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NECESSARY AND INDISPENSABLE PARTIES*

FLEMING JAMES**

In this article we shall consider who are "necessary" and "indispensable" parties. These terms are words of art. Necessary parties are those who must be included in an action either as plaintiffs or defendants unless there is a valid excuse for their non-joinder.¹ Probably it would be better to call such parties "conditionally necessary," but the shorter term will be used here to conform to general modern usage. Indispensable parties are those who must be included in an action before it may properly go forward. No excuse will be accepted for their non-joinder.²

There is a further artificial qualification on the use of these terms. If A alone owes plaintiff a debt, the plaintiff's action cannot go forward unless and until A is made a defendant in the action and the court obtains jurisdiction over his person or his property. In a very real sense A is an indispensable party. But that is *not* the sense in which the term is generally used here; rather it is used in situations where there are at least two possible defendants (or plaintiffs), to describe a rule which forbids the suit to go forward even where one is present, in the absence of the other. The term "necessary" has a similar meaning in this regard, although the requirement is a conditional one which may be satisfied by a valid excuse for non-joinder.

The definitions used here are of course arbitrary, and there has been considerable variation in the way the terms have been used in the past. In former state practice "necessary" was often used to denote what we have called indispensable.³ But the usage in vogue since about the time of the federal rules is the one described above and it will be observed throughout this article.

CONSIDERATIONS INVOLVED IN DETERMINING WHO IS A NECESSARY OR INDISPENSABLE PARTY

The concepts of necessary and indispensable parties are alike in this respect: both terms denote parties who *should* be joined in the action. It may be useful to think of necessary parties as the larger, all-inclusive class, out of which the exceptional class of indispensable parties is carved.

* This article will appear as part of a textbook on civil procedure to be published by Little, Brown and Company.

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1. See FED. R. CIV. P. 19(b); CLARK, CODE PLEADING 360-62 (2d ed. 1947) [hereinafter cited as CLARK]; 3 MOORE, FEDERAL PRACTICE ¶ 19.02 (2d ed. 1948) [hereinafter cited as MOORE].

2. See sources cited note 1 *supra*.

3. CLARK at 353-54. For an interesting summary of the various usages of the terms "indispensable," "necessary," and "proper," see Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 328 (1957). See also Comment, 29 CALIF. L. REV. 731 (1941).

The degree of obligation represented by the word "should" varies and, as we have seen, the sanctions to implement the obligations are of varying strength and carry consequences of different gravity. But the reasons *why* necessary and indispensable parties should be joined boil down to a very few basic considerations, one or more of which recur—but again with varying strength—in all the cases where the concepts are applied.⁴ The next step then is to examine these considerations.

(1) Protection of the absent party's interests.—A court has no jurisdiction over a person who has not been made a party to an action before it. No judgment or decree in an action is binding on non-parties, nor is any finding made in the course of arriving at the judgment.⁵ There are exceptions to this rule for those who stand in privity with parties,⁶ and the doctrine of representation may extend the notions of who are parties,⁷ but we are concerned here primarily with situations which fall within the general rule. Under it the judgment cannot validly bind non-parties through operation of *res judicata* or collateral estoppel.

It does not follow, however, nor is it true that judgments are always without practical, substantial effect on non-parties. Some of the most obvious and often serious of these effects are not in the usual case regarded as a basis for making the person affected a party at all. Thus a man's family and his creditors may be greatly affected by a judgment in his favor or by one against him; but this does not ordinarily give them any standing as parties to the action, to say nothing of making their presence necessary or indispensable.

Other practical effects on non-parties are, however, considered in connection with such an inquiry. Thus, a judgment under which a fund will be distributed seriously affects all claimants to the fund.⁸ While the claim of a non-party is not legally extinguished by the judgment, it may as a practical matter be worthless (for instance when the obligor is insolvent) unless it can be satisfied out of the fund. A judgment decreeing

4. The text borrows heavily from the analysis made in Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483 (1957).

This has had influence on recent rules and legislation. See MICH. GEN. COURT RULES 205 (1963); N.Y.C.P.L.R. § 1001. See also NEW YORK ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, FIRST PRELIMINARY REPORT 248-51 (1957), set out in ROSENBERG AND WEINSTEIN, *ELEMENTS OF CIVIL PROCEDURE, CASES AND MATERIALS* 1126-29 (1962).

Professor Reed's article is complemented by the historical study in Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961). See also WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 70 (1963).

5. RESTATEMENT, JUDGMENTS § 93 (1942); 1 FREEMAN, *A TREATISE OF THE LAW OF JUDGMENTS* §§ 111, 407 (5th ed. 1925) [hereinafter cited as FREEMAN]; 30A AM. JUR. *Judgments* §§ 73, 393 (1958).

6. RESTATEMENT, JUDGMENTS §§ 83-92 (1942); 1 FREEMAN §§ 438-43; 30A AM. JUR. *Judgments* §§ 396, 399-403 (1958).

7. RESTATEMENT, JUDGMENTS §§ 85-87 (1942) (and *cf.* § 80); 1 FREEMAN §§ 435-37; 30A AM. JUR. *Judgments* §§ 404, 405 (1958).

8. *Williams v. Bankhead*, 86 U.S. (19 Wall.) 563 (1873); *Russell v. Clarke's Ex'ts*, 11 U.S. (7 Cranch) 69 (1812); 3 MOORE 2159, ¶ 19.08.

that the plaintiff is the owner of land will not bind non-parties who claim title or some interest in it, but it will undoubtedly cast a cloud on their title or other interest.⁹ A judgment cancelling a lease to oil land will inevitably affect persons to whom the lessor has granted a part of the mineral rights, subject to this and future leases but covering royalties payable under them.¹⁰ Where the State of Texas sought an injunction against enforcement of allegedly invalid orders of the Railway Labor Board affecting wages and working conditions of railroad employees, the railroads and the workers would unquestionably be affected by a decree in Texas' favor.¹¹

In all the situations described in the last paragraph, the non-parties were held indispensable. But the possibility of an adverse effect on non-parties, even when it is entitled to consideration, does not always render them indispensable. Thus in *Husting Co. v. Coca Cola Co.*,¹² plaintiff alleged that it had had a contract with Western Coca Cola Co. for the exclusive right to bottle and sell Coca Cola in the Milwaukee area, and that Wisconsin Coca Cola Co. and Milwaukee Coca Cola Co. had aided Western to breach this contract and to make a new exclusive contract with them. Wisconsin and Milwaukee were made defendants and served with process. Western was named defendant but could not be served. The plaintiff asked for damages and an injunction restraining the local companies from performing their contract with Western. They answered in abatement on the ground that Western was an indispensable party,¹³ but the Supreme Court of Wisconsin ruled otherwise. It is clear that the injunction would interfere with and probably stop performance by the local companies under their contract with Western, without Western's having its day in court to show that this contract involved no invasion of plaintiff's rights. At best this would leave Western with a lawsuit rather than performance. Under one line of cases Western would not even have that, since the local companies' non-performance would be excused by the decree forbidding it.¹⁴

(2) Protection of present parties from prejudice because of the absence of non-parties.—The absence of B as a party to an action may work

9. *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936).

