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Joinder of Actions in Indiana (Concluded)

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Sec. 13. *Action to Recover Possession of Real Property and Damages.* The fifth class created by the code is for "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."

The statute here creates a class to include four different kinds of actions: 1. Ejectment, 2. Trespass or case for waste or injury done to the land, 3. Partition, and 4. Quiet title. It is to be noted that the second group, that is, for injury done to the land, is limited again to the land involved. Assuming that the first paragraph of complaint is for ejectment as to Lot X, the plaintiff could not properly join an action in his second paragraph of complaint for injuries to Lot Y. Whether such an action can be joined with an action of Partition or Quiet Title even although it be for injury to the land involved in those actions is questionable from the wording of the statute. The phrasing of the sentence would indicate that it was only an action to recover for injuries to the land in an ejectment action which could be joined with an action in ejectment. There is one case which may well be interpreted to place such a construction on the statute.\(^2\)

In that case an action to quiet title and an action for nuisance were held to be improperly joined. No reason is given in the opinion. Whether an action for nuisance would fall within the classification of an action for "damages done to the land" is of course questionable, although if the nuisance consisted of acts by the defendant which caused physical injury to the land it would obviously fall within the language in question. If it had to do with the pollution of the air, or was the result of other

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1. It was held in *City of Huntington v. Stemen*, 37 Ind. App. 553 (1905), that actions for nuisance and to quiet title could not be joined. Whether this was because the nuisance was thought not to be an action for damages for injury done to the land, or it was thought that such an action could be joined only with an action of ejectment, does not appear from the opinion.

2. *Supra* note 1.

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acts which affected the enjoyment of the property rather than a physical injury to it it might well be held here that it was not an action for "damages done to the land." In either event, of course, the law protects the plaintiff's rights in relation to the land, and not the land itself. A physical injury to the land is actionable, therefore, not because of the physical injury, but because such physical injury is an invasion of the plaintiff's right to be free from such acts as against the defendant and in respect to the land in question. An action for nuisance occasioned solely by the pollution of the air is therefore in one sense as much an action for damages for injury to land, as is an action of trespass q. c. f., because both after all are actions for damages for injury to the plaintiff's rights in respect to the land. At the same time there is a distinction between a physical injury which changes the form of the land and its improvements, and one which in common usage is regarded as an invasion of its enjoyment. It seems quite probable that the statute in question makes that distinction. Therefore, if in the Steeman case the action for nuisance was of the latter character the decision would be correct.

If, however, the case interprets the statute to allow an action for damages to the land only when the principal action is in ejectment it is submitted that the result is narrow and that it is bad in policy. As was stated above the phrasing of the statute would at first blush indicate such a result, because of the use of a comma after "thereof" instead of a semi-colon. Courts, however, have been quite free to disregard such minor errors in punctuation in order to reach a fair result. That is, there ought to be no presumption that the Legislature knows any more about grammar than it actually knows, which obviously is very little. A fair construction of this statute then is that there are four distinct subdivisions and that an action for damages could be joined with an action for partition or quiet title, provided the same land was involved in each action.

In any event if there is an action in ejectment: one for damages and one to quiet title: that case clearly falls within the statute.

It is to be observed that in any event the second action must

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3 See Covenants Running With the Land, 5 Ind. L. J. 786 (1930).
4 King v. State, 185 Ind. 312 (1916).
5 Cargar v. Fee, 140 Ind. 572 (1894); Richwine v. Presbyterian Church, 135 Ind. 80 (1893).
be for damages and that an equitable action for a mandatory injunction against the maintenance of a fence alleged to constitute a nuisance cannot properly be joined.\(^6\)

An action for partition and one for quieting title can, of course, be joined\(^7\) as also one for ejectment and quieting title.\(^8\)

**Legal and Equitable Actions.** In view of the fact that the action of ejectment is regarded as an adequate legal remedy there is no equitable action for the possession of real estate.\(^9\) And the statutory actions of Partition and quiet Title are to all intents and purposes legal actions.\(^10\) The action for waste or damages would normally be legal, so that the situation would be rare indeed where there would arise an occasion for the joinder of legal and equitable actions under this section. But if the situation should arise there would seem to be no doubt again that, of itself, that would constitute no valid objection.

**Sec. 14. Actions of Specific Performance and Cancellation of Instruments.** The sixth clause of the code allows the joinder of "claims to enforce specific performance of contracts, and to avoid contracts for fraud or mistake." Apparently there are no cases decided under this section,\(^1\) but it seems clear that joinder of the equitable actions of specific performance and of cancellation or recission of contracts is permitted. There is some confusion between this section, and Section 287 Burns Annotated Indiana Statutes 1926 in the minds of some authorities,\(^2\) but the latter deals with *reformation of instruments*, while this section deals with the cancellation and recission of *contracts*.

It is quite likely that "contracts" as used in this section does not include a deed, lease or other conveyance. There is no indication that the word is not used in its technical sense,\(^3\) while

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\(^{6}\) Giller v. West, 162 Ind. 17 (1904).

