

Michigan Law Review

Volume 55 | Issue 4

1957

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Recommended Citation

John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 483 (1957).

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COMPULSORY JOINDER OF PARTIES IN CIVIL ACTIONS*

John W. Reed†

III. COMPULSORY JOINDER PRINCIPLES IN ACTION, *cont'd.*

C. *In Cases Involving Interests in Real Property*

(Necessary Equals Indispensable)

COMPULSORY joinder cases involving interests in land display one peculiar and important characteristic: there is almost never any need in the state courts to wrestle with the question of whether a person is indispensable as distinguished from necessary. One hastens to add that this attribute of land cases appears to have gone largely unnoticed, but it exists none the less. It arises out of the fact that in a suit involving real property it is never impossible for the court to obtain jurisdiction over all persons interested therein to an extent which will enable the court to adjudicate controversies over these interests. Constructive service of process based on the court's power over the res within its jurisdictional confines will reach out to everyone having or claiming an interest in the res.¹⁸²

Thus, in this field a plaintiff ordinarily cannot complain that if he is not permitted to go ahead in *A*'s absence he will be foreclosed from all relief. It may be difficult, more expensive, slower, more annoying; but it will not be impossible. "Necessary" parties are understood to be those who ought to be present if the court is to do complete justice but who nevertheless may be excused if the court is unable to obtain jurisdiction over them. Such inability

* This article was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. The first instalment was published in the January 1957 issue [55 MICH. L. REV. 327].—Ed.

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¹⁸² *Smith v. Smith*, 123 Minn. 431, 144 N.W. 138 (1913). Cf. *Morgan's Heirs v. Morgan*, 2 Wheat. (15 U.S.) 290 at 298n. (1817); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

cannot well occur in land actions in state courts. To say that a person "ought" to be present is, virtually, to say that he *must*, since there can be no excuse of inability to cite him in.¹⁸³ Thus, if it is concluded that there may be some adverse effect on the interest of the absent person, or if for any other reason—such as preventing a duplication of litigation—it seems wise to require joinder, then joinder must (since it can) be accomplished. There can be few countervailing interests of importance in plaintiff's favor.

The same considerations would apply to cases in the federal courts¹⁸⁴ were it not for the fact that although a district court's process can reach an owner *qua* owner just as a state court's can, that party's presence once obtained may serve to oust the court's jurisdiction under the complete diversity rule.¹⁸⁵ Federal rule 19 (b) permits a court to proceed in absence of an "ought" party if his joinder would oust the court's jurisdiction; the rule is otherwise if the party is deemed "indispensable." Accordingly, so long as the present federal categories of parties are used, there is need for consideration of the distinctions between them even in property cases.¹⁸⁶

Professor J. W. Moore, referring principally to federal cases, suggests that two considerations determine what parties must be before the court in property cases: (1) what type of legal interest in the property is asserted, and (2) what type of relief is sought.¹⁸⁷ Although the latter matter is completely consonant with the thesis here urged, the former leads again to the employment of barren concepts which are definable only in terms of themselves. The hazards of this kind of analysis in property cases and the advantages of the method of balancing equities and convenience may be suggested by the following examination of some typical problems.

It is a general rule that one tenant in common may maintain ejectment against a trespasser.¹⁸⁸ The tenant is entitled to posses-

¹⁸³ There are instances, relatively few, in which the question may still arise. These involve, chiefly, the timeliness of defendant's objection and the number of those not joined.

¹⁸⁴ See 11 Stat. 272 (1858), as amended, 28 U.S.C. (1952) §1655.

¹⁸⁵ And of which more will be said later. See section III-D *infra*.

¹⁸⁶ See, e.g., *Fouke v. Schenewerk*, (5th Cir. 1952) 197 F. (2d) 234.

¹⁸⁷ 3 MOORE, FEDERAL PRACTICE, 2d ed., 2158 (1948).

¹⁸⁸ *Most v. Passman*, 21 Cal. App. (2d) 729, 70 P. (2d) 271 (1937); *Carlson v. McNeill*, 114 Colo. 78, 162 P. (2d) 226 (1945); *Madrid v. Borrego*, 54 N.M. 276, 221 P. (2d) 1058 (1950); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. (2d) 673 (1951); *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902). See *McComb v. McCormack*, (5th Cir. 1947) 159 F. (2d) 219 at 224. Indeed, at one time, joinder was not even permitted. See *Sevenson v. Cofferin*, 20 N.H. 150 at 151 (1849), where the court said: "By the common law there were certain serious embarrassments which would have attended the joinder of tenants in common in real actions. Although their possession was joint, their estates and

sion of the whole, except as against a cotenant, and thus he recovers only that to which he is entitled.¹⁸⁹ This recovery of possession inures to the benefit of his cotenants.¹⁹⁰

On the other hand, joinder of all the tenants is often required in an action for damages, as in trespass or waste.¹⁹¹ The distinction between this rule and the result in ejectment cases is unsatisfactorily explained by reference to property law concepts that although each tenant in common is entitled to possession of the whole,¹⁹² there is no such unity in monetary damages which may

titles might have been wholly different; and as these were in many cases required to be stated, and might have been traversed or avoided by plea, it is easy to perceive that numerous issues might have been joined in a single action, to some of which some of the parties to the suit might have been strangers, and yet bound to maintain them under pain of failing in the action. [But query.] This afforded sufficient ground for the rule which not only permitted but required tenants in common to sever in such actions."

¹⁸⁹ *Cook v. Spivey*, (Tex. Civ. App. 1943) 174 S.W. (2d) 634. For reasons which involve the origin of ejectment, some of the older cases regarded title as the main thing to be considered and so limited plaintiff's recovery to his interest in the property. See notes, *Extent of recovery in ejectment by tenants in common against stranger*, 6 L.R.A. (n.s.) 712 (1907), 51 L.R.A. (n.s.) 50 (1914).

¹⁹⁰ *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902); *Hanley v. Stewart*, 155 Pa. Super. 535, 39 A. (2d) 323 (1944).

¹⁹¹ *Guth v. Texas Co.*, (7th Cir. 1946) 155 F. (2d) 563; *Holder v. Elmwood Corp.*, 231 Ala. 411, 165 S. 235 (1936); *Bullock v. Hayward*, 10 Allen (92 Mass.) 460 (1865); *De Puy v. Strong*, 37 N.Y. 372 (1867). Cf. *Eckerson v. Haverstraw*, 6 App. Div. 102, 39 N.Y.S. 635 (1896), affd. 162 N.Y. 652, 57 N.E. 1109 (1900); *Slocum v. State*, 177 Misc. 114, 29 N.Y.S. (2d) 993 (1941); *Haught v. Continental Oil Co.*, 192 Okla. 345, 136 P. (2d) 691 (1943); *Marys v. Anderson*, 24 Pa. St. 272 (1855). See *Louisville, N.A. & C. Ry. v. Hart*, 119 Ind. 273 at 283, 21 N.E. 753 (1889); and see 14 AM. JUR., *Cotenancy* §98. This rule, based on a purpose to avoid multiplicity of suits for damages, is by no means universal. A few courts permit one tenant not only to recover possession for all but also to collect damages representing the entire injury to the common property, impressing the fund with a trust to the extent of the interests of the other tenants. *Fleming v. Katahdin Pulp & Paper Co.*, 93 Me. 110, 44 A. 378 (1899); *Lee v. Follensby*, 86 Vt. 401, 85 A. 915 (1913). Cf. *Young v. Garrett*, (8th Cir. 1945) 149 F. (2d) 223; *Carlson v. McNeill*, 114 Colo. 78, 162 P. (2d) 226 (1945); *Frederick v. Great Northern Ry.*, 207 Wis. 234, 240 N.W. 387 (1932) (joint tenants). Still other courts have not required joinder but have denied to the plaintiff any recovery beyond his own damage, leaving defendant open to additional suits by the other co-owners. *Jefferson Lumber Co. v. Berry*, 247 Ala. 164, 23 S. (2d) 7 (1945); *Kitchens v. Jefferson County*, 85 Ga. App. 902, 70 S.E. (2d) 527 (1952); *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902); *Kelly v. Rainelle Coal Co.*, 135 W.Va. 594, 64 S.E. (2d) 606 (1951). Sometimes a cotenant is permitted to recover his own share even though had defendant objected at the proper time to the absence of plaintiff's fellow tenants joinder might have been required. See, e.g., *Eastin v. Joyce*, 85 Mo. App. 433 (1900); *Winters v. McGhee*, 3 Sneed (35 Tenn.) 128 (1855); *Power v. Breckenridge*, (Tex. Civ. App. 1927) 290 S.W. 872. In fact, this last is probably what is meant when, in these cases, a court says joinder is "required": The cotenant is not indispensable, but merely required if timely objection is made and, in federal courts, if jurisdiction will not be ousted. *Slocum v. State*, 177 Misc. 114, 29 N.Y.S. (2d) 993 (1941); *Young v. Garrett*, (8th Cir. 1945) 149 F. (2d) 223. Cf. *MacFarland v. State*, 177 Misc. 117, 29 N.Y.S. (2d) 996 (1941) (joint tenants); *Baughman v. Hower*, 56 Ohio App. 162, 10 N.E. (2d) 176 (1937). See note, 24 TEX. L. REV. 511 (1946).

¹⁹² *Thompson v. Mawhinney & Smith*, 17 Ala. 362 (1850); *Metcalfe v. Miller*, 96 Mich. 459, 56 N.W. 16 (1893); *Taylor v. Millard*, 118 N.Y. 244, 23 N.E. 376 (1890). This same

be recovered. Thus in an ejectment case the defendant (assuming him not to be a cotenant) may not be heard to urge that plaintiff alone is not entitled to that which he seeks, simply because as a matter of substantive law plaintiff is entitled to possession of the whole as against the trespasser. Not so, in most jurisdictions, as to the suit for damages.

Is there, as to these problems, an essential difference between a recovery of possession and a recovery of damages? A unity of possession supports ejectment by one cotenant alone. Injury to that possessory right gives rise to damages which would appear to be susceptible to the same unity—at least, so far as is necessary to determine the right of one cotenant to recover them in full from a trespasser. These damages he will have to share with his fellow tenant, of course; but so must he share possession with him.

Two considerations only may be thought to support the usual distinction. First, it may be suggested that to permit one cotenant to receive all the money damages is unwise because of the possibility that he will be financially unable, or unavailable, to respond to his cotenant's demand for a portion of the proceeds. If the facts in the individual case indicate this possibility, then it should be weighed by the court; but it is scarce adequate reason for a rule denying all suits for damages by a single tenant. Further, plaintiff's interest in the real property will often constitute satisfactory security for the absent tenant's share of the damages.

Second, as a matter of substantive law, the interests of tenants in common are largely separate. Their only unity is that of possession.¹⁹³ To give one tenant the power to litigate a controversy relating to his cotenant's interest may be to place more power in him than is intended or is wise.¹⁹⁴

This is not to argue that more and more cotenants sue alone, for damages as well as for possession. Because it is well to adjudicate all phases of a controversy in one law suit, to bind all persons interested, and to avoid repeated harassment of defendant, a joinder of all cotenants wherever feasible is to be urged. And it is a major theme of this passage that in real property cases in state

unity, plus those of interest, title, and time, characterize joint tenancies. *Wilkins v. Young*, 144 Ind. 1, 41 N.E. 68 (1895). See *Equitable Life Assurance Soc. v. Weightman*, 61 Okla. 106 at 109, 160 P. 629 (1916).

¹⁹³ *People ex rel. Shaklee v. Milan*, 89 Colo. 556, 5 P. (2d) 249 (1931); *Madison v. Larmon*, 170 Ill. 65, 48 N.E. 556 (1897).

¹⁹⁴ See *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 196 S.W. (2d) 387 (1946).

courts such joinder is always possible and usually feasible. But if joinder is not effected and nonjoinder becomes an issue, the decision should not hinge upon a supposed difference between possessory and damage actions, else there are likely to be either "unjust" determinations or laborious attempts by the courts to avoid the effects of a rigid, pseudo-distinction.

A case in point is *Holder v. Elmwood Corporation*,¹⁹⁶ wherein a mother and her children owned a cemetery lot as tenants in common. Defendant was responsible for the burial of a stranger¹⁹⁶ in the lot, and plaintiff—one of the daughters—brought an action in trespass to realty. On the issue of whether joinder of the other tenants in common was required, the court held that although the general rule is that in trespass to realty all tenants in common must join, the rule has its exceptions. One such exception, here applicable, is that where the action is directed toward the recovery of consequential damages (such as damages for mental suffering resulting from a trespass committed under circumstances of insult or contumely),¹⁹⁷ a tenant thus injured may sue alone.¹⁹⁸ A concurring judge, sensing the issue a trifle better, suggested that in reality the *Holder* case is a situation in which trespass on the case would lie, and that no joinder would be required there. But unfortunately he maintained that if this were really an action in trespass to realty, there would be no authority for proceeding without the other cotenants.

The result reached by the court seems wise. It is a case in which, although formally for trespass to realty, the principal issue relates not to the usual trespass questions of where title is or whether there has in fact been a trespass (which apparently is conceded). Instead the controversy centers about the amount of damage personal to plaintiff. If an award for injury to plaintiff's feelings is to be made, there is little reason to require the presence of her brothers and her sisters and her cousins and her aunts. When separate plaintiffs have no factual issue of substance in common there can be little support for compulsory joinder of those plaintiffs. The instant case is one in which the wisdom of even

¹⁹⁶ 231 Ala. 411, 165 S. 235 (1936).

¹⁹⁶ Cf. *KESSELRING, ARSENIC AND OLD LACE*, Act II, where Abby Brewster says: "That man's an imposter! And if he came here to be buried in our cellar he's mistaken. . . . We've always wanted to hold a double funeral, but I will not read services over a total stranger."

¹⁹⁷ That such damages may be recovered in an action in Alabama for the trespass to realty, see *Mattingly v. Houston*, 167 Ala. 167, 52 S. 78 (1909).

¹⁹⁸ Cf. *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917).

permissible joinder is not self-evident; a fortiori, there should be no compulsion to join.

Both opinions give implied recognition to these factors. But to reach this appropriate result the majority opinion deals in exceptions to the joinder rule in trespass to realty cases, while the concurring judge, unwilling to see the integrity of the trespass rule impaired, reasons that this is essentially an action in case, where joinder is not required. This kind of manipulation of labels to rationalize conclusions supportable upon far more reasonable and practical grounds is not designed to evoke much confidence in the method. This situation differs from that in the ordinary case of trespass to realty, where the issues are the fact of the trespass and the amount of the damage to the realty. In such case there is every reason to require the whole matter to be litigated in one suit—whether by joining all co-owners or by permitting one owner to maintain a representative action. The issues are the same as to all owners, with the unimportant exception of possible quantitative differences in their interests in the land. In *Holder*, however, there is scarcely a single advantage in compelling joinder, and had the court based its decision on a consideration of the advantages and disadvantages, the conveniences and inconveniences, the equities and inequities of the alternative possibilities, there would have been no need for the irrelevant and merely confusing discussion of whether this was trespass or case or some exception to one of them.

How should these problems be handled? Two Texas decisions provide good illustrations of how non-conceptual, practical considerations may be brought to bear in reaching sensible results in these cases. In one,¹⁹⁹ the plaintiff, suing in trespass to try title, had assigned a portion of the claim to her attorney, one Tucker, but he did not join with her as party plaintiff. Joinder obviously was possible, and the court required it, stating that under Texas law Tucker was a necessary (but not an indispensable) party. After holding that he must become a party under the rule that persons having "joint interests" must be brought in if subject to the court's jurisdiction,²⁰⁰ the court said:

"There is another reason why Tucker was a necessary party in order to enable the court to grant complete relief as between the parties already before the Court. About the

¹⁹⁹ *Brown v. Meyers*, (Tex. Civ. App. 1942) 163 S.W. (2d) 886.

²⁰⁰ To the extent that this principle is the controlling consideration in the court's determination, the opinion leaves much to be desired.

only relief, generally speaking, that a defendant has by law against a plaintiff for asserting a claim against him which is found upon trial to be ill-founded, is the right to recover the court costs thereby incurred. . . . Such right . . . is the complete relief the law allows a defendant against a plaintiff for the annoyance and expense of defending against the plaintiff's claim. Since Tucker was a joint owner with plaintiff of the claim she was asserting against defendants, such defendants were entitled to have him made a plaintiff of record so that, in case defendants prevailed, they could have judgment against him for the costs they were put to in defending against the claim."²⁰¹

In its logical extreme this would require the joinder as plaintiff of every party who stood to benefit from the judgment sought, simply to stand as security for costs in the event that defendant prevailed, and it is doubtful that many courts would go so far. The case serves, however, to illustrate the manner in which relatively minor factors can be thrown onto the balance to see whether in a given situation a court should proceed in the absence of interested persons. The particular inquiry is sensible in cases like the instant one to help decide whether joinder, clearly possible, ought to be required. If joinder is impossible and absence unavoidable, then surely no court would refuse to go ahead simply because defendant could not hold the absent party liable for costs in the event that plaintiff's claim proves ill-founded.²⁰²

The second case, *Hicks v. Southwestern Settlement & Development Corporation*,²⁰³ is a yet more forceful illustration of the advantages of a flexible, practical approach to the joinder problem. Therein, 104 tenants in common, as heirs of Tom Collier, brought an action of trespass to try title — the Texas equivalent of ejectment²⁰⁴ — and for damages, including damages for withdrawal and appropriation of oil and gas. Defendants alleged the existence of 574²⁰⁵ other heirs of Tom Collier, and pleaded their nonjoinder in abatement. The trial court sustained the plea in abatement and, on plaintiffs' refusal to amend, dismissed the suit.

²⁰¹ 163 S.W. (2d) 886 at 889.

²⁰² Indeed, as suggested in the text above, the Texas court held that the attorney "was not a necessary party in order for a valid judgment to have been entered." Ibid.

²⁰³ (Tex. Civ. App. 1945) 188 S.W. (2d) 915.

