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Cause of Action and the Statutes of Limitation--"The Chains That Bind"

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viding sound, healthy citizens for the commonwealth. The present interpretation of the pure food act by the Ohio courts adequately deals with the situation.

The doctrine of warranty should be extended to cover members of the family and guests. This concept has been incorporated into the Uniform Commercial Code.[59] It has been propounded that the warranty of the seller extends to any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is thereby injured.

Viewing the many exceptions to the requriement of privity which are manufactured by the courts leads one to an inevitable conclusion. At least in situations involving the sale of foods, the courts are unhappy with the general privity requirement. This situation should be faced and boldly determined by less timorous courts.

If the courts insist on "privity of contract," then under the circumstances of modern merchandising, privity should be found to exist "full blown" in the minds of the parties. In the event that a more traditional rationalization is demanded by the courts, it would seem proper to maintain that the warranty runs with the food, from the time it is purchased until it is finally consumed.

THOMAS J. MCGUIRE

Cause of Action and the Statutes of Limitation—"The Chains That Bind"

"It is one of the maxims of the civil law that definitions are hazardous."[1] In 1853, the Ohio General Assembly affirmed legislative recognition of this rubric when they replaced the mystical and inflexible writ system with a simplified code of civil procedure.[2] For, in drawing the code, the legislature left untouched the body of rules limiting the right to bring suit. The assembly commanded that the statutes of limitation run from the accrual of the cause of action but *failed to define cause of action.* As the ancient metaphysicians vainly sought the definition of beauty, the energy of countless jurisprudents has since been fruitlessly exhausted in an attempt to define this illusive concept. In their zeal to establish one form of action, the legislators wholly *neglected a revision of the statutes of limitation.* These chronological periods still differed from one substantive cause to another. The attempt of the judiciary to recon-

[59] UNIFORM COMMERCIAL CODE, § 2-318 (1952).

cile the new factual pleadings with the old statutes of limitation anomalously *preserved the old forms of action.*

Under the old writ system, the judge knew by a glance at the formalized declaration exactly which statute of limitations applied. After the code revision, the petitions stated *facts* which *might embody more than one theory of recovery.* The choice of a proper theory became a matter to be proven at the trial stage. The choice of the proper period of limitation, still dependent on the nature of the cause of action, also became a problem to be resolved at the trial, after the theory of recovery had been chosen. But due more to habit than to reason, the courts continued to label the facts as one certain cause of action so as to select the statute of limitation at the pleading stage of the trial.

The interrelated problems arising from the failure to define cause of action and from the preservation of the antithetical and misplaced statutes of limitation will be considered in this note. An examination of the meaning of cause of action, the Ohio case law determining its accrual, and the use and rationale of the Ohio statutes of limitation may reveal the nature of the remedies needed to end this confusion.

CAUSE OF ACTION — HISTORICAL DEVELOPMENT

In an age of organization and definition the cause of action concept has grown more obscure. An examination of the meaning of cause of action, before and after the revision of civil procedure might explain this paradox.

Historically the common law writ was a statement of a substantive action recognized by the King's courts and invoking their jurisdiction.[3] When oral pleadings were replaced by written declarations,[4] lawyers drew their petitions in the form of these writs so as to assure the plaintiff that the court would entertain the claim. Cause of action was at this time the statement of the substantive elements of an accepted wrong merely clothed in facts. Each cause was distinct, and was easily identifiable by the uniqueness of the elements and the phraseology of the declaration.[5] This was the era of rigidity and certainty.

The age of flexibility and uncertainty of the cause of action dawned with the enactment of the Ohio Code of Civil Procedure in 1853.[6] The

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[1] Samuel Johnson.

[2] 51 OHIO LAWS 57.

[3] KIEGWIN, CASES IN COMMON LAW PLEADING §§ 5, 10 (2d ed. 1934).

[4] *Id.* § 11.

[5] KIEGWIN, CASES IN COMMON LAW PLEADING §§ 16, 17 (2d ed. 1934).

