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Compulsory Joinder of Parties in Texas

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"What's a necessary party?"

The White Knight rolled his eyes. "A necessary party," he intoned, "is a party that is necessary."

Alice thought for a moment. "Then both of us can be sued in El Paso if they can't sue one of us without suing the other?"

"Not *that* necessary. A necessary party need not be indispensable."

"Then how necessary is necessary?" Alice persisted.

"A necessary party is one without whom complete relief can't be granted. That's simple enough!" said the White Knight, severely.

Guittard, *Alice in Venue Land*†

I. Introduction

Few procedural subjects have proved knottier than compulsory joinder of parties in civil litigation. The purpose of this article is to review the principles of compulsory joinder in Texas in an effort to demonstrate how they developed and how they have been modified. This development may be conveniently, although somewhat arbitrarily, divided into four parts: (1) the influence of the common law and the principles of equity jurisprudence upon principles of compulsory joinder of parties in Texas; (2) the effect of Texas case law prior to the promulgation of the Texas Rules of Civil Procedure in 1941; (3) the interpretation of Rule 39 of the Texas Rules of Civil Procedure as it was initially promulgated in 1941; and (4) the impact of the 1971 amendment to Rule 39 as interpreted by current Texas case law.

II. The Influence of Common Law Principles and Equity Jurisprudence

Section 13 of the judiciary article (art. IV) of the Constitution of 1836 directed the Congress of the Republic of Texas to introduce the common law of England "with such modifications as our circumstances, in their judgment, may require," in the Republic of Texas.[1] Thereafter the First Congress of the Republic enacted the following law at its first session:

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† 10 Trial Law. F. 3, 3 (Apr.-June 1976).

1. 1 H. Gammel, Laws of Texas 1074 (1898).

> The common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practiced by the courts of this republic, so far as the same may not be inconsistent with this act, or any other law passed by this congress.[2]

Similarly, on January 20, 1840, the Fourth Congress of the Republic passed "An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws, and to Regulate Marital Rights of Parties."[3] This act repealed all laws enacted prior to the adoption of the constitution of the Republic; the common law of England, the Texas constitution, and the statutes passed by the Congress of the Republic were then substituted for prior law. The passage of "An Act To Regulate Proceedings in Civil Suits" on February 5, 1840, made it clear, however, that the adoption of the common law in Texas did not include the adoption of the common law system of pleadings.[4] Moreover, section 12 of the Civil Practice Act specified that both law and equity were to be administered by the same court in the same cause and that Texas would have a combined system of law and equity as well as a simplified system of pleading.[5] Texas appears to have been one of the first jurisdictions to abolish law and equity as separate judicial systems.[6] The decision to blend the systems of law and equity undoubtedly left many questions unanswered. As the following paragraphs will indicate, the law courts viewed the subject of compulsory joinder of parties differently than the courts in equity and, to the extent that the two views were inconsistent, the inconsistencies were not resolved by the simple expedient of combining proceedings in one tribunal. One of the principal theses of this article is that a failure to reconcile disparate ideas on compulsory joinder, either at the time the two systems were combined or any time thereafter, has caused much of the difficulty which has confronted

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2. Tex. Laws 1836, An Act Organizing the Inferior Courts, and Defining the Powers and Jurisdiction of the Same § 41, at 156-57, *reprinted in* 1 H. GAMMEL, LAWS OF TEXAS 1216-17 (1898).

3. J. TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS 85 (2d ed. 1913).

4. Tex. Laws 1840, An Act To Regulate Proceedings in Civil Suits 88-93, *reprinted in* 2 H. GAMMEL, LAWS OF TEXAS 262-67 (1898).

5. Although the exact nature of this system of pleading is beyond the scope of this article, its object was to simplify as much as possible

> that branch of the proceedings in courts, which, by the ingenuity and learning of both common and civil law lawyers and judges, has become so refined in its subtleties as to substitute in many instances the shadow for the substance. Our statute requires, at the hands of the petitioner to a court of justice only a statement of the names of the parties plaintiff and defendant, a full and fair exposition of his cause of action, and finally the relief which he asks.

Hamilton v. Black, Dallam 586, 587 (Tex. 1844). *See* McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24 (1959).

6. J. TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS 90 (2d ed. 1913).

the bench and bar in the context of compulsory joinder in Texas and elsewhere.

