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THE JOINDER OF ACTIONS IN INDIANA

BY BERNARD C. GAVIT*

Sec. 1. The Indiana Statutes. The subject of the joinder of actions is covered by Sec. 286-288 Burns Annotated Indiana Statutes, 1926. These sections are Secs. 106-108 of the Code of Civil Procedure enacted in 1881,¹ and were copied with but slight changes (noted hereafter) from the original Code of 1852.² The statutes are as follows:

Sec. 286. The plaintiff may unite several causes of action in the same complaint, when they are included in either of the following classes:
   First. Money demands on contract.
   Second. Injuries to property.
   Third. Injuries to person or character.
   Fourth. Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld.
   Fifth. Claims to recover the possession of real property, with or without damages, rents and profits for the withholding thereof, and for waste or damage done to the land; to make partition of and to determine and quiet the title to real property.
   Sixth. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistake.
   Seventh. Claims to foreclose mortgages; to enforce or discharge specific liens; to recover personal judgment upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedents' estates when such property has passed to heirs, devisees or their assigns; to marshal assets; and to substitute one person to the rights of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered.

Sec. 287. When the plaintiff desires to recover the possession of title papers or other instructions of writing, or correct any mistakes therein, a separate action may be brought therefore; or the possession of such title papers or other instruments of writing may be recovered or mistakes corrected in any other action, when such recovery or correction would be essential to a complete remedy.

Sec. 288. When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such

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Sec. 1.

¹ Revised Stat. 1881, Secs. 278-280.
² 2 Revised Stat. 1852, p. 43, Sec. 70-72.
other matters fall within some other one or more of the foregoing classes. When several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials, for the furtherance of justice.

The changes made in 1881 were as follows: the phrase “and for waste or damage done to the land” in Sec. 286 (5), and the phrase “to recover personal judgment upon the debt secured by such mortgage or lien” in Sec. 286 (7) were added by the Act of 1881, and the sentence in the same section and clause beginning “But causes of actions so joined” was originally the last (but unnumbered clause) in the section.³

Sec. 2. Joinder of Actions at Common Law and in Equity. The common law had some rather simple rules as to the joinder of actions. In the event that the plaintiff had several causes of action against the defendant, if they were of such a character that they all fell within the limits of one writ (or form of action) they could then be joined. The plaintiff set them out separately in several counts or paragraphs of his complaint. Thus the plaintiff could sue upon a debt on a record and a debt on a simple contract in the same action of debt.¹ Or he could sue for two trespasses. But he could not join debt and assumpsit, or case and trespass, for example. The reason was again that the cause of action, or substantive right, which the plaintiff alleged and proved had to conform to the writ upon which the action was based, and which was the foundation of the court’s jurisdiction.²

There were two apparent exceptions to that rule. Debt and detinue could be joined, as could also trover and case. The reason however was that they sprang from the same writs.³

The Code Changes. The changes which the Code has made have been far from satisfactory, and for the most part the code rules are almost as artificial as the rules of the common law. In truth the code prohibits joinder in a number of situations where it would have been proper prior to the code. For example, an action for negligent injury to property and for negligent

³ That is, the Act of 1852 was, “either of the foregoing classes; but causes of action so joined, etc.”

¹ Stephen, Pleading, 267; Flood v. Yandes, 1 Blackf. 102 (1820) (debt on simple contract and debt on specialty properly joined); Farnham v. Hay, 3 Blackf. 167 (1833) (semble).
² See The Code Cause of Action, 6 Ind. L. J. 207-217.
injury to person could have been joined at common law without question, for they were both covered by a writ in an action on the case. Today they normally can be joined only if they "arise out of the same transaction."4

In Equity. The law of the original writ5 had no application in equity. The result was that there did not develop in equity any hard and fast rules which classified rights into specific categories. It is probably true that until more or less recent times the court of equity did not conceive of itself as granting judicial recognition to an existing right between the parties. The court acted upon the theory that it was dealing with the conscience of the parties and not their pre-existing rights. A suit in equity was measured by what the court did rather than by what it would do. It is to be doubted, therefore, as to whether, originally, there was any doctrine or rule as to joinder of actions (or suits) in equity. Even where the court gave a variety of relief it undoubtedly looked at the suit as one suit, rather than a joinder of several suits. The leading text-book on Equity Pleading6 has nothing to say about joinder of suits in equity. It does have considerable space devoted to the joinder of parties,7 but the subject of joinder of suits is not even mentioned in the index. The suit in equity, therefore, was an *ex post facto* affair and consisted of the subject-matter which the court, in general, thought could be conveniently disposed of at one time.8

To substantiate the conclusion that the courts of equity never conceived of a problem as to the joinder of suits it may be noted that the original rules in equity adopted by the Supreme Court of the United States have several rules on the joinder of parties, but none on the joinder of suits.9 Apparently the first rule on the latter is contained in the rules of 1912.10

Legal theory has here undergone considerable change, and

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4 See *infra*, Sec. 16.
5 See *The Code Cause of Action*, cited supra n. 2.
7 *Ibid.* Chap. IV and V.
8 *Ibid.*, and see in particular Sec. 76c. See also Gaines v. Chew, 2 How. 619 (1844).
10 They are found in the appendix to Vol. 226 U. S. Reports, and Vol. 1, *U. S. Supreme Court Reports Digest*, pp. 131-153. The rule is No. 26, and provides, in part, "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant."
there is now little if any difference between the theories as to functionings of the courts of law and equity. We now conceive of equitable rights as pre-existing, and in so far as they fall within different legal classifications of substantive rights, they are regarded as separate and distinct rights. That is, a right to the performance of a contract, and a right against continued trespasses on Lot X are different rights, or causes of action, even although the parties be the same. So in the Federal System and in states maintaining courts of law and equity there is now a problem as to the joinder of actions, or suits.\(^\text{11}\)

The problem was imposed upon the code states by the code. The provisions of the code as to the joinder of actions applies equally to those involving legal or equitable rights. As will be noted hereafter, however, the courts when an equitable suit is involved are rather prone to still talk about the problem as though it were still only one as to joinder of parties.

