongs. A pleading raising one of these questions, or challenging the jurisdiction of the court over the person of the defendant, limits the scope of the action, from the viewpoint of a judgment for the defendant, to a single question.

From the viewpoint of a judgment for the plaintiff, an action cannot be limited by pleadings to a single question. Even where the defendant has appeared and there can be no question as to jurisdiction over his person, the court, before it may enter judgment for the plaintiff, must "in contemplation of law" find: (1) That the plaintiff's claim is sufficient in law, and (2) that the court has jurisdiction of this class of claims. Whether these questions are raised by the pleadings or not, they constitute from the plaintiff's viewpoint the minimum trial scope of a civil action. If other questions are raised, the trial scope is expanded accordingly.

2. *In equity.* After pointing out that "It is obvious that every Bill must have for its object one or more of the grounds, upon which the jurisdiction of a Court of Equity is founded," Story wrote:

> "But, whatever may be the object of the Bill, the first and fundamental rule, which is always indispensable to be observed, is,

[106] STEPHEN, PLEADING, 3d Am. ed., 106 (1924); SHIPMAN, PLEADING, 3d ed. 284 (1923).

that it must state a case within the appropriate jurisdiction of a Court of Equity. If it fails in this respect, the error is fatal at every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties. . . ."[107]

3. *Under the codes.* The original New York code (1848) provided that if certain objections should not be taken either by demurrer or by answer, "the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject of the action; and the objection that the complaint does not state facts sufficient to constitute a cause of action."[108] By making these exceptions the code writers preserved the common-law principle set forth above.

4. *Under the federal rules.* The federal rules (1938) provide:

> "A party waives all defenses and objections which he does not present either by motion . . . or . . . in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."[109]

It thus appears that if a judgment for the plaintiff is to be sustained in any civil action, whether at common law, in equity, under the codes, or under the federal rules, it must appear from the record (1) that the plaintiff's claim is one which the law recognizes, and (2) that the court has jurisdiction of the class of claims to which his claim belongs.

D. *Questions of Trial Procedure*

In the course of a trial, especially in the course of a trial of issues of fact, questions may arise as to the order of proceeding, admissibility of evidence, etc. As these questions cannot be raised by pleadings in advance of the trial, they are outside the scope of the action as expressly fixed by the pleadings, but within the scope of the action as developed at the trial.

E. *Collateral Issues*

According to Wigmore, two classes of facts are not collateral: (a) facts relevant to the issues; (b) facts discrediting a witness with respect

[107] STORY, EQUITY PLEADINGS, § 10 (1838).

[108] N. Y. Code (1848), § 127.

[109] Federal Rule 12 (h). See 1 MOORE, FEDERAL PRACTICE, § 12.10 (1938).

to bias, skill, knowledgė, etc.[110] Although not directly revelant to the issues formed by the pleadings, the matters mentioned in (b) are classified as noncollateral so that issues with respect to them can be formed at the trial. In the law of evidence the rule against collateral issues is based on the idea that a trial must, for practical reasons, be kept within certain bounds.

F. *Consolidation*

When two or more actions for claims which might have been joined are pending in the same court, the court in its discretion may order that they be consolidated into one action. This procedure, developed at common law,[111] is permitted under most of the codes,[112] and under the federal rules.[113] As, ordinarily, the claims must be joinable, the rule permitting consolidation does not extend the maximum potential scope of civil actions, but merely provides a method for determining the actual scope of an action at the stage of the trial.

III

JUDGMENT SCOPE

A. *Matters Admitted By Pleadings*

A matter of claim or defense admitted by the pleadings, either expressly or by failure to deny, is not within the scope of the trial, but appears of record and is within the scope of the judgment. It is res judicata.

B. *Matters Determined By Trial*

Issues formed by the pleadings or in the course of the trial are determined by the trial. The results of the trial of direct issues, as distinguished from collateral issues and questions of trial procedure, are placed upon the record and form a part of the basis of the judgment. They are within the scope of the action at the stage of the judgment. They are res judicata.

