Compulsory Joinder: The Real Thing Down In Louisiana

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COMMENTS

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Introduction

Compulsory joinder defines the parameters wherein a litigant's right to select his adversary is limited by the need to join certain persons for complete adjudication of a claim. Two fundamental principles lie at the core of rules mandating the joinder of parties in a given suit. The first of these principles is a basic doctrine of due process: A court will not adjudicate the rights of a person not before the tribunal; the second is that a court avoids rendering inconclusive judgments.

Joinder rules designed to implement these principles have been traced to the nineteenth century merger of law and equity; the merger impressed upon common law suits, which traditionally favored narrow rulings on the rights of the immediate parties, the more expansive joinder practices of the equity courts. The proliferation of

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1. The principles which led to the development of rules on mandatory joinder were isolated and explored extensively in Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957). This classic study identifies the origin of joinder rules in the merger of law and equity and calls for a pragmatic approach to joinder. Professor Reed's account of the basic principles joinder serves is adopted in Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254, 1287 (1961); Lewis, Mandatory Joinder of Parties in Civil Proceedings: The Case for Analytical Pragmatism, 26 U. Fla. L. Rev. 381, 382 (1974).

2. Reed, supra note 1, at 332, 334; Lewis, supra note 1, at 385. This principle also gives rise to judicial distaste for piecemeal litigation, which overburdens courts, delays a final resolution of issues, and increases the cost of adjudication. The rule favoring dispositive judgments, according to Professor Reed, reflects that "the public interest in a smoothly functioning judiciary overbears the individual's desire to impose on the court's time to secure a moot decision or to have two determinations where one would suffice." 55 Mich. L. Rev. at 334.

3. At law, the practice was to consider a single disputed issue, and thus was required the presence of only the persons "directly and immediately interested in the subject matter of the suit, and whose interests are of a strictly legal nature." The presence of persons possessing mere equitable or "similarly remote" interests was not only not required but was not even permitted. Naturally, only those present were bound by the court's decision. In equity . . . a decree was sought, and not a decision merely. Accordingly, it was necessary to bring before the court all persons whose interests might be affected by the proposed decree, or whose concurrence was necessary to an effective and meaningful determination of the con-
rules on joinder may have obscured, but has not invalidated, its basic principles, which favor affording all affected persons a day in court, but discourage needless or inconclusive litigation. The purpose of compulsory joinder is to effectuate—and in individual cases, to reconcile—two equally significant procedural goals; balancing interests lies at the core of the concept of joinder.

Principles, when applied to specific cases, inevitably splinter into rules, and joinder was no exception. When enough rules clutter the landscape to conceal the concepts justifying rules, a restatement of principles, reflecting current developments, is in order. The classic reformulation defining mandatory joinder in nineteenth century American jurisprudence was Shields v. Barrow, in which the United States Supreme Court rearticulated joinder principles but phrased them in terms of "necessary" and "indispensable" parties. The problem with the Shields v. Barrow formulation was that it encouraged a jurisprudence of labels in which evaluation of the interests and circumstances of individual persons in particular suits was subordinated to a fixed and rigid classification yielding "automatic" results. Whether labels actually have determined results in joinder controversy. Each person having a legal or equitable interest in the subject matter of the suit was required to be a party to the action.

Reed, supra note 1, at 330-31. The development of pleading rules on joinder through the seventeenth and eighteenth centuries is treated in Hazard, supra note 1.

4. Reed, supra note 1, at 347, cites English decisions rendered in 1682 and 1751 as stressing "the impropriety of a procedure which would leave defendant open to two or more lawsuits for the same alleged wrong."

5. 58 U.S. (17 How.) 130 (1855).

6. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, [they] are not indispensable parties.

Id. at 139. Indispensable parties are defined as:

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

Id.

7. Reed, supra note 1, at 351-56; Lewis, supra note 1, at 386. The problem of resolving joinder questions by reference to fixed categories, as opposed to careful analysis of specific cases, was intensified by the importance courts attached to the non-joinder of an indispensable party. The rule that a court could notice on its own motion the absence of an indispensable party was translated into a "jurisdictional" theory: If
cases is debatable; but even when courts use labels as shorthand for a thorough analysis of particular cases, the labels hide the factors which should be stated openly, both as a matter of judicial accountability and as a means of providing guidance. Proper use of joinder to facilitate efficient and fair litigation demands that both bar and bench squarely address the basic concerns of compulsory joinder:

1. the unfairness to those present of proceeding without an absent party; (2) the effect on the absentees of a determination of the controversy before the court; and (3) the court's ability to determine finally the rights of the parties before it in a manner which cannot be aborted by action of an absent party.10

The problem compulsory joinder addresses in any given case is whether the initial grouping of parties is to yield in favor of any—or a mixture—of these interests. The interests shift in the context of particular cases, and a neat "list" of relevant interests may be as

an indispensable absentee could not be brought before the forum, the court lacked "jurisdiction" over the action. The theory, fortunately discredited, was not merely inaccurate, but as commentators have pointed out, prevented courts from fashioning alternatives to joining needed parties. The jurisdictional theory is mentioned by Hazard, supra note 1, at 1254-55, and discussed in more detail by Lewis, supra note 1, 323-24.

8. This is the position taken by Professor Reed, who notes the influence of the Shields v. Barrow classification on American joinder cases:

It is not simply that labels have determined the outcome of many cases. The trouble rather is the result of several factors operating concurrently: a ready reliance on labels for solutions of particular cases, a thoughtless reiteration—instead of a critical reexamination—of the basic principles of required joinder, and a conceptualistic view of "jurisdiction" and "rights" in relation to the joinder of parties.

Reed, supra note 1, at 328-29.


Professor Reed's formulation of the three relevant interests is slightly different, focusing upon the interests of defendants, as opposed to the interests of all present parties, in the first grouping of interests. He argues that there is no reason to compel a plaintiff to litigate with a party "not of his own choosing" in order to protect the plaintiff's interests. Reed, supra note 1, at 330.

The broader formulation is used here because protection of the plaintiff's interest is a factor courts consider and because the protection afforded a plaintiff, if properly weighed against other interests in a given case, inures to the benefit of the system of justice as a whole.

11. Reed, supra note 1, at 330.
dangerous as labels in substituting abstraction for the concrete practical issues joinder involves: harassment of a defendant with multiple litigation, adverse practical consequences to absentees, additional delay and expense in obtaining a remedy, and convenience to a court.\textsuperscript{12} Not every relevant consideration is present in every case, and a basic task of the court is to isolate which interests are at play in a given action and then to evaluate them with due consideration of the kind and scope of relief sought. Also, the interests which are relevant at the trial level are altered by the time a case reaches an appellate court.

For instance, a plaintiff successful in the trial court now has an interest in preserving his judgment;\textsuperscript{13} the judicial resources already expended become significant;\textsuperscript{14} particularly if joinder would have served judicial economy at the trial level but would require relitigation on remand;\textsuperscript{15} if joinder is intended to protect the defendant, and he failed to raise an objection to nonjoinder before trial, his interest should be given less weight than if joinder is needed to protect the absentee.\textsuperscript{16} And, since dismissal of an action for nonjoinder of a compulsory party places the burden of joinder solely upon the plaintiff, any relevant relationship either plaintiff or defendant might have with the absentee should be scrutinized carefully, especially if joinder is to protect the defendant's interests.\textsuperscript{17} Careful attention to the facts of each case, including the object of the suit and the relationships of the parties, is essential if compulsory joinder is to accomplish the fairness and efficiency the device is intended to effect. The virtue of the revised version of Rule 19 of the Federal Rules of Civil Procedure is that the rule details the factors a court should consider pragmatically when deciding whether a party should or must be joined.\textsuperscript{18}

The goals of Louisiana's joinder rules\textsuperscript{19} do not differ from those

\begin{itemize}
  \item \textsuperscript{12} Id. at 356.
  \item \textsuperscript{13} Lewis, supra note 1, at 394.
  \item \textsuperscript{14} Id. at 410.
  \item \textsuperscript{15} Eagleton, supra note 9, at 622.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Comment, supra note 10, at 882.
  \item \textsuperscript{18} The criteria outlined in Rule 19 appear in notes 146 and 147, infra.
  \item It has been suggested that Federal Rule 19 emphasizes fairness and that "[c]onsiderations of economy and convenience are important and interrelated, but secondary." Lewis, supra note 1, at 388.
  \item The classic example of application of the Rule 19 criteria is Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).
  \item \textsuperscript{19} La. CODE CIV. P. arts. 641-47 are the core of Louisiana's joinder procedure; however, compulsory joinder also is mandated by specific articles; arts. 697 and 698
\end{itemize}
of any other procedural system. The claim that common law joinder principles were inapplicable to Louisiana had some justification when the joinder principles of the Federal Rules of Civil Procedure and those of other states followed the Shields v. Barrow test, keyed to whether the absentee's interest was severable from the subject matter of the litigation and focused on the joint and joint and several obligation. Since a "joint obligation" in Louisiana involves only virile share liability, and since solidary obligors need not be joined by an obligee, the discussions of joint interests which pepper liberally treatments of common law joinder are inapposite here. But if "[t]he rules of compulsory joinder in Louisiana ... rest upon purely procedural bases," procedural considerations also dictate the criteria of Federal Rule 19 as amended; the practical effect of the difference between Louisiana's obligations law and common law categories is evident only in considering the object of a suit, a factor which varies in each case under any procedural system. Since the 1966 amendments of the Federal Rules to incorporate explicitly functional criteria, Louisiana's joinder rules seem both abstract and restrictive by comparison, and it has been suggested that the efforts of the Louisiana Code of Civil Procedure joinder articles to regulate joinder by the antiquated labels largely abandoned by the Federal Rules "have on the whole probably produced more litigation

(governing subrogation and assignment); art. 1092 (governing intervention); and art. 1113 (governing the third party demand).

21. Id. at 9-11. This argument assumes, of course, that the Shields v. Barrow labels were in fact determinative of joinder issues and were not a mere shorthand or "smokescreen" for more careful pragmatic scrutiny.
22. Id. at 11.
24. McMahon, supra note 20, at 11.
25. Just as the Louisiana compulsory joinder articles do now, Federal Rule of Civil Procedure 19, when originally promulgated in 1937, attempted to regulate joinder on the basis of abstract concepts, not of functional considerations. . . . Because of the confusing and impractical judicial applications, the rule was revised in 1966 to require joinder or not on the basis of the true policy considerations, sometimes conflicting, such as the practical impairment of the protection of an absentee's interest, substantial risk to any of the parties of incurring multiple or otherwise inconsistent obligations, or the adequacy of the relief possible without the joinder. Similar revision of the Louisiana articles on the subject seems indicated by the growing confusion in their judicial applications.

and more confusion on the issue than existed prior to the 1960 attempt to clarify the question."26 Certainly, any attempt to analyze Louisiana's jurisprudence on compulsory joinder in light of the Code of Civil Procedure's scattered joinder provisions27 should avoid an isolationist stance. The concerns of joinder in Louisiana are identical to joinder interests in other procedural systems—and are ultimately reducible to fairness to all concerned persons and to efficiency in the allocation of judicial resources.

Moreover, Louisiana's joinder decisions and their accompanying rationales must be approached with the recognition that compulsory joinder is but one of several alternatives available to courts in meeting the goals of fairness and efficiency. When these objectives are presented in the context of adding parties to litigation, two basic alternatives should be considered before an action is dismissed or a judgment disturbed for lack of a needed litigant. The first alternative is suggested in Federal Rule 19(b): the court may be able to condition its judgment or to fashion relief narrowly so that the absentee is protected without leaving the present parties without a judgment to fix their relative rights.28 The other alternative forms the premise of Federal Rule 19(a): in many cases when joinder is not feasible, a full and final adjudication determining the rights of all interested persons is not essential; a partial judgment, or even several suits relitigating issues previously decided, may be preferable to denying all relief. "The mere fact that a second action may be required to determine the totality of the issues involved in a controversy is not a bar to the maintenance of the incomplete first action."29

Courts exist to settle disputes, as a civilized alternative to "self help." Given that truism, little justification exists for dismissing a legitimate claim or even for remanding a decision for certain relitigation when the possibility of future actions is speculative or remote. As important as the avoidance of multiple litigation and adverse effect on an absentee are, cases involving joinder always present multiple interests; and any joinder test which stresses one or two favored interests at the expense of others will lead inevitably to unfair results in those cases in which facts shift the equities to favor an interest an inflexible formula may overlook.

26. Id. at 289.
27. See note 19, supra.
28. Reed, supra note 1, at 354; Note, supra note 23, at 1091.
29. Reed, supra note 1, at 335. See Lewis, supra note 1, at 387-88.
Early Louisiana Jurisprudence: Roots

A sampling of Louisiana jurisprudence on compulsory joinder before the adoption of the Code of Civil Procedure indicates that Louisiana courts originally employed a balancing test to determine when a party's presence was essential to the litigation of a claim. The terms "indispensable" and "necessary" were used interchangeably in the early cases, but the functional impact of finding a party essential to an action was settled: The absence of an essential party was an objection which could not be waived. Aside from cases isolating specific relationships deemed crucial to represent certain interests, Louisiana appellate courts were hesitant to label persons as "indispensable" or "necessary" when to do so would set aside a judgment previously rendered. The majority of the cases sampled treat interests in real property, but the courts in various cases considered a number of factors in deciding whether an absentee's joinder was essential to adjudication of a given dispute.

The courts' reluctance to affect adversely the rights of absentees in immovable property or property-related interests was the determinative factor in several cases. In Ashbey v. Ashbey the plaintiff individually and as tutor for his minor children sued to set aside mortgages favoring the minors. The Louisiana Supreme Court, noting that the plaintiff-father's interests were adverse to those of his children, found the father "incompetent" to represent their interests. The young mortgagees, then, were in effect unrepresented, and the supreme court upheld the trial court's refusal to order the sheriff to cancel the mortgages on the grounds that the mortgagees

31. Early Louisiana jurisprudence recognized relational interests keyed to the procedural capacity of particular persons or entities to be sued and thus evolved a set of rules requiring, for instance, that a minor be represented by his tutor; see, e.g., Ashbey v. Ashbey, supra note 30; or that a partnership be sued in its own name; see, e.g., Key v. Box, 14 La. Ann. 497 (1859). Later codified as rules on parties defendant, these cases create functionally a form of compulsory joinder and are discussed in the text at notes 262-65, infra.
32. One commentator noted that "[c]ontroversies involving multiple interests in real property present courts with more problems of mandatory joinder than any other single class of cases." Lewis, supra note 1, at 346.
34. The court noted that the father sought to cancel a mortgage in the children's favor and to declare them one-half owners of valuable real estate which the record indicated that the minors wholly owned. 41 La. Ann. at 142, 5 So. at 547.
35. Id.
would be so directly affected by the erasure that they were "necessary parties" to an action ordering cancellation of their mortgages from the public records. In considering the impact upon the unrepresented minors, the Ashbey court turned to Gasquet v. Dimitry,\textsuperscript{38} which pointed out that an order to cancel a mortgage does not "bind" nonparties but is likely to work practical hardships on both the mortgagees and later purchasers of the property.\textsuperscript{37} Another "absentee" whose interests were at least mentioned by the Ashbey court was the recorder of mortgages; the court noted that "to order the recorder of mortgages to proceed to the cancellation, in the absence of such necessary parties . . . would be equivalent to an order to that officer to perform the duty at his peril."\textsuperscript{38} Thus, the interests of the absentees outweighed the plaintiff's interest in protecting a judgment obtained in violation of his duties to the minors, and the court found the absence of the necessary parties to invalidate the judgment.\textsuperscript{39}

The court's focus in Ashbey upon the interests of the absentees was reiterated in Sanders v. Flowers,\textsuperscript{40} a slander of title action which on original hearing dismissed the plaintiff's suit because he did not join the Commissioner of Conservation to an action attacking one of his orders.\textsuperscript{41} On rehearing, the supreme court decided that the Commissioner was not a "necessary party." The Sanders decision is illuminating both for its definition of the "test" for determining whether a party is a "necessary" defendant and for its pragmatic

\textsuperscript{36} 6 La. 453 (1834).
\textsuperscript{37} The Gasquet court speculated that
"[a]lthough those mortgagees are not parties to the rule, its being made absolute may do them great injury. They may not be bound by it, but the sheriff may release, and the recorder of mortgages, on the production of the release, may proceed to the radiation of these mortgages, and the radiation may occasion trouble and injury to these mortgagees and subsequent purchasers."
\textit{Id.} at 454-55.
\textsuperscript{38} 41 La. Ann. at 141, 5 So. at 547. Because neither the recorder nor the mortgagees would be "bound" by the order, nothing would prevent the mortgagees from attacking the cancellation, presumably by suing the recorder.
\textsuperscript{39} 41 La. at 142, 5 So. at 547-48. A similar set of facts was presented in Succession of Todd, 165 La. 453, 115 So. 853 (1928); the mother and tutrix of minor children also had served as executrix of the succession of their father and, in her dual capacity, had sold succession immovables to pay alleged succession debts. In a subsequent action to rescind the probate sale and to recover the property, the court cited Ashbey as grounds for refusing to rule on the appealed exceptions of prescription and no cause of action and for instead noticing \textit{sua sponte} the nonjoinder of necessary parties.
\textsuperscript{40} 218 La. 472, 49 So. 2d 858 (1950).
\textsuperscript{41} 218 La. at 486, 49 So. 2d at 863.
evaluation of that interest. According to Sanders, "[t]he test as to whether one should be made a party defendant in a given case relates to the interest which he may have in the outcome of the suit and how he would be affected by the judgment to be rendered."42 The test is narrow and does not take into account the other interests relevant to compulsory joinder: the interests of the parties and of the public in efficient judicial administration.4 But the court maneuvered adroitly within the restricted ambit of that test to find the Commissioner not a necessary party to the suit, because the plaintiff attacked the administrative procedure, not the substance of the Commissioner's order, and because the Commissioner "cannot be expected to appear in court and defend all of the orders issued by him whenever such orders are collaterally attacked" on procedural grounds.44 The absentee had "no interest"45 and thus could be excused from defending his order,46 to the greater efficiency of both judicial and administrative proceedings.

