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MANDATORY JOINDER OF PARTIES IN CIVIL PROCEEDINGS: THE CASE FOR ANALYTICAL PRAGMATISM

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Il est aisé de comprendre que si, d'un côté, la loi sur la procédure n'est que secondaire, en ce sens qu'elle n'a d'autre but que l'accomplissement de la loi civile, de l'autre, elle en est un complément necessaire, elle lui donne seule la force et la vie.[1]

Fundamental concepts of procedural policy have long limited a plaintiff's choice of those with whom and against whom he may or may not litigate. Those with whom he may not litigate are denominated improper parties. Those with whom he may litigate fall into any one of three classes: proper parties, necessary parties, or indispensable parties. Compulsory joinder problems have traditionally centered on consideration of whether a particular nonlitigant is "necessary" or "indispensable." Since the late eighteenth century courts have employed as tools of decision technical and abstract concepts such as "joint interest," "united in interest," "joint liability," "separability," and "complete justice." Reliance on such conceptualistic notions shifted attention away from the pragmatic, fact-oriented analysis that characterized English Chancery practice from 1674 to 1780,[2] occasioning what Professor John W. Reed has called "a ready reliance on labels for solutions of particular cases, a thoughtless reiteration — instead of a critical reexamination — of the basic principles of required joinder . . . ."[3]

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1. "It is easy to comprehend that in one sense the law of procedure is merely secondary, that is, it has no other purpose than the effectuation of the civil law; yet it is a necessary complement, it alone gives the civil law vitality and life." BELLOT, LOI SUR LA PROCÉDURE CIVILE DU CANTON DE GENEVÈ, AVEC L'EXPOSÉ DES MOTIFS (4th ed. 1877).

2. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1271 (1961). Professor Hazard's historical study reveals that the indispensable party concept was a late development that resulted from misinterpretations of decisions rendered during the tenures of Lord Chancellors Nottingham and Hardwicke.

3. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 329 (1957). Professor Reed's exhaustive study was the blueprint for the innovative amendment of

Rules of procedure govern the processes of the adjudicatory system and have no inherent value beyond that particular function. Their value lies not in what they are, but in what they do to make the substantive law real. Nevertheless, it is not infrequent that a particular procedural rule assumes a position in the law of such considered esteem that its proper adjectival role becomes forgotten. Particularly prone to this is any rule that may be stated clearly and simply and that has a good sound to it; its rough edges become smoothed and rounded; its internal structure becomes cohesive and coherent; it becomes a thing of beauty itself, like the work of an artist. Courts are loathe to disturb a rule that has become thus established, even if knowledge and experience demonstrate its obsolescence and irrelevance; they hesitate to tear it down, or even question it, because it has existed so long in its original shape.

In this fashion the rules of mandatory joinder have become ensnared, acquiring over the years an aura of mysticism that is difficult to penetrate. With the 1966 redesign of federal mandatory joinder law much of the fog has lifted, and in the federal courts a jurisprudence of labels has been replaced by a methodology of analytical pragmatism.[4] The influence of the traditional approach continues unabated in many state jurisdictions, including Florida; the following evaluative[5] and comparative study is designed to stimulate a reassessment of the law of mandatory joinder in Florida.

BASIC PRINCIPLES

The guiding rules in Florida have remained unchanged over the last century. Their origins are found in the writings of Justice Joseph Story and in an

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Federal Rule 19 in 1966. The Advisory Committee to the Supreme Court of the United States relied heavily on his thoughtful criticism of "labelism" and his forceful enunciation of pragmatic principles of decision.

4. Not everyone was in favor of the 1966 amendments. See Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19,* 74 YALE L.J. 403, 433 (1965). "A change in Rule 19 is not needed if its main purpose is to inform the federal courts that they can and should look to the practical realities of each case in determining whether the joinder of an absent person is absolutely required, since they have long done so and, since there is ample precedent in the cases for the federal courts to follow." *Id.* The reporter to the Advisory Committee on the Federal Rules of Civil Procedure responded to this criticism: "A new text was bound to be unsettling to bench and bar, and there was no assurance that it would generate better decisions than the old. But scholarly examination of the cases had turned up errors in no negligible quantity. With respect to a further group of cases, it would need a kind of clairvoyance to pronounce them right or wrong, since the courts, in tune with the rule, had not asked the really cogent questions and hence failed to bring out the facts and their legal implications, by reference to which the results could be intelligently criticized. One could well assume that a rule putting the right questions would produce results no worse and in all likelihood better than a rule that avoided crucial questions or put the wrong ones." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 HARV. L. REV. 356, 367 (1967). Further criticism was leveled at the proposed changes by the Committee on the Federal Rules of Civil Procedure, Judicial Conference (9th Cir. 1964), 36 F.R.D. 209, 214-221; 37 F.R.D. 71, 72-74, 499, 500.

5. Evaluation is difficult at times because the mechanical approach usually leaves critical facts uncovered. Many opinions fail to indicate whether the absentee *could* have been joined; they conclude simply that the absentee should have been joined.

early United States Supreme Court decision, *Shields v. Barrow*,[6] which has had a very profound impact on the American law of mandatory joinder. Indeed, the *Barrow* Court's description of the different categories of parties in civil proceedings is still central to present-day thinking. "Necessary parties," for example, were described as:[7]

> Persons 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. These persons are commonly termed necessary parties; but if their interests 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, [they] are not indispensable parties.

"Indispensable parties" were described as:[8]

> Persons 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.

These formulations, relied upon subsequently by many state[9] and federal[10] courts, were not necessarily inconsistent with a pragmatic resolution of the joinder issue; nevertheless, the unreasoned and perfunctory seach for separability[11] in *Shields v. Barrow* tainted the law of mandatory joinder.

As the *Barrow* definitions indicate there was great concern at equity that a decree be complete and conclusive in its determination of a controversy. The equitable concept of the indispensable party was much broader than that of the courts at law. Joseph Story described the general rule in the courts of equity in his *Commentaries on Equity Pleadings*:[12]

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6. 58 U.S. (17 How.) 130 (1855).

7. *Id.* at 139.

8. *Id.*

9. The Florida supreme court has cited *Shields v. Barrow* as persuasive authority in a number of cases. *E.g.*, Alger v. Peters, 88 So. 2d 903 (Fla. 1956); Martinez v. Balbin, 76 So. 2d 488 (Fla. 1954); Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905).

10. *E.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

11. The Supreme Court of Florida has demonstrated a similar preoccupation with the concept of separability. *E.g.*, Alger v. Peters, 88 So. 2d 903 (Fla. 1956); Milton v. City of Marianna, 167 Fla. 251, 144 So. 400 (1932).

12. J. STORY, COMMENTARIES ON EQUITY PLEADING 74 (19th ed. 1892). The first edition was published in 1838. Story was in fact paraphrasing a passage from an earlier treatise by Mitford. J. MITFORD, PLEADINGS IN CHANCERY 164-65 (4th ed. Jeremy 1827). Story's statement of the general rule at equity has been recited frequently, without citation, in the opinions of the Supreme Court of Florida. *E.g.*, Baynard v. City of St. Petersburg, 130 Fla. 471, 178 So. 150 (1938); Pepple v. Rogers, 104 Fla. 462, 140 So. 205 (1932); McAdoo v. Moses, 101 Fla. 936,

> [A]ll persons materially interested in the subject-matter, ought to be made parties to the suit, either as plaintiffs, or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make perfectly certain, that no injustice is done, either to the parties before it, or to others, which might otherwise be grounded upon a partial view only of the real merits.

The completeness of the decree, its effectiveness in binding all of those with an interest in the subject matter, was the primary operative consideration in determining mandatory joinder issues at equity. Unlike the law court, which simply rendered a decision, the court of equity was granting specific relief, and thus the desire for an effective decree led to a definitional approach that included as required parties at equity many who would not be proper parties at law. At law those who had a direct legal interest in the subject matter of the suit were the only proper parties, and their joinder was required.[13] Although the focus at law was thus much different,[14] as a matter of fundamental policy the principles of mandatory joinder at law and equity were consistent, their outward differences being a function of the nature of legal and equitable remedies rather than of differing procedural policies.[15]

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132 So. 638 (1931); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Sarasota Ice, Fish & Power Co. v. Lyle & Co., 53 Fla. 1069, 43 So. 602 (1907); Gibson v. Tuttle, 53 Fla. 979, 43 So. 310 (1907); Robinson v. Howe, 35 Fla. 73, 18 So. 368 (1895). In some earlier cases credit was duly given. *E.g.*, McDonald v. Russell, 16 Fla. 260 (1877); Betton v. Williams, 4 Fla. 11 (1851); Fillyau v. Laverty, 3 Fla. 72 (1850). Story's statement has cast a spell upon many courts and is repeated and applied in a most unfortunate way. The dangerous phrase is "materially interested in the subject matter." It may be that an absentee has an interest in the subject matter of the dispute before the court. Yet if he is not "interested" in the object of the suit and thus can in no way be prejudiced by an adjudication in his absence, his interest in the subject matter is irrelevant.

13. "This doctrine, as to parties, constitutes one of the most striking differences between the proceedings in courts of law, and the proceedings in courts of equity. In general, courts of law require no more than that the persons directly and immediately interested in the subject-matter of the suit, and whose interests are of a strictly legal nature, should be parties to it. All other persons, who have merely an equitable, or remote interest, are not only not required to be parties, but are excluded from being made parties." J. STORY, *supra* note 12, at 77.

14. Those who were jointly liable to a plaintiff were required to be joined in a single proceeding as parties-defendant. Alderman v. Puleston, 156 Fla. 731, 24 So. 2d 527 (1954); Davis v. First Nat'l Bank & Trust Co., 112 Fla. 485, 150 So. 633 (1933); Harrington v. Bowman, 106 Fla. 86, 143 So. 651 (1932); Reed, *supra* note 3, at 360. In the absence of such joint liability, joinder was improper. Prosser v. Orlando Bank & Trust Co., 93 Fla. 177, 111 So. 516 (1927); Jonas v. Burks, 87 Fla. 68, 99 So. 252 (1924); Graham v. Sewell, 80 Fla. 720, 86 So. 639 (1920); Webster v. Barnett, 17 Fla. 272 (1879). Those who possessed a joint right against another were required to join together in a single proceeding as parties plaintiff. Atlanta & St. Andrews Bay Ry. v. Thomas, 60 Fla. 412, 53 So. 510 (1910); Reed, *supra* note 3, at 368. Plaintiffs whose interests were not joint were not permitted to join even though they had a common interest in the subject matter of the litigation. Edgar v. Bacon, 75 Fla. 679, 122 So. 107 (1929).

15. Reed, *supra* note 3, at 331.

The legal and equitable principles of joinder of parties are said to have been largely intermingled as jurisdictions merged their systems of law and equity, creating a single action, the civil action, in which both legal and equitable remedies would be available.[16] In general, the intermingling of equitable and legal procedural concepts occurred in Florida in the 1954 version of the Florida Civil Rules, long before the merger of law and equity in Florida in 1967. Although the 1954 Florida Civil Rules did set aside twenty provisions for application at equity only, the merger was in large part accomplished at that time. For example, the 1954 rule 1.17(a) concerning permissive joinder of parties was nearly identical to Equity rule 8 of the 1931 Chancery Act.[17] What appears to be a unique and astonishing situation is that Florida has never included its law of mandatory joinder of parties in its rules of civil procedure. The Chancery Act and the Common Law Rules contained no mandatory joinder provision, nor have the Civil Rules of Procedure ever contained such a provision. Although the law of mandatory joinder in Florida is entirely common law, the decisional process has intermingled the equitable and legal concepts.[18]

In *Commentaries on Equity Pleadings* Justice Story remarked that equity courts had long recognized two basic principles:[19]

> One of them is a principle, admitted in all courts upon questions affecting the suitor's person and liberty, as well as his property, namely, that the rights of no man shall be finally decided in a court of justice, unless he himself is present, or at least unless he has had a full opportunity to appear and vindicate his rights. The other is, that when a decision is made upon any particular subject-matter, the rights of all persons, whose interests are immediately connected with that decision, and affected by it, shall be provided for, as far as they reasonably may be.

The two ideas thus expressed by Justice Story in 1838 continue to be controlling principles of decision in mandatory joinder cases today.

The first of these principles is embodied in the federal due process protections, which prohibit application of the doctrine of res judicata to any person not made a party, not in privity with a party, or not represented by a party in a class action.[20] Nevertheless, this constitutional policy has often been

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16. "It is evident that the codes thus adopt the equity rule that all whose interests would be directly affected by the decree are necessary parties." C. CLARK, CODE PLEADING 358-59 (2d ed. 1947). *See also* Reed, *supra* note 3, at 331.

17. The only difference was that the real party in interest provision in Equity Rule 8 was mandatory ("shall"). Rule 1.17(a) used permissive language. Rule 1.17(a) is now FLA. R. CIV. P. 1.210(a) and the language remains unchanged.

18. The conceptualizations of *Shields v. Barrow* found their way into decisions at law as well as decisions at equity. See notes 9, 12 *supra*.

19. J. STORY, *supra* note 12, at 73.

20. Countless United States Supreme Court decisions have enunciated this principle. *E.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Hansberry v. Lee, 311 U.S. 32 (1940); Pennoyer v. Neff, 95 U.S. 714 (1877). It is also basic to Florida

distorted to stand for the proposition that a court has no jurisdiction to render a judgment as between those who are parties to the proceeding in the absence of an "indispensable" party. This, the jurisdictional theory of indispensability, is thoroughly discredited today.[21] The court's lack of power over an absentee can in no way affect its power to adjudicate the relative rights and obligations of those before it. Such an absence may cause a court to stay its hand but surely cannot affect its competence to adjudicate. Nevertheless, the failure to join an indispensable party is such a substantial defect that appellate courts consistently notice the defect *sua sponte,* even when it is not raised at the trial level[22] and despite the fact that most procedural systems require that such an objection be raised before appeal.[23] In this sense failure to join is treated like the defect of lack of subject matter jurisdication,[24] and it seems quite appropriate that an appellate court should have such power in order to protect

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jurisprudence. *E.g.,* Alger v. Peters, 88 So. 2d 903 (Fla. 1956); R.W. Holding Corp. v. R.I.W. Waterproofing & Decorating Co., 131 Fla. 424, 179 So. 753 (1938); Cline v. Cline, 101 Fla. 488, 134 So. 546 (1931); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 So. 108 (1913); Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905); Robinson v. Howe, 35 Fla. 73, 17 So. 368 (1895).

21. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). Reed, *supra* note 3, at 332, 342-43. "Professor John Reed has made an admirable analysis of the indispensable party rule, laying bare the logical and practical fallacies that underlie the jurisdictional theory of indispensability. As he points out, the fallacy lies in the assumption that because the court does not have jurisdiction over the absentee it cannot act with respect to those before it. Again as Professor Reed points out, this idea is just plain nonsense." Hazard, *supra* note 2, at 1255. *See also* Fink, *supra* note 4, at 416-21. The Advisory Committee Notes to Federal Rule 19, as amended in 1966, clearly indicate a rejection of the notion that "absence from the lawsuit of a person who was indispensable . . . itself deprived the court of the power to adjudicate as between the parties already joined." FED. R. CIV. P. 19 (Advisory Comm. Notes). The Advisory Committee Notes to FED. R. CIV. P. 19 state: "Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process." Especially convincing is the Supreme Court's statement in Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 198 (1827). "[W]e do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court." *See also* 3A J. MOORE, FEDERAL PRACTICE §19.05[2] (2d ed. 1971); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1359, at 630 (1972). *But see* Hanson v. Denckla, 357 U.S. 235 (1958). Likewise rule 12 of the Federal Rules of Civil Procedure makes a clear distinction between lack of jurisdiction and absence of an indispensable party. *See also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1611, at 108 (1972).

22. *See, e.g.,* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). Florida courts have long taken this approach. *See, e.g.,* Martinez v. Balbin, 76 So. 2d 488 (Fla. 1954); McAdoo v. Moses, 101 Fla. 936, 132 So. 638 (1931); Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905); Robinson v. Howe, 35 Fla. 501, 39 So. 392 (1905).

23. *See, e.g.,* FED. R. CIV. P. 12(h)(2); FLA. R. CIV. P. 1.140(h)(2).

24. *See, e.g.,* Louisville & Nashville Ry. v. Mottley, 211 U.S. 149 (1908); FED. R. CIV. P. 12(h)(3); FLA. R. CIV. P. 1.140(h)(2).

the absent party from whatever adverse factual effect[25] a judgment rendered in his absence may have.

