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The Theory of Pleading Under the Missouri Code

Fred L. Kuhlmann

THE THEORY OF A PLEADING UNDER THE MISSOURI CODE [1]

The codes of procedure were enacted in twenty-nine states to facilitate the administration of justice. This was to be accomplished through the abolition of useless and burdensome technicalities of pleading which left a readier access to a judgment on substantive merits. To that end the framers incorporated in the codes, provisions to the effect that all forms of civil action were to be consolidated into one form of civil action,[2] and that a plaintiff was to state in his petition only facts sufficient to constitute a cause of action.[3] The pleading of legal conclusions was made unnecessary and, in fact, improper.

One outstanding evil aimed at by these revolutionary provisions is the common law requirement that a plaintiff must state in his petition the legal theory which he feels will justify a recovery upon the facts stated.[4] To err in the selection of this theory is as fatal to the plaintiff's case as an insufficiency in the cause of action stated. Rights do not determine remedies; remedies determine rights.

But in this respect as in others, the code reform was not uniformly accepted. A line of cleavage developed between the several code jurisdictions on the question of the necessity for the plaintiff to plead a particular theory to which he must adhere throughout the trial of the case. The nature of the question assumes that plaintiff's cause of action remains the same, and that the facts as originally stated will sustain the new theory. The problem is not one of changing causes of action; it is one of changing the legal theory of the cause of action.

I

The courts of several states have developed a strict interpretation of the code provisions.[5] The result is that they allow little

1. The law of Arkansas, Illinois, Kansas, and Oklahoma on this question will be treated under appropriate classifications.

2. R. S. Mo. 1929, sec. 696, is typical of code provisions in this respect.

3. R. S. Mo. 1929, sec. 764 is typical and requires "a plain and concise statement of the facts constituting a cause of action." R. S. Mo. 1929, sec. 783, is also applicable. In speaking of the allegations necessary in pleading, the statute requires that "only the substantive facts necessary to constitute the cause of action or defense shall be stated."

4. Clark, *Code Pleading* (1928) sec. 43, p. 178; Albertsworth, Theory of Code Pleadings (1922) 10 Calif. L. Rev. 202.

5. The following states require a strict adherence to the theory as originally stated in the petition:

Indiana: Mescall v. Tully, 91 Ind. 96 (1883); Oolitic Stone Company v. Ridge, 169 Ind. 639, 83 N. E. 246 (1908), holding that "a complaint must proceed upon some definite theory and on that theory plaintiff must suc-

if any departure from the common law rule. Judgment must be secured on the theory of the pleadings; otherwise the plaintiff's case fails. The decisions of the Indiana courts are outstanding in their support of the strict rule. The reasoning set forth in *Niedifer v. Chastain*[6] has received general recognition among this group of states. The tenor of that opinion is that to permit a change in theories would lead to confusion and injustice and might mislead the court and counsel.

The majority of the courts, however, sanction a change in the theory provided that the original allegations sufficiently state the elements essential to the establishment of the new theory.[7] The

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ceed or not succeed at all." See also Tibbett v. Zurbuch, 22 Ind. App. 354, 52 N. E. 815 (1899); Dyer v. Woods, 166 Ind. 44, 76 N. E. 624 (1906); State v. Adams Express Co., 172 Ind. 10, 87 N. E. 712 (1909); Miami County Bank v. State, 61 Ind. App. 628, 112 N. E. 389 (1916); Princeton Telephone Co. v. Runcie, 151 N. E. 431 (Ind., 1926) where the court held that the complaint must be good on the theory upon which it is drawn.

Kentucky: Smith v. Robinson, 185 Ky. 76, 214 S. W. 771 (1919) refusing a change from an express contract theory to a theory based on implied contract.

Massachusetts: Ash v. Childs Dining Hall Company, 231 Mass. 86, 120 N. E. 396 (1918), refusing a change from negligence theory to one of implied contract although the facts would have justified a recovery under the latter theory; Davis v. H. S. & M. W. Snyder, 252 Mass. 29, 147 N. E. 30 (1925).