10. *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946), *cert. denied*, 329 U.S. 782; *cf. Brodsky v. Perth Amboy Nat'l Bank*, 259 F.2d 705 (3d Cir. 1958).

11. *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158 (1922). Where plaintiff sought to enjoin a drainage district from using its facilities for disposal of waste water from oil wells, the proprietors of the oil wells were held to be indispensable parties in *Thompson v. Talbert Drainage Dist.*, 168 Cal. App. 2d 687, 336 P.2d 174 (1959).

12. 194 Wis. 311, 216 N.W. 833 (1927). For the subsequent history of this case, see 205 Wis. 356, 237 N.W. 85 (1931), *cert. denied*, 285 U.S. 538 (1932).

13. The local defendants also alleged that Western had properly terminated its contract with plaintiff because of plaintiff's failure to live up to its terms.

14. See analysis in Note, *Injunction against Performance of Contract in Absence of Party Thereto*, 41 YALE L.J. 1241 (1932).

prejudice to A, who is a party, in at least two ways. In the first place it may expose him to multiplicity of suits which, even without complicating factors, is itself something of an evil. But beyond that is the exposure, in some situations, to possible injustice such as double liability through the inconsistent results in two or more lawsuits which may occur because the non-party is not bound by the first judgment.

An example of uncomplicated multiplicity is found in the case of partial assignment or subrogation, when a debtor has incurred a single obligation he ought not to be subjected to multiple suits for its breach. The law recognizes this and where partial assignees are regarded as real parties in interest then all the holders of fractions of the claim should be joined in a single action—all are necessary parties.¹⁵ Another example is afforded where the obligation is originally undertaken to two or more obligees jointly.¹⁶ If there are two or more suits in these cases, the debtor will be harrassed—*bis vexatus*—but he runs no risk of double liability from inconsistent judgments¹⁷ (indeed such inconsistency may relieve him from part of the liability which would be imposed upon him by a single successful suit).

In other situations, however, a party to an action may be exposed to multiple liability as well as multiple suits, unless another is also made a party to the first action so as to be bound by the judgment. Thus, in *Mahr v. Norwich Union Fire Ins. Co.*,¹⁸ the defendant had issued a fire insurance policy to one Bartlett on his stock of goods in Iowa. Bartlett then mailed the policy to the plaintiff in New York as collateral for a loan, without formally assigning it. The goods were later destroyed by fire and after the loss, Bartlett formally assigned the policy to Kelly of Iowa. The plaintiff sought to restrain the defendant from paying money under the policy to Bartlett or Kelly and to direct it to pay to the plaintiff any money due for the loss. Kelly was not served with process though

15. *Grain v. Aldrich*, 38 Cal. 514 (1869); *Schilling v. Mullen*, 55 Minn. 122, 56 N.W. 586 (1893); *Verdier v. Marshallville Equity Co.*, 70 Ohio App. 434, 46 N.E.2d 636 (1940); *National Union Fire Ins. Co. v. Denver & R.G.R.R.*, 44 Utah 26, 137 Pac. 653 (1913); CLARK at 168-71.

While partial assignees and the partial assignor are all conditionally necessary parties, they are not indispensable. *Resnik v. La Paz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961); *Rogers v. Penobscot Mining Co.*, 154 Fed. 606 (8th Cir. 1907); *Hirsch v. Glidden Co.*, 79 F. Supp. 729 (S.D.N.Y. 1948).

16. See text at notes 88-97, *infra*.

17. If, that is, the only controversy is over defendant's liability and there are no conflicting claims about the validity of the alleged assignments or the extent of the interests held by the various potential claimants. Such conflicts may expose defendant to the possibility of multiple liability of the kind dealt with in the *Mahr* case, text at note 18 *infra*.

Some courts have held the avoidance of inconsistency to be important enough in itself to require the presence of all claimants even when that would oust the court of jurisdiction. *American Ins. Co. v. Bradley Mining Co.*, 57 F. Supp. 545 (N.D. Cal. 1944) (where, however, there was a more convenient forum available in which all could be joined); *cf. Langlie v. United Firemen's Ins. Co.*, 40 F. Supp. 24 (W.D. Wash. 1941). *Contra, Firemen's Fund Ins. Co. v. Crandall House Co.*, 47 F. Supp. 78 (W.D.N.Y. 1942).

18. 127 N.Y. 452, 28 N.E. 391 (1891).

the court had ordered him to be made a party. The trial court granted the relief asked for, but the court of appeals reversed, holding that Kelly was an indispensable party since his absence exposed the insurer to the possibility of double liability. Indeed, as the court pointed out, Kelly had recovered a judgment in Iowa between the time of the New York trial court's judgment and the decision of the appeal.¹⁹ The Iowa court noted that the New York court lacked jurisdiction over Kelly so that its judgment was not binding upon him.

This insistence that a decree should not expose a party to double liability was a child of equity.²⁰ The law did develop a few devices for affording this kind of protection in particular situations,²¹ but no general principle was erected and the lack of it has been reflected in cases under the codes. In *Petrogradsky M. K. Bank v. National City Bank*,²² the directors of a bank chartered by the Imperial Russian Government sued the defendant to recover a deposit, after the revolution of 1917 and the confiscation of private property by the U.S.S.R., but before recognition of the Soviet Government by the United States. The defendant objected to the action on the ground that recovery would subject it to the possibility of double recovery, since France and other European countries where the defendant had assets had recognized the Soviet Government. The New York Court of Appeals, through Cardozo, Ch. J., rejected this defense. Cases like *Mahr* were distinguished because they involved equitable relief and did not govern actions at law.²³ "In actions of that order, a refusal to pay when due is not sustained without more by the presence of an adverse claim. The defendant, if unable to interplead, must respond to the challenge, and defend as best it can 'The chance of double payment is a common risk of life.'"²⁴ In a provocative note in their casebook, Professors Louisell and Hazard raise the question whether the recent case of *Western Union Tel. Co. v. Pennsylvania*²⁵ may have cast constitutional doubt on such rulings, at least where the threat of double liability is very real because both claims are being aggressively pursued.²⁶

A variant of double liability is the possibility that A, who is entitled to indemnity from B, may be sued alone and then fail to establish the

19. *Kelly v. Norwich Union Fire Ins. Co.*, 82 Iowa 137, 47 N.W. 986 (1891).

20. Contrast the *Mahr* case, note 18 *supra*, and *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925) with *Petrogradsky M.K. Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930); and see text at note 23 *infra*.