[6] 51 OHIO LAWS 57.

goal of this revision was the development of a truly "*flexible system* (for the) prompt dispatch of litigated business . . . limited only by the *convenience* of the trial."[7] (emphasis added) To accomplish this goal, the old forms of action were abolished.[8] Substantive elements now called conclusions of law were excluded from the pleadings.[9] The more flexible petition now by nature *factual* rather than substantive brought uncertainty. The judge was compelled to infer a right to bring suit from a statement of the facts. Many times the facts reflected an amalgam of several old substantive actions. Yet the courts had new and more difficult questions to answer. Did a cause of action inhere in the facts? If one existed, which theory of recovery did it reflect? Did the facts state more than one cause? If so, were the causes properly joined? Determined to resolve these questions at the pleading stage of the trial, the courts sought tests for determining cause of action which might reinstate the certainty of the old writ system. When applied to the facts of a given transaction, however, these tests were shown to be indefinite and subjective. Consideration of two such tests, Pomeroy's "gist" theory and Clark's "transaction" theory demonstrates their obscurity.

Pomeroy, "father of the thoughts of a majority of the courts and writers"[10] defined the cause of action as "the primary right and duty and the delict or wrong."[11] Though Pomeroy regarded this definition as an "unerring test"[12] its use has resulted in a misleading search of the pleading for the *gist* or nature of the cause. When a single transaction presents a plurality of rights and duties, the courts, following this singular definition, seize on one right which they term the gist, excluding all others. A court might regard a transaction involving fraud on a contract as a suit on the warranty and excluding the elements of fraud, bar the suit by applying a short statute limiting the right to bring contract actions.[13] With equal veracity the court might exclude the contract elements and permit the suit by applying the longer period of limitations restricting claims arising out of fraud.[14] When applied to a given transaction, Pomeroy's certainty becomes vagueness.

Other theories like that of Pomeroy reduce the cause of action to a

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[7] Sherlock v. Manwaren, 208 App. Div. 538, 540, 203 N.Y. Supp. 709, 711 (4th Dep't. 1924).

[8] 51 OHIO LAWS 57.

[9] Millville Gas Light Co. v. Sweeten, 74 N. J. L. 24, 64 Atl. 959 (Sup. Ct. 1906).

[10] Bilikan v. Columbus Ry. & Light Co., 10 Ohio N.P. (n.s.) 561, 564 (1910).

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

[12] CLARK, CODE PLEADING, 137 (2d ed. 1947).

[13] Quintard v. Newton, 5 Robt. 72 (1867).

[14] Moore v. Noble, 53 Barb. 425 (1867).

bare formula emphasizing as controlling either the "right,"[15] the "duty," the "wrong,"[16] or the "remedy." All of the theories look good on paper. None stands the test of workabliity. The failure of similar all-solving formulae must have led Shakespeare to comment, "there was never yet a philosopher that could endure the toothache patiently."

Viewing the cause of action as a lay witness might view it, devoid of classifying legal rules, is Clark's realistic approach.[17] The cause of action stated as a chronological and continual fact transaction seems closest to the intent of the code commissioners. This view however, offers the judge no answers to questions such as which statutory period of limitations governs, and at what point the cause of action accrues.

For procedural purposes, the cause of action is no more than the *allegation* of all the "operative facts"[18] which give rise to the right to bring suit. If a right to sue whether on one or many substantive theories is present in plaintiff's final petition, the suit should be commenced. The proof of these rights and duties, the accrual of the cause, the selection of the proper statute of limitations must be left to the trial. When asked the meaning of "cause of action" under the code the safest answer is that of Lewis Carroll's Humpty Dumpty, "just what I choose it to mean — neither more nor less."

THE STATUTES OF LIMITATION

No segment of our law is more automatically used with less thought than the statutes of limitation. The Ohio periods of limitation have not been substantially modified since 1804.[19] As mentioned, the drafters of the code revisions perpetuated the old forms of action when they left these limitations almost untouched. Speculation over their function and rationale might show us not what they are, but *what they should be.*

The limitations have two justifications. Perhaps the historical rationale is based on the *sufficiency of evidence* needed to prove a claim.[20] As time passes witnesses to an event become unavailable and memories fade. For practical reasons a court does not consider a case after a cer-

[15] McCaskin, *Actions and Causes of Action,* 34 YALE L. J. 614, 638 (1925).