Sec. 3. A Joinder of Actions and Not of Causes of Action. The Code provides that "the plaintiff may unite several causes of action in the same complaint." Under any view of the "cause of action" it is impossible to unite "causes of action." The Code here is rather ambiguous but it is apparent what is meant. It is talking directly about the joinder of actions and of the indirect joinder of "causes of action" and complaints based on them. What the plaintiff really unites or joins are actions (judicial proceedings) and not rights, claims or facts. Properly paraphrased the Code here reads "the plaintiff may unite, or add or join to his original action, several actions, based upon several substantive rights and set out in several paragraphs of one complaint."

That is, fundamentally, the rules of procedure at common law, and under the Code deal with the situation where one plaintiff is suing one defendant and asserting against him one right.\(^\text{1}\) The normal judicial proceeding, therefore, was and is single in all of those respects. The purpose of the provisions of the Code here is to provide rules for the joinder or addition to such a normal situation. This is particularly obvious when we consider the subsequent provisions here that the "causes of action so joined must affect all of the parties to the action, and not require different places of trial and must be separately stated and num-

\(^{11}\) See, for example, 21 C. J. p. 413, et seq.

Sec. 3.

\(^{1}\) The statutes on Joinder of Parties are based on the same assumption.
bered.” As to whether or not the asserted rights in the several paragraphs of complaint affect (legally interest) all of the parties to the action depends, obviously, as to what the action is. If there is but one action and the joinder is of rights, or facts, or complaints as part of one action, then this latter provision is meaningless. That is, "the action" is what is joined, and if it is, then obviously all the parties are interested or affected.

It must, therefore, be assumed here that "the action" means something specific; that the added actions have the same parties as the original action. The truth is that we must take "the action" to be that which is represented by the first paragraph of complaint, and the question then is as to whether the Code here allows the subsequent actions as represented by the subsequent paragraphs of complaint to be joined to it.

The substance of the code provision here is that complaints on several asserted rights may be united; the complaint is, of course, a part of the action or judicial proceeding, so it is undoubtedly proper to speak of the joinder of complaints, and because the complaints necessarily assert several causes of actions, or rights, it is not altogether improper to speak of the indirect joinder of causes of action. But it is quite obvious after all that the code is here dealing with the joinder of actions, and that "the action" is the one represented by the first paragraph of the complaint.

Sec. 4. Definition of the Code Terms Here. As indicated in the preceding section "cause of action" again means specific substantive right as a matter of substantive law. "Action" obviously means "judicial proceeding." "The action" means the judicial proceeding based on the first paragraph of the complaint.

2 Cf., however, Clark, Handbook of the Law of Code Pleading (1928) pp. 75-87, 308-311. The learned author defines "cause of action" to mean the facts involved in any judicial proceeding as finally constituted under the Code. This necessarily disposes of any questions of joinder, or at least always begs the question. It disregards the fact that the Code specifically talks about joinder of complaints and actions and causes of action and that the Code was laying down rules and not results.

Sec. 4.

1 The Code Cause of Action, 6 Ind. L. J., 203, 295. Cf. Cincinnati, H. & D. R. v. Chester, 57 Ind. 297 (1877), holding that a husband could sue for injuries to himself, the loss of his wife's services and for injuries to a minor child in one action, where they arose out of the same accident, because they constituted but one cause of action. The case is clearly at variance with the other Indiana cases on the subject. See Sec. 11, and Rogers v. Smith, 17 Ind. 323 (1861).
plaint. 2 "Claims" means the same as "action," for they are obviously used synonymously. "Affect" means "legal interest." 3

Sec. 5. Distinctions Between Indiana Code and Others. The Indiana Code at this point has departed further from the original New York Codes than at any other point. In some respects the Indiana Code on the joinder of actions is unique. The essential differences between the Indiana Code and those of the other code states are as follows:

1. The Indiana Code allows a joinder of actions for injuries to property, while the usual provisions in other states makes separate classes as to actions for injuries to personal property and those for injuries to real property.

2. The Indiana Code allows a general joinder of actions for injuries to person or character, while most states make separate classes of the two.

3. Classes 6 and 7, Sec. 286 Burns Annotated Indiana Statutes 1926 and also Secs. 287 and 288, are unique to Indiana.

4. The Indiana Code on joinder does not contain a "transaction" or "subject of the action" clause. 1 The only clause which resembles it is Sec. 286 (7); "and all other causes of action arising out of a contract or a duty and not falling within either of the foregoing classes."

5. The New York Code requires that the causes of action be "consistent with each other," and as amended in 1920 leaves out the requirement that the actions joined affect all the parties to the action. 2

Sec. 6. Same Parties. The Code requires that the "causes of action so joined must affect all of the parties to the action."

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2 See supra Sec. 3.
3 See infra Sec. 6.
Sec. 5.

1 But see, Nave v. Powell, 62 Ind. App. 274 (1916), where a joinder of actions was held proper because the causes of action involved "arose out of the same transaction."

2 Cahill, N. Y. Civil Practice (1924), Sec. 258, p. 58. See Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. S. 709 (1924), for a decision under the amendment of 1920. See Pomeroy, Code Remedies (5th Ed. 1929), p. 508, et seq., for a collection of the code provisions on joinder of actions. And cf. Keller v. Boatman, 49 Ind. 104, 110 (1874), saying that there was a misjoinder because "The judgments are inconsistent, and unlike in kind," although there has never been any provision in the Indiana to the effect that the causes of action joined be consistent.
Sec. 6.
As pointed out above, "the action" must be the judicial proceedings based on the first paragraph of the complaint. The requirement here is, then, that the parties to that action, and the parties to the other actions joined with it, be the same—that is, the Code contemplates only the joinder of actions between the same parties. Obviously the Code as to the joinder of parties to an action applies to the action based on the first paragraph of the complaint, and to the actions joined with it. Having settled that the parties to the first action involved are those allowed and required by the Code, the parties which the Code allows and requires to be parties to the other actions joined must be the same as the parties to the first action.