21. The introduction of interpleader to law was largely statutory. See Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814, 818 (1921); MACLENNAN, INTERPLEADER 6-9, App. (1901) (the Appendix sets out the American statutes then in force).

22. 253 N.Y. 23, 170 N.E. 479 (1930).

23. See note 20 *supra*.

24. 253 N.Y. 23, 39, 40, 170 N.E. 479, 485. To the same effect is *Steingut v. National City Bank*, 38 F. Supp. 451 (S.D.N.Y. 1941).

25. 368 U.S. 71 (1961).

26. LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE 700 (1962).

conditions of indemnity against B in a second suit because B is not bound by the first judgment. The common law developed a measure of protection to A in some situations of this kind through the device of vouching B into the first action.²⁷

(3) Protection of society's interest in economy and effectiveness in litigation.—We have already spoken of multiplicity of suits as a burden on defendant, but society also has a distinct interest in avoiding unnecessary litigation because of the expense which litigation puts on the taxpayers and the disadvantages caused to the administration of justice generally by crowded dockets. Thus, even when a non-party's absence does not threaten a *defendant* with multiple suits (as where the later suit would be by the plaintiff against the non-party), society itself has some interest in avoiding the second suit.

Closely akin to society's interest in avoidance of unnecessary litigation is its interest in having a judgment or decree be as complete as possible. There was a traditional equitable principle

that when a decision is made, it shall provide for all the rights, which different persons have in the matters decided. For a "Court of Equity, in all cases, delights to do complete justice, and not by halves," to put an end to litigation, and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them.²⁸

As the quotation shows, the objective of completeness in judgments overlaps other objectives we have been discussing; a complete decree will protect parties who obey it as well as forestall further litigation by binding all persons who have or claim an interest in the controversy.

There are other aspects to this matter of completeness. There are many degrees of incompleteness. The absence of one party may simply prevent the court from putting the last piece of frosting on the cake;²⁹ the absence of another may render any judgment an altogether futile gesture.³⁰ Incompleteness of the former kind may be consistent with a useful judgment which does substantial justice among the parties present and no harm to absentees; its most serious vice may be nothing worse than an offense to an aesthetic yearning for symmetry. Incompleteness of the latter kind is an entirely different matter. Not only may it invite further litigation and leave present parties unprotected, but it will always

27. RESTATEMENT, JUDGEMENTS § 107(b) (1942) (and comment e); 1 FREEMAN §§ 447-50.

28. CALVERT, PARTIES TO SUITS IN EQUITY 2, 3 (2d ed. 1847).

29. Such as the formal action by corporate directors in declaring a dividend (on preferred stock) which the corporation is legally bound to pay. See *Kroese v. General Steel Castings Corp.*, 179 F.2d 760, 763-65 (3d Cir. 1950), 50 COLUM. L. REV. 997 (1950), 49 MICH. L. REV. 275 (1950).

30. See, e.g., *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897); cases cited notes 31 and 33 *infra*.

have another serious vice. Courts have ever shunned the making of judgments which cannot practically be enforced,³¹ and rightly so, since the entering of such idle decrees would soon impair the moral acceptability of court decisions. If the person who must take action in order to afford the relief sought is not brought within the court's jurisdiction, there can be no effective judgment.³² Such a person is indispensable. "[T]he problem must be tested in terms of the result if, under the particular setting, the [absentee]—not a party and hence under no coercive court order—sits tight and does absolutely nothing."³³ If his "sitting tight" will thwart an effective decree, the test is not met.

In this connection it should be noted that developments in the method of enforcing equitable decrees have narrowed the circle of those who could defeat a decree by sitting tight and doing nothing. As long as equity clung to the notion that it acted in personam only, against the conscience of the defendant, then such remedies as specific performance of a contract to sell land, or reformation or cancellation of an instrument, required personal obedience of the vendor or the original obligor of the instrument and no decree could be effective unless he was a party to the suit.³⁴ Now the decree for specific performance may (by statute) itself vest title to the land in the vendee, or authorize a deed in the vendor's name to be drawn by some court officer.³⁵ And upon proper findings, a court may simply treat an instrument as reformed or cancelled and render judgment accordingly.³⁶ Where equitable relief has come to be in rem in this way, then the other party to the contract or instrument is no longer needed in order to assure effectiveness to the decree. This is not to say that such persons may not properly be regarded as necessary or indispensable for some other reason, but simply that *this* reason for indispensability is no longer a valid one, though it may sometimes linger on as a contributing reason in fact, simply because of the frequent inability to use historical precedent with discrimination.³⁷

31. *Kendig v. Dean*, 97 U.S. 423 (1878); see *Underwood v. Maloney*, 256 F.2d 334, 338 (3d Cir. 1958).

32. Cases cited notes 30 and 31 *supra*.

33. *Johnson v. Kirkland*, 290 F.2d 440, 447 (5th Cir. 1961).

34. *Hart v. Sansom*, 110 U.S. 151 (1884); *Spurr v. Scoville*, 57 Mass. (3 Cush.) 578 (1849); HUSTON, ENFORCEMENT OF DECREES IN EQUITY chs. 4, 5 (1915) [hereinafter cited as HUSTON].

35. *Arndt v. Griggs*, 134 U.S. 316 (1890).

The statutes in effect in 1915 are collected in the Appendix to HUSTON, at 157.

The West Virginia court gave equitable decrees an in rem effect in land cases without benefit of statute. *Tenant's Heirs v. Fretts*, 67 W. Va. 569, 68 S.E. 387 (1910) (cloud on title cancelled against nonresident). See HUSTON chs. 4-6.

36. *Mike Occhiato Mercantile Co. v. Allemannia Fire Ins. Co.*, 98 F. Supp. 888 (D. Colo. 1951); *Stubbs v. Standard Life Ass'n*, 125 Colo. 278, 242 P.2d 819 (1952); *Hornick v. Union Pac. R.R.*, 85 Kan. 568, 118 Pac. 60 (1911); *Phillips v. Johnson*, 202 Okla. 645, 217 P.2d 520 (1950); *Taylor v. Highland Park Corp.*, 210 S.C. 254, 42 S.E.2d 335 (1947); *Craft v. Hahn*, 246 S.W.2d 897 (Tex. Civ. App. 1952).

37. See, e.g., *Cunningham v. Brewer*, 144 Neb. 211, 16 N.W.2d 533 (1944); and con-

(4) Protection of plaintiff's interest in access to a convenient forum which will adjudicate his claim on the merits.—The plaintiff clearly has the greatest interest in securing some forum, preferably a convenient forum, for the adjudication of his claim on the merits. A ruling that a non-party is indispensable so that the action may not go forward until he is brought in frequently will not jeopardize this interest at all. If the non-party may be brought within the forum court's jurisdiction, and if his presence will not oust the court of jurisdiction or render venue of the action improper, then such a ruling will impose no greater burden on the plaintiff than the extra procedural step in making him a party. Difficulty for the plaintiff will be encountered, however, if the non-party does not live in the state where the action is brought.