[110] 3 WIGMORE, EVIDENCE, 3d ed., §§ 1004, 1005 (1934).

[111] GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, 3d ed., 221 (1849).

[112] CLARK, CODE PLEADING 334 (1928).

[113] Federal Rule 42 (a). Under this rule consolidation is permitted of "actions involving a common question of law or fact." See 3 MOORE, FEDERAL PRACTICE, § 42.01 (1938).

C. *Claims And Defenses Not Made*

1. *Claims not made.* Claims not made in a particular action are not, ordinarily, within the scope of that action. For a claim not made to be within the scope of an action it must be one which the party is *required* to make in the particular action on the penalty of losing it. Such a claim is concluded by the judgment in the action although it does not appear in the record of the case.

Where claims are *required* to be made, the minimum judgment scope of the action is the total number of claims made and not made. Four illustrations of this principle appear above: (1) compulsory counterclaims under the federal rules; (2) claims in proceedings in rem; (3) claims of persons represented in class suits, and (4) claims of persons interpleaded.[114]

Another illustration of the principle referred to is the so-called "splitting" of a "cause of action."[115] If a person has a claim against another and sues on a "part" of that claim, he cannot in later action sue on another "part," as only one action is allowed on one claim. An objection on the ground of splitting cannot be made in the first action because the "part" of the claim set up has all the substantive elements of a valid claim. The objection must be made in the second action on the ground of res judicata.

A similar problem is presented when a plaintiff fails to ask for some of the relief to which he is entitled, and, later, brings an action for that relief. Or, when a defendant uses a claim as a defense and, later, attempts to make it the basis of an action. Also, when a plaintiff having two claims for one relief sets up one claim and, after failing to recover, sets up the other.

The anomalous practice of considering that certain claims are within the scope of an action and concluded by the judgment without an express requirement that they be included in the action may be traced either to failure on the part of the codes and the federal rules to fix the maximum scope of a "cause of action" or "claim," or to failure to in-

[114] Notes 41, 49, 50, 51. In certain special proceedings claimants must make their claims or lose them, claims in bankruptcy being the most familiar illustration. For a discussion of this problem in the field of estates of decedents, see comment, 41 MICH. L. REV. 920 (1942). A discussion of the principle in respect to proceedings to limit the liability of shipowners will be found in The Panuco, (D. C. N. Y. 1942) 47 F. Supp. 249.

[115] CLARK, CODE PLEADING, 318 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 201 (1932).

clude in the procedural scheme a provision requiring the joinder of certain claims. In view of the strong disagreements which have resulted from attempts to define "cause of action," the present writer suggests that attempts to fix the maximum scope of the secondary unit be abandoned, and that the problem be approached from the viewpoint of compulsory joinder.

Without attempting to give the exact language of a provision for compulsory joinder of claims, the writer suggests that the codes and new federal rules be amended so as to require joinder of all claims which arise from the same transaction or occurrence, or which involve common questions of law or fact.[116]

[116] Claims which arise out of the same transaction or occurrence ordinarily involve common questions of law or fact. Even in the exceptional instances joinder would effect some saving in time, labor, and expense. On the other hand, claims not arising out of the same transaction or occurrence may, in some instances, involve common questions. Unless both requirements are made in the alternative, it seems desirable to adopt the less scientific, but more simple, rule that claims arising out of the same transaction or occurrence must be joined. In the following illustrations the common questions approach will be referred to as Rule One; the same transaction or occurrence approach will be referred to as Rule Two.