The language of the Code is to the effect that the causes of action involved in the actions joined "must affect all the parties to the action." Or in other words the parties to the action must be affected by all of the causes of action involved. It seems quite obvious that "affected by" means "interested in," and that the test is that of legal or equitable interest. The question is no different from that involved in whether or not one is interested in a cause of action within the meaning of the statute on the joinder of parties. Again, each party must be interested in, or affected by, every cause of action involved in the actions sought to be joined. Thus actions against a husband and wife for the use and occupation of real estate, where one cause of action was based upon the use and occupation by the wife prior

1 Ante, Sec. 3.
3 See the cases hereafter cited and also Tate v. Ohio and M. R., 10 Ind. 174 (1858); Virden v. Ellsworth, 15 Ind. 144 (1860) (action against lessee and his guarantor; held, a misjoinder for no "unity of interest"); Rogers v. Smith, 17 Ind. 323 (1861); Mathes v. Shank, 94 Ind. 501 (1883) (action against two separate indorsees; held, two causes of action); Stewart v. Alvis, 30 Ind. App. 237 (1903) (husband and wife may not join actions for personal injuries against one defendant); Baker v. McCoy, 58 Ind. 215 (1877) (suit on several bonds against different parties; held, a misjoinder); Elliott v. Pontius, 136 Ind. 641 (1893) (actions by individual creditors on separate claims cannot be joined); Boonville Nat. Bk. v. Blakely, 166 Ind. 427 (1905) (semble); Ferguson v. Hull, 186 Ind. 339 (1893) (actions to review judgment and to enjoin acts of sheriff under an execution thereon, held, a misjoinder); Ryder v. Jefferson Hotel Co., 121 S. C. 72, 113 S. E. 474, 25 A. L. R. 739, semble.
4 Supra n. 2. The necessary and proper parties; the real parties in interest are all determined by a reference to the substantive law; is this party legally interested?
to the marriage was held to present a misjoinder of actions, for although both might be liable for the wife's occupation prior to the marriage, the husband alone was liable for the use and occupation after the marriage.\(^5\) And an action on a note signed by two cannot be joined with an action on a check signed by but one of the makers.\(^6\)

**Must be the Same and Identical Parties.** Not only must the parties to each action be the same, but they must be identical. So if one sues or is sued in different capacities the courts have construed the statute in question to prohibit the joinder. Thus a father cannot join actions for his own personal injuries and for the death of his minor child, because as to the latter he really recovers in a representative capacity.\(^7\)

Thus D individually and D as administrator are not identical persons and a joinder of actions against D in those two capacities is forbidden by the usual construction of the Code.\(^8\)

This may be in keeping with the rule that the law may regard a person as an individual and as an officer or trustee as not identical, and to a certain degree may recognize them as different persons.\(^9\) The propriety of the application of that distinction here, however, may well be doubted. The distinction primarily has to do with the doctrine of res judicata,\(^10\) and it might well have been said that the code here was talking about the same parties or persons and not identical parties or persons within the meaning of that doctrine.

But the distinction seems to be fairly well established in the Indiana decisions.\(^11\)

**No Question of Misjoinder if Only One Cause of Action.** In this connection it is well to remember that there can be no question of misjoinder until it is decided that the plaintiff is assert-

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\(^5\) *Tobin v. Connery*, 13 Ind. 65 (1859).


\(^7\) *Cincinnati, H. & D. R. v. Chester*, 57 Ind. 297 (1877).

\(^8\) The exact question apparently has not been decided by the Indiana courts, probably due to the fact that the practice here does not permit an action against an administrator or executor except under the conditions imposed by Burns' Ann. Ind. Stat. 1926, Sec. 3152-3172. See, however, the case cited supra note 7 and *Fischer v. Hintz*, 145 Minn. 161, 176 N. W. 177 (1920); *Clark, Handbook of the Law of Code Pleading* (1928), p. 302; *Pomeroy, Code Remedies* (5th Ed. 1929), p. 579 et seq.

\(^9\) 26 R. C. L. p. 1345 et seq.


\(^11\) See *Cincinnati, H. & D. R. v. Chester*, 57 Ind. 297 (1877).
ing more than one cause of action or substantive right. As has been pointed out heretofore one must always turn to the substantive law to determine whether or not out of the factual situation upon which the plaintiff relies there is created but one cause of action. If it be decided or assumed that there is but one cause of action asserted we may have a question of the joinder of parties, but no question as to the joinder of actions.

Here, as elsewhere, the problem as to how many separate rights arise out of a given situation has been settled primarily by looking to the traditional classifications of rights as developed by the common law and equity. The principal difficulty arises here under the latter, due largely to the fact that the suit in equity was an *ex post facto* affair. So, here, several creditors, having separate debts, may join in an action to set aside a fraudulent conveyance made by their common debtor, and there is but one cause of action, that is, they are regarded in equity as asserting a joint right. But if the plaintiffs fail to prove the facts as to the fraudulent conveyance the suit in equity fails; there arises a misjoinder as to causes of action and the plaintiffs cannot recover judgment on their several debts. In the case cited, however, the plaintiffs had not prayed for judgment on the debts, and it was said that the judgment in that suit would not bar subsequent separate actions by the individual creditors on their debts.

If the plaintiffs had prayed judgment on their debts the proper procedure would seem to depend on a number of considerations. It is submitted that it might still be possible to proceed in equity on the theory that if parties have started a suit in equity in good faith, and upon reasonable grounds, and fail to prove the strictly equitable cause of action asserted, the court of equity may proceed to render a judgment for damages. That is, the court of equity can give damages as supplemental relief and the mere failure to prove all of the plaintiff's case does not necessarily

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12 The Code Cause of Action, 6 Ind. L. J. 203-223.
13 Supra Sec. 2.
14 Doherty v. Holliday, 137 Ind. 282 (1893); Elliott v. Pontius, 136 Ind. 641 (1893); Field v. Holzman, 93 Ind. 205 (1883); Strong v. Taylor School Trustees, 79 Ind. 208 (1881); Ruffing v. Tilton, 12 Ind. 259 (1859).
15 Elliott v. Pontius, 136 Ind. 641 (1893).
16 Pomeroy, Equity Jurisprudence (4th Ed. 1918), Secs. 236-242; Doherty v. Hilliday, 137 Ind. 282 (1893); Spidell v. Johnson, 128 Ind. 235 (1890); Albrecht v. Foster Lbr. Co., 126 Ind. 318 (1890); Faught v. Faught, 98 Ind. 470 (1884); Murphy v. Blair, 12 Ind. 184 (1859).
destroy the court’s jurisdiction over that action. The court of equity must have had jurisdiction in the first instance; the failure to give strictly equitable relief must arise out of a failure of proof on controverted evidence and be such as to indicate that nevertheless the plaintiff reasonably assumed that he had an equitable cause of action.  