In personal actions the basic requirement for obtaining jurisdiction over a party is service of process upon him *within the territorial jurisdiction of the court*³⁸—usually, that is within the state in which the court is located.³⁹ This means that it is often impossible for the courts in one state to get jurisdiction over parties who live in another. A ruling then, that a non-party is indispensable may mean that the action cannot go forward in the forum of the plaintiff's choice.

Presumably there is some forum in which jurisdiction can be obtained over this indispensable non-party. But if there are more indispensable parties than one, and if they live in different states, then there may be no state in which jurisdiction over all of them can be obtained.⁴⁰ And in most cases the reach of federal process is no longer than that of a state,⁴¹ so that the plaintiff's predicament is not helped by the possibility of resort to a federal court even if his action is otherwise one over which such a court would have jurisdiction. In some situations, therefore, a ruling that a non-party is indispensable may in effect foreclose all courts to a plaintiff.

In some cases the very number of persons who should be made parties poses practical difficulties (such as ascertaining them all, keeping abreast of constant changes in the group, and so on) which may prove

trast *Sigal v. Hartford Nat'l Bank & Trust Co.*, 119 Conn. 570, 177 Atl. 742 (1935). See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 483, 501 (1957).

38. *Pennoyer v. Neff*, 95 U.S. 714 (1877), is the leading case on this point.

39. While Congress can constitutionally make the reach of federal process nationwide, it has done so only in a few exceptional situations. See, e.g., 15 U.S.C.A. § 22 (actions under anti-trust laws); 28 U.S.C.A. § 2361 (interpleader actions).

For the most part, process issuing out of a federal court (other than a subpoena) may be served only "within the territorial limits of the state in which the district court is held." FED. R. CIV. P. 4(f) (recent amendments have slightly extended this reach for persons brought in on impleader or as necessary or indispensable parties).

40. This was probably the case in *Shields v. Barrow*, 58 U.S. (17 How.) 129 (1854); *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950); *Bank of California v. Superior Court*, 16 Cal. 2d 516, 106 P.2d 879 (1940). Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

41. See note 39 *supra*.

insuperable in either a state or federal court.⁴² Not only is the difficulty of getting jurisdiction over nonresidents usually present when the action is brought in a federal court, but additional difficulties are often encountered. If federal jurisdiction is based on diversity of citizenship⁴³ this means that diversity must be complete; *no* plaintiff may be a co-citizen of the same state with *any* defendant.⁴⁴ Even if process can be served on an indispensable party, therefore, his presence in the action may oust a federal court of jurisdiction over the subject matter. And even when it does not do that, the federal rule of venue may mean that the district in which the action is originally brought is not a district in which the new party may properly be sued over his objection to the venue; so that if such objection is made, the action cannot go forward in that district.⁴⁵ To make matters still worse there are still some situations in which venue cannot properly be laid in *any* district if all indispensable parties are brought into the action.⁴⁶ Such a case cannot be brought before any federal court unless the objection to venue is waived.

From the above it will be seen that a ruling that a non-party is indispensable will not infrequently mean: (1) that the plaintiff's action cannot go forward in the court of his choice; (2) that this is even more often true where he has chosen a federal court; and in many of these cases; (3) that all courts are foreclosed to plaintiff. Any of these results imposes some hardship on the plaintiff, the last one a dire hardship. An analysis of this aspect of the problem would be incomplete, however, without pointing out some factors and some developments which tend to reduce the frequency with which a ruling of indispensability involves such serious results:

(a) It has long been the law that when an action is in rem the court which has jurisdiction over the *res* has power to adjudicate all interests in and claims to that *res*.⁴⁷ Personal service over the holders or claimants of such interests is not necessary so long as reasonable means are chosen to notify them of the pendency of the action and give them a chance to come in and present their claims.⁴⁸ If, therefore, such an action is brought in a state court having jurisdiction over the *res*, there is no insuperable obstacle to bringing in any party whom a court holds indispensable, unless the mere size of the group to be brought in imposes an

42. See, e.g., *Hicks v. Southwestern Settlement & Dev. Corp.*, 188 S.W.2d 915 (Tex. Civ. App. 1945).

43. 28 U.S.C.A. § 1332.

44. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

45. The general federal venue provisions are found in 28 U.S.C.A. § 1391. See Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); 3 MOORE ¶ 19.04.

46. Barrett, *supra* note 45, at 621-22; 3 MOORE ¶ 19.04.

47. *Arndt v. Griggs*, 134 U.S. 316 (1890); 1 FREEMAN § 347.

48. *Ibid.* Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1958); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

obstacle.⁴⁹ In this context the distinction between necessary and indispensable loses its significance. This category covers a wide and important range of actions, for example most actions concerning real estate (except those for damages for injury to it). What has been said of state courts is also true of federal courts, so far as jurisdiction over the person is concerned. In diversity cases, however, requirement of completely diverse citizenship holds for in rem actions as well as other types, so that the joinder of indispensable parties may still oust the court of jurisdiction over the subject matter.⁵⁰

(b) Even when an action is regarded as in personam, or not strictly in rem, the requirements for obtaining jurisdiction over a defendant have been substantially liberalized.⁵¹

(c) The concept of "involuntary plaintiff" softens the blow of a ruling that a non-party is indispensable on the plaintiff's side, in an area of limited but uncertain extent. Equity had developed the practice of making an unwilling plaintiff a defendant to bring him into the action,⁵² and this may be done under the codes and all modern procedures.⁵³ This device will not help, however, when jurisdiction cannot be obtained over the unwilling party; the requirements on that score are the same as in the case of any defendant.⁵⁴ The involuntary plaintiff, on the other hand, need not be served. He is named as plaintiff in spite of himself and is bound by the judgment just as if he had voluntarily participated in bringing the action.⁵⁵ Obviously this cannot be done in all cases; due process cannot be circumvented by so facile a form of words. There must have been some relationship between the real plaintiff and the one whose name is used, on the basis of which either some kind of implied authority to

49. As in *Hicks v. Southwestern Settlement & Dev. Corp.*, 188 S.W.2d 915 (Tex. Civ. App. 1945), discussed *infra* at notes 76-78. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 483, 489-93 (1957).

50. *Torrence v. Shedd*, 144 U.S. 527 (1892); *Parker v. Overman*, 59 U.S. (18 How.) 137 (1855).

51. See, e.g., Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

52. CLARK at 354. Cf. *Vinson v. Home Ins. Co.*, 123 W. Va. 522, 16 S.E.2d 924 (1941) (case transferred from law to equity side to permit this practice).

53. A typical code provision is: "If one who ought to be joined as plaintiff shall decline to join, he may be made a defendant, the reason therefor being stated in the complaint." CLARK at 359-60.

FED. R. CIV. P. 19(a) provides in part: "When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or, in proper cases, an involuntary plaintiff."