In City of Shreveport v. Kansas City, S. & G. Ry. Co.,47 an expropriation proceeding for right of way along tracks leased by a railroad,48 the absentee's interests were subordinated to those of the litigants and the court. The plaintiff suggested joinder of the defendant's lessee late in the litigation; the lessee was joined, and the court's judgment awarded his compensation. But after judgment the lessee, who had lost procedural rights by the tardiness of his joinder, claimed to be a "necessary party" and sought a retrial in which his exceptions and defenses could be heard. The court had jurisdiction over the lessee; thus even had he been labeled "indispensable," the action could have been maintained. But because the lessee had been paid for his losses and the plaintiff therefore was not subject to multiple liability, the supreme court was unwilling to grant a rehearing solely to revive the lessee's lost procedural rights. Citing the substantive law of expropriation, which does not refer to proceeding against anyone except the landowner,49 the court held

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42. 218 La. at 492, 49 So. 2d at 865.
43. See text at note 10, supra.
44. 218 La. at 493, 49 So. 2d at 865.
45. 218 La. at 493, 49 So. 2d at 865.
46. 218 La. at 495, 49 So. 2d at 866.
47. 181 La. 458, 159 So. 2d at 715 (1935).
48. The action was brought originally against the landowner and consolidated with similar suits against several railroads. Kansas City S. & G. Ry., a lessee, entered the proceedings late and then sought a retrial of issues already litigated in order to urge additional defenses and exceptions. 181 La. at 459-62, 159 So. at 716-17.
49. 181 La. at 462, 159 So. at 717.
that in an expropriation proceeding the landowner is the "sole necessary party defendant." Although the court based its decision on the substantive law and used the fact that expropriation is in the nature of an in rem proceeding, the procedural considerations prompting the holding are not hard to ascertain: The plaintiff-city represented an important public interest, already vindicated by full litigation, and expropriation proceedings justify a greater emphasis on efficiency and expedition than does purely private civil litigation. Moreover, the lessee lost only procedural, not substantive, rights. The court's failure to articulate the procedural reasons for its holding is unfortunate, but City of Shreveport nonetheless illustrates a weighing of relative interests which does not focus solely upon effect upon the absentee.

A classic torts case defining necessary parties, as contemplated later by article 642 of the Code of Civil Procedure, is Reed v. War-

50. The court also stated that "[s]uits to condemn or expropriate property for public use or in the public interest are proceedings in rem, proceedings against the property itself. . . . The owner of the property and he alone has authority to speak in defense of an action to force alienation." 181 La. at 464, 159 So. at 717.

51. The court may have been reluctant to state the holding in procedural terms for fear of disturbing the precedent of Ashbey and Succession of Todd, which established a general rule that lessees and mortgagees are necessary parties to litigation directly affecting their mortgages and leases. See text at notes 31-39, supra.

52. The court in Jackson v. Gulf Refining Co., 201 La. 721, 10 So. 2d 593 (1942) similarly refused to find a servitude or mortgage holder a "necessary party" in an action against a refining company to determine interests in oil and gas. The court characterized the plaintiff's suit as a "petitory action" and stated that "[t]he owner of a servitude . . . on a tract of land is not a necessary party to a petitory action brought against the owner of the land." 201 La. at 732, 10 So. 2d at 596. However, the court found the absentee nonnecessary in order to protect him. The plaintiff won the original suit, but the defendant landowner obtained a reversal on appeal; then the original plaintiff argued that since the lessee was a necessary party who did not join the suit, he could not take advantage of the reversal on appeal. The ruling that the servitude owner got the benefits of the landowner's appeal protected the absentee and thwarted further litigation by a claimant whose demands the court already had found untenable. 201 La. at 732, 10 So. 2d at 596.

It is interesting to speculate, however, on whether the court would have found the servitude owner "necessary" had it upheld the judgment against the landowner. In that case, the absentee should have been necessary so that the plaintiff could not collect royalties from the absentee until his defenses were heard.

Board of Commissioners of the Port of New Orleans v. City of New Orleans, 223 La. 199, 65 So. 2d 313 (1953), also refused to find the illegitimate daughter of the plaintiff's deceased employee a necessary party to the employer's suit against the defendant for indemnification for workmen's compensation that the employer paid the child. The absentee, already compensated by the plaintiff, had no interest in the suit; but had the child been a "subrogor" the plaintiff would have lacked a cause of action since the child was excluded from the Civil Code article 2315 list of beneficiaries to a wrongful death action. The court focused exclusively on the plaintiff's interests in order to maintain his cause of action. 223 La. at 203-04, 65 So. 2d at 314-15.
which held that all claimants of a wrongful death and a survival action under Civil Code article 2315 are necessary parties who must bring their claims in a single suit.\(^5\) The substantive basis of the decision rests upon counting causes of action in article 2315 and is not persuasive,\(^5\) but the procedural justification for the Reed v. Warren holding is more convincing: The court remarks the unfairness of subjecting a defendant to "the annoyance and expense of defending five, or perhaps ten, lawsuits, all founded upon the same cause of action and dependent upon the same relevant facts and the same defenses,"\(^5\) and indicates some consideration for the procedural goal of avoiding duplicative litigation by arguing that "it is just as important to avoid a multiplicity of suits on obligations arising ex delicto as on obligations arising ex contractu."\(^5\) The court cites concursus proceedings, partition suits, and "in fact . . . all cases where some outsider is a necessary party to the suit"\(^5\) as precedent for requiring joinder of all claimants in a single action. Having thus based the holding, procedurally, upon the interests of the defendant and upon public interests in efficient judicial administration, the court weighed the interests of the plaintiff and the absentees, evaluating an argument raised by the court of appeal:

> It is said in the opinion rendered by the Court of Appeal that, if the court should rule that all of the sons and daughters of the deceased . . . are necessary parties to the suit, and if one of them should be absent or unwilling to join in the suit, his absence or refusal to join . . . would prevent the others from bringing the suit. The answer to that . . . is that the plaintiff or plaintiffs in such a case should have the party refusing to join in the suit cited and ordered to say whether he will join in the suit or abandon his claim for damages.\(^6\)

Reed v. Warren illustrates a balancing of the plaintiffs' and defendant's interests against the absentee's and suggests that when the

53. 172 La. 1082, 136 So. 59 (1931). The "Preliminary Statement" to the Code of Civil Procedure's chapter on joinder identifies this decision as defining the concept of "necessary parties" adopted by the procedural code in article 642. 2 LA. CODE CIV. P. ANN., Preliminary Statement to Chapter I of Title I at 395 (West).

54. 172 La. at 1092, 136 So. at 62.


56. 172 La. at 1092, 136 So. at 63.

57. 172 La. at 1097, 136 So. at 64.

58. 172 La. at 1098-99, 136 So. at 65.

59. 172 La. at 1098, 136 So. at 64. See generally Morrison v. New Orleans Public Serv. Inc., 415 F.2d 419 (5th Cir. 1969).
former outweigh the latter, litigation can continue even when a necessity party cannot be joined. Conversely, if the absentee’s interests are so significantly interwoven with the litigation that a judgment rendered in his absence would be unfair or would invite relitigation, courts may refuse to hear a matter unless the absentee is joined.

That proposition is illustrated by Horn v. Skelly Oil Co., an action to determine the ownership of a 7/8ths interest in mineral rights to a tract of land. The absentee was the Federal Land Bank, whose deed to the landowner’s title ancestor had reserved mineral interests; the crucial substantive issue was the nature of the absentee’s reservation. The plaintiff claimed that the deed created a servitude, now prescribed in plaintiff’s favor; the defendants urged and the lower court found that the reservation created a royalty, likewise prescribed by ten years’ nonproduction. The supreme court, noticing on its own motion the nonjoinder of the Federal Land Bank, decided that in either case a decision on the prescription issue would affect adversely the absentee and remanded the case to allow the “impleading” of the “necessary party.” Notably, Horn v. Skelly Oil focused solely upon the speculative interest of the absentee, whose mineral interest, however defined, had in all likelihood prescribed and who would not have been bound by that factual determination in his absence. Although the remand may have been more efficient in this case than rendering a conditional judgment requiring either party to litigate the nature of the interest and the prescription issue with the absentee, Horn’s significance lies in its unfortunate preoccupation with the effect of the litigation upon only the absentee. If the court in fact was unwilling to give judgment without the Federal Land Bank because the dispute involved interests in immovables, failure to so state caused confusion, not merely in later cases, but in the criteria for compulsory joinder set forth in the Code of Civil Procedure.

Joinder in the Code of Civil Procedure: Gerontion

The crucial importance of Reed v. Warren and Horn v. Skelly Oil is their impact upon the Code of Civil Procedure, which turned

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60. 221 La. 626, 60 So. 2d 65 (1952).
61. 221 La. at 632, 60 So. 2d at 67.
62. 221 La. at 632-33, 60 So. 2d at 67-68.
63. 221 La. at 632-33, 60 So. 2d at 68.
64. Civil Code article 2286 requires that a judgment be rendered between the same parties to have the effect of res judicata.
to these cases in fashioning its distinction between necessary and indispensable parties. The "Preliminary Statement" to the Code's chapter dealing with compulsory joinder indicates that Reed v. Warren "expressly recognized and properly labeled" the concept of "necessary parties," while Horn v. Skelly Oil "recognized and properly labeled the concept of indispensable parties."

Article 641 of the Louisiana Code of Civil Procedure defines indispensable parties:

Indispensable parties to an action are those whose interests in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action.

The wording of the article, like the Skelly Oil decision which was its model, looks solely to the interests of the absentee. The article does not, of course, mandate that a court consider only the impact of a suit upon the nonjoined party; the phrase "complete and equitable adjudication" operates as a "savings clause" permitting consideration and evaluation of other relevant factors. But the cases cited treating indispensable parties in both the "Preliminary Statement" and Comment (c) to article 641 are decisions which stress the absentee's interests and thus are to some extent misleading, insofar as the article was intended to codify past jurisprudence. The emphasis in the code need not have been so restricted, since prior jurisprudence, while giving the absentee his due, also treated other pertinent interests.

Similarly, the definition of a necessary party in article 642 is keyed to the absentee's interest in the "subject matter" of the litigation. The code's criterion for distinguishing a necessary party from an indispensable one is both narrow, in failing to articulate other in-

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65. 2 LA. CODE CIV. P. ANN. Preliminary Statement to Chapter 1 of Title III at 395 (West).
66. Id.
67. The "Preliminary Statement" to the joinder chapter of the Code of Civil Procedure expresses dissatisfaction with the terminological inconsistency of the decisions, but articles 641 and 642 were, according to the Reporter, to clarify rather than to alter jurisprudential rulings. Id. at 396.
68. LA. CODE CIV. P. art 642 states, in pertinent part, that:

   Necessary parties to an action are those whose interests in the subject matter are separable and would not be directly affected by the judgment if they were not before the court, but whose joinder would be necessary for a complete adjudication of the controversy.
terests compulsory joinder serves, and vague, giving no standard for determining when an absentee’s interest is "separable" and when it is not.

Compulsory joinder is a procedural means of dealing with suits in which the interests of a nonlitigant are bound so intimately with the interests of the parties in the object of the suit that effective judicial administration always favors the absentee's joinder. Ideally, these absentees, whether denominated "indispensable" or "necessary," always should be joined. But joinder is not always possible or, when possible, is not always effected. Jurisdictional barriers to joinder or simple procedural default by litigants produce situations in which the needed person either cannot be or has not been brought into the suit. To deal with the problems created by these cases, the distinction between indispensable and necessary parties developed. The distinction is crucial because it triggers functional differences in the way objections to the absence of needed litigants may be raised; moreover, whether an action may be maintained without joinder of the needed person and whether a judgment rendered in his absence is valid and final also hinge upon whether the absentee is indispensable or merely necessary.

The articles defining necessary and indispensable parties express the functional consequences arising from classification. Article 641 states that "[n]o adjudication of an action can be made unless all indispensable parties are joined therein," while article 642 conceded that "[a]n adjudication of an action may be made even if all necessary parties are not joined therein." Thus, an action will be dismissed if "indispensable" parties cannot be joined, while a suit may proceed if a court lacks jurisdiction over a "necessary" absentee. The most obvious effect of classification relates to jurisdiction; classifying an absentee as "indispensable" means that if he cannot be brought before a court, the entire action is dismissed, and other litigants are denied relief.

More important on a practical level is the difference in treatment of the pleading rules for objecting to nonjoinder of a needed absentee. Adverse impact upon subject matter jurisdiction rarely occurs in state courts; lack of personal jurisdiction over a needed person or suit in an incorrect venue occasionally created problems.

69. Addition of a defendant whose reconventional demand against the plaintiff exceeds jurisdictional amount limitations in city or parish courts occasionally presents a problem. See, e.g., San-I-Baker Corp. v. Magendie, 157 La. 643, 102 So. 826 (1925), discussed in the text at note 289, infra.

70. See, e.g., Mire v. Hawkins, 177 So. 2d 795 (La. App. 3d Cir. 1965), discussed in the text at note 76, infra.
But most Louisiana cases deal with joinder problems arising from the plaintiff's simple failure to join the absentee. The defect created by procedural laxity could be partially "cured" by joining the missing litigant, though the expense and inefficiency of a remand for this purpose is outweighed only by the wastefulness of reversing a fully litigated judgment because an "indispensable" person was unrepresented but affected. Whether such a "cure" will be required depends in many cases upon whether the absentee is labeled "necessary" or "indispensable."

Article 645 of the Code of Civil Procedure governs the pleading of nonjoinder of a needed person and states:

The failure to join an indispensable party to an action may be pleaded in the peremptory exception, or may be noticed by the trial or appellate court on its own motion. The failure to join a necessary party to an action may be pleaded only in the dilatory exception.71

Thus, if a person considered "necessary" is not joined and no objection is made before an answer or a preliminary default, the action proceeds without the absentee, unless he intervenes to assert his claim or is joined by the defendant as a third party defendant.72 Likewise, inability to obtain personal jurisdiction over such a person will not defeat the suit even if the dilatory exception is raised timely. But if a person is labeled "indispensable" and jurisdiction cannot be had over him, the action is dismissed; if his joinder is possible, the action may be remanded even after an appellate court has given a judgment if the supreme court takes the case on certiorari and notices the absence of the indispensable party.73 The characterization of a party as "indispensable" frustrates judicial efficiency "since

71. (Emphasis added.) Code of Civil Procedure article 927(3) lists "nonjoinder of an indispensable party" among the peremptory exceptions; article 926(8) lists "nonjoinder of necessary party" as a dilatory exception. Article 928 governs the time of pleading. The dilatory exception must be pleaded prior to answer or judgment by default and, under article 926, is waived if not timely pleaded. But article 927 allows the peremptory exception to be pleaded "at any stage of the proceeding in the trial court prior to a submission of the case for a decision," and article 929 allows the exception, if introduced after trial, to be "tried specially." These articles, coupled with article 645's permission to both trial and appellate courts to notice on their own motions the lack of indispensable parties, mean that if an indispensable party is not joined, remand or dismissal is a threat through all stages of the proceeding. The differences in treatment accorded necessary and indispensable parties in the Code of Civil Procedure is discussed by Tate, supra note 25, at 289-90.


73. See, e.g., Horn v. Skelly Oil Co., 221 La. 828, 60 So. 2d 66 (1952).
no stage-preclusion bars the contention of non-joinder from being raised or noticed even on appeal and, if upheld, from thus requiring remand for joinder and then retrial. The express codification of the difference in pleading rules for the two "classes" of needed litigants was intended, however, to alleviate the "confusion" created by early decisional law.

Because the extended period for raising an objection to the want of an indispensable party can be manipulated by a defendant seeking to prolong litigation, the "nonwaivable" peremptory exception envisioned by article 645 can complicate litigation, thus thwarting, rather than implementing, the judicial efficiency objective of mandatory joinder; while provisions to compel joinder of needed persons may eliminate the need for, or decrease the likelihood of, relitigation in a subsequent separate action, these devices can be used to assure relitigation in a pending or appealed action. Thus appellate courts, in particular, should notice only sparingly the lack of indispensable parties.

The severity of dismissing an action for failure to join a party is shown in Mire v. Hawkins. Lessors of a mineral tract sued the co-owners of mineral interests in the tract, seeking recognition of the plaintiffs' mineral interests. The plaintiffs also sought to cancel mineral leases and to establish the unconstitutionality of an order reducing their acreage participation in a producing drilling unit; therefore, the mineral lessees and the Commissioner of Conservation were joined also. The suit was brought in Acadia Parish, a court of improper venue under a statute authorizing suits attacking an order of the Commissioner of Conservation. The Commissioner was dismissed on grounds of jurisdictional venue, and on a later ap-

74. Tate, supra note 25, at 290.
75. The procedure for raising the objection of the lack of indispensable parties, or for the failure to join a necessary party, has caused difficulty in Louisiana. Under the jurisprudence, one exception, that of nonjoinder of parties, has been utilized for both purposes. This exception has long been recognized as a dilatory one which must be pleaded prior to the filing of an answer or a default. McMahon, supra note 20, at 12. The author suggested that while the dilatory exception was adequate to notice the lack of necessary parties, lack of an indispensable party should be raised through a nonwaivable peremptory exception and be subject to a court's notice on its own motion. Id.
76. 177 So. 2d 795 (La. App. 3d Cir. 1965), aff'd, 249 La. 728, 186 So. 2d 591 (1966).
77. LA. R.S. 30:12 (1950). On an earlier appeal in the same suit, the Third Circuit Court of Appeal had determined that the only proper venue for the suit against the Commissioner was East Baton Rouge Parish, as required by the statute. Mire v. Hawkins, 147 So. 2d 892 (La. App. 3d Cir. 1962), writ denied 244 La. 116, 150 So. 2d 584 (1963).
peal the third circuit found him an "indispensable party";\textsuperscript{8} citing article 934 of the Code of Civil Procedure, the appellate court stated that "when the grounds of a peremptory exception cannot be removed by amendment of the petition, the cause of action must be dismissed. . . . No adjudication of a cause of action can be made unless all indispensable parties are joined."\textsuperscript{79}

Assuming that the Commissioner was vitally interested in the suit and that his interest, coincident with the defendants', outweighed the plaintiff's interest in the vitality of a long-litigated claim,\textsuperscript{80} the plaintiff need not have lost his suit on "jurisdictional" grounds. If Revised Statutes 30:12 establishes jurisdictional venue in attacks on unitization orders, the plaintiff could have sued the Commissioner in East Baton Rouge Parish and then used article 644 of the Code of Civil Procedure to obtain ancillary venue as to the co-owners and lessees, whose joinder was needed for a full adjudication on the order, as both would be affected directly and seriously by invalidation of the order.\textsuperscript{77} The Mire suit was dismissed, not because jurisdiction over an indispensable party could not have been obtained, but because the plaintiff failed to use fully the procedural devices available in the Code of Civil Procedure to bring all needed defendants into a single suit.\textsuperscript{82}

\textsuperscript{78} 177 So. 2d at 805.

\textsuperscript{79} Id.

\textsuperscript{80} The appellate court noted that La. R.S. 30:12 (1950) and jurisprudence construing it, particularly Everett v. Phillips Petroleum Co., 218 La. 835, 51 So. 2d 87 (1950), forbids collateral attack on the Commissioner's orders fixing production units and requires that such attacks be made directly against the Commissioner, and concluded that the Commissioner was an "indispensable party." 177 So. 2d at 805. The court did not articulate any balancing it might have done of competing interests, though the fact that the defendant's interests were compatible with those of the dismissed absentee and the traditional judicial deference to administrative determinations may have influenced the holding. Possibly the court felt little patience with the plaintiff, who might have preserved his claim by complying with the statutory venue provisions.