[16] BLISS, CODE PLEADING §§ 113, 114 (2d ed. 1887).

[17] CLARK, CODE PLEADING 128 (2d ed. 1947).

[18] *Ibid.*

[19] 2 OHIO LAWS 60. While the labels on the actions have been changed and new categories added from time to time the chronological periods are substantially the same.

[20] The original limitation on a "writ of right" was the time of memory. The time of memory was later defined as the reign of Richard I. It was subsequently reduced to 50 years and has since diminished to its present 20 or 21 years. HALE, HISTORY OF THE COMMON LAW (1779).

tain time, since it is thought to be incapable of proof. On this reasoning, those causes dependent upon oral testimony such as trespass, were barred sooner than a cause founded upon some writing, such as contract. The second basis for the limitations grew out of the equity notion that the inactivity of the plaintiff constituted *acquiescence* to the defendant's breach of duty.[21] Logically, the mere running of time was not acquiescence. If the plaintiff was under some *disability* so that he could not bring suit, the statute did not run against him.[22]

Accrual of Cause of Action

The development of rules determining the point at which a cause of action accrues is an illuminating study of the conflicting forces that mold our judicial process. Analysis of this area reveals a duel between the common law and legislation and a rivalry between precedent and policy. The most interesting and most vexatious problems will be considered: (1) those which by their nature, or the acts of the defendant are not known to the plaintiff, and (2) those arising out of contractual obligations.

The history of the rules governing the unknown wrong is important to an understanding of the modern rules. Prior to the code revision of 1853, law and equity were two distinct systems. The statutes of limitations did not include the pure equity actions. In equity cases such as fraud, mistake and breach of trust, the cause of action accrued on the discovery of the cause by the plaintiff.[23]

The law courts following the letter of the statute of limitations, held that the cause accrued from the commission of the wrong even though by its nature or by the acts of the defendant the plaintiff had no knowledge of it. In *Kerns v. Schoonmaker*[24] the court held that the cause of action does not run from discovery. In *Fee v. Fee*[25] the court found that fraudulent concealment does *not* bar the running of the statute in suits at law even though it does bar the running of time in equity.

In adopting the "Code of Civil Procedure," the Ohio legislature with one penstroke abolished the procedural distinction between law and

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[21] Woolsey v. Trimble, 18 F. 2d 908 (6th Cir. 1927): *dictum.*

[22] Ohio Rev. Code §§ 2305.19, 2305.21.

[23] Longworth v. Hunt, 11 Ohio St. 194 (1860); and Williams v. Presbyterian Church, 1 Ohio St. 478 (1853). Although written after the code revision both cases illustrate the equity view. It was felt that the defendant ought not in conscience avail himself of the running of time when the wrong was unknown to the plaintiff.

[24] 4 Ohio 331 (1831).

[25] 10 Ohio 469 (1841).

equity, and the forms of all such actions and suits.[26] Forewarned against the strict construction given all statutes in derogation of the common law the legislature commanded in the code that "its provisions and all proceedings under it shall be *liberally construed* with a view *to promote its object.*"[27] (emphasis added) In accordance with the termination of the law-equity dichotomy, a statute was added to the existing limitations, restricting the right to bring suit "on the ground of fraud." The equity rule was adopted and the period ran from the *"discovery" of the fraud.*[28] Contemporary annotators believed that this section abolished the rule of the *Fee* case that fraudulent concealment ran from the act, not from discovery.[29] However, in controversion to the code the Ohio Supreme Court construed the statute *strictly* and continued the pre-code *Fee* rule.[30] On two subsequent occasions the failure of the courts to apply the rule of "discovery" to unknown wrongs led to speedy legislative amendment of the statutes of limitation in clear derogation of both court decisions.[31] Construed liberally in the spirit of the code revisions, these two amendments spell out a legislative intent to make those wrongs which are unknown by their nature, or by the acts of the defendant, accrue at their discovery.