If the failure of proof was such as to indicate that the equitable action was not brought in good faith upon reasonable grounds, and was such, therefore, as to destroy the equitable jurisdiction of the court, there would arise questions as to misjoinder of actions under the clause in question, and also as to the right to jury trial. When the court finds that the equitable cause of action is non-existent it is submitted that that fact alone does not ipso facto dispose of the case. The court is in truth a court of law and equity; proper pleadings are no longer necessary to support a judgment and were the court to enter several judgments on the causes of action proved there would be no reversible error; especially in view of the fact that misjoinder of actions and jury trial may each be waived.

If the defendant in some manner presented the questions it is apparent that the trial court would have to docket the separate actions as such, and grant a jury trial. The granting of a jury trial would necessarily require the setting aside of the original submission and the parties would clearly then be in a position to raise the question as to misjoinder.

17 Roberts v. Lentzke, 39 Ind. App. 577, 586 (1906); Pomeroy op cit. supra n. 15, Sec. 237 (e). The learned author cites the case of Blair v. Smith, 114 Ind. 114 (1887), as sustaining this rule, but the case merely decides that the fact that one can recover damages alone against a constructive trustee does not destroy equity jurisdiction. The court in Boonville Nat. Bk. v. Blakely, 166 Ind. 427, 450, 451 (1905), admits the validity of the rule, but held that there never was an equitable cause of action asserted. Lefforge v. West, 2 Ind. 514 (1851) (semble).


21 Sec. 363, Burns Ann. Ind. Stat. 1926. It is to be noted, however, that the Supreme Court in the case of Boonville Nat. Bank v. Blakely, 166 Ind. 427, 447 (1905), considered the misjoinder to be as to parties and not actions.

The case of Boonville Nat. Bank v. Blakely,\textsuperscript{23} is the converse of the case of Elliott v. Pontius,\textsuperscript{24} there being there involved the assertion of separate claims by one plaintiff (trustee in bankruptcy) to avoid separate preferences given to different defendants. It was held that a general allegation of conspiracy was not sufficient to give rise to a joint equitable right against the several defendants, and that consequently there was a misjoinder. In keeping with the historical aspects of the equitable suit the court regarded the misjoinder as being one of parties and not of actions,\textsuperscript{25} but it is submitted that this is clearly erroneous. The court held that there was no single equitable cause of action in fact asserted, and it appears quite plain that then there was a misjoinder of equitable or legal actions\textsuperscript{26} under the clause in question because of the non-interest of one defendant in the cause of action against his co-defendants.

In the principal case the procedure was sought to be upheld upon the theory that admitting that there would normally be several actions improperly joined that the suit was one equitable suit in the nature of a Bill of Peace to avoid multiplicity of actions. The court, however, rejected that view, on the ground that the actions involved no common questions of fact, but only a common question of law (unlawful preference).\textsuperscript{27}

\textit{Joint Liability in Tort.} The questions of liability in tort for joint, or concurrent acts, or for conspiracy are essentially questions of joinder of parties rather than of joinder of actions. The substantive law is that the acts of several, if joint or concurrent, or pursuant to an agreement, creates one cause of action against all, or separate causes of action against each. And there are occasions when equity imposes a tort liability where the acts are cumulative rather than concurrent or joint. In any of these cases there is no question of a joinder of action, but only one of joinder of parties.\textsuperscript{28}

\textit{Bill of Peace an Exception.} In so far as the courts today recognize the Bill of Peace there is an exception to the statute in

\textsuperscript{23} Ibid.
\textsuperscript{24} Supra n. 16.
\textsuperscript{25} Supra Sec. 2.
\textsuperscript{26} The court in truth held that the defendants were entitled to a jury trial forcing the conclusion that after all there was a misjoinder of actions at law.
\textsuperscript{27} At p. 441.
\textsuperscript{28} Supra n. 2.
question. Several persons are permitted to prosecute admittedly separate causes of action to avoid a multiplicity of actions, or one is permitted to sue many on separate causes of actions, if the actions present a common question of fact and law. That such a procedure is proper today is well recognized. Although it is probably true again that the courts are prone to look upon the situation as involving a joinder of parties in equity rather than a joinder of actions.

A Statutory Exception. There is at least one statutory exception also. Sec. 261 Burns Annotated Indiana Statutes 1926 provides:

"Whenever any public officer or other person is required by the laws of this state to give bond for the performance of his duties and more than one bond is given by the same officer or person for the performance of such duties, either during the same period of time or for successive periods of time, any person entitled to sue upon either of said bonds may bring a joint suit upon all or any number of said bonds, and, in such action, the liability of all the respective sureties thereon shall be determined by the court or jury."

The statute allows the joinder of suits against separate sureties on separate bonds, regardless of the non-interest of some defendants in the cause of action against other defendants. It has been held to permit a joinder of actions on more than one bond given in a guardianship proceeding and also a joinder of actions on bonds given by a public road contractor, regardless of the fact that the sureties on the bonds were different.

Consolidation of Actions Creates an Exception. As a practical matter the efficacy of this requirement is extinguished by the doctrine of consolidation of actions discussed in Section 24 infra. The result there is that actions which may not be joined may nevertheless be consolidated if a single trial is expedient, and even although the parties be different.

Sec. 7. Venue of Actions Joined Must be Same. Sec. 286 (7) provides that "causes of action so joined must not require

29 Thompson v. Turner, 173 Ind. 598, 598 (1910) (dictum); Boonville Nat. Bank v. Blakely, 166 Ind. 427 (1905); Vandalia Coal Co. v. Lawson, 43 Ind. App. 226 (1909); Muncie Natural Gas Co. v. Muncie, 160 Ind. 97 (1908); Story, Equity Pleading (3d Ed. 1844), Sec. 124 et seq. 21 C. J. p. 78 et seq.