The Florida supreme court has often used jurisdictional language when discussing the indispensability problem.[26] For example, in *Oakland Properties Corp. v. Hogan*[27] the court declined to permit the issuance of a decree for reformation of a contract for the sale of real property to include an additional sixty-five acres of land. The court reached the inescapable conclusion that such a decree would be useless, since the grantor, although named as a party-defendant, had never been served with process.[28] The court said it was *"without jurisdiction* to determine the issue presented."[29] Although the jurisdictional theory does not improperly affect the ultimate decision in such a case, a court will obviously not consider the possibility of rendering a conditional or contingent decree if it considers the absence of a particular party to be a jurisdictional defect.[30] If, however, the defect is not considered jurisdictional a court can adjudicate the controversy between the parties before it with the proviso that the decree will not have effect until a similar and consistent decree is obtained against the absentee. In many circumstances, such a solution would be very consistent with considerations of "equity and good conscience."[31] A court might also be able to accompany the decree with protective provisions that would at once settle the dispute between the litigating parties and at the same time protect the absentee from prejudice.[32] These options are foreclosed whenever a court takes the jurisdictional approach to the nonjoinder problem, and thus the flexibility of a nonjurisdictional approach seems clearly preferable.[33]

The second of the two principles mentioned by Justice Story represents a laudable desire to achieve the complete settlement of a controversy. In these times of clogged court calendars avoidance of multiplicity of litigation is certainly an important consideration. The expansive joinder devices now avail-

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25. The only effect that such a judgment could have would be factual. The absent party cannot be legally bound by the judgment. *See* note 20 *supra* and accompanying text.

26. *E.g.*, Alger v. Peters, 88 So. 2d 903 (Fla. 1956); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 So. 108 (1913); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904). Florida Rule 1.140(b), however, makes a clear distinction between an objection for failure to join an indispensable party and an objection for lack of jurisdiction over the subject matter. FLA. R. CIV. P. 1.140(b).

27. 96 Fla. 40, 117 So. 846 (1928).

28. The absent grantor was labeled "indispensable." *Id.* at 49, 117 So. at 849.

29. *Id.* at 45, 117 So. at 847 (emphasis added).

30. *See* FED. R. CIV. P. 19(b).

31. FED. R. CIV. P. 19(b); Shields v. Barrow, 58 U.S. (17 How.) 130 (1855).

32. *See* note 30 *supra* and accompanying text.

33. The jurisdictional theory leads courts to the statement of this *non sequitur:* One who is not a party cannot be bound by a judgment and because *A* is not a party and would be bound by this judgment, no judgment can be rendered. In Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904), the supreme court made just such a statement. Professor Reed points out the fallacy of this reasoning: "If *A cannot* be bound by a court's judgment in his absence, he *will not* be bound by the court's judgment in this case." Reed, *supra* note 3, at 333.

able in most jurisdictions *permit* the joinder of parties and claims so as to finally and completely settle a controversy in a single proceeding. Rules that allow free joinder of claims, permissive counterclaims, cross-claims, impleader, intervention, class actions, and permissive joinder of parties are all designed to accomplish settlement of multi-party or multi-claim controversies in a single proceeding whenever feasible and fair. The doctrines of res judicata, collateral estoppel, and law of the case are likewise designed to prohibit relitigation of issues of fact and law. Nevertheless, the desire for completeness in litigation is prone to overemphasis. Justice Story said: "[C]ourts of equity delight to do justice, and not by halves."[34] The danger is that courts may forget that their first obligation is justice and that avoidance of further litigation may not be consistent with that primary obligation. Whenever the refusal to adjudicate because of the absence of an interested party would result in a denial of the plaintiff's substantive rights, a court should be most hesitant to stay its hand; it may be that justice can be fully obtained only through more than one lawsuit. Indeed, multiple litigation often will not subject either parties-defendant or the absentee to relitigation or harassment. In such situations considerations of convenience should be secondary;[35] the absentee should be considered necessary, not indispensable, and the litigation should proceed without him if joinder is not feasible. As long as courts are reluctant to classify an absentee as indispensable, as long as they keep sight of the primary goal of justice, the policy favoring completeness of litigation can be put into perspective and properly implemented.

A final matter of uncertain significance was raised by the United States Supreme Court's decision in *Western Union Telegraph Co. v. Pennsylvania.*[36] The Commonwealth of Pennsylvania brought suit in a Pennsylvania state court to escheat Western Union money orders that for various reasons Western Union was unable to deliver. The state of New York, which claimed a right to escheat the same obligations, was not a party and could not be made a party, since jurisdiction could not be obtained over it in Pennsylvania. As amicus curiae, New York presented its claims in a brief and by oral argument, and the Supreme Court, finding those claims to be "actual, active and persistent,"[37] concluded that it would be a violation of due process to compel Western Union to relinquish the property without assurance that it would not be held liable again in another jurisdiction or in a suit brought by a claimant not bound by the first judgment. That assurance not being possible because New York was not a party and could not be bound by a Pennsylvania judgment, the Court held that Western Union was not sufficiently protected to permit the Pennsylvania judgment to stand. The Court pointed out that there was an alternative forum available, since under article III, section 2 of the Constitu-

34. J. STORY, *supra* note 12, at 74.

35. "If only through multiple suits can justice be done, there is nothing inherent in our judicial system forbidding those several suits. Minimization of litigation is not an end in itself, and it has its price." Reed, *supra* note 3, at 337.

36. 368 U.S. 71 (1961).

37. *Id.* at 76.

tion the Supreme Court of the United States has original jurisdiction of cases in which a state is a party. This decision strongly suggests that whenever a defendant will be subjected to certain multiple liability because of the absence of an interested person, the absentee should be classified as indispensable and the action dismissed, assuming an alternative forum exists. In the absence of such a forum it is not clear whether due process would permit the suit to go to final adjudication without the absentee before the court.[38]

FEDERAL PRAGMATISM

The decision as to whether a court should continue to final judgment in the absence of an interested person calls for a pragmatic analysis of the consequences of proceeding vis-à-vis not proceeding. The traditional formulations focused attention on labels such as "necessary" or "indispensable" and distracted courts' attention from the real issues. They voiced a concern that adjudications be complete, without thoroughly considering the need for completeness in specific fact situations. Consequences of the nonjoinder of an interested party should be explored in the specific context of the factual and legal relationships presented to the court. Just as in most areas of the law, a balancing of interests is called for. As Mr. Justice Douglas once wrote:[39]

> [T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between the conflicting interests. This is why most legal problems end as questions of degree.

The traditional formulations, although couched in policy-oriented language, were often applied in a mechanistic and nonanalytical way. Courts failed to recognize that there were conflicting interests at work, so no accommodation was attempted. Professor Reed recognized that problems of nonjoinder tend to lie in the grey area, and he formulated a pragmatic method of solving such problems:[40]

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38. In this context it is conceivable that a court could simply render a decree but postpone its effectiveness until the plaintiff had obtained a consistent decree against the absentee in a subsequent suit. The defendant would thus be protected from multiple liability. If a contingent decree could not be given, there is precedent indicating that jurisdiction might be asserted over the absentee on the basis of necessity, as long as good notice and a fair opportunity to defend were provided, in order to avoid total denial of relief to the plaintiff. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957). *See* M. ROSENBERG, J. WEINSTEIN & H. SMIT, ELEMENTS OF CIVIL PROCEDURE 353 (1970), where the authors query: "Once it has been decided that the joinder of absent parties is mandatory, could it be argued that the court, by virtue of that determination, has in personam adjudicatory power over them?" The authors go on to observe: "In civil law countries, adjudicatory power over one defendant generally creates adjudicatory power of all other defendants interested in the dispute before the court." *See, e.g.*, P. HERZOG, CIVIL PROCEDURE IN FRANCE 193-94 (1967).

39. Estin v. Estin, 334 U.S. 541, 545 (1948).

40. Reed, *supra* note 3, at 338.

> In short, a court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to avoid an adverse factual effect on the interests of absent persons; on the other is the policy of seeking to give a petitioner as much merited relief as possible.

The 1966 amendments to Federal Rule 19 were in large part an adoption of Professor Reed's suggestions. The pre-1966 version of rule 19[41] was defective because of its failure to direct attention to the correct basis of decision. Much like the traditional approach to nonjoinder problems, the original rule provided no guidelines for courts to determine whether they should proceed in the absence of an interested person who could not be joined. The advisory committee noted:[42]

> In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

The revised version of Federal Rule 19[43] presented a thoroughly pragmatic

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41. *"(a) Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. 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.

"(b) Effect of Failure To Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) Same: Names of Omitted Persons and Reasons for Non-Joinder To Be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

FED. R. CIV. P. 19 (1965).

42. FED. R. CIV. P. 19 (Advisory Comm. Notes).

43. FED. R. CIV. P. 19:

"(a) *Persons To Be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined,

approach and its title "Joinder of Person Needed for Just Adjudication" signaled its central philosophy: fair adjudication. Considerations of economy and convenience are important and interrelated, but secondary.

Subsection (a) of Federal Rule 19 describes those persons, traditionally called "necessary parties," who should be joined if feasible. The "joint interest"[44] inquiry of the original rule was deleted and in its place was substituted a description of possible consequences of nonjoinder, the existence of any one of which should cause a court to join the absentee if feasible:

> (1) complete relief cannot be accorded to those before the court;
> (2) absentee's interest in the subject of the action will as a practical matter be impaired or impeded; and
> (3) persons before the court will be subjected to a substantial risk of multiple or inconsistent obligations as a result of the absentee's interests in the subject of the action.

Subsection (b) deals with the absentee who traditionally has been labeled "indispensable." In subsection (a) the term "necessary" is not even used; in subsection (b) the term "indispensable" is employed, but only in a conclusory sense. In other words, only after going through the analysis required by subsection (b) and concluding that the action should not proceed without the absentee on the basis of the factors enumerated, will the label "indispensable" be used. If the court concludes that joinder is not possible because of lack of jurisdiction over the absentee, or because joinder of the absentee would destroy the court's subject matter jurisdiction,[45] its decision as to whether the absentee

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the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

"(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23."

44. See note 41 *supra.*

45. Because federal courts have limited subject matter jurisdiction, the incidence of unfeasible joinder is much more frequent than it is in state courts. For example, in a case based on the general diversity statute, 28 U.S.C. §1332 (1970), if the plaintiff is from state *X* and the defendant is from state *Y*, joinder of an absentee from state *X* would destroy diversity of citizenship. Section 1332 has been interpreted to require complete diversity: each plaintiff must be of diverse citizenship from each defendant. *See* Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806).

is "indispensable" or merely "necessary" is critical. An action may proceed without a "necessary" party, but must be dismissed in the absence of an "indispensable" party. The four factors to which subsection (b) demands attention are:

> (1) the extent to which a judgment rendered without the absentee might be prejudicial to the absentee or to those already parties;[46]
> (2) the extent to which such prejudice can be minimized or eliminated by measures such as protective provisions or shaping the relief;[47]
> (3) the extent to which a judgment rendered without the absentee will be adequate;[48] and
> (4) the availability of another forum if the case is dismissed for nonjoinder of the absentee.[49]

Rule 19(b) thus demands that the federal courts make a pragmatic investigation into the consequences of proceeding or not proceeding in the absence of an interested party; that is: "[T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."[50] The interests of those already parties, of the absentee, and of the public are involved in any decision on the indispensability issue. The public interest is in a just, speedy, and economical adjudication of the controversy.[51] The interest of the plaintiff is in obtaining merited relief. The interest of the defendant is in avoiding the harassment of multiple litigation and in-

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46. The Advisory Committee Notes describe the first factor in this manner: "The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat?" FED. R. CIV. P. 19 (Advisory Comm. Notes).

47. The Advisory Committee Notes describe the second factor thus: "The second factor calls attention to the measures by which prejudice may be averted or lessened. The 'shaping of relief' is a familiar expedient to this end . . . .

"Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. The court should consider whether this, in turn, would impose undue hardship on the absentee." FED. R. CIV. P. 19 (Advisory Comm. Notes).

48. The Advisory Committee Notes describe the third factor: "The third factor — whether an 'adequate' judgment can be rendered in the absence of a given person — calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the 'shaping of relief' mentioned under the second factor." FED. R. CIV. P. 19 (Advisory Comm. Notes).

49. The Advisory Committee Notes describe the fourth factor: "The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. FED. R. CIV. P. 19 (Advisory Comm. Notes).

50. FED. R. CIV. P. 19(b).

51. See FED. R. CIV. P. 1; FLA. R. CIV. P. 1.010.

consistent or multiple obligations. The interest of the absentee is in avoiding an adverse and prejudicial factual effect upon his interests.

No doubt the best exposition of the pragmatic approach to mandatory joinder is found in the United States Supreme Court decision of *Provident Tradesmens Bank & Trust Co. v. Patterson.*[52] The case involved an action against an automobile owner's insurer and the estate of the deceased driver by the estate of a deceased passenger seeking a declaratory judgment that the automobile was being operated by the driver with the permission of the insured when it collided with a truck. The automobile involved in the accident[53] was being driven by Cionci, to whom the owner, Dutcher, had given the keys; Lynch and Harris were passengers. The automobile collided with a truck being driven by Smith; Cionci, Lynch, and Smith were killed and Harris was seriously injured.

In addition to the declaratory judgment proceeding, three other lawsuits arose out of the accident. The petitioner, Provident Tradesmens Bank, brought suit as administrator of the estate of passenger Lynch against Cionci's estate; Harris and Smith's administratrix each brought actions against the estates of Lynch and Cionci, and against the owner, Dutcher. The latter two actions were still pending when the declaratory judgment action was instituted, and the first action by Lynch's estate against Cionci's estate had been settled for 50,000 dollars, which the estate of Cionci never paid because of insolvency. The instant action was instituted by the estate of Lynch as an attempt to satisfy its judgment against Cionci's estate out of the insurance fund of 100,000 dollars under the liability insurance policy that the owner, Dutcher, had with the respondent insurance company.[54] This fund was potentially subject to two different sorts of claims by the tort plaintiffs. Dutcher himself might be found liable under the doctrine of *respondeat superior,* or the fund might be reached under the policy provision covering any person driving Dutcher's car with Dutcher's permission. It was this latter approach that Lynch's estate was pursuing by requesting a declaration that Cionci's use of the car had been with the permission of Dutcher.

On the merits of the permission issue the district court found for the plaintiffs and entered judgment accordingly.[55] The court of appeals, with two judges dissenting, vacated the judgment and remanded with directions to dismiss the action.[56] Its decision was based on two alternative grounds, one of which was the absence of the insured, Dutcher, whom the court labeled an indispensable party. The issue of Dutcher's nonjoinder was neither raised at the trial level nor at the appellate level by any of the parties. The court of appeals held:[57]

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52. 390 U.S. 102 (1968).

53. The accident occurred almost ten years before the case reached the Supreme Court of the United States on writ of certiorari. *Id.* at 104.

54. The other tort plaintiffs, Harris and Smith's estate, were joined as parties-plaintiff. *Id.*

55. 218 F. Supp. 802 (E.D. Pa. 1963).

56. 365 F.2d 802 (3d Cir. 1966).

57. *Id.* at 809.

> [O]ne whose interests or rights will be adversely affected by the outcome of an action has a *substantive* right to be joined as a party, and that . . . right forecloses a trial court from proceeding to a final decision of the cause until he is joined as a party.

The court of appeals also concluded that the indispensable party doctrine, being substantive, was beyond the reach or rule 19 of the Federal Rules of Civil Procedure.[58]

The Supreme Court reversed, holding that the mechanistic approach of the court of appeals exemplified the kind of reasoning that rule 19 was designed to avoid,[59] and rejecting the appellate court's statement that the indispensable party doctrine was substantive and thus uncontrolled by the federal rules. The district court judgment was reinstated despite the nonjoinder of the insured. Justice Harlan noted that it was clear that the absentee Dutcher was one who should be joined if feasible. Since the action was for adjudication of the validity of claims against the insurance fund and, since the insured had an interest in having the fund preserved to cover potential liability, there was at least the possibility that a judgment favorable to the plaintiffs would impair or impede the insured's ability to protect his interest. Joinder of the insured being impossible because of the limited subject matter jurisdiction of the federal court, Harlan proceeded to a second tier of analysis to determine whether the action could safely and properly proceed without the insured. Analyzing the nonjoinder problem from the appellate perspective, he considered the impact of proceeding or not proceeding on the interests of the plaintiff, the public, the defendant, and the absentee.

Plaintiff's primary interest at the appellate level is not represented by the availability of an alternative forum; instead, the plaintiff is most concerned with preserving the favorable judgment awarded below.[60] Justice Harlan stated that this interest should not be overborne except by compelling counter considerations. Had the nonjoinder issue been considered at trial, the plaintiff's interest in litigating the matter in the federal court would not have been compelling, given the availability of a convenient state forum where all interested persons, including the insured, could have been joined. Under such circumstances Justice Harlan believed the trial court would have been well advised to dismiss the action. But at the appellate level the plaintiff had an

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58. *Id.* at 805. The court held that the Rules Enabling Act, 28 U.S.C. §2072 (1972), which prohibited any of the rules from abridging, modifying, or enlarging substantive rights, rendered rule 19 inoperative.

59. 390 U.S. at 107.