In the 1847 *case of Coles v. Kelsey*,[7] the supreme court noticed a

> most striking similarity in our forms to the English bill and answer in chancery, so much so as to leave no doubt of their kindred origin. They are both derived from the Roman law, out of which grew up the civil law, which now prevails all over continental Europe with various modifications; ours came to us through the laws of Spain. Judge Story says that equity pleadings were borrowed from the civil law, or from this canon law, which is a derivative from the civil law, or from both. Hence at almost every step, we may now trace coincidences in the pleadings and practice in a Roman suit.[8]

This remarkable quotation indicates the use of Justice Story's popular works on equity pleadings in Texas. His analysis has been severely criticized as lacking in depth and comprehension and as perpetuating erroneous concepts of compulsory joinder premised upon the view that principles of compulsory joinder constitute a branch of the law of subject matter jurisdiction.[9] However, an examination of his *Commentaries on Equity Pleadings* reveals that the following concepts governed the subject of compulsory joinder of parties in courts of equity.

> The rights of no man shall be finally decided in a court of justice, unless he himself is present, or at least unless he has had a full opportunity to appear and vindicate his rights. . . .
>
> All persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs, or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all . . .
>
> Only persons who have an interest in the object of the suit as opposed to the subject matter of the suit are ordinarily required to be made parties. . . .
>
> If a Court of Equity can dispose of the merits of a case before it without prejudice to the rights or interests of other persons, who are not parties, or if the circumstances of the case render the application of the [general] rule wholly impracticable, [*e.g.*, when one absent person cannot be reached by process], the general rule will not be applied to defeat the very purposes of justice because the rule is one of convenience and policy. But, "if complete justice between the parties before the Court cannot be done without other parties being made, whose rights or interests will be prejudiced by the decree, then the Court will altogether stay its proceedings, even though those other parties cannot be brought before the Court; for in such cases the Court will not, by its endeavors to do justice between the parties before it, risk the

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7. 2 Tex. 542 (1847).
8. *Id.* at 552-53.
9. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1287 (1961). Refer to notes 84 & 86 *infra*.

> doing of positive injustice to other parties, not before it, whose claims are or may be equally meritorious."
>
> If the proper parties are not made, the defendant may demur to the bill; or take the objection by way of plea or answer; or . . . , when the cause comes on for hearing, he may object, that the proper parties are wanting; or the court itself may state the objection, and refuse to proceed to make a decree; or, if the decree is made, it may, for this very defect, be reversed on a rehearing, or on an appeal; or if it not be reversed, yet it will bind none but the parties to the suit, and those claiming under him.[10]

In substance, the general equity rule was that all persons interested in the object of a suit should be joined as parties. If they refuse to join voluntarily, they should be served with process and made defendants. Joinder of all persons interested in the outcome of the litigation will permit a court to completely resolve the conflict and, consequently, avoid a multiplicity of suits. Similarly, all persons who may be affected by the litigation should be joined unless they are beyond the jurisdiction of the court, because the court will insist upon doing complete justice between the parties over whom it has jurisdiction. However, since a nonparty will not be bound by any decree entered, the court will proceed only if the rights of the nonparty will not be prejudiced by the judgment. Therefore, the question is whether the court can enter a decree in the absence of the nonparty which will be effective to resolve the controversy with respect to the parties before it.

In conventional terms all persons interested in the subject of the action are proper parties who should be joined so that a multiplicity of suits may be avoided. All persons who claim an interest in the object of the suit are parties without whom the court will not proceed unless it is impracticable to join them because they are outside of the court's jurisdiction or are too numerous for joinder. If they cannot practicably be joined, the court should review the object of the suit to see whether a decree can be rendered which will be effectual between the parties before the court. If so, the court should proceed. If any decree entered could be undone in a subsequent action instituted by a nonparty, the court should not proceed.

Criticism of Justice Story is based upon the view that since a decree has no res judicata effect upon a nonparty, there is no risk to the nonparty if the court proceeds to adjudicate the dispute in his absence. Professor Hazard's influential article[11] rejects the argument that a decree which is not binding in the sense of res judicata may have an effect upon the

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10. J. STORY, COMMENTARIES ON EQUITY PLEADINGS 87-88 (5th ed.°1852). *See also* F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 1-18 (1st ed. 1837).

11. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1287 (1961). Refer to notes 84 & 86 *infra*.

interests of a nonjoined person.[12] Assuming, however, that Justice Story's principles are somewhat contradictory in this regard, it must be noted that he was aware that proceeding in the absence of an interested person might be a meaningless adventure because of the inability to bind the nonjoined person. If no decree could be rendered except one which necessarily "affected" the interest of the nonjoined person when the object of the suit is considered, and if the decree could not preclude him from instituting a subsequent action that would undo all that was accomplished in the suit to which he was not a party, what is the sense of proceeding in his absence in the first place? In short, the second linchpin of Justice Story's conceptual framework is much harder to criticize. It is not contradictory and, as will be seen in the context of modern Texas cases, the only answer to it is that a court does not know whether the absent person's interest will be affected at all until the suit has proceeded in his absence. Therefore, we do not know whether the absent person will be interested in undoing the litigation result in the first case until it is concluded.

Justice Story also noted a significant distinction between proceedings in the courts of law and courts of equity. "In general, courts of law require no more than that all persons directly and immediately interested in the subject matter of the suit and whose interests are of a strictly legal nature should be parties to it."[13] This distinction between law and equity must be kept in mind because the joinder principles enunciated by Justice Story did not apply in the law courts, where the matter was thought of in an entirely different way.

It may confidently be stated that the law courts based their principles of compulsory joinder upon a determination of the nature of the substantive legal interest.[14] At law, once the legal interest was identified, the question of joinder of parties was resolved. The difference between joint, joint and several, and several rights was rigidly insisted upon.[15]

> Joint contracts are those in which the parties are jointly and collectively bound to perform the duties or are entitled collectively to enjoy the rights resulting from the contract. The extent of the liability of each joint obligor is as great as if he alone were bound for its performance, but his contract does not bind him to perform

12. Although Professor Hazard recognizes that an absent person may be factually prejudiced by actions of the parties in accordance with a judgment which cannot be res judicata as to the nonjoined person, he contends that practical impairment is not a sufficient reason for a court to fail to proceed. *Id.* at 1288 n.183.

13. J. STORY, COMMENTARIES ON EQUITY PLEADINGS 92 (5th ed. 1852).

14. *See* J. CHITTY, A TREATISE ON THE PARTIES TO ACTIONS AND ON PLEADINGS 2 (9th Am. ed. 1844).

15. J. TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS 280 (2d ed. 1913).

his undertaking singly, but only in connection with all his co-obligors.[16]

The preoccupation with the exact nature of the legal interest in the law courts is philosophically distinct from the principles enunciated by Justice Story. As will be seen, however, both played a role in the development of the law of compulsory joinder of parties in Texas, and both are with us today even if we sometimes fail to recognize them.

III. Early Texas Authority

Early Texas cases reflect the influence of common law principles of compulsory joinder as well as equitable concepts of joinder derived from the works of Justice Story. The following paragraphs discuss the impact of common law and equity principles and the development of the concept of fundamental error.

Holliman v. Rogers[17] contains a heavy dose of common law reasoning while at the same time giving consideration to when the absence of an interested person should be raised. The action was instituted to collect two promissory notes executed by Holliman, O'Neil, and Grace in favor of one Frank or bearer. Rogers instituted the action against the defendant Holliman and did not name either O'Neil or Grace as parties defendant. The defendant pleaded that the real interest in the notes sued upon was in Grace, his coworker, who, according to the defendant's allegations and evidence, had paid the notes and against whom the defendant claimed a setoff. The defendant did not, however, file a plea in abatement. The question thus raised was whether the defendant's evidence that Grace was the real party in interest should have been admitted in the absence of a plea in abatement. The court states the following general rules:

> Should it be said that a defect of parties can only be taken advantage of by plea in abatement, the answer is that the general rule that exceptions to parties should be taken advantage of by a plea in abatement, giving to the party a better writ, is subject to exceptions; and one of these exceptions is that a defendant may take advantage of such defect in a party plaintiff on the trial, if it should appear from the evidence although not pleaded. Not so, however, as to want of proper parties defendant. This the defendant must show by his plea and give the names of the parties that should have been joined with him. If, however, the evidence

16. *Id.* Townes gives this example:

> That is—if A, B and C are joint obligees in an undertaking, and this is not performed, A can not sue on it, nor can A and B, but A, B, and C must sue jointly, because performance is not due to A, nor to A and B but to A, B, and C; and no number less than all can enforce the undertaking. The same rule applies at common law to the obligors.

Id.

17. 6 Tex. 91 (1851).