Despite these amendments the courts still refused to apply the rule of "discovery" to equity rights when they arose in conjunction with a legal right. When the trustee of an express trust misappropriated the funds of the trust, the cause was held to have accrued at the discovery of the fraud.[32] But in those cases in which elements of law and equity are mixed the courts consistently exclude the equity elements, hold that the

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[26] 51 OHIO LAWS 57.

[27] *Ibid.*

[28] *Id.* at 59.

[29] 2 SWAN & CRITCH., 949 n. 1.

[30] Lathrop v. Snellbaker, 6 Ohio St. 276 (1856). Ohio's courts were joining the great opposition to the reform by reducing it through strict construction to "the empty change in a few words." POMEROY, CODE REMEDIES § 453 (5th ed. 1929).

[31] In *Howk v. Minnick,* 19 Ohio St. 462 (1869) the court ruled that the statute of limitations governing fraud did not apply to the plaintiff's claim of fraudulent concealment of a prior conversion of his personal property. The legislature amended the statutes of limitation accruing actions "for the wrongful taking of personal property . . . (from) the *discovery* of the wrongdoer." 64 OHIO LAWS 145. In *Williams v. Pomeroy Coal Co.,* 37 Ohio St. 583 (1882) the Supreme Court, citing the *Howk* case, held that lack of knowledge of a trespass to underground coal mines did not bar the running of the statutory period thereby accruing the cause of action from the wrongful act rather than from discovery. The legislature then added the provision, "in an action for trespass underground or injury to mines, the action shall not be deemed to have accrued until the wrongdoer is *discovered.*" 81 OHIO LAWS 145.

[32] Schofield v. Cleveland Trust Co., 149 Ohio St. 133, 78 N.E.2d 167 (1948); OHIO REV. CODE § 2305.22.

gist of the action is the legal right, and bar the suit. In a leading case suit was brought against the trustees for loss sustained due to their bad faith and negligence in the purchase of stock. The court ruled that the gist of the action was not fraud and that therefore the statute could not run from discovery. Reluctant to hold that a cause founded on breach of trust ran from the wrongful act, the court compromised and held that the cause accrued at the termination of the trust relationship.[33]

Even when breach of trust has been coupled with fraudulent concealment, the courts have held that fraud is not the gist of the action and that the cause accrues at the time of the act rather than at discovery.[34] In *Minster Loan & Savings v. Laufersweiler*[35] the court said that the "applicable statute is to be determined from the nature of the action."[36] The court ignored its own rule, and determining the cause solely on the nature of the relief sought, barred the suit.

The restriction of the equity notion of "discovery" seems to be due to three factors: (1) the strict construction of the statute of limitation governing fraud given by the early decisions; (2) the continuation of the *Fee* and *Kerns* rules; and (3) the attempt to glean the single nature of cause out of a transaction thereby excluding the other rights involved in it.

Malpractice

The malpractice suit best illustrates the accrual of tort actions when the wrong is undiscovered. The attempt to avoid the harsh results of a short one year period[37] can be seen to conflict with the well settled *Kerns* rule that the cause accrues at the breach of duty rather than at discovery. In malpractice suits brought against physicians the usual serious nature of the plaintiff's injury has given rise to a judicial policy favoring the preservation of plaintiff's right to sue. In the earliest Ohio suit of this type the court upheld the plaintiff's right to bring suit by asserting that the foundation of a malpractice suit was not the contractual relation but was rather the doctor's negligence.[38] In *Fronce v. Nicholls*[39] the

[33] State *ex rel* Lien v. House, 144 Ohio St. 238, 58 N.E.2d 675 (1944); OHIO REV. CODE § 2305.22.

[34] Minster Loan & Savings Co. v. Laufersweiler, 67 Ohio App. 375, 36 N.E.2d 895 (1940).

[35] *Ibid.*

[36] *Id.* at 378, 36 N.E. 2d at 897.

[37] OHIO REV. CODE § 2305.11.