60. In Fouke v. Schenewerk, 197 F.2d 234 (4th Cir. 1952), the court dismissed an action for want of indispensable parties who could not be joined because of their common citizenship with the plaintiff. The court said: "[T]here is no reason in this case for a court of equity to strain hard to find a way to adjudicate the merits of this controversy in the absence of interested parties whose presence was readily obtainable if it had not already been actually obtained. The decision of this controversy is governed by the local law of Texas, and the courts of Texas are open to the plaintiffs and fully competent to acquire jurisdiction in rem if not in personam." *Id.* at 236. *Cf.* Warfield v. Marcus, 190 F.2d 178 (5th Cir. 1951). *See also* Fitzgerald v. Haynes, 241 F.2d 417 (3d Cir. 1957).

investment in energy and money that would have been completely wasted if reversal and dismissal were ordered. Justice Harlan believed this investment, in addition to plaintiff's desire to preserve the favorable adjudication, should not be lightly considered.

The public interest at the trial level is represented by the third factor set out in Federal Rule 19(b), the adequacy of the decree.[61] The policy favoring complete adjudications and final settlement of the entire controversy in a single proceeding, assuming the existence of an alternative forum, would certainly strengthen the case for dismissal. But on appeal the public interest in avoiding multiplicity of litigation actually reinforced the plaintiff's argument for affirmance of the decree. To reverse and dismiss after a *proper* adjudication of the merits at trial would result in an unneeded loss of expended judicial resources.

Justice Harlan's consideration of the defendant's interest brought into play the first factor,[62] which focuses attention on the possibility that an adjudication completed without the absentee would subject the defendant to subsequent suit by that absentee. If the defendant makes a timely objection at trial the trial court must consider the possibility of further litigation against the defendant by the absentee. In the *Provident Tradesmens* case defendant insurance company had a maximum liability of 100,000 dollars under the insurance policy, and all of the potential claimants to that fund were parties to the litigation. The possibility of a subsequent suit by the insured against the insurer-defendant was remote and conjectural; even if there were some basis for suit there would be little likelihood of a judgment that would be inconsistent with the distribution of the insurance fund ordered by the earlier judgment. At the trial, therefore, the defendant's only valid argument for dismissal coincided with the public interest in a complete adjudication, given the availability of an alternative forum.

On appeal, however, analysis of the defendant's interest differs, especially when it did not properly object to nonjoinder at trial. If it had protested and been overruled it would seem from the preceding analysis that its interest in a reversal would deserve little consideration. Such a conclusion is even more inescapable if the objection was *not* raised at the trial level. The defendant should be foreclosed from raising the objection on appeal because the possibil-

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61. In *Kroese v. General Steel Castings Corp.*, Judge Goodrich, speaking for the court, reversed the district court's dismissal of an action against a corporation to compel the declaration and payment of accumulated dividends on preferred stock. The dismissal had been based on the plaintiff's failure to join as defendants a majority of the corporation's board of directors. The argument of the defendant was that dividends can be made payable only if the court has personal jurisdiction over the directors in order to coerce a majority of them to vote such dividends. Goodrich responded that if the court determined on the merits that plaintiffs are entitled to the requested relief, and if the assets of the corporation were within the court's territorial jurisdiction, the court could sequester those assets and effect the requested payment of dividends. Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950).

62. *Cf.* A.L. Smith Lion Co. v. Dickson, 141 F.2d 3 (2d Cir. 1944); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D.N.Y. 1955).

ity of prejudice is remote and conjectural and because inaction at the trial level creates a presumption of that remoteness. The defendant insurer, having had full and fair opportunity to litigate the merits of the issue of permission against all of the potential claimants to the fund, should not on appeal have been permitted to "obtain a windfall escape from its defeat at trial."[63]

Since an absentee is without an advocate before the court, care must be taken to assure that he is not injured by any collateral consequences that might result from the judgment rendered in his absence. At the trial level the existence of such a prejudicial impact is much more conjectural than it is subsequent to a judgment on the merits. If the judgment below has been favorable to the defendant, then on appeal there is no reason to reverse for nonjoinder, at least in the context of *Provident Tradesmens,* since there a judgment for the defendant-insurer would have had nothing but a beneficial effect on the insured. But if the judgment at trial is unfavorable, as it was in *Provident Tradesmens,* the possibility of an injurious collateral consequence must be seriously considered.[64]

In his analysis of the absentee's interest, Justice Harlan noted that the first factor of rule 19(b) required attention to the possibility that Dutcher would have been disadvantaged if the insurance fund had been used to pay judgments rendered against Cionci's estate and thus had been depleted before he had an opportunity to assert his interests. Justice Harlan observed that this "supposed threat is neither large nor unavoidable."[65] He reasoned that there was little likelihood that Dutcher would be subjected to tort judgments; the pending actions had remained dormant for many years and the substantive law was apparently favorable to Dutcher. Furthermore, even if the other claimants did in fact pursue Dutcher, he would be able to defend on the issue of permission. If he lost on that issue and if the insurance company refused to pay, then he could sue it and argue lack of permission, hoping to receive a favorable judgment and obtain a credit on *his* liability for all moneys paid out by the insurer to the claimants based on the earlier judgment. Although an additional action would be required to obtain this result, the obligations would be adjudicated consistently.

It was clear, then, that the absentee Dutcher would be able to protect his interests by litigating the issue of permission in any event. Even if he failed in his suit against the insurance company on the issue of permission, the setback would have no causal relaton to the fact of his nonjoinder in the earlier suit.

Furthermore, under the state of affairs existing at the time of the decision, the sequel just described seemed unlikely to occur at all. Finally, had there

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63. 390 U.S. at 112 (1968).

64. Mr. Justice Harlan raised, but did not seriously consider, the possibility that Dutcher should be bound, in the res judicata sense, by the judgment because he had actual notice of the litigation and could have intervened pursuant to rule 24 of the Federal Rules of Civil Procedure. Justice Harlan assumed that Dutcher was not foreclosed by his failure to intervene and necessarily concluded that there could be no res judicata as to him. *Id.* at 113-16.

65. *Id.* at 114.

appeared significant danger of prejudicing the absentee's rights the court could have accompanied the judgment with protective provisions or it could have stayed enforcement of the judgment until the anticipated further litigation reached a conclusion.[66]

The foregoing pragmatic analysis of the consequences of proceeding vis-à-vis not proceeding indicates that the decision may vary depending on whether the issue is considered at the trial level or at the appellate level. In the context of the *Provident Tradesmens* facts, a trial level decision should have lead to dismissal of the action for nonjoinder. The plaintiff there had available an alternative forum in which all interested persons could have been joined and a conclusive and complete determination of the litigation could have been made. At the appellate level, however, the interests of the concerned parties were altered because of the substantial investment of private and judicial resources; it was for this reason that the Supreme Court reinstated the judgment of the district court. It found that the plaintiff's interest in preserving a valid judgment on the merits far outweighed the defendant's interest in a "windfall escape," the absentee would suffer no significant injury, and the public investment of judicial resources would be conserved.

The opinion in *Provident Tradesmens* went beyond a decision of that particular controversy to present clearly and convincingly the workability and desirability of a pragmatic analysis of the consequences of proceeding or not proceeding in the absence of an interested party. Mr. Justice Harlan noted:[67]

> The decision whether to dismiss (*i.e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.

The decision of the Fifth Circuit Court of Appeals in *Haas v. Jefferson National Bank*[68] serves as a reminder that even good rules may be imperfectly applied. Haas, a citizen of Ohio, brought suit in the United States District Court for the Southern District of Florida for a mandatory injunction directing the defendant-bank to issue him certain shares of its common stock. In the alternative, he sought damages reflecting the stock's value. Plaintiff alleged two agreements with another citizen of Ohio, Glueck, under which the latter purchased shares of the bank's stock, one-half of the stock being purchased with Haas's money, but all of the stock being issued in Glueck's

66. This is the second factor listed in 19(b). In Roos v. Texas Co., 22 F.2d 171 (2d Cir. 1927), Judge Learned Hand discussed the possibility of shaping a decree so as to avoid prejudice to absent parties. In that case the court concluded that under the circumstances presented the decree could not be shaped so as to protect those interests and the absentees were therefore indispensable parties. The court dismissed the case noting that there was an alternative forum available to the plaintiff where all interested persons could be joined.

67. 390 U.S. at 118-19.

68. 442 F.2d 394 (5th Cir. 1971).

name. Plaintiff further alleged that the bank knew of his ownership and that, pursuant to agreement, Glueck had presented to the bank 250 share of stock with instructions to reissue 170 shares to Haas and the balance to Glueck. The pleadings indicated that the bank refused to make the assignment because Glueck was indebted to it under a promissory note, the terms of which required that Glueck pledge to the bank any of his property coming into the bank's possession. Apparently Glueck withdrew his instructions and pledged the stock with another bank as collateral for a loan. The district court concluded that Glueck was an indispensable party, ordered Haas to amend his complaint to join him, and then dismissed on the grounds that his joinder would destroy diversity.[69]

Before analyzing the issue of nonjoinder, the appellate court issued a bit of dictum indicating that, although the court relied upon the *Provident Tradesmens* case, it did not really understand the thrust of that decision. The *Haas* court said:[70]

> It is settled that failure of the district court to acquire jurisdiction over indispensable parties to an action deprives the court of *jurisdiction* to proceed in the matter and render a judgment.

The court thus fell into the jurisdictional fallacy despite the clear and unequivocal statement of the Supreme Court in *Provident Tradesmens* that the lack of an indispensable party is not a jurisdictional defect.[71]

The Fifth Circuit correctly concluded that Glueck fell into that category of persons who should be joined if feasible. His ability to protect his interest in the stock might have been impaired by an adjudication rendered in his absence as to the ownership of the stock claimed by Haas. In addition, the bank would have faced the possibility of incurring double, multiple, or otherwise inconsistent obligations if judgment were rendered in the absence of the one who held legal title to all of the stock. The court observed that Glueck was more than an important witness with inestimably valuable testimony; rather he was "an active participant in the alleged conversion of Haas' stock."[72]

For that reason the court concluded that Glueck was an indispensable party: both he and the bank might have suffered prejudice if a judgment had been rendered against the bank in his absence. Sufficient protective provisions could not have been provided to avoid the prejudice that would have resulted

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69. *Id.* at 399. In fact, Glueck was never served and apparently could not have been served, since there was no basis for asserting jurisdiction over him in Florida. *Id.* The district court, having concluded that Glueck was indispensable, should have dismissed for lack of an indispensable party instead of ordering the joinder of one who could not be served with process and then dismissing for lack of subject matter jurisdiction.

70. *Id.* at 396 (emphasis added).

71. In *Provident Tradesmens* Justice Harlan quoted with approval the language of the Supreme Court in *Mallow v. Hinde* and noted that in that case the court "explicitly stated, there is no question of jurisdiction." 390 U.S. at 121-22.

72. 442 F.2d at 398.

from a determination as to the title to the stock in question,[73] a judgment in his absence would not have settled the whole dispute,[74] and the state court in Ohio would have constituted an alternative forum for the plaintiff to litigate his rights against Glueck.[75]

The court's analysis was at best superficial and cursory and the interests of the plaintiff were not considered at all. The dismissal occurred at the pretrial stage where the relevant inquiry should have been directed to the existence of an alternative forum. Although Ohio provided such a forum, only Glueck could have been reached in Ohio. Thus, the Ohio forum was no better than the Florida forum. There must necessarily have been two proceedings and two judgments to finally settle the controversy. The court recognized this fact but lamely noted that it would have been better for the first adjudication to have occurred in Ohio where the issue of title to the stock could have been litigated between Glueck and Haas. Nevertheless, litigation of the title question by Haas against Glueck was not essential to obtaining either of the alternative forms of relief sought against the bank. Haas sought a decree requiring the bank to issue a certain number of shares of its common stock to him; the bank could have issued the shares regardless of the presence or absence of Glueck. In the alternative, Haas requested damages reflecting the value of the stock, alleging that the bank had knowledge of his ownership; again, such relief would not have required the presence of the absentee for its effectuation. Furthermore, by relegating Haas to a suit in Ohio against Glueck the court forced Haas to choose as a defendant the one party against whom a judgment was likely to be useless.[76] Since Glueck had already pledged certificates of the stock to another bank, the only worthwhile decree from plaintiff's point of view, assuming Glueck to be judgment proof, would have been a decree against the defendant-bank for damages.[77]

The defendant-bank's interests might have been impaired by Glueck's absence in the Florida proceeding because his absence would have subjected the bank to the possibility of subsequent litigation and inconsistent obligations. Nevertheless, it would have been easy to assure the bank sufficient protection. If plaintiff had obtained a favorable judgment on his request that the

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73. *Id.* at 399. "[I]t is difficult to conceptualize a form of relief or protective provisions which would not require as a preliminary matter the determination of the question of title with all the resulting potential for prejudice."

74. *Id.* "It seems evident to us that the absence of Glueck in this litigation would, of necessity, result in less than a complete settlement of this controversy."

75. *Id.* at 400. The court concluded: "[A]ssuming the disposition of the preliminary question of title in the Ohio courts, it is not difficult to conceptualize circumstances permitting the possibility of a second action against the bank in which the problem of nonjoinder would not be so acute."

76. From the facts presented in the case, Glueck's financial situation, at best, appeared shaky and uncertain. *Id.* at 395. As the court noted, Haas had already instituted suit in Ohio but this was not dispositive, since Haas would probably not have pursued that action to a conclusion if he had obtained relief against the bank in the Florida proceeding.

77. It is curious that the court did not consider whether the second bank with whom Glueck pledged the stock certification should be joined as a party-defendant. If service of process could be obtained there would have been little difficulty in joining the second bank.

stock be issued in his name, the judgment's enforcement could have been conditioned upon the plaintiff's obtaining a consistent decree against Glueck in the Ohio courts. In the alternative, if the plaintiff had obtained a favorable judgment on his request for damages there would have existed no possibility that the bank would be subjected to inconsistent obligations and relitigation.

The absentee would likewise have faced no potential impairment of his interests if an unfavorable judgment had been rendered on the issue of title to the stock. Because he was not a party to the original proceeding, his property interest could in no way have been legally affected. Unless he had been made a party to the Florida proceeding, nothing could have affected the fact that the stock was in his name and he had legal ownership, nor could there have been either collateral estoppel or res judicata consequences. Although the appellate court perceived a serious "resulting potential for prejudice,"[78] it neglected to state the source of that prejudice or consider the possibility of a conditional decree.

Finally, the public interest in a complete and efficient adjudication of the *Haas* controversy did not call for a dismissal. Since the dispute was certain to involve two adjudications, no considerations of convenience justified the dismissal. In fact, the dismissal partially destroyed the private and judicial effort that had taken the case to the pretrial conference stage.

In summary, the Fifth Circuit's opinion reflected an unwillingness to engage in the rigorous pragmatic analysis that decisions of this sort deserve and require. No great harm was caused by the court's failure to follow Mr. Justice Harlan's superb example because an alternative forum was available. Nevertheless, bad precedent was set, and the mischief caused by judicial insensitivity in the *Haas* case could result in substantial and irrevocable harm in a later case.

FLORIDA PRECEDENTS

In the pages to follow the pragmatic analysis of consequences will be applied to representative Florida cases to evaluate and to present alternatives. First, there is a discussion of required joinder of parties when contractual obligations and rights are being litigated, with focus on those that are characterized as being "joint." Following that there is a discussion of adjudications in which real property is the subject matter of the controversy; this class of cases provides more required joinder problems than any other area of the law. It is fortunate that in such cases joinder of the absentee is almost always feasible because of the court's power over property within its jurisdictional territory.[79] Finally, a joinder problem of more recent origin, whether an insured must be joined as a party-defendant in an action by an injured plaintiff against the insured's liability insurance carrier, will be treated.[80]

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78. 442 F.2d at 399.

79. Reed, *supra* note 3, at 340.

80. Because this is a policy article rather than a data-retrieval article, a representative sample of problem areas was selected. Not considered, for example, is the necessity of joining

Contractual Rights and Obligations — Multiple Interests

Joint Obligors — Joinder of Defendants. The old common law rules relating to joint obligors remain nearly unchanged in Florida today,[81] despite the fact that most states have either completely abolished the traditional distinction between joint obligations and joint and several obligations or have substantially reformed the common law rules on joint obligors.[82] Florida is one of three states in the Union to have reformed only one of the five common law rules that purportedly distinguish the joint from the joint and several obligation.[83] The five rules that traditionally have characterized joint obligations are: (1) required joinder, (2) joint judgment, (3) discharge of all by judgment against one, (4) survivorship, and (5) discharge of all by release of one.[84] In Florida the survivorship rule has been abolished,[85] but the other four common law rules remain in full force. The ultimate concern of

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a trustee in an action touching the trust res. The Florida law became well known in legal circles as a result of the landmark decision of the United States Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958). In that case it was significant that the Court concluded that under Florida law a trustee is an indispensable party and that in the absence of such a party the judgment rendered is void. The indispensability of a trustee is well established in Florida case law. Trueman Fertilizer Co. v. Allison, 81 So. 2d 734 (Fla. 1955); Huttig v. Huffman, 151 Fla. 166, 9 So. 2d 506 (1942); Griley v. Marion Mortgage Co., 132 Fla. 299, 182 So. 297 (1937); Wilson v. Russ, 17 Fla. 691 (1880); First Nat'l Bank v. Broward Nat'l Bank, 265 So. 2d 377 (4th D.C.A. Fla. 1972); Indian Lake Club v. Hainsworth, 212 So. 2d 915 (2d D.C.A. Fla. 1968).