Torts: Both rules would require joinder of a claim for personal injury with one for injury to property where both injuries were caused by the same tortious act (e.g., where person and property were injured in a collision of automobiles). The same result would follow where injuries by one tortious act (e.g., nuisance) were to tracts of land held by separate titles; and where several items of personal property were taken at one time. Also, where husband and wife were injured by one act and the husband has a claim for his own injuries and for the loss of his wife's services. Claims for repeated trespasses on the same tract of land would have to be joined under Rule One if a common question (e.g., claimant's possession or defendant's right to enter) would be involved. Claims for repeated libels or slanders would have to be joined under Rule One as it is very probable that a common question (viz., truth) would be involved. A claim for an assault and one for slanderous words spoken at the same time would not involve common questions, but would have to be joined under Rule Two. Where claimant alleges one set of facts, (e.g., negligence causing personal injury) and claims on two or more legal theories (e.g., common law, state liability act, and federal liability act), he must join his claims under both rules. The rules under consideration would not, however, require the joinder of a claim for injuries causing death and a claim under the death act, if the claimant holds the claims in different capacities and is considered two persons.

Contracts: The proposed rules would not aid in determining whether a breach of a contract should be considered as an entire breach or merely as one of several breaches, each of which may be made the basis of a claim. Where several breaches of one contract have occurred they can be considered as merged into one claim or can be considered as claims which should be joined under both rules. Where claims are based on separate contracts made as parts of one transaction (e.g., a series of notes secured by one mortgage or coupons attached to one bond), they would have to be joined under Rule

The rule indicated would not take care of all of the problems of res judicata referred to above, but would eliminate the troublesome doctrine of "splitting" and would serve as a simple and rational basis for holding that claims of the types mentioned are within the scope of the action whether pleaded or not and are concluded by the judgment. The federal provision for compulsory counterclaims is a step in the right direction.

2. *Defenses not made.* A defendant who has a claim which is also a defense is not required to use it either as a counterclaim (except where compulsory by statute or court rule) or as a defense, but may make it the basis of a later action.[117] A defendant may not, however, fail to make use of a defense and later use it as a means of upsetting a judgment against him.[118] It has been said that "a defendant is bound to make as many defenses as he has, and cannot make a defense in a subsequent suit which he might have made in a former one."[119] From this it appears that defenses which can be made in an action, but are not made, are nevertheless within the scope of the action and concluded by the judgment.

D. *Questions Not Waived*

All questions not raised by pleadings or at the trial are waived except (1) legal insufficiency of a claim, defense, or reply; (2) want of jurisdiction over the class of claims to which the plaintiff's claim belongs. In rendering the judgment the court, "in contemplation of law," decides these questions. This explains the practice of allowing these questions to be raised "for the first time" on appeal. Whether expressly raised or not, these questions are within the scope of the action and are determined by the judgment.

Two; and also under Rule One if any question should be raised which would affect the entire series.

Several kinds of relief: Where from a single set of facts two or more claims for relief are made (e.g., abatement of nuisance, damages, and injunction) these claims would have to be joined under both rules. The proposed rules would require the joinder of a claim for reformation of a contract with one for its enforcement. A claim for a debt and to enforce a lien given to secure it would have to be joined.

Alternative claims: The proposed rules would require the joinder of alternative claims, such as a claim for breach of contract *or* for amount promised as compromise settlement. A claim for possession of property on which the defendant has erected a wall would have to be joined with a claim, in the alternative, that the defendant be required to remove the wall.

[117] Watkins v. American Nat. Bank of Denver, (C. C. A. 8th, 1904) 134 F. 36.

[118] Covington & Cincinnati Bridge Co. v. Sargent, 27 Ohio St. 233 (1875).

[119] Mengert v. Brinkerhoff, 67 Ohio St. 472 at 489, 66 N. E. 530 (1903).

IV

SCOPE DETERMINATION

A. *Pleading Techniques*

1. *Pleading the Elements of Claims and Defenses*

(*a*) *Substance.* The various systems of procedure referred to in this paper—common-law, equity, code, and federal—agree in requiring that claims and defenses be stated in writing in advance of trial. They further agree in requiring that all claims and defenses as stated be legally sufficient in substance. For a court to be able to determine from a written statement whether a claim or defense is substantially sufficient it is necessary that the statement mention in some form all the substantive elements of the claim or defense.[120] Because of the importance attached to this requirement it may be called the basic rule of pleading.