> went to show that the plaintiff in the suit had not merely presented his right defectively, *but that he had no right at all, in any form of presentation, it would seem that it* [evidence that the right belonged solely to another] *was admissible under the plea in bar.*[18]

The court held that since the excluded testimony demonstrated that Grace paid the notes as the security of the defendant Holliman, Grace and not Rogers was the proper party plaintiff. If Grace had paid off the notes they were extinguished by the payment, and "[t]he right of action would have been founded upon an implied *assumpsit* . . . [which was not] assignable."[19] Thus if Holliman could prove that Grace had paid the notes, he would show that Rogers had no right at all in any form of presentation and, therefore, no plea in abatement would be necessary. If, however, the defect in parties consisted of a want of proper parties defendant, the court stated that a plea in abatement is necessary.

The next case of importance is *Anderson v. Chandler.*[20] Chief Justice Hemphill there concluded that a coobligor on an obligation could not take advantage of the omission by the plaintiff of his coobligor except by plea in abatement unless it should appear from the face of the petition that the coobligor was living (an unlikely allegation). The reasoning of the chief justice is especially noteworthy: "[D]efendants ought not to be permitted to lie by and put plaintiffs to the delay and expense of a trial, and then [after losing] set up a plea not founded upon the merits of the case, but upon the form of the proceeding."[21]

Therefore, the absence of a coobligor could not be raised for the first time on appeal unless the plaintiff himself raised the coobligor's absence by affirmative allegation. Since the plaintiff could readily avoid the allegation that the coobligor was living, the defendant had to raise the matter prior to appeal as a practical matter. Both *Holliman* and *Anderson* focus upon the nature of the legal interest in formulating principles of joinder.

Somewhat later, the influence of Justice Story's popular works on equity pleading[22] are manifested in *Buffalo Bayou Ship Channel Co. v. Bruly.*[23] This was a partition suit in which the court held that no final and binding decree of partition can be made, even as between the parties before the court, unless all persons claiming an interest in the property to be partitioned are joined, "for at any time the owner of the other interest may sue for partition."[24] *Bruly* was followed in *De La Vega v. League,*[25] which stated the equitable principle that a court "will not make a decree

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18. *Id.* at 97-98 (emphasis added).
19. *Id.* at 97.
20. 18 Tex. 436 (1857).
21. *Id.* at 440, *citing* Rice v. Shute, 98 Eng. Rep. 374, 375 (K.B. 1770).
22. J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 72 (8th ed. 1870).
23. 45 Tex. 6 (1876).
24. *Id.* at 8.
25. 64 Tex. 205 (1885).

when it is apparent that it cannot definitely settle the rights of the parties or make a final disposition of the subject of litigation."[26]

Both *Bruly* and *De La Vega* suggest, however, that the principle was thought of in practical terms. Courts will not enter decrees which are ineffectual or inadequate under their reasoning. Since one who is not a party could not be bound by the decree, it is impractical to enter a decree which he may subsequently attack. The point made is vintage Story in that courts should not waste their time and not that they lacked jurisdiction to adjudicate disputes between the parties before them. However, in *Ebell v. Bursinger*[27] suit was brought to cancel a deed, procured by threats and intimidation, conveying certain land in trust for the benefit of a third person who was not named as a party defendant. Judgment was entered by default. The defendant trustee moved for a new trial on the ground that the beneficiary had not been joined. The court held that the *cestui que trust* was a necessary party and that the trustee could object to the nonjoinder of the beneficiary after default.[28] The case can be analyzed by noting that the law of trusts which developed in the courts of equity recognized the interest of a beneficiary and required that all actions brought against the trustee by the settlor to recover trust property necessitate the joinder of all beneficiaries unless they are too numerous for joinder. Although the interest was not a joint one in the sense that the law courts considered joint obligees on a contract to enforce rights together "joint," the principle is roughly equivalent. The rule may be properly considered a reaction to the law court's refusal to recognize beneficial interests altogether. Similarly, the equitable interest of the beneficiary would not be foreclosed by the judgment against the trustee.[29] Therefore, a successful attack upon the judgment awarding recovery of the trust property to the settlor or grantor would render the judgment nugatory.

Hanner v. Summerhill[30] is the most significant compulsory joinder case to be decided before the promulgation of the Texas Rules of Civil Procedure in 1941, and its importance requires detailed consideration. The litigation arose out of a sale of land by James Park to Horace Summerhill for a sum of $10,000 to be paid in three installments. Park reserved a vendor's lien upon the land sold as security for the payment of the purchase price. When Summerhill failed to make the third payment, Park instituted an action to recover the installment and obtained a judgment. Summerhill obtained an injunction to enjoin execution of the judgment. Park died and his suit was renewed in the name of his personal representatives, resulting in the

26. *Id.* at 212.
27. 70 Tex. 120 (1888).
28. *Id.* at 123.
29. *But see* Mason v. Mason, 366 S.W.2d 552, 554 (Tex. 1963) (doctrine of virtual representation applied in absence of conflict between the *cestuis que trust* and the trustee).
30. 26 S.W. 906 (Tex. Civ. App. 1894, writ ref'd).

injunction being dissolved. Under Park's will, J.P. Hanner was named executor. Park willed all his money "or money arising to me" to his wife, Mrs. Park, and J.P. Hanner's wife, and all lands to J.P. Hanner.