²⁰⁴ *Cage Bros. v. Whiteman*, 139 Tex. 522, 163 S.W. (2d) 638 (1942).

²⁰⁵ Although the figure 574 is used generally in the opinion, at two places the court refers to the 512 heirs listed in the first amended plea and the 63 additional heirs in the second amended plea. 188 S.W. (2d) 886 at 927, 928.

Plaintiffs appealed. The appellate court reversed, holding that these 104 plaintiffs might proceed alone.

The court noted the well settled rule that trespass to try title (ejectment) can be brought by one tenant in common against one having no title. Thus, there was no serious question on this phase of the case.

The real controversy related to the prayer for damages. On this point, the court stated that the rule is equally well settled that a defendant in a damage action for injury to property has a right to require that all tenants in common be made parties to the suit. He must file his objection in limine,²⁰⁶ but defendants did that here. The purpose of the joinder requirement, the court observed, is to avoid multiplicity of suits against defendant.²⁰⁷ The court stated that since in a suit for damages all tenants in common should join, the rule is not different simply because damages are sought as incident²⁰⁸ to a possessory action, in which joinder of the others is not required.

Nevertheless, as mentioned, the 104 were permitted to proceed in the absence of the other 574. To reach this result, the court found it desirable first to characterize briefly the nature of the interests of plaintiffs and the absent tenants:

“ . . . [I]t is apparent that the rights of the various tenants in common to recover damages for injury to the property owned in common are technically several as distinguished from joint; that each tenant in common is only entitled to the possession of his own share of the damages; that the presence of all tenants in common is not indispensable to the rendition of judgment for damages in favor of one or less than all; and that the determination of the plaintiff's proportionate share of the damages and the adjudgment thereof to him despite the absence of his tenant in common constitutes relief which can be granted, and which, in fact, seems to have been regarded by our courts as if it were as normal and customary a form of relief as the very right of a defendant to insist upon joinder.”²⁰⁹

However, after this concession to tradition, the court turned to a painstaking examination of the circumstances of this litiga-

²⁰⁶ Else his only protection is his right to require apportionment of damages, so that plaintiff recovers only his share. See note 191 *supra*; 188 S.W. (2d) 915 at 920.

²⁰⁷ *May v. Slade*, 24 Tex. 205 (1859). Cf. *Taylor v. Catalon*, 140 Tex. 38, 166 S.W. (2d) 102 (1942).

²⁰⁸ Plaintiffs sought relief in excess of three quarters of a million dollars—a rather substantial “incident.”

²⁰⁹ 188 S.W. (2d) 915 at 921.

tion to see whether the factors supporting plaintiffs' claim to go it alone outweighed defendants' claim to have their liabilities settled in one lawsuit. And it found no lack of authority for its power so to inquire. From Story's *Equity Pleadings*, for example, this quotation:

"All these exceptions [to rules requiring joinder of persons materially interested in subject matter] will be found to be governed by one and the same principle, which is, that, as the object of the general rule is to accomplish the purposes of justice between all the parties in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons, who are not parties, or if the circumstances of the case render the application of the rule wholly impracticable."²¹⁰

One of the exceptions referred to by Story is for parties so numerous that it is impracticable to join them. Although the statement is normally made in the context of class actions, "we believe the rule can be applied, and ought to be applied, as an independent exception where no effective relief can be granted in a class suit to persons who are not before the court in the ordinary and usual sense as named parties."²¹¹

Then the court examined with some care the facts relating to the tenants in common mentioned in the plea in abatement.

"The petition names 104 plaintiffs, of whom perhaps 17 are formal parties. Plaintiffs include residents of fifteen counties in Texas and two parishes in Louisiana; two come from Michigan, and one from Puerto Rico. The pleas in abatement now list 574 additional heirs of Tom Collier and tenants in common of appellants who are described as necessary parties to this suit. It is with more than casual interest that we have searched for some evidence or some statement to the effect that these were all of such heirs, but we have not found such evidence or such a statement in the record. It seems of direct significance to the application of the exceptions noted [relating to nonjoinder of interested parties] that

²¹⁰ Section 77 (10th ed., 1892).

²¹¹ 188 S.W. (2d) 915 at 927; *Hess v. Webb*, 103 Tex. 46, 123 S.W. 111 (1909). Cf. *Bailey v. Morgan*, 13 Tex. 342 (1855); *Smith v. Peeler*, (Tex. Com. App. 1930) 29 S.W. (2d) 975.

appellees amended their pleas in abatement twice; that their first amended pleas in abatement listed 512 such heirs and that 63 additional heirs²¹² were named in the second amended pleas, on which the trial court acted. It now appears that five persons who were named in said first amended pleas are dead; that three persons named in said pleas are now described as married women, and that mistakes in the names of several individuals have been discovered and corrected. . . . [A]mong the 63 additional heirs are residents of four additional states, namely, of two counties in New Mexico, one county in Arizona, two counties in Georgia, and one county in Florida. These 63 persons also include residents of three additional parishes in Louisiana and nine additional counties in Texas. Among these 63, one unknown person, a formal party, is referred to; no addresses are given for two persons; and eight minors are listed, without reference to guardianship. Although we have no information respecting the status and residence of the 512 heirs listed in the first amended plea, we feel safe in assuming that they are as diversely scattered about the United States and are of as varied a status as are the 63 additional persons named in the second amended pleas."²¹³

After this recital, the court simply held that the action might proceed without joining the absent tenants in common, on the grounds that every issue raised by the pleadings could be determined between the parties in the absence of the omitted tenants and without injury to their interests, and that

"The injury which may result to [defendants] from a multiplicity of suits on the causes of action before us is more than counterbalanced by the injury which might result to appellants if the exception noted was not applied, for otherwise [plaintiffs] . . . might be denied the right to maintain their action. . . . [U]pon considering the great number of plaintiffs already in this suit, and the diverse status and residences of said plaintiffs, we have reached the conclusion that it would be impracticable . . . to require the joinder of any appreciable number or percentage of the persons listed in the pleas in abatement. . . ."²¹⁴

Here exemplified is the very approach suggested throughout these materials. *This* is the way to do it! Recognition is given to the

²¹² See note 205 supra.

²¹³ 188 S.W. (2d) 915 at 927-928.

²¹⁴ Id. at 928, 930.

pressing need to conclude the controversy as neatly and expeditiously as possible. Defendants must be protected from repetitive litigation, if possible. But the countervailing factor is the tremendous difficulty, if not impossibility, of obtaining the presence of all interested — numbering in the hundreds. The court's opinion, which is long, contains some discussion of the nature of the rights involved. The court does conclude that the rights of the tenants in common, although technically several,²¹⁵ are joint within the meaning of the rule²¹⁶ that persons having a joint interest shall be made parties,²¹⁷ and that all else being equal there is much force in defendants' position that the suit should be abated unless all are joined. But all else is not equal; indeed, the force of the difficulty argument outweighs, and plaintiffs are permitted to proceed without their fellow tenants.²¹⁸

One may dissent from the court's conclusion on the ground that substituted service would suffice to confer jurisdiction to settle the whole controversy. But the important thing to note is the court's *method*. One knows exactly what considerations produced the decision. There is no camouflage, no hiding behind slippery, conceptual terms meaning one thing this time and another the next. The court states the practical factors which moved it to this result. This is the method which ought always to be employed.

What of determinations of the respective interests of co-owners among themselves, as in partition, for example? The purpose of judicial partition is to determine the interests of the co-owners and to sever and divide the property among them.²¹⁹ No clairvoyance is needed to sense that courts seldom, if ever, will dispense with a co-owner in a partition suit. If tenant in common *A* is absent from a partition suit, any determination of the interests of the other co-owners will be imperfect. It will not be binding on *A*.²²⁰ Title to the property will be difficult to market. If a co-

²¹⁵ See text at note 209 supra.

²¹⁶ Texas Rules of Civil Procedure 39 (a) (similar to Federal Rules of Civil Procedure 19[a]).

²¹⁷ 188 S.W. (2d) 915 at 926.

²¹⁸ Cf. *Choctaw and Chickasaw Nations v. Seitz*, (10th Cir. 1951) 193 F. (2d) 456, an action to establish title and recover possession, where the court proceeded without the United States (which refused to be joined and would not, therefore, be bound) even though this left defendants with cloud on their title and subject to another suit. The court held that the uncertainty of defendants' position was nothing new and was outweighed by the inability of plaintiff nations to obtain any adjudication otherwise.

²¹⁹ See 40 AM. JUR., Partition §§2, 4, 27.

²²⁰ If support is needed for this near-axiomatic statement, see *Butler v. Roys*, 25 Mich. 53 (1872).

owner nevertheless succeeds in selling an imperfectly partitioned share, he and his buyer may have some renegotiating to do when *A* appears, attacks the partition, and gets it set aside.²²¹ The presence of all parties in interest in the partition action is clearly indicated, and this is the standard pronouncement on the question: All persons having or claiming any interest in the land in suit are necessary parties.²²² As suggested earlier, it never will be impossible for a state court to obtain jurisdiction over all co-owners, known and unknown, domestic and foreign; the presence of the land in the jurisdiction furnishes a basis for constructive service of process, and with no relief sought other than determination and severance of respective interests in the land (and, possibly, distribution of the proceeds of a judicial sale) the court clearly has the requisite power over all owners to enter a decree.²²³ Therefore, joinder will be required.

The rule in the federal courts is much the same,²²⁴ except when joinder of all co-owners would destroy complete diversity of citizenship and, typically, the foundation of jurisdiction. If co-owners are merely necessary, jurisdiction-destroying joinder may be dispensed with; if indispensable, then the federal court should not proceed.²²⁵ Which is the case?

Although it seems amiss, as argued repeatedly herein, to conclude that a federal court is without *power* to issue a partial decree among those owners present (having dispensed with joinder of diversity-destroying owners), the practical value of the decree and the effects of the court's action normally would be so slight that expenditure of the court's effort in this direction would be unwarranted. This complies, substantially, with one of the tests of indispensability in *Shields v. Barrow*: the controversy would be left "in such a condition that its final determination may be

²²¹ *Ibid.*

²²² *Henry Quellmalz Lumber & Mfg. Co. v. Roche*, 145 Ark. 38, 223 S.W. 376 (1920); *Gates v. Salmon*, 35 Cal. 576 (1868); *Butler v. Roys*, 25 Mich. 53 (1872); *Wilson v. Wilson*, 166 Miss. 369, 146 S. 855 (1933); *Johnson v. Johnson*, 170 Mo. 34, 70 S.W. 241 (1902); *Toole v. Toole*, 112 N.Y. 333, 19 N.E. 682 (1889). Cf. *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 S. 722 (1904); *Haggerty v. Wagner*, 148 Ind. 625, 48 N.E. 366 (1897); *Young v. Meyers*, 124 Ohio St. 448, 179 N.E. 358 (1931). But cf. *Bank of California v. Superior Court*, 16 Cal. (2d) 516, 106 P. (2d) 879 (1940).

²²³ *Toole v. Toole*, 112 N.Y. 333, 19 N.E. 682 (1889). See *Fouke v. Schenewerk*, (5th Cir. 1952) 197 F. (2d) 234 at 236; *Arizona Lead Mines v. Sullivan Mining Co.*, (D.C. Idaho 1943) 3 F.R.D. 135 at 138.

²²⁴ *Barney v. Baltimore*, 6 Wall. (73 U.S.) 280 (1867); *Torrence v. Shedd*, 144 U.S. 527 (1892). Sec. 1655 of Tit. 28 of the United States Code (1952) continues the venerable provision for substituted service in actions to enforce a claim to property within the district. That this applies to partition actions, see *Greeley v. Lowe*, 155 U.S. 58 (1894).

²²⁵ Federal Rules of Civil Procedure 19 (a), (b).

wholly inconsistent with equity and good conscience."²²⁶ *A* would not be bound, and the interests of those made parties still would be subject to *A*'s claims. Title would be highly unmarketable. The whole situation would be tentative and uncertain, to say the least. In the absence of the most compelling of countervailing considerations, the court should refuse to proceed. Is any such consideration possible here?

One can conceive of but two circumstances which might be forwarded as sufficiently important to overcome the court's reluctance to proceed. The first, unavailability of another forum, may be disposed of easily. Plaintiff clearly has a remedy in the state court, and the federal court should take cognizance of that plain fact.²²⁷ Diversity jurisdiction is a luxury here, not a necessity.

The second, closely related, involves the suggestion that because of local prejudice a fair trial cannot be had in the state forum. In other words, although there is another court where plaintiff may have his claim adjudicated, the alternative to remaining in federal court is heavily weighted against plaintiff. To the extent that venue change within the state is available and efficacious, the suggestion has no merit in this context. If, however, diversity jurisdiction is demonstrably needed to accomplish here what apparently was its original purpose — to provide a neutral forum for citizens of different states — then conceivably the federal court might consent to proceed without *A*. But this is rather academic, because it is hard to imagine a partition case in which incomplete relief in a federal court would be superior to the complete relief available in a state court. In other terms, the practical objections to partitioning land among less than all co-owners are so strong that it is almost inconceivable that there could exist countervailing prejudices sufficient to cause a federal court to proceed nevertheless.

Thus it seems valid to characterize co-owners as indispensable parties to judicial partitions, not conceptually but factually.

²²⁶ 17 How. (58 U.S.) 130 at 139 (1854). At least, Justice Miller so indicated in the majority opinion in *Barney v. Baltimore*, 6 Wall. (73 U.S.) 280 at 285 (1867): "This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit. . . . If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties."

²²⁷ *Fouke v. Schenewerk*, (5th Cir. 1952) 197 F. (2d) 234.

Although the existence of undivided joint interests in land presents the best argument for required joinder of the owners in actions having to do with that land, there are other types of (common) interest which give rise to joinder questions. One of these arises out of the lessor-lessee relationship, not in terms of litigation inter sese but in suits by or against one without the other. When should a lessee be joined in an action by or against his lessor? When should a lessor be joined in his lessee's action?

To remain for the moment on the subject of partition, it is interesting to note the holdings on the necessity of joining lessees of co-owners. Some courts — apparently most — hold that since the interest of a lessee will not be affected by the partition, the existence of the lease is no bar to partition among reversioners or remaindermen²²⁸ and the lessee is not a necessary party to the action.²²⁹ A few courts, however, hold the lessee necessary,²³⁰ while still others indicate — largely on statutory grounds — that the lease is a bar to the maintenance of the action.²³¹

If in fact a lessee's interest will not be affected by partition, the conclusion that he need not be joined can scarce be gainsaid. Upon what ground, then, is a lessee ever held necessary? In a dictum in *Thruston v. Minke*,²³² the Maryland court said that the lessee should be joined so that he "may be required to join the lessor in the deed of severance."²³³ Surely this is but a formality. Failure to join could not qualify the partition. The fee is subject to an outstanding lease. This lease cannot be diminished by the partition, absent special circumstances; neither does the lease render the severance of the various reversionary or remainder interests the less effective.

²²⁸ *Willard v. Willard*, 145 U.S. 116 (1892); *Finch v. Smith*, 146 Ala. 644, 41 S. 819 (1906); *Blakeslee v. Blakeslee*, 265 Ill. 48, 106 N.E. 470 (1914). Cf. *Erwin v. Hines*, 190 Okla. 99, 121 P. (2d) 612 (1942).

²²⁹ *Fyffe v. Fyffe*, 292 Ill. App. 539, 11 N.E. (2d) 857 (1937); *Bethel College v. Gladish*, 204 Ky. 10, 263 S.W. 659 (1924); *Thruston v. Minke*, 32 Md. 571 (1870); *Peterman v. Kingsley*, 140 Wis. 666, 123 N.W. 137 (1909). Cf. *Gailey v. Ricketts*, 123 Ark. 18, 184 S.W. 422 (1916).

²³⁰ *Glaser v. Burns*, 154 N.Y.S. 21 (1915), *affd.* 170 App. Div. 321, 155 N.Y.S. 936 (1915); *Cornish v. Gest*, 2 Cox Eq. Cas. 27, 30 Eng. Rep. 13 (1821). See *Thruston v. Minke*, 32 Md. 571 at 575 (1870).

²³¹ *Hunnewell v. Taylor*, 6 Cush. (60 Mass.) 472 (1850); *Sullivan v. Sullivan*, 66 N.Y. 37 (1876) (partition now might be unfair by the end of the lease). See *Henderson v. Henderson*, 136 Iowa 564 at 568, 114 N.W. 178 (1907). The statutes provide that partition is available only to owners of estates in possession.

²³² 32 Md. 571 (1870).

²³³ *Id.* at 575. The court held this consideration inapplicable in the instant case for the reason, *inter alia*, that there was not to be a severance but rather a judicial sale with distribution of the proceeds.

In an English equity case, the court noted that the tenant therein had an interest approximating a freehold, "a very material interest which must [sic] be affected by this decree."²³⁴ In fact, the tenant had a 99-year lease determinable on lives — a once common way of establishing a life tenancy without some of its technical disadvantages. Although conceivably it may be sensible to include as a party one who will have the possessory interest for a potentially long term, the brief opinion does not suggest how the interest *must* be affected by the sought partition, and it thus is difficult to support the conclusion that the lessee is necessary. Incidentally, one American court distinguishes between a tenant for a long term (necessary) and a tenant from year to year (not even proper!).²³⁵

In general, the necessity of joining a tenant in partition cases is determined on the usual test of whether his interest will be affected by the partition. Normally it will not. A few courts say it will and hold the tenant necessary; none holds him "indispensable."