\textsuperscript{81} Code of Civil Procedure article 644 arguably establishes ancillary venue with respect to necessary and indispensable parties.

\textsuperscript{82} A similar procedural lapse by a plaintiff led to dismissal of an action on appeal in Bolden v. Brazile, 172 So. 2d 304 (La. App. 4th Cir. 1965). The plaintiffs sought to be declared the owners of a tract of land and also sought an accounting for the value of minerals extracted from the property, as well as damages. The plaintiffs joined individual lessors and their corporate lessees as defendants but failed to take any steps to prosecute the claim against anyone except the lessee, Texaco. The individual defendants were dismissed on the ground of abandonment; then the fourth circuit, citing Horn v. Skelly Oil, found the dismissed persons indispensable parties. The individual defendants were not solidarily liable with their lessee, so steps taken against Texaco did not interrupt the five years' inaction as to the individual defendants under articles 56 and 3519 of the Code of Civil Procedure, governing abandonment for five years' in-
The alternative to dismissal of an action for want of an indispensable party is to allow amendment of the pleadings for his joinder; this cure is available only when a court has jurisdiction over the absentee, and the device is most useful at the trial level, when amendment would not upset a judgment nor involve the expense and delay of a remand. This approach was taken in *Succession of Guidry v. Bank of Terrebonne & Trust Co.*; there a succession representative brought a declaratory action against a bank, bank officer, and the officer’s son for recognition of the succession as owner of a note the defendants claimed. The plaintiff alleged that the bank took the decedent’s note as collateral security for a loan to the officer’s son, that the father and son used the loan proceeds, and that the bank accepted the note in bad faith. However, the trial court found the petition defective in failing to allege that the officer acted as the bank’s agent; without proof of that relationship, the bank would not be a participant in the officer’s use of the loan proceeds. The First Circuit Court of Appeal noted the “tendency of modern practice is to yield as little as possible to technicalities and to be liberal in upholding substantive rights” and held that the trial court’s refusal to allow amendment as mandated by article 934 of the Code of Civil Procedure was error. The *Guidry* rationale should be applied whenever amendment could cure a joinder defect and mitigate the harsh consequences of nonjoinder of a needed litigant.

The Code of Civil Procedure establishes clearly a practical difference between necessary and indispensable parties. The non-

action. Since these defendants were dismissed, there arose “an absence of indispensable parties,” which could not be cured by amendment of the petition because “the individual defendants have been dismissed and plaintiffs cannot join them again in the instant suit.” The court then applied article 934 of the Code of Civil Procedure and dismissed the suit for want of indispensable parties.

It is difficult to believe that the “comedy of errors” represented by *Bolden* can have precedential value. The interests of the lessors in their title and mineral royalties to the disputed tract were at least as keen as the interests of the Federal Land Bank in *Skelly Oil*; had the court lacked jurisdiction over the lessors, it would have been proper to classify them as “indispensable” and to refuse to allow the plaintiff to attack their interests in their absence. But once these parties were before the court and properly joined, the fourth circuit should have noticed their critical interest in the suit before allowing their dismissal, rather than waiting until after they had become “absentees” by judicial order to mandate their joinder. The court, impatient with the plaintiff’s lack of diligence in pressing their claim against the lessors, seems to have used the “indispensable parties” label as a vehicle for dismissing the action, letting the plaintiffs’ lassitude operate to their own disadvantage.

83. 193 So. 2d 543 (La. App. 1st Cir. 1966).
84. *Id.* at 547.
85. *Id.* at 547-48.
joinder of an indispensable party cannot be waived and can affect radically the final disposition of a case on appeal; nonjoinder of a necessary party is a waivable dilatory exception. But the absence of specific criteria indicating whether these vastly different procedural consequences should apply to a given case constitutes a gaping flaw in the Code's treatment of joinder. It was left to the Louisiana judiciary to give content to the distinction and to fashion criteria to define "indispensable" and "necessary" parties in the context of particular litigation.

The judiciary, of course, was limited to the cases brought before it in fulfilling its implied task, and particularized contexts necessarily limited the scope and clarity of the criteria case law could supply. The equities in specific cases influence decisions which, when read as establishing broad principles of joinder, may be misleading. But a survey of joinder cases decided under the Code of Civil Procedure does yield some general guidance as to when a party is indispensable and when not.

Post-Code Jurisprudence: News for the Delphic Oracle

The early cases on compulsory joinder decided under the Code of Civil Procedure show a high degree of protection afforded the interests of absentees when litigation involves, as in Skelly Oil, interests in immovables or mineral rights. The cases illustrate, although they do not always articulate, several reasons courts hesitate to entertain actions involving interests in immovables without joinder of all whose claims might be affected: first, jurisdiction over the absentee presents little problem when the action asserts interests in Louisiana immovables; second, because these proceedings resemble in rem actions, focusing on interests in Louisiana real property, judicial efficiency and efficacy of judgments mandate resolution of all interests in a single proceeding; third, resolution of all claims in one action protects defendants against multiple liability. And, if the interests not only of the absent potential claimant but of the litigants before the court require the presence of the absentee to resolve a critical issue, courts are apt to find him indispensable.

For instance, in Martin Timber Co. v. Roy, 86 an action for partition by ligation, the owner of a fractional interest in land sold his mineral interests to a third person while the partition was pending. The state supreme court held that the transferee of the mineral inter-

86. 244 La. 1050, 156 So. 2d 435 (1963).
ests "should and must be made a party to this proceeding"87 and remanded the case for his joinder, even after the court of appeal had affirmed the district court's judgment ordering sale of the property.88 The supreme court considered joinder essential to resolve several vital questions. The court addressed the absentee's interests in the issue of whether he could be deprived by a partition judgment ordering sale of the property "clear of encumbrances"89 of mineral interests acquired while the partition was pending. A determination of this issue was crucial also to distribution of the sale proceeds,90 which would affect all parties to the partition, and was also essential in notifying future bidders of precisely what was being sold. The supreme court was interested in protecting a future buyer from "buying litigation," for if the mineral transferee was not bound by the partition judgment, nothing would prevent his suing the purchaser after the sale. Thus the court looked beyond the interests of the nonjoined parties and found that the rights of present parties, of prospective bidders, and of judicial economy would be served by remand for relitigation of the partition action after joining the transferee.

A similar balancing of interests required joinder of all mineral lessors in Humble Oil & Refining Co. v. Jones,91 a suit by a mineral lessee for a declaratory judgment of royalty rights under mineral leases. The suit hinged upon the effect of a Commissioner's compulsory drilling unit upon a previous contractual unit, when some lessors in the contractual unit were included in the Commissioner's unit and some were not.92 The Louisiana Supreme Court focused upon the language of the Declaratory Judgment Act and decided:

87. 244 La. at 1058, 156 So. 2d at 438.
88. The court of appeal had considered whether the transferee was a necessary party and decided that he was not; the appellate court ruled that the provisions of article 741 of the Civil Code, which states that a mineral interest is unaffected when its owner is not joined as a party to a partition sale, did not apply when the mineral interest was acquired when the partition was pending. Thus the transferee was left only a cause of action against his vendor and had no interest in the partition. 244 La. at 1058, 156 So. 2d at 437.
89. 244 La. at 1053, 156 So. 2d at 436.
90. 244 La. at 1055, 156 So. 2d at 436-37.
91. 241 La. 661, 130 So. 2d 408 (1961).
92. Resolution of this issue was critical in determining how to distribute the production royalties from the Commissioner's unit; Humble urged that when the Commissioner of Conservation creates a forced unit overlapping a prior conventional unit, the forced unit does not abrogate the contractual unit, which must be considered in calculating the royalties due to the lessors; the defendants, owners of interests in the forced unit, understandably argued that the Commissioner's unit preempts and that all acreage excluded from the forced unit is disregarded in calculating royalty payments. 241 La. at 670-73, 130 So. 2d at 411-12.
We do not understand . . . that the statutory provision that "no declaration shall prejudice the rights of persons not parties to the proceeding" nullifies the explicit language that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." . . . It is essential that an affected, interested person be cited in the action when his existence and claim are evident.46

However, the court did not consider solely the possible rights of the absentees,46 but also evaluated the effect of resolving the crucial substantive issue upon various other parties and nonparties in both units and upon the lessee-plaintiff. The determination that the absentees were indispensable was motivated partially by the goal of avoiding relitigation in various suits of issues which might be resolved in the pending action.

The solicitude Louisiana courts display for interests in immovable property is shown also by Roussel v. Noe,46 which found indispensable absentees who stood to lose title to mineral leases as a result of a taxpayer action seeking to declare state leases null and seeking mandamus against the Mineral Board to force it to rescind approval of lease assignments made by the defendant. The first circuit in Roussel gave no explanation for finding the assignees and later owners of the leases indispensable,46 but the facts that the plaintiff knew the identity of these parties, that jurisdiction over them presented no problems, and that joinder of all would be more efficient than separate actions justify the holding and remand.

However, although these cases suggest that when the object of the suit is similar to the object of an in rem action, the nature of the subject matter is the predominant joinder consideration, they should not be read to mean that all owners of mineral interests are indispensable to all actions affecting mineral rights. In Fontenot v. Sun Oil Co.47 the Louisiana Supreme Court refused to find in DISPENS-

93. 241 La. at 670, 130 So. 2d at 411.
94. The contractual lessors excluded from the forced unit would lose their rights to payments if the forced unit nullified the prior agreement, though they might bring a later action against the lessee. 241 La. at 671, 130 So. 2d at 412.
95. 274 So. 2d 205 (La. App. 1st Cir. 1973).
96. The court merely stated that:
   If these leases are invalid as to Noe, they are invalid as to all other parties. Plaintiff has set forth with particularity the alleged illegal acquisition of Noe's and others' interests in these leases, including the subsequent assignments and present owners of the remainder. Certainly, all parties who have an interest in these leases are indispensable.
The court then cited article 641 of the Code of Civil Procedure. Id. at 211.
97. 257 La. 642, 243 So. 2d 783 (1971).
sable three owners of overriding mineral royalties when a lessor who previously had obtained a judgment cancelling mineral leases sued the lessee, Sun Oil, and the royalty owners for an accounting on production. The original cancellation suit was brought against Sun Oil and its six overriding royalty owners. Three of the royalty owners were absentees represented by a curator ad hoc, and these defendants did not appeal the cancellation judgment. On appeal by Sun Oil and the other royalty owners, certain of the leases were excepted from cancellation; no accounting for production on the excepted properties was due to plaintiff. However, on appeal of the suit for an accounting, the court of appeal ruled that the nonappealing royalty owners owed an accounting even from the excepted portions of the leases because these royalty owners were indispensable parties who had failed to appeal the cancellation judgment and thus were bound by it. The supreme court held that the appeal by the lessee had preserved by rights of Sun Oil's royalty owners, who probably were not even necessary parties to the second suit. The holding was based upon the derivative nature of the right the royalty owners had, as contingent upon the rights of their lessee.

The holding evoked a dissent from former Justice Summers, who maintained that the non-appealing royalty owners were at least necessary parties to the second suit who, under article 644 of the Code of Civil Procedure, could be forced to join as defendants, and whose failure to appeal the first judgment made both judgments binding upon them. The majority recognized, however, that the plaintiff's claims for a "full accounting" were in fact directed against Sun Oil, as the plaintiff sought nothing directly from the royalty owners, against whom the plaintiff had no contractual rights. Characterizing the royalties as "appendages to the leases" and the rights of the royalty owners as "accessory," the supreme court studied the parties' substantive relationships and concluded that if the plaintiff had

98. 257 La. at 644, 243 So. 2d at 783.
99. 257 La. at 644, 243 So. 2d at 783.
100. 257 La. at 611-622, 243 So. 2d 789-90.

[T]heir failure to appeal makes the issues adjudicated ... final insofar as they are concerned. Any contrary position is inconsistent with Article 644 of the Code of Civil Procedure which declares that a necessary party who refuses or fails to join in and assert his rights in an action which he should join may be joined as a defendant and required to assert his rights or be precluded thereafter from asserting them. To refuse to give final effect to the adjudication against the overriding royalty owners in this case would make the right to join necessary parties an empty gesture.

257 La. at 662-63, 243 So. 2d at 790 (Summers, J., dissenting).
101. 257 La. at 651, 243 So. 2d at 788.
no valid claim against its lessee for production on the excepted leases, the plaintiff had no rights against royalty owners whose interests were contingent upon Sun Oil's leases. Thus Sun Oil's appeal protected the interests of the royalty owners.102

The court found that as a matter of both law and common sense the royalty owners' failure to appeal was irrelevant.103 Refusing to construe articles 641 and 642 to make the appeal issue decisive, the court noted doubts as to whether the royalty owners were either necessary or indispensable104 to an action against Sun Oil for accounting. The court also refused to interpret article 644 of the Code of Civil Procedure as determinative of the parties' substantive rights.105 Here, the court focused upon the nature of the plaintiff's claim and upon the practical impact of requiring joinder: The plaintiff's interests were defined by the cancellation judgment; he had no interest in sands not excluded except his interest under the still valid lease. The lessee-defendant might have risked inconsistent duties had he owed production royalties on these sands to both the plaintiff and the royalty owners. But since Sun Oil's interest in the lease coincided with the interests of the royalty owners, no practical reason required the royalty owners to assert the lease's validity. Article 644 was not intended to expand substantive rights; thus the court's emphasis on the substantive claims of the parties and absentees, as opposed to reflex resort to labels, illustrates a pragmatic and practical evaluation of joinder.

Another line of cases interpreting articles 641 and 642 of the Code of Civil Procedure indicates that Louisiana courts will find an absentee indispensable when his presence would protect the state's interests or the rights of state administrative agencies. Fuselier v. State Market Commission106 was a taxpayer action to enjoin the defendant Market Commission from making, and a grain corporation from receiving, a loan from the state for construction of rice storage bins; the court held that another state agency, the Bond and Building Commission, authorized by statute to issue state bonds,107 was indispensable to an action to enjoin the loans on the grounds that is-

102. 257 La. at 652-53, 243 So. 2d at 786.
103. 257 La. at 652, 243 So. 2d at 786.
104. 257 La. at 653-54, 243 So. 2d at 787.
105. 257 La. at 654-55, 243 So. 2d at 787.
106. 331 So. 2d 652 (La. App. 3d Cir. 1970).
The court's solicitude for the prerogatives of administrative agencies seems the critical factor in ordering a remand. Other concerns prompting the judiciary to label the absentee indispensable, which may be of doubtful precedential value if lifted from the context of the suit in which the interests arose, include protection of the plaintiff's interest, protection of an absentee from prejudice from collusion between the plaintiff and defendant, and use of the label as grounds for dismissing a frivolous claim.

108. The court noted that a ruling that issuance of the bonds was unconstitutional would "necessarily constitute an adjudication that the State Bond and Building Commission cannot issue the bonds" and therefore would affect that agency's interests so "directly" that "a complete and equitable adjudication of the controversy cannot be made unless it is joined in the action." 231 So. 2d at 655.

109. In *Dugas v. Insurance Co. of St. Louis*, 134 So. 2d 634 (La. App. 4th Cir. 1961), a mortgagee insured under a "loss payable" clause in a collision policy issued by the defendant was held indispensable when the mortgagee settled with the insurer to the possible detriment of the plaintiff's claim for damages to his automobile; the court joined as "indispensable" an absentee who had no interest in the suit, having already obtained satisfaction from the defendant, because the mortgagee's absence might have prejudiced the rights of the plaintiff:

[T]his defendant is an indispensable party to this lawsuit. The suit looks to recovery by the owners and co-insureds of their undivided share of proceeds due on an insurance policy under which the mortgagee was also insured, and in these circumstances in which a conflict of interest could prevail plaintiff's claim could not have been validly adjudicated unless the mortgagee was also before the court.

110. *Di Maggio v. Capaldo*, 131 So. 2d 87 (La. App. 4th Cir. 1961) held a sublessee an indispensable party to a summary proceeding to require the lessee to vacate leased premises for allowing illegal gambling. The court stressed the express authorization of the sublease by the lessor, and the language of the decision might be read to suggest that privity between a lessor and sublessee is enough to give the sublessee "indispensable" status in an eviction against the lessee. From a procedural standpoint, privity should be irrelevant. Here the plaintiff sued a defendant with little or no interest; the party who would be affected was not joined, and collusion between the plaintiff and defendant to frustrate the sublessee's interests is suggested. There was no jurisdictional barrier to joining the sublessee, and the court's remand was fair.

111. *Warner v. Clarke*, 232 So. 2d 99 (La. App. 2d Cir.), writ refused 255 La. 913, 233 So. 2d 565 (1970), presents an interesting "quirk" by using a procedural device to dispose quickly of a trivial claim. The plaintiffs, trespassers on certain levees, sought a declaratory judgment that private lands were subject to public use and an injunction against prosecution for trespass. The court refused to give declaratory judgment on the grounds that the landowners were not joined as defendants: "The nonjoinder of an indispensable party may be noticed by the appellate court on its own . . . . We cannot decide whether [these] lands are burdened with a servitude unless the owners of the land are parties to the litigation." 232 So. 2d at 101.

The court did not remand for joinder, but found the plaintiffs' claims unmeritorious, as under the relevant criminal trespass statutes, *La. R.S. 32:292 (Supp. 1968)* and *La. R.S. 38:213.1 (Supp. 1968)*, the trespass on the levees was illegal even if the levees were burdened with a servitude favoring the public.
Similarly, in *Commercial Union Insurance Co. v. Milazzo*, an insurer's action to enjoin the insured's succession from proceeding with arbitration of a claim against the insurer, the Fourth Circuit Court of Appeal found the State Insurance Commissioner an indispensable party to the action because the insurer attacked the constitutionality of Revised Statutes 22:1406(D)(5) (1950) as vesting the insured with the exclusive right to invoke arbitration in settling disputed claims on uninsured motorist coverage. Finding that the thrust of the plaintiff's attack was directed, not at the statute, but at a regulation of the Insurance Rating Commission which required all policies to contain a provision allowing arbitration, the court of appeal noted that the Insurance Code outlines the procedure for challenge to a regulation of the Insurance Rating Commission.

