The question of support for the illegitimate child remains a pressing problem.[30] Though many jurisdictions have not yet accepted the practically uncontested medical accuracy of the blood test,[31] this test has greatly decreased the possibitity of an incorrect finding of parentage. Thus, states such as Missouri would be well-advised to require the same assurance of support for illegitimate children as is provided for legitimate offspring.[32] Therefore it is to be hoped that more states will follow Kansas[33] and Arizona[34] in taking progressive steps to place the burden on the proper persons, rather than on the taxpayer or the illegitimate child himself.

PLEADING—DEFAULT JUDGMENT—AMENDED PETITION AS ASSERTING NEW OR ADDITIONAL "CLAIM FOR RELIEF"

Plaintiff brought an action against two defendants to recover damages for personal injuries sustained in a fall on a metal freight door embedded in the sidewalk in front of defendants' premises. A third defendant was later joined by an amended petition, and a default judgment for $3,000 was entered against all three defendants on the amended petition, although the amended petition (with summons) had only been served on the last defendant joined. Defendants' motion to set aside the default judgment was denied, and on appeal directly to the Missouri Supreme Court, the cause was transferred to the St. Louis Court of Appeals.[1] Held: affirmed. The new summons

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30. In 1946 the United States Public Health Service reported 95,395 illegitimate births in thirty-four states. PLOSCOWE, *op. cit. supra* note 21, at 101.

31. That the test is accepted by medical authorities, see PLOSCOWE, *op. cit. supra* note 21, at 124. For articles discussing failure of the courts to accept the tests, see Britt, *Blood-Grouping Tests and More "Cultural Lag,"* 22 MINN. L. REV. 836 (1938); Schatkin, *Paternity Blood Grouping Tests: Recent Setbacks*, 32 J. CRIM. L. 458 (1941).

32. Kelly v. Kelly, 329 Mo. 992, 47 S.W.2d 762 (1932); Viertel v. Viertel, 212 Mo. 562, 111 S.W. 579 (1908); Winer v. Schucart, 202 Mo.App. 176, 215 S.W. 905 (1919); Bennett v. Robinson, 180 Mo.App. 56, 165 S.W. 856 (1914); Lukowski v. Lukowski, 108 Mo.App. 204, 83 S.W. 274 (1904); *cf.* Thomas v. Thomas, 238 S.W.2d 454 (Mo. 1951) (father relieved of the duty of support because the nineteen year old son was earning more than the father).

33. See note 27 *supra*.

34. See note 29 *supra*.

1. Miltenberger v. Center West Enterprise, Inc., 245 S.W.2d 855 (Mo. 1952). The court held that here they had no original, appellate jurisdiction.

and amended petition need not be served on the original defendants in default, the amended pleadings having asserted no "new or additional claims for relief"; the phrase "claim for relief" in the Missouri Code of Civil Procedure is for all practical purposes identical with the phrase "cause of action" in the old Missouri code.[2]

Section 5 (a) of the 1945 Missouri Code of Civil Procedure provides that amended pleadings asserting "new or additional claims for relief" must be served on parties in default to an original pleading.[3] With but one exception,[4] "claim" or "claim for relief" was substituted in the new code for "cause of action," the phrase used in the old code. Thus in this particular the code was patterned after the federal rules.[5] The principal problem which the court considers in this case is: how shall the phrase "claim for relief" be interpreted? Is it the same as "cause of action"?[6] If it is the same or so similar as to be indistinguishable for all practical purposes, then did the amended petition state a new or additional "cause of action"?

Section 36 of the code provides that in a pleading which sets forth a claim for relief, the pleader must include a short and plain statement of "facts" showing that he is entitled to relief.[7]

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2. Miltenberger v. Center West Enterprises, Inc., 251 S.W.2d 385 (Mo. App. 1952).

3. Mo. Rev. Stat. § 506.100 (1949):

> 1. Every pleading subsequent to the original petition . . . shall be served upon each of the parties affected thereby, but no service need be made upon parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided. . . .

See also Mo. Sup. Ct. Rule 3.03(c).

4. Mo. Code Civ. P. § 23; Mo. Rev. Stat. § 506.110 (1949): "Suits may be instituted . . . (1) by filing . . . a petition setting forth the plaintiff's cause or causes of action. . . ."

5. For example, compare Mo. Code Civ. P. §§ 37, 38, 39, 42 and 43 with Fed. R. Civ P. §§ 18(a), 18(b), 8(b), 8(e)(2) and 10(b), respectively.

6. There is another issue, with which this comment is not concerned, as to whether plaintiff followed the proper procedure in joining Carl Fiorito as a defendant. It is not attempted in this comment to discuss what would have happened if the court had decided that the two controversial terms "claim for relief" and "cause of action" were dissimilar, and what interpretation would then have been given to the amended petition to determine whether it stated a "new or additional claim for relief."