A sampling of injunction cases with respect to activity on leased land supports further the conclusion that the important test is whether the action by or against a lessor only, or a lessee only, so affects the interest of the other that any litigation ought to be undertaken or defended by them together. Thus the Iowa Supreme Court held²³⁶ that in an action against an oil company to have operation of the company's filling station abated as a nuisance, the lessee-operator was an "indispensable" party under the rule that

"A party is indispensable if his interest is not severable, and his absence will prevent the Court from rendering any judgment between the parties before it; or if notwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the court."²³⁷

The operator was a lessee and not an employee, and it would seem evident that any injunction granted by the court ought to run against him also and not merely the lessor, particularly if it prescribes conditions relating to the mode of operation.²³⁸ Be-

²³⁴ *Cornish v. Gest*, 2 Cox Eq. Cas. 27, 30 Eng. Rep. 13 (1821).

²³⁵ *Thruston v. Minke* again. See notes 229 ff.

²³⁶ *Wright v. Standard Oil Co.*, 234 Iowa 1241, 15 N.W. (2d) 275 (1944).

²³⁷ Iowa Rules of Civil Procedure 25 (b).

²³⁸ Cf. *Interstate Commerce Commission v. Blue Diamond Products Co.*, (8th Cir. 1951) 192 F. (2d) 43.

cause an injunction would render his lease of less (perhaps no) value, he should have opportunity to be heard in opposition. It is probable that he was within the jurisdiction and subject to the court's process. There was strong reason to require his joinder and apparently none to excuse it. No fault can be found with the result.

Unfortunate, however, are the Iowa rule and the court's use of it in characterizing the lessee as indispensable. As to the rule's first clause, severability of interest very nearly begs the question in every case. In the instant case it was of no help; the court did not suggest that there was a non-severable interest. The inquiry suggested in the second clause into whether a decree would necessarily affect the absent party inequitably points in the right direction, although taken alone it is yet short of adequate. But, good or bad, it does not clearly apply to this case. The rule labels as indispensable a party who would "necessarily be inequitably affected." A determination (clearly possible) that operation of the station did not constitute a nuisance would not affect the lessee inequitably (adversely); therefore, he is not *necessarily* so affected. The mere possibility of an adverse holding may suffice, in context, to require joinder. But alone it does not deprive the court, either by the rule or on general principle, of power to proceed without the lessee if there is a legitimate reason why he cannot be joined. Enjoining the lessor alone might serve to abate the nuisance. For many purposes, a filling station lessee is little more than an employee,²³⁹ the lease being drafted to give the lessor company as much employer control as possible without abandoning the lease status; and on occasion the company may be treated as employer despite the terminology of the agreement.²⁴⁰ Under such circumstance, action against the lessor alone might serve as a satisfactory, better-than-nothing remedy. There is nothing basic missing from the ability of the court to proceed in that fashion.

To be compared with the filling station case is *Ambassador Petroleum Company v. Superior Court*.²⁴¹ The state of California sought under statute to enjoin some forty-two operators (lessees) in an oil field from committing unreasonable waste of natural gas. In the cited action the operators made application for a writ of prohibition to restrain the proceedings until the lessors of the

²³⁹ See note, 1 OKLA. L. REV. 277 (1948).

²⁴⁰ See, e.g., *Greene v. Spinning*, (Mo. App. 1931) 48 S.W. (2d) 51; *Eason Oil Co. v. Runyan*, 158 Okla. 241, 13 P. (2d) 118 (1932).

²⁴¹ 208 Cal. 667, 284 P. 445 (1930).

land be joined, for the asserted reason that the lessors' royalties on production would be affected.²⁴² Although suggesting by way of dictum that a different rule would apply in purely private disputes, the court held that the lessors were not indispensable even though they would be "bound" by the ruling.

The court apparently was faced with a situation in which the large number and diverse locations of owners of the property made it difficult to find them or impracticable to bring them all in. The purpose of the original action was to conserve natural resources in the public interest, and that could be done most effectively by enjoining certain activities of the defendant operators. Although the question of illegal operation could be determined between the state and the operators, the consequence of reducing royalty payments to owners certainly justified joining the owners, and would even suggest that their presence be required if feasible. (Indeed, the California court in a later decision²⁴³ referred to the *Ambassador Petroleum* case as one involving "necessary" as distinguished from "indispensable" parties — that is, parties whose joinder would be required if possible, but whose excusable absence would not prevent an adjudication by the court.)

The court noted the state's argument that "the interests of both lessors and lessees in defeating the pending action are identical in so far as said action may result in a diminution of production and . . . the petitioners [lessees] are therefore the representatives of their lessors in defending said action,"²⁴⁴ and indicated its agreement, saying: "Certain it is that the interests of the parties so claimed to be represented and the interests of those before the court are not antagonistic. The interests of the numerous lessors . . . are so inseparably bound up and identical with the interests of the lessees in the subject matter of the action that both might well be deemed in the same class in the pending litigation."²⁴⁵

Yet for aught that appears in the opinion, the interests of the absent lessors may lie with the state almost as easily as with the lessors. The court does not indicate that there has been any factual inquiry into the question of what the lessors — any of them — want. It seems simply to assume that because an injunction

²⁴² The degree of defendants' solicitude for the welfare of absent parties, both here and generally, is remarkably related to its usefulness as a defense in the pending action.

²⁴³ *Bank of California v. Superior Court*, 16 Cal. (2d) 516, 106 P. (2d) 879 (1940).

²⁴⁴ 208 Cal. 667 at 675.

²⁴⁵ *Ibid.*

will reduce production and, therefore, royalties, the lessors oppose the injunction as do the lessees. It is possible, however, that inquiry would disclose that high production (and royalties) now would result in a much shorter well life, with consequent less total return from the well. An operator's natural desire for quick recovery of his drilling costs, with which to drill again, may lead in quite the opposite direction from the lessor's desire for the greatest return from his royalty interest, even if it be spread out over a longer period of time. The facts related by the court are insufficient to provide a basis for judgment as to which result would be adverse to any of the lessors. In this respect the opinion appears faulty; one cannot tell whether the court made a proper determination or not. But the result reached is supportable notwithstanding, because the public interest, as defined by the statute providing for this kind of action, furnished the court ground for going ahead in the teeth of the conceded possibility that the absent owners would be, in fact, adversely affected.

The court did not stumble over concepts of inseparability of rights or over lack of power to determine the legal position of absent parties. Instead, it appears to have weighed the importance of protecting the public interest, as expressed in the conservation law, against the importance of protecting the interests of absent owners, and to have found that the former overbalanced the latter. Whatever possibility there was of bringing in the absentee owners by constructive service of process was apparently overcome by the impracticability of citing in so large a number.²⁴⁶ The court's method here is commendable. Although there was the possibility that absent persons would be adversely affected factually — and this usually serves to bar consideration of the case — that possibility was outweighed by the need for gas conservation. When the court stated that a different result might obtain in purely private disputes, that simply was recognition that in the absence of the public interest in conservation there would

²⁴⁶ The court appropriately could have inquired whether any steps had been taken to notify the owners of the pendency of the action, enabling any of them desiring to do so to enter the action as a litigant. *Mortgage Guarantee Co. v. Atlantic City Jewish Community Center*, 14 N.J. Misc. 1, 181 A. 700 (1935), *affd.* 121 N.J. Eq. 110, 187 A. 372 (1936).

Reference to the large number of owners immediately suggests the possibility of a representative suit, and the court offhandedly mentions that because the interests of the operators and of the owners are "so inseparably bound up and identical" with each other, "No violence would therefore be done to the doctrine of representation to hold that in defending said action the petitioners are representing their lessors." 208 Cal. 667 at 675. With the language in context, however, the court seems not to hold that there was virtual representation of the owners; rather, it holds that the injunction action may proceed without the owners.

be no compelling reason for proceeding without the owners. It is not to say that the court's power is diminished or its discretion shackled.

Lawsuits directed toward invalidating a deed or lease are usually but not universally²⁴⁷ subjected to the requirement that there be joined not only all parties to the instrument²⁴⁸ (a common holding in contract rescission cases²⁴⁹) but also all persons whose interests in the land may be adversely affected by the litigation.²⁵⁰

Failure to join all parties to a lease and to a deed in an action to cancel and to rescind was held "fundamental error," which can be raised in the appellate court for the first time, even without assignment of error.²⁵¹ The court spoke in the same case of the party defect as depriving it of "authority" to pass on the merits of the controversy or to decide any question which might affect the rights of the absent parties. Lessors who are tenants in common all must be before the court in a suit in which they seek to cancel a lease.²⁵² But a Kansas case indicated that if tenants in common convey by separate instruments, joinder not only may not be required, it may not even be permitted—this in the face of the fact that all conveyances run to a single person in consequence of a single fraudulent scheme.²⁵³ Fortunately, liberalized rules and interpretations would permit such joinder in nearly all jurisdic-

²⁴⁷ As exceptions to the general rule, see, e.g., *Gandy v. Fortner*, 119 Ala. 303, 24 S. 425 (1893); *Corwin v. Tillman*, 255 Ill. App. 230 (1929); *Stevens v. Thompson*, 98 Mich. 9, 56 N.W. 1041 (1893).

²⁴⁸ *Baten v. Nona-Fletcher Mineral Co.*, (5th Cir. 1952) 198 F. (2d) 629; *Lake v. Dowd*, 207 Cal. 290, 277 P. 1047 (1929); *Henson v. Federal Land Bank*, 162 Ga. 839, 134 S.E. 923 (1926); *Brinker v. Haydon*, 3 Dana (33 Ky.) 156 (1835); *Dose v. Dose*, 172 Minn. 145, 214 N.W. 769 (1927).

²⁴⁹ *Trimble v. John C. Winston Co.*, (5th Cir. 1932) 56 F. (2d) 150, cert. den. 286 U.S. 555 (1932); *Commonwealth Trust Co. v. Smith*, (9th Cir. 1921) 273 F. 1, affd. 266 U.S. 152 (1924); *Spanner v. Brandt*, (S.D. N.Y. 1941) 1 F.R.D. 555. Cf. *Board of Railroad Comms. v. Reed*, 102 Mont. 382, 58 P. (2d) 271 (1936). See 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §657 (1929). But cf. *New England Mutual Life Ins. Co. v. Brandenburg*, (S.D. N.Y. 1948) 8 F.R.D. 151.

²⁵⁰ *Calcote v. Texas Pacific Coal & Oil Co.*, (5th Cir. 1946) 157 F. (2d) 216, cert. den. 329 U.S. 782 (1946); *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145 (1906); *Young v. Young*, 157 Wis. 424, 147 N.W. 361 (1914). Cf. *Warfield v. Marks*, (5th Cir. 1951) 190 F. (2d) 178; *Sigal v. Hartford Nat. Bank & Trust Co.*, 119 Conn. 570, 177 A. 742 (1935).

²⁵¹ *Dial v. Martin*, (Tex. Civ. App. 1923) 8 S.W. (2d) 241; a subsequent reversal, on other grounds, is not pertinent here.

²⁵² *Kentucky Natural Gas Corp. v. Duggins*, (6th Cir. 1948) 165 F. (2d) 1011. The court distinguished the case from suits in ejectment, in which tenants in common need not join. ". . . a tenant in common in such an action is seeking to recover his aliquot portion of the land involved, and each tenant in common has a similar separate right. The rule does not apply when tenants in common seek to cancel or rescind a lease of oil and gas. In such an action it is the rule that all the tenants in common must unite on account of the contract involved being an entire and indivisible one." P. 1016. The problem is deemed to possess more contract characteristics than property peculiarities.

²⁵³ *Jeffers v. Forbes*, 28 Kan. 174 (1882).

tions today; but there is little reason to believe that the issue of compulsory joinder would be decided differently.

In *Cunningham v. Brewer*,²⁵⁴ the Nebraska court held that both Mr. and Mrs. Cunningham were "indispensable" parties to a suit to rescind for fraud a deed of their homestead to Brewer. Under state law they were joint tenants with right of survivorship, and the court stated that a final decree canceling the deed could not be entered without materially affecting both of them. Although the statement is true literally, it would be quite possible for the appellate court to reach a result (as did the trial court) which would not *adversely* affect the absent husband: a judgment for plaintiff-wife. As an Illinois court said in a similar case, "The decree on the prayer asked for took nothing from [him], but, on the contrary, the cancellation of the deed thereunder would restore whatever rights [he] had lost."²⁵⁵ Were the issue being raised for the first time in the trial court, the perhaps equal possibility of a judgment for defendant would indeed justify a court in refusing to proceed until Mr. Cunningham was brought in, else the whole proceeding might ultimately prove to have been in vain. Mr. Cunningham apparently was available; indeed the trial court had denied as untimely his motion to intervene after trial. But the fact is that the issue of his nonjoinder was being raised for the first time in the appellate court. The result was to remand the case to the trial court with direction to make him a party. For all that appears, when the trial court and the appellate court look at the case next time they may order rescission, thus having rendered of no particular importance the husband's absence in the first case. Already having the record before it, it seems wasteful for the appellate court to remand the case without first determining—probably with some ease—whether it would be inclined to rule in favor of defendant. If it would be so disposed, then it ought to remand, so that Mr. Cunningham could be heard.²⁵⁶ If, however, a judgment for plaintiff (Mrs. Cunningham) appeared warranted, the presence of the husband would add nothing; on balance, the judgment

²⁵⁴ 144 Neb. 211, 16 N.W. (2d) 533 (1944).

²⁵⁵ *Corwin v. Tillman*, 255 Ill. App. 230 at 235 (1929).

²⁵⁶ This assumes that Mr. Cunningham's interest is aligned with his wife's and will be served as hers is served. Actually, it appears that Mr. Brewer, knowing of Mrs. Cunningham's "physical and mental weakness," paid Mr. Cunningham, illiterate and a habitual drunkard, \$150 to persuade his wife to join him in the deed to Brewer. Presumably Mr. Cunningham is not now a friend of Mr. Brewer's, but his true position in the controversy is not made clear. As mentioned in the text above, Mr. Cunningham attempted to intervene after trial, but his petition was denied for reasons not stated.

would affect him beneficially—not adversely—and no second suit would ensue.

In *Sigal v. Hartford National Bank & Trust Company*²⁵⁷ the Connecticut court proceeded to an affirmance of a trial court ruling that an agreement was valid, even though there were absent several individuals having a “direct interest” whose “rights would be adversely affected” if the agreement were held invalid. Said the court:

“But the question at issue has been ably and thoroughly presented to us; in our opinion the agreement is clearly valid; a decision to this effect will give the persons who are mentioned in it all they could claim; and any right of the estate would depend upon facts not appearing upon the present record and which may or may not exist. We shall therefore decide the case, even though, of course, our decision would not be conclusive upon the rights of persons not parties to the action.”²⁵⁸

Put it this way: A valid reason for a trial court’s refusal to proceed when one possible outcome of a case will affect an absent party adversely is that so long as that potentiality exists, there is a strong possibility that the court and the parties will have had their time employed in a completely vain pursuit, which must be gone through again in the presence of a party absent the first time. If the absent one is available he ought by all means to be brought in. That makes sense. But *Cunningham v. Brewer* stands at the other end of the trail. The case has already been tried and the result in the trial court was a victory for Mrs. Cunningham: rescission. Since Mr. Cunningham’s interest presumably is aligned with that of his wife’s, he is not yet harmed. When the appellate court, without looking at the merits, sends the case back for a new trial with the husband present, it does not assure that there will be no waste of judicial energy.²⁵⁹ Instead, it seems to produce the prospect of even more potentially vain effort than has already been expended—that is, in the event of a victory for plaintiffs in a subsequent trial and appeal. How much better it would be for the Nebraska court to follow the example of the *Sigal* case:²⁶⁰ to examine the record and, if it finds support for the decree below and no adverse effect upon the husband, to affirm; plaintiff’s case presumably would become no weaker upon the addition of her

²⁵⁷ 119 Conn. 570, 177 A. 742 (1935).

²⁵⁸ *Id.* at 573.

²⁵⁹ Except as this case may be a warning to subsequent litigants.

²⁶⁰ Note 257 *supra*.

husband. If, on the other hand, a reversal on the merits is warranted, a new trial is in order, because judgment for defendant might accomplish little by way of a complete disposition of the controversy: Mr. Cunningham may well bring a suit of his own, thus putting defendant improperly to the trouble of resisting two suits and imposing unnecessarily on the courts.

Two or more separate agreements concerning the same property may nevertheless be so related that an action directed to but one may involve the parties to the others to such an extent that their joinder is at least an "ought" and perhaps a "must." This is particularly well exemplified in cases involving petroleum bearing land. In a suit for forfeiture of an oil and gas lease for the sublessee's breach of an implied covenant to protect from drainage, both the lessee and the sublessee "should" be made parties.²⁶¹ This is so even though acts constituting grounds for forfeiture of the parent lease may be committed by a sublessee alone. The principal lessee's interest is affected, and although there is no fatal objection to proceeding in absence of the lessee if he proves unavailable, when he is available the court is amply justified in holding that he should be brought in.²⁶² In *Veal v. Thomason*²⁶³ the Texas Supreme Court was concerned with the claimed invalidity of an oil and gas lease which reserved title in the lessors to one-eighth of the oil but provided that the lessors in similar leases in the unitized block should participate in the royalties from oil, gas, or other minerals, "if, when and as produced and sold." The court of civil appeals had ruled²⁶⁴ that the lessors held absolute title until the oil was sold, and that the rights of the various other lessors in the unitized block as regards the royalty earned by any particular leased tract in the block did not accrue until the owner of the tract had reduced the royalty to money. It followed that the claim against such an owner in favor of the other lessors was merely a money demand, not to be classed as an interest in the land from which the royalty was derived. Hence, said the lower court in a trespass to try title action wherein the lease was claimed to be invalid, the other lessors in the unitized tract were not "necessary" parties. However, the supreme court, reversing, held that since a single transaction or purpose was consummated, the unitization

²⁶¹ *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. (2d) 232, 73 P. (2d) 1163 (1937) and cases therein cited.

²⁶² Cf. *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 284 P. 445 (1930).

²⁶³ 138 Tex. 341, 159 S.W. (2d) 472 (1942).