Thereafter, Mr. and Mrs. Hanner sued for recovery of the land or the purchase price in the alternative. At trial, the claim for the purchase money was abandoned and J.P. Hanner's claim to the land was the basis of a judgment against the defendants. When this judgment was appealed,[31] the supreme court held that the right to rescind the sale had been waived by the suit for the purchase money; that J.P. Hanner had no right to recover the purchase money; that the claim for the purchase money belonged to Mrs. Hanner and Mrs. Park and, that "[b]y making Mrs. Park a party plaintiff . . . the appellees may proceed to enforce their claim for the purchase money."[32]

When the case was remanded, Mrs. Park was not joined, and a verdict was directed for the defendants. Upon appeal, the decision of the trial court was affirmed because

> [a]s the allegations of plaintiffs' petition, after the abandonment of their claim for the purchase money, only constituted a claim for the land, and the supreme court having decided that they could not recover the land, there was nothing upon which a verdict for the plaintiff could be based, and it was the duty of the trial court to direct a verdict for the defendants.[33]

Despite this conclusion, the court of civil appeals went on to consider whether Mrs. Park was a necessary party. In this connection, the court of civil appeals also stated that "Mrs. Hanner could not recover . . . unless Mrs. Park was made a party. . . ."[34]

> We think it is well settled that, in actions upon joint contracts, all persons in whom the right of action exists must be made parties thereto; and the failure to make them such will prove fatal to the right to recover, whether the defendant pleads such want of parties in abatement or not. The failure to make the necessary parties plaintiff to an action on a joint contract will be considered on appeal by this court if brought to its notice, whether the defendant pleads the want of parties below or not, as it is fundamental error.[35]

In support of its conclusion, the court of civil appeals cited *Holliman v. Rogers*[36] and *Stachely v. Pierce*,[37] which held that "[j]oint creditors whether by record, specialty, or simple contract, must all join in an action

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31. Summerhill v. Hanner, 72 Tex. 224, 9 S.W. 881 (1888).
32. 9 S.W. at 885.
33. Hanner v. Summerhill, 26 S.W. 906, 907 (Tex. Civ. App. 1894, writ ref'd).
34. *Id.* at 908.
35. *Id.*
36. 6 Tex. 91 (1851).
37. 28 Tex. 328 (1866).

to recover the debt or the estate which they respectively hold together."[38] The approach taken by the court of civil appeals in *Hanner v. Summerhill* reflects the influence of the common law principles of joinder. The identification of the legal interest as joint determined the necessity of joining Mrs. Park as a party. Mrs. Hanner had no interest without Mrs. Park's joinder. Therefore a directed verdict was proper. Equity principles of complete relief played no role in the conclusion that persons having joint rights are necessary to the enforcement of those rights. Moreover, although the result reached could have been analyzed in practical terms, the court did not refuse to proceed because its judgment would be subject to attack by an interested person who could render the judgment nugatory in a subsequent action. Its refusal is premised upon a conceptualistic identification of the legal interest as a joint one which must be enforced by all holders of the joint right together. While it can be doubted that the term fundamental error enjoyed the same meaning in 1894 that was later given by the supreme court in *Oar v. Davis*,[39] or later still in *Ramsey v. Dunlop*,[40] the seeds of viewing an absent person's nonjoinder at trial in jurisdictional terms had been sown.

Many subsequent cases decided before the promulgation of the Texas Rules of Civil Procedure in 1941 cite *Hanner* and espouse the formalistic notion taken from the common law that it perpetuated.[41] Although the joint obligor problem was resolved by statute,[42] joint obligees, bailors, and beneficiaries were necessary and indispensable, and their absence could be raised for the first time on appeal. Prior to 1941 Texas courts used the term necessary to signify a person whose presence was required to adjudicate a dispute. While a nonjoined person may also have been termed indispensable prior to the adoption of the Texas Rules of Civil Procedure and to a certain extent thereafter, the terms necessary and indispensable were synonymous. Therefore, care should be taken in reviewing Texas precedent before *Petroleum Anchor Equipment, Inc. v. Tyra*.[43]

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38. *Id.* at 335.