30 State ex rel. v. Parsons, 147 Ind. 579 (1897).

31 Massachusetts Bonding Co. v. State ex rel., 82 Ind. App. 377 (1924). Sec. 7.
The purpose of this provision was to make it certain that the statute on the joinder of actions did not repeal any of the provisions of the Code as to the venue of actions.\textsuperscript{1} It is believed that no case has been decided by the Supreme or Appellate Court involving this specific provision\textsuperscript{2} but it is apparent what the statute means. If under the venue statutes the actions should have been brought in different counties they cannot be joined.\textsuperscript{3}

How is the Question Raised? Primarily the question is one as to the venue of actions rather than their joinder. The place of action may be jurisdictional or not depending normally upon whether or not the subject matter involves real property.\textsuperscript{4} If it goes to the jurisdiction of the subject matter it cannot be waived and the question may be raised at any time; if the action is transitory, the place of bringing the action is not jurisdictional, and the question can only be properly presented by a plea in abatement.\textsuperscript{5}

The Code provides that a question of misjoinder of actions may be raised by demurrer or answer depending on whether or not the defect is apparent on the face of the complaint.\textsuperscript{6} Suppose there is involved in a given case the misjoinder of actions by the addition of an action which is admittedly transitory because the transitory action should have been brought in another county, may the defendant raise the question by demurrer or answer, or must he raise it by a plea in abatement to the second action? Would the failure to file a plea in abatement here waive the question of venue both under the venue statute and the joinder statute? If the defendant consents (as he may) to the trial of the transitory action in the wrong county, do the

\begin{itemize}
\item \textsuperscript{1} Secs. 322-330 Burns' Ann. Ind. Stat. 1926.
\item \textsuperscript{2} None of the cases cited in Watson's Revision of Work's Practice and Forms (1918), v. 1, Sec. 295 note 7, decide any question under the joinder statutes.
\item \textsuperscript{3} The question has apparently not been raised very often. See, 1 C. J. p. 1077; Clark, Handbook of the Law of Code Pleading (1928), p. 304.
\item \textsuperscript{4} Supra n. 1.
\item \textsuperscript{5} Sec. 389, Burns Ann. Ind. Stat. 1926.
\item \textsuperscript{6} Secs. 362, 366, Burns Ann. Ind. Stat. 1926.
\item \textsuperscript{7} Thus an action for injury to real property is brought in the county where the real estate is situated, and an action for injury to personal property is joined to it. The defendant lives in another country. The actions fall within Sec. 286 (2) Burns Ann. Stat. Ind. 1926, and the parties are the same, and the only objection is on the ground of venue under Sec. 286 (7).
\end{itemize}
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actions joined “require different places of trial?” It is submitted that they do not and that it ought to be held that the question would be waived by a failure to file a plea in abatement. That is “require different places of trial” means as a practical proposition and not from an entirely theoretical standpoint.8

Sec. 8. Money Demands on Contract. Under the first section of the joinder statute the plaintiff is permitted to join actions based on causes of action described as “money demands on contract.” Sec. 900 Burns Annotated Indiana Statutes 1926 defines that phrase as meaning “an action arising out of contract when the relief demanded is a recovery of money.” The statute is based upon the traditional classification of actions into actions ex contractu and ex delicto,1 and limits the joinder to those falling within the first group, provided also the action is to recover damages rather than some equitable relief. If the actions in question are based upon actions at law to recover damages for the breach of a contract, either express or implied in fact the statute clearly permits the joinder.2 And it makes no difference that the contractual obligations arise out of different forms of contracts. Thus the plaintiff may join actions on an express contract and the common counts;3 and an action on a promissory note with one on an indemnity bond;4 and an action on a written contract with one on an oral contract.5

Must Money Judgment be Sole Relief? Does Contract Include Quasi-Contract? Two questions present themselves at this point. Must the demand for a money judgment be the sole relief asked,

8 In the case of Wilson v. L. & N., (Ky.) 112 S. W. 585 (1908), the question was raised by a plea in abatement.

Sec. 8.

1 Miami County Bank v. State, ex rel., 61 Ind. App. 360, 373 (1916); The Cincinnati W. and M. R. v. Harris, 61 Ind. 290 (1878); Boyer v. Tiedeman, 34 Ind. 72 (1870); Coddington v. Canaday, 157 Ind. 243 (1901).

2 See cases cited in notes 3-5 infra.

3 Bates v. Dehaven, 10 Ind. 319 (1858) (no question of misjoinder was raised in this case, but no objection was raised to the propriety of such a joinder by the parties or the court); Wüstach v. Hawkins, 14 Ind. 541 (1860) (semble).

Cf. Grant v. Davis, 5 Ind. App. 116 (1892) (such actions were brought separately and consolidated; held, no error). See Sec. 24 infra as to consolidation of actions.

4 South Side Planing Mill v. Cutler & S. Lbr. Co., 64 Ind. 560 (1878).

5 Board v. Newlin, 132 Ind. 27 (1892) (question not raised, but procedure assumed to be correct); Everroad v. Schwartzkopf, 123 Ind. 35 (1889) (semble); Wolcott v. Yeager, 11 Ind. 84 (1858) (semble).
and does “contract” include “quasi-contract?” As to the first, suppose the plaintiff sues on what is clearly a contract obligation and asks only a money judgment and in a second paragraph of complaint sues on another contract and asks specific performance and supplemental damages, or damages in the alternative; is there a misjoinder? It is believed that no case has been decided in Indiana settling the question, but it is submitted there would be a misjoinder, under this clause. Suits for specific performance, reformation, and foreclosure are dealt with in later provisions of the statute and are put in separate classes, indicating that the first class, (money demands on contract) is limited to actions where the sole relief sought is a judgment for damages. The distinction is not necessarily between legal and equitable actions for one may have an equitable action where the sole relief sought is a money judgment.