²⁶⁴ 144 S.W. (2d) 361 (1940).

contract was single even though the leases were separate.²⁶⁵ The lessors were joint owners or tenants of all royalties reserved in each of the several leases in the unitized block, the ownership being proportionate. Thus, the other lessors or royalty holders were necessary parties. Said the court, if not joined and the judgment here were to free this land from the lease, the royalty owners under the other leases in the unitized block will have had their royalty interest in this land cut off and destroyed, for all practical purposes, without their having had a day in court. Without more facts than appear in the two *Veal* opinions, the decision of the supreme court is appropriate enough. Its method plainly is superior to that of the lower court, which attached controlling importance to distinctions between interests in money and interests in land. Instead, the higher court looked realistically into the question of the factual effect on the other parties to the unitization agreement of a possible finding of invalidity of the lease, and it concluded that their interests—however they may be characterized—might indeed be adversely affected. In this view the result seems supportable, although it is difficult to see that joinder of the other parties would have much effect on the outcome of the case; i.e., it would be surprising if they could provide much assistance in a trial on the issue of the validity of the agreement between one lessor and his lessee. But the possible effect on the others and the inter-relationships inherent in the unitization agreement suggest the need for an opportunity for them to be heard, and the court so held.

To compare with the preceding cases the decision in *McArthur v. Rosenbaum Co.*²⁶⁶ is to observe again the clear need for deciding required joinder cases one by one on particular facts. Plaintiff lessee brought action in federal court against defendant lessor for a declaratory judgment construing a renewal clause in the lease. Plaintiff had erected a single building on four tracts, only one of which was owned by the lessor. Each tract was leased under virtually identical agreements. As required, plaintiff had erected his twelve story building in such way as to make possible its division into four units, with dividing walls on tract lines. Lessors under the other leases were not here joined, and the joinder would have destroyed diversity jurisdiction. The Third Circuit held that

²⁶⁵ But cf. *Jeffers v. Forbes*, 28 Kan. 174 (1882). In *Hudson v. Newell*, (5th Cir. 1949) 174 F. (2d) 546, plaintiffs' disclaimer of an intent to interfere with unitizations formed before the filing of this action led the court to dispense with joinder of otherwise indispensable parties to the earlier unitizations.

²⁶⁶ (3d Cir. 1950) 180 F. (2d) 617.

joinder was not required, that the other lessors were not indispensable parties because (a) the interests of these lessors would not be "directly affected legally by the adjudication," and (b) failure to join would not be inconsistent with equity and good conscience.

Discussing the latter point, the court noted that although the other lessors were undoubtedly interested in the result of this case, the possibility of loss of this tenant had been before them for the life of the lease, many years, and the provision for dividing walls would leave them with separate buildings erected at the tenant's cost. "If anyone will suffer an inequity it would appear to be the lessee. . . . But this is its own fault. . . ." ²⁶⁷ Actually, it would seem that the second of the court's two reasons for dispensing with joinder of the other lessees could be rephrased so that the two would read: (a) the interests of the lessors would not be directly affected legally by the adjudication, and (b) the interests of the lessors would not be directly affected factually by the adjudication. ²⁶⁸ And the first of these, as insisted elsewhere herein, ²⁶⁹ is empty of meaning, since nothing the court can do will *legally* affect the interest of an absent person, in the *res judicata* sense.

The result's clear dependence on the particular facts, i.e., the "separability" of the portions of the building, is emphasized by the court's pains to distinguish the instant case from the decision in *Metropolis Theatre Co. v. Barkhausen*, ²⁷⁰ where on otherwise comparable facts indispensability was the rule because the twenty-two story building involved housed a theater which could not reasonably be divided by walls along the lot lines.

It does not surprise that the courts respond to joinder questions in deed reformation cases in about the same pattern as in suits for rescission and cancellation. That is to say, they demand joinder of all parties to the original transaction, ²⁷¹ holding even that a judgment of reformation absent the grantor is "fatally defective," subject to collateral attack. ²⁷² Yet here too a court can draw from circumstance justification for excusing nonjoinder of a party to the deed, as where objection is untimely ²⁷³ or the deed-party has

²⁶⁷ Id. at 622.

²⁶⁸ The attempt is to rephrase in almost the court's own language. Were further departure considered, the word "directly" should be replaced by "adversely."

²⁶⁹ Text at notes 46-47 *supra*.

²⁷⁰ (7th Cir. 1948) 170 F. (2d) 481.

²⁷¹ *Ford v. Glens Falls Indemnity Co.*, (E.D. S.C. 1948) 80 F. Supp. 347; *Eureka Co. v. Henney Motor Co.*, (D.C. Del. 1933) 4 F. Supp. 564; *Kegel v. McCormack*, 225 Wis. 19, 272 N.W. 650 (1937). Cf. *Skurski v. Gurski*, 329 Mich. 474, 45 N.W. (2d) 359 (1951).

²⁷² *Fox v. Faulkner*, 222 Ky. 584, 1 S.W. (2d) 1079 (1927).

²⁷³ *Flowers v. Germann*, 211 Minn. 412, 1 N.W. (2d) 424 (1941).

virtually estopped himself by conceding that the deed contains error.²⁷⁴

Thus, in a Minnesota case²⁷⁵ the defendants in an ejectment action asked for reformation of the deeds by which they and plaintiffs obtained title to their lands from common grantors. The trial court denied reformation and gave judgment for plaintiffs. Not until the case was on appeal did plaintiffs, as appellees, raise the issue of nonjoinder of the grantors, and the court held that the objection came too late unless, without the grantors, no decree whatever could be made determining the principal issues in the case. Admitting that a decree in the instant case would not " 'completely settle all the questions which may be involved in the controversy' so as to 'conclude the rights of all the persons who have any interest in the subject-matter of the litigation,' "²⁷⁶ the court concluded nevertheless that a substantial, meaningful decree could be made without injuring absent persons and that therefore the grantors were not required to be present in order for the court to consider the case, especially since plaintiff did not raise the nonjoinder question by demurrer or answer in the trial court. It is true that if plaintiffs lose, as they seem destined to do, they may bring an action against the grantors for breach of warranties in the deed—though the facts indicate little chance of success. That is one more factor to be cast onto the scale in favor of requiring joinder; but it does not indicate a lack of power in the court to enter a final judgment without the grantors since the purpose of the action can be accomplished in their absence.²⁷⁷

²⁷⁴ Welch v. Johnson, 93 Ore. 591, 183 P. 776 (1919).

²⁷⁵ Flowers v. Germann, 211 Minn. 412, 1 N.W. (2d) 424 (1941).

²⁷⁶ Id. at 420. These phrases are derived from a leading Minnesota case, Tatum v. Roberts, 59 Minn. 52, 60 N.W. 848 (1894), which attempts to define kinds of parties in equity actions. The definitions make "necessary" parties roughly equivalent to the federal category of "indispensable" parties, and "proper" about the same as "necessary."

Necessary parties "are those without whom no decree at all can be effectively made determining the principal issues in the cause." 59 Minn. 52 at 56; these words in turn are taken from POMEROY, REMEDIES AND REMEDIAL RIGHTS, 2d ed., §329 (1883). Proper parties "are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation." Ibid. Except that the labels are not those usually employed and understood by lawyers, these definitions are good. All is common sense and there is no confusion about a lack of power in either definition. Rather, the concern is whether a decree as to those before the court will be effective as to the main issues in the case. With these as tools a court could, if it would, work well.

²⁷⁷ Unfortunately, to an otherwise laudable decision a confusing element is added by the appellate court's disposition of the case. After holding that the grantors are not "necessary" (meaning "indispensable") parties, and that there must be a reversal on the merits, i.e., reformation should be decreed, it states that the reversal is without prejudice to the

Relevant, though not directly in point, is a Georgia reformation case²⁷⁸ where a real estate agent had inserted the description of several lots in a blank deed signed by plaintiff so as to convey not only the intended property but several other lots also, including two owned by plaintiff's wife. The wife's presence in the suit was held not essential.²⁷⁹ Although it would be "better practice" to have made her a party, she would be benefited by a decree of reformation, not prejudicially affected, and accordingly joinder would not be required. This proper concern over the position of the absent wife is allayed upon the express assumption that if plaintiff wins, the wife is affected favorably, not adversely, and upon the tacit assumption that if plaintiff loses, the wife still may bring a suit of her own against defendant. All is well as to the wife. The tacit assumption, however, poses the problem of a double burden upon defendant, who, after a successful defense of the first action, may be summoned to battle again. Where there is a strong possibility that a defendant may be put to two suits it seems improper for a court to proceed in the absence of an interested person merely because the absent one cannot conceivably be hurt. A plaintiff in state cases will not be remediless if joinder is required, and therefore the value inherent in minimizing litigation and protecting defendants from repetitious suit may have full play. If the court is clearly of the opinion that on the merits decision is to go for plaintiff, then all of this may become surplusage; but the court should say so: "We find that plaintiff's claim is meritorious. In that view nonjoinder of plaintiff's wife becomes inconsequential." Instead, the implication of the court's language is that *if* plaintiff succeeds, the wife will not be hurt and accordingly joinder will not be required. So long as the matter is an "iffy" one, the court ought specifically to recognize that if defendant wins instead, the absent wife is not hurt (having an unimpaired claim of her own) but by the same token the defendant may be prejudiced. The decisional process then would turn into one of an

right of the trial court to hear and consider a motion to join the grantors. "Upon that court initially rests the burden of determining who should be joined as parties." 211 Minn. 412 at 422. Thus, after holding expressly that the grantors were not "necessary" parties, the appellate court suggests that the trial court have a whack at the question. Although the facts indicate that the presence of the grantors would not detract from the force of defendants' apparent right to reformation, the appellate court, by its disposition of the case, seems dangerously near contradicting its expressions of opinion on the party question.

²⁷⁸ Parnell v. Wooten, 202 Ga. 443, 43 S.E. (2d) 673 (1947).

²⁷⁹ The holding is somewhat less than square. A general demurrer having been sustained by the trial court, an amendment to bring in the missing wife was held inappropriate.

evaluation of interests, with the nod probably going to defendant, it being possible in all state and many federal cases for plaintiff to join the wife.

Under a Texas statute, joinder of spouses is required in reformation pleas involving community property. A case²⁸⁰ in that state held that a pro forma joinder of the husband satisfies the requirement, the court saying:

"The test to be applied in determining whether or not there was a sufficient joinder of all necessary parties plaintiff is whether the judgment, if it had been favorable to the defendant, would have protected the defendant under a plea of *res judicata* against a subsequent suit involving the same subject matter. If H. E. Flannery and his wife were sufficiently before the court that they would have been barred from maintaining a second suit involving the same subject matter against the defendant, then the defendant has no right to complain of the lack of necessary parties; otherwise he has such right."²⁸¹

This articulate concern lest defendant be subjected to two claims is what is lacking in the Georgia case.

Compulsory joinder questions in real estate mortgage foreclosures are subject to essentially the same type of analysis as those in other actions involving land.

The mortgagee's primary objective in foreclosing usually is to obtain payment of the defaulted obligation out of the security. To accomplish this, he asks the court to terminate the equities of redemption of all persons having an interest in the mortgaged property, that title to the property as it stood before the mortgage may be vested in a purchaser at judicial sale. The mortgagee wants to achieve a sale of all the right and title that his mortgage covers, and the buyer wants to know with some certainty what title it is that he buys. Only thus can a maximum price be obtained. It becomes clear that there is good reason to require the presence of all persons who may have an outstanding interest in or claim against the property.²⁸² These persons are sometimes termed "necessary,"

²⁸⁰ *Wade v. Wade*, 140 Tex. 339, 167 S.W. (2d) 1008 (1943).

²⁸¹ *Id.* at 342.

²⁸² "It is manifestly unjust to all persons interested in the proceeds of the sale of the mortgaged premises that the sale be made subject to an outstanding right to redeem, for that invariably and inevitably prejudices the sale." *Gould v. Wheeler*, 28 N.J. Eq. 541 at 542 (1877) (ordering a subsequent mortgagee joined). "[T]he owner of any quantity or quality of estate in the premises, even in the remotest degree or of the most trifling value, becomes as necessary a party defendant to perfect the title as the sole owner of the entire equity of redemption." WILTSIE, *MORTGAGE FORECLOSURE*, 5th ed., §330 (1939). Said one

in the sense that their joinder as defendants is necessary to the full accomplishment of the purpose of the foreclosure action.²⁸³

From here it is simple to go on to a list of types of individuals who are "necessary" in this sense:²⁸⁴ e.g., the mortgagor,²⁸⁵ purchasers from the mortgagor,²⁸⁶ heirs or devisees of the mortgagor,²⁸⁷ junior mortgagees,²⁸⁸ subsequent lessees of the mortgagor.²⁸⁹ The

court with reference to the necessity of joining the mortgagor (pledgor) in a suit to foreclose a pledge of stock: "It is the duty of the security holder to exhaust the security before he can obtain a deficiency judgment against the indorser or maker. . . . The security holder cannot reasonably exhaust the security if at the foreclosure sale no one would buy it, because no one could get a title which would be worth paying 10 cents for [, for] the simple reason that the owner's interest would not be foreclosed." *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134 at 147, 76 P. (2d) 234 (1938). See 37 AM. JUR., Mortgages §548. Cf. *O'Brien v. Moffitt*, 133 Ind. 660, 33 N.E. 616 (1892); *Webb v. Patterson*, 114 Neb. 346 at 351, 207 N.W. 522 (1926).

²⁸³ OSBORNE, MORTGAGES §321 (1951); WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §329 (1939).

²⁸⁴ WILTSIE, note 283 supra, lists some 51 categories of possible parties and indicates that 30 of them are or may be "necessary."

²⁸⁵ *Goodenow v. Ewer*, 16 Cal. 461 (1860); *Riddick v. Davis*, 220 N.C. 120, 16 S.E. (2d) 662 (1941). See *Federal Land Bank v. Fjerestad*, 66 S.D. 429 at 431, 285 N.W. 298 (1939).

²⁸⁶ *Terrell v. Allison*, 88 U.S. 289 (1874); *Fowler v. Lilly*, 122 Ind. 297, 23 N.E. 767 (1889).

²⁸⁷ *Chew v. Hyman*, (C.C. N.D. Ill. 1881) 7 F. 7; *Thomas v. Barnes*, 219 Ala. 652, 123 S. 18 (1929); *Phillips v. Parker*, 148 Kan. 474, 83 P. (2d) 709 (1938); *Buff v. Schafer*, 157 Minn. 485, 196 N.W. 661 (1924). Cf. *Reedy v. Camfield*, 159 Ill. 254, 42 N.E. 833 (1896); *Fraser v. Bean*, 96 N.C. 327, 2 S.E. 159 (1887). See *Federal Land Bank v. Fjerestad*, 66 S.D. 429 at 431, 285 N.W. 298 (1939); and see annotation, 119 A.L.R. 807 (1939). The result may be otherwise by force of applicable statute. See, e.g., *McClung v. Cullison*, 15 Okla. 402, 82 P. 499 (1905); *Dixon v. Cuyler*, 27 Ga. 248 (1859); *Tryon v. Munson*, 77 Pa. 250 (1874). An executor or personal representative, who does not succeed to the decedent-mortgagor's interest in the property, is not a necessary party. *Woods v. First Nat. Bank*, (9th Cir. 1926) 16 F. (2d) 856; *Heidgerd v. Reis*, 135 App. Div. 414, 199 N.Y.S. 921 (1909); *Federal Land Bank v. Fjerestad*, supra this note. Cf. *Hinkle v. Walker*, 213 N.C. 657, 197 S.E. 129 (1938). See *Fraser v. Bean*, supra this note at 329. Again, the rule is sometimes otherwise by statute. E.g., *Okla. Stat.* (1951) tit. 58, §252. See *Seals v. Chadwick*, 18 Del. 381, 45 A. 718 (1900). Or where plaintiff seeks a deficiency judgment against the estate. *Belloc v. Rogers*, 9 Cal. 124 (1858); *Columbia Theological Seminary v. Arnette*, 168 S.C. 272, 167 S.E. 465 (1932). In this latter instance, the estate will be directly affected, and the personal representative of the deceased mortgagor is, with reason, a necessary party.

²⁸⁸ *Mechanics State Bank v. Kramer Service, Inc.*, 184 Miss. 895, 186 S. 644 (1939); *Gould v. Wheeler*, 28 N.J. Eq. 541 (1877). But cf. *Street v. Beal and Hyatt*, 16 Iowa 68 (1861); *Harris v. Hooper*, 50 Md. 537 (1878); *Pierson v. Pierson*, (Tex. Civ. App. 1939) 128 S.W. (2d) 108, revd. on other grounds, 136 Tex. 310, 150 S.W. (2d) 788 (1941) ("must be made parties or they are not affected by the foreclosure. . . . That does not mean, however, that no effective judgment of foreclosure can be had without their presence in the suit. It means only that, if the plaintiff wishes to shut off their equity of redemption, he must make them parties." [128 S.W. (2d) at 113]); *Davis v. Walker*, (Tex. Civ. App. 1921) 233 S.W. 521 at 523; and see *Stroup v. Rutherford*, (Tex. Civ. App. 1951) 238 S.W. (2d) 612 at 613.

Whether a junior mortgagee is a necessary party cannot be answered without asking, "For what purpose?" For example, if the issue arises between the mortgagor and the senior mortgagee and the foreclosure sale has already been consummated, failure to have joined the junior mortgagee is unimportant: he is not a necessary party. *Spokane Savings & Loan Soc. v. Liliopoulos*, 160 Wash. 71, 294 P. 561 (1930). The same issue raised before

interests of all these individuals must be terminated if the foreclosure action is to accomplish all that it ought. In fact, however, it is misleading to lump all these types of parties into this one category. In the first place the question of *required* joinder seldom arises. It normally is the desire of all who have any interest in the mortgaged property that it be sold for the highest price possible, and that can happen only if the buyer can be vested with title equal to that held by the mortgagor at the time of the mortgage. Hence, we may expect that the parties themselves will take steps to join all those whose interests are affected and who may have rights of redemption. In the second place the term "necessary," here as in other areas, is a term of various denotations.²⁹⁰ There seems to be no case, for example, in which a court has had to refuse, finally, to proceed in the absence of one of these parties, for the reason that with constructive service of process available in real property cases a ruling by the court that a party is "necessary" typically leads to the immediate joinder of the missing party without further compulsion by the court.²⁹¹ In such cases, then,

the sale probably will lead to an order requiring the junior mortgagee to be joined: he is a necessary party. *Gould v. Wheeler*, supra this note. See *Norfolk Bldg. & Loan Assn. v. Stern*, 113 N.J. Eq. 385 at 387, 167 A. 32 (1933); *Morris v. Wheeler*, 45 N.Y. 708 at 711 (1871). See also note, 88 UNIV. PA. L. REV. 994 (1940).