Following the Florida supreme court decision in Hoffman v. Jones, 280 So. 2d 431 (1973), which replaced contributory negligence with comparative negligence, there was some speculation that a plaintiff should be forced to join all defendants who are joint tortfeasors. This suggestion was made formally by the Circuit Judges Conference but was wisely rejected by the Subcommittee on the Rules of Civil Procedure of the Florida Bar. Further speculation was occasioned because of the anticipation that the court would abandon the traditional rule prohibiting contribution between joint tortfeasors. Nevertheless, it would be inappropriate to change the traditional rule that views joinder of joint tortfeasors as permissible but not mandatory. If a plaintiff has no desire to litigate against a particular joint tortfeasor, then it would be champertous of the law to require joinder; such mandatory joinder cannot be justified by analogy to the compulsory counterclaim rule, since the latter results only in the assertion of an additional claim between those already parties and permits nonassertion if the potential counterclaimant is willing to be precluded from later reliance on the claim. A defendant who might desire contribution against a co-joint tortfeasor can invoke the impleader procedure under Florida Rule 1.180 by serving summons and a third-party complaint upon the absentee as a third-party defendant. FLA. R. CIV. P. 1.180.

81. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 554 (2d D.C.A. Fla. 1965).

82. RESTATEMENT (SECOND) OF CONTRACTS §§111-32, introductory note at 248-55 (Tent. Draft Nos. 1-7, 1971).

83. Florida abolished the common law rule of survivorship and substituted a new rule: "No cause of action dies with the persons. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by court." FLA. STAT. §46.021 (1973).

84. RESTATEMENT (SECOND) OF CONTRACTS §§111-32, introductory note at 248-55 (Tent. Drafts Nos. 1-7, 1971).

85. See note 83 *supra.*

this discussion will be the rule requiring joinder of joint obligors. As this rule was considered to be one of necessity based on the substantive characteristics of a joint obligation, these characteristics must be analyzed in considering the need for joinder.

A joint obligor is one who is liable for the entire debt but is not himself bound alone.[86] Professor Williston expressed it this way: "The primary conception of a joint duty or obligation under a contract is that two or more persons are together bound as if they were a single person."[87] At common law the presumption was that when two or more people incurred an obligation, that obligation was a joint undertaking.[88] The presumption could be overcome only if the language of the instrument disclosed an intent to create several liabilities.[89] A number of consequences flow from the joint obligor label, one of which is the joinder requirement.[90]

The common law rule for a joint contract gave the obligee a single cause of action against all obligors.[91] In 1849 the Supreme Court of Florida described this rule in *Ferrall v. Bradfords* as follows:[92]

> If parties enter into a joint obligation, it is certainly to be understood they are to be sued jointly, and not severally. It is part of their bargain, and they have a right to insist upon its fulfillment. . . . If they have undertaken severally to pay, separate suits may be brought against each; but when their undertaking is joint unless they waive the advantage, by not imposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged, by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy.

In *Alderman v. Puleston*[93] the court said: "The rule is well settled that where parties to a cause of action are joint obligors on a joint obligation they *must* be sued jointly."[94] Although mandatory language was used in describing the joinder requirement, a number of exceptions were recognized. In the traditional terminology, therefore, joint obligors were necessary but not indispensable parties.[95] Absence of one obligor from the jurisidiction would allow the obligee to sue the remaining obligors,[96] and if the obligors who were

86. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 554 (2d D.C.A. Fla. 1965).

87. 2 S. WILLISTON, LAW OF CONTRACTS §316, at 928 (rev. ed. 1936).

88. Brill v. Jewett, 262 F. 935, 936 (5th Cir. 1920); RESTATEMENT (SECOND) OF CONTRACTS §§111-30, introductory note at 259 (Tent. Drafts Nos. 1-7, 1971).

89. Atlanta & St. Andrews Bay Ry. v. Thomas, 60 Fla. 412, 422, 53 So. 510, 513 (1910).

90. The discussion to follow will suggest that these consequences are neither inevitable nor necessarily desirable.

91. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 554 (2d D.C.A. Fla. 1965).

92. Ferrall v. Bradfords, 2 Fla. 508, 515 (1848).

93. 156 Fla. 731, 24 So. 2d 527 (1946).

94. *Id.* at 734, 24 So. 2d at 528 (emphasis added).

95. 3A J. MOORE, *supra* note 21, §19.10; 7 C. WRIGHT & A. MILLER, *supra* note 21, at 124; Reed, *supra* note 3, at 358; *see* Alderman v. Pulestan, 156 Fla. 731, 24 So. 2d 527 (1945); Corlett v. Oliver, 107 Fla. 403, 144 So. 877 (1933); Harrington v. Bowman, 106 Fla. 86, 143 So. 651 (1932); Jones v. Griffin, 103 Fla. 745, 138 So. 38 (1931); Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552 (2d D.C.A. Fla. 1965).

96. See note 95 *supra*.

joined failed to object to nonjoinder of the absentee they were held to have waived any possible objection to nonjoinder.[97] Clearly, joinder was required only if feasible and only if requested. This limited and conditional joinder requirement has no inherent merit; instead, its justification must rest on some procedural or substantive necessity. Whether such a necessity exists remains to be determined by further consideration of the nature of a joint obligation. As Professor Reed has pointed out:[98]

> [The joinder requirement] has meaning only if it is a result flowing from the determination that an obligation is joint — a determination made on the basis of other attributes of joint liability which have some independence, some force of their own.

Let us consider those other attributes to determine whether they have any force of their own.

Fundamental to the concept of a joint obligation is that there is only one obligation, jointly owed, representing a single cause of action. The other attributes of the joint obligation are spin-offs from the singleness of the cause of action created by a joint contract. Thus, the common law developed the rule that when joint obligors are sued on a joint obligation there must be a joint judgment.[99] In *Pollak v. Hutchinson*[100] the supreme court held there could not be two judgments upon the same cause of action, and thus there could not be two judgments against joint debtors.[101] In addition, Florida adopted the common law position that recovery must be "against all or none of those declared against jointly."[102] Nevertheless, a judgment against less than all of those joined and named as joint obligors was permitted when a joint obligor raised a personal defense, and in *Jones v. Griffin*[103] the Supreme Court of Florida held that such personal defenses included insolvency and personal disability to contract created by infancy, insanity, coverture, and other like matters. The bankruptcy of one of several joint obligors also permits a judgment against less than all.[104]

The joint judgment characteristic of joint liability, however, does not itself provide sufficient reason to require joinder. Each joint obligor is liable for the whole of the indebtedness, and although a joint judgment may be entered and although the writ of execution is joint, the property of each obligor is

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97. Ferral v. Bradfords, 2 Fla. 507, 515 (1849).

98. Reed, *supra* note 3, at 360.

99. *Id.*

100. 21 Fla. 128 (1884).

101. *Id.* at 131.

102. Davis v. First Nat'l Bank, 112 Fla. 485, 486, 150 So. 633 (1933). This position was further expressed by the Florida supreme court in Harrington v. Bowman, 106 Fla. 86, 90, 143 So. 651, 653 (1932): "[W]here the action brought is a joint action brought as if upon a contract imposing joint liability, judgment cannot be taken against less than all the defendants thus sought to be held jointly liable."

103. 103 Fla. 745, 138 So. 38 (1931). *See also* Ferrall v. Bradfords, 2 Fla. 508 (1849).

104. *E.g.*, Corlett v. Oliver, 107 Fla. 403, 406, 144 So. 877, 879 (1933).

severally subject to execution and may be sold to satisfy the entire obligation. As Professor Reed has observed:[105]

> [I]n the matter of execution of a judgment, a joint obligor stands in no different position from that of a joint and several obligor; in either instance the plaintiff may be expected to pursue the more accessible and responsible of the judgment debtors. Whatever the verbal differences between the two kinds of judgments, there is in fact no distinction of importance to be drawn between them.

A second spin-off from the single cause of action nature of the joint obligation is the traditional rule that a judgment against one joint obligor discharges his co-obligors.[106] In *Merchants' & Mechanics' Bank v. Sample*[107] the Supreme Court of Florida held that if a plaintiff elects to serve and take judgment against less than all the defendants sued on a joint obligation, he may not afterward bring a new action against those not sued.[108] The court's basis for its holding was that the plaintiff should not be allowed to sever the single cause of action. When judgment is taken, the cause of action is replaced by the right to sue on that judgment and is no longer available to support a subsequent suit against the other joint obligor. Moreover, in a joint action upon a joint contract, if the plaintiff takes a default judgment against one of the joint obligors the suit must be dismissed as against the other joint obligors.[109] It is abundantly clear that this facet of the joint obligation is totally unrelated to the joinder *requirement*. Although it might be in plaintiff's interest to join all joint obligors in a single proceeding if he intends or needs to insist upon the performance of each, the plaintiff should be able to sue less than all if by so doing he can achieve full satisfaction. From the plaintiff's viewpoint, joinder should be permitted, but not required. Certainly the absentee joint obligors are completely protected, since they are not bound by the adjudication: in fact, they are insulated from further suit by the very operation of the rule itself. As to the defendant, he may seek contribution either by impleading the absentee co-obligor or by bringing an independent suit. The mere possibility of such a second suit does not alone justify requiring joinder, particularly because a defendant would ordinarily prefer to assert his right to contribution by way of a third-party complaint.

A consideration of joint obligors' right to contribution is appropriate at this point, since the existence of that right nullifies any significance that the common law rule of survivorship might have had with respect to the issue of joinder. In *Meckler v. Weiss*[110] the Supreme Court of Florida allowed con-

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105. Reed, *supra* note 3, at 362.
106. Ferrall v. Bradfords, 2 Fla. 508 (1849).
107. 98 Fla. 759, 124 So. 49 (1929).
108. *Id.* In the first action the joint-obligor-defendant had not objected to the nonjoinder of his co-obligor, who was the defendant in the later case.
109. Hale v. Crowell's Adm'x, 2 Fla. 534 (1848).
110. 80 So. 2d 608 (1955).

tribution by one co-tenant against the other for recovery of money paid to discharge a mortgage. Explaining the law of contribution, the court said:[111]

> [As between co-obligors,] when one of them pays more than his proportionate share of the debt owed by both, the payor is entitled to contribution from the others and where the entire obligation has been discharged the payor in addition to an action at law for restitution is entitled to be subrogated to the position of creditor but his right of recovery by means of subrogation is limited to contribution if between them neither had a prior duty of performance.

In a suit for contribution the defendant may raise defenses that are personal to him,[112] and each joint obligor is responsible for protecting his own right of contribution.[113] Because contribution is allowed only after a party seeking contribution has paid the obligation in question, the right to contribution — although arising when the relationship that creates it is formed — is contingent until payment is made by the complaining party.[114] In addition, a surviving obligor retains a right to contribution by paying the debt and then making a claim against the estate of the deceased for his contributive share.[115] The right of surviving obligors to obtain contribution from the estate of a deceased obligor substantially nullifies any relevance that the rule of survivorship might otherwise have had for the joinder issue.

The common law position on survivorship of joint obligations was philosophically consistent with all the other rigid common law doctrines that surrounded the joint obligation syndrome; upon the death of a joint obligor only the surviving obligors could be sued. Under this rule the estate of the deceased joint obligor was not liable and could not be sued by the obligees,[116] with the exception that the estate of the *last* surviving obligor could be sued.[117] Since the rule of survivorship at common law was accompanied by the rule that permitted surviors to obtain contribution from the deceased obligor's estate,[118] the economic consequences were no different than if the obligation had been joint and several.[119] The estate was still liable, but to the surviving obligors by way of contribution, rather than to the obligee, as in the case of an estate of a deceased obligor whose obligation was several and not joint.

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111. *Id.* at 609. *See also* Berkan v. Brown, 242 So. 2d 207 (3d D.C.A. Fla. 1970), *cert. denied,* 246 So. 2d 111 (Fla. 1971), in which the court said: "Between co-obligors, when one of them pays more than his proportionate share of the debt owed by both, he is entitled to a contribution from the other, even to the extent of establishing an equitable lien." *Id.* at 209.

112. McMahon v. Weesner, 254 F. Supp. 839, 841 (S.D. Fla. 1966).

113. *See* Massey & Weston, *Civil Procedure,* 20 U. MIAMI L. REV. 584, 634 (1966).

114. Lopez v. Lopez, 90 So. 2d 450, 459 (1956).

115. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 556 (2d D.C.A. Fla. 1965).

116. Lee v. Puleston, 102 Fla. 1079, 1081, 137 So. 709, 710 (1931); Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 554 (2d D.C.A. Fla. 1965). *See also* Reed, *supra* note 3, at 362.

117. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552, 554 (2d D.C.A. Fla. 1965).

118. *Id.* at 556.

119. *See* Reed, *supra* note 3, at 363.

The only possible difference between the joint obligation and the several obligation occurred when the survivors were insolvent and the deceased's estate was solvent, as the obligee was then unable to recover.[120]

In Florida the common law rule of survivorship has been abrogated by a statute,[121] which has been interpreted to permit the obligee to sue the estate of a deceased joint obligor.[122] The creditor may at his option pursue the estate of the deceased joint obligor, or he may pursue the surviving obligor in a separate suit,[123] but he may not join the estate of the deceased and the survivor in the same suit.[124] It was early held that a valid judgment cannot be rendered against the personal representative of the deceased and the surviving co-obligor at the same time, as one is charged *de bonis testatoris*[125] and the other is charged *de bonis propriis*.[126] The law of judgments at common law was not flexible enough to permit such a joint judgment.[127] This presented a difficult procedural problem for the obligee, since a judgment against one obligor would extinguish the cause of action and preclude an action against the other. In *Corlett v. Oliver*,[128] the court indicated a solution: that is, to permit the joint liability of the deceased joint obligor to be reduced to judgment in a separate suit brought against the personal representative of the deceased joint obligor, for the purpose of adjudicating the fact and amount of such liability that survived against the deceased, but to stay execution or enforcement of the judgment so rendered until the asserted joint liability was also reduced to judgment against the surviving joint obligor or obligors.[129]

The final characteristic of the joint obligation, thought to distinguish such obligations from those that are joint and several, is that the discharge of one joint obligor discharges the rest. In Florida the courts have held that the effect of a release of a joint judgment debtor is to be given the same effect as a satisfaction.[130] In *Flowers v. Miskoff*,[131] for example, an attorney sued for recovery of fees upon a contract jointly signed by the defendants. Since the plaintiff had already settled with one of the primary obligors, the court ruled

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120. *See* Reed, *supra* note 3, at 363.

121. FLA. STAT. §46.021 (1973); Brill v. Jewett, 262 F. 935, 937 (5th Cir. 1920).

122. Brill v. Jewett, 262 F. 935 (5th Cir. 1920); Lee v. Puleston, 102 Fla. 1079, 1082, 137 So. 709, 710 (1931); Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552 (2d D.C.A. Fla. 1965).

123. Phillipi Creek Homes, Inc. v. Arnold, 174 So. 2d 552 (2d D.C.A. Fla. 1965).

124. City of Orlando v. Gooding, 34 Fla. 244, 15 So. 770 (1894).

125. "*Of the goods of the testator, or intestate.* A term applied to a judgment awarding execution against the property of a testator or intestate, as distinguished from the individual property of his executor or administrator." BLACK'S LAW DICTIONARY 476 (4th ed. rev. 1968).

126. "*Of his own goods.* The technical name of a judgment against an administrator or executor to be satisfied from his own property, and not from the estate of the deceased . . . ." BLACK'S LAW DICTIONARY 476 (4th ed. rev. 1968).

127. City of Orlando v. Gooding, 34 Fla. 244, 257, 15 So. 770, 774 (1894).

128. 107 Fla. 403, 144 So. 877 (1932).

129. *Id.* at 406, 144 So. at 879.

130. Movielab, Inc. v. Davis, 217 So. 2d 890, 892 (3d D.C.A. Fla. 1969).

131. 233 So. 2d 201 (4th D.C.A. Fla. 1970).

that this served to release them all.[132] Where the contract is one of guaranty and the parties are primarily and secondarily liable, however, a release of the surety will not discharge the principal debtor.[133] This is another technical incident of joint obligor status that has no real pecuniary impact on the parties to the contract and is unrelated to the traditional classification of joint obligors as necessary parties.