54. *Independent Wireless Tel. Co. v. Radio Corp. of America*, 269 U.S. 459 (1926); *McAulay v. Moody*, 185 Fed. 144 (C.C. Ore. 1911).

55. *Hawkinson v. Carnell & Bradburn*, 26 F. Supp. 150 (E.D. Pa. 1938). See Paul E. *Hawkinson Co. v. Carnell*, 112 F.2d 396, 398 (3d Cir. 1940). Contrast *Gibbs v. Emerson Elec. Mfg. Co.*, 29 F. Supp. 810 (W.D. Mo. 1939).

See generally Commentary, *The Involuntary Plaintiff*, 4 FED. RULES SERV. 907 (1941); 3 MOORE ¶ 19.06.

use it can be spelled out, or judicial imposition of such authority may be warranted.⁵⁶

The notion of involuntary plaintiff was not altogether unknown to the common law though the term was not used. The assignee of a chose in action could often sue in the assignor's name and the latter had no say in the matter and no control over the action.⁵⁷ The authority in this kind of situation may be found in the assignment itself as well as in the power of attorney which often accompanied it. There was also some common-law authority for the similar use by one joint obligee of another's name in an action to enforce the joint right.⁵⁸ Equity, too, made use of such a procedure. In the leading case of *Independent Wireless Tel. Co. v. Radio Corp. of America*,⁵⁹ the Supreme Court allowed suit to be brought in the name of a patentee by its exclusive licensee of the patent, to enjoin infringement thereof. This case was cited by the committee which drafted the federal rules, as an "example of a proper case for involuntary plaintiff" in its note to Rule 19 which provides: "When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or, in proper cases, an involuntary plaintiff."⁶⁰

It has been urged, with good reason,⁶¹ that a joint obligee of a contract or other obligation may properly be made an involuntary plaintiff, but the recent cases to date have not gone so far.

(d) The doctrine of representation⁶² and the representative or class suit,⁶³ where applicable, have enabled parties to overcome the difficulties of indispensability.

56. Sources cited note 55 *supra*. In *Rosen v. Rex Amusement Co.*, 14 F.R.D. 75 (D.D.C. 1952), authority to make a partner an involuntary plaintiff was denied where the appearing plaintiffs sought to enforce some rights against the absent partner.

57. *Farmers & Mechanics' Bank v. Humphrey*, 36 Vt. 554 (1864); Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816 (1916).

58. *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48 (1908); *Harris v. Swanson & Bros.*, 62 Ala. 299 (1878); *Ingham Lumber Co. v. Ingersoll*, 93 Ark. 447, 125 S.W. 139 (1910); *Wright v. McLemore*, 18 Tenn. (10 Yerg) 235 (1837); Comment, *Compulsory Joinder of Unwilling Plaintiffs in Civil Actions*, 25 Mo. L. Rev. 63 (1960); Note, 48 W. VA. L.Q. 184 (1942). Cf. *Chambers v. Donaldson*, 9 East 471, 103 Eng. Rep. 653 (K.B. 1808). A nonassenting partner could insist on indemnity against payment of costs.

59. 269 U.S. 459 (1926).

60. 3 MOORE ¶ 19.01[2] sets out the text of the original note.

61. After citing *McAulay v. Moody*, 185 Fed. 144 (C.C. Ore. 1911), in which the action failed for want of jurisdiction and proper venue when a nonresident joint obligee was sought to be made a defendant, Professor Moore continues: "The obligees were left without a remedy. Both of these difficulties could be obviated by making the obligee an involuntary plaintiff, and we believe that this is a 'proper case' for the application of that doctrine." 3 MOORE 2150, ¶ 19.06, n.10. Compare also sources cited note 58 *supra*.

62. See text at note 7 *supra*.

63. See FED. R. CIV. P. 23; 3 MOORE at 3401-560. The subject of the class suit is an interesting and controversial one. See, e.g., Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Kalven & Rosenfeld, *Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958).

(e) There has been some use of the power of Congress to make federal process nationwide. In the present connection the federal Interpleader Act has within limits greatly increased the availability of parties who may be held indispensable.⁶⁴

Summary and analysis.—The considerations described in the foregoing sections are, it is submitted, the principal ones, if not the only ones, entitled to weight in determining whether a party is necessary or indispensable. While they are basically few and simple, yet each one may exist in varying degrees and the different interests represented often compete so that the total net impact of all the relevant considerations varies infinitely from case to case. Moreover, in many cases a factual inquiry is needed before a realistic appraisal can be made of the weight properly to be attached to one or more of the factors. Because of all this, the problem does not readily lend itself to solution by fixed and rigid rules. What is called for, rather, is flexibility and a case-by-case appraisal of the relevant factors. Moreover, when the consequences of indispensability are grave for the plaintiff, courts should be astute to fashion their decrees so as to do as much justice as they can without unduly impairing the interests of absentees or present parties. Completeness of judicial action and avoidance of multiple suits are good things, but they should not be bought at too high a price in terms of substantive justice.

The point of view set forth in the last paragraph has been urged as the overall solution of this problem⁶⁵ and it is probably consistent with the historical development of the requirements for parties in equity. Moreover it has found application in recent legislation⁶⁶ and in some well reasoned recent cases. There are, however, classifications and formulas which have currency with the courts today and they deserve separate treatment. Before that is done a few examples of careful judicial appraisal of the relevant considerations may well be described.

In *Kroese v. General Steel Castings Corp.*,⁶⁷ a preferred stockholder sued a Delaware corporation in a Pennsylvania federal court to compel the payment of dividends. Since dividends were payable "when and as declared by the Board of Directors," the district court held a majority of the board members to be indispensable parties.⁶⁸ According to the plaintiff's claim there was no one state or federal district in which a majority might be served.⁶⁹ The court of appeals reversed this ruling. It

64. See note 39 *supra*. For treatments of the problems involved in interpleader, see, e.g., Chafee, *The Federal Interpleader Act of 1936*, 45 *YALE L.J.* 963, 1161 (1936); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 *HARV. L. REV.* 874 (1958).

65. See sources cited note 4 *supra*.

66. *Ibid.*

67. 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950), 50 *COLUM. L. REV.* 997 (1950), 49 *MICH. L. REV.* 275 (1950).

68. *Kroese v. General Steel Castings Corp.*, 9 F.R.D. 273 (E.D. Pa. 1949).