\(^{7}\) Schissel v. Dickson, 129 Ind. 139 (1891).

\(^{8}\) Muffley v. Turner, 141 Ind. 580 (1895).


\(^{10}\) A jury trial is a matter of right in each instance. Kitts v. Wilson, 106 Ind. 147 (1885) (partition); Trittijo v. Morgan, 99 Ind. 269 (1884) (quiet title).

Sec. 14.

\(^{1}\) The case of Hunter v. McCoy, 14 Ind. 428 (1860), cited under it in Burns Ann. Ind. Stat. 1926, is not in point.

\(^{2}\) See note 1 *supra*.

\(^{3}\) It must, therefore, be interpreted accordingly. Sec. 247 (1) Burns Ann. Ind. Stat. 1926.
the use of the broader "instruments in writing" in the next section indicates a conscious intention to make a distinction.

Sec. 15. *Action To Foreclose Mortgages, etc.* Clause 7 provides for the joinder of actions on:

A. Claims to foreclose mortgages,

B. Claims to enforce or discharge specific liens,

C. Claims to recover personal judgment upon the debt secured by such mortgage or lien,

D. Claims to subject to sale real property upon demands against decedents' estates when such property has passed to heirs, devisees or their assigns,

E. Claims to marshall assets,

F. Claims to substitute one person to the rights of another.

G. Claims arising out of a contract or a duty and not falling within either of the foregoing classes.

It is believed that sub-class G here is really a general class and should have been numbered clause and class 8. It is, therefore, discussed separately in the next section.

Sub-classes A, B, C, D, and E refer to well defined legal and equitable actions, and there should be little difficulty in connection with them. It is to be noted that there is no requirement here that the same property be involved in the actions joined. The plaintiff therefore, could join actions for foreclosure of a mortgage on Lot X, for foreclosure of a mechanic's lien on Lot Y (or foreclosure of a lien on personal property, for that matter), for personal judgment on the debts secured by the mortgage or lien, for the sale of Lot Z to pay the debts of the decedent,\(^1\) for the marshaling of assets as to all those lots and others.

Sub-class F deals with "claims to substitute one person to the rights of another." What the so-called intention of the legislature was here is a little hard to grasp. It is possible that the clause refers to actions of Interpleader, Creditors Bills, Receiverships or Attachments. But logically it then would include a great many other proceedings in *rem*, for example, Partition, Foreclosure of Liens and Sale of Real Estate (by guardian or administrator or a wife against a deserting husband).

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1 Such an action may only be brought by an administrator or executor (Sec. 3179 *et seq.* Burns Ann. Ind. Stat. 1926, and in particular Sec. 3183 and Sec. 3185.) The general provision that all actions joined must affect the same parties would probably require that all other actions be by the administrator or executor. See Section 6 *supra.*
Or it may include only an action to compel an assignment. (Although it would seem as if that were included under specific performance in class 6.) Or it may include Subrogation. There have been no cases decided which attempt to construe this provision.

Sub-classes A and C were involved in the case of Sharts v. Awalt. In that case the creditor of a mortgagee garnisheed the mortgagor: recovered judgment against both and likewise a judgment of foreclosure as to the mortgage. In a subsequent suit brought by an assignee of the mortgage it was said that the joinder was proper. The court, however, rests the decision on Section 178 of the Code of 1852, which is now Section 1007 Burns Annotated Indiana Statutes (1926). This section necessarily refers to the other provisions of the code and therefore the joinder must rest on the joinder statutes. The joinder might be sustained under sub-classes A, C, and F, although it quite clearly was proper under Section 288 Burns Annotated Indiana Statutes (1926).

**Foreclosure and Quiet Title.** Again actions joined must fall within the sub-classes created by this section, and thus an action to foreclose a mortgage and to quiet title cannot be joined under the statute in question. But it has been held that under the statutes on foreclosure adverse and prior claims may be litigated. The court regards the result, however, not as a joinder of actions to foreclose and to quiet title, but solely an action to foreclose with the incidental remedy of quieting title. The result could well be sustained again under Section 258 of the joinder statute, and a defendant could well raise the question by demanding a jury trial.

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2 73 Ind. 304 (1881).
3 "All such proceedings, (when a garnishee fails to appear) pleadings and process shall be had according to the practice in other cases, as shall be necessary to determine the rights of the parties and render a final judgment."
4 Infra. Sec. 18.
5 Butler University v. Conrad, 94 Ind. 353 (1883).
7 Masters v. Templeton, 92 Ind. 447 (1883); City of Covington v. Ferguson, 167 Ind. 42 (1906). The case of Pancost v. Travelers Insurance Co., 79 Ind. 172 (1881), to the contrary must be considered as impliedly overruled.
8 Sec. 18 infra. Sec. 16.
Sec. 16. Causes of Action Arising Out of a Contract or Duty. It seems quite clear that the comma which precedes this section should be either a period or colon, and that the phrase “not falling within either of the foregoing classes” refers to the general clause created by the entire section, and does not refer to the sub-classes created by clause or class 7. This phrase then really creates a class which should have been numbered 8. The result would be the same, whether it be a sub-class or a general class, but as the former it would, for instance, be a duplication of general class number 1, whereas as the latter it would permit the joinder of contract actions not covered by class 1, which is a more reasonable and obvious interpretation.

