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The Philosophy of Code Pleading

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Thesis

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by

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THE PHILOSOPHY OF CODE PLEADING.

The first steps in the path of civilization are the formation of a system of law and its use in litigation. When this step is taken jurisprudence has its birth. In its beginnings it is crude and unsatisfactory, it is narrow and inflexible but later in its development it becomes a science. It is called into being by the wants of society and, having at its foundation the principals of justice, the philosophy of human law must eventually come to the surface. When it does come to the surface, then it is that jurisprudence as an agent and a science becomes a potent servant of abstract justice and the legal and moral rules become more in unison. Litigation, it is true, is an evil and a burden upon society, but it is an evil which must be born as a refuge from greater ones. The first step in litigation is the pleading.

During the earliest period of the development of the Roman law of which there can be found any traces, and for a long time subsequent to the decemviral legislation known as the Twelve Tables, there were five "actions"

by which all civil rights could be maintained. They were arbitrary and necessarily narrow in their application. Persons desiring to take advantage of these remedies must perform various acts, repeat certain formal phrases and make all of the symbolic gestures -- necessary to bring before the court the subject of the litigation. These regulations were construed strictly and a party omitting to perform the requirements was driven from court and his case failed. The five Roman actions were as follows. Ist. Action by means of a wager. This was the oldest action and seems to have been in most general use. In this action the plaintiff brought the property claimed into court and by holding a rod over it claimed it. The defendant then did the same. The plaintiff then offered to wager and his offer was then accepted. The court then decided the wager. 2nd. Action by demanding a Judex. In this case the Judex took the place of our jury and might be called a jury man. But little is known of this action but it is thought that it was used where there was a dispute as to the terms of an actual contract. 3rd. Action by notice, wherein the plaintiff served a summons upon the defendant to appear within thirty days. This action was used whenever the terms of the contract were certain

and the only dispute was as to its performance. 4th. Action by arrest, which was a proceeding by which the defendant was arrested and brought into court. It is supposed to have been a sort of a body execution. 5th. Action by taking pledge. This was also an execution, being used against property.

The object of actions was to place within the reach of the people modes whereby they might enforce rights and redress wrongs. This object was not gained by the technical practice under the five forms of actions. A system containing so little philosophy must necessarily give way to a more liberal method where a nation is constantly in a process of development.

The Formula is the generic name given to the system which followed. In this system we find the first trace of the modern idea of pleading. Under this method the parties came before the Praetor and made oral pleadings, which were taken down by the court. After the pleadings were drawn the facts were tried before a Judex. New formulae were adopted from time to time and the old ones were extended. There was however another system of pleading gradally inserting itself into Roman practice at this time. This system was that which by virtue of the extraordinary jurisdiction of the praetor enabled him to try both the law and the fact. This became gradually enlarged until it assumed proportions as our modern court

Passing from the practice of the early Romans let us examine for a moment the methods of the English legists under their first systematic practice. Here as in Rome the different modes of proceeding in the redress of wrongs, are known in the law as "actions". They were divided into "formed actions" and "actions on the case" The first division are of the greater antiquity. They were certain defined formes, each designed for some particular wrong. The latter class was more extended and applied to classes of wrongs.

Pleadings in the English common law actions comprise all the allegations during the course of the action. The object of pleading is, to ascertain, by a process of allegations and denials, the matters really in controversy, to give the parties notice of the case which they will be compelled to prosecute or defend and the speedy settlement of the cause. It is necessary that they should be in writing in order to avoid departure from the pleadings, which would cause endless altercation
All pleadings ever devised requiring a statement of the facts constituting the cause of action or the defence, imply a proposition of law. Issues may be tendered either upon the truth of the facts or upon the truth of the proposition of law. The issue of fact is tendered by a denial called ~~an answer or a reply~~ a plea, The issue of law is tendered by a denial called a demurrer