39. 105 Tex. 479, 151 S.W. 794 (1912). Fundamental error is "such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily." 151 S.W. at 796, *citing* Houston Oil Co. v. Kimball, 103 Tex. 94, 104, 122 S.W. 533, 537 (1909).

40. 146 Tex. 196, 205 S.W.2d 979 (Tex. 1947). "[A]n error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or constitution of this state is fundamental error." 205 S.W.2d at 983.

41. *See* Nail v. Taylor, 223 S.W. 719 (Tex. Civ. App.—Fort Worth 1920, no writ); McKay v. Peterson, 220 S.W. 178 (Tex. Civ. App.—Amarillo 1920, no writ); Modern Woodman of America v. Yanofsky, 187 S.W. 728 (Tex. Civ. App.—San Antonio 1916, writ ref'd) (joint insurance beneficiaries held necessary parties); Barlow v. Linss, 180 S.W. 652 (Tex. Civ. App.—El Paso 1915, writ ref'd) (joint obligees ruled necessary parties); Western Grocery Co. v. Jata, 173 S.W. 518 (Tex. Civ. App.—El Paso 1915, no writ) (partners determined to be necessary parties in suit by or against a partnership).

42. *See* TEX. REV. CIV. STAT. ANN. arts. 1986-87 (1964).

43. 406 S.W.2d 891 (Tex. 1966). Refer to text accompanying notes 52-67 *infra*.

IV. Compulsory Joinder of Parties under the 1941 Texas Rules of Civil Procedure

When the Texas Rules of Civil Procedure were adopted in 1941, the 1937 version of Federal Rule 19 was adopted with minor textual change as Texas Rule 39.[44] Shortly after the rule was adopted an advisory opinion was handed down by the subcommittee on interpretation of the Rules of Civil Procedure.[45] This opinion is interesting because of its muddled treatment of the problem and consequently it is printed in full.

> Question (No. 22): Where the owner of a portion of a royalty under an oil lease brings suit against the lessee to recover damages because of the breach of implied contract of reasonable development, is it *mandatory* that all persons who own portions of the royalty be joined?
>
> Answer: This matter is dealt with by Rule 39 which provides that persons having a joint interest shall be joined in the suit. This rule is taken from Federal Rule 19, and under the annotations to the Federal rule it has been held a number of times that the phrase, "joint interest," should be construed to mean those who would be necessary in the sense of indispensable parties under the previous practice.
>
> If under the previous practice all royalty owners were not necessary parties in such a suit, then it is the opinion of the committee that it would not be necessary to join them because of the adoption of new rules. On the other hand, if joinder of all would have been necessary under the old practice, then it is still necessary under the new rules.
>
> The subcommittee calls attention to possible relaxations suggested by and under the conditions stated in Subdivisions (b) and (c) of Rule 39 and in Rule 42.
>
> The subcommittee feels that the above general construction of the rule is as far as it can properly go in answering the question.

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44. Necessary Joinder of Parties.
(a) Necessary joinder. Except as otherwise provided in these rules, persons having a joint interest shall be made parties and be joined as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
(b) Effect of failure to join. When persons who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them made parties. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein shall not affect the rights or liabilities of persons who are not parties.
(c) Names of omitted persons and reasons for non-joinder to be pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties, if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Tex. R. Civ. P. 39 (1967).

45. *Civil Procedure,* 5 Tex. B.J. 287 (1942). Committee members were Robert W. Stayton, chairman, Randolph Carter, and W. A. Vinson.

> In other words, the subcommittee feels that it should confine its interpretations to general explanation of the rules, and should not undertake to brief questions arising under the facts of specific cases.
>
> In the above opinion the subcommittee consulted with and was aided by Roy W. McDonald.[46]

By using the terms indispensable and necessary as synonymous terms, the opinion construing Rule 39 further confused the subject. Despite later comments by Professor Stayton interpreting Rule 39,[47] the case law failed to reflect an understanding that the rule substantially modified principles set out in the case law decided before 1941. One civil appeals court concluded that Rule 39 was inapplicable to the extent that it displaced the common law principles.[48]

As late as 1956 the rule appears to have made no real impact upon the prior practice. For example, in *Scott v. Graham*,[49] an action brought by a taxpayer against the district attorney, county treasurer, county judge, and county commissioners to have a commissioners' court order authorizing payment of $600 to an assistant district attorney declared void, the supreme court concluded that the county in its corporate form was a necessary party. However, the most striking aspect of the opinion is its consideration of the practical consequences of the issuance of an injunction in the absence of the county in its corporate form as the court stated, "Without a judgment against the county, there will be nothing to prevent its future officials from making the payment which petitioner now seeks to enjoin."[50] The joint interest analysis taken from the common law is not the basis of the opinion, which harkens back to *Bruly* and *De La Vega*. Similarly in *Royal Petroleum Corp. v. Dennis*,[51] the supreme court again defined a necessary party as one without whom a final judgment or decree could not be made.