At another point rules of pleading involve substantive law. Ordinarily the burden of proof follows the burden of pleading.[121] To the extent that this is true, rules which determine whether a matter must be stated as an element in the plaintiff's claim or pleaded by the defendant as a defense are concerned not merely with the manner of stating claims and defenses, but with the substantive matter of allotting the burden of proof.

(*b*) *Form.* Formal headings, commencements, conclusions, etc. are useful in the sense that any label or identifying mark is useful, but otherwise have little or no significance. The same is true of separate statements of claims and defenses, and the putting of allegations in separate paragraphs. The form in which the substantive elements of a claim or defense are mentioned is not important, but has been made important in code states by the code requirement that a party set forth the "facts" which constitute his "cause of action" or "defense." This requirement has led to elaborate considerations of the meaning of "facts," accompanied by vain attempts to distinguish between (a) evidentiary facts, (b) ultimate facts, and (c) legal conclusions. The difficulties which arose from the code requirement led the draftsmen of the federal rules (1938) to avoid the use of the word "facts" and to

[120] This general statement is subject to a rule which dispenses with the statement of matters of which the court takes judicial notice. Under this exception the law applicable to the case need not be stated expressly. As the matters stated must be stated in relation to the law, the law is "understood" and is, in this sense, included in the pleading.

[121] CLARK, CODE PLEADING 418 (1928).

require merely that claims and defenses be stated in language which is "simple, concise, and direct."[122]

(*c*) *Detail.* In the schemes of procedure under consideration, the stating of a claim or defense in the abstract is never permitted. Certain factual details, such as time, place, and descriptions of property, have always been required. Under this rule it is not enough to allege that the law confers certain rights or that the party has a certain right. Factual details showing that the claim or defense actually exists in the realm of fact are generally required. Certain other factual details must be pleaded merely as notice of what will be proved at the trial.

The nearest approach to the statement of a claim in the abstract was the common-law pleading of general assumpsit. This general type of pleading was allowed when the plaintiff could describe his claim without mentioning an express contract. If he had to refer to an express contract he was required to go farther and describe the contract in some detail. Pleading in this general way has continued under the code,[123] and is now allowed under the federal rules (1938).[124]

Another general type of pleading at common law was the action for damages based on negligence. A plaintiff might state a claim on this ground without specifying in detail the nature of the negligence. Today the details must be stated in many jurisdictions.[125] Under the federal rules (1938) negligence need not be specified in detail unless required by the court.[126]

Details of special, as distinguished from general, damage must be specified in order to give notice.

One reason for requiring factual detail is to give each substantive element of claim or defense an appearance of factual existence so its truth may be denied and an issue of fact formed, if desired. Another, is to give notice of matters which, if proved without notice, might take the opposite party by surprise.

2. *Forming Issues of Law and of Fact*

(*a*) *Issues of law.* At common law a party might demur on the ground that a pleading of an opposing party was defective in substance

[122] Federal Rule 8 (e) (1). See I MOORE, FEDERAL PRACTICE, § 8.07 (1938).

[123] CLARK, CODE PLEADING 196 (1928).

[124] See Forms 4 to 8.

[125] CLARK, CODE PLEADING 207 (1928).

[126] See Forms 9 and 10. "Indeed, it is interesting to see how the true common-law pleading had . . . a simple system of direct allegation which is even now the basis of the federal forms of complaints in negligence and contract. . . ." Clark, "Simplified Pleading," A. B. A. JUDICIAL ADMINISTRATION MONOGRAPH No. 18, p. 6 (1941).

or in form. A demurrer for a defect in form had to point out specially the defect complained of. If an issue of law raised by a demurrer was the only issue, its decision determined the entire case, unless the losing party was allowed to amend or plead over. This was due to the rule that a party could not raise an issue of law and of fact to the same matter at the same time. When a party demurred he was taken to have admitted the truth of the opposing party's pleading by failing to deny it. If he lost on the demurrer, all was lost unless the court would allow him to plead again. A similar result followed when a demurrer was sustained. If the court would not allow the pleading found defective to be amended, judgment was entered for the attacking party.