Since the statutory procedure requires an administrative hearing, the court concluded that failure to comply with the mandatory procedure was a "collateral attack on the constitutionality of an insurance regulation and as such completely ineffectual"; because the jurisdictional venue requirement was not met and because the plaintiff did not join the Commissioner, an "indispensable party in a declaratory proceeding seeking to have adjudicated the constitutionality of a regulation of any commission created under the Louisiana Insurance Code," the fourth circuit reversed a judgment favoring the plaintiff. In so doing, the court protected the administrative prerogatives of the Insurance Rating Commission by refusing to allow collateral attack of a regulation in private litigation. The Commissioner's interest was identical to the public interest and

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112. 265 So. 2d 298 (La. App. 4th Cir. 1972).
113. Id. at 300.
114. In order to successfully assail a regulation of the Louisiana Insurance Rating Commission, it is mandatory that there be strict compliance with the prescribed statutory procedures set forth in the Insurance Code. . . . The Louisiana Insurance Rating Commission and more particularly the Casualty and Surety Insurance Division created under LSA—R.S. 22:1401 is charged with the responsibility of regulating automobile liability insurance. LSA—R.S. 22:1406. subd. D. It is empowered to permit submission of claims to arbitration. LSA—R.S. 22:1406, subd. D(5). The statute provides for a hearing and review of any ruling or regulation of the Rating Commission (LSA—R.S. 22:1418), and prescribes the procedures therefore in LSA—R.S. 22:1351-1365. All orders of the Commissioner resulting from said hearing are subject to review by the district court under LSA—R.S. 22:1360, which provides:

*****The petition for such review shall be filed only in the district court in and for the parish of East Baton Rouge and shall be taken only from an order refusing a hearing or an order on hearing.

Id. at 300-01.
115. Id. at 301.
116. Id. (footnotes omitted).
outweighed the plaintiff's interest in a private injunction when he failed to follow statutory procedures designed to protect the public interest by assuring its representation through the official designated to regulate insurance activities.

When a party seeks relief from a governmental body or official, failure to join the particular party charged to perform the responsibility at issue is crucial. A judgment commanding an official to perform an act he has no authority to perform would place that defendant in an impossible position and would be ineffective and therefore pointless. The courts may salvage a suit filed against the wrong defendant by mandating joinder of the governmental entity with the authority to grant the relief the plaintiff seeks. Firemen's Pension & Relief Fund for the City of Lake Charles v. Sudduth thus solves the problem; the plaintiff pension fund had sought mandamus to command the mayor of Lake Charles to pay into the fund a sum equaling four percent of the total salaries of all fire department employees. When the mayor protested that he had no ministerial duty under the relevant statute, the plaintiff sought leave to amend his petition. The Third Circuit Court of Appeal found the City of Lake Charles to be "an indispensable party" because it was the entity "directed by the statute to pay the funds"; the appellate court used article 646 of the Code of Civil Procedure and remanded to allow joinder of the city, improperly denied by the lower court.

Not all cases requiring joinder are so sensible. One criticized case, Consolidated Credit Corp. of Baton Rouge, Inc. v. Forkner, held indispensable the first mortgagee in a declaratory action on the distribution of the proceeds of a judicial sale. The mortgagee's sole interest in the distribution was the extra-legal interest in obtaining his share of the proceeds "early," for the sale was made subject to his mortgage. The sole effects of remand for his joinder were to prolong further the judgment creditor's execution of his judgment, to subject the parties to extra expense, and to clog the court with pointless litigation.

The cases in which the courts refused to require joinder also help define, at least by negative implication, criteria for the labels of

117. 276 So. 2d 727 (La. App. 3d Cir. 1973).
119. 276 So. 2d at 733.
120. 219 So. 2d 213 (La. App. 1st Cir. 1969).
121. Tate, supra note 25, at 291.
articles 641 and 642. The courts are reluctant to require joinder when the absentee had notice of litigation pertinent to his interests but took no steps to preserve his own rights, when joinder might complicate review of administrative proceedings or hamper agency effectiveness, and when the joinder issue is moot.

*Baton Rouge Production Credit Association v. Alford,* an action by a judgment creditor to cancel from the public records a contractual mortgage executed by the debtor, demonstrates judicial reluctance to join parties who took no steps to protect their own interests. The plaintiff maintained that the contractual mortgage was simulated and given without consideration. The absent transferee was outside Louisiana, but the trial court established communication with him. He did not intervene, and the court appointed an attorney to represent him at the plaintiff’s suggestion. The court of appeal found the disinterest exhibited by the mortgagee “damaging” evidence that he lacked real interest in the mortgage. Doing lip service to the *res judicata* aspect of mandatory joinder, the court refused to decide whether the absentee, whose court-appointed attorney was not served properly, would be bound by a finding that the mortgage was simulated. The court admitted that under Louisiana jurisprudence the holder of a note usually is an “indispensable party” to a suit attacking the instrument, but the court adopted the rule prevalent in other jurisdictions that “a person who while suit is pending acquires an interest in property which will be affected by that litigation is not an indispensable party to the proceedings involving the property, although he may be entitled to intervene therein.” In *Alford* the court used a pragmatic approach to protect the judgment creditor’s execution of his judgment without further delay, refusing to let possible collusion between the defendant and the absentee hamstring the court to prolong litigation in which the absentee’s interest was merely fictional.

122. 235 La. 117, 102 So. 2d 866 (1958).
123. 235 La. at 119, 102 So. 2d at 867.
124. 235 La. at 122, 102 So. 2d at 868.
125. 235 La. at 122, 102 So. 2d at 868. In view of its assessment of the absentee’s lack of interest, the court probably did not expect him to litigate the issue later anyway.
126. 235 La. at 123, 102 So. 2d at 868.
127. The prevalence of the adopted rule is asserted only through citation to legal encyclopedias and to one Arkansas case, *Galbreath v. Estes*, 38 Ark. 599 (1882). 253 La. at 123, 102 So. 2d at 868-69.
128. 253 La. at 123, 102 So. 2d at 868.
A similar approach was taken by the Third Circuit Court of Appeal in *Michigan Wisconsin Pipe Line Co. v. Fruge*, 129 an expropriation proceeding by a utility company against the defendant's rice farmland. The absentee tenant and servitude owner was a witness for the defendant in the original action and had on prior appeal been nominated a "necessary party"; 130 nonetheless, when the second appeal reached the third circuit, the tenant still had not been joined; the court refused to prejudice the plaintiff's rights or to expend further energy by allowing the expropriation to be delayed by a nonlitigant who had had every opportunity to assert his interests already.

The judiciary's reluctance to find indispensable parties in actions related to administrative proceedings probably is prompted by efficiency considerations. In *State v. Board of Zoning Adjustments of the City of New Orleans*, 131 the Vieux Carre Property Owners & Associates, Inc. challenged the defendant's grant of a building permit to property owners who wanted to erect a garage in violation of zoning restrictions; the licensees intervened in the action but were not joined on appeal. The supreme court refused to find the grantees indispensable parties to appellate review of the agency action. 132 The court's rationale is not well articulated, but the decision hints that courts are not eager to let those opposing agency action force the agencies into complex litigation on review by requiring joinder of every party affected by agency action, particularly since the affected group often would be large enough to require a class action. Nor are courts willing to force the state or its administrative agencies to participate in private litigation when the state or agency has no direct interest at stake. 133 *Walmsley v. Pan American Petroleum Corp.* 134 involved proceedings to cancel a mineral lease executed by the State Mineral Board insofar as the lease affected record title to the plaintiff's property. The supreme court painstakingly construed the petition to create an action to remove cloud from title, rather than as a petitory action claiming ownership, in order to avoid compulsory joinder of the state as a party defendant. 135

130. 210 So. 2d 375, 377-78 (La. App. 3d Cir. 1968). The case was remanded for joinder of the tenant-servitude owner so that he could claim his damages to his irrigation canal.
131. 251 La. 691, 206 So. 2d 74 (1968).
132. 251 La. at 704-05, 206 So. 2d at 78-79.
133. See text at notes 107-19, supra.
134. 244 La. 513, 153 So. 2d 375 (1963).
135. The supreme court noted that had the plaintiffs brought a petitory action, the title to the lands would be at issue. The State Mineral Board, a joined defendant, could
One of the most procedurally significant of the cases in which a court declined to find compulsory joinder is *Hayward v. Noel.* The owner of a one-third undivided interest in real estate claimed damages for the defendant's alleged trespass. The First Circuit Court of Appeal refused to find the owners of the two-thirds undivided interest indispensable to the action, but instead limited the plaintiff's recovery to her share [one-third] of the total damages. By limiting the plaintiff's interest to her virile share of the damages, the court structured a judgment to avoid exposing the defendant to excessive liability should the other co-owners later seek damages. Although the court could have forced joinder of the co-owners as necessary parties under the authority of article 644 of the Code of Civil Procedure, the court avoided the increased costs and delays that procedure would entail by rendering a pragmatic judgment which saved added strain on judicial resources. The cases demonstrate the propriety of sidestepping relitigation when a particular case is susceptible of more efficient resolution and serves as a precedent for the application to Louisiana joinder cases of factors outlined in Federal Rule 19(b).

A few cases on compulsory joinder deal with objections that a party already joined is superfluous. In *State v. Ferris,* an expropriation suit, the state on appeal urged that the lessee, awarded payment by the trial court, was not a necessary party to the action; the supreme court noted that the issue was "purely academic" since "the State, having joined the lessee as a party defendant, is hardly in a position to complain." Similarly, in *Vernon Co. v. Adams,* wherein a creditor of a dissolved partnership sued a former partner who filed a third party demand against the others, the court held

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not stand in judgment for the state were the state's title to lands assailed; the state would have to be joined. 244 La. at 319, 153 So. 2d at 377.

To avoid this problem, the court determined that the plaintiffs' petition did not allege ownership except as "collateral to the main demand, which is to remove a cloud on plaintiffs' record title." 244 La. at 522, 153 So. 2d at 378.

Since only the validity of the lease, insular as it clouded record title, was attacked, ownership between the plaintiffs and the defendants would not be decided, and the state need not be joined. 244 La. at 524-28, 153 So. 2d at 379-80.

137. 225 So. 2d at 641.
139. 227 La. at 23-24, 78 So. 2d at 496. Dicta in *State v. Ferris* hints that a lessee may be an indispensable party to an expropriation action, although the court neither specifically considered *City of Shreveport,* see text at note 47, *supra,* nor announced a ruling on the issue.
140. 165 So. 2d 541 (La. App. 1st Cir. 1964).
that the two partners who had contracted upon dissolution to pay the particular debt at issue were indispensable to the proceeding. The partner contractually absolved of liability was "not an indispensable party," but the trial court should not have sustained his exception of no cause of action, because keeping him a party in the suit would eliminate "a multiplicity of suits for determination of indemnification and liability among joint obligors."

Judicial Realism and Lamar: The Importance of Being Earnest

The attempt by the courts to give concrete content to article 641 produced a "hodge podge" of jurisprudence: While the courts in the main evaluated pragmatically the effects of nonjoinder in individual cases, the functional rationale of the decisions was obscured by catchwords or apparently facile classifications which might, as in Roussel v. Noe, be a shorthand for critical analysis, or might, as in Forkner, be a substitute for analysis.

Insofar as Louisiana cases do define which absentees are necessary and which indispensable, the task of sifting through cases to identify criteria for classification is time-consuming and offers numerous opportunities for error. The inefficiency and confusion resulting from the failure of the Code of Civil Procedure to clearly define joinder stands in marked and shabby contrast to the clear articulation of joinder principles outlined in the Federal Rules of Civil Procedure.

The federal system distinguishes clearly "persons to be joined if feasible" under the criteria of Federal Rule 19(a) and absentees

141. Id. at 542-43.
142. Id. at 543.
143. Id. The court cited Code of Civil Procedure articles 642 and 643 for authority for its determination that the former partner, once joined, should not be released until all issues relevant to him were resolved.
144. 274 So. 2d 205 (La. App. 1st Cir. 1973), discussed in the text at note 95, supra.
145. 219 So. 2d 213 (La. App. 1st Cir. 1969), discussed in the text at note 120, supra.
146. The criteria for joinder of "necessary" parties is given in Fed. R. Civ. P. 19(a):
A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
who should be deemed "indispensable" if, after consideration of the criteria of Federal Rule 19(b), a court determines that an action cannot proceed without such persons. Both classes are needed to do complete justice; but a necessary party "may be excused if the court is unable to obtain jurisdiction"—partial justice being preferred to no justice—while the presence of a person deemed indispensable is essential to the suit, which may be dismissed if the court is unable to compensate for the impact of his absence through shaping relief, as suggested in Federal Rule 19(b). The federal system also distinguishes in the pleading of absence of a necessary party and of an indispensable party in Rule 12(h), which allows raising the lack of an indispensable party as late as at trial, but does not afford the same length of time for objecting to lack of a person who should be joined if feasible.

Against the backdrop of Louisiana's jurisprudential confusion and the Federal Rule's clarity, the Louisiana Supreme Court in 1973 decided State Dept. of Highways v. Lamar Advertising Co. of Louisiana, Inc., the most significant pronouncement on compulsory

147. Before finding an absentee "indispensable" a federal court is ordered to consider, under Rule 19(b) the following factors:

First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Rule 19 and Rule 21, allowing a court to order joinder of a party on its own motion at any stage of the proceedings, create broad discretion in the trial court. See Comment, supra note 9, at 887 for a discussion of the court's discretion under these articles prior to the 1966 amendments of the Federal Rules of Civil Procedure.

148. See Reed, supra note 1, at 483-84. Reed's functional analysis of joinder provided impetus for the revision of the federal joinder rules in the 1966 amendments to the Federal Rules of Civil Procedure. The contribution of the Reed article is noted in Lewis, supra note 1.

149. Reed, supra note 1, at 483. Federal joinder cases often entail a dimension uncommon in state court proceedings—joinder of a needed litigant may destroy subject matter jurisdiction in diversity actions. The implications of the problem and its impact on early federal jurisprudence on joinder is treated by Reed, supra note 1, at 517-37.

150. Rule 12(b) of the Federal Rules of Civil Procedure notes that failure to join an indispensable party is not waived if not filed before answer but may be raised as late as trial. The treatment afforded pleading this objection before amendment of Federal Rule 12 in 1966 is discussed in Comment, supra note 9, at 887; Eagleton, supra note 9, at 621-22 suggests that because pleading is not a "game" but a "tool" for keeping a trial as "simple and intelligent" as possible, the trial judge should have the final word on joinder issues in most cases.

151. 279 So. 2d 671 (La. 1973).
joinder since the enactment of the Code of Civil Procedure. The Department of Highways had brought seven separate suits to enjoin the owners of advertising signs from maintaining the signs along the highways; the cases were consolidated, and on appeal the circuit court held that the landowners upon whose lands defendant's signs were posted were indispensable parties to the suit and had remanded for their joinder. Former Justice Tate, writing for the supreme court, used the *Lamar* suit to review the goals of compulsory joinder and, in effect, to adopt the criteria of Federal Rule 19 as the standard for pragmatic analysis under article 641 and 642 of the Louisiana Code of Civil Procedure. Noting that the Louisiana procedural code had adopted the joinder classifications of the original Federal Rules, Justice Tate remarked:

Unfortunately, this new formulation of indispensable and necessary parties has not proven a satisfactory guide for our courts in the cases decided since the adoption of the new code. To the contrary, the rigid application of the terminology by the courts has led to decisions which are apparently more dependent upon the label the court has attached to a particular party than upon the underlying factual basis for labeling a party indispensable, necessary, or merely proper. The court reviewed the procedural consequences which flow from labeling a party indispensable as opposed to necessary and noted that "[t]hese differences in the way the absent party affects the case, and the possible harsh result if the party is ruled indispensable, mandate that such a classification be applied to a party only after the facts clearly establish that no complete and equitable adjudication of the controversy can be made in his absence." Then the court reminded trial and appellate courts that "great care must be exercised to insure a proper factual analysis of the party's interest in the case before a determination of the party's classification is made." Although *Lamar* reached the state supreme court after appellate notice of lack of indispensable parties after trial, the court's instructions apply to decisions on joinder before litigation: The court announced an interpretation of articles 641 and 642 which forbids exclusive focus upon the speculative interests of absentees.

152. 271 So. 2d 49 (La. App. 1st Cir. 1972).
153. 279 So. 2d at 674.
154. *Id.* at 675 (emphasis added).
155. *Id.* at 673-75.
156. *Id.* at 675.
157. *Id.*
The defendants in *Lamar* urged that the absent landowners had a keen interest in the suit because “[t]he signs *may* under the terms of the agreement belong to the landowners rather than the sign-erector defendants” so that sign removal would deprive the landowners of rentals. The supreme court reminded the appellate court of the *res judicata* element of joinder: that absentees are not legally bound by adjudications in which they are not represented. The problem, then, was not that nonjoinder would legally prejudice the absent landowners, but that their nonjoinder might have adverse practical effects upon them (loss of rentals) and, equally important, that the plaintiff Department of Highways might face further litigation in order to remove the signs if the landowners took further action by asserting a claim. But the most vexing aspect of the circuit court’s ruling was that the record reached the supreme court without revealing a factual analysis of these interests, but instead indicated that the court of appeal had based its holding solely upon speculation about the absentees’ interests. The narrow focus upon the landowners’ interests combined with apparent willingness to accept vague speculation upon the extent of that interest prompted the supreme court’s objections:

The court of appeal in effect held that the courts of this state are powerless to adjudicate a controversy between parties properly before the court if such adjudication *may* affect contract rights one of the parties alleges he has with an absent third person. The result of such a rule, if upheld, is to permit skillful counsel by filing conclusory pleadings and by artful argument, to convince a trial judge that property rights of an absent third person *may* be affected and therefore have a plaintiff’s suit delayed or dismissed, without any factual determination whether these contract rights will in fact be affected by the court’s action, or to what extent they will be affected.

158. *Id.* at 674 (emphasis added).
159. *Id.* at 675.
160. No factual analysis of the rights of the parties and absent persons could have been made. Thus, it is difficult to determine how the previous courts arrived at the conclusion that the property rights of the landowners would be detrimentally affected by a judgment ... in the absence of any evidence to support such a conclusion.

*Id.* at 675 (emphasis added). The supreme court’s remarks on the scantiness of the record on joinder issues suggests that if a court finds an absentee indispensable, the finding should be supported by facts and analysis in the record to demonstrate that the finding was the product of a proper analysis, rather than of unthinking classification.

161. *Id.* at 675-76. The echoes of a “jurisdictional” approach to joinder implicit in the reference to judicial impotence highlight the dangers of “pigeonhole” classification.
Furthermore, the landowners in *Lamar* were not the only group of unrepresented persons whose interests *might* have been asserted to thwart the plaintiff’s suit: Even were the landowners joined on remand, the defendant could have raised on yet another appeal the peremptory exception to assert the interests of the defendant’s clients, “the advertisers, whose products or services are advertised on these signboards,”¹⁶² in order to delay further the suit to congest the docket of the trial and appellate courts. This point was raised in *Lamar* to illustrate that the peremptory exception of nonjoinder of an indispensable party is subject to manipulation and abuse. To counter possible abuse, courts need flexibility in treating the exception; and a model of practical flexibility is available, the court noted, in revised Federal Rule 19,¹⁶³ an anecdote to “an overly technical non-functional interpretation of our own Code’s equivalent provision.”¹⁶⁴

The *Lamar* court found that the “unfortunate wording”¹⁶⁵ of articles 641 and 642, with exclusive emphasis upon the absentee’s interests, encourage skimpy and inadequate analysis of joinder questions because “[n]o mention is made of the possible hardship to the parties before the court”¹⁶⁶ if the finding that an indispensable litigant is missing results in “defeat of substantive rights through procedural technicalities,”¹⁶⁷ a result clearly not intended by the Code of Civil Procedure:¹⁶⁸

The defect in our article, if interpreted without regard to the overall purpose of the code, is that . . . [t]he plaintiff may be left without any remedy, although he has a valid legal right and has before the court the person against whom that right should be exercised, merely because a third party also has rights which may be affected by the judgment.¹⁶⁹

Litigants cannot be allowed to convince a court that it is “powerless” unless the impact of nonjoinder would, as a practical matter, render an adjudication meaningless; but whether that would result cannot be determined by examining only the possible interests of absentees without the court’s considering its ability to protect those interests by limiting or conditioning the judgment.