The most important Texas case decided under the 1941 compulsory joinder rule (old Rule 39) was *Petroleum Anchor Equipment, Inc. v. Tyra*,[52] which construed the provisions of Rule 39 in accordance with federal precedent construing Federal Rule 19,[53] from which Rule 39 was copied.

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46. *Id.*
47. R. Stayton, *Important Developments in Trial Civil Procedure Since 1940*, STATE BAR OF TEXAS REFRESHER HANDBOOK 3 (1946).
48. Hicks v. Southwestern Settlement & Dev. Corp., 188 S.W.2d 915, 919 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.), *noted in* 24 TEXAS L. REV. 511 (1946).
49. 156 Tex. 97, 292 S.W.2d 324 (1956).

> Whether a person is a necessary party is determined by his interest in the subject matter and outcome of the suit. . . . [A]ll persons who claim a direct interest in the object and subject matter of the suit and whose interest will necessarily be affected by any judgment that may be rendered therein, are not only proper parties, but are necessary and indispensable parties.

292 S.W.2d at 327.
50. 292 S.W.2d at 327.
51. 160 Tex. 392, 332 S.W.2d 313 (1960), *noted in* 15 SW. L.J. 172 (1961).
52. 406 S.W.2d 891 (Tex. 1966).
53. FED. R. CIV. P. 19 (1965).

Petroleum Anchor brought suit to cancel a bill of sale and a subsequent assignment of an invention by the buyer to defendant Tyra on the ground that the sale and the subsequent assignment were the result of a fraudulent conspiracy. The buyer was not made a party defendant in the action by Petroleum Anchor and no one raised the question of the buyer's absence at trial. Judgment was rendered that Petroleum Anchor take nothing. Petroleum Anchor appealed and the court of civil appeals noted that the buyer was a necessary and indispensable party in whose absence the trial court had no jurisdiction to proceed.[54] The supreme court reversed.

The opinion of the supreme court is of major importance for the careful analysis given the provisions of Rule 39. After indicating that Texas courts "have been inclined to give too little attention to the wording of the rule and overriding attention and effect to prior judicial decisions, often ignoring the rule altogether,"[55] the court stated that the language of Rule 39(a), which provided that "[p]ersons having a joint interest shall be made parties and be joined as plaintiffs or defendants,"[56] when properly interpreted, constituted the rule's definition of "indispensable" parties whose joinder in the trial court was essential to jurisdiction. On the other hand, when the rule spoke in terms of "persons who ought to be parties if complete relief is to be accorded between those already parties,"[57] it indicated that they were not indispensable because the rule conferred discretion upon the trial court to proceed without joinder of such persons if jurisdiction over them could not be acquired except by their consent or voluntary appearance. The court reasoned that "[i]f joinder of such persons is discretionary, their joinder cannot be essential to jurisdiction of a court to proceed to judgment."[58] The court noted that persons in the second category are referred to as "conditionally necessary" by federal authority[59] and that Professor Stayton had termed them "insistible."[60] Finally, conditionally necessary or insistible persons were required to be joined if a party to the suit insisted upon their joinder at trial. However, a party could not insist upon the joinder of a conditionally necessary person not subject to the jurisdiction of the court.[61]

After clarifying the nomenclature to be utilized henceforward in construing Rule 39, the court stated that the buyer had no joint interest with Tyra because he had long since disposed of his interest and no relief was sought against the buyer. The court also considered whether the buyer

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54. Petroleum Anchor Equip., Inc. v. Tyra, 392 S.W.2d 873, 876 (Tex. Civ. App.—Dallas 1965), *rev'd*, 406 S.W.2d 891 (Tex. 1966).
55. 406 S.W.2d at 892.
56. TEX. R. CIV. P. 39(a) (1967).
57. *Id.* 39(b).
58. 406 S.W.2d at 893.
59. 3A J. MOORE, FEDERAL PRACTICE ¶ 19.05[2] (2d ed. 1974).
60. 406 S.W.2d at 893, *quoting* R. Stayton, *Important Developments Since 1940 in the Texas Law Relating to Parties and Actions* in UNIVERSITY OF TEXAS LAW REFRESHER (on file with University of Texas School of Law Library).
61. 406 S.W.2d at 893.