Minnesota: Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105 (1913), using almost the identical language of the Indiana cases.

Nebraska: Omaha Electric Light & Power Co. v. Butke, 101 Neb. 159, 162 N. W. 421 (1917), refusing a change from theory of negligence to trespass.

New Mexico: Gallegos v. Sandoval, 15 N. M. 216, 106 Pac. 373 (1910).

6. 71 Ind. 363, 36 Am. Rep. 198 (1880).

7. The following state courts have taken a liberal view:

Connecticut: Knapp v. Walker, 73 Conn. 459, 47 Atl. 655 (1900); Cole v. Jerman, 77 Conn. 374, 59 Atl. 425 (1904).

Colorado: Grimes v. Greenblatt, 47 Colo. 495, 107 Pac. 1111 (1910), permitting a recovery for false imprisonment although the action was labeled malicious prosecution; Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923); Colorado Nat. Bank v. McCue, 249 Pac. 3 (1926).

California: Wentz v. Linthicum, 245 Pac. 205 (1926); Continental Mortg. Co. v. Eyraud, 208 Cal. 566, 283 Pac. 65 (1930).

North Dakota: Black v. Minneapolis & Northern Elevator Company, 7 N. D. 195, 73 N. W. 90 (1897); Miller v. National Elevator Co., 155 N. W. 871 (N. D., 1915).

North Carolina: Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207 (1920), where the court said "there is a wide difference between the statement of a defective cause of action . . . and the defective statement of a cause of action." Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874 (1907); Brewer v. Wynnd, 154 N. C. 467, 70 S. E. 947 (1911); Muse v. Motor Co., 175 N. C. 466, 95 S. E. 900 (1918).

Oklahoma: Byeson v. Territory, 10 Okla. Cr. 677, 103 Pac. 532 (1902); State Natl. Bank v. Ladd, 162 Pac. 684 (Okla., 1917); Schanbacher v. Payne, 79 Okla. 101, 191 Pac. 173 (1920); Security Nat'l Bank of Tulsa v.

clear and unambiguous language of the codes lies at the basis of this line of decisions. No legal theory need be pleaded and the court will render judgment on any theory sustained by the cause of action.

The decisions in a third group of states evidence conflicting tendencies within single jurisdictions.[8] The New York decisions

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Geck, 96 Okla. 89, 220 Pac. 373 (1923); Gourley v. Northwestern Nat. Life Ins. Co., 94 Okla. 46, 220 Pac. 645 (1923); Ginn v. Knight, 106 Okla. 4, 232 Pac. 936 (1925); In re Babtiste's Guardianship, 125 Okla. 184, 256 Pac. 520 (1927); Green v. Correll, 271 Pac. 241 (Okla., 1928); Nicholson v. Roberts, 144 Okla. 116, 289 Pac. 331 (1930); Warren v. Dodrill, 49 P. (2d) 137 (Okla., 1935), the court holding that the pleading need not state facts to bring the case under any particular form of action, but the petition is sufficient if it states facts in a plain and concise manner which entitles plaintiff to some legal or equitable relief.

Nevada: Waters v. Stevenson, 13 Nev. 157 (1878), ruling that "whether the pleader intended to allege trespass to the land, or trespass de bonis, or trover, the result is that the plaintiff is entitled to recover just such damages as are allowable from the facts alleged and proved which make up the whole case."

Iowa: Hollenbeck v. Ristine, 105 Iowa 488, 75 N. W. 355, 65 Am. St. Rep. 306 (1898).

Idaho: Bates v. Capital State Bank, 18 Idaho 429, 110 Pac. 277 (1910); Rauh v. Oliver, 10 Idaho 3, 77 Pac. 20 (1904); Elliott v. Collins, 6 Idaho 266, 55 Pac. 301 (1898); Casady v. Scott, 40 Idaho 137, 237 Pac. 415 (1925).

Ohio: Gartner v. Corwine, 57 Ohio St. 246, 48 N. E. 945 (1897); Arnold v. Arnold, 110 Ohio St. 416, 144 N. E. 261 (1924).