The plaintiff first states the facts constituting his cause of action. It is then necessary for the defendant to file his answer. he may allege that the matters set forth in the declaration do not constitute a cause of action. This is a demurrer. He may deny the truth of all the matters alleged,which is known as pleading the general issue. He may deny part of the facts set forthforth in the declaration,or he may set up new matter as a defence. This is called special pleading. The demurrer closes the altercation by bringing the case at once to an issue at law. The issue of law is whether upon the whole matter as declared,when admitted to be true, the plaintiff is entitled to recover. That is , when we admit the truth of the allegations,by demurring, we deny the conclusions of law which the pleador draws from the same allegations of fact. If on the other hand the defendant wished to deny the truth of the "facts" alleged, he filed a plea called a traverse. By means of this plea the party could deny the whole matter set forth, or he might deny any part of it. Again if the party wished and the circumstances required, he could admit the the allegations of his opponent to be true and set up new matter as a defence.Thereupon his opponent would file a traverse and deny the allegations averred in the plea. The matters thus alleged and denied constituted the issue and it

was to try this issue that the jury was called. In this manner there might be several pleadings served by each party before an issue was reached. When a party alleged a matter which his opponent wished to deny and that allegation was denied, the issue was determined and the cause ready for trial.

The system which prevailed in the later Equity courts was much the same. It contained the same feature of numerous pleadings but dispensed with the fictitious allegations used to make the actions in law to conform with the original actions. The old features which were discarded were the technical requirements so peculiar to primative peoples. The philosophy of pleading was asserting itself with the advance of human thought. It is often asserted that this system is the only true foundation upon which to build a perfect system of pleading. In reducing the issue to a small compass this is certainly true, and in the hands of learned lawyers it may be so in all respects.

When the first New York code was issued it contained the following provision. "The distinctions 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 but one form of action for enforcement and protection of private rights and the redress of private wrongs, which shall be denom-

inated a civil action". It might seem that by this sweeping provision, the New York legislature had ,by a single blow, annihilated the whole system of ancient English remedies. This however would be a mistaken conception. The common law and equity systems were founded upon a deep seated and stable philosophy which were not discarded by this legislation. The old forms were abolished but the old causes of action were still in existance. We have in the place of a number of pleadings a single one but this single one must set forth all the facts constituting the plaintiffs cause of action,hence it must contain all of the statements found in all of the pleadings in the old system. The answer is to set forth the whole defence of the defendant and therefore contains all of the allegations which would be found in the many pleadings in the early system.The same result is reached as by the use of the old system. The only exception to this rule is where a reply is used. The defendant denies certain or all the allegations in the complaint and thereby forms an issue. This is the cardinal purpose of a system of pleading. It is necessary to define the issue and bring before the judge or jury the point to be decided. Those who lament that the entire system of common law pleading is abolished by this new system of pleading seem to confound the form of the action with the cause of action. Form is not substance. Neither are the plead-

ings of the parties their remedy.

One great aim of the rule making it necessary to reduce all the facts in issue between the parties to writing is to bring before the court the real and true matters in dispute. This purpose is attained by requiring each party to state fully and accurately all of the facts upon which they rely and by requiring their denial to be truthfully made in detail. By requiring the pleadings to be sworn to ,the courts do not permit either party to allege any fact which is not true or which at least he does not believe to be true,or to deny or controvert any allegation which he knows to be true. It was boasted that the common law system of pleading was arranged to accomplish this very purpose.But a comparison of it with the later systems shows that the contrary must be true. All manner of false statements were always allowed and frequently actually required. This necessarily would often work injustice. The real character of a party's cause of action or defence could be and often was concealed behind a fiction. The party was not in fact given notice of the action brought against him. It is sometimes said that the party would know of the cause or claim of his opponant and therefore would practically have notice. But the very purpose of a pleading is to give the opposing party <u>actual</u> notice and if we are to rely upon his personal knowledge why then have any more

than the summons. This objection it is true has been greatly reduced by the reform of the equity system. Nevertheless it is also true that there is still room for improvement in this system, if we look at it from the standpoint of one accustomed to code pleading.

There is in the common law system a distinction between two classes of facts which is comparatively unknown to the later method. That is the distinction between the inducement and the cause of action proper. "Inducement" and "gist" are common terms in the old system of pleading. This distinction however does not pertain to form only but to the actual substance of the action. In the older system inducement often consisted of a fiction. This is not the means by which it is used in the later system. Here it is used only when necessary to complete the parties cause of action. It consists of extrinsic facts which show the right of the particular person to bring the action or to answer, or the particular liability of the defendant, where these matters are not set forth in the allegations showing the injury or defence. An example of this would be an allegation setting forth title, encorporation, &c.