[38] Shuman v. Drayton, 14 Ohio C.C.R. 328 (1897); This suit was brought one day before the residual four year period of limitation had terminated. After the cause of action arose but before the instigation of the suit the legislature had expressly included malpractice in the one year period along with libel, slander, etc. Since the statute was not retroactive it did not apply.

[39] 22 Ohio C.C.R. 539 (Ct. App. 1901).

court followed the *Kerns* rule and held that the statute ran from the act. While barring the suit the court suggested that the statute "be amended . . . in order that knowledge of the resulting injury . . . would cause the action to accrue."[40] In 1902 the supreme court in *Gillette v. Tucker*[41] attempted to avoid the oppressive result of the entrenched *Kerns* rule. A sponge was left in the abdominal cavity during an operation. The court held that the injury was not negligently leaving the sponge but *continuing* to leave it. Ruling that the period ran from the undefined "consequential injury"[42] the majority found that the suit was not yet barred. Three judges dissented invoking the *Kerns* rule. Just three years later the supreme court overruled the *Gillette* majority and decided *McArthur v. Bowers*[43] on the reasoning of the dissenting opinion of the *Gillette* case. The problem lay dormant until 1918 when the inflexibility of the *Kerns* rule was again demonstrated. Suit was brought just five days after the statutory period had elapsed — if computed from the original negligent act. To preserve the suit, the court held that the cause of action accrued two weeks after the operation when the physician failed to remove the sponge upon removal of the stitches.[44]

The following year the supreme court overruled the *McArthur* decision. In *Bowers v. Santee*[45] the doctor had negligently set a broken leg which he continued to treat for one year. Defendant's negligence was clearly confined to his first careless act. The element present in the *Gillette* case justifying continuing negligence — the constant irritation of a foreign body — did not exist. The court saved the suit by holding that the cause of action accrued at the termination of the *contractual* relationship. The original Ohio holding that malpractice is not founded on the contract was ignored or forgotten.[46] Between 1920 and 1953 seven cases were decided following the "contract" theory fabricated in the *Bowers* case. In three of these, evidence was presented showing a continuing relation subsequent to the wrongful act bringing the suits within the statutory period.[47] Four suits concerning the special services of a doctor during an operation were barred.[48]

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[40] *Id.* at 542.

[41] 67 Ohio St. 106, 65 N.E. 865 (1902). Avoiding any suspicion that the court was casting doubt on the intrenched *Kerns* rule, the court asserted that plaintiff's lack of knowledge of the injury was not considered in the decision.

[42] *Ibid.* at p. 127, 65 N.E. at 870 (1902).

[43] 72 Ohio St. 656, 76 N.E. 1128 (1905).

[44] Horne v. Pawlicki, 14 Ohio App. 94 (1918).

[45] 99 Ohio St. 361, 124 N.E. 238 (1910).

[46] Shuman v. Drayton, 14 Ohio C.C.R. 328 (1897).

[47] Amstutz v. King, 103 Ohio St. 674, 135 N.E. 973 (1921); Meyers v. Clarkin, 33 Ohio App. 165, 168 N.E. 771 (1929); Netzel v. Todd, 24 Ohio App. 219 (1926).

[48] De Long v. Campbell, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); Swankowski v.

Neither the "contract" theory nor the "continuing trespass" theory was completely successful in saving malpractice suits from the short period. Only one dissenter urged the abandonment of consistency and the revival of the "continuing trespass" theory thereby saving a suit barred on the "contract" rule.[49] Most courts confined their dissatisfaction to a plea for legislative change of the short malpractice limitation statute.[50]

The sympathy for the plaintiff underlying medical malpractice suits does not seem to transfer to litigation involving the negligence of an attorney. In a 1923 case, the suit was barred even though the judge accepted the "contract" theory.[51] In a later suit the "contract" theory would have preserved the plaintiff's right to sue but the judge, distinguishing the physician's services from that of the lawyer's, held the statute to have run from the initial act of negligence, barring the suit.[52]

Thus the rule that the cause of action accrues upon discovery of the injury was given a strict construction by courts seeking to minimize the change in the common law. The succeeding generation of judges inherited the anti-legislation precedent of its forebearers. Faced with the choice of breaking with precedent and giving the statutes a liberal construction, or following precedent, the courts chose the latter. The severe result of this choice frustrated both the unsuccessful litigant barred on a procedural technicality and the judge. The useful rule of discovery lies dormant, and the courts remain linked to harsh precedent by chains forged by their predecessors.