The foregoing analysis began as an attempt to discover if there were in fact any reason for distinguishing between joint and joint and several liabilities; if there were a reason, then perhaps the rule requiring joinder of joint obligors when feasible might be justified. Analysis indicates, however, that the differences are far less than generations of lawyers have thought.[134] There is no substantial difference of economic significance for the litigants under the joint judgment rule, since execution is necessarily several against the individual assets of the joint obligors. The same is true with respect to the survivorship rule, now abrogated, because of the availability of contribution. The rules providing that the release or discharge of one joint obligor releases or discharges the others and that judgment against one precludes a judgment against the others are technical rules of procedure, which seem to have little or nothing to do with the intent of the parties to the contract. They are merely rules that play mischief and occasionally frustrate the probable intent of the contracting parties. If the economic and practical consequences of joint liability and joint and several liability are substantially the same except for the procedural irritations that have traditionally accompanied the joint liability syndrome, what justification can there be for calling joint obligors necessary parties and joint and several obligors merely proper parties, especially when those irritations are compounded rather than alleviated by required joinder?

The plaintiff has a significant interest in suing only those whom he desires to sue; to require one to litigate against others, not of his own choosing, requires substantial justification. The interests of the defendant-joint obligors do not mandate joinder; they may implead the absentee if they seek contribution and if the absentee is in the jurisdiction. If the absentee is outside the jurisdiction, then impleader would be impossible and an independent suit may be brought for contribution. Significantly, if impleader were impossible because of lack of jurisdiction, original joinder of the absentee would likewise be impossible. The absentee suffers not at all from nonjoinder. In fact, the judgment rendered in his absence will extinguish the obligee's cause of action against him. The absentee will, of course, remain liable for contribution, but the fact of nonjoinder has no impact on that liability, and the defendant can raise defenses that are personal to him. The public interest in

132. *Id.* at 205. The court also held that FLA. STAT. §768.04(1) (1973), which provides that the release of one tortfeasor releases all, was not applicable because the suit was not for property damage to, personal injury of, or the wrongful death of any person. *Id.*

133. Feiner's Organization, Inc. v. Caffina, 77 So. 2d 852, 854 (Fla. 1955).

134. Reed, *supra* note 3. Professor Reed comes to this conclusion by way of a similar analysis of leading American cases.

seeing a complete and full settlement of a controversy in a single adjudication may be accomplished by the defendant's institution of a third-party action against the absentee to seek contribution (assuming that plaintiff for some reason has decided not to join the absentee as a defendant). If none of those who are parties to the litigation have any interest in joining the absentee, and if the absentee cannot be prejudiced in any way by nonjoinder, and if the absentee declines to intervene, then the public interest in avoiding a hypothetical second litigation is inconsequential. In addition, it appearing from close analysis that there is little distinction of substance between obligations that are joint and those that are joint and several, if joinder is not required for the latter then there is no reason why it should be required for the former. It is not surprising, therefore, that many states have enacted statutes that effectually abolish the joint obligation, either by negating all five of the traditional distinctions, by making joint obligations joint and several, or by erecting a presumption that contracts of co-obligors are joint and several.[135]

Joint Obligees — Joinder of Plaintiffs. In most significant respects the rules governing the rights of joint obligees are analogous to those governing joint obligors as previously discussed. The law of joint obligees has been given little treatment in the decisional law of Florida, but insofar as Florida law is ascertainable, it is consistent with the traditional common law approach. Florida follows the rule that joint obligees will be required to join as plaintiffs unless such joinder is not feasible.[136] Whether an action should be permitted to proceed in the absence of a joint obligee (the "indispensable" party question) and whether joinder of the absent joint obligee should be required if feasible (the "necessary" party question), can best be determined after a consideration of the incidents of joint obligee status.

The requirement of joinder of joint obligees has traditionally been justified by reference to the character of joint rights. Addressing this issue and comparing joint rights with joint obligations, Professor Williston declared:[137]

> [S]everal persons who are promisees under a contract may be treated as a unit and, thereby, together become entitled to the performance of

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135. RESTATEMENT (SECOND) OF CONTRACTS §§249-55 (Tent. Drafts Nos. 1-7, 1973). FLA. STAT. §673.118 (1973) is the Uniform Commercial Code provision that erects a presumption of joint and several liability on negotiable instruments: "Unless the instrument otherwise specifies, two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as 'promise to pay.'" FLA. STAT. §620.63 (1973) provides: "All partners are liable: (1) Jointly and severally for everything chargeable to the partnership under §§620.62 and 620.25. (2) Jointly for all other debts and obligations of the partnership; but a partner may enter into a separate obligation to perform a partnership contract."

136. Atlanta & St. Andrews Bay Ry. v. Thomas, 50 Fla. 412, 53 So. 510 (1910); Edgar v. Bacon, 97 Fla. 679, 122 So. 107 (1929).

137. 2 S. WILLISTON, LAW OF CONTRACTS §317 (rev. ed. 1936).

> the promise. . . . But though each joint promisee has not be regarded as individually entitled to the full performance of the promise in the same way that a joint promisor has been subjected to entire liability for the joint promise, a somewhat similar effect is produced by implying an agency on the part of each joint promisee to receive or collect performance on behalf of those entitled to it.

The Supreme Court of Florida has discussed the joinder requirement in this way:[138]

> Where the parties make a contract that is joint and not several in its obligations, an action for its breach should be by all the joint obligees who are capable of being plaintiffs. If a joint obligee is dead the action should be brought by the survivors. Where for any valid reason a joint obligee is not a plaintiff in an action to enforce or redress the joint right or interest under the contract, the failure to make such party a plaintiff should be sufficiently accounted for in the proceedings or the action will fail on appropriate demurrer unless a valid statute provides otherwise.

The court's statement is revealing; nonjoinder is permissible if properly accounted for, although the court did not specifically indicate what excuses would be sufficient. Presumably, absence from the jurisdiction would be an exception to required joinder in Florida, although there are no cases so holding. The Florida rule, which suggests that the joinder requirement should be excused at least by infeasibility, is in line with more modern thinking;[139] but the Florida rule is not followed in the federal system[140] nor in the majority of state jurisdictions.[141]

The remaining incidents of joint obligee status appear to be substantially the same as those of joint obligor status.[142] For example, at common law, under the survivorship rule, the right of action upon an obligation devolved to the survivor,[143] and the survivor had an obligation to account to the deceased obligee's estate.[144] The statutory abolition of the survivorship rule in Florida permitted the estate of the deceased obligee to sue the obligor;[145] and just as the release of one joint obligor releases the rest, one joint obligee can discharge the promisor, that is, by accepting full performance from the obligor one joint obligee can settle the claims of the other obligees.[146]

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138. Atlanta & St. Andrews Bay Ry. v. Thomas, 60 Fla. 412, 421, 53 So. 510 (1910).

139. RESTATEMENT (SECOND) OF CONTRACTS §129 (Tent. Draft Nos. 1-7 1973); Reed, *supra* note 3, at 368. *But see* 3A J. MOORE, *supra* note 21, §19.10; 7 C. WRIGHT & A. MILLER, *supra* note 21, §1613.

140. 3A J. MOORE, *supra* note 21, §19.10; 7 C. WRIGHT & A. MILLER, *supra* note 21.

141. Reed, *supra* note 3, at 368-69.

142. Reed, *supra* note 3, at 372.

143. Atlanta & St. Andrews Bay Ry. v. Thomas, 60 Fla. 412, 421, 53 So. 510, 513 (1910).

144. RESTATEMENT (SECOND) OF CONTRACTS §132 (Tent. Draft Nos. 1-7 1973); Reed, *supra* note 3, at 369.

145. Lee v. Puleston, 102 Fla. 1079, 1082, 137 So. 709, 710 (1931).

146. RESTATEMENT (SECOND) OF CONTRACTS §130 (Tent. Draft Nos. 1-7 1973). But if a

Given the incidents of joint obligee status, should joinder of all joint obligees be required?[147] It may be true that a plaintiff-obligee would not be disadvantaged by a rule requiring joinder of the absent co-obligee whenever feasible. If said absentee is beyond the jurisdiction of the court, the plaintiff may pursue the obligor as "agent" for all obligees.[148] If an obligee is reachable, but refuses to join, he may be joined as a defendant or an involuntary plaintiff.[149] But the mere fact that the plaintiff suffers no disadvantage is not a sufficient justification for coercing joinder and altering the plaintiff's choice of partners in litigation. Nor is mandatory joinder necessary to insure that complete and final relief is accorded those who are already parties. The plaintiff is asking for satisfaction of an obligation owed by the obligor-defendant; the merits of the controversy may be fully litigated and a judgment granting full satisfaction may be granted if the plaintiff's claim merits relief. Such a judgment will preclude subsequent action by the absent co-obligee against the obligor unless the judgment is obtained by collusion with the obligor and in fraud of the other obligee.[150] Therefore, the relief is complete and the obligor is protected from ensuing inconsistent, multiple, or double liabilities.

Furthermore, the absentee is entitled to his share of the performance of the obligation if the plaintiff recovers the full performance; if the plaintiff is recalcitrant, the absentee can enforce his equitable right to share in the proceeds of the action. This is the only possibility of multiplicity, yet this multiplicity does not represent relitigation against the original defendant nor does it involve relitigation by the absentee. It does involve relitigation against the original plaintiff, but only because the original plaintiff has refused to honor his obligation to his co-obligee. This cycle of litigation being conjectural and remote, the public interest would not compel joinder. Therefore, contrary to traditional[151] and modern[152] notions, there is no reason at all to label the absent joint obligee necessary or indispensable. The action may properly proceed in the absence of a joint obligee with no substantial threat of multi-

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negotiable instrument is made payable to the order of *X* and *Y* Uniform Commercial Code §3-116 provides that the instrument can be discharged only by all co-obligees. *See* FLA. STAT. §673.116 (1973). Additional procedural incidents of minimal significance may be noted. In a suit to enforce joint rights all those joined as plaintiffs must be able to recover. Sahlbery v. J.A. Teague Furniture Co., 100 Fla. 972, 976-77, 130 So. 432, 434 (1930). All obligees must be entitled to recover or none may recover. Edgar v. Bacon, 97 Fla. 679, 682, 132 So. 107, 109 (1929).

147. The conceptualistic argument exists that the joint right is a single cause of action and can support only one adjudication, thus requiring joinder of all joint obligees. The cause of action concept, however, is intended to effectuate policy rather than to control it. The rule against splitting a single cause of action has the salutary aim of avoiding multiplicity, but only where multiplicity is such that it *must* be avoided should the label "single cause of action" be used. This is an indirect way of coercing joinder, and the primary question still remains whether joinder should be coerced.

148. See note 138 *supra* and accompanying text.

149. *E.g.*, FED. R. CIV. P. 19(a); FLA. R. CIV. P. 1.210(a).

150. RESTATEMENT OF JUDGMENTS §102 (1942).

151. See notes 139-41 *supra* and accompanying text.

152. See note 139 *supra* and accompanying text.

ple litigation, inconsistent or double liability, and no threat of impairment of any interested person's rights.

It should be apparent that as to joinder issues involving joint obligations and rights, analysis may be made on the basis of the legal and equitable principles that govern the nature of the rights and obligations in dispute. An in-depth factual inquiry, while imperative for solution of joinder problems in other contexts, is not needed because the factual variations are dominated by the applicable substantive principles governing the rights and responsibilities of those who are in a "joint" relationship with another.

Real Property — Multiple Interests

Controversies involving multiple interests in real property present courts with more problems of mandatory joinder than any other single class of cases. Because of the presence of the property within its territorial jurisdiction, the court has power to adjudicate the rights of all interested persons, wherever they may be, upon proper service of process. The presence of all those who have an interest in the object of the adjudication is commonly required to achieve a fair and complete settlement of a controversy involving real property, and that presence is nearly always assured because of the in rem nature of such a proceeding. A person whose presence is required and who is beyond the in personam reach of a court may nevertheless have his interests in the property adjudicated, upon proper service of process in a quasi in rem proceeding.[153] Those whose names or whereabouts are not ascertainable may also be finally concluded by a quasi in rem adjudication if appropriate constructive service of process is effected.[154] This unique aspect of real property controversies suggests that there need be no distinctions between those whose presence is indispensable and those whose presence is merely necessary. If an absentee ought to be made a party, it is always feasible to make him a party; there is no excuse for proceeding in the absence of one who, after appropriate pragmatic analysis, is concluded to have sufficient interest in the object of a litigation to make his presence desirable.

Two pragmatic principles of decision deserve reiteration at this point. First, the oft-repeated phrase states that all those materially interested in the subject matter of the suit, real property in this context, should be joined. This principle, however, is misleading. Many people may have interests in a particular parcel of land, yet the relief being sought in any given proceeding may have no relationship to some of these interests, either factually or legally. In such a case, joinder is not required and is improper. The focus should be on the object of the suit, the nature of the relief, and its impact on others with interests in the property.[155]

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153. Arndt v. Griggs, 134 U.S. 316 (1890); Cline v. Cline, 101 Fla. 488, 134 So. 546, 548 (1931); A. FREEMAN, THE LAW OF JUDGMENTS §347 (5th ed. 1925); F. JAMES, CIVIL PROCEDURE §9.23 (1965); Reed, *supra* note 3, at 483.

154. See FLA. STAT. ch. 49 (1973) (constructive service of process).

155. See text accompanying notes 157-166 *infra; cf.* Brown v. Solary, 37 Fla. 102 (1896),

Second, although joinder is always feasible, it may not have been accomplished at the trial level, often because no party requested the joinder. When a case of this sort reaches the appellate level, the distinction between necessary and indispensable parties becomes important. If the adjudication can be preserved despite the absence of an interested person, then it should be preserved, the absentee being considered merely necessary. In order to avoid a waste of spent judicial resources, a court should explore all possible opportunities for upholding the judgment without prejudicing either those who were parties or the absentee.[156] A discriminating determination of those who actually have interests that involve the *object of the suit* may permit a court to uphold a judgment rendered in the absence of a person who, in a more general sense, has an interest only in the *subject matter of the suit.* On the other hand, when the interests of the absentee cannot be separated, even an appellate court must react to the nonjoinder by dismissal.

To establish an overview of joinder problems concerning multiple interests in real property, a brief analysis of five Florida cases follows. In the first the court failed to realize that relief is possible despite nonjoinder of an "interested" person. In the second and third cases the courts necessarily dismissed because of the absence of an "interested" person. And in the last two cases courts faced factual situations permitting them to grant relief despite the nonjoinder of an "interested" person.

In *Robinson v. Howe*[157] the holders of a judgment lien sought to subject a parcel of land to execution and sale in satisfaction thereof. It was admitted that one Jackson was possessed of a prior judgment lien on the property, but he was not made a party to the proceeding. The Supreme Court of Florida concluded that no relief could be granted without necessarily affecting the rights of the absent party, and that "it is an elemental principle that a court cannot adjudicate directly upon the rights of parties without having them actually or constructively before it."[158] Thus, the court reversed the judgment with leave to add the absentee; since the land was within the territorial jurisdiction of the court, joinder of the absentee was feasible. Upon analysis it seems that the court was mistaken in its conclusion that joinder was required. Sale of the land in question could have been accomplished without joinder of the absentee. The purchaser at such a sale would simply take subject to the outstanding and superior interest of the absentee. Although the purchase price obtained by such a sale would be lower than it might otherwise be, this result, being the consequence of the *plaintiff's decision* not to join the absentee, would nevertheless be consistent with "equity and good conscience."

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where *T* and *M.*, grantors of the defendants, were not joined as parties in a suit for injunctive relief and an accounting of profits with respect to real property. The absentee-grantors had conveyed their entire interests and no relief was sought against them; their joinder was therefore not required nor would it have been permitted as they were not even proper parties.

156. The Florida courts have demonstrated a willingness to do just this. See text accompanying notes 159-166 *infra.*

157. 35 Fla. 73, 17 So. 368 (1895).

158. *Id.* at 82, 17 So. at 371.

Furthermore, even if the absentee were joined, his superior interest would not be terminated at the request of the inferior lien holder. At most, the court could determine the extent or nature of his interest and, if possible, separate it to permit the sale of the plaintiff's interest with greater assurance as to the actual extent of the absentee's interest.

In *Craver v. Spencer*[159] suit was brought for specific performance of a contract for the sale of land. The vendee and the assignee of the right to purchase brought suit against the vendor and another who claimed title under a subsequent conveyance of that land by the vendor. While the suit was pending the original vendee died, and his administrator was substituted as a party plaintiff. The assignee of the right to purchase also died, but neither the heirs nor the administrator of the assignee were joined as parties plaintiff. The trial court ordered in its decree that the defendants deliver to plaintiff, the administrator of the deceased vendee, bond for title and execute a deed conveying the land to plaintiff; the court further issued a writ of possession to plaintiff and the heirs of the vendee and cancelled the conveyance between the two defendants, enjoining them from executing any other conveyance of the land in question.