As to the second, suppose again the plaintiff sues on what clearly falls within the first class, and joins an action based upon the fact of a conversion of personal property by the defendant but upon the waiver of the tort and upon the theory that the conversion created a debt recoverable under a count for “money had and received.” Or suppose the second count is based upon a claim for money paid under mistake. In either event the defendant’s obligation is quasi-contractual; and upon a so-called promise implied in law. If the language of the courts be taken at its face value and it be true that the distinction here is between the traditional actions ex contractu and ex delicto the joinder is proper. There is a dictum in The Indianapolis & C. R. v. Bollard, involving a somewhat similar phrase in the counter-claim statute to the effect that a tort liability may be “waived and implied assumpsit relied upon” under that statute. “Contract” in the New York Code (in this connection) has been construed to mean “quasi-contract.” The result ought to be

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6 The answer to the question is simple under the usual Code, because the provision in New York and elsewhere is that a joinder is permitted if the actions be on “contract express or implied,” and regardless of whether the actions be “legal or equitable.”

7 See later discussion of the effect of clause 7 on this clause 1 in this same section; and also Sec. 15 infra.

8 Blair v. Smith, 114 Ind. 114 (1887).

9 Supra note 1.

10 22 Ind. 448, 451 (1864).

11 Hawk v. Thorn, 54 Barb. 164 (1869).
the same in Indiana. It has been held that actions for breach of trust are *ex delicto.*

*How Affected by Sec. 236 (7).* The seventh clause of the same section of the Code provides that the plaintiff may join “all other causes of action arising out of a contract or a duty and not falling within either of the foregoing classes.” The proper interpretation and the effect of clause 7 are discussed in Section 16 infra.

Sec. 9. *Actions Joined Must Fall Within the Classes Created by the Statute.* It is well at this point to emphasize what the Code here makes very plain, that is, that the various clauses create classes of actions, and that the question of joinder is to be settled by ascertaining as to whether or not all the actions joined fall within any of the classes so created. Thus it is clear that the Code does not permit the joinder of actions on contract liabilities with actions on tort liabilities. An action in ejectment cannot be joined with an action to foreclose a mortgage. An action to quiet title to real estate cannot be joined with an action to recover damages for the maintenance of a nuisance.

Sec. 10. *Injuries to Property.* Clause 2 of the statute in question allows the joinder of actions based on “injuries to property.” Sec. 900 Burns Annotated Indiana Statutes 1926 defines “property” as including “personal and real property.” It defines “personal property” as including “goods, chattels, evidences of debt and things in action.” It defines “real property” as including “lands, tenements and hereditaments.”

It has been assumed in a number of cases that separate actions for injuries to personal property (e. g., against a railroad for killing of animals at different times) could be joined, if separately stated. And it was decided in *The Chicago and Erie R. v. Kern,* that injuries to real estate and personal property

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12 *Coddington v. Canady,* 157 Ind. 243 (1901).

Sec. 9.


2 *Butler University v. Conard,* 94 Ind. 353 (1883).

3 *City of Huntington v. Stemen,* 37 Ind. App. 553 (1906).
arising out of the same negligent act constituted but one cause of action, requiring but one paragraph of complaint. It was assumed in *Ross v. Thompson*, that an action for injury to a private way could be joined with one for an injury to a public way. It is believed that there are no other Indiana cases involving a construction of this clause except the case of *Bailey v. Indianapolis Abattoir Co.* hereafter discussed.

**May the Actions Joined be Some Legal and Some Equitable?**

As noted above it appears reasonably clear that class one as a practical proposition is usually limited to legal actions. Is that true here? It is submitted that it is not, and that one, for example, could join an action based on the destruction of an automobile by the defendant with an action to enjoin threatened or continued trespass on the plaintiff's land by the defendant. The code has created but one form of action for legal and equitable rights and unless the context here prohibits the joinder of actions based on them, "action" here must mean "legal" or "equitable." There seems to be no question but that the only possible construction of the code here is that actions based both upon legal and equitable rights involving injuries to property may be joined.

**Are deceit and Fraud Injuries to Person or Injuries to Property?**

Suppose P has a cause of action against D for personal injuries and that by fraudulent means D secures a release, is an action based on the fraud (either to avoid the release or recover damages) an action involving injury to property or person? It was decided in *Bailey v. Indianapolis Abattoir Co.* that it involved an injury to property and not to person. The decision must turn on whether or not the plaintiff owned the right to be free from fraudulent misrepresentation as an incident to his properties or as an incident to his rights of personality. The answer is not so obvious as the court in the case cited assumed it to be, but the case is in accord with the only

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1 As to the distinctions between these words see *Owens v. Lewis*, 46 Ind. 488, 503 (1874), and *Adams v. Merrill*, 45 Ind. App. 315, 326 (1909).
2 See *Louisville, N. A. & C. R. v. Quode*, 101 Ind. 364 (1884), and cases there cited.
3 9 Ind. App. 505 (1893).
4 78 Ind. 90, 92 (1881).
5 Supra Sec. 8.
7 66 Ind. App. 465 (1918).
other case involving the point with which the author is familiar.\(^8\) But the New York case cited turns upon a New York statute defining injury to property as "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract."

**Breach of Trust.** It has been held that an action for breach of trust is an action *ex delicto* and therefore for injury to property.\(^9\)

**Action to Quiet Title.** The code puts an action to quiet title in class 5, and it, therefore, does not fall within the general class of actions for injuries to property. Such an action may not be joined with an action for damages resulting from nuisance.\(^10\)

**What Constitutes One Cause of Action for Injuries to Property?** Again we must emphasize the proposition that there is no question as to joinder of actions, or causes of action, until it is decided that as a result of the factual situations involved the substantive law has created more than one substantive right in favor of the plaintiff and against the defendant. It is of course obvious that if defendant has trespassed on plaintiff's real estate and has negligently run into plaintiff's automobile on the public highway the next day, that the law would regard those situations as creating two separate causes of action. If, however, while trespassing on plaintiffs' real estate defendant intentionally or negligently runs into plaintiff's automobile or steals it, is there one cause of action or two? There is little doubt but that at common law plaintiff could recover for the trespass *q. c. f.* and for the intentional injuries or taking (at least) as to the personal property in an action of trespass *q. c. f.*, the latter damages being recovered as consequential damages to the original trespass.\(^11\) But it probably is also true that the plaintiff could bring one or two actions,\(^12\) and if he could treat the actions as separate for the purposes of a separate suit on one, there is little reason why he could not treat them as separate for the

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\(^9\) Coddington v. Canady, 157 Ind. 243 (1908).