Prior mortgagees ordinarily are not necessary parties in a foreclosure action by a junior mortgagee. *Jerome v. McCarter*, 94 U.S. 734 (1876); *Cone Bros. Construction Co. v. Moore*, 141 Fla. 420, 193 S. 288 (1940). See *Raymond v. Holborn*, 23 Wis. 57 at 63 (1868). Although there is some authority to the effect that holders of superior interests are not even proper parties (e.g., *Cone Bros. Construction Co. v. Moore*, supra), the weight of authority indicates that such persons may be joined. In certain circumstances it has been held that they must be joined, as where sale of the entire property and estate, and not merely the equity of redemption, is desired. This is requisite so that the amount of prior encumbrances can be fixed and paid out, and the purchaser protected. See *Jerome v. McCarter*, supra this note, at 735-736; *San Francisco v. Lawton*, 18 Cal. 465 (1861).

²⁸⁹ Cf. *Dundee Naval Stores Co. v. McDowell*, 65 Fla. 15, 61 S. 108 (1913); *Metropolitan Life Ins. Co. v. Childs*, 230 N.Y. 285, 130 N.E. 295 (1921); *Stark v. Super-Cold Southwest Co.*, (Tex. Civ. App. 1951) 239 S.W. (2d) 402; *Thornely v. Andrews*, 40 Wash. 580, 82 P. 899 (1905). But cf. *McDermott v. Burke*, 16 Cal. 580 (1860); *Chicago Title & Trust Co. v. Herlin*, 299 Ill. App. 429, 20 N.E. (2d) 333 (1939); *Dolese v. Bellows-Claude Neon Co.*, 261 Mich. 57, 245 N.W. 569 (1932). The result may depend on whether the state adheres to the title or lien theory of mortgages, and on whether the tenant in possession holds under the mortgagor. See comment, 17 WASH. L. REV. 37 (1942); *Chicago Title & Trust Co. v. Herlin*, supra this note (question raised for first time on appeal: court implied that different result should obtain in trial court); *Stroup v. Rutherford*, (Tex. Civ. App. 1951) 238 S.W. (2d) 612.

²⁹⁰ "[I]n this context as in most contexts 'necessary' means convenient. Or do you prefer to say it means very convenient or very, very convenient." DURFEE, *CASES ON SECURITY* 204 (1951).

²⁹¹ However, see *Gould v. Wheeler*, 28 N.J. Eq. 541 (1877), in which a stay of the proceedings was ordered pending the joining of a subsequent mortgagee; *418 Trading Corp. v. Moon Realty Corp.*, 285 App. Div. 444, 137 N.Y.S. (2d) 513 (1955). Cf. *Nashville & Decatur R.R. v. Orr*, 85 U.S. 471 (1873).

there is no cause to determine indispensability as distinguished from necessary joinder. This is true, also, where for reasons sufficient to the parties joinder is dispensed with by consent. There can be no harm to those not joined,²⁹² so that a court has no cause to raise the question on its own motion.

There seem to be but two ways in which the question of indispensability arises. One, there may be an objection on appeal to the failure below to have joined the holder of a particular interest. The counter argument offered may be that the nonjoinder was not mentioned below and may not be raised for the first time on appeal. The latter argument cannot prevail if the court holds the party indispensable.²⁹³ Two, in a later suit (a subsequent foreclosure, or a different kind of proceeding, as, for example, ejectment) the original foreclosure proceeding may be challenged as void for lack of a party.²⁹⁴ The number of cases upholding such challenge is inconsiderable. The courts regularly hold that failure to join this lienholder or that claimant renders the action below ineffective as to *him*. But as emphasized repeatedly herein, that is quite a different thing from holding the action ineffective to foreclose interests which *were* represented in the original proceeding.²⁹⁵

There do appear from time to time statements to the effect that since the principal purpose of a foreclosure suit is to terminate the equity of redemption, the owner of that equity *must* be made a party.²⁹⁶ This means, ordinarily, the original mortgagor; and in the simple case where he has not encumbered the property additionally or transferred all or a part of it to another person, he is spoken of as the only defendant necessary.²⁹⁷ But this is hardly more than to say that if *B* wants to recover money from *A*, he must

²⁹² I.e., their interests simply remain unaffected by the adjudication in their absence. *Terrell v. Allison*, 88 U.S. 289 (1874); *Riddick v. Davis*, 220 N.C. 120, 16 S.E. (2d) 662 (1941).

²⁹³ *Thomas v. Barnes*, 219 Ala. 652, 123 S. 18 (1929) (heirs of mortgagor held "indispensable" in this sense); *Hambriek v. Russell*, 86 Ala. 199, 5 S. 298 (1888) (mortgagee held "indispensable" in this sense in foreclosure instituted by assignee of mortgage debt); *Langley v. Andrews*, 132 Ala. 147, 31 S. 469 (1902) (same). Cf. *Reader v. District Court*, 98 Utah 1, 94 P. (2d) 858 (1939).

²⁹⁴ *Richards v. Thompson*, 43 Kan. 209, 23 P. 106 (1890); *Phillips v. Parker*, 148 Kan. 474, 83 P. (2d) 709 (1938).

²⁹⁵ This discussion emphasizes the rules in state courts. If federal jurisdiction in these matters be explored, one comes upon the diversity problem as a third instance in which the indispensability question may arise. Cf. *Woods v. First National Bank*, (9th Cir. 1926) 16 F. (2d) 856. See generally section III-D infra.

²⁹⁶ See, e.g., *Riddick v. Davis*, 220 N.C. 120, 16 S.E. (2d) 662 (1941); *Federal Land Bank v. Fjerrestad*, 66 S.D. 429, 285 N.W. 298 (1939).

²⁹⁷ *Carpenter v. Ingalls*, 3 S.D. 49, 51 N.W. 948 (1892).

sue *A*. If he comes into court and says that process has not been served on *A* and that *A* is nowhere about, but that a judgment against *A* is desired, the indicated result is a dismissal. So it is that if a mortgagee wants to foreclose the mortgagor's interest in the security (and, probably, to obtain a deficiency judgment against him),²⁹⁸ he must sue the mortgagor. One can think of few circumstances in which foreclosure of the interest of the mortgagor or his successor in interest is not vital to the success of a foreclosure proceeding. In this sense the mortgagor is indispensable.²⁹⁹ So, in this sense, are all persons whose interests the mortgagee wants to foreclose: their interests can be cut off only if they are made parties.

However, it is conceivable that in a given instance, the mortgagee may be willing that the foreclosure sale vest in the purchaser something less than unencumbered title. The sale price will be less and the omission is not to be encouraged,³⁰⁰ but there is no generally accepted principle which makes the proceeding fatally defective for failure to join any particular interest. It simply is ineffective as to those not joined but is valid as to those who were.³⁰¹ Indeed, one author suggests that since the word "necessary" is of "relative signification,"³⁰² there is no such thing as a "necessary" (in the sense of "indispensable," apparently) party defendant in foreclosure cases.³⁰³

²⁹⁸ Obviously, if the creditor wants a deficiency judgment against the original mortgagor who has conveyed the property to another, the mortgagor must be joined. See *Johnson v. Home Owners' Loan Corp.*, 46 Cal. App. (2d) 546 at 548, 116 P. (2d) 167 (1941); *Dennis v. Ivey*, 134 Fla. 181 at 185, 183 S. 624 (1938). But cf. *Vanderspeck v. Federal Land Bank*, 175 Miss. 759, 167 S. 782 (1936); *Methvin v. American Savings & L. Assn.*, 194 Okla. 288, 151 P. (2d) 370 (1944). Guarantors of the mortgage note are not necessary parties; suit against them for the balance of the note in default may be brought before foreclosure, or after a foreclosure proceeding to which the guarantors were not parties. *Berea College v. Killian*, 304 Ill. App. 296, 26 N.E. (2d) 650 (1940); *Prevatt v. Federal Land Bank*, 129 Fla. 464, 176 S. 494 (1937) (rule extends to co-makers and endorsers if they have no interest in the mortgaged property).

²⁹⁹ *Terrell v. Allison*, 88 U.S. 289 (1874).

³⁰⁰ See the quotation from *Hoyt v. Upper Marion Ditch Co.*, note 282 supra.

³⁰¹ "[The mortgagor's grantee] should have been made a party to the foreclosure suit. His rights could not be cut off by that proceeding, unless he was made a party thereto. But the decree was not, for that reason, a void decree. . . . The failure to make him a party . . . does not affect the validity of the decree, but simply leaves his right of redemption unimpaired. . . . Although the grantee of the mortgagor, who is not a party, is not affected, yet his interest, which remains the same, is only a right to redeem. By the foreclosure and sale and the master's deed thereunder, the legal title becomes vested in the grantee in such deed, and leaves nothing in the mortgagor, or his grantees, who are not parties to the proceeding, except the right to redeem in equity." *Walker v. Warner*, 179 Ill. 16 at 23-24, 53 N.E. 594 (1899). The cases in note 294 supra are the exception, not the rule.

³⁰² I.e., its meaning must relate to the objective or purpose of the mortgagee.

³⁰³ WILTSIE, *MORTGAGE FORECLOSURE*, 5th ed., §329 (1939). Cf. *DURFEE, CASES ON SECURITY* 204 (1951).

The authorities discussed in the preceding half dozen paragraphs involve, generally, a debtor-mortgagor or parties deriving their interests through him. Much of what is there said is applicable equally to those who have creditor interests, although these latter belong in the category of parties plaintiff. If they are held necessary but refuse to associate themselves as plaintiffs, they will be brought in as defendants. Only a mortgagee or someone claiming through him can have any reason for seeking foreclosure, and usually he commences the action voluntarily. Hence, by comparison with required joinder questions as to persons holding debtor interests the number of such problems as to creditors is minute.

A suit for foreclosure is normally brought by the mortgagee or, if he has assigned his interest, by his assignee or transferee. If the mortgage is held by a single creditor and the obligation and the security interest in the mortgaged property have not been divorced, there is no joinder problem. Any issue of the propriety of his bringing the suit will relate to the question of who is the real party in interest, a (substantive law) question not within the purview of this discussion. But where two or more have an interest in the secured obligation, or where the obligation is held by one and the security title by another, it may become necessary to decide which of the creditors and title holders must be made parties.

Foreclosure, of course, assumes the existence of a secured obligation in default. Necessarily, then, the holder of the obligation must be a party to the foreclosure proceedings to establish the amount of the obligation, his ownership of it and the fact that it is in default.³⁰⁴ It has been stated that where two or more have an interest in the ownership of the lien, all must be joined, as plaintiffs if willing, as defendants if not.³⁰⁵ There is a substantial body of cases holding co-mortgagees to be "necessary" parties,³⁰⁶

³⁰⁴ *Bennett v. Taylor*, 5 Cal. 502 (1855); *Bergen v. Urbahn*, 83 N.Y. 49 (1880). "[T]he finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed. . . ." *Chicago & Vincennes R.R. v. Fosdick*, 106 U.S. 47 at 71 (1882).

³⁰⁵ *Holm v. Goodley Holding Corp.*, 164 Misc. 45, 295 N.Y.S. 885 (1937) (holder of a junior participating interest in a first mortgage required to bring in his assignor who was present holder of the senior participating interest). Cf. *Webb v. Patterson*, 114 Neb. 346, 207 N.W. 522 (1926).

³⁰⁶ *Hopkins v. Ward*, 51 Ky. 185 (1851); *Blanchard v. Baldwin*, 88 N.H. 423, 190 A. 285 (1937); *Oppenheimer v. Schultz*, 107 N.J. Eq. 192, 152 A. 323 (1930); *Flemming v. Iuliano*, 92 N.J. Eq. 685, 114 A. 786 (1921); *Lowe v. Morgan*, 1 Bro. Ch. 368, 28 Eng. Rep. 1183 (1784). Cf. *Goodall v. Mopley*, 45 Ind. 355 (1873). See *Porter v. Clements*, 3 Ark. 364 at 382 (1841); *Tyler v. Yreka Water Co.*, 14 Cal. 212 at 219 (1859); and see WILTSIE, *MORTGAGE FORECLOSURE*, 5th ed., §§318, 396 (1939).

but there also are cases holding that one co-mortgagee can sue alone.³⁰⁷ This serves but to demonstrate again the impropriety of labeling any one class of persons "necessary" or "indispensable" at all times and in all circumstances.³⁰⁸ Instead, each case should be examined on its facts. Why is co-mortgagee *A* not joined? Will the mortgagor be harmed by his absence? Will *A* himself be harmed? In *Nashville & Decatur R.R. v. Orr*,³⁰⁹ railroad bonds were secured by a mortgage which ran not to a trustee but directly to the persons holding the bonds, who were named and their several interests described. The mortgagor defaulted, and Orr, a bondholder, suing for himself and for others who might intervene and contribute to the expenses of the suit, sought to foreclose. There was substantial doubt that the security was adequate. The Supreme Court dismissed Orr's bill on the ground that with the security insufficient Orr's success likely would be prejudicial to the interests of the absent bondholders covered by the same mortgage. "Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it. . . . If . . . there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place, and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value."³¹⁰ This is a sensible result, reached upon inquiry into facts far more pertinent than such matters as whether Orr and the other bondholders were joint tenants or tenants in common or totally separate in their interests.

The holders of the security interest in the land should be made parties in order to enable the court to vest in the foreclosure sale purchaser the entire title to the property as of the time the mortgage was given.³¹¹ This may be true even where the titleholder never

³⁰⁷ *Brown v. Bates*, 55 Me. 520 (1868) (statute may have had an effect on the result); *Thayer v. Campbell*, 9 Mo. 277 (1845); *Montgomerie v. Marquis of Bath*, 3 Ves. Jr. 560, 30 Eng. Rep. 1155 (1797). Cf. *Platt v. Squire*, 53 Mass. 494 (1847). See *Cochran v. Goodell*, 131 Mass. 464 at 466 (1881).

³⁰⁸ It may be possible to explain (if not justify) the division of authority between footnotes 306 and 307 in orthodox joint-several terms: the cases in the former involved what the courts commonly call "joint" interests, whereas the co-mortgagees in the latter note's cases had "separate" interests, i.e., they were tenants in severalty or in common. But cf. WILTSIE, *MORTGAGE FORECLOSURE*, 5th ed., §318 (1939): "Where a mortgage is owned in severalty, it is indispensable [sic] that all the interests be represented in an action to foreclose. All co-mortgagees must be made parties."

³⁰⁹ 85 U.S. 471 (1873).

³¹⁰ *Id.* at 475.

³¹¹ Cf. *Goodenow v. Ewer*, 16 Cal. 461 at 469 (1860); *Champion v. Hinkle*, 45 N.J. Eq. 162 at 165, 16 A. 701 (1888).

had³¹² or has divested himself of³¹³ an interest in the obligation which the title was given to secure.

These are the general principles. To simple cases the application is simple. In complex cases—for example, trust indenture mortgages securing corporate bonds³¹⁴—the problems are harder but the litigation is cut to the same pattern.

It will have been apparent from all this that the purposes of foreclosure proceedings are best and most fairly effectuated by bringing before the court all persons who may have any interest in or claim to the property, whether as debtor, creditor, or otherwise. Because constructive service of process may be employed to gain jurisdiction over these interests and claims and their holders to the extent of the property itself, one would expect the courts always to insist upon joinder. This is especially true in the light of the interest of the public and of the defendant in avoiding multiple litigation and the desire to deal cleanly with property titles. Indeed there is something akin to a presumption in favor of joinder: “The courts should be particularly jealous of the integrity of judicial sales.”³¹⁵ And the strong interest of the parties in wrapping up the whole matter in one package normally leads to an avoidance of any nonjoinder issue. Nevertheless there are instances in which the petitioner fails to join interested persons;³¹⁶ and in some of these the courts do not insist on joinder,³¹⁷ noting that the foreclosure action is without prejudice to the absent persons’ interests. These cases run counter to the “presumption” that joinder will be required. But in each the court has concluded

³¹² As intimated, at least, in *Chrisman v. Chenoweth*, 81 Ind. 401 (1882).

³¹³ *Flagg v. Florence Discount Co.*, 228 Ala. 153, 153 S. 177 (1934). This applies, of course, only to title theory jurisdictions.

³¹⁴ The requirement of joinder depends on the wording of the indenture. The trustee, as holder of title to the security, must be a party. See *Busch v. City Trust Co.*, 101 Fla. 392, 134 S. 226 (1931); 37 AM. JUR., *Mortgages* §§545, 547. Ordinarily, the indenture precludes the bondholders from instituting foreclosure, even though they are the “real” creditors. See *OSBORNE, MORTGAGES* §320 (1951).

³¹⁵ *First Carolinas Joint Stock Land Bank v. McNiel*, 177 S.C. 332 at 343, 181 S.E. 21 (1935).