The first portion of the clause seems quite clearly to allow the joinder of an action for specific performance of a contract, and one for damages for its breach (in the alternative). Does it allow a joinder of an action of specific performance of contract A and with one for damages for the breach of contract B? Does “a contract” mean “the same” contract; “any contract?” It may mean either.

It is submitted that it ought to be construed to mean “the same.” It means too much if it is construed as “any,” for it would entirely supersede Class 1, and parts of all the other classes except possibly classes 2 and 3. And apparently it was inserted to take the place of the “transaction” clause in the usual joinder provision in other codes, and the language there is “the same transaction,” which has been and must be, construed to mean a definite situation.

More important than those considerations, however, is that which arises out of the use of the same word in the later phrase “or a duty.” “A” cannot here be construed to mean “any,” for if it is that phrase supersedes and destroys the entire balance of the code on joinder of actions. Every cause of action arises out of a “duty” of some sort. The code was written before the legal philosophers had distinguished between rights, powers, privileges and immunities and their correlatives. Today “duty” is used only as a correlative of “right,” but in 1852 and 1881 “right” was used in its broadest sense and included every legally

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1 * * *, “and all other causes of action arising out of contract or a duty, and not falling within either of the foregoing classes.”
2 “Money demands on contract.”
3 1 C. J. 1.
4 See The Code Cause of Action, 6 Ind. L. J. 299-315.
recognized interest, and therefore "duty" would necessarily have to be accorded the same broad meaning and mean the corresponding "duty" arising out of any legally recognized right. The joinder of causes of action arising out of "any duty" would allow an unlimited joinder. "A duty" must be construed to mean "the same duty," and therefore "a" ought to mean the same in the preceding phrase "a contract."

Arising out of a (the same) Contract. This same phrase is used in the counter-claim statute, and because of its importance in that connection the detailed discussion as to its meaning is found in that connection. Based on the reasons and conclusions there set out it is submitted that here the code permits the joinder of actions, or complaints, based on rights (or causes of action) which "come into being partly out of the same contract (in fact)," and that they do so "come into being" when there is a causal connection in fact (one fact in common) between the factual situations which form the bases of the various complaints joined. Thus, one could join under this provision an action for damages for fraud inducing a contract and also recover for a breach the contract, despite the fact that one is ex contractu and the other ex delicto. Or one could sue for specific performance, or for damages, in the alternative.

There is apparently only one case decided under this clause. It was said in the case of State, ex rel. v. Peckham that it permitted the joinder of an action to set aside a judgment approving a guardian's final report with an action to recover on his bond. There is no discussion in the case, and again it seems obvious that in any event the joinder was proper under Sec. 288. But it might be said that the causes of action both arose out of the same contract (that is, the bond) for the cause of action for breach of contract and for fraud might come into being out of the same facts which give rise to the right to set aside a fraudulent final report. For the same reason it might be said that they arose out of the same duty.

5 The same word used more than once in the same section or statute is presumably used each time in the same sense. Ryan v. State, 174 Ind. 468 (1910).
6 It is to be discussed in a later paper.
8 136 Ind. 198 (1893).
9 Infra. Sec. 18.
Arising out of a (the same) Duty. This phrase is used in the set-off statute, and is likewise discussed in detail there. Based on the reasons and conclusions there stated it is submitted that here the code permits the joinder of actions where there is cause in fact between the different paragraphs of complaint, and regardless of whether they are based on contract or tort rights.

The phrase then, to all intents and purposes, constitutes a transaction clause, and the case of Nave v. Powell could here be sustained as it could under the "arising out of the same contract" clause. In that case the court held that a joinder of an action on breach of warranty and an action for fraud in inducing the contract could be joined because "they arose out of the same transaction." The court cites only an Ohio case, where the code does contain such a clause. Obviously the case is no authority under the Indiana statute: but as suggested here the same result could be, and ought to be reached under the clause in question.

The question as to when causes of action arise out of (or come into being out of) the same duty is the simple question as to whether there is cause in fact between the factual situations involved in the various paragraphs of complaint. That it, "but for" one fact in one factual situation would the other have come into existence. Is there a common fact which would be involved in proof of both causes of action?

Such an interpretation of this clause would without question permit the joinder of an action for personal injuries and an action for injuries to property arising out of the same accident.

10 It is to be discussed in a later paper.
11 But it was held in the Indianapolis and Cincinnati R. v. Ballard, 22 Ind. 448 (1864), that in the set-off statute the word "duty" was confined to "contract duty."
There would be no reason either why one could not join actions to recover possession of property and foreclose a mortgage on it if the rights arose out of the same instrument.  