On appeal, the Supreme Court of Florida reversed, finding a "fatal defect in parties to the suit."[160] The defect lay in the fact that the contract on which specific performance was sought was absolutely and irrevocably assigned to the deceased, whose heirs or proper representative were not parties to the suit. The original vendee was not a real party in interest, since his interests had been extinguished by the assignments. Thus, the assignee had the sole right to performance.[161] The failure to include, as a party, a representative of the interests of the assignee meant that the one person entitled to performance was not present. Obviously, no meaningful decree could properly issue.

A particularly interesting case was triggered when, in 1833, General LaFayette of France sold on credit certain lands in Florida to Nuttall, Braden, and Craig upon their bonds for the purchase price plus interest, and executed and delivered to them a bond to make conveyance of good title upon payment. Soon thereafter the vendees sold a large portion of these lands to Hunter, who gave them his bond for the purchase price in return for their bonds to make good title upon payment. Hunter then assigned his right to title to another, which right was assigned several additional times until acquired by Betton. Williams, as attorney for General LaFayette, brought suit against the final vendee upon his bond for the purchase price, which bond had been transferred to LaFayette. Betton demurred for failure of the vendor to join as parties the original vendees, and the Supreme Court of Florida reversed the lower court's refusal to sustain the demurrer.[162] The court neces-

159. 40 Fla. 135, 23 So. 880 (1898).

160. *Id.* at 141, 23 So. at 881.

161. *Id.* at 140, 23 So. at 881. *See also* RESTATEMENT (SECOND) OF CONTRACTS §148 (Tent. Drafts Nos. 1-7 1973).

162. Betton v. Williams, 4 Fla. 11 (1851).

sarily concluded that no relief could be granted in the absence of the original vendees.[163]

In several situations, however, Florida courts have recognized the possibility of granting requested relief despite the absence of a person who had an interest in the subject matter of the suit. The key in these cases has been that the absentee's interests remained unaffected by the relief granted to those who were parties to the suit. In *Alger v. Peters*[164] six cotenants, not parties to another tenant's earlier suit against their landlord in which an injunction issued prohibiting said landlord and the six nonparty tenants from raising potatoes, appealed a contempt citation issued by a lower court against them for violation of the injunction. The supreme court pointed out that the earlier decree was not void insofar as it adjudicated the rights of the landlord and the other tenant, but that it could have no force and effect as to the six tenants who were not made parties. The court thus upheld the earlier decree as it affected those who were parties, but clearly prohibited its application to those who were absent.

Another good example of this type of flexibility is provided by *United States v. Florida*.[165] Money was seized in a gambling raid and turned over to the clerk of a Florida circuit court. To effect a disposition of the money, the state and Dade County filed suit against the clerk and the United States, which had made assessments of federal wagering excise taxes against the gambler in whose room the money was found. The United States' motion to dismiss for absence of an indispensable party (the gambler) was denied. The court found for the state and county; the United States appealed. The appellate court affirmed, noting that a judgment declaring that the United States had no interest in the seized funds would not deprive the gambler of any rights he had in such funds. Since he was not made a party, his interests were separable from those of the United States, and he was free to assert his rights to the funds in a subsequent action against the plaintiffs.[166] Thus, as in the *Alger* case, the court was able to grant relief despite nonjoinder of an "interested" person.

Partition. Controversies concerning the partitioning of land are particularly illustrative of the analytical and pragmatic principles that should guide the decision of joinder problems in real property litigation. The purpose of a partition suit is to avoid the inconveniences that result from a common possession and to enable the owners to possess and enjoy their respective shares in severalty.[167] If partition cannot be accomplished, then the realty is

163. The court stated: "[They] should be parties to the suit, so as to be bound by the decree of the court to make the conveyance which they had contracted to make, and which vendee or his assignee has a right to require, before he parts with his money." *Id.* at 19.

164. 88 So. 2d 903 (Fla. 1956).

165. 179 So. 2d 890 (3d D.C.A. Fla. 1965).

166. *Id.* at 894.

167. Weed v. Knox, 157 Fla. 896, 27 So. 2d 415 (1946).

sold and the joint tenants, tenants in common, or coparceners will share in the proceeds thereof.

In *Cline v. Cline*[168] complainants brought suit at equity for the purpose of partitioning real estate, title to which they claimed as heirs at law of the deceased. The complainants alleged that they were the wife and children of the deceased. Not joined as parties in this proceeding were the decedent's first wife and two children by that wife, who filed a petition seeking permission to intervene, alleging that they were lawful heirs of the deceased and seeking recognition of their interests in the property described in the complainant's bill. The trial court denied the petition for intervention, and the Supreme Court of Florida reversed. The court observed that it had been repeatedly held that "persons whose interests will necessarily be affected by any decree that can be rendered in a cause are necessary and indispensable parties and the court will not proceed without them."[169] Perhaps the court's phrase "necessary *and* indispensable" indicates an acknowledgment that whenever an absentee with an interest in the object of a suit involving real property ought to be joined, then he must be joined, since joinder is always feasible. In such cases "necessary" is "indispensable"; the two terms are synonymous.[170]

The *Cline* court's use of the word "affected" also deserves further attention. The petitioners for intervention, if true owners of the property, could not be divested of their title by any decree unless they were made parties. Nevertheless, a decree of partition or sale rendered in their absence would certainly cast a cloud upon their title.[171] To eliminate such a cloud, petitioners would have the right to institute a subsequent proceeding to have their interests clarified. In the event that a decree of partition or sale were rendered in the earlier suit in their absence, there would be nothing to hinder them from bringing about another division or sale upon proper proof. But this would embarrass and perhaps prejudice their cotenants or the purchaser at the earlier sale. For that reason joinder of the petitioners was clearly called for and, since they had voluntarily submitted themselves to the jurisdiction of the court, joinder was not only desirable but feasible as well. The court pointed out that even had they not voluntarily submitted themselves to the power of the court, because of the court's authority over the property, they would, upon proper service of process, be bound. There was, therefore, no impediment to making them parties.[172]

The joinder of parties in suits for partition is controlled by statute in Florida.[173] This statute has been uniformly interpreted to require that a

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168. 101 Fla. 488, 134 So. 547 (1931).

169. *Id.* at 495, 134 So. at 548-49.

170. See Reed, *supra* note 3, at 483.

171. Cline v. Cline, 101 Fla. 488, 134 So. 547 (1931).

172. *Id.* at 496, 134 So. at 549. It should be noted that partition procedures must be venued in the county where the land is located. FLA. STAT. §64.022 (1973).

173. FLA. STAT. §64.031 (1973): "The action may be filed by any one or more of several joint tenants, tenants in common or coparceners, against their cotenants, coparceners or others interested in the lands to be divided." *Id.*

cotenant seeking the partition of property join all other known cotenants as parties-defendant.[174] The statute is the embodiment of wise policy; the joinder of all is desirable and reasonable in partition suits. In *Camp Phosphate Co. v. Anderson*[175] the Supreme Court of Florida reversed a decree ordering sale of the premises because of the absence of the owner of an undivided one-seventh interest in the land. Thus, in a suit for partition or sale all those cotenants not suing as plaintiffs must be joined as defendants. Accordingly, in *Nelson v. Haisley*[176] where a cotenant-defendant died during the pendency of an action for partition, the heirs and personal representative of the deceased were required to be joined.[177]

Despite the mandatory nature of the Florida partition statute,[178] the Supreme Court of Florida has not been wooden-handed in its application of this provision; wherever possible the court has preserved the private and judicial efforts at the trial level. In *Lovett v. Lovett*[179] the complainant brought suit for partition, and the defendant asserted a counterclaim asking that additional lands in which complainant and defendant had a common interest be subjected to any decree that the court might deem appropriate. The court ordered sale of the lands described in the original bill and in the counterclaim. The judgment was rendered with reference to two minors who were not made parties and who admittedly had interests in the additional land described in the counterclaim. The supreme court concluded that this error could be cured, validating the proceeding as to all the parties, if the omitted minors would enter an appearance within ninety days, file a reply to the counterclaim, consent to the relief granted in the counterclaim, ratify the orders and decrees of the chancellor, and accept their share of the proceeds of the sale of land as full compensation for their interests.[180] The court's ingenuity thus made possible the preservation of a judgment that had been rendered after an extraordinarily difficult and lengthy litigation.[181]

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174. *E.g.*, Cline v. Cline, 101 Fla. 488, 134 So. 548 (1931); Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927); Yager v. N. & S. Alafia River Phosphate Co., 82 Fla. 38, 89 So. 340 (1921); Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904); Lyon v. Register, 36 Fla. 661, 18 So. 587 (1895).

175. 48 Fla. 226, 37 So. 722 (1904).

176. 39 Fla. 145, 22 So. 265 (1897).

177. *See also* Lyon v. Register, 36 Fla. 611, 18 So. 589 (1895). This decision represents the operation of two statutes: FLA. STAT. §64.031 (1973), *quoted in* note 173 *supra,* and FLA. STAT. §733.02 (1973), which provides: "In all actions or suits involving the title to real property, against an estate for possession or recovery of real property or for the purpose of quieting title thereto, the personal representative and the heirs or devisees of such property shall be made parties." The latter provision has been construed to make heirs or devisees of a decedent "indispensable" parties to a suit against the estate. *See* Marquette v. Hathaway, 76 So. 2d 648 (Fla. 1954); Scott v. Jenkins, 46 Fla. 518, 35 So. 101 (1903). In practice, this indispensability has meant only that the omitted party will not be bound, not that the judgment will be void as to those who were parties. See text accompanying notes 209-211 *infra.*

178. FLA. STAT. §64.031 (1973). See note 173 *supra.*

179. 93 Fla. 611, 112 So. 768 (1927).

180. *Id.* at 655, 112 So. at 784.

181. The Supreme Court of Florida demonstrated an approach of equal flexibility in a

Reformation, Cancellation, or Rescission of Conveyances. Whenever the reformation of a deed of conveyance would shift ownership of real property from one person to another, it would seem axiomatic that the person to be dispossessed must be made a party to the proceeding. There can be no justification for nonjoinder (because of the presence of the *res* within the territorial jurisdiction of the court) and due process will not permit any extinguishment of an absentee's interest. A case in point is *Oakland Properties Corp. v. Hogan*[182] in which the complainant sought multiple relief, including the reformation of a deed between the complainant as grantee and Middle River Development Corporation, the grantor. Middle River was not named as a party and the court adopted the view that the requested relief, alteration of the deed to convey seventy-five acres rather than ten acres, clearly could not be granted in the absence of the grantor, from whom the additional lands would have to come.

At the other extreme are those cases in which an absentee has no interest that could be affected by the relief requested; such a person would not even be a proper party. In *McDonald v. Russell*[183] the complainant brought a bill to subject certain land to sale under a writ of execution issued against McDonald. McDonald had purchased the land from Sanford, and Sanford conveyed title to Boyd in trust for and at the insistence of McDonald. McDonald and Boyd were named as defendants, but Sanford was not joined as a party. The Florida supreme court held that Sanford was not necessary to a final determination between the parties. Thus, setting aside the deed from Sanford to Boyd and subjecting the property to the judgment lien held by Russell would have no effect on Sanford, since he had parted with all interest in the land and since no relief was being sought against him.[184]

Understandably, not all cases are capable of such simple settlements. For example, in *Heisler v. Florida Mortgage, Title & Bonding Co.*[185] Heisler filed a bill in equity for reformation of a deed of conveyance to remove certain use restrictions contained therein. She alleged that the parties to the conveyance had contemplated use of the property, which was located in a residential section, for a sanitarium. Furthermore, although Heisler had earlier been enjoined from using the property as a sanitarium,[186] the complainants in the prior suit (adjacent property owners) were not named as parties to the subsequent suit for reformation of the deed of conveyance.

A court-appointed commissioner, who wrote most of the opinion, analyzed the facts and concluded that the adjacent property owners had no rights that

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suit brought to set aside a decree of partition and a sale in Yager v. N. & S. Alafia River Phosphate Co., 82 Fla. 38, 89 So. 340 (1921). The court affirmed a judgment on the merits for the defendant notwithstanding the absence of the holder of legal title to the land. This absentee was labeled "necessary" but, since his interests were not prejudiced by the *judgment for the defendant,* reversal was not needed.

182. 96 Fla. 40, 117 So. 846 (1928). See notes 27-29 *supra* and accompanying text.

183. 16 Fla. 260 (1877).

184. *Id.* at 261.

185. 105 Fla. 657, 142 So. 242 (1932).

186. Heisler v. Marceau, 95 Fla. 135, 116 So. 447 (1928).

were sufficient to make them "necessary" parties.[187] The commissioner's part of the opinion concluded with the statement that the court was not called upon to determine what effect, if any, reversal of the decree dismissing the instant action would have upon the rights of the parties as affected by the injunction in the prior suit. The supreme court adopted the commissioner's report with the modification that the complainants in the injunction suit were necessary parties who must be brought into the case before the court could enter any decree of reformation that might disturb their rights as previously adjudged. The commissioner had concluded that the absentees had no interest in the subject matter of the litigation, but he specifically indicated that no consideration had been given to the possible effect a decree of reformation would have on the right established by the injunction proceeding.

Analysis of the earlier proceeding indicates that the supreme court's conclusion, although unexplained, was correct. The chancellor in the injunction proceeding entered a decree "permanently restraining and enjoining the defendants from using the building erected by them on said lots for the purpose of a sanitarium or for any other purpose inconsistent with the nature of a strictly residential section."[188] It was thus clear that a decree of reformation permitting use of the premises as a sanitarium would be in direct conflict with the terms of the injunction decree and the rights established by it. That decree clearly declared that the complainants had sufficient interests in the Heisler property[189] to prevent the noncomplying use. To the extent that a decree of reformation would permit such a use, those interests would be clearly affected. If the complainants in the injunction proceeding were not made parties, then two decrees – one prohibiting use as a sanitarium and one permitting such a use – would be extant, and a third proceeding would probably be needed to resolve the conflict. The reversal of the trial court's decree

187. "The record does not reveal that the complainants in the injunction suits acquired by the deed to them any rights that will be affected by a decree in Mrs. Heisler's favor, in this litigation. While the deeds to them provided that their said property should not be used for any purpose inconsistent with the nature of a strictly residential section, no provision in such deeds has been brought to our attention that would bind the owners of the subdivision or subsequent purchasers of other lots to observe such restrictions, nor has it been shown that Mrs. Heisler knew of any contract or understanding between such vendors and their vendees that Suburb Royal was to be a residential section, and that the lots therein were not to be used for any other purpose. If the complainants in the injunction suit had acquired their property after the deed to Mrs. Heisler had been recorded, without notice of the circumstances connected with the transaction that led up to the execution of such deed, it might be urged with some degree of plausibility that they had some interest in the subject matter of this litigation. Such is not the case with them, for it appears that they acquired the title to their lots before Mrs. Heisler purchased those involved in this litigation. They have no interest that is adverse to those of Mrs. Heisler, and therefore are not necessary parties to the suit." 105 Fla. at 669, 142 So. at 247.

188. Heisler v. Marceau, 95 Fla. 135, 136-37, 116 So. 447, 448 (1928).

189. The court specifically indicated that no question as to the complainants' right to require compliance with the restrictive covenant was raised. *Id.* Perhaps they sued as third-party beneficiaries. *See* RESTATEMENT OF PROFERTY §528 (1944).

dismissing the bill for reformation was properly conditioned on the joinder of those who were the complainants in the injunction proceeding.

In the previous discussion of *McDonald v. Russell*[190] it was noted that in a suit for reformation of a deed the grantor need not be joined when no relief is sought against him and he retains no interest in the property that was the subject of the conveyance. This holds true as a general proposition unless the original grantor or an intermediate grantor conveyed title by warranty deed. For example, in *Indian River v. Wooten*[191] the Supreme Court of Florida held that in a suit for reformation of a deed, where the rights of the complainant were acquired upon warranty, the lessor-warrantors were "necessary"[192] parties. The absentees in that case were lessors who had executed a lease conveying a turpentine privilege to the plaintiff promising that they would warrant and defend the rights conveyed therein against all persons claiming under them. On the same day the lessors executed another deed of the same lands to Dallam, subject to the lease of the turpentine privilege and without warranty. Dallam thereafter conveyed to Indian River Manufacturing Company. In an equity proceeding devoid of participation by the lessor-absentees, the chancellor granted the plaintiff-lessee a decree reforming the lease to include the additional right of the lessee to cut and carry away the wood and timber on the land. The Supreme Court of Florida reversed the decree for failure to join the lessor-warrantors, finding that by reason of the warranty clause in the lease the lessors were bound to warrant and defend whatever rights were conveyed by the lease and holding that the lessor-warrantors were therefore necessary parties to the proceeding.[193] The court also concluded that, since the deed from the lessor-grantors contained no warranty, the grantee Dallam was not a necessary party.[194]

The court's conclusion that the lessor-grantors were necessary parties because of the warranty contained in the lease does not withstand analysis, however, for the complainants were seeking no relief against the lessors nor were they attempting to enforce or rely upon the promise to warrant and defend. The absentees could not be affected in a legal or practical sense by a decree granting the relief of reformation as requested by the complainants. At first glance it might seem that the decree reforming the lease placed an additional burden on the absentees by extending their warranty to cover the right to timber. Yet clearly the decree did not so affect the absentee's warranty because

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190. 16 Fla. 260 (1877). See text accompanying notes 183-184 *supra*.