³¹⁶ It is quite possible, of course, that the plaintiff has a legitimate reason for omitting certain persons. See, e.g., *Cody Trust Co. v. Hotel Clayton Co.*, 293 Ill. App. 1, 12 N.E. (2d) 32 (1937) (mortgage bondholders were not joined because they were numerous and were adequately represented by the trustee); *Mortgage Guarantee Co. v. Atlantic City Jewish Community Center*, 14 N.J. Misc. 1, 181 A. 700 (1935), *affd.* 121 N.J. Eq. 110, 187 A. 372 (1936). The local procedure for substituted service may be expensive and difficult; and of course due process must be complied with. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³¹⁷ “That [i.e., joinder of trust deed beneficiaries] they dispensed with, why should not the court? Their absence does not render the bill defective.” *Continental Bank & Trust Co. v. Fulton Realty Co.*, 10 N.J. Misc. 1105 at 1110, 162 A. 560 (1932).

from the facts that (1) there was a good reason why joinder had not been effected and (2) the action would accomplish something significant for the parties without prejudice to any person not present.³¹⁸ One does not regret the deviations from general rule, but rather recognizes that the general rule allows—indeed requires—a case-by-case determination of the factual need for joinder, and that there are situations where joinder may be excused without apology.

D. *In Cases Where Federal Jurisdiction Is Bottomed on Diversity of Citizenship*
(A Dimension Is Added)

In the main, compulsory joinder presents the same questions in the federal courts as in state courts. The considerations that move a court to one determination or another are not greatly different. Indeed the familiar formulations of required joinder rules utilized by all courts, both state and federal, derive principally from federal cases where jurisdiction was supported by diversity of citizenship,³¹⁹ and in diversity cases the question of indispensability well may be decided upon the basis of state rules. To the extent that required joinder is determined by reference to the character of the parties' rights or interests the problem is essentially substantive and must be settled by reference to the governing law—usually state,³²⁰ under *Erie R.R. v. Tompkins*,³²¹ but sometimes federal, as, for example, where copyrights and patents are involved.³²² Where, however, the question of indispensability

³¹⁸ Note the emphasis upon particular facts in this statement: "It is well recognized that a Court of Equity has wide discretion in determining who are necessary parties in a case of this sort. Conceding the general rule to require that a trustee be made a party for the purpose of divesting his title and removing this cloud, the situation here was exceptional. When the record disclosed that this corporate trustee was not only insolvent and had ceased to do business for many years, with such assets as it possessed being administered by a receiver, who appeared and disclaimed and renounced the right or authority to perform the functions of this trust, and that, further more, while technically a separate entity, this trustee was a subsidiary, an arm of the mortgagee bringing the suit, which owned all of the capital stock of the corporate trustee, we think the chancellor was well within the discretion and jurisdictional powers vested in him in proceeding as he did. . . . 'The modern tendency in all progressive jurisdiction is away from formal defects and distinctions, not affecting the merits.'" *Lawman v. Barnett*, 180 Tenn. 546 at 569-570, 177 S.W. (2d) 121 (1944). See also the cases in note 316 supra.

³¹⁹ The most important of which is *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1854).

³²⁰ *Kroese v. General Castings Corp.*, (3d Cir. 1950) 179 F. (2d) 760, cert. den. 339 U.S. 983 (1950); *Young v. Garrett*, (8th Cir. 1945) 149 F. (2d) 223; *Platte v. New Amsterdam Casualty Co.*, (D.C. Neb. 1946) 6 F.R.D. 475.

³²¹ 304 U.S. 64 (1938).

³²² *Stuff v. La Budde Feed & Grain Co.*, (E.D. Wis. 1941) 42 F. Supp. 493.

depends on whether the court can do justice to the parties in court without injuring the rights of absent persons, the problem is said to be procedural and governed by federal rules.³²³

Nevertheless, elements substantially foreign to the usual purpose of the joinder inquiry do exist in one important class of federal cases—those in which jurisdiction is based solely on diversity of citizenship. It is a familiar fact that federal district courts may entertain civil suits involving more than \$3000 between parties who are “Citizens of different States.”³²⁴ Since 1806, the date of *Strawbridge v. Curtiss*,³²⁵ it has been considered settled that the quoted phrase contemplates so-called complete diversity; i.e., no plaintiff may be a citizen of the same state as any of the defendants, irrespective of the number of litigants plaintiff or defendant.³²⁶ Thus, although a case may lie properly in the federal courts so long as *B* of Michigan is plaintiff and *C* of New York is defendant, adding *D* of New York as plaintiff or *E* of Michigan as defendant normally will oust federal jurisdiction. At once it is apparent that, as in *Shields v. Barrow*,³²⁷ a decision that a defendant from the same state as plaintiff (or that a plaintiff from defendant’s state) is “indispensable” must effectually end consideration of the case by the federal court, since his joinder would destroy the basis of jurisdiction.³²⁸ Federal rule 19 (b) provides that when a person is not indispensable but ought to be a party if complete relief is to be accorded between those already parties—in the terminology of *Shields v. Barrow* a “necessary” party—the court in its discretion may proceed without him where his joinder would deprive the court of jurisdiction of the parties before it.³²⁹ This

³²³ *Ford v. Adkins*, (E.D. Ill. 1941) 39 F. Supp. 472. It is doubtful that this separation of the joinder inquiry into two elements is especially meaningful, although as made in § OHLINGER, FEDERAL PRACTICE 354-358 (1948), it is approved by Judge Goodrich in *Kroese v. General Castings Corp.*, note 320 supra, at 761-762, n.1. Professor Moore argues for determination according to federal rules [§ MOORE, FEDERAL PRACTICE, 2d ed., §19.07, pp. 2152-2153 (1948)], but his explanation of his position ranges him very nearly alongside Mr. Ohlinger. To the extent that they differ, see the criticism in Judge Goodrich’s opinion.

³²⁴ 228 U.S.C. (1952) §1332 (a).

³²⁵ 3 Cranch (7 U.S.) 267 (1806).

³²⁶ *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941).

³²⁷ 17 How. (58 U.S.) 130 (1854).

³²⁸ But cf. *Washington v. United States*, (9th Cir. 1936) 87 F. (2d) 421 at 427.

³²⁹ Federal Rules of Civil Procedure 19 (b): “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

may be regarded as a left-handed limitation on the doctrine of *Strawbridge v. Curtiss*. Though phrased in permissive terms, the very presence of the rule seems to direct the federal courts to accept all diversity cases which legally they can.³³⁰ They will reject cases where there is absent an "indispensable" party, because they must; this, of course, is the rule in all courts, state and federal. The federal courts may accept cases when a "necessary" party is beyond reach of process, because by definition a necessary party is dispensable under such circumstance; this, too, is consonant with state practice. But the federal courts may proceed without a "necessary" party whose joinder, although he is within the state, would destroy diversity or would pose venue problems; there seems nothing exactly like this in state court practice.³³¹

Two principal and interrelated questions are presented. First, should the "line" between indispensable and necessary parties be drawn at the same place in federal diversity cases as in the state courts? Second, should rule 19 (b) and its antecedents³³² be supported as providing for the maintenance of federal diversity jurisdiction at, virtually, its maximum?

Although this is not the place for an extended restatement of the familiar controversy over diversity jurisdiction, some position with respect thereto must be taken, because one's notions about the propriety of concurrent jurisdiction in the federal courts bear heavily upon his answers to the two questions just stated. If a party is indispensable and joinder will destroy diversity, the case must be dismissed from federal court; if only necessary, the case may continue under rule 19 (b). A desire to maintain or extend concurrent jurisdiction may well incline a court toward a holding of dispensability, and a desire to restrict that jurisdiction, toward indispensability. As suggested above, rule 19 (b) seems founded

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."

The rule was not an innovation in 1938. Its substance had been embodied in statute and recognized in court long before. See, e.g., 5 Stat. 321 (1839); *Barney v. Baltimore*, 6 Wall. (73 U.S.) 280 (1867); and see Federal Equity Rule 39, 226 U.S. 659 (1912). Cf. *Cameron v. M'Roberts*, 3 Wheat. (16 U.S.) 591 (1818).

³³⁰ Although this is regarded as the general tenor of rule 19 (b), the court is not required to proceed in the excusable absence of a necessary party. The discretion to proceed implies discretion not to proceed. *Heyward v. Public Housing Administration*, (D.C. Cir. 1954) 214 F. (2d) 222.

³³¹ But see Stevens, "Venue Statutes: Diagnosis and Proposed Cure," 49 MICH. L. REV. 307 at 325-331 (1951).

³³² See note 329 supra.

on a policy favoring maximum exercise of federal jurisdiction. Apparently, however, the only federal opinion which expressly acknowledges the liberalizing effect of a desire to retain jurisdiction—and, even then, the acknowledgment is tucked away in a footnote—is that of the Court of Appeals for the District of Columbia in *Brown v. Christman*:³³³ “The courts of the United States tend to relax the rules as to the necessity for joinder. . . . This liberality in applying the rules as to necessary joinder is due in large measure to the exigencies of exercising jurisdiction based on diversity of citizenship.”

The desirability of diversity jurisdiction has been the subject of prolonged and sometimes heated³³⁴ debate in legal periodicals,³³⁵ with little effect upon the rules.³³⁶ With all respect for the fetish of seeking out the intent of the constitutional fathers,³³⁷ the more fruitful inquiry is into the need and justification for concurrent federal jurisdiction today. From an academic point of view, it is hard to justify concurrent jurisdiction in its present form. Shopping between forums is an unfortunate operation with no necessary relation to the justice of the case.³³⁸ *Erie R.R. v. Tompkins*³³⁹ has reduced that activity as to substantive law, and the trend of state practice rules toward the federal rules is certain to reduce in number the procedural distinctions between the two systems

³³³ 126 F. (2d) 625 at 631-632, n.23 (1942). The cases cited by the court reach “liberal” results, but they do not expressly acknowledge a “tendency to relax” rules of joinder.

³³⁴ See Frankfurter, “Distribution of Judicial Power between United States and State Courts,” 13 CORN. L.Q. 499 (1928); Yntema and Jaffin, “Preliminary Analysis of Concurrent Jurisdiction,” 79 UNIV. PA. L. REV. 869 (1931); Frankfurter, “A Note on Diversity Jurisdiction—In Reply to Professor Yntema,” 79 UNIV. PA. L. REV. 1097 (1931). The Frankfurter view, expressed with undiminished assurance, appears most recently in *Lumbermen’s Mutual Casualty Co. v. Elbert*, 348 U.S. 48 at 53 (1954) (concurring).

³³⁵ See, e.g., the list of articles in Wechsler, “Federal Jurisdiction and the Revision of the Judicial Code,” 13 LAW & CONTEMP. PROB. 216 at 235, n.93 (1948). And see Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” 29 A.B.A. REP. 395 at 411-412 (1906).

³³⁶ For a list of the principal statutory changes in diversity jurisdiction of the federal trial courts, see Frankfurter, “Distribution of Judicial Power between United States and State Courts,” 13 CORN. L.Q. 499 at 511-514 (1928). To this list should be added the federal interpleader acts [39 Stat. 929 (1917); 43 Stat. 976 (1925); 44 Stat. 416 (1926); 49 Stat. 1096 (1936)], 28 U.S.C. (1952) §§1335, 1397, 2361] and the statute extending diversity jurisdiction to citizens of the District of Columbia and territories [54 Stat. 143 (1940), 28 U.S.C. (1952) §1332 (b)].

³³⁷ See Yntema and Jaffin, “Preliminary Analysis of Concurrent Jurisdiction,” 79 UNIV. PA. L. REV. 869 (1931).

³³⁸ But cf. Horowitz, “*Erie R.R. v. Tompkins*—A Test to Determine Those Rules of State Law to which Its Doctrine Applies,” 23 SO. CAL. L. REV. 204 at 219 (1950), suggesting that forum shopping to avoid a restrictive state rule is not evil where the state rule rests on no stronger policy than one of reducing the amount of litigation in the state courts.

³³⁹ 304 U.S. 64 (1938).

of courts. But these things do not strike at the heart of the problem.

It is usually asserted that the rationale of diversity jurisdiction is the possibility of state court prejudice against a litigant when out of his home state.³⁴⁰ There is a difference of opinion as to the contemporary reality and importance of prejudice of this kind.³⁴¹ Unfortunately, as has been pointed out, there is little objective evidence one way or the other,³⁴² although the persistence of the view that access to the federal courts is essential to justice for the non-resident is itself some objective evidence that local prejudice exists. If in truth this be the *raison d'être* of diversity jurisdiction, then plainly that jurisdiction "is not defined in terms that are responsive to the theory."³⁴³ For example, diversity jurisdiction holds even though neither party is a resident of the state where the action is brought; it is not limited to jury cases; it permits a corporation whose stockholders all are citizens of state X and whose operations are entirely in state X to litigate a claim against a citizen of that same state in the federal court simply because it happens to be, or is designedly, incorporated in state Y.³⁴⁴ Moreover, there are other prejudices, such as those directed to race and religious faith, probably more damaging than simple distrust of a "foreigner," for which there is no such major remedy as removal to another system of courts.³⁴⁵ The critics of diversity jurisdiction concede that, in any given case, there may well be very real prejudices based upon irrelevant factors of this kind, and that some protection is indicated; but if the federal courts are to be

340 "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts." *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 at 347 (1816). See also Parker, "The Federal Jurisdiction and Recent Attacks Upon It," 18 A.B.A.J. 433 at 437 (1932).

341 For a statement of both views, see WENDELL, *RELATIONS BETWEEN THE FEDERAL AND STATE COURTS*, c.12 (1949).

342 *Id.* at 259-262; Limiting Jurisdiction of Federal Courts—Comments by Members of Chicago University Law Faculty, 31 MICH. L. REV. 59 at 61 (1932).

343 Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 236 (1948).

344 *Id.* at 236-237; Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 CORN. L.Q. 499 at 525-527 (1928).

345 Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 236 (1948).

made available to guard against local prejudice,³⁴⁶ the diversity rule is a remarkably broad remedy, and in its place should be a provision, after the fashion of the common change-of-venue rules, for removal in those cases where local bias is shown.³⁴⁷

Although early abandonment of concurrent jurisdiction is not seriously expected in any quarter, attacks upon some phases of that jurisdiction continue, aimed at eliminating its more vulnerable features. And there have been significant retreats by those heretofore advocating the status quo. For example, the Committee on Jurisdiction and Venue of the Judicial Conference of the United States, in its report dated March 12, 1951,³⁴⁸ recommended the retention of diversity jurisdiction but recommended also that the Judicial Code be amended to set the jurisdictional minimum at \$7500 and to provide that a corporation may not invoke federal jurisdiction in a state in which it is doing business and from which it receives more than half its gross income.³⁴⁹ Chairman of this committee is Judge John J. Parker, who more than twenty years ago, wrote one of the most vigorous defenses of concurrent jurisdiction.³⁵⁰ The 1951 report was circulated throughout the federal judiciary, and by the time the Judicial Conference next met, in September, 1951, the latter recommendation had been changed, at the suggestion of the Tenth Circuit, to provide that in cases based on diversity of citizenship a corporation should be deemed a citizen both of the state of its creation and of the state in which it has its principal place of business.³⁵¹ The conference approved

³⁴⁶ Apparently there is little demand for federal jurisdiction to protect against other prejudices, reliance being placed rather on state remedies. This should be qualified by noting that in extreme cases an appeal may be made to the Supreme Court on due process grounds.

³⁴⁷ In 1945 a bill was introduced in the Senate which would have restricted diversity jurisdiction to cases removed from a state court by a non-resident defendant "when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court. . . ." S.466 (as amended), 79th Cong., 1st sess. See Hearing before the Senate Judiciary Committee on S.466, 79th Cong., 1st sess. 1 (1945).

In *New York Central R.R. v. Johnson*, 279 U.S. 310 (1929), a judgment obtained in a federal district court in Missouri and affirmed by the circuit court of appeals was reversed by the Supreme Court because of remarks of trial counsel designed to appeal improperly to sectional and local prejudice. That a state court, especially an elected one, might not be so ready to reverse is argued in *Limiting Jurisdiction of Federal Courts—Comment by Members of Chicago University Law Faculty*, 31 MICH. L. REV. 59 at 61 (1932).

See also WENDELL, *RELATIONS BETWEEN THE FEDERAL AND STATE COURTS* 264-268 (1949); McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090, 1225 at 1257 (1943).

³⁴⁸ Mimeographed.

³⁴⁹ REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 210 (1951).

³⁵⁰ Parker, "The Federal Jurisdiction and Recent Attacks Upon It," 18 A.B.A.J. 433 (1932).

³⁵¹ REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1951). This is the test specified in the jurisdictional provisions of the Bankruptcy Act. 30 Stat. 545 (1898), 11 U.S.C. (1952) §11 (1946).

the recommendations and authorized the committee to be of any possible service to Congress in its consideration of the legislative changes proposed.³⁵² In April of 1952, Representative Celler introduced a bill to effect the change with regard to corporations,³⁵³ but it died in committee. Bills to increase the minimum amount in controversy have been numerous in recent sessions, but none has passed.³⁵⁴ If modifications of this kind are made soon, the criticisms of diversity jurisdiction are likely to become less pointed and more theoretical. Hence, wise or unwise, concurrent jurisdiction probably will be with us for years to come. One cannot escape the facts, however, that the principal justification offered for diversity jurisdiction in its present or proposed form is that it is a weapon against denial of justice through local prejudice, and that it is ill designed for that end. To avoid injustice in particular instances, we have opened the federal courts to a large class of cases, many, perhaps most, of which do not in fact involve any prejudice whatever. One ordinarily does not kill a housefly (or even a hornet) with a ten-pound sledge.

Implicit in the foregoing is the question whether a court—any court—should take into consideration the availability of another forum when deciding indispensability questions. Should the court of state *X* be more ready to dismiss in the absence of an indispensable party if there is a good chance that all persons interested can be brought into court in state *Y*? And what of a federal court which will have to dismiss for incomplete diversity if *A* is joined—should it take into account the possibility of a complete remedy in some state court when deciding whether *A* is indispensable (and so dismiss) or only necessary (and so proceed under rule 19 (b) without him)? The cases do not afford a clear answer to these questions, but common sense indicates an affirmative answer to each.³⁵⁵ As indicated repeatedly above, a court should consider carefully the harm which may be done to the interest of an absent person, and it should avoid making meaningless and incomplete determinations; but it must seek also to avoid a ruling which serves,

³⁵² REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1951). See also REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (1952).