Sec. 17. Reform and Other Relief. Sec. 287 provides that “when the plaintiff desires to recover the possession of title papers or other instruments in writing, or correct any mistakes therein, a separate action may be brought therefor; or the possession—recovered or mistakes recovered in any other action when such recovery or correction would be essential to a complete remedy.”

The obvious purpose here is to allow the plaintiff to reform an instrument and recover upon it as reformed. Thus one may reform a deed, a mortgage, a note, a contract and seek also any appropriate remedy on the instrument as reformed. The language of the code is quite broad and says any “instrument in writing,” but, of course it is procedural only and would not allow the reformation, for example, of a will, where equity disclaims power to act.

the joinder statute to create one cause of action, and we have the absurdity that there is one cause of action because both rights arise out of the same transaction, and therefore after all no question of joinder because there is one and not two causes of action. The joinder statute itself is used to defeat any reason for its existence.

16 Cf. Butler University v. Conrad, 94 Ind. 353 (1883), where however, the actual facts are not disclosed and the clause in question was not discussed.

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2 Cf. Smith v. Kyler, 74 Ind. 575 (1881), and Earl v. Van Natta, 29 Ind. App. 552 (1902), holding that reformation plus possession constitutes but one cause of action.

3 Walls v. State, 140 Ind. 16 (1894).

4 Bigsbee v. Trees, 21 Ind. 227 (1863).

5 Palmer Steel & Iron Co. v. Heat, L. & P. Co., 160 Ind. 232 (1903). The court puts the decision on Sec. 281, Burns Ann. Ind. Stat. 1901, which is now Sec. 288, Burns 1926, and also talks about there being but one cause of action, and the money judgment being “incidental relief;” but clearly the case falls within the section in question. The case of Monroe v. Skelton, 36 Ind. 302 (1871), is correctly decided under the provision in question.


Cf. Grimes v. Harmon, 35 Ind. 198, 9 A. R. 690 (1871), saying that equity may reform a mistake apparent on the face of the instrument, which probably only means that in construing a will the court will disregard an apparent mistake.
Although the section in question apparently gives the plaintiff a right to maintain separate actions of reformation and recovery on the instruments it is well to remember that in the recent case of *Royal Ins. Co. v. Stewart*, the Supreme Court held that an action to reform and recover on the reformed instrument was barred by a prior unsuccessful action to recover on the instrument “as was.” This is in keeping with the modern doctrine of *res judicata*.

Sec. 18. *Actions to Set Aside Fraudulent Conveyances, etc.* Sec. 288, provides as follows: “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 speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes.”

It is to be noted that this section applies only if the principal action is one arising out of contract. There is no reason to suppose but that again the code here uses “contract” as meaning *ex contractu*, and therefore includes *quasi* contractual rights.

Primarily the purpose of the statute seems to be to allow the joinder of an action on a contractual right with an action to set aside a fraudulent conveyance. But it has also been held that it permits an action on a debt and a suit to enjoin the fraudulent transfer of the debtor’s property.

While it seems quite clear that the code here regards the action on the debt and the action to set aside or enjoin the fraudulent conveyance as separate actions the language of the cases decided by the Indiana courts in this connection indicates that the courts regard the situation as involving a principal action in equity to reach the debtors’ property and, seem to regard the judgment on the debt as being supplemental or incidental to that, that is, after all there is but one action involved. This conclusion is

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7 190 Ind. 444 (1921).

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1 Burns Ann. Ind. Stat., 1926.

2 See Sec. 8, supra.

3 *Prisco v. Engle*, 77 Ind. App. 439 (1922), and cases there cited.

4 *Field v. Holtzman*, 93 Ind. 205 (1883).

5 See the cases cited in notes 3 and 4, supra, and also the case of *Pontius*, 136 Ind. 641 (1893), discussed in detail in Sec. 6, supra.
further sustained by those cases which hold that the parties are not entitled to a jury trial.\textsuperscript{6}

The question as to the true theory in these cases could be raised by a motion to separate, or a demand for a jury trial, as to the whole or part. The result would probably be that the courts would hold that the action was still essentially equitable\textsuperscript{7} and that the personal judgment was in the nature of supplemental and incidental relief. Such a result presents no question of joinder, for there is but one cause of action involved. If the plaintiff fails as to the fraudulent conveyance aspect of the case there is presented the question involved in \textit{Elliott v. Poutins},\textsuperscript{8} discussed in Section 6, \textit{supra}.