Oregon: Lun v. Mahaffey, 94 Or. 292, 185 Pac. 746 (1919); Hanna v. Hope, 86 Or. 303, 168 Pac. 618 (1917); Laird v. Frick, 18 P. (2d) 1029.

Montana: Cassidy v. Slemons & Booth, 41 Mont. 426, 109 Pac. 976 (1910); Haskins v. No. Pac. Ry., 39 Mont. 394, 102 Pac. 988 (1909); Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648 (1908); Samuell v. Moore Merc. Co., 62 Mont. 232, 204 Pac. 376 (1922); Hardie v. Peterson, 86 Mont. 150, 282 Pac. 494 (1930).

Wyoming: Garber v. Spray, 25 Wyo. 52, 164 Pac. 840 (1917).

Washington: Brown v. Baldwin, 46 Wash. 106, 89 Pac. 483 (1907); Williams v. Snow, 109 Wash. 329, 186 Pac. 861 (1920); Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572, L. R. A. 1917 C. 1128 (1917).

Illinois: Although Illinois was a common law state until 1934, it was apparently quite liberal in requiring a theory of the pleadings: George v. Ill. Cent. R. Co., 197 Ill. App. 152 (1915); Monahan v. City of Wilmington, 328 Ill. 242, 159 N. E. 199 (1928); In re Paar, 264 Ill. App. 372 (1932), the court stating that where the substance of each count of a declaration is in trespass on the case, the declaration is one in case, although the praecipe, summons, and the beginning of the declaration are entitled as in assumpsit.

8. Conflicting tendencies are found among the decisions of the following courts:

Kansas: The Kansas courts originally followed a liberal interpretation: Akin v. Davis, 11 Kan. 580 (1873); Kunz v. Ward, 22 Kan. 132 (1882). In 1902, however, Gretner v. Fehrenschield, 64 Kan. 764, 68 Pac. 619, in the clearest language followed the Indiana rule, holding that plaintiff not having proved his specific theory was not entitled to recover. This decision has in turn been unquestionably reversed, and Kansas can once again be

are so contradictory that it is impossible to trace any tendency, one way or the other.[9] Other states have adopted one rule only to discard that view and follow the opposite trend.

The Missouri decisions indicate that Missouri is to be included within the last-mentioned group. In 1908, a writer for a law review classified Missouri according to the Indiana rule;[10] in his later work on code pleading Professor Clark recognizes a conflict among the Missouri cases;[11] in 1937, it is submitted that the strong tendency is to adopt the liberal interpretation in all cases.

II

Immediately following the adoption of the code in 1849, the Missouri courts got off to a bad start by erroneously confusing

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classed among the liberal states: Cockerell v. Henderson, 81 Kan. 335, 105 Pac. 443 (1909) held that it was immaterial whether plaintiff's action was based upon a theory of fraud, deceit, or contract. "All that is important is that the petition state facts constituting a cause of action and that the evidence is sufficient to justify a determination of the case." See also United States Tire Co. v. Kirk, 102 Kan. 418, 170 Pac. 811 (1918); Wellington v. Midwest Ins. Co., 112 Kan. 687, 212 Pac. 892 (1923); Estey v. Southwestern Gas Co., 129 Kan. 573, 283 Pac. 628 (1930); Goodman v. Beougher, 136 Kan. 388, 15 P. (2d) 414 (1932).

Arkansas: Earlier cases indicated an adherence to a narrow interpretation: Jones v. Minogue, 29 Ark. 637, 648 (1874). Subsequent decisions, however, have reversed any tendency in favor of a strict doctrine. Crowder v. Fordyce Lumber Co., 93 Ark. 392, 125 S. W. 417 (1910); Logan v. Mo. Valley Bridge & Iron Co., 157 Ark. 528, 249 S. W. 21 (1923); Hembrey v. Cornelius, 31 S. W. (2d) 539 (Ark., 1930), holding that plaintiff could change from a contract to a tort theory provided the elements of a tort action had been specifically pleaded; Short v. Kennedy, 35 S. W. (2d) 59 (Ark., 1931) where it was held that a plaintiff seeking to recover the value of certain logs, need not state whether he is suing on breach of contract or for trespass.