191. 48 Fla. 271, 37 So. 731 (1905).

192. The court used the appellations "necessary" and "indispensable" interchangeably, as if they had the same meaning. Many Florida supreme court opinions demonstrate a similar lack of distinction. *E.g.*, Savage v. Olson, 151 Fla. 241, 9 So. 2d 363 (1942); Griley v. Marion Mortgage Co., 132 Fla. 299, 182 So. 297 (1937); Gibson v. Tuttle, 53 Fla. 979, 43 So. 310 (1907); Sarasota Ice, Fish & Power Co. v. Lyle & Co., 53 Fla. 1069, 43 So. 602 (1907); Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905); Betton v. Williams, 4 Fla. 11 (1851). Furthermore, in one instance the supreme court used the term "proper" to describe one who *must* be joined, Brecht v. Bar-Ne Co., 91 Fla. 345, 108 So. 173 (1926).

193. 48 Fla. at 277, 37 So. at 733.

194. *Id.*

they were not parties to the proceeding and their warranty could not therefore be affected or extended in any respect.[195] In addition, the defendant-grantees might have attempted to pursue a remedy against the absentees despite the lack of warranty in their deed. It is not justifiable, however, to require joinder on the unsupported supposition that the defendants might desire such relief on a matter collateral to complainant's request for relief. The court's reversal destroyed a substantial private and judicial effort that had finally concluded the rights of the parties *inter se* and arbitrarily required joinder of a party against whom no one sought relief.

In a case decided in the same year as *Indian River,* the Supreme Court of Florida again reversed a trial court for failure to join one who had granted land by warranty deed to the defendant-grantee.[196] Complainant sought a decree setting aside an allegedly fraudulent conveyance between the absent grantors and Florida Land Rock Phosphate Company, a corporation formed and wholly owned by the absentees. The complainant was purchaser at a sheriff's sale of the property, which had been subjected to a judgment lien just after the alleged fraudulent conveyance. Complainant alleged that defendant took with notice of the vendor's lien, which was later reduced to judgment, the execution of which resulted in sale to the complainant. The court concluded that the grantors were "necessary and indispensable"[197] because they were directly charged with fraud and with having made the fraudulent conveyance, which the bill sought to have set aside. The court's decision reversing the judgment on the merits for the complainant was based on the fact that the absentees gave a warranty deed to the defendant and that they were charged with fraud.[198]

Upon analysis, the court's decision cannot be justified on either of its stated grounds. That the absentees gave a warranty deed to Florida Land Rock is of no consequence, since Florida Land Rock was formed by and wholly owned by the absentees. They faced no subsequent suit for breach of that warranty.[199] Furthermore, the court below found that Florida Land Rock participated in the fraud and was chargeable with it; so even if Florida Land Rock were not, for all practical purposes, the alter ego of the absentees, it still would not have had an actionable claim on the warranty.

The court's reversal of the judgment on the merits came in an extensive opinion that described in detail the long and complicated proceeding below,[200] all of which was rendered void because of the court's naive and nonanalytical conclusion that the absentees were "necessary and indispensable" parties. The resulting loss of private and judicial resources as a result of this heavy-handed, mechanistic approach to joinder was both substantial and egregious.[201]

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195. See note 20 *supra* and accompanying text.

196. Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905).

197. *See* note 192 *supra.*

198. 50 Fla. at 514-15, 39 So. at 396-97.

199. The court cited its earlier decision in Indian River Mfg. Co. v. Wooten, 48 Fla. 271, 37 So. 731 (1905), in support of the warranty basis of the decision.

200. 50 Fla. at 509, 39 So. at 395.

201. In Gibson v. Tuttle, 53 Fla. 979, 43 So. 310 (1907), the court was faced with a

In *Frell v. Frell*[202] a Florida intermediate appellate court concluded that the absence of a grantor who conveyed by warranty deed to the grantee-appellants was not a defect in a suit to cancel and set aside the conveyance as fraudulent. The court concluded with the following cryptic comment that the absentee-warrantor was neither an indispensable nor a necessary party:[203]

> The conveyances to the appellants were by warranty deed and the record precludes any possibility that the appellants as grantees, could proceed against the defendant, as grantor, if the conveyances were set aside.

The grantees in the *Frell* case were the brother and sister-in-law of the absentee and the court's comment was a recognition of the fact that the conveyance was without consideration and was an effort to frustrate the plaintiff's collection of past due alimony. The court properly observed that, as knowing participants in the fraud, the grantees posed no threat of liability upon the warranty. The decree below, which had set aside the conveyance as fraudulent, was therefore affirmed. Thus, in none of these cases could the fact that the absentee-grantor had conveyed by warranty deed justify mandatory joinder of that grantor, who had parted with all interest in the property and against whom no relief was sought.

Foreclosure. When an obligation is secured by a mortgage on real estate and that obligation is in default, the mortgagee may seek foreclosure to obtain payment by sale of the mortgaged premises. When there are multiple interests in the mortgaged land, the mortgagee must decide which persons should be made parties to the proceeding. There is rarely any question as to joinder of parties-plaintiff, since only the mortgagee or someone claiming under him has a right to foreclose. With regard to the joinder of parties-defendant, however, the plaintiff's success is usually dependent upon his ability to join all of those who have claims against the mortgaged premises that are inferior to the mortgagee's interest. Joinder of such persons will always be feasible in the

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nearly identical case and reached the same indefensible result for the third time in three years. In *Gibson* the complainant sought a decree cancelling deeds conveying title to real estate as being clouds upon his title. These deeds all contained warranties; the only absentee was the grantor to the last vendee; the absentee owned the last vendee. A different analysis may be called for when the warrantor and the warantee are adversaries. For example, suppose that *X* purchases real estate from *Y*, who conveys title by warranty deed. Thereafter, *Z* institutes an action to quiet title in that real estate and names *X* as defendant. *X* properly requests *Y* to defend against the claim of *Z*, but *Y* fails to do so. If the judgment is for *Z*, then it should be conclusive in an action on the warranty by *X* against *Y* with regard to *Z*'s interest in the land. Although joinder is not required, *Y* is given notice and an opportunity to participate and to protect his interests; failing to do so he may properly be bound. *See* RESTATEMENT OF JUDGMENTS §108 (1942). *Cf.* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), wherein Mr. Justice Harlan suggested the possibility that one who has the opportunity to intervene but fails to do so might properly be precluded on the merits.

202. 154 So. 2d 706 (3d D.C.A. Fla. 1963).

203. *Id.* at 708. The grantor was defendant in his wife's suit for overdue alimony, but was not served and did not appear in the proceeding for cancellation of the conveyance.

jurisdictional sense because of the court's ability to proceed quasi in rem as to any of those beyond its in personam power.

It is generally thought that those persons having an interest in the mortgaged property superior to that of the mortgagee are neither required parties nor proper parties,[204] since the sole purpose of a mortgage foreclosure suit is to foreclose the lien against the title of the mortgagor and those claiming under him. If the priority of the liens is uncertain, all holders of such liens should be joined in the foreclosure proceeding so as to determine priority,[205] and if any one is found to possess an interest superior to that of the mortgagee then he should be dismissed.[206] For example, the lessor is not a proper party in a suit for foreclosure of a mortgage upon the leasehold brought by the mortgagee against the lessee-mortgagor.[207] And where the original mortgagor has conveyed all interest in the mortgaged premises before the filing of the foreclosure proceeding, then his joinder is not required or permitted unless a deficiency judgment is sought against him.[208]

Nonjoinder problems are infrequent in the mortgage foreclosure context because the mortgagee is driven by self-interest to join all of those who have interests in the real estate inferior to the mortgage sought to be foreclosed. The mortgagee seeks payment of the defaulted obligation out of the property, and he wants the property sold at a price sufficient to give a full return on his investment. In order to accomplish this objective fully the mortgagee needs a sale of the premises at the maximum price, which can usually be obtained only if a title free of junior liens and mortgages is offered to the judicial sale purchaser. Because of the court's authority over the property, joinder of all such persons is feasible and, for the reasons just mentioned, desirable.

It appears to be established in Florida jurisprudence that the joinder of all inferior lien holders and claimants is *necessary,* but this necessity is not used in the sense of *required* for the continuance of the proceeding to final adjudication. As already indicated, such joinder is necessary if the mortgagee is to accomplish the purpose of the suit, assuming that purpose is to remove all inferior liens and claims so that a maximum price may be obtained at the foreclosure sale. The second part of this necessity is that inferior lien holders and claimants must be made parties to the proceeding before their interests can be foreclosed.[209]

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204. *E.g.,* Jones v. Florida Lakeland Homes Co., 95 Fla. 964, 117 So. 228 (1928).

205. *E.g.,* Tippins v. Belle Mead Corp., 112 Fla. 372, 150 So. 719 (1933).

206. *E.g.,* Wooten v. Bellinger, 17 Fla. 289 (1879); Boynton Beach State Bank v. J.I. Case Co., 99 So. 2d 633 (2d D.C.A. Fla. 1957).

207. *Cf.* Great S. Aircraft Corp. v. Kraus, 132 So. 2d 608 (3d D.C.A. Fla. 1961).

208. *E.g.,* Dennis v. Ivey, 134 Fla. 181, 183 So. 624 (1938).

209. R.W. Holding Corp. v. R.I.W. Waterproofing & Decorating Co., 131 Fla. 424, 179 So. 753 (1938); T-R Indian River Orange Co. v. Keene, 124 Fla. 343, 168 So. 408 (1936); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 So. 108 (1913); Pan American Bank v. City of Miami Beach, 198 So. 2d 45 (3d D.C.A. Fla. 1967); Lynch v. Welan Inv. Co., 126 So. 2d 148 (3d D.C.A. Fla. 1961).

No Florida case has been found that holds void or ineffective a decree of foreclosure with respect to those who were parties; it is effective as to them, although ineffective as to those who were absent. In a similar vein, while it is settled that the owner of legal title to land is a necessary party to the foreclosure of the mortgage on that legal title, and that in the absence of such joinder neither the decree nor the judicial sale will affect his title,[210] there are a number of cases holding that a foreclosure may be maintained even though the holder of the legal title to the property is not a party, and the resulting decree may establish the rights of persons who are parties.[211] It should be clear, therefore, that absentees of this sort are not "necessary" in the traditional sense. For example, a decree of foreclosure on a mortgage covering seventy-five acres of land was upheld in a subsequent suit to vacate as to sixty-five of the acres owned by one who was a party to the foreclosure proceeding, but was vacated as to the other ten acres owned by one who was not made a party to the foreclosure proceeding.[212] Where a mortgage covered three parcels of land and the owners of two of the parcels were named as defendants while the owner of the third parcel was not, the decree foreclosing the mortgage was upheld as to the two parcels owned by the named defendants, but vacated as to the third parcel owned by the absentee.[213] Further, where foreclosure of a mortgage was obtained in a suit in which the personal representative of deceased-mortgagor was named as a defendant, the foreclosure was effective as to the personal representative, but did not affect the legal title of the devisees of the property who were not made parties to the foreclosure proceeding.[214] Similarly, where suit was brought against the mortgagor to foreclose the mortgage and the plaintiff failed to join as parties – defendant the assignees of a lease executed by the mortgagor and duly recorded, the foreclosure proceeding was effective to give title to the purchaser, which title included the right to ultimate possession. Nevertheless, as the rights of the leaseholders were not adjudicated, the title and right of possession acquired by said purchaser were subject to the rights of the leaseholders.[215] Thus, when a number of persons have interests in a parcel of land, the foreclosure of a mortgage upon that land affects the interests of only such persons as were made parties to the

210. *E.g.*, R.W. Holding Corp. v. R.I. Waterproofing & Decorating Co., 131 Fla. 424, 179 So. 753 (1938); Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928); Jordan v. Sayre, 24 Fla. 1, 3 So. 329 (1855); Berlack v. Halle, 22 Fla. 236 (1886).

211. *E.g.*, R.W. Holding Corp. v. R.I. Waterproofing & Decorating Co., 131 Fla. 424, 179 So. 753 (1938).

212. Oakland Properties Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (1928).

213. R.W. Holding Corp. v. R.I. Waterproofing & Decorating Co., 131 Fla. 424, 179 So. 753 (1938).

214. Pan American Bank v. City of Miami Beach, 198 So. 2d 45 (3d D.C.A. Fla. 1967). It should be pointed out that under FLA. STAT. §733.02 (1973), both the personal representative and the heirs or devisees must be made parties in all actions against an estate involving title to real property. As interpreted, this provision does not alter the stated rule that the foreclosure proceeding will bind those who were parties despite the absence of heirs or devisees. Oakland Properties Corp. v. Hogen, 96 Fla. 40, 47, 117 So. 846, 847 (1928).

215. Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 So. 108 (1913); *cf.* Great S. Aircraft Corp. v. Kraus, 132 So. 2d 608 (3d D.C.A. Fla. 1961).

foreclosure proceeding. An owner of an interest in the land will have that interest terminated by foreclosure against him, but one not made a party to the proceeding is not affected by it.

In a general sense, therefore, although the effectiveness of the decree is diminished if there is less than full joinder, it is understandable that courts allow the plaintiff-mortgagee to proceed without full joinder and affirm the "incomplete decree." It would be unconscionable for the judicial system to intercede and require termination of property interests, which the mortgagee is not interested in terminating. The decree's effectiveness may be limited by incomplete joinder, but it will have some effect, presumably that effect desired by the mortgagee. Neither those who are parties nor those who are absent are prejudiced by nonjoinder. The possibility of further litigation alone is not sufficient to require complete joinder. The party most interested in the matter can, and usually will, accomplish complete joinder.

Joinder of the Insured in a Direct Action Suit Against the Insurer

By decisional law in Florida, an injured party has a direct cause of action as a third-party beneficiary against the insurer of an alleged tortfeasor.[216] In *Shingleton v. Bussey* the Supreme Court of Florida held:[217]

> [T]he third party beneficiary doctrine encompasses, substantively speaking, a cause of action against an insurer in favor of members of the public injured through the acts of an insured.

The cause of action against the insurer vests in the injured party at the same time a cause of action vests against the insured,[218] but the liability of the insurer is conditioned upon the injured party's establishment of the insured's liability to judgment.[219] The judicial creation of this right of action occurred in the context of joining the insurer as a codefendant in an action against the

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216. Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). This rule has been extended to all forms of liability insurance policies. *See* Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 Fla. (1970). *See also* Note, *Direct Action Against the Liability Insurer: A Legislative Approach for Florida,* 23 U. FLA. L. REV. 304 (1971); Comment, *Civil Procedure: Joinder of Liability Insurers — A Welcome Clarification of* Shingleton *and* Beta Eta, 24 U. FLA. L. REV. 820 (1972); Comment, *Judicial Creation of Direct Action Against Automobile Liability Insurers,* 22 U. FLA. L. REV. 145 (1969).

217. 223 So. 2d at 716.

218. *Id.* at 716. The court conditioned this investiture upon the insurer's recipt of notice of the injured party's claim and its ability to investigate said claim. This seems to be a peculiar and unworkable requirement that makes the time of investiture difficult to ascertain. The due process clause of the fourteenth amendment clearly requires notice and an opportunity to defend as preconditions to a binding judgment; perhaps this is what the court had in mind. If so, the time at which the cause of action vests is irrelevent. No subsequent cases have considered this "condition."

219. The court said: "Of course, by the very nature of liability insurance it is axiomatic that liability of the insured is a condition precedent to liability of the insurer on the cause of action against it by the injured third party." 223 So. 2d at 716.

insured. In permitting joinder of the insurer the Supreme Court of Florida relied upon a fundamental principle of procedural policy:[220]

> [T]he public policy of this state [favors] the elimination of multiplicity of suits and unreasonable impediments to the remedial process of adjudication of adversary rights conferred by the operation of substantive principles of law . . . .

The court was convinced that both substantive and procedural policies were furthered by permitting the third-party beneficiary to pursue a remedy against both the insured and the insurer in the same proceeding; accordingly, the court gave the injured party the option of joining the insurer, although such joinder was not made mandatory.[221] The court clearly focused on the benefits to the injured party that would flow from this policy of permissive joinder:[222]

> In such cases, it is hard to imagine all of the many difficulties which could operate to impede the injured third party plaintiff from ferreting out and having adjudicated his rights of adequate remedy against the insured and the insurer when he is precluded from initially and directly having the trial court consider all facets of the joint and several liabilities of the defendants in one action, not only as to plaintiff's claim against the insured, but as to any defenses of insurer against insured which might operate to destroy his claim.