\textbf{Sec. 19. Foreclosure Suits.} Originally a suit to foreclose a mortgage was strictly equitable, and the decree was a foreclosure of the equity of redemption. It operated solely to extend the time set in the original conveyance for the payment of the loan, and the consequent forfeiture of the mortgagor's interest in the property upon the condition subsequent.\textsuperscript{1} But in a state where the so-called "lien theory" prevails (as in Indiana) there is no longer a transfer of title upon a condition subsequent to the mortgagee, but only the transfer of a so-called "mortgage interest" or "lien." The mortgagee can only realize on this through an action to foreclose, the purpose and result of which is to sell the property to satisfy the debt.\textsuperscript{3} It seems quite clear that the mortgagee's interest in the property is thus only a power of sale, which normally must be exercised through the means of a judicial decree.\textsuperscript{4} The same theory exists as to other liens.


\textsuperscript{7} Equity did take jurisdiction in these cases, although the remedy at law was adequate (i.e., the conveyance being \textit{void} the judgment plaintiff could levy on it in the hands of the third person). Apparently because it was thought that the "fraud" gave jurisdiction. See, \textit{Wait, Fraudulent Conveyances} (2nd Ed. 1889), p. 78, \textit{et seq}.

\textsuperscript{8} \textit{Supra}, note 5.

\textit{Sec. 19.}

\textsuperscript{1} \textit{Tiffany, Real Property} (2nd Ed. 1920), Secs. 599-501.

\textsuperscript{2} \textit{Brown v. Follette}, 155 Ind. 316 (1900).


\textsuperscript{4} See, \textit{Gavít}, "Under the Lien Theory of Mortgage is the Mortgage Only a Power of Sale?" 15 Minn. L. R. 147 (1931); "Is a Power of Sale in a Mortgage Valid in Indiana," 5 Ind. L. J. 293 (1930).
It is customary to seek a personal judgment on the debt secured by the lien. Is there one cause of action, or two? In view of the fact that the statute specifically allows separate actions on the debt and to foreclose it would appear that there were two causes of action. The joinder statute specifically allows the joinder. The decided cases in Indiana so indicate.

At the same time, however, it has been held that there is no right to a jury trial in a foreclosure suit even as to the money judgment, and one paragraph of complaint, based on the recovery of the debt and the foreclosure of the mortgage, is not subject to a motion to separate.

Again the courts have insisted on regarding the action to foreclose as being of equitable origin and they have failed to recognize the distinction between the older suit to foreclose the equity of redemption where there was no money judgment, but merely a finding and decree as to the amount due (and therefore to be paid in redemption) and the present statutory action where the judgment is for the sale of the property, and where there may be a money judgment for the amount due.

**Foreclosure and Quiet Title.** As pointed out in Section 15, supra, the courts have reached the result that under the foreclosure statutes the plaintiff may also quiet title. But again the theory would seem to be that such relief was granted as incidental to the foreclosure, and was not based on a separate cause of action.

**Sec. 20. The Separate Statement.** The last sentence in Sec. 296 (7) provides that “But causes of action so joined must be separately stated and numbered.” There is presupposed

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6 Sec. 15, supra.
7 Jenkinson v. Ewing, 17 Ind. 505 (1861); Rodman v. Rodman, 64 Ind. 65 (1878); Huston v. Fatka, 30 Ind. App. 693 (1903).
8 Brown v. Russell, 105 Ind. 46 (1885). (Chattel mortgage); Carmichael v. Adams, 91 Ind. 526 (1883) (real estate mortgage); Albrecht v. Foster Lbr., 126 Ind. 318 (1890) (mechanic's lien); Bozarth v. McGillicuddy, 19 Ind. App. 26 (1897) (street assessment lien).
9 Mansfield v. Shipp, 128 Ind. 55 (1890).
10 See Bolles v. Duff, 43 N. Y. 469 (1871).
11 The confusion is apparent in the opinion in the case of Carmichael v. Adams, supra, note 8.

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both (1) the joinder of two or more actions based on what the substantivc law regards as separate and distinct causes of action, or rights, and (2) that the joinder is proper under the statutes in question. This specific provision then deals with a pure question of pleading, and requires that the actions joined be represented by separate paragraphs of complaint, separately numbered. The other provisions of the code dealing with the law of pleading as to the plaintiff’s complaint, and in particular the one which provides that in the complaint the plaintiff shall “state the facts constituting his cause of action,” apply here.

It is well to note, however, in this connection that the plaintiff is now permitted to incorporate by reference into subsequent paragraphs of his complaint allegations in previous paragraphs which are properly identified under Sec. 361 Burns Annotated Indiana Statutes 1926.3

What is One Cause of Action. As stated above there is presupposed two or more causes of action, and that their joinder is proper (or not objected to).

In this connection, it has been decided that an action against a railroad company for sheep killed one day, and for horses killed another day involves two causes of action;4 that an action to foreclose a chattel mortgage where the debt was evidenced by two notes involved but one cause of action;5 that an action for seduction and conspiracy to procure an abortion against the principal defendant and another involved but one cause of action, that is, a joint tort;6 and it was apparently assumed on the trial of the case of The Louisville, N. A. & C. Ry. v. Worley7 that an action for, animals killed by two different trains on the same day involved two causes of action.