The common-law scheme has continued under the codes as to some defects both of substance and of form.[127] As to others, motions must be used.[128] The federal rules (1938)[129] and the statutes or court rules of some states[130] have abolished demurrers, requiring that all issues of law be raised by motion or by answer.

(*b*) *Issues of fact.* When a necessary matter alleged as a substantive element of a claim or defense is denied specifically, the denial is called a specific denial. While it is permissible to deny all the elements specifically, the denial of any one is a complete answer, for if an issue thus formed is decided in favor of the denying party the claim or defense is defeated entirely. A general denial is one which denies the truth of all matters properly alleged by an opposing party as the substantive elements of his claim or defense. At common law such a plea was called a general issue.[131] Some general issues were true general denials. Some denied more than one but not all of the substantive elements of a claim. Others denied all elements but also opened the way for the proof of certain affirmative matters. Under the codes and under the federal rules (1938) a general denial is a true or logical general denial.

3. *Separate Statement of Claims*

(*a*) *At common law.* At common law the plaintiff was required to state each distinct claim in a separate count. He was permitted to state one claim in several counts with slight changes in factual detail or legal

[127] CLARK, CODE PLEADING 354, 358 (1928).

[128] Id. 374.

[129] Federal Rule 7 (c). See I MOORE, FEDERAL PRACTICE, § 7.03 (1938).

[130] CLARK, CODE PLEADING 371 (1928); Pike, "Objections to Pleadings under the New Federal Rules of Civil Procedure," 47 YALE L. J. 50 (1937).

[131] STEPHEN, PLEADING, 3d Am. ed., 168 (1924); SHIPMAN, PLEADING, 3d ed., 304 (1923).

theory as a means of pleading in the alternative. This practice of multiplying counts became one of the objectionable complexities of the common-law system.[132]

(*b*) *In equity.* The count system was not employed in the courts of equity. A bill might have a "double aspect,"[133] but was not repeated as many times as there were "aspects."

(*c*) *Under the codes.* The codes commonly provide that each "cause of action" must be separately stated and numbered.[134] In applying this rule it is necessary for the court to determine whether a division of a pleading contains one "cause of action" or more than one. If it states a single invasion of (or threat to invade) a single right, the answer is easy. If it states two or more invasions of one right, or the invasion of two or more rights on the same occasion, the answer becomes difficult because of the failure of the codes to fix the maximum scope of the secondary unit. If the codes should be amended to require the joinder of claims arising out of the same transaction or occurrence or involving common questions, they should be amended further to permit the pleading of the joined claims in the same count. The making of these two changes will eliminate most of the problems which have resulted from the failure of the codes and the courts to give an adequate definition of "cause of action."

(*d*) *Under the federal rules.* Rule 10 of the new federal rules (1938) provides that "Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth." In applying this rule it is not necessary for the court to determine in all instances whether the division contains only one "claim" or more than one. Some of the objections to the code provision are thus avoided.

B. *Trial Techniques*

1. *Motions.* Questions not waived (Subdivision II, C, supra) and some questions of trial procedure (Subdivision II, D, supra) may be raised by oral motions made in the course of the trial. Resistance by argument forms the issue which the court decides.

2. *Offer and objection.* Questions as to the admissibility of evidence are usually raised by offers of evidence resisted by objections.

[132] CLARK, CODE PLEADING 314 (1928).

[133] STORY, EQUITY PLEADINGS, § 254 (1838).

[134] CLARK, CODE PLEADING 312 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 320 (1932).