Contractual Duties

The accrual of a cause of action arising out of the breach of contractual duties again illustrates the confusion growing out of the attempted solution of factual and substantive problems at the pleading level

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Diethelm, 98 Ohio App. 271, 129 N.E.2d 182 (1953); Truxel v. Goodman, 38 Ohio L. Abs. 113, 49 N.E. 2d 569 (Ct. App. 1942); Searer v. Lower, 25 Ohio App. 328 (1927).

[49] De Long v. Campbell, 157 Ohio St. 22, 31, 104 N.E.2d 171, 181, (1952); "The continuing effects (of the) tortious conduct" extended beyond the period of contractual relationship postponing the running of the statute "until it is reasonably possible for the victim . . . to discover the wrong."

[50] De Long v. Campbell, 157 Ohio St. 22, 27, 104 N.E. 2d 177, 179 (1952): "The legislative branch . . . (has) fixed the time when the statute (shall run) . . . It is not our function . . . to disregard, by legislating, a legislative enactment." The court then suggested that the legislature change the statute as it had after the *Williams* case, 37 Ohio St. 583 (1882), *supra* n. 43, when it made the applicable statute run from discovery negating the court's decision, 81 OHIO LAWS 145; *and* Truxel v. Goodman, 38 Ohio L. Abs. 113, 117, 49 N.E. 2d 569 (Ct. App. 1942): "We think some change in the limitation statute could very properly be made."

[51] McWilliams v. Hackett, 19 Ohio App. 416 (1923).

[52] Galloway v. Hood, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

of the suit. The first of such problems involves the question: Does the petition state one complete transaction, or many separate transactions? This issue arose in an action brought *by* a physician to recover for services rendered during 31 housecalls made while the patient suffered from pneumonia. If considered as separate transactions each commencing the running of the statute, many of the claims would have been barred. If considered as one transaction, the statute would have run from his final call and the entire claim would have been within the period. The court reasoned that had the claim been for services rendered during a case of pneumonia it would have constituted one transaction. However, since the petition related separate house calls, the court held that the "right of action accrues on each item at date."[53] The nature of the services determining the computation of the period of limitation was a factual problem to be proven in the suit not dismissed in the pleadings.

A final problem exists when the transaction affords both a right in tort, and one arising out of implied contract. Since the latter has a longer period of limitations, claims barred under the tort element might be brought successfully under the contract right. Again the courts show a tendency to pinpoint the "gist" of the action at the pleading stage. Ohio courts have held that the "gist" of the action was tort, and barred the suit,[54] and that the "gist" was implied contract and admitted it.[55]

CONCLUSION

The analysis of the case law governing the accrual of cause of action and the selection of the statute of limitations discloses two consistent abuses of procedure resulting in the exclusion of valid claims; (1) to determine which statute of limitation applies the courts attempt to fit a complex transaction involving more than one theory of recovery into a single pigeon-hole classification excluding the other theory; (2) the courts hold that a cause of action in which the injury is by its nature unknown to the plaintiff accrues at the time of the wrongful act rather than at the discovery of the injury. Fundamental to the elimination of these ills is the recognition of the nature of cause of action and the rationale of the statutes of limitation, under the rules of code pleading.

The certainty of cause of action disappeared with the abolition of the writ system. Today's petition is no longer a statement of substantive elements but is rather a statement of facts. For procedural purposes the

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[53] Munro v. Jakovseck, 26 Ohio L. Abs. 449 (Ct. App. 1937); *see:* Pelton v. Bemis, 44 Ohio St. 51, 4 N.E. 714 (1886).

[54] Andrianos v. Community Traction Co., 155 Ohio St. 47, 97 N.E. 2d 549 (1951).