Question How Raised. There is no code provision on the point, but the proper practice is to raise the question of the separate statement by a motion to require the plaintiff to separate the complaint into paragraphs as to each cause of action stated.8 A demurrer for misjoinder is ill-taken for there is

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2 Sec. 359, Burns Ann. Ind. Stat. 1926.
3 The statute deals with grammatical paragraphs and not counts or paragraphs in the pleading sense.
4 The Wabash, St. L. & P. Ry. v. Rooker, 90 Ind. 581 (1883).
5 Mansfield v. Shipp, 128 Ind. 55 (1890), and see the other cases cited, supra, Sec. 19.
6 Gunder v. Tibbits, 153 Ind. 591 (1899).
7 107 Ind. 320 (1886).
8 Booher v. Goldsborough, 44 Ind. 490 (1873) (an answer involved, but
presupposed a proper joinder, and there is no provision in the demurrer statute which is applicable. The motion to separate must be in writing and specifically point out the causes of action to be separated and give the reasons for the required separation.

Motion to Strike Out is Improper. It was said in the case of Western Union Tel. Co. v. McClelland, that the proper remedy is by motion to separate or motion to strike out. The latter is quite obviously incorrect and the case of Hendry v. Hendry is to the contrary, and of course controlling.

One Cause and Part of Another Stated. If the complaint states one cause of action and insufficiently states another cause it has been held that the latter must be regarded as surplusage and that a motion to separate is not well taken. The present authority of those decisions, however, may well be questioned. Under the present statute on waiver for failure to demurrer, and similar provisions in the code at this time almost any attempted statement of a cause of action is a good complaint unless properly questioned by the defendant.

The motion to separate should be filed before the demurrer, and probably ought to be well taken today. At least the second insufficient statement should constitute such prejudicial surplusages to be subject to a motion to strike out.

Question May be Waived. Unless a proper motion is filed the right to a separate statement is waived.

Not Reversible Error. The erroneous overruling of a proper motion to separate is never reversible error.

the problem is the same); Western Union Tel. Co. v. McClelland, 38 Ind. App. 578 (1906); Tishbein v. Paine, 52 Ind. App. 441 (1913).


11 Scott v. The Indianapolis Wagon Works, 48 Ind. 75 (1874); Hay v. State ex rel., 58 Ind. 337 (1877); Rich v. Fry, 196 Ind. 303 (1925).

12 38 Ind. App. 578 (1906).

13 32 Ind. 349 (1869).

14 Booher v. Goldsborough, 44 Ind. 490 (1873); Shaw v. Ayers, 17 Ind. App. 614 (1897).


16 Western Union Tel. Co. v. McClelland, 38 Ind. App. 578 (1906); Hendry v. Hendry, 32 Ind. 349 (1869).

17 See, Shaw v. Ayres, 17 Ind. App. 614 (1897), and cases there cited; also, Fishbein v. Paine, 52 Ind. App. 441 (1912), and Rich v. Fry, 196 Ind. 303 (1926).
Exception in Trespass Q. C. F. As pointed out above\textsuperscript{18} at common law and under the code the plaintiff might regard several trespasses to real estate as parts of one cause of action, and recover for them on one paragraph of complaint under a continuando.\textsuperscript{19} A motion to separate in such a case would not be well taken.

Several Paragraphs on the Same Cause of Action. 1. A plaintiff may have two or more distinct and unconnected causes of action against a defendant, for example on contract 1 and 2, or on tort 1 and 2. Clearly the statute in question here applies. 2. A plaintiff may have two or more causes of action, which however cover the same liability, for example, a tort liability and a contract liability for injury to goods shipped by common carrier. Again the statute in question here applies and the question of a possible double recovery is governed by the law of election of remedies. 3. A plaintiff may have in fact and in law, only one of two or more possible causes of action, for example, a railroad employee's right to recover for injuries may be either a right under the Federal Employee's Liability Act, or a right under the State Common or Statute Law, depending on whether in fact and in law he was "employed" in interstate commerce at the time of injury, or a right under a State Workmen's Compensation Act, depending again on that fact plus other requirements made by the act. The laws involved are mutually exclusive, however, and in law and in fact the plaintiff only has one right. As to the first two at least the plaintiff may sue either in the state courts or Federal courts, although as to the latter two there must exist diversity of citizenship.\textsuperscript{20} The rights are both injuries to person, and also arise out of the same transaction, so that the joinder is proper. But is there one cause of action or two: must there be a separate statement under the Federal Law and the State Law? Arguing that because there can finally only be one recovery the New York Court of Appeals has said that there is but one cause of action, and that therefore but one paragraph of complaint is required.\textsuperscript{21} But such a decision confuses the substantive law with procedural law.\textsuperscript{22} The

\textsuperscript{18} Sec. 10, supra.
\textsuperscript{19} Rucker v. McNeely, 4 Blackf. 179 (1826); Holcroft v. King, 25 Ind. 352 (1865).
\textsuperscript{21} Payne v. N. Y. S. & W. R., 201 N. Y. 436, 95 N. E. 19 (1911).
test here is not how many causes of action can the plaintiff actually prove under the substantive law, but how many does he assert or claim? The fact that he cannot ultimately recover on both does not destroy the fact that he does claim or assert two. That there are two causes of action asserted seems very plain, and particularly in view of the recent decision of the Supreme Court of the United States to the effect that a right under the Federal Act cannot even partially be based on a violation of a State law. Most of the other decided cases are contrary to the New York case. There are no Indiana decisions on the subject, but the practice has been to regard them as two causes of action.