\(^10\) City of Huntington v. Steman, 37 Ind. App. 553 (1906).

\(^11\) Donohue v. Dyer, 23 Ind. 521 (1864); Richardson v. Brewer, 81 Ind. 107 (1881). See also, *Indiana Pipe Line Co. v. Christiansen*, 195 Ind. 106 (1924). (Damages to real property and cattle recoverable in one action but on the theory of a nuisance rather than trespass.)

\(^12\) Board of Commissioners v. Trees, 12 Ind. App. 479 (1895); American Sand & Gravel Co. v. Spencer, 55 Ind. App. 523 (1913).
purposes of a joinder. In the event the so-called consequential injury were to an incorporeal right, (for example, to plaintiff's business, as distinct from his physical properties) there is an intimation in the case of Cleveland, C. C., etc. Ry. v. Simpson\textsuperscript{13} that the damages for such injury cannot be recovered in an action for injuries to the real estate. Such a result would be hard to justify, especially in view of the decision in Donohue v. Dyer\textsuperscript{14} permitting a plaintiff to recover for the seduction of his daughter as consequential damages in an action of trespass \textit{q. e. f}, the injury there no longer being to the father's loss of service. In the Simpson case, however, in view of the authorities cited by the court, probably the fair interpretation of the decision is that the court was of the opinion that such damages could not be recovered as a matter of substantive law rather than as a matter of misjoinder of actions.

\textit{Joint Liability in Tort.} As seen above\textsuperscript{15} the question of liability for joint or concurrent acts, for conspiracy, and for equitable torts, are essentially, too, questions of the substantive law. If there is joint or concurrent action (or what equity regards as such) the result is one cause of action against several, rather than separate causes of action against each.

\textit{Several Trespasses to Real Estate.} At common law it was possible to recover for several trespasses to real estate in the same paragraph of complaint, under a \textit{continuando} whereby the several trespasses were considered as one trespass.\textsuperscript{16} Such a complaint presents a question as to the separate statement,\textsuperscript{17} but it has been held good under the code.\textsuperscript{18}

The same result is reached if the plaintiff seeks to recover for a so-called "continuing trespass" or nuisance.\textsuperscript{19}

\textsuperscript{13} 182 Ind. 693, 702 (1915). The case of Wilson v. Smith, 10 Wend. (N. Y.) 324 (1833), is contrary: holding that there is but one cause of action for an intentional trespass to real estate with consequent damages to an incorporeal right.
\textsuperscript{14} 23 Ind. 521 (1864). But see, Sec. 262 Burns Ann. Ind. Stat. 1926 and Sec. 11 infra.
\textsuperscript{15} Sec. 6.
\textsuperscript{16} Rucker v. M'Neely, 4 Blackf. 179 (1836); Pierce v. Pickens, 16 Mass. 470 (1820).
\textsuperscript{17} See infra Sec. 20.
\textsuperscript{18} Holcraft v. King, 25 Ind. 352 (1865).
\textsuperscript{19} Indiana Pipe Line Co. v. Christensen, 195 Ind. 106 (1924); City of North Vernon v. Voegler, 103 Ind. 314 (1885).
Sec. 11.
Sec. 11. Injuries to Person or Character. Class 3 permits the joinder of actions for injuries to person or character. Apparently there is but one decision under this clause. It was held in the case of Thomas v. Dabblemont that actions against a doctor for malpractice and assault and battery were not misjoined for they were "both in tort." The clause clearly permits joinder of any action for injuries to the person, and also such actions as libel and slander and malicious prosecution.

In another connection it has been held that "injuries to person" includes an action for seduction of the plaintiff's daughter. The only Indiana case on the point does not decide the point, holding merely that damages for seduction might be recovered as aggravated damages in an action of trespass q. c. f.

The result in Indiana ought to be the same for the reason that in Georgia and in Indiana the gist of the action is no longer loss of services.

Husband's Action for Loss of Services of Wife or Child. The question then presents itself as to whether or not an action by a father for loss of services resulting from injuries to his wife or minor child is an action for injuries to person or to property. The author can find no case in which the point has been specifically determined, doubtless because the question does not often arise, as most states have a "same transaction clause" in the joinder statute, and the injuries to the husband and wife normally result from the same accident and the causes of action obviously arise out of the same transaction, or are connected with the subject of the action within the meaning of those phrases. Neither of those phrases being contained in the Indi-

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1 31 Ind. App. 146 (1903).
2 In those states where the code makes separate classes for injuries to person and character it has been held in some states that malicious prosecution is an action for injury to character and in other states that it is an action for injury to person. See, Pomeroy Code Remedies (5th Ed. 1929) Sec. 390 and 1 C. J. p. 1079. The problem is not presented, of course, by the Indiana Code. If the language used is not libelous or slanderous per se the plaintiff must prove damage to business; and in such cases the action is for injury to property. It is believed, however, that the action should for the purposes of joinder be classified as an action for injury to character.
3 Under a statute of limitations making distinctions between injuries to person and property.
5 Donohue v. Dyer, 23 Ind. 521 (1864).
6 See, Sec. 272 Burns Ann. Ind. Stat. 1926 and cases there cited.
a question of misjoinder is presented in a very frequent situation.

It would seem that the gist of the action is the injury to the husband's right to his wife's services and that the action would, therefore, be for injuries to property. Under the statute of limitations, however, where there is a distinction between actions for injuries to person and actions for injuries to property the Indiana Supreme Court has held that the action by the husband is barred by the two year statute as to injuries to person. This case is in accord with the authorities in other states, and doubtless the court would apply the case to the joinder statute.

There are, likewise, no cases upon the specific point as regards a father's action for injuries resulting in loss of services to his minor child, and none as to the applicability of the statute of limitations. In other states the cases on the last point are not in accord. There would seem to be no distinction in principle between the two situations, and it is most probable that the courts would consider the Mullen case as decisive in this instance also.

If the case of The Cincinnati, H. & D. R. v. Chester, discussed in the next sub-section, is a binding decision on the point, the problem is removed, for there is but one cause of action rather than two or more, and, therefore, no question of joinder.