¹⁶². *Id* at 676.
¹⁶³. *Id.* (discussion of the amendment to the federal rule).
¹⁶⁴. *Id.*
¹⁶⁵. *Id.*
¹⁶⁶. *Id.*
¹⁶⁷. *Id.*
¹⁶⁸. Article 5051 of the Code of Civil Procedure commands that: “The articles of this Code are to be construed liberally, and with due regard for the fact that rules of procedure implement the substantive law and are not an end in themselves.”
¹⁶⁹. 279 So. 2d at 677.
Since the goal of joinder under both Louisiana's and the federal procedural schemes is to "prevent injustice" and since the defects of the original federal pattern were cured by the flexible and pragmatic criteria of the amended rule, the Lamar court, without ruling on whether the landowners were indispensable, implicitly adopted the revised federal criteria as the proper interpretation of Louisiana's joinder provisions. The supreme court, moreover, indicated pointedly that the tag of indispensability is to be applied only in extreme circumstances to defeat or delay litigation:

[Parties should be deemed indispensable only when that result is absolutely necessary to protect substantial rights. A close factual analysis of the cases ... reveals that very few absent parties are absolutely indispensable to the litigation before the court. The court, by the shaping of its decree, may be able to avoid any possibility of prejudice to the rights of an absent party and still do justice to the parties before the court.]

The court in Lamar need not have based its interpretation of articles 641 and 642 solely upon analogy to Federal Rule 19. Louisiana jurisprudence, both before and after enactment of the Code of Civil Procedure, in fact considered a wider range of pertinent factors than the wording of the code's joinder articles encompasses. But the court's use of the amended federal rule, in lieu of previous state cases, probably was intentional. The court intended in Lamar to provide criteria to be used in evaluating joinder issues; and though prior cases show a pragmatic approach and balancing of interests, no single case set forth all the various interests which might arise in a given case. If the shortcomings of articles 641 and 642 were to be overcome by a definitive interpretation of joinder's function, the clarity and conciseness of the federal rule was more useful and direct than a recommendation that Louisiana courts re-study previous cases. The Lamar court could not, of course, go so far as to say that articles 641 and 642 are equivalent to Federal Rule 19 or to adopt the Federal Rule in lieu of the Code's by blatant fiat. But the references to the common goals and history of the federal and Louisi-
siana joinder provisions, the praise of the federal rule's express recognition of the scope and variety of concerns joinder addresses, and the clear commands that appellate courts consider the interests of the parties before the court, develop a record to support joinder rulings. And applying the label "indispensable" sparingly leaves little doubt that joinder under the Code of Civil Procedure is to be approached both functionally and frankly.

The fundamental advantage of the federal approach is that it encourages articulation of the balancing test joinder requires. Lamar was a call, not only to pragmatism, but to clarity. Courts are not simply to decide joinder questions, but are to outline the facts and weighing process prompting a particular ruling, to develop an evolving and comprehensive jurisprudence on joinder. The thrust of Lamar was to eliminate the twin evils of labeling: the defect of the analysis in some cases, the obscurity of the rationale in others.

Unfortunately, the tonic Lamar offered to the inconsistent discussions of joinder in Louisiana cases is diluted by the apparent failure of subsequent joinder cases to adhere to the standards Lamar announced. Lamar's command to use sparingly the "indispensable party" label has been ignored in a number of later appellate decisions; equally disappointing is the failure of post-Lamar jurisprudence to articulate the balancing of interests Lamar mandates.

Post-Lamar Cases: The Road Not Taken

The failure of the appellate courts to take Lamar seriously is most apparent in a group of cases involving claims to real property and is reminiscent of Horn v. Skelly Oil Co. Litigation involving expropriation, succession or trust property, or simulation claims focuses upon property within Louisiana and may be likened to in rem proceedings: The relationship between the Louisiana property, the suit, and the parties who own interests in the property is so close that jurisdiction over the interest-owner generally is assured. Louisiana courts traditionally have given staunch protection to such property interest and both judicial efficiency and finality justify so doing. In cases where the interests of those with claims to real

172. 221 La. 628, 60 So. 2d 65 (1952).
176. See the cases discussed in the text at notes 86-96, supra.
property require joinder, Louisiana courts are quick to consider absent interestholders "indispensable" and to mandate their joinder as a condition for maintaining an action. In _in rem_-like proceedings the nature of the subject matter of the litigation is the most crucial joinder factor. However, the continued failure of courts to state the reasons those with interests in immovables or successions and trusts are "indispensable" violates the dictates of _Lamar_.

A recent example of such an action in _Guice v. Modica_., a creditor's action to nullify a debtor's donation of an immovable to his children. The second circuit held the donees to be indispensable parties, basing the ruling upon the obvious interest of the donees in the litigation, which posed a direct threat to their title. Since the suit involved immovable property in Louisiana, joinder of the donees would not involve jurisdictional problems, and the court of appeal remanded for joinder. When the absentees are the present property owners, their joinder is feasible; and if the claim is that they do not in fact own the property, joinder is needed to avoid both prejudice to them and relitigation of ownership between them and the party attacking their title. But more sweeping statements that all parties allegedly involved in simulated sales or that all heirs must join one heir's action to set aside a sale of a decedent's property are not justified in light of _Lamar_'s insistence upon close analysis of the facts of individual cases before a party is determined indispensable.

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177. 337 So. 2d 302 (La. App. 2d Cir. 1976).
178. As owners of the property, the children have an interest in the action that would be directly affected by any judgment rendered in this suit. They should not be subjected to a possible divestiture of their title without being made parties to the suit.

_Id._ at 303.
179. 279 So. 2d at 675. The inadequate articulation of the rationale in _Guice_ is reflected also in _Succession of Terral_, 301 So. 2d 754 (La. App. 2d Cir. 1974), aff'd in part and rev'd in part on other grounds, 312 So. 2d 296 (La. 1975). The Second Circuit Court of Appeal held that heirs, seeking to set aside four acts of sale as simulations or disguised donations, were not entitled to bring a class action; citing article 641 of the Code of Civil Procedure, the appellate court upheld the trial court's determination that six absent heirs were "indispensable parties" in a suit against co-heirs for simulation; no reasoning was offered to support affirmation of the trial court's dismissal of the plaintiff's suit.

Perhaps the second circuit gave short shrift in _Terral_ to the joinder issue because it was subordinate to the plaintiff's request for class action certification.

However, in _Oby v. Flanagan_, 356 So. 2d 1047 (La. App. 1st Cir. 1977), the First Circuit Court of Appeal likewise held all other forced heirs indispensable parties to a son and forced heir's action to set aside as a simulation a sale of land by the deceased father, citing article 641 of the Code of Civil Procedure in lieu of explaining why the presence of the absent heirs were not protected by the plaintiff's assertion of an interest coincidental with theirs.
Succession of Burgess, a forced heir's attack upon a will and trust, presented the Fourth Circuit Court of Appeal an opportunity to explore in detail joinder issues relating to several categories of possible parties; but the decision is disappointing for its failure to use the analysis Lamar suggests. The fourth circuit instead focused upon the declaratory judgment articles and upon article 2931 of the Code of Civil Procedure, treating these provisions as supplying extra rules defining indispensable parties in a declaratory action to attack a will or trust. The court of appeal mandated summarily the joinder of the testamentary executor and trustees and of the usufructuary and beneficiary under the trust. Although the court did not state a rationale for joinder of these parties, the obligation of the trustees to carry out the provisions of the trust instrument and the direct interest of the usufructuary and principle beneficiary of trust income in a suit to alter the duties of the trustees and the income of the beneficiary would suggest that joinder is fair, particularly when, as here, personal jurisdiction poses no problems and joinder is made timely before trial. The appellate court considered more carefully the object of the plaintiff's action and whether in light of his claim the residuary legatees should be called indispensable or necessary parties:

The two children of plaintiff are legatees of the residual estate. Plaintiff's allegations are that the terms of the will have infringed upon his legitime, and he asks that his legitime be computed on

180. 323 So. 2d 914 (La. App. 4th Cir. 1975).
181. The court cited LA. CODE Civ. P. arts. 1871, 1872, & 1874 and found particularly relevant article 1880.
182. LA. CODE Civ. P. art. 2931 provides that:
A probated testament may be annulled only by a direct action brought in the succession proceeding against the legatees, the residuary heir, if any, and the executor, if he has not been discharged. The defendants shall be cited, and the action shall be tried as an ordinary proceeding.
183. If this action was brought directly as an annulment of the probated testament under the provisions of Article 2931, it would be required that the heir proceed against the legatees, then residual heirs and the executor. We perceive no difference in the requirements of this declaratory judgment suit and we hold that the defendants [the trustees, the usufructuary and beneficiary under the trust, and the residuary legatees] meet the requirements of indispensable parties set out in C.C.P. article 641.

184. Article 742 of the Code of Civil Procedure provides that the trustee is the proper defendant in suits to enforce obligations against a trust.
185. "It is further not open to argument that the usufructuary of an heir's legitime and the beneficiary of trust income are indispensable to a suit attacking the validity of the usufruct and the validity of the trust." 323 So. 2d at 918.
a basis other than that proposed in the will and by the executors; he asks that those portions of the will which cause his legitime to bear an undue portion of inheritance taxes, etc., due by other legatees be declared null, and he seeks to declare the residual trust null. Under these circumstances the residual legatees are indispensable and not simply necessarily parties, and the specific legatees other than the plaintiff's father and children, are, more likely than not, indispensable parties.\textsuperscript{186}

Despite its attention to the plaintiff's demands, the court's finding that the residuary legatees and specific legatees were indispensable parties is couched in conclusory terms; the determination in respect to the specific legatees is suspect in light of \textit{Lamar} and of the court's admission that "it really does not appear that those specific legacies could encroach upon the plaintiff's legitime," but that "it is within the realm of possibility, dependent upon the facts, that their specific legacies might be affected."\textsuperscript{187} The court finally based its finding upon the fact that the legitime might be burdened with taxes on the specific legacies and upon article 2931.\textsuperscript{188} But the troublesome aspect of this reasoning is that it is grounded in speculation.

The joinder holdings in \textit{Burgess}, given the similarity of the action to an in \textit{rem} action, are justified under an analytic test: Jurisdiction presented no problem; all the interests asserted hinged upon a single instrument, giving a close factual density to the various interests so that resolution of the issues in one suit is efficient. By resolving the validity of the trust in one proceeding, the court could protect the trustees against inconsistent claims against them. And article 2931, while not controlling, indicates the extent and degree of interest legatees and executors have in the validity of an instrument conferring benefits and duties upon these persons. The problem with \textit{Burgess}, a perennial problem in cases involving property interests, is that the court did not state the reasons joinder should be required and did not by a close account of its reasoning show that in some similar cases joinder of specific or residuary legatees might not be necessary. If, for instance, these persons lived in New York or France, the delay, expense, and inconvenience of requiring their joinder as defendants might outweigh the convenience and tidiness of joinder, since the trustees could represent adequately the interests of the legatees. \textit{Burgess}, then, frustrates the aspects of

\begin{footnotes}
\item[186.] Id.
\item[187.] Id.
\item[188.] Id.
\end{footnotes}
that demand articulation of the balancing involved in joinder determinations and suggests that the treatment of joinder currently afforded by Louisiana's courts yields sweeping and overly broad statements of questionable precedential value.

The most problematical of the post-Lamar cases dealing with interests in immovables is Phillips v. Great Southern Mortgage & Loan Corp.,189 in which a defendant posited simulation as a defense to an action brought by the plaintiff-landowner for illegal seizure of the plaintiff's property. The defendants were a creditor of a former owner of the land and the sheriff, who seized the property at the creditor's behest. The seizure was invalid, and the plaintiff's plea for an injunction and damages would be enforceable unless the creditor could establish that the property passed to the plaintiff as a result of simulated sales.190 The creditor, however, failed to join prior transferors and transferees of the property who were allegedly involved in a simulated sale by the debtor.191 Noting that a creditor attacking a sale as a simulation has the burden to establish that the sale was simulated and operated to his injury,192 the Third Circuit Court of Appeal insisted that the creditor "must join all transferors and transferees to the simulated sale or sales since they are [all] indispensable parties."193 The court reasoned that since it was "absolutely essential" that the absentees be joined to prove simulation, nonjoinder meant that "the issue as to whether or not the sales in question were valid or invalid was not properly before the trial court... and clearly could not be adjudicated by the trial court."194 The court expressly based its grant of an injunction to the plaintiff upon the fact that the creditor failed "to join indispensable parties" to the defense of simulation.195

Several aspects of Phillips are troubling; the third circuit omitted any indication of the balancing of interests required by Lamar and failed to articulate any rationale for holding the absentees in-
dispensable. Moreover, the court's treatment of the effect of non-joinder suggests a jurisdictional theory of joinder: Because the absentees were not present, the creditor's defense was simply not before the court. The appellate court did not remand for joinder but dismissed the alleged defense out of hand. If the court considered the defense frivolous, the decision should have so stated frankly instead of inserting into Louisiana case law a jurisdictional view of joinder discarded by modern theorists and inconsistent with Lamar's demand that courts consider shaping judgments or conditional relief to avoid prejudice to the parties if joinder of needed absentees is impossible.196

The joinder issue in Phillips boils down to a matter of proof. The court of appeal believed that without the absentees, the defendant could not prove the sales simulated. An analysis of the interests of the plaintiff and absentees reveals no reason to consider the transferors and transferees "indispensable" save to prove defendant's claim. The plaintiff's claims were in no way contingent upon action against the absentees, so the plaintiff had no reason to join them initially. If the court were concerned with protecting the absentees, it failed to state that interest, and examination of the absentees' practical interest reveals only the kind of speculative or remote contingency Lamar noted as insufficient to compel joinder.197 The absentees retained no present interest in the property; were the defendant to establish simulation, these persons would be liable to the present plaintiff if he asserted an action in breach of warranty or for rescission. But unless the absentees were parties to the present action, a ruling on simulation would not bind them, and they could assert their defenses in a later action. Only the far-fetched contingency that the plaintiff might lose his land if the defendant established simulation, but might forfeit reimbursement if the breach of warranty or rescission action were defended successfully in a later suit, would justify insisting on the absentees' joinder in Phillips. But the court of appeal did not mention this possibility; nor did it suggest that the plaintiff might have joined its vendor once the simulation defense was raised. Thus the reasons for insisting on joinder were obscure, and the court foreclosed a defendant's establishing simulation should joinder prove impossible.

The question of jurisdiction over the absentees was not raised in Phillips; but the case differs from the usual in rem-like action in that the transferors and transferees retained no present interest in

196. 279 So. 2d at 677.
197. Id. at 676.
the property. In a similar situation the prior property-owners conceivably could have left Louisiana without leaving property relevant or connected to the simulation claim so that joinder would be foreclosed for want of personal jurisdiction over the absentees. In that case, the third circuit's overbroad statements that joinder of transferors and transferees is "absolutely essential" implies that a creditor with a simulation claim would not be allowed to assert it either as a plaintiff or in the Phillips posture, and procedural rules would defeat substantive rights, in violation of both Lamar and article 5051 of the Code of Civil Procedure.

The courts' interest in protecting the prerogatives of administrative agencies in pre-Lamar cases continues to be a concern in contemporary joinder decisions. As noted before, courts will find absentees indispensable to litigation when that finding preserves the rights of administrative agencies, of governmental officials, and of the public interest these entities represent. In Lamar the state supreme court questioned the use of nonjoinder of indispensable parties to defeat an action brought by the State Department of Highways, which represented the public interest. Later cases preserve the tendency to protect administrative and governmental prerogative when the absentee represents the public interest or is a governmental employee whose functions might be inhibited by suits in which he is not represented. Probst v. City of New Orleans was a taxpayer action to nullify a city property tax levy on the New Orleans central business district; the plaintiff, an affected property owner, claimed that the tax upon an artificially designated geographical unit was repugnant to state and federal equal protection guarantees and to the state constitutional right to uniform taxes; he also sought reimbursement for the tax payment he had made under protest. However, the procedure for reimbursement of taxes paid under protest is fixed by statute, and the tax collector is the sole proper defendant to a reimbursement claim; thus the appellate court remanded for the "limited purpose" of joining the tax collector as a

198. See text at notes 106-119, supra.
199. 279 So. 2d 671 (La. 1973).
201. 325 So. 2d at 670.
202. Id.
defendant, allowing him to present his defenses.\footnote{204} The remand was mandated by statute and was necessary if the plaintiff were to obtain the relief he sought because the tax collector, not the city, was the governmental official with authority to repay the tax should the judgment order reimbursement. But the fourth circuit, instead of articulating that joinder was essential to the interests of both the plaintiff and the absentee, concentrated upon the relevant procedural statute and then noted that "the court is powerless" to cast the tax collector in judgment if he is not before the court—an undisputable proposition which does not, however, assist in erasing remnants of a jurisdictional approach to joinder and in replacing them with the pragmatic model \textit{Lamar} urges.

\textit{Lamar}'s command that courts state the reasons for their joinder rulings also was ignored in \textit{Trahan v. Larivee},\footnote{205} another case involving the interests of public officials not joined by the plaintiff. The plaintiffs were a radio station and its general manager, who sued the mayor and city administrative officers for disclosure of the performance evaluation reports of various city department heads. The city filed a separate action for declaratory judgment; the suits were consolidated for trial, but none of the city employees whose performance records were sought were joined as parties, even though the defendants urged that public disclosure would violate the privacy of these individuals.\footnote{206} The Third Circuit Court of Appeal quoted article 641 and without further analysis concluded that "[s]ince the rights of the various city directors are so interrelated and would be affected as a result of this litigation, we feel that these persons are indispensable parties to the proceedings."\footnote{207} Noticing their nonjoinder on its own motion, the appellate court remanded, reversing and setting aside the trial court's judgment. The third circuit's attention apparently was fixed exclusively upon the privacy interests of the absentees, though it is probable that these persons were aware of the suits and apparently had made no effort to intervene, perhaps believing that their interests would be represented adequately by the named defendants, who, in fact, urged the absentees' privacy rights before the appellate court.