Wisconsin: The early Wisconsin cases were such ardent advocates of the strict doctrine that its decisions had a great deal of influence on other state courts including Missouri, particularly the case of Supervisors v. Decker, 30 Wis. 624 (1872), where the court, using picturesque language, held that the plaintiff's theory "cannot be 'fish, flesh, or fowl' according to the appetite of the attorney preparing the dish set before the court." But at about the same time that the Kansas and Missouri courts adopted the liberal view the Wisconsin courts also recognized the more liberal attitude. See Biere v. Fonger, 139 Wis. 150, 120 N. W. 862 (1909). See also Banner v. Kindling, 142 Wis. 613, 126 N. W. 5 (1910) where again in graphic terms the court disproves a narrow construction saying that "the plan of 'hitting it if it is a deer, and missing it if it is a calf,' does not prevail in legal proceedings." In accord, Bruheim v. Stratton, 145 Wis. 271, 129 N. W. 1092 (1911).

9. The development and comparison of the New York cases is in itself a subject for a lengthy and scholarly discussion. For a treatment of the New York holdings see Whittier, The Theory of a Pleading (1908) 8 Col. L. Rev. 523, 529.

10. Ibid.

11. Clark, Code Pleading (1928) sec. 43, p. 177.

the theory of the pleading with the cause of action referred to in the code. This mistaken conception was at the basis of the decision in the first case dealing with the problem. In *Link v. Vaughn*,[12] the court, after asserting that under the code a plaintiff can only recover on the cause of action alleged in his petition, concludes therefrom that "under a petition for goods sold and delivered, he cannot recover on a state of facts which constitute a trespass d.b.a." The court is plainly confusing the plaintiff's cause of action with the theory of the cause of action which the plaintiff's lawyer adopts in order to convert the plaintiff's substantive right into a judgment. Its premise that the plaintiff must recover on the cause of action pleaded is undoubtedly correct; but the fallacy is to be found in the extension of that rule to prohibit a change in the legal theory of the case. The latter may quite conceivably vary although the facts giving rise to the cause of action remain unaltered.

Another case decided in the same year displays a similar misconception.[13] The petition stated a case of trover and conversion. Subsequently, the plaintiff attempted to change to a theory of negligence. The court again misinterpreted the code as applied to the theory of the pleadings instead of solely to the cause of action. As a result the plaintiff's case was defeated, although his cause of action, which had not been changed, justified a recovery on the negligence theory. The framers of the code certainly did not intend their reforms to produce such results. Unfortunately, both of these cases provided precedent for unanalytical courts in later cases to rely upon as supporting a strict interpretation. Still more unfortunately, the fallacious reasoning was likewise followed in succeeding cases.

In 1855, two cases were decided which held that a plaintiff could not alternatively ask for two different types of relief.[14] For some unknown reason these cases were also seized upon to support the view definitely followed at a later date that a plaintiff

12. 17 Mo. 585 (1853).

13. Duncan's Admin. v. Fisher, 18 Mo. 403 (1853). The petition was based on a theory of trover and conversion, whereas the theory on the trial of the case was founded on the negligence of the defendant.

14. Robinson v. Rice, 20 Mo. 229 (1855). Plaintiffs stated that defendant wrongfully obtained possession of the slaves and unlawfully detained the same, and then proceeded to ask that if the court should be of a different opinion that a decree be granted on breach of covenant of warranty; Pensenneau v. Pensenneau, 22 Mo. 27 (1855). Plaintiffs brought suit to enforce a trust, praying a divestiture of title, and also praying that if the court should refuse the first prayer, the rights of plaintiff and defendant may be ascertained and a partition decreed.

must state one theory in his petition and recover on that theory or not at all. Such an interpretation of these cases is entirely unwarranted. The decisions are obviously concerned with another point; and the dicta, if relied upon at all, must be recognized as favoring a liberal construction of the code provisions in regard to the theory of the pleading. The court in *Pensenneau v. Pensenneau*[15] asserts that the plaintiff must state his facts in a way to entitle him to the relief he seeks; but it qualifies that statement by saying that if the plaintiff mistakes his theory, the code affords a remedy: "We understand the clause above cited to mean that, if on the facts as stated, the plaintiff is entitled to relief of two or more kinds, and he asks for only one kind, yet failing to obtain that, he may have any other relief to which his case, as made, entitles him."