7. Mo. Rev. Stat. § 509.050 (1949): "A pleading which sets forth a claim for relief . . . shall contain a short and plain statement of the facts showing that the pleader is entitled to relief. . . ."; Atkinson, *Missouri's New Civil Procedure*, 9 Mo. L. Rev. 47, 62, 73, 76 (1944).

The federal rules use "claim" where the code uses "facts" above,[8] and as a result, the theory of pleading under the two systems is different; *i.e.*, it is generally conceded that the federal rules provide for notice pleading, and that the Missouri code provides for fact pleading.[9] Because of this, and because of the close association between "facts" and "cause of action" established throughout the history of pleading, it is doubtful that cases construing the federal rules are applicable to our problem.[10]

Several Missouri cases have touched on the problem, and all have said either directly or by implication that there is no practical difference between "claim for relief" and "cause of action."[11] It is true that in the leading case, *Gerber v. Schutte Investment Co.*,[12] the court apparently was unaware that the phrase "cause of action" still exists in the code, in section 23. But does that single appearance of the term in itself require that a distinction be drawn between the two phrases?[13] Appellant in the principal case made capital of the point in its briefs and oral argument, but the court ignored the contention. Because none of the cases which construed "claim for relief" dealt with section 5 (a) of the code, and because the brief cognizance that has been given to the phrase is at best strong dicta, the principal case is one of first impression.

The court concluded that for all practical purposes, "claim for relief" as used here was the same as "cause of action," and

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8. FED. R. CIV. P. 8(a).

9. Harper, *Differences Between Missouri and Federal Procedure*, 7 J. OF MO. BAR 97 (1951); Pike and Willis, *The New Federal Deposition-Discovery Procedure : I & II*, 38 COL. L. REV. 1179, 1436 (1938).

One could almost pedantically say that the problem is entirely one of semantics, the requirement for pleading facts being as present in the federal courts now as it ever was. However, few will disagree that although it is still necessary to plead facts under the federal rules, it is a different breed of pleading from the old requirement; there is a real difference in degree.

10. Besides being of doubtful utility, they are also hard to reconcile. Some cases say that plaintiff must state facts to show that he has a cause of action, or sufficient to state a cause of action, whereas other cases say the exact opposite. See generally the annotations on FED. R. CIV. P. 8(a), in 28 U.S.C.A. (1951).

11. Therrien v. Mercantile Commerce Bank and Trust Co., 360 Mo. 149, 227 S.W.2d 708 (1950); Devault v. Truman, 354 Mo. 1193, 194 S.W.2d 29 (1946); Gerber v. Schutte Investment Co., 354 Mo. 1246, 194 S.W.2d 25

12. 354 Mo. 1246, 914 S.W.2d 24 (1946).

13. TRANSCRIPT OF INSTITUTE ON CODE OF CIVIL PROCEDURE 19, 20, 22 (1944).

that the amended petition did not state a new cause of action.[14] The court compared the two petitions,[15] and, by applying the

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14. Plaintiff had stated a good cause of action (or claim for relief) in both petitions. See PROSSER, TORTS 603 (1941); 1 SHERMAN AND REDFIELD, NEGLIGENCE 64-67; 2 *id.* at 833, 843, 844; 4 *id.* at 1834 (Rev. ed. 1941).

15. ". . . that on the 4th day of June, 1949,

PETITION # 1.	PETITION # 2.
as she was walking westwardly	plaintiff was walking westwardly
on the sidewalk on the south side of Market Street,	along the sidewalk in front of the premises of defendants,
she was *caused* to stumble and fall over the *handle* of defective and unsafe metal freight doors,	when her right foot came into contact with the metal freight or delivery *door*
which were embedded in the concrete sidewalk and used by the defendants for the purpose of transporting freight in and out of defendants' premises.	which was in and forming a part of the concrete open and public sidewalk,
[*Causation is alleged in the first petition, but not nearly so well as in the second.*]	and as a direct and proximate result of the negligence and carelessness of the defendants as hereinafter set forth, plaintiff was *caused* to fall and sustain serious and permanent injuries.
That said defect of said doors was due to defendants in permitting and maintaining the defective metal doors as hereinabove mentioned in front of the said address, to-wit: 504 Market Street, *causing* a *trap* to exist;	3. Plaintiff further states that all said defendants were guilty of the following acts of negligence in this, to-wit:
that said defective and unsafe metal doors was known to the defendants	(a) That defendants and each and all of them knew
and had continued for a time sufficient and long prior to plaintiff's injuries for its presence and condition and the danger therefrom to have been known to said defendants,	or by the exercise of ordinary care could have known
[*The court says that this allegation is the only change between the two petitions.* Sed quaere.]	that said metal freight door or delivery door was not even with said sidewalk, that it projected above and at some places below the said public sidewalk,

tests which had been developed in the past, found that no new or different amount of damages were sought and no new or additional injuries claimed, and that, just because there was a change in or addition to the allegations of the negligence which caused the injury, that change in itself did not brand the amended petition as introducing a new or additional cause of action.[16]