Remand for relitigation to compel a trial court to hear essentially repetitive individual defenses and evidence seems patently inefficient in this case; the perfunctory treatment of joinder in \textit{Trahan} im-

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\item \footnote{204} 325 So. 2d at 671.
\item \footnote{205} 359 So. 2d 329 (La. App. 3d Cir. 1978).
\item \footnote{206} Id. at 331.
\item \footnote{207} Id.
\end{itemize}
plies that the appellate court did not consider joinder's goals of avoiding relitigation and of protecting the plaintiff's claim against defeat or undue delay. Possibly, although no analysis in the opinion so indicates, the court was concerned with protecting the defendants from later liability claims from the absentees if the defendants were ordered to disclose the evaluations. However, this interest is speculative and remote and would not under Lamar justify the remand. The court more likely was affording the city employees protection—whether convenient to them or not—reminiscent of the solicitude the judiciary displays for governmental and administrative agencies. But if the joinder ruling was prompted by reluctance to subject city employees to possibly adverse publicity, that rationale should have been disclosed, not disguised by an apparently unthinking application of the "indispensable party" label.

The courts since Lamar have continued to mandate joinder when it will prove the plaintiff's right of action or will define the scope of a defendant's liability or obligations. In so doing, the courts implement the supreme court's reminder in Lamar that joinder involves the interests of the parties, as well as of the absentees. In Tropicana Pools South, Inc. v. Chamberlain the Second Circuit Court of Appeal commanded joinder of an "indispensable" nonresident absentee in order to establish proof of the plaintiff's right of action against the defendant for the amount owed on a written contract for construction of a swimming pool. The plaintiff, suing on the contracts, was not a party to it; the contract was signed by the defendant and by an individual absentee, who the plaintiff claimed had acted as its agent. The absentee's signature on the contract did not establish that he acted in a representative capacity. The trial court had sustained defendant's exception of "no cause of action and no right of action contending that Tropicana Pools South, Inc. was not the 'proper party plaintiff'" because there was no indication that the plaintiff had rights under the contract, though the defendant had admitted that at the time of contracting he though the absentee to be a "representative" of the plaintiff. The trial court had characterized the absentee as a "necessary" party and ordered his joinder, then sustained the defendant's exception when joinder proved impossible because the absentee had left Louisiana. While taking issue with the lower court's nomenclature, the appellate court agreed that "this adjudication undoubtedly would affect Russell's

208. 324 So. 2d 29 (La. App. 2d Cir. 1975).
209. Id. at 31.
210. Id.
COMMENTS

rights under the contract. Since Russell's was the only signature besides the defendant's, Russell should be required to assert or disclaim his rights in and to the contract." The second circuit then discussed articles 644" and 645 of the Code of Civil Procedure, quoting the reporter's comments" to conclude that if the absentee were characterized as "indispensable" instead of "necessary," he would be amenable to service of process through a court-appointed attorney "so that an adjudication can be made rather than thwarted." The court then, predictably, found the absentee indispensable and, likening the subject matter of the litigation (the contract) to a "res before the court," analogized to an in rem attachment to justify appointment of an attorney ad hoc to give the absentee "the constitutional protection required by law and due process." The jurisdictional ploy used by the court in Tropicana is constitutionally precarious since Shaffer v. Heitner" applied the same connexity standards to quasi-in rem jurisdiction as are required for personal jurisdiction; but the use of the legal fiction to support jurisdiction probably was unnecessary under the Lamar test, since the absentee arguably was not indispensable to this suit, which could have proceeded without him. The Tropicana court did not state frankly its reasons for classifying Russell as indispensable, but his joinder was "necessary" only as a means of proving the plaintiff's right to sue on the contract. Proof of the agency relation might have been established through the plaintiff's business records, or the plaintiff might have sued on a theory of unjust enrichment, rather than suing directly upon the contract.

Were the court concerned that the absentee might have rights in the contract which might be slighted in his absence, the court

211. Id. at 31.
212. Article 644 of the Louisiana Code of Civil Procedure provides:

   If an indispensable party, or a necessary party subject to the jurisdiction of the court, who should join as a plaintiff refuses or fails to do so, he may be joined as a defendant and required to assert his rights in the action or be precluded thereafter from asserting them.

213. 324 So. 2d at 31-32, (quoting LA. CODE CIV. P. art. 644).
214. 324 So. 2d at 32.
215. Id.
216. Id.
219. The court of appeal in Tropicana cited Childers v. Police Jury, 9 La. App. 490, 121 So. 248 (2d Cir. 1928), which held that an undisclosed principal can sue directly a person contracting with the principal's agent on the principal's behalf. 324 So. 2d at 32.
could have specified that the judgment rendered by the trial court protect those interests and shield the defendant from possible double liability by providing that the plaintiff obtain a release from the absentee or by stipulating that the plaintiff would defend or satisfy any subsequent claim on the contract that the absentee might press against the defendant. The plaintiff’s interest in compensation for services and the defendant’s interest in the conclusive effect of the judgment could have been served by judicial creativity without a fictitious joinder of a person over whom the court lacked personal jurisdiction and whose actual interest in the contract was doubtful. A modified judgment would afford the absentee more real protection than his representation through an attorney who might be unable to contact Russell or to discover facts to support a claim if the absentee really retained an interest. When the lack of personal jurisdiction over the absentee would foreclose his joinder, a conditional judgment is preferable to fictional representation yielding a judgment subject later to collateral attack on jurisdictional grounds by a person supposedly before the court and therefore “bound” by the adjudication.

An agency-principal relationship between a defendant and an absentee triggered dismissal of a plaintiff’s action for conversion in Reilly v. Houma Body & Fender, Inc.\(^\text{220}\) wherein failure to join the “necessary” principal as a defendant would, according to the trial court and first circuit, have left a sheriff exposed to liability.\(^\text{221}\) The defendant towed the plaintiff’s vehicle upon the sheriff’s orders; the first circuit concluded that the sheriff would be affected by possible liability to the plaintiff, though if the plaintiff recovered his damages from the defendant, the maxim against double recovery should have foreclosed danger to the sheriff on that score. Moreover, the court reasoned, the absentee might be liable to his agent “for any expenses incurred in the execution of its duty.”\(^\text{222}\) Thus the court found the sheriff a necessary party “whose interests can be indirectly affected”\(^\text{223}\) and dismissed the suit when the plaintiff did not amend his petition to join the sheriff.\(^\text{224}\) In light of the uncertainty of

\(^{220}\) 364 So. 2d 201 (La. App. 1st Cir. 1978).

\(^{221}\) The trial judge’s findings establish a principal-agency relationship between the Sheriff and the defendant and based on that determination the applicable general rule is that a principal is liable to third persons for acts committed by the agent while acting within the scope of his authority.

\(^{222}\) Id. at 202 (citing LA. CIV. CODE art. 2380).

\(^{223}\) Id. (citing LA. CIV. CODE art. 3022).

\(^{224}\) Id. at 203.
the indirect effect upon the absentee and the possibility of protecting him with a conditional judgment, dismissal seems a harsh remedy; if the court suspected collusion between the plaintiff and absentee to prejudice the defendant, a factor which would justify dismissal under prior jurisprudence, a statement to that effect would have contributed to needed clarity in developing joinder law.225

One might expect *Lamar*’s influence to be most evident in cases finding joinder not compulsory. But it is impossible to assert with conviction that *Lamar* changed the responses of Louisiana appellate courts to cases dealing with necessary parties. That the courts do not find an absentee indispensable when his interest does not seem to warrant mandatory joinder is not a departure even from the lopsided statutory test of the absentee’s alleged interest of article 642, although *Lamar* may have sparked closer scrutiny of those interests. A realistic, practical assessment of the absentee’s interests is demonstrated in *Lilliedahl & Mitchell, Inc. v. Avoyelles Trust & Savings Bank.*226 The plaintiff-corporation sued a bank to recover proceeds from certificates of deposit, payable to the corporation, which the bank had cancelled at the request of the corporation’s president, who applied the proceeds to reduce his personal debt to the bank. The defendant urged before the Third Circuit Court of Appeal that the succession representative of the deceased president’s

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225. An example of a post-*Lamar* decision compelling joinder of an absentee to elicit evidence needed to protect a party is *Succession of Smith, 359 So. 2d* 234 (La. App. 2d Cir. 1978). The administratrix of a succession filed a tableau of distribution opposed by the decedent’s children of a former marriage. The Second Circuit Court of Appeal upheld the trial court’s ruling that when a contested issue is the existence and validity of a debt allegedly owed to the decedent’s retail corporation, the corporation is an indispensable party to the contest. The Smith decision is similar to the “in rem-like” decisions, wherein the nature of the substantive rights at issue are the determinative factor in a joinder analysis. The corporation’s interest in recovering from the succession justified compulsory joinder when no jurisdictional barrier to joinder existed and when joinder would protect the succession representative against inconsistent obligations to the heirs and the corporation. Moreover, joinder was ordered at the trial level, so the appellate court’s affirmance did not disturb a previous judgment nor delay litigation. The sole flaw in the resolution of the instant joinder issue was the court’s disinclination to state its rationale.

226. An example of insufficient absentee interest to justify joinder is *Travelers Indemnity Co. v. Reserve Insurance Co., 364 So. 2d* 1041 (La. App. 1st Cir. 1978). Citing *Lamar*, the first circuit held that an insured is not an indispensable party to a dispute between a primary insurer and an excess insurer for a declaratory judgment as to which insurer is liable for interest on the excess portion of a judgment against their insured, as “no substantive rights of [the insured] would be affected by either a favorable or unfavorable ruling against Reserve.” *Id.* at 1043.

estate was an indispensable party because "in order for plaintiff to recover, Lilliedahl would have to be found a mismanager of corporate funds, converter, or a breacher of fiduciary duties." Holding that the succession representative was not indispensable, the third circuit, citing Lamar, pointed out that the defendant urging joinder did not show how a judgment would impair the rights of the succession and that the defendant did not raise the exception of nonjoinder of an indispensable party until appealing a judgment for the plaintiff. The absentee's interest in the suit simply was insufficient to support his joinder at the appellate level; the plaintiff was making no claim against the succession, and even if a favorable judgment for the plaintiff implied that the decedent was guilty of conversion, the judgment would not so state and would have no effect against the succession. Other equities militating against joinder, not discussed in the opinion, are the unfair prejudice to the plaintiff with a judgment and the waste of judicial resources in remand when a defendant raises an exception of nonjoinder on appeal merely to delay execution of a judgment.

The remoteness of the interests of a party claiming after intervention to be indispensable was also the basis for the supreme court's determination in In re Succession of Harleaux that the wife and child of a decedent, although beneficiaries of a trust, are not indispensable parties to an action by a law firm to collect attorney's fees from the trust. Burgess can be distinguished because the plaintiff sought disbursement of trust funds but did not assert a claim touching the validity or property interests set out in the trust itself. The supreme court noted that in deciding which persons are indispensable to a suit against a trust, article 641 of the Code of Civil Procedure must be read in conjunction with article 742 and with the provisions of the Trust Code which stipulate that one duty of a trustee is "to defend actions that may result in a loss to the trust estate." The supreme court concluded that these statutes make it clear "that the only indispensable party to a suit against a trust is the trustee."
Just as Louisiana courts traditionally have required joinder of governmental entities to protect public interests, the judiciary excuses these bodies from participation in litigation when their interest is remote or nonexistent. Decisions since Lamar illustrating this principle stress the absentee’s disinterest. In State v. Ward\(^\text{238}\) the state instituted a possessory action against the heirs of the donor of a wildlife refuge and the corporate lessees of oil and gas leases granted by the heirs. The defendants converted the possessory action into a petitory action by claiming ownership of the property.\(^\text{239}\) The state then raised the exception of nonjoinder of the Wildlife and Fisheries Commission, as successor to the alleged donee;\(^\text{240}\) the appellate court upheld the trial court’s ruling that the Commission merely managed the tract and that the state as owner was the sole defendant needed in the petitory action.\(^\text{241}\) An interesting joinder question involving whether a city was an indispensable party to a breach of contract action by a subdivision owner against a street contractor and its liability insurer and against an engineering firm was presented in Howard Building Centre, Inc. v. Hale.\(^\text{242}\) The defendants claimed that the City of Waldo, Arkansas, owned the streets, alleging that the streets were dedicated to the city. The appellate court found the claim to be “without merit” because insufficiently supported by proof\(^\text{243}\) and gave the joinder exception no further consideration. The issue of dedication probably would have been governed by Arkansas property law, and the defendants apparently did not develop the contention with proof of either facts or Arkansas law; the court was justified in refusing to mandate joinder of an Arkansas city upon mere allegation of interest. The second circuit also may have opined that even if the city owned the streets, it might have an action against the plaintiff for defects; or the court simply might have decided that the plaintiff, as a matter of obligations law, had an action against the defendants regardless of present ownership of the streets. Also, jurisdictional barriers militated against requiring joinder in this case.\(^\text{244}\)

\(^{238}\) 314 So. 2d 383 (La. App. 3d Cir.), writ refused, 319 So. 2d 440 (1975).
\(^{239}\) LA. CODE Civ. P. art. 3657.
\(^{240}\) At the time of the donation, the Board of Commissioners for the Protection of Birds, Fish, and Game served the functions of the present Wildlife and Fisheries Commission. 314 So. 2d at 388.
\(^{239}\) Id. at 388-89.
\(^{240}\) 309 So. 2d 384 (La. App. 2d Cir. 1975).
\(^{241}\) Id. at 386.
\(^{242}\) When an absentee’s interest in litigation is insufficient to require his joinder, the joinder issues may be resolved by reference to substantive law indicating his lack.
An approach similar to *Hayward v. Noel's*243 was used by the Third Circuit Court of Appeal in *Jardell v. Sabine Irrigation Co., Inc.*,244 which shows judicial ingenuity in shaping a judgment to avoid joinder. The plaintiff was a farm lessee who sued an irrigation company for breach of a contract to irrigate the plaintiff's rice crop, for damages from flooding his soybeans, and for bonus payments under a program instituted by the defendant. The defendant evoked a statute allocating crops in sharecropping leases between lessors and lessees245 to argue that the lessor was an indispensable party. The third circuit instead designated the lessors as necessary parties with “separable” interests because the plaintiff abandoned his claims for damages to the part of the crop that the lessor owned and because the trial court was able to shield the defendant from double liability by calculating damages to allow “defendant a credit equal to the portion of the crop designated as rent for the landowners.”246 The pragmatic damage calculation insulated the absent landowners from possible prejudice while serving the legitimate interests of the parties. The appellate court also preserved the trial court’s judgment, thus conserving judicial resources, by designating the absentees merely necessary parties and noting that by failure to raise timely the dilatory exception of nonjoinder of necessary parties the defendant had “waived its right to compel joinder of the landowners.”247

A survey of the cases after *Lamar* shows that the supreme court’s attempt to rephrase Louisiana’s joinder law has had little appreciable effect.248 Louisiana courts still weigh the interests of the

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244. 346 So. 2d 1365 (La. App. 3d Cir. 1977).
245. LA. R.S. 9:3204 (1950) declares that “[i]n a lease of land for part of the crop, that part which the lessor is to receive is considered at all times the property of the lessor.”
246. 346 So. 2d at 1369.
247. *Id.*
absentee, the parties, and the public in making joinder rulings in most cases; but joinder decisions are explained in terms of the narrow and rigid classifications of articles 641 and 642 of the Code of Civil Procedure, with their exclusive emphasis upon the interests of the absentee. Insofar as Lamar described openly and frankly the joinder factors considered by courts even before enactment of the Code of Civil Procedure, Lamar's lack of impact on later cases can be explained as a reflection of the fact that Louisiana's judiciary always has considered a variety of interests in making joinder rulings.

But if Lamar was intended to correct the unbalanced classifications of articles 641 and 642 by reinterpretating those articles, enabling the courts to refer to the federal criteria as a vehicle for honest explanation of joinder decisions and to reflect that joinder is inherently a matter of balancing, the post-Lamar jurisprudence is disappointing. The cases indicate that Lamar's influence is not sufficient to overcome the narrow terminology of the Code of Civil Procedure. Neither clarity, consistency, nor frankness is served by decisions which cloak the pragmatic weighing process in terms of "direct effect" and "separable" interests of absentees, to the exclusion of clear and forthright consideration of the parties' and the courts' interests in joinder questions. The decisions after Lamar show clearly, if regrettably, that the supreme court's attempt to clarify Louisiana's joinder law has failed. Apparently nothing short of statutory change, replacing articles 641 and 642 with a provision closely tracking revised Federal Rule 19, will persuade the judiciary to explain joinder in such a way as to make comprehensible and rational this area of Louisiana's procedural law.

Specialized Joinder Provisions: Thirteen Ways of Looking at a Blackbird

The confusion in Louisiana joinder law created by the deceptive terminology of articles 641 and 642 is compounded by the disjointed fashion in which other provisions on compulsory joinder are scattered throughout the Code of Civil Procedure. The general joinder chapter is followed by chapters on "Parties Plaintiff" and on "Parties Defendant" intended to consolidate prior rules contained in the Civil Code, the Code of Practice, the Revised Statutes, and the

250. LA. CODE Civ. P. arts. 731-43.
jurisprudence. These chapters denominate persons with sufficient interest and capacity to sue or be sued and serve the same purpose as Federal Rule 17, but attempt to specify precisely which persons have sufficient authority to represent incompetents or entities such as a partnership, a succession, or a labor union.

The chapter on "Parties Plaintiff" does not purport to establish joinder rules. The fundamental principle of the chapter is stated in article 681: "Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." The remaining articles in the chapter either identify such persons specifically or designate representatives for incompetents or legal entities or associations.

However, articles 697 and 698, treating subrogation and assignment, apparently create joinder rules: When an entire right is subrogated or assigned, the subrogee or assignee is the proper person to enforce the right. But partial subrogations and partial assignments require joinder of both subrogor and subrogee, or assignor and assignee, in a suit to enforce the claim.

252. Rule 17(a) of the Federal Rules of Civil Procedure states: "Every action shall be prosecuted in the name of the real party in interest."
253. Article 687 of the Code of Civil Procedure provides that a person who does business under a trade name shall sue in his own name to enforce rights arising from the business; article 688 specifies that a partnership has procedural capacity to enforce its rights and appears through an authorized partner; article 689 grants procedural capacity to unincorporated associations, which appear through an authorized officer; articles 690 and 691 recognize that domestic and foreign corporations and insurers who are not in receivership have capacity to sue in the corporate name.
254. Code of Civil Procedure article 683 designates the representatives of minors' interests, while article 684 treats representatives of mental incompetents.