[55] Ohio Casualty Ins. Co. v. Capolino, 44 Ohio L. Abs. 564, 65 N.E. 2d 287 (Ct. App. 1945).

cause of action is no more than the *transaction as a natural unit* containing facts which justify a right to sue. To avoid burdensome procedural technicality, prior to the trial the court should recognize that the facts alleged state at least one right, a correlative duty and breach of duty which if proven will give rise to a right to a remedy against the defendant. While many matters of procedure must be resolved at the pleading stage, the selection of the right on which the claim is based when more than one is pleaded, should be left to the introduction of evidence and proof during the trial.[56]

The problem arising out of our 1804 model statutes of limitation can be solved by drawing a new *procedural* statute of limitation which conforms both to the unitary form of code pleading avoiding all substantive differences and the rationale behind the periods of limitation. The statute must apply uniformly to *all* causes of action, scaled only to the sufficiency of evidence supporting the suit. A future statute might have a shorter period limiting claims supported solely by *oral* testimony, and a longer period restricting those claims which are supported by both oral testimony and any *written* proof that is acceptable under the rules of evidence. The statute must also have saving clauses defining the circumstances which prevent the running of the statutory period when the plaintiff has not acquiesced. Those already existing saving clauses: minority,[57] insanity,[58] imprisonment,[59] absence of the defendant from the jurisdiction,[60] and others,[61] should be retained and clarified. The rule of discovery should be restated so that wrongs which by their nature, or due to the active concealment or misrepresentation of the defendant are unknown, shall accrue at the discovery of the wrong or the time that it should reasonably have been discovered.

The law is like an oyster. In the oyster, constant irritation of a foreign body results in the production of a pearl. In the law, continual maladjustment and irritation leads to the development of more workable modes of resolving human conflict. The production of a legal "pearl"

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[56] Masten v. Levy, 17 Ohio C.C.R. (n.s.) 267, 270, 271, *aff'd.*, 86 Ohio St. 363 (1912): "It is manifest that the intermingling of allegations . . . concerning the same transactions does not necessarily commit the pleader to a single theory of his right to recover. He may introduce evidence in support of both aspects of his case, and recover in either or both, according to the proof. . . ."

[57] OHIO REV. CODE § 2305.16.

[58] *Ibid.*

[59] *Ibid.*

[60] OHIO REV. CODE § 2305.15.

[61] OHIO REV. CODE § 2305.22: The statutes of limitation do not run in restriction of a right to bring suit against a trust until the termination of the trust relationship. Nor do they run against the right of a purchaser in possession of real property to obtain a conveyance.

took place in Ohio 104 years ago when the legislature adopted a simplified code of civil procedure. Such a major legislative reform, unlike the pearl, is not the end product but is rather the beginning. Constant reformation and supplementation in the spirit of the original reform is necessary to meet unforeseen problems as they arise. As can be seen, the "perpetual revision" is a task for both the legislature *and* the judiciary. The legislature must continually seek greater clarity of intent.[62] The courts must frequently expound the statute as a principle of law applying it by analogy to a new situation.[63] When this change stops, the ills continue, and the machinery created by the original reform functions poorly. This breakdown is well illustrated by the failure of the judiciary to realistically integrate cause of action and the statutes of limitation into the code. The enactment of new statutes of limitation which comport with the code of civil procedure and the rationale of the periods of limitation; and the recognition that cause of action is basically factual under the code, will resume the reform and grease the machinery of code pleading. New problems will arise. In meeting them, the lawmaker must realize that while precedent and cumulative experience wards off capriciousness; prompt and realistic adaptability to change preserves the law's utility to the community.

SHELDON L. GREENE

[62] Frankfurter, *Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 528, 545, 546 (1947), in COHEN & COHEN, READINGS IN JURISPRUDENCE 524 (2d print. 1953); (The legislatures) "are under a special duty . . . to observe that 'Exactness in the use of words is the basis of all serious thinking.'"

[63] Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908), in COHEN & COHEN, READINGS IN JURISPRUDENCE 500 (2d print. 1953); "(The courts) might receive (a legislative innovation) fully into the body of the law as affording not only a rule to be applied but a principle from which to reason . . . by analogy."