³⁵³ H.R. 7623, 82d Cong., 2d sess. (1952).

³⁵⁴ See, e.g., H.R. 5007, 84th Cong., 1st sess. (1955); H.R. 4266, 83d Cong., 1st sess. (1953); H.R. 78, 1328, 1988, and 3098, and S. 1593, 82d Cong., 1st sess. (1951); H.R. 3643, 3763, 3868, 4938, 6435, and 9306, 81st Cong., 2d sess. (1950). See also Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 at 873, n.7 (1931).

³⁵⁵ Cf. *Aetna Ins. Co. v. Busby*, (N.D. Ala. 1950) 87 F. Supp. 505; *Martin v. Chandler*, (S.D. N.Y. 1949) 85 F. Supp. 131; *Latrobe Elec. Steel Co. v. Vascoloy-Ramet Corp.*, (D.C. Del. 1944) 55 F. Supp. 347.

in effect, to deprive a plaintiff of all opportunity for a judicial determination of the merits of his claim. If plaintiff clearly has a remedy elsewhere should he seek to pursue it, it is not especially serious if he be sent out of this court for non-joinder of *A*; and it should not require much of an adverse effect on *A* to cause the court, on motion of a party or sua sponte, to move to protect *A* by ordering him joined on pain of dismissal of the action. But if the plaintiff likely cannot maintain his action elsewhere—due to limitations on the jurisdictional reach of the various courts—then the court ought to consider every means available to retain his case for adjudication,³⁵⁶ including a careful weighing of the likelihood of factual injury to *A*'s interest and its relative value, and a consideration of the possibility of shaping a decree to grant plaintiff as much merited relief as possible while safeguarding *A*'s interest.³⁵⁷ This procedure surely may be employed by state courts; nothing in the concept of state autonomy prevents one court from noting the availability of a forum in a sister state (or a federal forum). One unsympathetic with concurrent jurisdiction may argue that a federal court not only may, but indeed *should* look to the jurisdictional availability of a state court. To a substantial extent rule 19 (b) countermands this procedure, but not entirely. First, as noted,³⁵⁸ the rule permits a court to refuse to proceed even where *A* is only necessary, and this refusal may be based on the feeling that the case would be better disposed of in one package in a state court. Second, the indispensable necessary line still is a vague shadow zone, and the conclusion that a unitary determination in a state tribunal is preferable may well lead to a holding of indispensability and a refusal to proceed, even though in absence of an alternative state jurisdiction the same federal court might strain to hold *A* only necessary and so proceed without him.

The more serious problem is presented by the case where all facts seem to indicate that *A*'s interest will be adversely affected

³⁵⁶ Certainly it does not help for the court merely to express sympathy for his predicament, as in *Baker v. Dale*, (W.D. Mo. 1954) 123 F. Supp. 364 at 370.

³⁵⁷ An excellent example of this process in practice is *Kroese v. General Steel Castings Corp.*, (3d Cir. 1950) 179 F. (2d) 760 at 764-766, cert. den. 339 U.S. 983 (1950), discussed in section III-A supra, at notes 82ff. And see *Latrobe Elec. Steel Co. v. Vascoloy-Ramet Corp.*, (D.C. Del. 1944) 55 F. Supp. 347, where the federal court in Delaware stayed the principal proceedings to give plaintiff time to bring action in the federal court in Illinois, where jurisdiction over this defendant and the absent corporation could be obtained. If plaintiff should fail to institute suit in Illinois, then this court would re-examine the motion for dismissal for want of an indispensable party, but would not determine that question now.

³⁵⁸ See note 330 supra.

if the court is to make a meaningful determination at all, and yet there appears to be no state court where jurisdiction over all persons can be obtained. Joinder of *A* in the federal court is impossible because the court's process stops at the state line³⁵⁹ or, at best under a recent suggestion, 100 miles from the courthouse,³⁶⁰ or because the statutory venue requirement cannot be met,³⁶¹ or because the joinder would destroy jurisdiction by creating incomplete diversity. At present, if the court can formulate no decree which will protect *A*'s interests, plaintiff's claim is at dead end and will remain there unless a timely change in location of his adversaries or co-parties occurs. His predicament is the same as Robert Barrow's.³⁶² This is the point at which diversity jurisdiction could be of great assistance to litigants. Here it is that the federal courts could furnish a desirable, unduplicated forum in diversity cases. Yet, now, where the state court is impotent, so is the federal; and *Strawbridge v. Curtiss* makes the area of federal impotence even wider. At the precise point where most needed, federal diversity jurisdiction is currently of no value.³⁶³

The problems of process and venue are amenable to legislative solution.³⁶⁴ It would not be novel to permit federal court process to run across state lines; indeed that very thing now happens in some cases not based on diversity, as, for example, in cases under the Federal Interpleader Act³⁶⁵ and in suits to obtain patents or relief against patent interference.³⁶⁶ And recently proposed was an amendment to the federal rules to permit out-of-state

³⁵⁹ Federal Rules of Civil Procedure 4(f).

³⁶⁰ Proposed (but rejected) amendments to rule 4(f) would have permitted service without the state if within 100 miles of the courthouse, as is the case with subpoenas under present rule 45. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1954).

³⁶¹ 28 U.S.C. (1952) §1391(a): "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." The most significant exception referred to is 28 U.S.C. (1952) §1655, the first paragraph of which permits venue in actions to enforce liens on or claims to property or to remove clouds on title to be laid in the district where the property is. See Blume, "Actions Quasi in Rem under Section 1655, Title 28, U.S.C.," 50 MICH. L. REV. 1 (1951).

³⁶² *He of Shields v. Barrow*, section III-A supra.

³⁶³ See Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEMP. PROB. 216 at 234 et seq. (1948); Barrett, "Venue and Service of Process in the Federal Courts—Suggestions For Reform," 7 VAND. L. REV. 608 at 634 (1954).

³⁶⁴ See Barrett, note 363 supra, at 627 et seq.

³⁶⁵ 49 Stat. 1096 (1936), as amended, 63 Stat. 105 (1949), 28 U.S.C. (1952) §2361.

³⁶⁶ 44 Stat. 1394 (1927), 35 U.S.C. (1952) §72(a). Additional examples are listed in Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 at 23, n.92 (1945).

service within 100 miles of the courthouse.³⁶⁷ Venue provisions, being incapable of enlarging the jurisdiction of the court system, could be altered in any suitable fashion within the jurisdictional framework, subject only to the obvious requirement that the place of trial have some reasonable connection with the parties or the event.³⁶⁸ No decisions appear to cast any doubt on the propriety of permitting venue to be laid in any district where *any* of the parties resides, especially when the court is empowered to transfer the cause to a more convenient forum, as under present section 1404 (a) of the Judicial Code.³⁶⁹

There is, however, some doubt whether legislative abrogation of the complete diversity rule of *Strawbridge v. Curtiss* would be constitutional. Section 2 of Article III of the United States Constitution provides that "The judicial power shall extend . . . to controversies . . . between citizens of different States. . . ." The present provision in the Judicial Code which confers diversity jurisdiction requires that the action be between "Citizens of different States."³⁷⁰ Language not materially different was said in *Strawbridge* to mean "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."³⁷¹ All subsequent Supreme Court pronouncements seem to affirm the *Strawbridge* requirement: each plaintiff must be qualified by diversity to sue each defendant in a federal court.³⁷² Several of the cases have suggested that an interpretation of the statute to permit incomplete diversity would be beyond the constitutional authorization. For example, Justice Curtis, in our much-cited case of *Shields v. Barrow*, said of an order which would sanction the addition of parties

³⁶⁷ See note 360 supra. Thus, process might have run across even two state boundaries, as, e.g., from New York City to Philadelphia.

³⁶⁸ See Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1 at 22 (1945), citing *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923) (Minnesota trial of imported cause of action between non-residents held precluded by commerce clause).

³⁶⁹ 62 Stat. 937 (1948).

³⁷⁰ 28 U.S.C. (1952) §1332 (a) (1).

³⁷¹ 3 Cranch (7 U.S.) 267 (1806).

³⁷² *Shields v. Barrow*, 17 How. (58 U.S.) 130 at 145 (1855); *Coal Co. v. Blatchford*, 11 Wall. (78 U.S.) 172 (1871); *Case of the Sewing Machine Companies*, 18 Wall. (85 U.S.) 553 (1874); *Removal Cases*, 100 U.S. 457 (1879); *Blake v. McKim*, 103 U.S. 336 (1881); *Hyde v. Ruble*, 104 U.S. 407 (1882); *Peninsular Iron Co. v. Stone*, 121 U.S. 631 (1887); *Smith v. Lyon*, 133 U.S. 315 (1890); *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941).

who would render diversity incomplete, "It is apparent that, if it were in the power of a circuit court of the United States to make and enforce orders like this, both the article of the constitution respecting the judicial power, and the act of congress conferring jurisdiction on the circuit courts, would be practically disregarded in a most important particular. . . . No such power exists. . . ." ³⁷³ It has been argued that in no case has the constitutional issue been decided squarely, it being possible to place each holding on other grounds; ³⁷⁴ but the close similarity between the constitutional language and the statutory language and the hostile indications in the cases lend considerable weight to the argument that the *Strawbridge* interpretation of the statute is the Court's interpretation of the Constitution as well.

If it is true that *Strawbridge* is indicative of a constitutional principle, there are nevertheless several devices curiously available for circumventing it. For example, a class suit properly may be lodged in a federal court if the representatives have the requisite diversity from their antagonist even though some or all of the other members of the class are citizens of the antagonist's own state. ³⁷⁵ The Delaware corporation whose stockholders, office and entire business are in Arizona may nevertheless make use of the federal courts in its litigation with Arizona residents. ³⁷⁶ As noted already, federal rule 19 (b) runs counter to the spirit if not the letter of *Strawbridge*. Also available is the device of intervention: if the intervenor's claim is deemed ancillary to the principal litigation, intervention need not be supported by independent jurisdictional grounds. ³⁷⁷ When this principle is coupled with

³⁷³ 17 How. (58 U.S.) 130 at 144 (1855). See also *Blake v. McKim*, 103 U.S. 336 (1881).

³⁷⁴ McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090 at 1105 (1943). See *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 at 71 (1939). And it is argued that federal interpleader provisions for a kind of incomplete diversity are indication that the prohibition is not constitutional. Keffe, "Twenty-Nine Distinct Damnations of the Federal Practice," 7 VAND. L. REV. 636 at 654-655 (1954).

³⁷⁵ *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Shipley v. Pittsburgh & L.E.R.R.*, (W.D. Pa. 1947) 70 F. Supp. 870. See *Stewart v. Dunham*, 115 U.S. 61 at 64 (1885).

³⁷⁶ See Frankfurter, "Distribution of Judicial Powers between United States and State Courts," 13 CORN. L.Q. 499 at 523 (1928); 1 CYC. OF FED. PROC., 2d ed., §200 (1943). See, generally, McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090, 1225 (1943). The most recent important attack on the effect of the corporate citizenship fiction on federal jurisdiction is the recommendation of the Judicial Conference of the United States, note 352 supra, embodied in Representative Celler's bill, note 353 supra, that a corporation be deemed a citizen both of the state of its creation and of the state in which it has its principal place of business. On the effect of multiple incorporation see *Seavey v. Boston & Maine R.R.*, (1st Cir. 1952) 197 F. (2d) 485; Frankfurter, supra this note.

³⁷⁷ *Humble Oil & Ref. Co. v. Sun Oil Co.*, (5th Cir. 1951) 190 F. (2d) 191; *Kentucky Nat. Gas Corp. v. Duggins*, (6th Cir. 1948) 165 F. (2d) 1011; *Johnson v. Riverland Levee*

rule 19 (b) in an appropriate case, the complete diversity rule comes a cropper, as strikingly illustrated by *Drumright v. Texas Sugarland Company*.³⁷⁸ The Sugarland Company, a Kansas corporation, mortgaged land to Grand Lodge, an Oklahoma corporation. Later, Sugarland sold the land to Drumright and others for cash plus a promise to pay off the mortgage. The buyers apparently were Texans, with the exception of one Oklahoman. The buyers defaulted in their payments on the mortgage, and Sugarland and Grand Lodge sued in a federal district court in Texas for foreclosure, to have an equitable lien declared and enforced, or for rescission, alternatively. Because federal jurisdiction was based on diversity of citizenship the Oklahoma purchaser moved to dismiss the case for incomplete diversity. The court dismissed not the case but only Grand Lodge as a plaintiff, holding that it was not an indispensable party.³⁷⁹ Thereupon, Grand Lodge filed a petition to intervene in the cause; intervention was allowed. "The Grand Lodge, as the holder of a mortgage on the land against which an equitable lien in favor of the Sugarland Company was asserted by the suit, had such an interest in that land as to make permissible the assertion by intervention of the Grand Lodge's rights under its mortgage."³⁸⁰ No jurisdictional problem was deemed to exist. Thus, by the simple device of dismissal (or withdrawal³⁸¹) of a party and subsequent intervention, one may avoid the *Strawbridge* rule. There is much uncertainty as to when an intervention must stand on its own jurisdictional feet and when it may rely on the jurisdictional facts of the main case,³⁸² but in any

Dist., (8th Cir. 1941) 117 F. (2d) 711; *Glover v. McFaddin*, (E.D. Tex. 1951) 99 F. Supp. 385. See *American Bowling Supply Co. v. Al Martin, Inc.*, (D.C. Kan. 1951) 96 F. Supp. 35 at 37; *American Union Ins. Co. v. Lowman Wine & Bottling Co.*, (W.D. Mo. 1950) 94 F. Supp. 774 at 776.

³⁷⁸ 5th Cir. 1927) 16 F. (2d) 657.

³⁷⁹ "So far as the bill was one for the enforcement of the equitable rights of the Sugarland Company as the seller of said land, the holder of a mortgage on that land, which was in existence at the time of the sale, was not an indispensable party, as the seller's rights against the buyer could be adjudged and enforced without directly affecting the pre-existing mortgage on the land or the holder of that mortgage. *Sioux City Terminal R. & W. Co. v. Trust Co.* (C.G.A.) 82 F. 124." *Id.* at 658. Assuming that Grand Lodge was merely "necessary," this is precisely the result which would obtain under present rule 19 (b).

³⁸⁰ 16 F. (2d) 657 at 658.

³⁸¹ By dictum, the court in *Kentucky Nat. Gas Corp. v. Duggins*, (6th Cir. 1948) 165 F. (2d) 1011, states clearly that employment of the intervention device to escape jurisdictional limitations, even as a deliberately chosen alternative to outright joinder, does not defeat jurisdiction.

³⁸² "As stated in all the textbooks, there is considerable confusion, if not conflict, in the authorities." *Sun Oil Co. v. Humble Oil & Ref. Co.*, (S.D. Tex. 1950) 88 F. Supp. 658 at 663, *revd.*, obviously on other grounds, *sub nom. Humble Oil & Ref. Co. v. Sun Oil Co.*, (5th Cir. 1951) 190 F. (2d) 191. However, Professor Moore believes the cases can be

case of the latter class the *Strawbridge* policy can be circumvented by the *Sugarland* expedient.³⁸³

In the matter of the timing of the compulsory joinder

marshaled to support the following rules: "[1] Intervention under an absolute right, or [2] under a discretionary right in an *in rem* proceeding, need not be supported by the grounds of jurisdiction independent of those supporting the original action. [3] Intervention in an *in personam* action under a discretionary right must be supported by independent grounds of jurisdiction, except when the action is a class action." 4 MOORE, FEDERAL PRACTICE 139 (1950).

The third statement seems supportable. So-called discretionary intervention in an *in personam* action ordinarily is tied to the principal litigation only by a common question of law or fact. Federal rule 24 (b) (2). It represents an independent suit, and must possess its own jurisdictional facts. Lacking diversity, intervention will be denied. *Johnson v. Riverland Levee Dist.*, (8th Cir. 1941) 117 F. (2d) 711; *Baltimore & O. R.R. v. Thompson*, (E.D. Mo. 1948) 8 F.R.D. 96. *Wichita R.R. v. Public Utilities Comm.*, 260 U.S. 48 (1922), sometimes cited as contrary, was not strictly an *in personam* action. See *Baltimore & O. R.R. v. Thompson*, *supra* this note, at 99.

Moore's second rule, that intervention under a discretionary right in an *in rem* proceeding need not be supported by independent jurisdictional grounds, also finds some basis in the cases, on the ground that the intervention is ancillary to the main case. *Drumright v. Texas Sugarland Co.*, (5th Cir. 1927) 16 F. (2d) 657; *Golconda Petroleum Corp. v. Petrol Corp.*, (S.D. Cal. 1942) 46 F. Supp. 23; cases cited in note 377 *supra*.

But real difficulty is encountered in the first class of cases mentioned, those where intervention is "under an absolute right." This is due chiefly, one suspects, to the clear error, embalmed in the federal rules, in assuming that—save the rare intervention of right under a federal statute—there is any such thing as an absolute right to intervene. Rule 24 (a) purports to make intervention available of right "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." But the trial court still must determine whether representation of the applicant's interest is inadequate and whether he may be bound by the judgment; this is a discretionary determination, involving findings both of fact and of law. Neither does the rule rob the court of discretion in deciding whether the applicant is so situated as to be adversely affected by a distribution of property in the court's custody or control. Intervention in these cases is not and cannot be of right until the preliminary determination is made. This preliminary determination is substantial and is so serious a limitation on the "right" as to make the use of the term misleading. It is true that in cases under rule 24 (a) the court apparently is not authorized to take into account the possible delay or prejudice to the principal action, whereas under rule 24 (b) it is directed to do so. Except for this omission, subdivisions (2) and (3) of rule 24 (a) employ language closely similar to that used when a court is determining the indispensability of a party. If in a given case the tests be substantially the same, i.e., for permitting intervention and for finding indispensability, one is disturbed by the frequent statement that where the intervenor is an indispensable party his improper citizenship will destroy the court's jurisdiction—a rule partially at variance with Moore's attempted summary. *Kentucky Nat. Gas Corp. v. Dugins*, (6th Cir. 1948) 165 F. (2d) 1011; *Charleston Nat. Bank v. Oberreich*, (E.D. Ky. 1940) 34 F. Supp. 329. Compare *Wichita R.R. v. Public Utilities Comm.*, 260 U.S. 48, 54 (1922) ["Much less is such (diversity) jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties."] with *Humble Oil & Ref. Co. v. Sun Oil Co.*, (5th Cir. 1951) 190 F. (2d) 191 at 197 ["To allow the State of Texas to intervene here would introduce a new litigant, which is not an indispensable party and whose presence would destroy the jurisdiction of the court. . . ."].