Objections to argument of counsel must be accompanied by appropriate motions.

3. *Introduction of evidence.* Some issues are raised tacitly by the introduction of evidence. If evidence comes in without objection and is met by countervailing evidence, an issue different from that raised by the pleadings may be formed. Where the series of pleadings stops short of issue, the issue is formed by introducing evidence.

V

MINIMIZING SHAM SCOPE

A. *Specific denials.* The Michigan Court Rules (1933) abolished the general issue and provided that every answer shall contain an "explicit admission or denial of each allegation in the declaration or bill of complaint of which the defendant has knowledge or belief."[135] A similar practice was established in Illinois in 1933.[136] The Michigan rules further provide: "In connection with every denial, the answer shall set forth the substance of the matters which will be relied upon to support such denial." The commission which recommended the Michigan rules believed that the "specific answer in equity is much more effective as a means of developing and disclosing the real points in dispute than common law pleas," and that the requirement of support for denials has "great possibilities for disclosing meritorious defenses and exposing fictitious defenses."[137] Regardless of one's view as to the merits of these devices, it must be recognized that the ease of putting in general denials has led to the forming of countless sham issues of fact. The scope of an action should be limited to matters which are honestly in dispute between the parties.

B. *Verification.* Sworn answers were required in equity,[138] but not at common law except in pleas in abatement.[139] The original New York code (1848) required that all pleadings, with certain exceptions, be verified.[140] This was changed in 1849 to provide that if one party shall verify a pleading, all subsequent pleadings must be verified.[141] Some

[135] Michigan Court Rules (1931), No. 23, § 2.

[136] Ill. Stat. Ann (Smith-Hurd, 1936), c. 110, § 164.

[137] See notes to Michigan Court Rule 23, § 2, MICHIGAN COURT RULES ANNOTATED (1930) (University of Michigan Press).

[138] STORY, EQUITY PLEADINGS, § 874 (1838); CLEPHANE, EQUITY PLEADING AND PRACTICE 301 (1926).

[139] O'DONNELL, COMMON-LAW PLEADING 193 (1934).

[140] N.Y. Code (1848), § 133.

[141] N.Y. Laws (1849), c. 438, § 157.

of the present codes follow the scheme of 1848; others, that of 1849.[142] Under the federal rules (1938) pleadings need not be verified "except when otherwise specifically provided by rule or statute."[143] The code commissioners of New York (1848) believed that verification of all pleadings was essential to "good faith in pleading and honest issues."[144]

C. *Certificates of counsel.* The federal rules (1938) provide:

> ". . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subject to appropriate disciplinary action."[145]

This provision is a new device intended to prevent, principally, sham denials. Its success will depend on the vigor with which it is enforced.

D. *Motions to strike.* The statutes of some of the code states provide:

> "Sham . . . answers, defenses, or replies . . . may on motion be stricken out, or judgment rendered notwithstanding the same, as for want of answer or reply."[146]

In Minnesota this procedure has been developed into an effective method of detecting and eliminating sham issues of fact.[147]

E. *Summary judgments.* Under the summary judgment statutes a party, after supporting his own position by a preliminary showing of evidence, may call upon an opposite party to support his position by a preliminary showing of evidence.[148] If such a showing is not made when required, the court may at once enter judgment for the moving party. This procedure is designed to expose sham claims and defenses, particularly sham denials. It is a highly effective method of eliminating sham issues of fact.

[142] CLARK, CODE PLEADING 143 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 307 (1932).

[143] Federal Rule 11. See 1 MOORE, FEDERAL PRACTICE, § 11.01 (1938).

[144] CLARK, CODE PLEADING 143 (1928).

[145] Federal Rule 11. See 1 MOORE, FEDERAL PRACTICE, § 11.01 (1938).

[146] CLARK, CODE PLEADING 378 (1928); PHILLIPS, CODE PLEADING, 2d ed., § 442 (1932).