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and by the exercise of reasonable care by the defenadants for them to have corrected and repaired or otherwise to have made said metal doors in said place safe, prior to plaintiff's injuries,

but that defendants negligently suffered, allowed, permitted and maintained said metal doors in said dangerous condition, *whereby* plaintiff was injured and damaged as hereinafter set forth."

and that as a direct result thereof said sidewalk in front of the premises aforementioned was not reasonably safe for the travel of the public, more especially plaintiff,

in time thereafter for said defendants and each and all of them to have remedied or repaired the same.

(b) That after defendants and each and all of them knew or could have known of the conditions above referred to in the paragraph lettered 'a' they negligently and carelessly failed and omitted to *warn* plaintiff of said conditions."

Both petitions sought recovery for the same amount of money damages and the same injuries. They were identical, except for the added defendant and the differences shown above. (Emphasis and comment added.)

16. The following questions have been developed as test Missouri courts to determine whether a subsequent petition states a new or different cause of action than the original petition. If the answer to each is affirmative, then no new cause of action has been stated. The questions are: Would the same judgement be rendered on each petition; *i.e.*, would a judgment on one bar recovery on the other? Can the same plea be entered by defendant? Would the same measure of damages apply? Is the same injury adhered to? Is the "gist" of the action the same? Is the identity of the transaction or incident on which the action is based adhered to? Will the same evidence support both petitions? The pleader, however, has not necessarily committed a departure or a change in his cause of action if: proof of one petition would not support the other; the quality and quantity of the evidence is not equal, although the character of the evidence is the same; allegations of new facts essential to constitute a cause of action and necessitating new evidence in support of same are introduced; the allegations in the original petition are general negligence and in the second petition specific negligence; or, the allegations in the original petition are specific negligence and in the second petition general negligence. Kirchner v. Grover, 343 Mo. 448, 121 S.W.2d 796 (1938); Smith v. Harbinson-Walker Refractories Co., 340 Mo. 389, 100 S.W.2d 909 (1936); Bader v. Beck, 173 S.W.2d 647 (Mo. App. 1939); Riggs v. Meeker Co., 8 S.W.2d 1035 (Mo. App. 1928); Ingwerson v. Chicago & Alton Ry., 150 Mo. App. 374, 130 S.W. 411 (1910); Bick v. Vaughn, 140 Mo. App. 595, 120 S.W. 618 (1909).

It is impossible to obliterate such terms as "facts" or "cause of action" from the lawyer's vocabulary or the court's opinions.[17] Could it not be truly said that under the federal rules you must still have a cause of action to come to court, but you need not plead it as formerly required. The federal rules abandoned the old distinctions and requirements as to pleadings which had developed through the use of these phrases for hundreds of years in court procedure, and with the substitution of "claim" and "claim for relief" hoped to rid themselves of these distinctions. Any standard or pleading, however, must be determined by rules of court which, by their very nature, are incapable of acute definition.[18] The problems resulting from such a situation are obvious to one with even a casual acquaintance with the annotated statute sections on civil procedure.

The code of civil procedure was designed primarily to facilitate an expeditious adjudication of each and every case brought before the court.[19] It must be used and lived with daily by all practicing attorneys and by the community. A system of procedure and pleading based on ultra-technical difinitions and distinctions, which, though perfect in logic, are impossible in application, is precisely the situation which the code was designed to replace. It is submitted that, notwithstanding the mistake in the *Schutte* case, *supra,* and the reliance placed upon this case by later decisions, and notwithstanding the presence of "cause of action" in section 23 of the code, the opinion of the court in the principal case is founded upon logic and an understanding of the history of our code. Although legal scholars will continue to develop refined distinctions between a "claim for relief" and a "cause of action", which are helpful to our understanding of the problem, the result reached here, upon a determination that for all practical purposes they are identical, produced substantial justice. It was in keeping with the spirit as well as the letter of our modern civil code.

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17. Indeed, there was no attempt to remove these from the legal vocabulary. See Sunderland, *The New Federal Rules,* 45 W. VA. L.Q. 5, 12 (1938).

18. In general, see CLARK, CODE PLEADING 127-148, 392, 462-468, and the index under "Cause of Action" and "Claim" (1947).

19. MO. CODE CIV. P. § 2; MO. REV. STAT. § 506.010 (1949): "It [the Code] shall be construed to secure the just, speedy, and inexpensive determination of every action."