Article 685 designates the succession representative as the proper party to enforce succession rights; article 686, as amended in 1979, provides that either spouse may sue during the existence of the community to enforce a community right, but that the other spouse is a "necessary party" whom the court may order joined if nonjoinder could result in injustice to the absent spouse; article 692 designates the receiver or liquidator of a corporation or partnership as the proper party to enforce corporate or partnership rights; article 693 makes the same provision as to a domestic insurer, while providing that a Louisiana court-appointed ancillary receiver or liquidator is the proper party to enforce rights of a nonresident insurer; article 699 designates the trustee as the proper plaintiff to sue on behalf of an express trust. Article 700 creates a presumption of authority in a designated representative, which may be challenged by a dilatory exception.
255. LA. CODE CIV. P. art. 697 provides that:

An incorporeal right to which a person has been subrogated, either conventionally or by effect of law, shall be enforced judicially by:
Most of the cases interpreting these articles address whether, in the case of a total assignment or subrogation, the assignor or subrogor retains sufficient interest to bring suit as a plaintiff and thus to preserve his assignee's or subrogee's claim from extinction by prescription.\textsuperscript{[66]} \textit{LaFleur v. National Health & Life Insurance Co.},\textsuperscript{[67]} purportedly treated a total assignment of medical benefits on a health policy to a hospital and an attending physician. The defendant insurer claimed that under article 698 the insured lacked a right of action because the assignees were the proper plaintiffs or, alternatively, that the assignees were indispensable parties.\textsuperscript{[68]} The court found that the plaintiff was a proper party by questioning whether the assignment was, in effect, "entire enough" to deprive the insured of all practical interest in the insurance proceeds.\textsuperscript{[69]} Then, noting that the purpose of the subrogation and assignment articles is to protect defendants "against the harassment of multiple suits on the same obligation,"\textsuperscript{[70]} the court required a remand for joinder of the assignees, whom it termed "indispensable."\textsuperscript{[71]} However, the court also con-

(1) The subrogor and the subrogee, when the subrogation is partial; or
(2) The subrogee, when the entire right is subrogated.

Article 698 makes substantially the same provision as to total and partial assignments. \textsuperscript{256} \textit{Younger v. American Radiator & Standard Sanitary Corp.}, 193 So. 2d 798 (La. App. 3d Cir.), writ refused, 250 La. 366, 195 So. 2d 644 (1967), held that a fully compensated insured lacked interest in the subrogated claim of his insurer against a manufacturer for losses caused by a boiler explosion; the insured thus was not a proper plaintiff to sue on the claim. But \textit{Carl Heck Engineers, Inc. v. Daigle}, 219 So. 2d 294 (La. App. 1st Cir. 1969) suggests that if the subrogor and subrogee by contract stipulate that the subrogor will sue the debtor and hold in trust the recovery for the subrogee, the subrogor properly may sue as agent of the subrogee. The decision is discussed in \textit{Tate, supra} note 25, at 293.

\textsuperscript{257} 185 So. 2d 838 (La. App. 3d Cir. 1966). The court considered the effect upon the plaintiff of the trial court's dismissal of the suit: The assignment, though apparently entire, might be proved by other evidence to have been only partial, in which case the insured, to collect benefits due him, would have to file a later suit after the assignees brought their claim; or later agreements between the insured and assignees could change the assignment's effect, so that even a suit by the assignees would "be subject to dismissal upon a similar technical defense." Since dismissal risked a multiplicity of suits and prejudice to the plaintiff, and since the defendant's rights would be protected adequately by a remand for joinder of the assignees, the court of appeal refused to uphold the exception of no right of action and reversed the dismissal of the action. \textit{Id.}

\textsuperscript{258} Id. at 840.
\textsuperscript{259} Id. at 841-42.
\textsuperscript{260} Id. at 841 (quoting \textit{LA. CODE CIV. P.} art 644, comment (c)).
\textsuperscript{261} Id. at 841. In \textit{LaFleur} the appellate court balanced the interests of the plaintiff, the defendant, and the judicial system and used the remand for joinder to preserve the plaintiff's claim. The decision illustrates the weighing process needed to resolve which parties belong in a single action and also indicates that the same factors which govern joinder in the cases decided under the general joinder articles are decisive for articles
sidered comment (d) to article 698, which states: "If the defendant fails to object timely to the nonjoinder of a necessary party, in a case of partial assignment, the objection is waived and the court may make an adjudication." The comment indicates that while articles 697 and 698 mandate joinder in cases involving partial subrogations or assignments, the articles designate necessary, as opposed to indispensable, parties. Certainly a court could shape its judgment to insure that the claimant in a given case received only his share of the debt owed by an obligor, though joinder analysis under articles 697 and 698 requires the same attention to particular facts and circumstances that are controlling in other joinder cases, and thus whether articles 697 and 698 denominate necessary or indispensable parties cannot be settled meaningfully in the abstract.

The chapter treating "Parties Defendant" requires joinder of the specified representatives or entities: Persons lacking capacity to be sued are represented by a tutor or a curator and, in the absence of these, by a court-appointed attorney.

Substantially the same rules govern parties defendant as parties

697 and 698. The remand from the appellate level suggests that the joinder rules for partial assignments or subrogations generally will have the same procedural impact as the rules on indispensable parties, given the keen interest of obligors and absentees with contractual rights in the litigation.

262. LA. CODE CIV. P. art. 732.

263. LA. CODE CIV. P. art. 733.

264. The need for representation of an unemancipated minor has been recognized since Ashbey v. Ashbey, 41 La. Ann. 138, 5 So. 546 (1889), which noted that a tutor whose interests are adverse to the minors' cannot represent them in suits on the conflicting interest. The proper circumstances for judicial appointment of an attorney to represent a minor's interests were discussed in Redd v. Bohannon, 166 So. 2d 362 (La. App. 3d Cir. 1964), wherein an unemancipated minor stationed for military service in Louisiana, with nonresident parents, was sued for damages to an automobile. Even though the minor hired an attorney to represent him after suit was instituted, the third circuit noted that the named defendant lacked procedural capacity; but the trial court should have responded to the dilatory exception of lack of procedural capacity by allowing the plaintiff to amend his petition to seek appointment of an attorney to represent the minor, rather than by dismissing the action. However, the parent, tutor, or attorney needed to protect the minor is not always treated as an indispensable party; if a minor without procedural capacity is sued and an exception to his lack of capacity is not raised before answer, the exception is waived, and the suit may proceed.

The Redd decision was cited in Davis v. Bankston, 192 So. 2d 614 (La. App. 3d Cir. 1966), as the basis for ruling that when a mother, apparently not qualified as tutrix, sues on behalf of her child and when the defendant asserts a reconventional demand, that demand cannot be made against the plaintiff unless an attorney is appointed by the court to represent the minor. Id. at 619.

See also Nicosia v. Guillory, 322 So. 2d 129 (La. 1975).
The clarity of the provisions designating proper defendants accounts for the paucity of recent jurisprudence interpreting them. The recent amendment of article 735 and enactment of article 743 to correspond with the revision of the community property laws may present interesting problems in identification of a "managing spouse" with respect to a particular community obligation; article 735 also gives a trial court discretion to order on its own motion the joinder of the absent spouse to a suit to enforce an obligation against community property. The provision is puzzling—although "either spouse" is the proper defendant to an action against community property, the other is a "necessary party"—and suggests

265. A succession representative is the proper defendant to an action against a succession under administration, and heirs and legatees need not be joined. LA. CODE CIV. P. arts. 734, 920(6). The rule that the succession representative is the sole necessary defendant in an action against a succession was established by Pauline v. Hubert, 14 La. Ann. 161 (1859), a suit by a slave included in the succession inventory to establish that she was freed. The supreme court reasoned that the heirs may not have accepted the succession and that since the administrator represents both heirs and creditors, he is able to protect the rights of all persons interested in the succession's effects. See also, Veith v. Meyer, 168 La. 453, 117 So. 552 (1928).

A trustee is the proper defendant to any action enforcing an obligation against a trust. LA. CODE CIV. P. art. 742. Succession of Burgess, discussed in the text at notes 180-87, supra, suggests that if the trust's validity is attacked, the beneficiaries of the trust income are indispensable.

Corporations and insurers, domestic and foreign, can be sued in the corporate name, LA. CODE CIV. P. art. 739, unless they are in receivership or liquidation, in which case the receiver is the proper representative of the defendant. LA. CODE CIV. P. art. 740. The provision also applies to partnerships.

Article 740 was intended to overrule legislatively Winn v. Veal-Winn Company's Receiver, 16 La. App. 323, 134 So. 264 (2d Cir. 1931) by eliminating the rule that judicial permission was required to sue a receiver. The Winn decision, however, established an exception: A receiver who defends the suit without objection was deemed to have waived the objection to lack of judicial consent. 16 La. App. at 326, 134 So. at 266. Accord, Anding v. Texas & P. Ry. Co., 158 La. 412, 104 So. 190 (1925) which applied criteria similar to that of Federal Rule of Civil Procedure 15(c).

266. LA. CODE CIV. P. art. 735, as amended in 1979, provides:

Either spouse is the proper defendant, during the existence of the marital community, in an action to enforce an obligation against community property; however, if one spouse is the managing spouse with respect to the obligation sought to be enforced against the community property, then that spouse is the proper defendant in an action to enforce the obligation.

When only one spouse is sued to enforce an obligation against community property, the other spouse is a necessary party. Where the failure to join the other spouse may result in an injustice to that spouse, the trial court may order the joinder of that spouse on its own motion.

267. Code of Civil Procedure article 743 makes the other spouse the proper defendant to a suit against community property if the managing spouse is an absentee or mental incompetent.
that, as one is proper and the other necessary, a plaintiff who wishes to avoid delay in decision of a claim against community property should join both spouses as a practical matter.

An unincorporated association, such as a church or labor union, has procedural capacity to be sued in its own name under article 738, although the members may be sued jointly on an association obligation.

The rule that during the existence of a partnership suit must be brought against the partnership, and not against individual members, is firmly embedded in Louisiana jurisprudence and codified in article 737 of the Code of Civil Procedure. Some of the older cases reflected confusion as to whether the individual partners could be sued in solido with the partnership before its dissolution. Later decisions address whether a partnership is an "indispensable" party in suits to enforce or defend partnership obligations.

A partnership was held indispensable to a reconventional demand to cancel a lease executed by the partnership in *Foster v.*

268. LA. CODE Civ. P. art. 738.

269. In *Squire v. Polk*, 153 So. 504 (La. App. Orl. Cir. 1934), a pastor was not allowed to single out seventeen members of the congregation and to sue them for a debt allegedly owed him. Under former LA. R.S. 13:3471 (1918), he should have sued the association through service on a managing officer.

The rule was evaded in *Douglas Public Serv. Corp. v. Gaspard*, 225 La. 972, 74 So. 2d 182 (1954), a strike case in which the supreme court allowed suit against only a portion of the union membership because the plaintiff did not name the union as a defendant, but merely sued twenty-one striking individuals and then prayed for joinder of all persons acting in concert with them. 225 La. at 979, 74 So. 2d at 184-85. Article 738 apparently ratifies this procedure, as well as upholding the ruling in *Godchaux Sugars, Inc. v. Chaisson*, 227 La. 146, 78 So. 2d 673 (1955), that a union may be named and cited through its officers.

270. *Key v. Box*, 14 La. Ann. 497 (1859). The rule was stated in article 165 of the Code of Practice; the *Key v. Box* court created an exception to the general rule when a Louisiana creditor attached property of a member of a foreign partnership, even though the debt was a debt of a nonresident individual partner. Id. at 497.

The general rule was upheld in *E.B. Hayes Mach. Co. v. Eastham*, 147 La. 347, 84 So. 898 (1920), which held that article 2892 of the Civil Code, holding partners solidarily liable for the debts of a commercial partnership, did not apply to give a cause of action against an individual partner until the partnership is dissolved. 147 La. at 352, 84 So. at 900.

271. See, e.g., *First Nat'l Bank in Gibsland v. Knighton Bros.*, 16 La. App. 407, 134 So. 706 (2d Cir. 1931), which held that individual partners could be joined as solidary obligors with their commercial partnership. But in *Rheuark v. Terminal Mud & Chem. Co.*, 213 La. 732, 35 So. 2d 592 (1948), the state supreme court held that the solidary liability established by Civil Code article 2872 "does not become enforceable against the individual members . . . separately and apart from the firm until it has been dissolved." 213 La. at 737, 35 So. 2d at 594.
Stewart, a partner sued to enjoin the partnership's lessor from violating the lease terms. The original plaintiff did not answer the defendant's reconventional demand, and the defendant took a default judgment against the partner for cancellation of the lease and for $5,000 damages. The lessor claimed that the plaintiff's procedural error in instituting suit in his own name, instead of in the name of the partnership, and his failure as defendant to the reconventional demand to assert nonjoinder of the partnership should estop his assertion of nonjoinder in challenging the default judgment. The first circuit, however, excused the partner's omissions by finding the copies of the lease annexed to the original petition sufficient notice to the defendant that the plaintiff had sued on behalf of the partnership; pointing out that the lessor had failed to object to nonjoinder of the partnership, the court shrugged off the parties' mutual accusations of procedural default and focused on the interest of the absent partnership in its lease. Finding the partnership an indispensable party whose nonjoinder could be noticed on appeal, the court set aside the trial court's denial of a new trial.

Given the farcical scenario with which it was confronted, the first circuit's exclusive focus upon the absentee's interests—and upon the impact of the default judgment upon those interests—was probably proper.

However, it should be noted that the specific "rules" of the Code of Civil Procedure designating particular plaintiffs and defendants are keyed to a basically relational concept of interest. Though the Code presumes a high degree of interest in the designated parties, that interest should not invite reflex application of the specific articles. Comment (c) to article 697 and comment (d) to article 698, indicating that in cases of partial subrogation and assignment nonjoinder of a necessary party is waivable and that the plaintiff may recover his share of the claim, is reminiscent of Federal Rule 19(b)'

272. 161 So. 2d 334 (La. App. 1st Cir. 1964).
273. Id. at 336.
274. Id. at 336-37. The court remarked (patiently) that "[A]ppellant's error in instituting action in his own name was no more grievous than appellee's failure to except to appellant's want of interest." Id. at 337.
275. Delta Motors is an indispensable party to these proceedings considering its contractual rights . . . would be so vitally affected by the outcome of this litigation that complete and equitable adjudication of the present controversy cannot be made unless the partnership is joined herein. Id.
shaping of the judgment to avoid dismissal in the absence of a needed party. The principle suggests that the Code of Civil Procedure contemplates the modern federal remedy; and if that remedy is required in cases involving partial subrogations or assignments, its practical benefit should be extended to all cases in which partial relief might preserve a valid legal claim while protecting a defendant from inconsistent obligations. The provision also serves as a reminder that joinder involves concrete, practical considerations which vary according to particular facts. Thus, even the tidiest rules should bend in light of analysis of facts in specific cases in which the principles underlying joinder should control conclusions as to whether a party—partner, assignee, spouse—is indispensable or necessary or proper in a given action.

The provisions discussed previously—the general joinder articles and joinder of designated parties—address compulsory joinder in the traditional sense—that is, whether a missing litigant is so essential to adjudication of a suit that his presence is either necessary or indispensable. In more limited situations, the Code of Civil Procedure contemplates "compulsory"-joinder in a different sense: allowing joinder so that the "absentee" can protect his own interests, even though the parties before the court are not required to join him. When property is seized by a judgment creditor and is about to be sold at a judicial sale, article 1092 allows intervention by a third person claiming ownership or a mortgage or privilege on the property to assert his claim before the sale or disbursement of the proceeds. Although the language of article 1092 is permissive, allowing intervention of right, timely intervention often is a practical necessity for preservation of the intervener's interests in seized property.

If the third person claims ownership, he must intervene before the sale, and the court may enjoin the sale pending decision of his ownership claim; although failure to intervene to assert ownership

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Wagner v. Newman, 18 La. Ann. 508, 511 (1865) established the rule that under article 401 of the Code of Practice, a third opponent asserting a privilege could proceed against the sheriff and seizing creditor without having first obtained a judgment against the debtor and without requiring his joinder to the opposition. The rule was changed by article 1093 of the Code of Civil Procedure, which requires joinder of all parties to the principal action in the intervention.

278. LA. CODE CIV. P. art. 1092. The intervenor's petition is served on the sheriff and on all parties to the judicial sale, and citation is not necessary. LA. CODE CIV. P. art. 1093.
does not give conclusive effect to the judicial sale and deprive the actual owner of his property rights, intervention will protect the owner from the need to litigate in a later action a cloud on his title or the adverse claims of purchasers. A third person claiming a mortgage or privilege must intervene before the sheriff distributes the sale proceeds; the court can order the sheriff to hold the proceeds pending resolution of ranking issues. And if intervention is made before the sale, the court can order a separate appraisal or sale of the property.

If the claimant holds a superior mortgage or privilege on an immovable or a chattel mortgage recorded on the public records and covering the entire property to be sold, intervention is not essential to preserve his privilege: The property passes to the buyer encumbered with the superior privilege made effective by recordation. But intervention is advisable to facilitate the distribution of proceeds and to regulate the respective rights of the superior privilege holder and the buyer, particularly if the mortgage or privilege has matured and is in default. An inferior lienholder should intervene to enforce his claim against proceeds remaining after the seizing creditor’s judgment is satisfied. If the inferior lien covers only part of the property to be sold in a “lump sale,” it is imperative that intervention be filed before the sale so that a court can order a separate appraisal of the property to calculate the proportion of the proceeds attributable to the property covered by the lien.

In Caldwell v. Laurel Grove Co. an intervener who claimed a prior privilege from an attachment of part of the debtor’s property was denied a preference because he did not intervene before the judicial sale under a writ of fieri facias in time to obtain a separate ap-

279. LA. CODE Civ. P. art. 2371. See also LA. CODE Civ. P. art. 2298.
280. LA. CODE Civ. P. art. 1092.
281. Id.
282. LA. CODE Civ. P. arts. 2372, 2374.
283. LA. CODE Civ. P. art. 1092, comment (b).
284. An attempt to regulate the effect of a seizure and sale after disbursement has been made is, obviously, wholly ineffectual. The supreme court apparently was shocked by such a claim by an inferior privilege holder in Payne, Dameron, supra note 277, commenting:

How the plaintiffs in this extraordinary proceeding expect ‘to regulate the effect of a seizure in what relates to them’ or their junior mortgage, eighteen months after the seizure has been released, the sale consummated, and the funds distributed, we can not imagine.
praisal. The rationale for denying the preference bottomed upon sheer practical necessity:

It has been the uniform jurisprudence of this court that an intervener or opponent who claims or is entitled to a preference on only part of the property under seizure must demand a separate sale of such property or at least a separate appraisement. The reason is that without such separate sale or appraisement it is impossible to determine the proportionate share of the proceeds to which such intervener is entitled.