69. 179 F.2d at 762.

found that under the allegations of the complaint, affairs had "reached the point where the judgment of the directors is no longer controlling,"⁷⁰ under substantive law. The court's judgment based on a rule of law had become substituted for the directors' business judgment. If formal action had to be recorded on a minute book "that formal action [was] nothing but a ministerial act."⁷¹ Further, the decree could be made effective without the directors' being bound by it. A chancellor "with legal imagination" could "do a great deal" to incorporate property within Pennsylvania, by sequestration, if need be. If the formal act of the directors was necessary to fulfill Delaware law,

we cannot think that a receivership or sequestration of a foreign corporation's property will not produce the result. Equity courts have known for a long time how to impose onerous alternatives at home to the performance of affirmative acts abroad as a means of getting those affirmative acts accomplished.⁷²

In *Bank of California v. Superior Court*,⁷³ plaintiff sued to enforce the provisions of an alleged contract with the decedent to leave her entire estate (about 225,000 dollars) to the plaintiff. The decedent's will "left individual legacies and bequests amounting to \$60,000 to a large number of legatees, including charitable institutions and individuals, some residing in other states and in foreign countries."⁷⁴ The executor and all beneficiaries under the will were named defendants but only the executor and the residuary legatee were served. The California Supreme Court held that the trial court had discretion to allow the action to proceed without the missing beneficiaries. Their share of the estate would not be affected at all—the plaintiff would simply get less than she claimed because of their absence.⁷⁵ And the objections addressed to inconvenience and possible multiplicity of suits were properly to be weighed in the exercise of discretion but would not bar the action as a matter of law.

In *Hicks v. Southwestern Settlement Dev. Corp.*,⁷⁶ 104 tenants in common, as heirs of Tom Collier, sued for possession of oil and gas lands and for damages for the withdrawal and appropriation of oil and gas.

70. *Id.* at 763.

71. *Id.* at 764. *Cf.* *W.Q. O'Neill Co. v. O'Neill*, 118 Ind. App. 116, 25 N.E.2d 656 (1940); *Rockenfield v. Kuhl*, 242 Iowa 213, 46 N.W.2d 17 (1951).

72. 179 F.2d, at 764, 765. The decision in the *Kroese* case has been followed in *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609 (5th Cir. 1957); *Whittemore v. Continental Mills*, 98 F. Supp. 387 (D. Me. 1951); *Swinton v. W.J. Bush & Co.*, 199 Misc. 321, 102 N.Y.S.2d 994 (Sup. Ct. 1951) *aff'd*, 278 App. Div. 754, 103 N.Y.S.2d 1019 (1951). But contrast *Schuckman v. Rubenstein*, 164 F.2d 952 (6th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); Note, 50 MICH. L. REV. 275 (1950) (approving result in *Kroese* but stating that majority view was then opposed to it).

73. 16 Cal. 2d 516, 106 P.2d 879 (1940).

74. *Id.* at 518, 106 P.2d at 882.

75. *Cf.* *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961).

76. 188 S.W.2d 915 (Tex. Civ. App. 1945).

The defendants pleaded that there were 574 other heirs who were indispensable parties. The trial court dismissed the action because of their non-joinder, but the appellate court reversed this ruling. It recognized that tenants in common should all join in seeking damages,⁷⁷ but nevertheless allowed the plaintiffs to proceed because of the hardship which would otherwise be involved. It described the situation graphically as follows:

The petition names 104 plaintiffs, of whom perhaps 17 are formal parties. Plaintiffs include residents of fifteen counties in Texas and two parishes in Louisiana; two come from Michigan, and one from Puerto Rico. The pleas in abatement now list 574 additional heirs of Tom Collier and tenants in common of appellants who are described as necessary parties to this suit. It is with more than casual interest that we have searched for some evidence or some statement to the effect that these were all of such heirs, but we have not found such evidence or such a statement in the record. It seems of direct significance to the application of the exceptions noted that appellees amended their pleas in abatement twice; that their first amended pleas in abatement listed 512 such heirs and that 63 additional heirs were named in the second amended pleas, on which the trial court acted. It now appears that five persons who were named in said first amended pleas are dead; that three persons named in said pleas are now described as married women, and that mistakes in the names of several individuals have been discovered and corrected. The first amended pleas are not in the transcript; they have been adopted and described generally in defendants' second amended pleas, but we have observed that among the 63 additional heirs are residents of four additional states, namely, of two counties in New Mexico, one county in Arizona, two counties in Georgia, and one county in Florida. These 63 persons also include residents of three additional parishes in Louisiana and nine additional counties in Texas. Among these 63, one unknown person, a formal party, is referred to; no addresses are given for two persons; and eight minors are listed, without reference to guardianship. Although we have no information respecting the status and residence of the 512 heirs listed in the first amended plea, we feel safe in assuming that they are as diversely scattered about the United States and are of as varied a status as are the 63 additional persons named in the second amended pleas.⁷⁸

THE TEST FORMULATED IN *Shields v. Barrow*

The most famous formulation made by an American court of the general equitable rule governing indispensable and necessary parties is

77. *Id.* at 919, citing *May v. Slade*, 24 Tex. 205 (1859). The purpose of the rule requiring joinder here is to avoid multiplicity of suits. ●

78. *Id.* at 927, 928.

that found in *Shields v. Barrow*,⁷⁹ decided by the Supreme Court of the United States in 1854. Under this test parties are indispensable

who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.⁸⁰

Necessary parties are those

having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it.⁸¹

These passages so far as quoted embody a test quite consistent with the one suggested here. The protection of the non-party's interest is clearly referred to; and a judgment which unduly prejudices a present party because of a non-party's absence may well be described as a "termination [of the case] inconsistent with equity and good conscience." Moreover, there is nothing in the statements quoted above which suggests a rigid rule rather than the balancing of interests from case to case in the manner so traditional with equity.

In spite of all this, as Professor Reed has shown in a perceptive article,⁸² *Shields v. Barrow* has had a restrictive effect on the law and represents a stage in the development of the equitable doctrine wherein the earlier imaginative flexibility had given way to a search for rules that afforded more of certainty, and consequently of rigidity. This is reflected not in the passages quoted above but in the references immediately thereafter and at other points in the opinion to the concept of "separability," and in the actual *holding* of the court. Unavailable necessary parties need not be joined "if their interests are separable from those of the parties before the court."⁸³ And where rescission of a contract is sought, the interests of all the parties to it were held inseparable.

If separability is used simply as a compendious word to sum up the result of weighing the considerations listed above,⁸⁴ perhaps no great

79. 58 U.S. (17 How.) 129 (1854).

80. *Id.* at 139.

81. *Ibid.*

82. Reed, *supra* note 3, at 343-56.

83. 58 U.S. (17 How.) at 139.

