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Pleading-Joinder of Parties and Action

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PLEADING—JOINDER OF PARTIES AND ACTION—This was an action of appellees for damages resulting from fire from appellant's engines. The first paragraph was for the loss of a barn of the value of $600. The appellee insurance company had insured the barn for $200, and now, after full pay-

ment of the claim, claims to be subrogated to that amount. The second paragraph asked damages caused by destruction of personal property in the barn. The appellant railway made motion for separation of causes of action and demurred to each paragraph for misjoinder, but both were overruled by the court. There was verdict for plaintiffs in the amount of $600 for full value of the barn and that appellee insurance company be subrogated to $200 of same; and for $400 for the personal property loss. The appellant, on appeal assigns as error the court's action in overruling the motion for separation and the demurrer for misjoinder. *Baltimore & Ohio Ry. Co. v. Day et al.*, 166 N. E. 668, June 7, 1929.

HELD: *Affirmed.* Under the statute Sec. 277, Burns' 1926 Revised Annotated Statutes which provides, "all parties united in interest must join as plaintiffs or defendants" the court held here the parties had become united by subrogation and therefore must be joined. As for there being two actions the court held it might be recovered in one action in the same paragraph by the owner. *Chicago, etc. Ry. Co. v. Kern*, 9 Ind. App. 505. The action of the lower court in overruling the demurrer seems to be contrary to the wording of Sec. 286 which reads, "Plaintiff may unite several causes of action in the same complaint when they are included in the following classes . . . Second. Injuries to property, but the causes of action so joined must affect all the parties to the action," etc. Section 900 says the word "property" denotes both real and personal property, but here all the parties are not affected. The lower court probably erred in its rulings but in Indiana the matter is left to the discretion of the court because of Sec. 364, which states, "There can be no reversal for failure to sustain or overrule a demurrer for misjoinder of causes of action." The ultimate effect of Indiana practice is the same as other states except the court makes fewer steps and does not follow the strict common law rule. Pomeroy, *Code Remedies.*

In states having similar or the same rule as to joinder of plaintiffs, the majority have held that the insured and the insurer may join after subrogation of rights. Oregon and Washington have allowed joinder when only the word "shall" appears rather than "must." In *Gaugler et al v. Chicago, etc., Ry. Co.*, 197 Fed. 79, which is a suit for more than the insurance by the owner and the insurance company, the court states the plaintiffs are "co-owners of the insured's cause of action . . . required to join" on the basis there is but one cause which can not be split. It has been held that to give damages to joint plaintiffs and deny remedy of damages as to other injuries caused by the same act would be making a useless distinction. *Fairbanks et al v. San Francisco Ry. Co.*, 115 Cal. 579. Where there is but one wrongful act, causing but one loss and creating one liability, it makes no difference whether the insurer takes by subrogation or assignment. Where there is one cause of action, those interested must adjust in one action. *Supra.*

In Indiana the question of joinder because of subrogation was decided in *Pittsburgh C. C. & St. L. Ry. v. Home Insurance Co.*, 183 Ind. 355, where the equitable rule was adopted allowing it. The same is allowed in cases of indemnity insurance on an automobile. *Auto Owner Exch. v. Edwards*, 136 N. E. 577. In case the insured sues in his own name the insured becomes the trustee for the insurer. *Kansas City etc. Ry. Co. v. Shutt*, 104 Pac. 51.

R. R. D.