In *Ahern v. Collins*[16] the plaintiff's petition was framed on the theory of malicious prosecution. Since that particular theory could not be substantiated, the defendant argued that the plaintiff was left without any remedy. The court, however, held that "the true object is to ascertain, not whether this averment would bring it within any one of the different forms of action as they existed at common law, because the use of them had been entirely superseded by our own statutes, but as to whether it contains a sufficient statement of facts showing a right on the part of the plaintiff to recover." This court, too, seems to have sensed the intention of the framers, and, as a consequence, the result reached is more consonant with the spirit of the code.

Up to this point the cases are contradictory. One group adopts a liberal interpretation consistent with language of the code; the other supports a narrow construction incompatible with the declared intention of the framers.

III

From approximately 1870 to 1910, the large number of clear and strong cases favoring the strict doctrine leave no doubt that that view came to prevail.[17] The few cases which prior to 1870

15. Ibid., l. c. 35.
16. 39 Mo. 145, 149 (1866).
17. Eyerman v. Mount Sinai Cemetery Ass'n of St. Louis, 61 Mo. 489 (1876), refused to allow plaintiff to change from an express contract theory to a *quantum meruit* theory at the trial; Waldhier v. The Hannibal & St. Joseph R. R. Comp., 71 Mo. 514 (1880); Parker v. Rodes, 79 Mo. 88 (1883) refusing an amendment because it changed the "cause of action" from one in trover and conversion to an action for fraud and deceit; Carson v. Cummings, 69 Mo. 325 (1879); Clemonts v. Yeates, 69 Mo. 623 (1879); Jones v. Loomis & Snively, 19 Mo. App. 234 (1885); Huston v. Tyler, 140 Mo. 252,

had adopted a liberal view were forced into oblivion and forgotten amidst the enthusiastic adherence to the Indiana rule. The decisions of other state courts no doubt played no little part in bringing about this decided trend. This is evidenced by the frequent references made in the Missouri opinions to foreign decisions.[18] And the early Missouri cases furnished an adequate supply of precedent for those courts who felt inclined to accept the Indiana doctrine. All of the confusion arising out of the failure to distinguish between a cause of action and a theory of the pleadings was crystallized into one grossly misused principle. Practically every court faced with the problem during those forty years lays down the proposition that a party cannot declare upon one cause of action and recover on another and different cause. That principle is, of course, true when correctly applied. However, since it has no application to situations in which only the theory of the pleadings is involved, its use in that connection works an unnecessary hardship on the plaintiff.

Perhaps the two most frequently cited cases of that period are *Carson v. Cummings*[19] and *Clemonts v. Yeates*.[20] But these cases are typical in that they state no substantial basis for the decisions other than the abused proposition that the plaintiff who has sued on one cause of action cannot recover on another. And that rule is not appropriately used in either case for the simple reason that all that is involved in either is a change in the legal theory. The true basis of these strict holdings is best stated in *Estes v. Desnoyers Shoe Co.*[21] In that case the court said: "The rules of good pleading require that the instrument relied on should be pleaded in its legal effect.—The pleading is addressed to the court and should state the pleader's theory of his case not leaving it to the court to construct a theory as best it may from the evidence set out, and not leaving his adversary in the dark as