84. This may be what the court had in mind in the passage quoted at note 71 *supra*, for the context of the quotation is this—if the interests of the directors are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.

harm is done, though the word is not a particularly apt one to describe such a process, and it is confusing for its suggestion of other considerations extraneous to the list. The word seems to suggest, and is often intended to convey, a reference to some additional formal test such as whether the words of an instrument create a joint obligation⁸⁵ (as opposed to a several obligation), or whether (as in *Shields v. Barrow* itself) all of the parties in question were parties to a single instrument which was challenged.⁸⁶ The notion here seemed to be that the instrument would either have to stand or fall as a whole and could not, for example, be cancelled as to some (those who are parties) and left intact as to others (non-parties). But as Professor Reed has shown,⁸⁷ this is much too conceptualistic; it is characteristic of the type of thinking that sees everything as either all white or all black. A multi-party agreement is a complex of rights and obligations and it is in fact perfectly possible to strike some down and to leave others alone. Perhaps a court *should* not do this in any given case, but if it should not, that is because of one or more of the considerations listed above. There is, it is submitted, no valid basis for an *additional* requirement of separability before a non-party's presence may be dispensed with; yet, statements of the rule frequently contain this as a distinct and separable requirement and this of course has not been without influence.

PARTIES HAVING JOINT OR UNITED INTERESTS

The typical code provisions require joinder as plaintiffs or defendant of "parties who are united in interest."⁸⁸ The federal rules provide that "persons having a joint interest shall be made parties."⁸⁹

So far as technically joint rights and obligations go, these provisions carry forward the traditional common-law rules. Joint obligees were indispensable parties plaintiff.⁹⁰ Joint obligors had to be joined as defendants but an unavailable obligor could be dispensed with.⁹¹ Statutes in

85. See text and authorities cited at notes 88-96 *infra*.

86. See also text and authorities cited at notes 110-15 *infra*.

87. Reed, *supra* note 3, at 343-46.

88. CLARK at 358.

89. FED. R. CIV. P. 19.

90. *Gregory v. Stetson*, 133 U.S. 579 (1890); *Perkins v. Standard Oil Co.*, 3 F. RULES SERV. 2d 19b. 321, Case 1 (D. Ore. 1960); *McAulay v. Moody*, 185 Fed. 144 (D. Ore. 1911); *Dewey v. Carey*, 60 Mo. 224 (1875); CLARK § 57; 3 MOORE ¶ 19.11; RESTATEMENT, CONTRACTS § 129 (1932). *Cf. McGinnis v. General Exch. Ins. Corp.*, 142 Kan. 338, 46 P.2d 876 (1935).

91. *Camp v. Gress*, 250 U.S. 308 (1919); *Greenleaf v. Safeway Trails, Inc.*, 140 F.2d 889 (2d Cir. 1944), *cert. denied*, 322 U.S. 736; RESTATEMENT, CONTRACTS § 117 (1932). All joint obligors must be joined on appropriate objection "except such of them as are at the time of suit dead or beyond the jurisdiction of the court." See *Baldwin v. Ely*, 127 Pa. Super. 110, 114, 193 Atl. 299, 301 (1937). See also *Dillon v. Barnard*, 328 Mass. 53, 101 N.E.2d 345 (1951); Reed, *supra* note 3, at 357-67; CLARK § 60; 3 MOORE ¶ 19.11.

many states made joint *obligations* joint and several,⁹² but joint *rights* remain joint.⁹³

The indispensability of the joint obligees as plaintiffs was tempered, by some courts at least, by the notion that each had given implied authority to the others to use his name if need be.⁹⁴ And there was some authority allowing an unavailable obligee to be omitted.⁹⁵

The law today is in about the same state. There is perhaps good reason for joinder of all joint obligors or obligees where that is feasible. In either case completeness of judgment and avoidance of unnecessary litigation will be furthered, in the social interest. In the case of joint obligees, their joinder will also protect the defendant from undue harassment. He has incurred only a single obligation and should be sued only once for it. But while these reasons are entitled to weight, they scarcely warrant the denial of substantive justice to the present obligees, or to obligees who can find only some of their joint obligors. And none of the other considerations listed above apply; absentees will not be prejudicially affected, nor will present parties be by a judgment which does not bind absentees (except only as this leaves the door open to further suits). There is then no justification for a rule which will stop the action for want to unavailable joint obligors or joint obligees. And if the latter are viewed as indispensable for historical or technical reasons, then the unavailable obligees should properly be made involuntary plaintiffs.

The same considerations which call for conditionally compulsory joinder of joint obligees apply to other situations also. As we have seen, partial assignees of a chose in action may sue in their own name, but the holders of all fractions of the single claim are necessary parties, as they should be, though not indispensable parties.⁹⁶

There is considerable authority for the proposition that tenants in common of real estate must all join in an action for damages to the property⁹⁷ (although one co-tenant alone may sue for possession of it⁹⁸). Here again, threat of multiple actions and harassment warrants a require-

92. See Burdick, *Joint and Several Liability of Partners*, 11 COLUM. L. REV. 101 (1911); 2 WILLISTON, CONTRACTS § 336 (rev. ed. 1936) (collecting statutes). Cf. UNIFORM COMMERCIAL CODE § 3-118(e).

93. Sources cited *supra* note 90; Reed, *supra* note 3, at 367-69.

94. Note 58 *supra*.

95. Keene v. Chambers, 271 N.Y. 326, 3 N.E.2d 443 (1936). Cf. 39 AM. JUR. *Parties* § 30, p. 893 (1942).

96. See note 15 *supra*.

97. Guth v. Texas Co., 155 F.2d 563 (7th Cir. 1946); Bullock v. Hayward, 92 Mass. (10 Allen) 460 (1865); DePuy v. Strong, 37 N.Y. 372 (1867) (in last two cases, defect was held waived by failure of timely objection). See Cummings v. Greif Bros. Cooperage Co., 202 F.2d 824, 829 (8th Cir. 1953) (joint owners).

98. Most v. Passman, 21 Cal. App. 2d 729, 70 P.2d 271 (1937); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951).

ment of joinder where that is feasible, but not at the possible cost of denying meritorious relief where it is not.⁹⁹

PARTIES HAVING INTERESTS IN REAL ESTATE

At the outset it should be recalled that actions to determine interests in real estate are in rem, so that no party is unavailable simply because he is beyond reach of the court's process.¹⁰⁰ Difficulty here may, however, come from the fact that parties are embarrassingly numerous (as with the heirs of Tom Collier¹⁰¹), that the holders of contingent interests are sometimes unascertainable and perhaps not even in being; and that federal jurisdiction based on diversity may be ousted by their joinder.¹⁰²

This wider availability of parties in this type of case means that a ruling of indispensability is fraught with less serious consequences for the plaintiff; in practically all cases he can get redress in the courts of the state in which the land lies. Such a ruling may, however, deprive the plaintiff of his access to a federal court. Whether, on balance, this is a good or a bad thing will depend on one's attitude towards diversity jurisdiction generally, and particularly where the question is one of local land law. In any event, it submitted, the availability of the state court is a factor properly to be considered by the federal court in weighing the relative interests which will be affected by a ruling of indispensability.¹⁰³ Even if the plaintiff's preference for the federal forum deserves the court's enthusiastic protection, the disappointment of that choice is not as great a hardship on the plaintiff as the foreclosing of all courts to him.