A contract or legal instrument should be stated according to its legal effect. (I Chitty on Pleading 312).

This rule applies to all matters and instruments. A party is often tempted to set forth an instrument or other facts in an untrue light. This rule compels the party to allege the contract in its exact words or to allege it according to its exact and precise legal effect.

Under the new practice the plaintiff may unite in the same complaint several causes of action either legal or equitable or both. They must however arise out of the same transaction or transactions connected with the same cause of action and must be of the same nature. It is improper to join with an action for slander a count setting up a cause of action upon breach of contract. The causes of action which may be properly joined in the same complaint may be found in all codes of procedure. (N.Y. Code Civ. Pro. 484.)

An action has been defined as a proceeding for the redress or prevention of wrong. The cause of action then must be the wrong itself. The facts set forth in the pleading show the wrong and if there is no wrong shown then the complaint is defective as not showing facts sufficient to constitute a cause of action. This may not be always in a neglect to allege allof the unlawful acts performed by the defendant. You may allege all of the acts constituting trespass ,but if the plain-

tiff neglects to set forth title he has failed to make out a cause of action. The court frequently gives more than one kind of relief for one wrong. The defendant may owe a debt and it may also be secured by a mortgage. A failure to pay this however, would constitute only a single wrong. The plaintiff may sue on the debt or he may foreclose the mortgage. The only way in which to ascertain the precise cause of action is to take each supposed cause of action and see if taken alone it states facts sufficient for recovery and then compare the two and see if they have any common important facts. If so they can be said to constitute a single cause of action The reason for any rule limiting an action to causes which are practically of the same nature is probably founded upon a lack of confidence in the ability of the average human mind to solve difficult or intricate questions. It is simply a rule insisting upom simple trials of fact when they must necessarily come before an average jury of unintelligent men. Another application of what is practically the same rule is that not only must the cause of action must be between the same parties but must be concerning the same right. A defendant cannot be sued individually and in the same action in a representative capacity.

In discussing the foregoing rules we find that

our present jury system figures prominently in the philosophy of our modern code pleading as well as in the older methods. Experience has taught us that an ordinary jury is not composed of ordinary men and the system of pleading and in fact our whole practice must be shaped in order to permit us to retain in our system that feature of which the only peculiarity and distinctive characteristic is ignorance and inability to decide the ordinary cases which would come before them were it not for the provisions for their benefit.

It is also provided that the causes of action must arise from the same transaction. "Transaction" is a term including contracts and any acts or omissions between the parties that may become the foundation of an action. It is difficult to define accurately this word derived from trans ago . The practicing attorney, it seems, often finds it difficult to avoid dividing up his cause of action because his cause of action consists of several items or parts or because he wishes to demand more than one kind of relief. The other error to be avoided is the uniting of two or more causes of action in one because they are in some way connected. All of these errors grow out of a misconception of of the precise wrong which is the precise cause of action.

Therefore the first question to be answered is the question "What is the wrong of which the plaintiff complains?" The wromg is the violation of the right. If the wrong is the violation of several distinct rights it is still but one cause of action for there is but a single wrong But in performing a single act a person may become guilty of a crime and a tort Here there are two distinct causes of action from a single act. The only general rule which can be formulated is that after examining the rights and wrongs and the redress demanded we find a distinct line of demarkation between any parts of the supposed cause of action it will be necessary to bring two actions.

On the other hand a cause of action springing from a single transaction and of the same nature cannot be separated into two or more causes of action. All damages arising from a single wrong although performed at different times make but a single cause of action. (19 Wend. 207.) So a running account under a contract is but a single cause of action. This rule however must not be interpreted to allow a contract and a tort action united in the same action although they arise from the same act performed by the same party.

The New York code permits a party to unite

in one pleading several causes of action where they all arise out of the same express or implied contract. Under the common law system it was allowable only to unite causes of action springing from similar contracts. This was adopted entirely for the benefit of the jurors. But inasmuch as with the development of peoples and systems of law the individual also develops, it is in these later days found to be unnecessary to make the restrictions favoring the modern jury as strict as in former times. Still it is necessary to limit the cause of actions for it is a sad truth that the brain of the modern juror is as yet by no means in a perfect state of development.