³⁸³ The Fifth Circuit reaffirmed *Sugarland* in *McComb v. McCormack*, 159 F. (2d) 219 at 224-225 (1947).

inquiry, also, it is revealing to compare federal diversity cases with state (and federal non-diversity) cases. Nicely illustrative of the manner in which a federal diversity case may offer problems not necessarily presented in non-diversity cases is *Calcote v. Texas Pacific Coal & Oil Company*.³⁸⁴ On June 1, 1939, Calcote and others as lessors entered into a lease with Texas Pacific, giving it the right to explore for oil, gas, and other minerals. The term of the lease was ten years, with annual delay rentals of \$60. The lessors and the leased land were in Mississippi. The lessee was not qualified to do business in Mississippi as of the date of the lease; a Texas corporation, it became domesticated in Mississippi on January 2, 1940. Thereafter, the lessors conveyed mineral interests in the land, subject to the lease, to several grantees, at least one of whom was in Texas, one in New York, and several in Mississippi. These grantees were given no right to bonuses or delay rentals; their participation in future leases was limited to a proportionate amount of royalty payments under any such future lease, even as under the existing agreement. In May of each year through 1944, delay rentals were accepted by the lessors.

An action in a federal district court in Mississippi was then instituted by the lessors to cancel the lease on the ground that it was void when executed because of the lessee's non-qualification to do business in Mississippi. The lessee answered that the lease was voidable merely and had been ratified by the lessors' acceptance of delay rentals and by conveyances of the greater part of their royalty interests after the lessee had qualified to do business in Mississippi. The lessee filed a counterclaim, asking that its rights under the lease be confirmed.

The district court gave judgment for defendant-lessee both on the original bill and on defendant's counterclaim, and plaintiffs appealed to the Court of Appeals for the Fifth Circuit. At no time—in the district court or in the circuit court—did either party object to the nonjoinder of the lessors' grantees. Nevertheless, the majority in the circuit court felt the absence of the grantees to be a complete barrier to maintenance of the action, and the case was reversed and remanded to the district court with direction to add parties. In view of the fact that joinder of the grantees would destroy diversity, the court's action was tantamount to an order of dismissal.

The circuit court said that "In diversity cases, the question of

³⁸⁴ (5th Cir. 1946) 157 F. (2d) 216, cert. den. 329 U.S. 782 (1946).

indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action."³⁸⁵ Stating also that the "true test is the situation that existed before and not after entry of the final judgment"³⁸⁶ and that this "decisive" jurisdictional issue is "on the threshold"³⁸⁷ of the appeal, the court thus indicated clearly that where its jurisdiction depends upon the establishment of diversity of citizenship of the parties, it will inquire into the question of compulsory joinder of absent parties at the outset if the problem is recognized. It is plain also that the inquiry will be made by the court on its motion, if necessary, and at whatever stage in the action the problem first calls itself to the court's attention.

It cannot be denied that there is much that is sound in the court's view that in the presence of a "jurisdictional question" (a more nearly appropriate use of that phrase here than is usual in joinder cases³⁸⁸) the inquiry into the necessity of joinder cannot be put aside to abide the outcome of the litigation—to stand if the decision does not affect the interests of absent parties adversely, to fall if it does. Any other view would involve the court as often as not in the wasteful process of presiding over a lengthy course of litigation proving ultimately to have been void ab initio. "A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained."³⁸⁹ So long as the federal courts are empowered to adjudge some controversies solely because the parties are from different states, the necessity of joining another person whose presence will destroy diversity is a question which ought to be determined at the earliest possible moment.

But when the argument in the preceding paragraph has been made, what has been added to the general principles applicable to all these joinder cases? Can it not be said that in all actions, diversity cases merely included, the determination of whether the absent person will be affected adversely cannot logically be put off to abide the event of the action? If the action may so prejudice the absent *A* as to be "wholly inconsistent with equity and good conscience"³⁹⁰ (a question of fact), then *A*'s joinder should be re-

³⁸⁵ 157 F. (2d) 216 at 218.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ See text in section II-A *supra*, at notes 15-17.

³⁸⁹ *Calcote v. Texas Pacific Coal & Oil Co.*, (5th Cir. 1946) 157 F. (2d) 216 at 218, cert. den. 329 U.S. 782 (1946).

³⁹⁰ *Curtis, J.*, in *Shields v. Barrow*, 17 How. (58 U.S.) 130 at 139 (1854).

quired—whether the court be state or federal has no bearing. If in the diversity case a decision to require joinder effectually terminates the action by leading to a destruction of diversity and thus of jurisdiction, so also in non-diversity cases a requirement of joinder may as effectually bring an end to the case if the absent person is not within the court's reach. The process and effect are not fundamentally different in the two circumstances. Destruction of diversity is not part and parcel of the party issue, which is practically the same in state and federal cases. Ouster of jurisdiction is merely a consequence of a particular holding, already arrived at, on the party issue.

This should be qualified by saying that the possible mortality inherent in the court's determination of the party question may be taken into account in deciding that very question. This is federal rule 19 (b)³⁰¹ again, but it represents the desirable state procedure as well. The court should ask of those present: Why do you want to handle this without the grantees when they won't be bound (of course) and could relitigate? Whether or not the court should continue will depend largely on the answer to that question. If the answer suggests the probability of a multiplicity of suits, then joinder presumably should be required. Here, there seems little likelihood of litigation by the *Calcote* grantees. But the court's reasoning moves in the other direction. The not unreasonable assumption that the grantees and the lessors had similar interests might indicate that cancellation, sought by the lessors, would be to the grantees' benefit as well³⁰² (perhaps, for example, because of the availability of a more lucrative lease were they free to enter into it). Yet the court stated that a cancellation of the lease would adversely affect the grantees since it would annul their "vested rights."³⁰³ If it be thought to follow therefrom that confirmation of those vested rights, as prayed in defendant's counterclaim, would not adversely affect the interests of the grantees, the court has an answer for that too, stating that "The cancellation of the present lease would destroy their vested interest

³⁰¹ See text at notes 329 et seq. *supra*.

³⁰² "Doubtless all will admit that the [lessors] have only an undivided one-fourth of one-eighth royalty in the minerals so long as the present lease is in force and effect. It is a fractional mineral interest in the whole tract distinct from their contingent reversionary interest. It would not be possible to cancel this lease without destroying the undivided three-fourths royalty interest therein owned by the above named individuals who have not been made parties to this suit. [But query.] . . . The lessors and their grantees were, technically and beneficially, joint owners of a common property, each with an undivided interest in every particle of the minerals." 157 F. (2d) 216 at 219.

³⁰³ *Id.* at 219.

in praesenti, whereas a declaration of its validity would either destroy absolutely their vested interest in futuro or postpone the enjoyment of it indefinitely. Vested interests of absent parties, therefore, will be directly and vitally affected regardless of the outcome of this litigation."³⁹⁴ That an adverse or injurious³⁹⁵ effect is inevitable may be doubted. Quite possibly the trouble is that the court lacked the facts which would be elicited by the inquiry as to why plaintiffs and defendant both were willing to proceed in the grantees' absence. The lack of those facts may have required that the case be remanded. But the court did not say so. The absence of any objection by the parties themselves to nonjoinder should not be dispositive of the issue. Failure to object may be collusive or ignorant, or the result of a simple mistake. At best, the failure may be an indication that the parties are satisfied to proceed as they are because they anticipate no subsequent suit by the absent ones. However, the court can do better than draw inferences from the parties' silence; it can and should ask them why they choose to proceed thus.

The *Calcote* decision seems additionally unfortunate in that it was on the appellate level. The kind of inquiry just suggested is designed for the trial court's use; once the case passes that tribunal and arrives in an appellate court, there ought to be the most compelling of reasons before dismissing (in effect) and on the court's own motion.³⁹⁶ If a case has been tried and is on appeal with a result which is supportable in law and which does not adversely affect the interests of the absent party³⁹⁷ whose nonjoinder is being urged as a ground for reversal, more, rather than less, vain judicial work is required. It would be unfair, however, not to point out the pertinent consideration of discipline, i.e., that if the case were not remanded, trial courts might go right on entertaining jurisdiction in cases where that jurisdiction may prove baseless ultimately. *Calcote* is a warning to judges and lawyers alike, at a client's expense.

³⁹⁴ *Id.* at 221. "It would be hard to find a better illustration of indispensable parties than is afforded by the instant case." *Id.* at 220.

³⁹⁵ Both the majority and minority opinions use the phrase "injuriously affect"; only the minority uses "adversely affect."

³⁹⁶ This is not to suggest that a court should be limited to those joinder issues raised by the parties; but it does suggest that if it is not clear that an absent person will be harmed there should be reluctance to dismiss after completion of the entire trial process.

³⁹⁷ Concededly, this fact is not clear in the *Calcote* case. The court concluded that such interests would be "vitally" affected, which in context obviously meant adversely. Elsewhere the court used "injuriously." The opinion is lacking in facts to support the conclusion.

Judge Hutcheson's dissent³⁹⁸ is refreshing in its implicit acknowledgment that so-called indispensable parties are not inevitably indispensable in the dictionary sense of that word.

"The truth of the matter is that the classification of parties as necessary or indispensable depends entirely upon the particular facts of each case. . . . Further, though some of the decisions exhibit more than a little confusion about it, it is undeniable that the error in non-joinder of parties, either necessary or indispensable, is not jurisdictional. . . . Finally, it is clearly settled that even if a party is indispensable,³⁹⁹ his absence from a suit will not be ground for dismissing it or reversing a judgment in it, if it clearly appears that no relief can be, or has been, obtained in the suit which injuriously affects his interest."⁴⁰⁰

As suggested earlier, the majority in the *Calcote* case seems to be concerned primarily with what it calls a "precarious jurisdiction," not wanting the court to spend time dealing with litigation which may prove to have been entertained erroneously. And yet the Supreme Court, in *Bourdieu v. Pacific Oil Company*,⁴⁰¹ held that an inquiry into the indispensability of a party would be a waste of time where the bill failed to state a cause of action.⁴⁰² If the question of indispensability is indeed liminal, a court would be without jurisdiction even to determine the issue of whether a cause of action is stated. Yet this would be unnecessarily strict. The *Calcote* majority opinion agrees, but it seeks to distinguish the *Bourdieu* rule by stating that an examination into indispensability in the *Bourdieu* circumstances would be a gratuitous inquiry, and improper under the rule that a court will not concern itself with vain things. Instead, it is deemed perfectly proper to

³⁹⁸ 157 F. (2d) 216 at 223.

³⁹⁹ Judge Hutcheson's failure to place "indispensable" in quotation marks as used in this sentence reminds of the familiar dialogue in chapter six of "Through the Looking Glass" which follows Humpty Dumpty's assertion that he used "glory" to mean "nice knock-down argument."

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

"The question is," said Alice, 'whether you *can* make words mean so many different things.'

"The question is," said Humpty Dumpty, 'which is to be master—that's all.'

⁴⁰⁰ 157 F. (2d) 216 at 223.

⁴⁰¹ 299 U.S. 65 (1936).

⁴⁰² Cf. *West Coast Exploration Co. v. McKay*, (D.C. Cir. 1954) 213 F. (2d) 582 at 592-593, cert. den. 347 U.S. 989 (1954).

dismiss, upon having entertained the case for that purpose; and no distinction is drawn between those cases in which joinder of the absent person would have ousted federal jurisdiction and those in which it would not. In a case where it is obvious that no cause of action is stated, there is no difficulty in dismissing quickly, and the absent person, no matter how plainly his interests would be affected by the outcome of the suit were it to go to judgment on the merits, can have no objection since his interests are not affected at all by abortive litigation. It is not always readily apparent, however, whether a bill states a cause of action. Occasionally a case will go all the way to a court of last resort on the issue of whether the facts offered by plaintiff provide, in point of law, grounds for the relief sought. But there is in the *Bourdieu* rule, which is recognized and distinguished by the *Calcote* majority and relied upon by the minority, nothing to draw any line between the case of the obviously bad bill and the one which is only arguably bad. That argument may take the case through several courts and may be resolved ultimately in favor of the plaintiff, with the results that the joinder issue thereupon must be faced. Conceivably, more effort will have been expended in vain than if the party joinder question had been disposed of first.

However, a distinction suggests itself, a distinction which may justify a difference in results. If the question is whether the result to be reached on a presumably good cause of action will or will not affect the absent person adversely, the possibility of the prejudicial result is rather definite and foreseeable. If, however, the question is one of the validity of a cause of action and the initial ruling, in the trial court, is one of dismissal, that issue and that alone will be appealed. Affirmance on appeal renders the joinder question moot, whereas reversal will normally be followed by an opportunity to plead over (if, indeed, that was not given and availed of in the trial court). Upon the statement of a cause of action which the trial judge feels can be sustained, the joinder issue can then be considered.

The view that failure to join an interested person is non-prejudicial if the relief given did not harm him came under heavy attack by the Fifth Circuit in *Young v. Powell*.⁴⁰³ The relief asked for, not that granted, in the trial court was held to determine indispensability. In this view, the *possibility* of a decree which

⁴⁰³ 179 F. (2d) 147 (1950), cert. den. 339 U.S. 948 (1950).

would have an adverse effect upon an absent person would override the fact that the relief actually given benefited instead of harmed him. In effect, a person is indispensable if his interests will be affected, whether favorably or injuriously makes no difference. To the argument that the relief given inured to the benefit of absent persons and thus excused nonjoinder, the court responded that to permit such a distinction to prevail would make of the indispensable party rule a "delusion and a snare," and that the

"whole doctrine and the equitable basis on which it rests would be gone by the board.

"Such view would permit the continual harassment of the defendant by successive suits brought singly by interested parties, each in the interest of them all, for cancellation with no protection, in case the defendant wins, from successive suits by the others who had not been made parties, while in case he lost in the first suit, his complaint that he ought not to have suffered a judgment in favor of persons who were not sued,⁴⁰⁴ would be met by the cynical view, 'Well, those who ought to have been in the suit haven't suffered because their interests have prevailed, and having lost the suit, it doesn't lie in your mouth to complain that they got the benefit of a suit to which they were not made parties.'"⁴⁰⁵

Does the common sense of this statement cut the ground from beneath criticism of the *Calcote* decision? If so, it is odd to find Judge Hutcheson writing the dissent in *Calcote* and the opinion of a unanimous court in *Young*. Hutcheson himself suggests, but does not spell out, the distinction.

"The doctrine of indispensable parties as set down in *Mallow v. Hinde*, 12 Wheat. at page 198, 6 L. Ed. 599, is equitable in origin and result, set down carefully and as carefully maintained, there has never been any basis for the view that where the want of indispensable parties has been *timely* called to the attention of the trial judge, and he has denied a motion to dismiss, such want can be regarded as cured by the fact relied on here, that a judgment has been granted in plaintiff's suit in favor of the absent parties."⁴⁰⁶

⁴⁰⁴ The court apparently alludes to persons whose interests align them with plaintiff, although if they failed to come in voluntarily and were brought in by plaintiff to make possible a full adjudication they nominally would be defendants.

⁴⁰⁵ 179 F. (2d) 147 at 152.

⁴⁰⁶ *Ibid.* Emphasis supplied.

In *Young*, defendant made timely objection in the trial court and at every appropriate point in the course of the litigation; in *Calcote*, no objection came from the parties themselves at any stage, including the hearing before the circuit court. This bears upon the opportunity which plaintiff had in the trial court to justify the nonjoinder. In *Calcote*, the matter is new and to reverse without an affirmative showing of injury to those absent is to express a concern beyond the dictates of necessity. If it can be shown that the absent persons have been unharmed in fact, or even benefited, it seems foolish to remand or dismiss the case. In *Young*, however, defendant has been objecting every step of the way, with ample opportunity to plaintiff to show the propriety of nonjoinder. When an appellate court believes plaintiff has failed, a reversal may be appropriate even though the evolution of the case has left unharmed those not joined.

E. *In Short*

The essence of all that precedes is that questions of required joinder should be resolved less and less on the basis of pat formulations which provide generalized characterizations of parties, and more and more on case by case consideration of the interrelated and sometimes competing interests in reducing litigation, minimizing harassment of defendants, protecting absent persons, providing a forum for bona fide claims, and the like. If it be deduced from any portion of the cases discussed that criticism of mechanical solutions based on (unrealistic) labels is an attack on a straw man, and that in fact the courts now actually decide these questions rationally, then it is not too much to ask that the obfuscating use of the labels be abandoned and that opinions indicate that facts have been sought and examined which bear on the various interests presented.

If one accepts Dean Pound's theory that our legal system in development alternates between strict rule and formula on one hand and informality and judicial discretion on the other, and that contemporary jurisprudence is in one of the liberal, more flexible eras, our thesis is, at very least, riding the pendulum; and one gains if only from realizing that labels no longer determine outcomes. It may not be fruitless to catalog cases to show, e.g., that courts often call junior mortgagees necessary or indispensable in foreclosure suits, or that joint obligees are required to sue together; most cases fit into the general pattern. But no lawyer

worth his calling can afford to forget for one moment that such lists give rise to little more than a presumption. There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence. The descriptive term assigned to him is irrelevant to the process of decision.