As seen above actions for fraud and deceit are actions for injuries to property and not to person.

What Constitutes One Cause of Action. Here again we are confronted with the problem as to how many rights the substantive law creates out of a given situation. In this connection it was said in the case of The Cincinnati, H. & D. R. v. Chester that "it seemed to the court" that a father's rights for injuries to himself, to his wife (resulting in loss of services) and to a minor son (resulting in loss of services) resulting from one

7 Cf. Nave v. Powell, 62 Ind. App. 274 (1916). Holding that because a cause of action on contract and one on tort arose out of the same transaction they could be joined. The court makes no reference to the Indiana Code, and cites only an Ohio case. See further discussion of this case in Sec. 16 infra.
8 Mullen v. Town of Newcastle, 180 Ind. 386 (1913).
9 See 37 C. J. p. 775.
10 See 37 C. J. p. 776.
11 Sec. 10 supra.
13 57 Ind. 297 (1877).
negligent act on the part of the defendant constituted but one cause of action, for which he could recover in a single paragraph of complaint. As a precedent the case is of doubtful weight, as the court prefaced its statement by the phrase “it seems to us” and actually decided that the motion to separate the causes of action filed by the defendant and overruled was too broad to present any question.

As seen above the code probably permits the joinder if it be held that more than one cause of action results, and the sole question is as the separate statement, and as the improper overruling of a motion to separate is not reversible error,\textsuperscript{14} the question is more or less academic. The weight of authority is clearly to the effect that there are several causes of action rather than one resulting from such a situation.\textsuperscript{15} The question usually arises as to whether one cause is barred by a settlement or judgment as to the other, so that practically all of the cases to the contrary can be explained on the modern doctrine of res \textit{judicata}; that is, under the joinder statute the plaintiff “might have” sued on all of the causes of action at once, and having failed to do so he is nevertheless barred.\textsuperscript{16}

It is believed that the profession in Indiana has not followed the suggestion in the Chester case, and regards a cause of action for injuries to a father as separate and distinct from those for injuries to his wife and children.

As to whether they might fall within the clause “causes of action arising out of a contract or a duty” is discussed later in Section 16.

Sec. 12. \textit{Actions to Recover Possession of Personal Property and Damages.} The fourth class created by the code is for “claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld.” The only common law actions for the possession of personal property were the actions of detinue and replevin. These have now been combined under the code under the general name of replevin.\textsuperscript{1} As to what would amount

\textsuperscript{14} Secs. 20 and 23 \textit{infra}.
\textsuperscript{16} See \textit{The Code Cause of Action}, 6 Ind. L. J. 295-298.

\textit{Sec. 12}.

\textsuperscript{1} Secs. 1314-1326 Burns Ann. Ind. Stat. 1926.
to one taking or one detention so as to constitute but one cause of action is again a question of fact and of the substantive law. However, in view of the fact that the joinder of the actions would be proper whenever the plaintiff seeks the recovery of the possession the question as to whether or not there was one or more cause of action joined would present a question only as to the separate statement, and any real decision on the point is practically evaded by the rule that an erroneous ruling would not be reversible error.  

Equitable Actions. One can also maintain a suit in equity for the restitution of personal property if the property comes within the definition as to "unique chattels." There would seem to be no reason why such a suit could not be joined with the legal action of replevin, as again the code makes no distinction between legal and equitable actions.

Damages Recovered Also. It probably is true today that the law regards the right to the possession of personal property and the right to damages for its unlawful possession as one right, the latter being incidental to the first. In view of Sections 601 and 624 Burns Annotated Indiana Statutes, 1926, providing that the verdict and judgment in a replevin suit shall be for the possession and "damages for the taking and detention" there would seem to be little doubt as to that conclusion in Indiana, although from the joinder statute in question there might be an inference that there were separate causes of action for the possession and damages for unlawful detention.

The joinder statute, however, does go further and provides that actions for "injuries to the property withheld" might be joined to the action for possession. The measure of damages in a replevin suit is normally the depreciation, loss of use and expenses accruing between the time the right to possession accrues and the action is started. If the action is based on a wrongful taking in the first instance, the damages would necessarily include the damages for injuries, as they would come within the term of "depreciation," and a separate paragraph of complaint would be unnecessary. If, however, the damages for injuries accrued subsequent to the commencement of the action, it would be necessary to file an additional paragraph of complaint based upon them, and the code here distinctly allows the joinder.

\[2\] Secs. 20 and 23 infra.
\[3\] Pomeroy, Equity Jurisdiction (4th ed. 1918) Sec. 175 et seq.
\[4\] Yelton v. Slinkard, 85 Ind. 190 (1882).
If the damages for injury were involved in an action founded, not upon an unlawful taking, but upon a wrongful detention arising out of a proper demand for possession and the wrongful refusal to give possession, it is submitted that damages for injuries occurring prior to the demand could not be recovered in the action of replevin. So again a separate paragraph of complaint ought to be filed for those damages. The right here might be based solely on a contract to safely keep the property, and not upon the violation of any duty supporting a tort action. The second paragraph of complaint would be *ex contractu* necessarily: whereas the first would be *ex delicto*: but it seems very plain that again the joinder would be proper because of the specific language of the statute. It is to be noted that the damages for injuries must be to the property involved in the replevin action.

*Conversion and Replevin.* It is said in the case of *Beals v. Stewart*,\(^5\) that this section specifically allows the joinder of an action of replevin with an action for the conversion of the same property. This would seem to be the fair construction of the statute. Under the New York code the actions would be inconsistent.\(^6\) But there is no such requirement in the Indiana code. The plaintiff should not, of course, recover on both paragraphs of his complaint and would be required to elect between them before judgment.\(^7\) (That point was not involved in the *Baals* case as the plaintiff voluntarily dismissed the replevin action before trial.)

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\(^5\) 109 Ind. 371 (1886).


\(^7\) There is considerable confusion in the law of Election of Remedies and much criticism concerning it. This is one instance where it must be applied, otherwise the plaintiff recovers twice for the same (although legally different) injury. But the plaintiff need not be compelled to elect until after the verdict.

*Sec. 13.*
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