A plaintiff confessedly may have but one cause of action but he undertakes to state it upon different theories in separate paragraphs, or in the same paragraph of complaint. Which is proper? Clearly if the different paragraphs of complaint are so similar as to be in substance the same statement of facts, they are repetitious and all but the first should be stricken out on a proper motion. At the same time it is proper to state the same cause of action in separate paragraphs of complaint, but upon different theories as to the facts. Although it is proper, for example, to allege several specific acts of negligence in one paragraph of the complaint, and the plaintiff can recover upon proof of any one. The distinction seems to be between those cases where the facts alleged are cumulative and where they are repugnant. In the first they may be alleged in one paragraph of complaint; in the second they must be alleged in separate paragraphs of complaint, because of the rule that repugnant allegations destroy each other if they are contained in the same paragraph of complaint.

For a somewhat similar confusion, see the recent case of Duvall v. Ranson, etc., Co. (Ind. App.), 169 N. E. 437 (1930), where the court holds a set-off or counterclaim to be not within the code provisions on the subject because in law and fact it appeared that the plaintiff had a defense to it.


They are collected in 45 U. S. C. A., Sec. 51, note 445.

Holcroft v. King, 25 Ind. 352 (1865).


Sec. 21.
The result is that additional paragraphs of complaint need not allege additional causes of action, but may be based on the same cause of action, but on allegations of inconsistent facts. Such a rule is neither inconsistent, nor consistent with the rule as to the separate statement of several causes of action under the joinder statute. It involves an entirely different proposition, the method of allegation as to inconsistent facts constituting but one right.

Sec. 21. The Separate Trial. The last sentence in Sec. 288\(^1\) provides that “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.” This clause presupposes both a proper joinder and a proper separate statement; although it would seem clear that neither of those is a prerequisite to the ordering of separate trials, under the inherent powers of the court to regulate trial convenience.\(^2\)

The result is that upon motion of either party, or on motion of the court, the actions joined do not have to be tried at the same time, unless it is desirable to so try them. There appear to be no cases decided under this clause, but the situation would be within the discretion of the trial judge, and it is doubtful if an adverse ruling would ever be reversible error.\(^3\) If, however, there has been a misjoinder, which is properly questioned by demurrer, and a motion for separate trial is refused, it has been held that this may constitute reversible error.\(^4\)

A party cannot object to a joint trial after it has been started, his right, if any, to a separate trial having been waived.\(^5\)

Sec. 22. Question of Misjoinder: How Raised. Sec. 362 (6)\(^1\) provides that a party may demurrer for the reason “That the several causes of action have been improperly joined.”

This provision gives the only means of raising a question of misjoinder of causes of action.\(^2\) And so a motion to separately

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2 See, Rich v. Fry, 196 Ind. 303 (1926).
4 Boonville Nat'l Bank v. Blakely, supra, No. 3.

Sec. 22.
2 Langsdale v. Woolen, 120 Ind. 16 (1889).
docket the misjoinder action presents no question.\textsuperscript{3} And a demurrer for insufficient facts is not well taken.\textsuperscript{4}

\textbf{Court Must Separately Docket Misjoinder Action.} Section 3635 provides that "Where a demurrer is sustained (for misjoinder of actions) the court shall cause as many separate actions to be docketed between the parties as there are causes decided by the court to be improperly joined, and each shall stand as a separate action."

Under this statute although a demurrer for misjoinder is sustained the plaintiff does not have to start his actions over. Each action so separately docketed constitutes a separate action, as if it had been originally begun as a separate action.\textsuperscript{6}

It would seem that any motion here was unnecessary because the statute imposes the duty on the judge to act. But it was assumed in \textit{Rich v. Fry}\textsuperscript{7} that such a motion was proper, but its overruling was not reversible error. So far as the record discloses there was no demurrer for misjoinder filed, and therefore the statute could not apply. It appears from the cases cited in the opinion\textsuperscript{8} that the court is confused in its assumption, and that possibly it was dealing with the motion as a motion for a separate trial.