41 S. W. 795 (1897), plaintiff having declared upon an express contract or warranty was precluded from relying on an implied warranty to the same effect; International Co. v. Smith, 17 Mo. App. 264 (1885); Schneider v. R. R., 75 Mo. 295 (1882); Rush v. Brown, 101 Mo. 586, 14 S. W. 735 (1890); Ensworth v. Barton, 60 Mo. 511 (1875); Whipple v. Peter Cooper Bldg. & Loan Ass'n, 55 Mo. App. 554, 558 (1893); Glass v. Gelvin, 80 Mo. 297, (1883); Iron Mtn. Bank of St. Louis v. Murdock & Armstrong, 62 Mo. 70 (1876); Moffatt v. Conklin, 35 Mo. 453 (1865); Kellerman Contracting Co. v. Chicago House Wrecking Comp., 137 Mo. App. 392, 118 S. W. 99 (1909).

18. See Sumner v. Rogers, 90 Mo. 324, 330 (1886); Huston v. Tyler, 140 Mo. 252, 264 (1897).

19. 69 Mo. 325 (1879).

20. 69 Mo. 623 (1879).

21. 155 Mo. 577, 583, 56 S. W. 316 (1900).

to what the theory advanced is, or what construction the pleader puts on his contract. It is not a contest in which the combatants may catch as they can." This excerpt from the court's opinion plainly shows that the elements which lie at the basis of the Indiana rule are those of notice and surprise. Incidentally, the case illustrates the extent to which the practical workings of the strict doctrine depart from the intent of the framers. The case holds that the plaintiff who relies on a contract must plead it from the standpoint of its legal effect and not in *haec verba*. It is difficult, if not impossible, to reconcile this principle with the code requirement of fact pleading as opposed to the pleading of legal conclusions.[22]

During this period characterized by strict holdings, there is a series of cases which permit a change in theories provided that the defendant concurs in the change.[23] These cases are explained on the basis of estoppel. As one court puts its,[24] "the defendant will not be heard to complain where it committed a like error, by submitting the converse of the theory hypothesized in plaintiff's instructions." Although these cases are somewhat apart from the question under consideration, they nevertheless suggest this criticism of the strict doctrine: If the courts permit a change in theories when the defendant accepts it by outward manifestations, why should the courts refuse the change when the defendant *should* accept it, *i. e.*, when the facts are sufficiently pleaded so as to make it possible for the defendant to adopt the new theory without prejudicing his case?

IV

In 1910, the Missouri courts performed a "right-about-face." For some unknown and incomprehensible reason, the cases from

22. The case of Johnson v. United Railways, 247 Mo. 326, 352, 152 S. W. 362 (1912), offers a much more practical solution for such a situation. The court said that it is not necessary to set forth the contract in *haec verba*. The plaintiff need only set forth the "ultimate facts," and in "construing his pleading for the purpose of determining its effect, the judicial function is to construe its allegations liberally with a view to substantial justice between parties." This latter decision, falling as it does in a period when the court began to adopt a liberal interpretation of the theory of the pleadings, requires only a pleading of the important parts of the contract and says nothing of the necessity of pleading the legal effects of the contract. In fact, it specifically states that that is the duty of the courts.

23. Johnson-Brinkman Co. v. Central Bank of Kansas City, 116 Mo. 558, 22 S. W. 813 (1893); Hilz v. Ry. Co., 101 Mo. 36, 13 S. W. 946 (1890); Iron Mtn. Bank v. Armstrong, 92 Mo. 265, 279, 4 S. W. 720 (1887); Thorpe v. Missouri-Pacific Ry. Co., 89 Mo. 650, 2 S. W. 3 (1886); Bettes v. Magoon, 85 Mo. 580, 586 (1885); Davis v. Brown, 67 Mo. 313 (1878).

24. Johnson-Brinkman Co. v. Central Bank of Kansas City, 116 Mo. 558, 22 S. W. 813 (1893).

that year on adopt a decidedly liberal attitude. It is peculiarly significant that in the preceding year the courts in Kansas and Wisconsin likewise reversed their former decisions in favor of the liberal doctrine.[25] The closest approach to an explanation was given by a Wisconsin court when it attributed its reversal to "the progressive tendency to broaden the judicial vision";[26] but that, of course, does not explain the change in attitude occurring in all three states at the same time.