This passage indicates that the thrust of the decision permitting joinder of the insurer was to assure that the injured party had an adequate opportunity to obtain a remedy from those obligated to him under the law. Another significant feature of the above-quoted passage is the court's view that the liability of the insured and the insurer is "joint and several." This further underscores the fact that the court was permitting joinder, but not requiring it; the traditionally accepted American rule has been that a plaintiff has a free hand in deciding whether to join as parties-defendant those who are jointly and severally liable to him.[223]

Such a viewpoint may also support the logical corollary that joinder of the insured in a direct action against the insurer will not be required by the court when the issue is presented to it.[224] It is clear that the court's decision per-

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220. *Id.* at 718.

221. The court used permissive language rather than mandatory language. For example: "If joinder is *allowed*." *Id.* at 719 (emphasis added).

222. *Id.* at 719.

223. Colle v. Atlantic Coast Line R.R., 153 Fla. 258, 263, 14 So. 2d 422, 424 (1943); Pendarvis v. Pfiefer, 132 Fla. 724, 730, 182 So. 307, 309 (1938); Fincher Motor Sales v. Lakin, 156 So. 2d 672, 674 (3d D.C.A. Fla. 1963); 3A J. MOORE, *supra* note 21, §19.07(1); 7 C. WRIGHT & A. MILLER, *supra* note 21, §1623; Reed, *supra* note 3, at 357.

224. As indicated throughout this article, the characterization of the liability of an insured and an insurer as "joint and several" should not be dispositive; the issue of joinder is properly resolved by pragmatic analysis rather than by use of abstract labels, which have no probative functional meaning in this context.

mitting joinder of the insurer contemplated an action in which insured and insurer were codefendants. It is just as apparent that the court did not have occasion, nor did it purport, to consider the other side of the joinder issue. In the traditional terminology, is the insured a necessary or indispensable party to a direct action brought by the injured third-party beneficiary against the insurer?

This question is apparently settled in some other states[225] where the view has been that joinder of the insured is permissible but not required.[226] The generally accepted rule permits a third-party beneficiary to seek specific performance without joinder of the promisee.[227] There have been several Florida cases at the intermediate appellate level that have permitted a direct suit against the insurer without joinder of the insured where the issue of joinder was not raised by the parties nor considered by the court.[228] Furthermore, two district courts of appeal directly considered whether joinder of the insured should be required, but they reached opposite conclusions.[229] In *Kephart v. Pickens*[230] the Fourth District Court of Appeal rejected the reasoning of the Third District in *Maxwell v. Southern American Fire Insurance Company*[231]

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225. *E.g.*, GUAM GOV'T CODE §§23,525, 43,354 (1961); LA. REV. STAT. ANN. §22:655 (1959); P.R. LAWS ANN. tit. 26, §§2001, 2003 (1968); WIS. STAT. ANN. §260.11 (1969). For a discussion of the Louisiana and Wisconsin statutes, respectfully, see McDonald, *Direct Action Against Liability Insurance Companies*, 1957 WIS. L. REV. 612; Note, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243 (1961).

226. Most jurisdiction permitting direct actions against the insurer have held the insured and insurer to be jointly and severally liable. *E.g.*, Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967); Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp. 823 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968). For cases allowing suit against the insurer without the insured's presence, see Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (La. Ct. App. 1963); Elliot v. Indemnity Ins. Co. of N. America, 201 Wis. 445, 230 N.W. 87 (1930). Consistent with the "joint and several" characterization are the holdings that joinder of the insured is merely permissible. *E.g.*, Fraticelli v. St. Paul Fire & Marine Co., 375 F.2d 186, 187-88 (1st Cir. 1967); Tillman v. Great Am. Indem. Co., 207 F.2d 588, 590 (7th Cir. 1953); 7 C. WRIGHT & A. MILLER, *supra* note 21, §1619.

227. *See* Fidelity & Cas. Co. v. Plumbing Dep't Store, Inc., 117 Fla. 119, 157 So. 506 (1934); American Sec. Co. v. Smith, 100 Fla. 1012, 130 So. 440 (1930). RESTATEMENT (SECOND) OF CONTRACTS §138 (Tent. Drafts Nos. 1-7, 1937) provides: "Where specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owned to an intended beneficiary." and "[T]here is no general requirement that the promisee be made a party, but the promisee is ordinarily a proper party and the circumstances may be such that a final decree should await joinder of the promisee." *Id.* comment *a. See also* A. CORBIN, CONTRACTS §§810, 812, 824-25 (1951); 2 S. WILLISTON, LAW OF CONTRACTS §§358-59, 366, 390-92 (3d ed. 1959).

228. Boston Mfrs. Mut. Ins. Co. v. Fornalski, 234 So. 2d 386 (4th D.C.A. Fla. 1970); American Fire & Cas. Co. v. Blanton, 182 So. 2d 36 (1st D.C.A. Fla. 1966).

229. Kephart v. Pickens, 271 So. 2d 163 (4th D.C.A. 1972), *cert. denied*, 276 So. 2d 168 (Fla. 1973); Maxwell v. Southern Am. Fire Ins. Co., 235 So. 2d 768 (3d D.C.A. Fla. 1970). See Note, *supra* note 216.

230. 271 So. 2d 163 (4th D.C.A. Fla. 1972).

231. 235 So. 2d 768 (3d D.C.A. Fla. 1970). The *Maxwell* opinion contains no analysis of the joinder issue.

and affirmed the circuit court's dismissal on the ground that the plaintiff failed to join an indispensable party, the insured. The court read *Shingleton v. Bussey* and a follow-up decision[232] as permitting a direct action only where the insurance company is a codefendant.[233] The court distinguished the *Maxwell* case, noting that it involved a suit under the medical payment provisions of a homeowner's liability policy and was not an attempt to recover for the alleged negligence of the insured under the liability portion of the policy.[234] The court apparently saw this to be a distinction with merit and observed:[235]

> In the instant case, of course, the actions of the insured are uniquely in issue, and he is therefore an indispensable party as the plaintiff must prove that the insured was negligent in order to recover from the insurer under the liability insurance policy.

This reasoning amounts to nonreasoning and cannot survive analysis.[236]

In *Kephart* a resident of Florida alleged that a Kentucky resident negligently drove an automobile causing it to collide with the plaintiff in an automobile-pedestrian accident in Kentucky. Suit was instituted in Orange County, Florida, and jurisdiction was obtained over the insurer,[237] but service of process on the insured in Kentucky was not possible under the Florida long-arm provisions governing the in personam jurisdiction of Florida courts over nonresidents.[238] The dismissal, which was upheld, denied the Florida resident a Florida forum in which to litigate his right as a third-party beneficiary against the insurer, who was subject to the in personam power of Florida courts. The decision in *Kephart* clearly relegated the injured third-party beneficiary to a forum whose conflict of law rules might not permit utilization of the *Shingle-*

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232. Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970).

233. 271 So. 2d at 164.

234. The court in *Kephart* relied on a most dubious precedent. In Russell v. Orange County, 237 So. 2d 192 (4th D.C.A. Fla.), *cert. denied*, 239 So. 2d 825 (Fla. 1970), the county was sued for failure to maintain county roads properly, and the insurer was joined as a codefendant. The circuit court dismissed the complaint as to the insured, apparently on the ground of sovereign immunity. The insurer was then dismissed and the court of appeal affirmed the latter dismissal: "[O]nce the trial court determined that the amended complaint stated no cause of action against the county it *necessarily* followed that no cause of action was stated against the insurance carrier for the simple reason that the insurer's liability was dependent upon the establishment of liability on the part of the county." 237 So. 2d at 193. This decision thus stands for the uncontrovertible proposition that the insurer's liability is conditioned upon proof of the insured's liability. It has no impact on the joinder issue.

235. 271 So. 2d at 165.

236. This "reasoning" is reminiscent of the Fifth Circuit's argument in Haas v. Jefferson Nat'l Bank, 442 F.2d 394 (5th Cir. 1971).

237. Service was made pursuant to FLA. STAT. §48.181 (1973). The insurer was a foreign corporation qualified and authorized to transact business in Florida.

238. Service of process on the nonresident insured would not be permitted under the new Florida long-arm provision, FLA. STAT. §48.193 (1973), and, arguably, would not be permitted by the federal fourteenth amendment because of the absence of contacts between Florida and the nonresident insured. *Cf.* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958).

ton v. Bussey direct action rule, whose own domestic rules might not permit such a direct action and whose inconvenience as a forum to a Floridian is obvious.[239] In addition, the advantages of the direct action rule were denied to the injured plaintiff in precisely the type of case where they were most needed — where joinder of the insured was not feasible. A decision with such unfortunate consequences to an injured plaintiff calls for further consideration as to whether the insured is an interested person in whose absence the action should not proceed.

Proceeding in the absence of an interested person always presents the potentiality of hazards to the defendant and to the absentee. If these hazards are real and substantial, then joinder should be required if feasible. Will a judgment rendered in the absence of the insured impair or impede the insured's protection of his interests in the subject matter of the action, the insurance fund? Will a judgment rendered in the absence of the insured subject the insurer-defendant to the risk of inconsistent or multiple obligations or liabilities?[240] If either of these questions is answered in the affirmative, then joinder should be required if feasible (the absentee being labeled a necessary party). If joinder is not feasible, further analysis is required to determine if the insured is one in whose absence the action must not proceed (the absentee being labeled an indispensable party). If the answer to the first question is negative, then joinder is permissible at the option of the plaintiff, but not mandatory.

It is clear that, if a judgment is rendered against the insurer, the insurance fund will be depleted or exhausted upon satisfaction of the judgment by the insurer. Nevertheless, the insured is not disadvantaged, since the fund is used for precisely the purpose contemplated by the insured and insurer in their contract. In the *Kephart* case there was no indication that there would be other claims against the insured arising out of the litigated accident, since it was a two-party automobile-pedestrian collision. Therefore, the insured would not have been faced with a prejudicial depletion of the fund and the concomitant loss of the contracted-for indemnity.[241]

Furthermore, the insured will be entitled to a credit for any money paid by the insurer in satisfaction of the judgment; the amount of the injured party's claim against the insured will be necessarily reduced by the amount

239. It might be argued that witnesses and other proof are likely to be more accessible in Kentucky, the state of the accident. Such may be the case as to the issue of liability, but as to the issue of damages it is likely that the needed expert testimony will come from Florida if the plaintiff's treatment and convalescence were in his home state. That the plaintiff attempted to bring suit in Florida is further indication that the Florida forum was preferable. This preference might in some cases ripen into a necessity if the claim involved would not justify the additional expense and burden of suing in a foreign forum.

240. FED. R. CIV. P. 19(a).

241. Compare this with Justice Harlan's conclusion in *Provident Tradesmens Bank & Trust Co. v. Patterson* that the insured was at least a necessary party to a determination as to claims to the insurance fund, since there were multiple claimants. This underscores the fact that it is dangerous and inappropriate to assume that because in one factual situation an insured is merely a proper party that he is properly considered merely a proper party in all factual situations. Each case must be decided separately and in the context of its own unique facts. See text accompanying note 59 *supra*.

paid by the indemnitor-insurer. This raises the issue as to the possibility of future litigation between the insured and the injured party.[242] If the injured party is successful in his suit against the insurer, he might nevertheless seek additional recovery against the insured beyond the limits of the liability insurance policy. It would seem that such a suit should be permitted and that the rules of res judicata and collateral estoppel should be so interpreted, at least where joinder of the insured in the first proceeding was not feasible. In the *Kephart* case, any subsequent litigation would have occurred outside Florida — most likely in Kentucky. The insured would have had all defenses and would have been permitted full litigation on the merits; he would not have been prejudiced by the earlier suit in any way and would in fact have been benefited to the extent that the insurer's payment reduced his liability.

In addition, this subsequent suit in no respect presented the danger of multiple or inconsistent liability for the insured. If the injured party had been unsuccessful in the initial direct action suit against the insurer, then it would seem that the second forum, where suit would have been brought against the insured, should permit the insured to assert collateral estoppel,[243] despite the absence of mutuality.[244] There is no policy that would favor giving the injured party a second opportunity to litigate the same facts. In summary, it would seem that there is no indication on the facts of *Kephart* that the absentee-insured would have been disadvantaged if a direct action against the insurer had been permitted without his joinder.

Nor could the insurer logically argue that the insured must be joined, except to say that such a requirement would make it more difficult for the plaintiff to obtain relief if joinder were not feasible in the forum. An insurer's liability is strictly controlled and limited by the terms of the policy of insurance, and whole or partial satisfaction of the insured's duty to the plaintiff would satisfy to that extent the insurer's duty to the insured.[245] Thus, the absence of the insured presented no threat of future litigation by other claimants in the *Kephart* case, nor would it necessarily have been causative of future litigation between the insurer and the insured. Furthermore, an insurance company always has a full and fair opportunity to litigate the issue of the insured's negligence, and proof of the insured's liability will be an ab-

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242. There is no Florida law dealing with the injured party's right to prosecute a second action against the insured following a completed adjudication between the insurer and the injured party. As a matter of practicality, injured parties apparently do not attempt to bring suit against the insured following an unsuccessful suit against the insurer. *See* Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954).

243. Collateral estoppel is one branch of res judicata and refers to the preclusive effect that a judgment may have with respect to issues actually and necessarily litigated in a prior proceeding when drawn into question in a subsequent suit upon a different cause of action.

244. The rule of mutuality requires that the party asserting collateral estoppel be bound by the judgment equally with the person against whom the estoppel is asserted. For a discussion of the Full Faith and Credit Clause and choice of law problems involved, see Lewis, *Mutuality in Conflict — Flexibility and Full Faith and Credit*, 23 DRAKE L. REV. 364 (1974).

245. RESTATEMENT OF JUDGMENTS §105 (1942).

solute condition precedent to the insurer's liability.[246] Finally, the insurer will have full occasion to litigate the issue of coverage.[247]

In the *Kephart* case the court concluded that the absentee-insured was an indispensable party because his actions were "uniquely in issue."[248] Nevertheless, it should be clear that an insured's presence as a party to a proceeding is in no way needed for complete and fair litigation of an injured party's claim as third-party beneficiary against the insurer; nor is the absentee disadvantaged in any respect. An insured's "actions" will obviously be the subject of much evidence at trial, and his testimony may be helpful or needed, but that testimony is available without requiring that the insured be made a party.[249]

It would also seem demonstrable that giving the plaintiff an option as to whether he will join the insured, assuming joinder is feasible, is reflective of realities of everyday practice. As the Supreme Court of Florida noted in *Stecher v. Pomeroy*,[250] the insurance companies readily admit:[251]

> [T]he legal responsibility placed on the insurance company gives pointed verification to the fact that the interest involved in defense of liability suits is *primarily and ultimately the interest of the insurance company.*

The insurance company has the burden of paying the costs of the defense and will be the entity called upon to satisfy any judgment for the plaintiff up to the amount of the policy. It is anomalous and inconsistent with public policy to deprive the third-party beneficiary of a direct action against the ultimate obligor solely because of nonjoinder of the insured, who is often no more than a passive and disinterested participant. The *Shingleton* court justified its decision permitting joinder of the insurer in an action against the insured by observing that the plaintiff is thus given the same opportunity to litigate against an adversary (the insurer), which the insurer has always had against its adversary (the injured party).[252]

246. *See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

247. *See* Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers,* 22 U. FLA. L. REV. 145, 150 (1969).

248. Kephart v. Pickens, 271 So. 2d 163 (4th D.C.A. Fla. 1972).

249. If the insured is beyond the subpoena power of the court his testimony by way of deposition may be introduced to the trier of fact. FLA. R. CIV. P. 1.330(a).

250. 253 So. 2d 421 (Fla. 1971). For a discussion of this case, see Comment, *Civil Procedure: Joinder of Liability Insurers — A Welcome Clarification of* Shingleton *and* Beta Eta, 24 U. FLA. L. REV. 820 (1972).

251. 253 So. 2d at 423.

252. 223 So. 2d at 720 (1969).

EPILOGUE

Analytical pragmatism best resolves questions of required joinder. The misleading labels and mechanical formulations of the past are not responsive to relevant procedural principles. The solution of joinder problems should center upon a weighing of the competing and interwoven interests in providing a forum to plaintiffs for recovery of merited relief, avoiding the private and public burdens of multiple litigation, and protecting parties and interested absentees from prejudice. A methodology based on such considerations will benefit the adjudicatory process and the public that it serves. The Florida experience, a microcosm of the traditional American experience, reflects the unfortunate consequences of permitting a body of precedents to freeze and preserve the judical naivete of earlier generations. Joinder problems should not be resolved by resort to simplistic and conclusory labels; the shibboleths and false notions should be cast aside.