The classes of wrongs which may be united in a single action are,

For personal injury (with few exceptions).

Libel and Slander.

Injury to real property.

Ejectment.

Detention of chattels.

Causes connected with the same transaction.

All of these except the last are adopted from the same considerations as the first, viz-in order to make it more easy for the jury to understand.

The reply is a pleading which is served by

the plaintiff after receiving the defendant's answer .In the reply are concentrated all the functions of the several pleadings in the common law system. When a reply is required is often a question. But the general rule seems to be ,if the answer sets forth any new matter which, if standing alone ,would constitute an affirmative cause of action it requires a reply. Any new matter alleged in the answer which is only for the purpose of controverting the cause of action alleged in the complaint does not require a reply. The law ss set forth in the cases is that only a counterclaim requires a reply but the difficulty then presents itself when we attempt to answer the question"What is a counterclaim?". There are also cases which declare that a set off does not require a reply. This is correct if we accept the term set off as designating only such claims as refer either directly or indirectly to the subject matter of the cause of action set forth in the complaint. But on the other hand, if we accept the term set off as designating a subdivision of a counterclaim,these cases are not consistent with the true theory of the reply.

The only grounds for a demurrer which will be discussed here are

I That there is another action pending between the parties concerning the same cause of action.

2, That the causes of action are improperly joined.

3, That the complaint does not contain facts sufficient to constitute a cause of action.

The ground first stated is one which would suggest itself at once to the student. The object of an action is to give an injured party a remedy for his wrong. When that action is prosecuted to its end the remedy is enforced and the wrong is redressed or the right protected. When this is accomplished the logical conclusion of the law is that the grievance no longer exists. It would therefore be folly to bring a second action to enforce a remedy when there is no logically wrong to be redressed. It is upon this theory the rule of demurrer which provides against the two actions pending concerning the same wrong is placed. One of the actions will be sufficient and the plaintiff is allowed but one. It must be clearly shown however that the parties are identical and that they are seeking the same remedy for the same wrong in both cases.

The second ground for demurrer which we are to consider we have mentioned before. It is as we have seen founded principally upon the prevailent lack of confidence in the average juror. Causes of action must

be similar or connected with the same transaction in order to go before the jury for decision. This is solely for the purpose of enabling the jurors to understand the issues and to permit them to consider the controvercy with more or less intelligence. In order to ascertain whether or not this objection applies to a complaint or an answer it is necessary for the party to examine carefully the whole pleading.

The last ground which we may properly examine is that the pleading does not contain facts sufficient to constitute a cause of action. This is simply a denial of the implied proposition of law contained in the pleading. It is an admission of all of the allegations contained therein and an assertion that they do mot show that the party has suffered any wrong. A party may demur to the whole of the complaint or to a single cause of action contained therein.

Whenever a demurrer is served the court will examine all of the pleadings and set aside the first defective pleading. This rule was adopted to induce care on the part of all parties drawing up pleadings. It is almost the only safeguard against the inaccuracy which is too often found among those practicing in what are known as code states.

What then is the philosophy of pleading? The philosophy of code pleading is necessaryly the philosophy of all pleading and of all law. The principals which underly pleading are the source and foundation of all legal phenomena and practice. The law is developed and made identical with moral law by the ever changing wants of society. It is by means of the wants of man that civilization becomes an entity in stead of a mere scheme. So it is the requirements of a people that brings unto its members a logical system of logical rules which are certain, reasonable, consistant with custom and immemorial. "The greatest good to the greatest number" was proclaimed by the ancient philosophers to be both the great source and end of all philosophy. Those philosophers were utilitarians. The philosophy of all law is primarily and only utility. The crucial question then to be answered is "What will result in the greatest good to the greatest number?" When that is answered we have the key to a perfect system of law and pleading. The early systems contained all of the principals of pleading relating to the exposition of the issues but it was left for the later legists in our modern codes to bring forward in an immeasurably more efficient manner the indispensable factor of utility. "The stone which the builders refused

is become the head stone of the corner." The corner-stone of a true system of pleading is and always must be SIMPLICITY.

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