Nevertheless the fact remains that in 1910 the Kansas City Court of Appeals in *Central American S. S. v. Mobile & Ohio R. R. Co.*[27] rendered an opinion which cannot be reconciled with the cases preceding it for the past forty years. The court said in clear and unmistakable terms that under the code in which there is but one form of civil action and in which only a plain and concise statement of facts is required by the plaintiff, it does not devolve upon the pleader to state the nature of his cause of action. "He must give a plain and concise statement of the facts constitutive of the cause of action. From such statement the court will determine the nature of the cause, and will not turn the plaintiff out of court where the facts averred comprise all the elements of a good cause of action." No precedent is cited; the only basis relied upon is the code provisions themselves.

The Springfield Court of Appeals earlier in the same year unquestionably committed itself to a similar liberal interpretation.[28] The court decided that "if the facts pleaded show any right of recovery, the petition must be held good, and, whether we denominate this an action at law for conversion, or for breach of contract for failing to comply with the terms of the mortgage, or an action in equity, it is clear that, if the allegations in the petition are true, the plaintiff has stated therein a cause of action." The decisions in these two cases are the results of a clear conception of the distinction between a cause of action and the theory of the pleadings.

In 1919, *Morrill v. Alexander,*[29] the case most frequently cited in support of the liberal view, was decided. In the same year, *Nave v. Dieckman*[30] placed a qualification upon the liberal rule

25. See supra, note 8.
26. Bieri v. Fonger, 139 Wis. 150, 120 N. W. 862 (1909).
27. 144 Mo. App. 43, 128 S. W. 822 (1910).
28. Simpson v. Bantley Realty Co., 142 Mo. App. 490, 126 S. W. 999 (1910).
29. 215 S. W. 764 (Mo., 1919). Court allowed plaintiff to recover for breach of contract, although his petition was framed on a conversion theory.
30. 208 S. W. 273 (Mo. App., 1919).

by holding that a "plaintiff cannot rule and *try* his case on one cause of action and recover on another." In other words, the plaintiff cannot change his theory in the instructions asked of the court after the testimony has been concluded. That would be carrying the liberal rule to the extreme of giving the plaintiff an unfair advantage over the defendant. The careless use of the term, "cause of action," is to be noted, for an examination of the case proves that the court was speaking of the theory of the pleading when it made the above statement.

The cases decided subsequent to *Morrill v. Alexander*[31] continue the development of the liberal doctrine.[32] In 1927, however, the Missouri Supreme Court in the case of *Sandwich Mfg. Co. v. Bogie*,[33] for some unaccountable reason, revived the ancient common law stress on forms of action. The plaintiff had originally brought what was formerly a common law action of account, and then had tried to amend his petition by setting up an action for money had and received. The court in that situation rendered an opinion which is entirely out of line with every decision of the past quarter century. It refused to allow the amendment, although the fact allegations in the original and amended petitions were practically identical. The court held that the amended petition stated a new cause of action. The result was fatal to the plaintiff's case inasmuch as the Statute of Limitations had run to prevent the bringing of a new cause of action. The error made in the selection of theories in this case was as disastrous as it was two hundred years ago.

Fortunately, the case had no influence on subsequent decisions. In 1932, the opinion in *Way v. Raby*[34] brought the liberal development up to date. The court held that "the character of the action must be determined from the petition as a whole. Its substance is controlling, and statements in the nature of legal conclusions (plaintiff's theory of the pleadings) are of little or no consequence. The petition contains all necessary allegations of a cause of action for reimbursement of an amount paid by sureties for the principal debtor and legal verbiage does not alter the situation."

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31. 215 S. W. 764 (Mo., 1919).

32. Waiters' Benevolent Ass'n v. Cella, 223 S. W. 444 (Mo. App., 1920); K. C. Stockyards Co. of Maine v. Federal Grain Co., 279 S. W. 771 (Mo., 1926).