[147] See Neefus v. Neefus, 209 Minn. 495, 296 N.W. 579 (1941).

[148] Clark, "Summary Judgments," A. B. A. JUDICIAL ADMINISTRATION MONOGRAPH No. 5, p. 12, Bibliography (1941). For summary judgments under the 1938 federal rules (Rule 56), see 3 MOORE, FEDERAL PRACTICE, c. 56 (1938).

F. *Pretrial conferences.* Another recently developed method of detecting and eliminating sham issues of fact is the pretrial conference.[149] One of the principal objects of the conference is to simplify and formulate the issues in the case.[150] In this intimate conference between attorneys and judge an attorney is not likely to insist on a denial which he knows is sham, especially if the judge calls for a limitation of the issues to matters which are fairly in dispute between the parties.

G. *Costs.* The court rules of Michigan adopted in 1933 provide:

> "If it shall appear at the trial that any fact denied by pleading ought not to have been denied, and the same is proved or admitted at the trial, the actual and reasonable expense of proving or preparing to prove the same, including a reasonable counsel fee for the time and attention devoted thereto, to be ascertained and summarily taxed as the trial, shall be paid by the party making such denial."[151]

This rule, if vigorously enforced, will discourage, but of course, will not prevent, sham issues of fact.

COMMENTS AND CONCLUSIONS

1. In the foregoing analysis, the writer has undertaken to show that all rules commonly called rules of pleading may be classified either as rules of *scope-limitation* (rules which declare *what* may or must be included in a civil action) or as rules of *scope-determination* (rules which direct *how* the included matters shall be stated). The latter are usually thought of when the term pleading is used. The vice of classifying rules of scope-limitation as rules of pleading has been the tendency to emphasize the manner of stating claims and defenses, instead of concentrating attention on the scope of the trial.

2. From the brief historical data presented in connection with the analysis it appears that the outer boundaries (maximum scope) of the Anglo-American civil action have been gradually expanded. From a period in which the common-law rules of scope-limitation had as their great object the formation of a single issue, we have moved step by step to a period in which there is a growing body of opinion to the effect that the maximum scope of actions should not be fixed in advance by statutes or by general rules, but should be left to the good sense of the parties, subject to the control of the judge in the particular case. In the

[149] Laws and Stockman, "Pre-Trial Conference," A.B.A. JUDICIAL ADMINISTRATION MONOGRAPH No. 4, p. 18, bibliography (1941).

[150] See Federal Rule 16; 1 MOORE, FEDERAL PRACTICE, c. 16 (1938).

[151] Michigan Court Rules (1931), No. 17, § 10.

last fifty years the rules which govern "The Compass of the Cause" have shown "conspicuous advance."[152]

3. While the maximum scope of the action was gradually expanding the minimum scope remained substantially the same. There has been, however, an increasing tendency to require that certain groups of claims be treated as one claim to prevent a multiplicity of suits. Although developed as a part of the law of res judicata, the requirement is dealt with in the law of pleading under the heading, "Splitting a Cause of Action." It seems clear that the requirement is really one of scope-limitation—one which increases the minimum scope of the action in which it operates. Trial convenience dictates not only that certain matters should *not* be tried together, but that certain matters *should* be tried together to prevent a multiplicity of suits.

4. In order to give the requirement mentioned in (3) proper recognition as a rule of scope-limitation and to eliminate the confusion which results from attempts to deal with a "cause of action" of undefined maximum scope, the codes and new federal rules should be amended to provide for the compulsory joinder of claims which arise out of the same transaction or occurrence, or involve common questions of law or fact.

5. In considering how simple or complex an action should be, attention is focused on the trial. Simple actions on the one hand and the prevention of unnecessary actions on the other present conflicting aims which must be compromised. The finding of the best middle ground is not an academic exercise, nor is it a mere technicality of procedure. It is a pressing problem of procedural policy.

[152] Supra at note 1.