Although Caldwell was decided before enactment of the Code of Civil Procedure, the practical need for separate appraisal to enforce a privilege on part of seized property remains unchanged. The lienholder must join in the judicial sale by timely intervention, and the sanction for failure to do so is loss of the privilege on the property. Likewise, an inferior privilege on movables is lost after a judicial sale unless the privilege-holder joins the sale before distribution of the proceeds; if the privilege covers only part of the property, intervention must precede the sale to be effective. Article 1092 allows joinder of a judicial sale without prejudicing the claimant’s right to attack the validity of the seizing creditor’s claim and thus overrules legislatively early decisions imposing an inefficient estoppel principle whose sole effect was to require two suits when one could have served to vindicate both claims of the intervener.

286. 179 La. at 55, 153 So. at 18.
287. LA. CODE CIV. P. art. 1092.
288. In Albert Pick & Co. v. Stringer, 171 La. 131, 129 So. 731 (1930), an intervener with chattel mortgages on movables in a building about to be sold sought a temporary restraining order against seizure and sale of the real estate and movables. The intervener acquired his mortgage after executory process issued. The supreme court held that “an opposition will not lie where the opponent attacks the validity of the judgment or mortgage and in the same action claims to be paid by preference out of the proceeds realized from the sale of the property.” 171 La. at 141, 129 So. at 735.

That rule was applied in Eddy v. Weathers, 16 La. App. 634, 134 So. 259 (Orl. Cir. 1931), wherein a mortgage-creditor sued a defendant on a note which was secured by real estate, livestock, and trucks. An intervenor claiming a vendor’s privilege on cattle intervened before the sale to attack the validity of the creditor’s mortgage and to claim a preference on the sale proceeds. The court refused to let the intervenor attack the mortgage by intervention before the sale “because the intervenor went into that proceeding and acquiesced in the sale under the act of mortgage, merely claiming that he was entitled to the proceeds by priority over the mortgage creditor.” 16 La. App. at 636, 134 So. at 260.

Although the court’s reasoning in these cases may have a technical consistency, no practical reason exists for insisting that the lienholder institute a separate suit before intervention to attack the creditor’s mortgage. Even if the sale were stayed pending resolution of the validity attack, common sense and judicial efficiency support article 1092’s elimination of a rule which produces only duplicative litigation and delay.
Occasionally, the requirement that a lienholder intervene to protect his security clashes with jurisdictional amount limitations on subject matter jurisdiction in courts of limited jurisdiction. In *Sam-I-Baker Corp. v. Magendie* a plaintiff sued in city court and seized under fieri facias an automobile; another party claimed ownership of the vehicle and sought mandamus in the district court to compel the city court to enjoin execution of the creditor's judgment. The district court denied the injunction because the value of the automobile exceeded the $300 jurisdictional amount limitation on the city court. The Louisiana Supreme Court held that "when the value of the property seized under a writ from a court of limited jurisdiction, is beyond the jurisdiction of that court, an injunction may be obtained by one claiming its ownership from a court having jurisdiction of the amount involved." The court in dicta also announced that when a plaintiff is prevented by the amount of his claim from litigating his rank and privilege *vis-à-vis* other creditors in a court of limited jurisdiction, the intervener may "compel his adversary to come into a higher court to litigate their claims."

Joinder by intervention required by article 1092 is mandated by practical needs to regulate the effects of a judicial sale; even when intervention is not essential to preservation of a claimant's interest, a single proceeding is the most efficient way to effectuate the interests of the seizing creditor, other lienholders or persons claiming ownership, and the buyer of property sold. Because joinder under article 1092 is intended to protect the interests of the third person, he must initiate intervention, and it is he, and not the other parties, who bears the onus of failure to join his claim timely.

Article 1092 creates intervention of right in limited circumstances; whether intervention of right is otherwise available in Louisiana's procedural system is an open question. The criteria for permissive intervention in Louisiana are purportedly established in article 1091 of the Code of Civil Procedure, which states, "A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto. . . ." The article, however, does not define what *degree* of relation or connection is sufficient to justify intervention. Comment (b) to article 1091 states categorically that Federal Rule 24's concepts of "intervention of right" and "permissive intervention" "are not suitable for implementing the substantive law of a civil law jurisdiction," presumably

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289. 157 La. 643, 102 So. 821 (1925).
290. 157 La. at 645, 102 So. at 822.
291. *Id.*
because "the test of 'a question of law or fact in common' of the federal permissive intervention is much too narrow and inflexible to define the traditional function of intervention in the procedure of civilian jurisdictions." The reporter's comments do not explain why civilian substantive law and federal intervention are incompatible. It is difficult to believe that the intervention permitted by article 1091 is really broader and more flexible than federal intervention, given the restrictive traditional Louisiana test:

[T]he interest required to authorize intervention must be a direct one by which the intervenor is to obtain immediate gain or suffer immediate loss by the judgment which may be rendered between the original parties. The interest must be closely connected with the object in dispute and founded on some right, lien, or claim, either conventional or legal.

The restrictive application of article 1091 is illustrated in Resor v. Mouton, which refused to allow a building owner to intervene in a tort suit between two drivers who had injured his property on the grounds that the would-be intervener "had no interest in the main demand and therefore had no right to intervene." Since the "object" of the building owner's attempted intervention was "to recover his own damages," he did not "seek to enforce a right related to or connected" with the parties' liability claims against one another, although the fourth circuit indicated that consolidation of a separate suit by the intervener with the original suit might be proper to avoid a multiplicity of actions. That suggestion indicates that the consolidation standard of "involving a common issue of law or fact" outlined in article 1561 is broader than the intervention standard of connexity, despite the claim of 1091's comments that Louisiana intervention is broader than the federal model. The close factual relationship between the intervener's claim and the parties' tort is obvious in Resor, and the decision can only be read to mean that even permissive intervention is often unavailable in Louisiana, as more
than a factual link between the intervener's claim and the object of the main suit is required.

The imprecision and "double talk" of Louisiana's intervention standard is highlighted in a subsequent statement by the reporter responsible for the comments to article 1091:

Obviously in Louisiana, such a rule [allowing intervention] must be broader than either the "community of interest" required for the cumulation of actions by or against plural parties, or the "interests affected by the judgment" which determines necessary or indispensable parties. Yet, to prevent interference with the administration of justice by intermeddlers and rank interlopers, the privilege of intervening must be restricted to those who have some action. 299

It does not make sense to say that intervention in Louisiana is "broader" than the community of interest required for cumulation of parties, which does not require a juridical connexity among parties, and then to posit as a requirement for intervention "some juridical interest." If the statement means anything, it means that the standards for intervention under article 1091 are indefinite and defy rational definition. Given the uncertainty of statutory standards in the Code of Civil Procedure, statements which claim that Louisiana does not need federal intervention of right are suspect, particularly when no reason is given for denial of that useful procedural device.

Moreover, Louisiana may have intervention of right already, at least obliquely, even in cases beyond the scope of article 1092. An interesting joinder decision by the First Circuit Court of Appeal is Gulf Federal Savings & Loan Association v. Sehrt, 301 which uses "indispensable party" terminology to create a device like intervention of right. The plaintiff brought an action for declaratory judgment that a state statute authorizing the State Banking Commissioner to approve state bank branches was unconstitutional. The state bank grantees attempted timely to intervene, but the trial court dismissed their claims. Remanding on other issues, the first circuit stated that "each of these intervenors had already received approvals from the Commissioner and several had commenced operations thereunder. Their interventions should not have been dismissed because they

300. See, e.g., Gill v. City of Lake Charles, 119 La. 17, 43 So. 897 (1907).
301. 233 So. 2d 288 (La. App. 1st Cir. 1970).
are indispensable parties, who possess rights that are now sought to be materially affected." Given the keen interest of the state banks in the litigation and the diligence with which they asserted their claims, the appellate court's ruling is reasonable and fair. The lack of an explicit device for intervention of right in Louisiana can be supplied by finding an intervener "indispensable" or "necessary." If a party's interests in an action and his relation to it are such that he would be indispensable under the Lamar multi-factored joinder test, a court should have required his joinder and can at least be responsive enough to his interests to permit him to protect them; and if a person would be necessary under the tests of Federal Rule 19(a) that Lamar extends to article 632, his intervention also should be allowed of right, as he is a party who "should be joined if feasible" for full adjudication.

The close parallels in the federal system between Rule 19(a) criteria and the criteria established by Federal Rule 24(a) for intervention of right suggest that compulsory joinder is an appropriate vehicle for filling this gap in the Louisiana procedural scheme; as indicated in Sehrt, a finding that a person has enough interest to require his joinder has the same effect as allowing intervention of right and serves both fairness and judicial efficiency.

The conditions under which addition of claims or parties to a suit is permitted in Louisiana is covered by the chapter of the Code of Civil Procedure dealing with “Cumulation of Actions.” Article 463 provides that a party may add litigants to a pending suit if:

1. There is a community of interest between the parties joined; 
2. Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and 
3. All of the actions cumulated are mutually consistent and employ the same form of procedure.

302. Id. at 271.
303. No jurisdictional problems can arise in a state court proceeding when the court has general jurisdiction and when the party asks to join a pending action.
304. Federal Rule of Civil Procedure 24(a) states in pertinent part that:

Upon timely application anyone shall be permitted to intervene in an action: . . .
(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This language is substantially similar to language addressing the absentee's interest in Rule 19(a) and is compatible with La. Code Civ. P. art. 641.
In most instances, joinder by a defendant of a third person who may be liable for all or part of the plaintiff's claim is permissive and is governed by the general rules on cumulation, with the exception that a third party defendant properly impleaded cannot object to venue if it is proper in the main demand. The sole exception to the general rule is article 1113, which compels a defendant to join the third person if joinder is necessary to preserve the third person's defenses:

A defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not on that account lose his right or cause of action against such person, unless the latter proves that he had means of defeating the action which were not used, because the defendant either failed to bring him in as a third party defendant, or neglected to apprise him that the suit had been brought. The same rule obtains with respect to a defendant in reconvention who fails to bring in as a third party defendant a person who is liable to him for all or part of the reconventional demand.

The compulsory joinder requirement of article 1113 is unusual; it has no immediate procedural impact upon the main action between the plaintiff and defendant, and the person who should have been joined must establish in a later action that the original defendant's failure to join has prejudiced the third party's defenses. To do so the omitted person must prove that he had defenses to the plaintiff's claim which were not used and that the defendant not only did not join the third party, but also did not inform him of the suit so that he could intervene to protect his own interests.

In *Trinity Universal Insurance Co. v. Good* a surety sued to recover from the defendants under an indemnity contract; the Fourth Circuit Court of Appeal held that the defendants could not defeat the surety's claim by complaining of his failure to join them in the prior action against the surety, for which indemnification now was claimed, because the defendants were notified of the suit six weeks before judgment and therefore had ample time in which to in-
tervene. The defendants also failed to prove that they could have defeated the action against the surety.\textsuperscript{311}

The nonjoined absentee has the burden of proof to show that he should have been a third party defendant in an earlier action, because joinder under article 1113 is designed to protect solely the interests of the absentee; the plaintiff with a valid claim against a defendant need not concern himself with joining a person who may owe the defendant a portion of the plaintiff's claim. The defendant, who could protect himself by joining the absentee, is not required to do so in order to protect his own interests; he can institute a later suit to enforce his claims against the absentee.\textsuperscript{312} But if joinder would protect the absentee, the defendant must join the third party if he can prove prejudice from nonjoinder.

Moreover, the "mandatory" joinder of the absentee to protect his defenses will not be allowed when the third party demand would disrupt orderly disposition of the main suit. In \textit{Commercial National

\begin{footnotes}
\item[311] 202 So. 2d at 384. In \textit{Futch v. Nolden}, 221 So. 2d 351 (La. App. 4th Cir. 1969), a suit to recover from a solidary co-obligor the payments the plaintiff made to settle a prior suit, the defendant claimed that the plaintiff had abandoned his claim by failing to join the defendant to the suit. The fourth circuit noted that article 1113 "makes it clear that a litigant does not lose his cause or right of action by failing to bring a third-party action against a party who may be liable to him, unless that party can prove he had the means of defeating the action at the time the principal demand was made." Id. at 352.

\item[312] The limited recovery against a third party defendant granted by article 1111 encourages the defendant not to bring the third party demand if he also has non-indemnification claims to press against the absentee. As written, the article allows the defendant to recover only all or part of the amount owed to the plaintiff. And Louisiana does not have an article permitting cross claim. \textit{Beneficial Fin. Co. of New Orleans v. Bienemy}, 244 So. 2d 275 (La. App. 4th Cir. 1971) upheld a restrictive interpretation of article 1111, ruling that a defendant can seek only reimbursement and not his own damages by way of a third party demand.

However, in \textit{Travelers Ins. Co. v. Sonnier}, 344 So. 2d 73 (La. App. 4th Cir. 1977) the fourth circuit expressly overruled \textit{Bienemy} and reasoned that if a defendant properly impleads a third party, the question of which claims can be pressed against the third party is to be governed by the cumulation articles.

The Louisiana Supreme Court has not ruled expressly on whether a defendant may assert his own damage claims, in addition to an indemnification claim, against a third party defendant when the claims are closely related. However, its holding in \textit{Avegno v. Byrd}, 377 So. 2d 268 (La. 1979), that objection to the use of a third party demand to assert a defendant's claims for his own damages against a third party defendant was untimely if not made before the case is submitted for decision hints that the supreme court may approve combination of an article 1111 third party demand with cumulation under article 462 to create a cross claim, a procedure which would serve the interests of both the parties and the judiciary in economy.
\end{footnotes}
Bank of Shreveport v. Calk a contractor sought to defend a bank’s suit on a negotiable instrument by joining a machinery dealer who sold the defendant allegedly defective equipment; the trial court refused to allow joinder of the dealer because he could not be located, and a continuance would delay the bank’s suit. The court of appeal affirmed and “out of an abundance of precaution” expressly reserved the defendant’s right to proceed later against the dealer. The court’s balancing of the absentee’s possible interests in joinder against the interests of the parties and of the court in efficient dispatch of the claim suggests that the traditional factors influencing joinder are pertinent even to this specialized form of joinder which stresses the interests of the nonjoined person.

A claim that the limited joinder requirements of article 1113 of the procedural code are supplemented by a requirement in article 2103 of the Civil Code that might require joinder whenever contribution rights among solidary obligors arise was treated in Thomas v. W & W Clarklift, Inc. and rejected by the state supreme court. The case involved an employee’s suit against the seller of a used forklift and its insurer for injuries the employee sustained on his employer’s premises. The defendant made a third party demand against the employer’s supervisory personnel for negligence and sought contribution. The trial court dismissed the third party demands; at issue was whether the defendant’s contribution claim had prescribed. The supreme court cited article 2103 of the Civil Code as allowing assertion of a contribution claim by a defendant through a third party demand, but noted that the provision does not require assertion of the contribution claim in the main action. The court reasoned that a defendant’s right to contribution does not arise until the plaintiff gets a judgment against the defendant, so prescription cannot begin to run until the defendant is cast as a tortfeasor. The court’s use of article 1113 of the Code of Civil Procedure to support its holding on the prescription issue did not discuss the aspects of the procedural article designed to protect the absentee, and the decision does not mean that joinder in the main action would not have been required had the third party defendant shown prejudice from nonjoinder or lack of notice of the main action. The relationship of article 2103 of the Civil Code to article 1113 of the

313. 207 So. 2d 578 (La. App. 3d Cir. 1968).
314. 375 So. 2d 375 (La. 1979).
315. LA. CIV. CODE art. 2103.
316. 375 So. 2d at 378. The court cited article 1113 as authority for the defendant’s right to bring a later action against the employer’s personnel.
Code of Civil Procedure also was considered in *Emmons v. Agricultural Insurance Co.* The defendant and his insurer did not bring a third party demand in the trial court against allegedly solidary co-tortfeasors; at issue on appeal was whether the defendant could appeal against the co-defendant without third party demand on the trial level. In creating a third party demand at the appellate level for solidary obligors, the supreme court relied in part upon article 2068 of the Code of Civil Procedure, but stressed too the discretionary, permissive aspect of article 2103 of the Civil Code and noted that "[t]here is no penalty" for failure to seek contribution through a third party demand. *Emmons* and *Thomas* indicate that Civil Code article 2103 will not be engrafted upon the procedural code to mandate joinder for all contribution claims among solidary obligors and that article 1113 will remain a device available to compel joinder only in limited factual situations.

The protection afforded an absentee under article 1113 requires joinder only when failure to join would frustrate the absentee's defense. Even when joinder is required solely to protect the absentee, the *Commercial Bank* decision shows that the absentee's interests still must be balanced against the interests of the present parties and of the court in convenience and efficiency before joinder is in fact mandatory.

**Concluding Unscientific Postscript**

Review of Louisiana jurisprudence and legislation on compulsory joinder reveals no interests peculiar to Louisiana's legal system which are not within the general scope of joinder goals in all procedural systems: fairness to the absentee, the litigants, and the court. What is revealed, however, is that the statutes intended to provide criteria for resolving joinder issues in Louisiana are at once vague and narrow, keyed exclusively to the outdated and lopsided test of the absentee's interests. The effort by the Louisiana Supreme Court in *Lamar* to correct the defects of the Code of Civil Procedure's general joinder articles has been largely ignored by subsequent cases, so that the inconsistency, reflex decisions, and

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318. LA. CODE CIV. P. art. 2086 provides: "A person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken." The *Emmons* court noted that the "right [of appeal] is extended not only to the parties to the suit . . . but also to a third party when such third party is allegedly aggrieved by the judgment." 245 La. at 425, 158 So. 2d at 599.
obscurity of joinder rulings condemned by the supreme court continues unabated.

The confusion created by rigid and impractical formulas in articles 641 and 642 is compounded by the Code of Civil Procedure's "shotgun" approach to other specific joinder questions, treating them in scattered provisions which suggest rigid, isolated rules which also fail to state the varied interests joinder addresses. The pragmatic concerns which prompted formulation of joinder principles in the first place have become replaced with incomplete formulas which overlook facts by substituting labels. Since judicial reformulation of principles has been, regrettably, unsuccessful, it seems that only legislative reformulation can resolve rationally and practically Louisiana's joinder dilemma.

Articles 641 and 642 should be replaced with a provision patterned closely upon Federal Rule 19, stating clearly the factors courts must consider in deciding joinder questions. Jurisprudence based upon the present Code articles must be recognized as having little precedential value—not only because the cases are too often scanty in offering reasons for their rulings, but also because the very nature of joinder mandates that the facts of particular cases control. And insofar as specific joinder rules such as articles 697, 698, 1092, and 1113 are retained, they should be modified to incorporate at least by reference the flexible criteria of the federal rule. Nothing short of a clear understanding by both bench and bar that joinder is a practical and not a doctrinaire device can ensure rational joinder decisions in particular suits. Joinder should be used only to promote the principles that spawned it. And a legislative mandate should command the attention of the courts and their officers, sparking careful evaluation of the diverse interests to be addressed functionally when an interested party is omitted from a suit.

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