All who hold or claim interests in the land which may be affected by the relief sought are indispensable parties.¹⁰⁴ Thus, the record title owners of all the parcels of land which the plaintiff claims to have acquired by right of accretion, must be made parties in his action to have his claim declared valid.¹⁰⁵ All tenants in common to land must be joined in an action for its partition.¹⁰⁶ In an action to foreclose a mortgage or

99. Some cases allow one tenant in common to maintain an action for damages without joining his co-tenants. *Young v. Garrett*, 149 F.2d 223 (8th Cir. 1945) (under Arkansas law each tenant recovers his aliquot share); *Carlson v. McNeill*, 114 Colo. 78, 162 P.2d 226 (1945); *Lee v. Follensby*, 86 Vt. 401, 85 Atl. 915 (1913) (one co-tenant recovers for whole damage but holds shares of other co-tenants in trust for them).

100. Note 47 *supra*.

101. Note 76 *supra*.

102. *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); text at note 50 *supra*, and at notes 43 and 44 *supra*.

103. See *Fouke v. Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952) (noting availability of state court).

104. *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957); *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952).

105. *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960).

106. *Barney v. Baltimore*, 73 U.S. (6 Wall.) 280 (1867); *Henry Quellmalz Lumber & Mfg. Co. v. Roche*, 145 Ark. 38, 223 S.W. 376 (1920); *Gates v. Salmon*, 35 Cal. 576 (1868).

other lien, the owner of the equity of redemption and all *junior* encumbrancers are generally regarded as indispensable parties.¹⁰⁷ On the other hand, holders of interests which will not be disturbed or affected by the relief need not be joined. Thus, in the partition case, a lessee of the property need not, by the weight of authority, be made a party since the relief affects only the reversion and leaves the tenancy intact.¹⁰⁸ And in foreclosure cases, where liens senior to the plaintiff's will not be disturbed by the judgment sought, the senior lienors need not be joined.¹⁰⁹

PARTIES TO AN INSTRUMENT

A question often arises whether all parties to an instrument need be joined in an action to cancel or reform it. The instrument may affect interests in land (*e.g.*, lease, deed, mortgage), or it may not (*e.g.*, insurance policy). It is often said that all such parties are indispensable¹¹⁰ and indeed under the facts of any given case it will often appear that the omitted party is indispensable under the tests suggested above. Thus, where a stockholder and creditors of a corporation sued it to set aside transfers of corporate property which the corporation had allegedly made *ultra vires* and without consideration, the grantees were held indispensable. Any decree in their absence—since it could not bind the grantees—would be ineffective and futile, except as it cast a cloud on the grantees' title and therefore created some bargaining leverage against them. And to the extent it did that, the decree would adversely affect their interests without a chance on their part to be heard on the merits.¹¹¹ But parties to an instrument may have passed out of the picture so far as any significant present interest goes, and the only need for their presence may be a vestige of the notion that equity once acted only in personam so that the effectiveness of her decrees depended on coercing

107. See, *e.g.*, *Black v. London Assur. Co. of London*, 122 F. Supp. 330 (W.D.S.C. 1954) (judgment lienors junior to mortgage); *Auburn Ins. Agency v. First Nat'l Bank*, 263 Ala. 30, 81 So.2d 600 (1955) (second mortgage); *City of Wilmington v. Merrick*, 231 N.C. 297, 56 S.E.2d 643 (1949); 4 AM. LAW OF REAL PROPERTY §§ 16.188, 16.191 (1952). *Cf. Kling v. Ghilarducci*, 3 Ill. 2d 454, 121 N.E.2d 752 (1954).

The use of the term necessary or indispensable here—at least for junior incumbrancers—probably does not mean that the action cannot proceed in their absence, but rather that their absence will render defective any title based on the judgment. See Reed, *supra* note 3, at 510-17; 4 AM. LAW OF REAL PROPERTY §§ 16.188, 16.191 (1952).

108. See, *e.g.*, *Fyffe v. Fyffe*, 292 Ill. App. 539, 11 N.E.2d 857 (1937); *Bethel College v. Gladdish*, 204 Ky. 10, 263 S.W. 659 (1924); *Thruston v. Minke*, 32 Md. 571 (1870); *Peterman v. Kingsley*, 140 Wis. 666, 123 N.W. 137 (1909). Compare *Willard v. Willard*, 145 U.S. 116 (1892); *Finch v. Smith*, 146 Ala. 644, 41 So. 819 (1906) (outstanding lease no bar to partition).

109. See, *e.g.*, *Mason v. Cathedral Bldg. Corp.*, 125 F. Supp. 542 (D. Alaska 1954); 4 AM. LAW OF REAL PROPERTY § 16.190 (1952).

110. See, *e.g.*, *Shields v. Barrow*, 58 U.S. (17 How.) 129 (1854); *Brodsky v. Perth Amboy Nat'l Bank*, 259 F.2d 705 (3d Cir. 1958); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *Morco Properties v. Cumberland Constr. Co.*, 19 F.R.D. 224 (W.D. Ky. 1956); *Cunningham v. Brewer*, 144 Neb. 211, 16 N.W.2d 533 (1944).

111. *Baten v. Nona-Fletcher Mineral Co.*, 198 F.2d 629 (5th Cir. 1952).

the personal obedience of the original party to the instrument to be reformed or rescinded.¹¹² When this is the case, it is submitted that the party's presence may be dispensed with now that equitable decrees are given in rem effect in such cases.¹¹³ Thus, in an action in ejectment between two grantees of a common grantor, where one of them claimed that the deeds should be reformed, it has been held that the grantor is not an indispensable party though he should be joined if available.¹¹⁴ In other cases, the absence of some parties to the instrument may mean only that a decree will lack perfect completeness. This should not stand in the way of a useful (if incomplete) decree when the incompleteness carries no threat of substantial injustice to anyone besides the plaintiff, and when the alternative to incomplete relief is no relief at all.¹¹⁵

112. *J.R. v. M.P.*, Y.B. 37 Hen. VI (C.P. 1459) reprinted in FIELD & KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 268 (1953). See sources cited note 34 *supra*.

113. See notes 35 and 36 *supra*.

114. *Flowers v. Germann*, 211 Minn. 412, 1 N.W.2d 424 (1941). Cf. *Crary v. Goodman*, 12 N.Y. 266 (1855), discussed in CLARK at 625 n.158.

115. *New England Mut. Life Ins. Co. v. Brandenburg*, 8 F.R.D. 151 (S.D.N.Y. 1948); Reed, *supra* note 3, at 343-56 (containing an admirable analysis of *Shields v. Barrow*).

In the *Brandenburg* case Judge Knox said: "courts are wary of the danger of permitting contradictory judicial orders being directed to a single fund, but are not so disturbed where the only possible inconsistency is that of two persons whose claims appear to be similar, one may ultimately recover and the other may not." 8 F.R.D. at 154.