\textbf{Sec. 23. Effect of Misjoinder—Waiver—Reversible Error.} Unless properly questioned the misjoinder of actions is waived.\textsuperscript{1} And Sec. 364\textsuperscript{2} specifically provides that the improper overruling of a demurrer for misjoinder of actions is not reversible error.\textsuperscript{3} The practical result of this is that it lies within the power of the court (subject to review only as to the so-called abuse of judicial discretion) to adopt its own views as to the proper joinder of actions; for any technical misjoinder under the code

\textsuperscript{3} \textit{Ibid.}, Cf., \textit{Giller v. West}, 162 Ind. 17 (1904), and \textit{Rich v. Fry}, 196 Ind. 303 (1926), containing language to the contrary.
\textsuperscript{4} \textit{Board of Commrs. v. Redifer}, 32 Ind. App. 93 (1903), and cases there cited.
\textsuperscript{5} Burns Ann. Ind. Stat. 1926.
\textsuperscript{6} \textit{Gillen v. West}, 162 Ind. 17 (1904).
\textsuperscript{7} 196 Ind. 303, 311 (1926).
\textsuperscript{8} \textit{Langsdale v. Woolen}, 120 Ind. 16 (1889), and \textit{Cargar v. Fee}, 140 Ind. 572 (1894).

\textsuperscript{1} \textit{Langsdale v. Woolen}, 120 Ind. 16 (1889).
\textsuperscript{2} Burns Ann. Ind. Stat. 1926.
may be sustained in any event under the powers of a court to consolidate actions.\textsuperscript{4} But it has been held that if there was a misjoinder of actions and a motion for separate trials was overruled it may constitute reversible error.\textsuperscript{5} And if there was both a misjoinder of parties and of causes of action there may again be reversible error.\textsuperscript{6}

Sec. 24. Consolidation of Actions. Sec. 9336\textsuperscript{1} specifically provides for the consolidation of actions brought to foreclose mechanics' liens against real property. This means that although a joinder in the first instance would be prohibited, because of the provisions in the joinder statute to the effect that the actions joined must affect all of the parties to the action,\textsuperscript{2} upon motion separate actions affecting the same property may be consolidated, or joined.\textsuperscript{3}

But in addition to this statutory power to consolidate actions the courts possess an inherent power in that respect.\textsuperscript{4} No case has attempted to define the limits of this power. It seems quite clear, however, that if separate actions have been begun which might have been joined under the joinder statutes of the code, that on motion by either party or the court, such actions could be consolidated for the purpose of one trial, with the consequent saving of time and expense.

If there are involved separate actions which could not have been joined in the first instance, then as to whether or not the actions should be consolidated ought to depend on whether or not a single trial is possible and reasonably expedient.\textsuperscript{5}

\textsuperscript{4} See Sec. 24, infra, and Northwestern Loan, etc., Assn. v. McPherson, 23 Ind. App. 250 (1899).
\textsuperscript{5} Boonville Nat'l Bank v. Blakely, 166 Ind. 427 (1906).
\textsuperscript{6} Tobin v. Connery, 13 Ind. 65 (1859).

Sec. 24.

\textsuperscript{1} Burns Ann. Ind. Stat. 1926.
\textsuperscript{2} Supra, Sec. 6, and see, Northwestern Loan Assoc. v. McPherson, 23 Ind. App. 250 (1899).
\textsuperscript{3} Central States Mfg. Co. v. Parker-Russell Mining, etc., Co., 196 Ind. 163 (1925). In the case cited the court relied on the inherent power of the court to order the consolidation, and not the statute in question.
\textsuperscript{4} Atkinson v. Disher, 177 Ind. 665 (1912).
\textsuperscript{5} Ibid. See, also, Oldfather v. Zent, 11 Ind. App. 430 (1894) (actions for malicious prosecution, and new trial of first action on newly discovered evidence after term); Horne v. Harness, 18 Ind. App. 214 (1897) (semble); Turner v. Simpson, 12 Ind. 413 (1859) (separate actions by one on several notes, tried together); Grant v. Davis, 5 Ind. App. 116 (1892) (two sepa-
The refusal to consolidate is not reversible error; and in no event are the rights of the parties on the trial to be prejudiced by consolidation.\(^6\)

The result of this doctrine is that a joinder in fact may be accomplished in any cases where a trial of separate actions is inexpedient. The result is in truth the same as that accomplished by the recent amendment to the New York Code which strikes out of that code the requirement that the "action joined affect all of the parties to the action" so that after all the question presented is one of trial convenience, depending largely upon the question as to whether or not the actions present a common question of law and fact.\(^8\)

There is nothing in the doctrine of consolidation of actions which enlarges the jurisdiction of a court of equity as to a bill of peace, and the two (consolidation and bill of peace) cannot be used to defeat the parties' rights to a jury trial.\(^9\)

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\(^6\) Trook v. Crouch, 82 Ind. App. 309 (1923).

\(^7\) Midland R. v. Island Coal Co., 126 Ind. 384 (1890) (one party cannot bind another by agreement for continuance).

\(^8\) See, for example, Sherlock v. Manwaren, 208 App. Div. 538, 203 N. Y. S. 709 (1924).

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