33. 317 Mo. 972, 298 S. W. 56 (1927). For a criticism of this case, see comment, 22 Ill. L. Rev. 660 (1928).

34. 49 S. W. (2d) 672 (Mo., 1932).

The most recent case[35] dealing with the problem asserts that the petition need not "explicitly specify by name the cause of action relied upon. All that is necessary is that nothing contradictory of the cause relied on is stated, but that it contain all the elements of the cause that is relied on." The use of the word "cause" instead of "theory" indicates that the old confusion has not yet been entirely dissolved. But, although the words are still confused on occasions, the underlying distinction seems to be generally understood and applied.

V

The present Missouri tendency to accept the liberal doctrine is of definite advantage for the lawyer who at the outset of the case is aware of only one theory and then later discovers that he has erred in his selection. To aid the lawyer who is uncertain from the outset as to which of two possible theories to sue under, a Missouri statute[36] provides a method of stating two theories in the same petition. Although the language of the alternative pleading statute would seem to bring only the fact allegations within its purview, the courts have interpreted it to extend to the pleading of theories alternatively.[37]

In *Waechter v. St. Louis & Meramec River R. R. Co.*[38] the court held that proof of negligence disproves wilfulness and that the two theories cannot be joined in the same count. Under the alternative pleading statute, however, the two were held to be properly alleged in different counts to meet any proper evidence which might show the manner in which the injury was caused. And the courts have been very liberal in deciding whether the pleading has followed the statutory instructions. It is interest-

35. Vaughn v. Mo. Power & Light Co., 89 S. W. (2d) 699 (Mo. App., 1935).

36. R. S. Mo. 1929, sec. 798, which provides that "either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance whether it be one or the other."

37. Wade v. Douglas, 116 Mo. App. 348, 143 S. W. 830 (1912), where plaintiff did not know whether money was due him from principal or agent, the court holding that under the alternative pleading statute a cause of action may be stated in separate counts under two theories in which case plaintiff would be entitled to have both theories presented to the jury; Hendricks v. Calloway, 211 Mo. 536, 111 S. W. 60 (1908), where although the pleading did not obey with precision the statutory admonition relating to alternative pleading, "a liberal gloss shows the pleader was standing on two theories one of which might be false and the other true, and that if either be true there was equity in the bill"; Waechter v. St. Louis & Meramec River R. R. Co., 113 Mo. App. 270, 88 S. W. 147 (1905).

38. Ibid.

ing to note that Kentucky, which has a similar statute,[39] has in no instance given it such a peculiar construction.[40]

SUMMARY

The mere fact that several states, including Missouri, have adopted the liberal doctrine after having tried the Indiana rule should furnish rather persuasive evidence that the liberal rule produces the better results. The cases indicate that it secures a greater degree of justice for the plaintiff without putting the defendant to any noticeable disadvantage. The present Missouri rule insists that facts be pleaded to support a cause of action. Any theory supported by the facts will then be sustained by the court. This would seem to give the defendant adequate notice. Issues are formed on the substantive merits of the case as originally pleaded. Since the cause of action remains the same, it is only reasonable to assume that the defendant should be prepared to meet it regardless of the theory adopted by the plaintiff.

From a strictly legal standpoint, the liberal doctrine must be accepted. The code requires only a pleading of facts. Legal conclusions are to be left for the court to develop. The liberal doctrine follows the statutory instructions; the strict rule entirely disregards the code provisions and retains in force the common law rule which the codes sought to abolish.

It is therefore submitted that the plaintiff who voluntarily frames his petition according to a particular legal theory should be permitted to adopt any new theory provided it is founded on the cause of action as originally stated. That is code pleading.

FRED L. KUHLMANN.

39. Ky. Civ. Code Prac. 1927, sec. 113, subd. 4.

40. *Quaere:* Why should the courts go out of their way to permit alternative theory pleading in the counts of a petition, and yet refuse to allow alternative pleading in the prayer for relief? See Robinson v. Rice, 20 Mo. 229 (1855); and Pensenneau v. Pensenneau, 22 Mo. 27 (1855).