would have been prejudiced by a decree enjoining use of the invention after cancellation of the bill of sale. Here, the court stated that the buyer could not be legally prejudiced because a judgment would not be res judicata in any subsequent litigation "to which he may be a party,"[62] and that although "[p]ersons whose rights will be *factually* prejudiced are sometimes held to be indispensable . . . in such cases the interests of the absent parties should be more directly involved than are the interests of Fite [the buyer] in this suit."[63] Thus, despite the fact that cancellation of the bill of sale given to Fite by Petroleum Anchor might result in a suit by Tyra against Fite to recover money paid Fite for the assignment of the invention sold, his interest was too remote to require his joinder. In this connection the opinion demonstrates the influence of Professor Reed's article on compulsory joinder of parties which the court cites.[64] The interests of the absent person were analyzed as too remote to preclude litigation from proceeding between Petroleum Anchor and Tyra. The interest of Petroleum Anchor in having a forum (Fite was not subject to personal jurisdiction in Texas) overbalanced any possible prejudice to the absent person or to defendant Tyra.[65]

However, the court's focus on the language of the rule itself necessitated that the rule's joint interest formulation be interpreted each time the question of required joinder was raised for the first time on appeal. The legacy of the common law principles of joinder was firmly embedded in the phrase "joint interest," thereby making the adoption of a set of balancing principles manifestly difficult. In short, the rule itself was not

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62. *Id.* at 894.
63. *Id.* at 895.
64. *Id., citing* Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340 (1957). Professor Reed notes that Shields v. Barrow, 58 U.S. (17 How.) 130 (1854), constitutes the most influential United States Supreme Court case on the subject of required joinder of parties. 55 MICH. L. REV. at 340. He criticizes *Shields* because it resulted in a belief "that certain persons, depending upon the nature of their rights ('common,' 'joint,' 'united in interest'), are, automatically and for all time delegated to one class [necessary] or the other [indispensable]." *Id.* at 355. He suggests that the classification of persons as necessary ("Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act . . . and finally determine the entire controversy, and do complete justice." Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854)) or indispensable ("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 the final termination may be wholly inconsistent with equity and good conscience." 58 U.S. at 139) should be abandoned in favor of an "informal, rational balancing of competing interests." 55 MICH. L. REV. at 356. Professor Reed's central thesis is that the plaintiff may be left without a remedy unless he can proceed in the absence of a party who is beyond the court's jurisdiction or whose presence will destroy diversity. The interest of the plaintiff in having a forum must be balanced against the possible factual prejudice which the party defendant or the absent person may suffer, and formulistic notions derived from *Shields* do not permit the informal balancing of the interests, "interests relating to the helplessness of the plaintiff, double vexation of defendant, the possible effect on absent persons, the convenience of the court, and the equity and good conscience—in short, the justness—of the end result." *Id.* at 355-56.
65. 406 S.W. 2d at 895.

suited to a consideration of the question of required joinder in practical terms.

One other aspect of *Petroleum Anchor* should also be considered. The court stated that if an absent person was "truly indispensable," it would be fundamental error to proceed in his absence.[66] Although the definition of fundamental error had been narrowed by adoption of the 1941 Rules of Civil Procedure, it still included proceeding without parties who are indispensable, meaning those having a joint interest "properly interpreted."[67] Although it is relatively clear that the proper interpretation was to proceed pragmatically and that the phrase "joint interest" was to be given a narrow construction, the matter was still viewed in jurisdictional terms.

It is somewhat ironic that just about the time the Texas Supreme Court was deciding how to construe the 1941 version of Rule 39, criticism of the 1937 version of Rule 19 of the Federal Rules of Civil Procedure, from which the Texas rule was taken, led to its complete revision in 1966.[68] The phrase "joint interest" was deleted, and the revised rule was written in pragmatic terms incorporating virtually all of Professor Reed's analysis.[69] By its order of July 21, 1970, effective January 1, 1971,[70] the Texas Supreme Court completely rewrote Texas Rule 39 to adopt, with minor changes, the provisions of Federal Rule 19 as amended.[71]

V. NEW RULE 39

New Rule 39, like its federal counterpart, does not include the phrase "joint interest."[72] Much of the criticism of old Federal Rule 19 was directed toward the wasteful consequence of voiding judgments when the matter of the absence of a person was raised for the first time on appeal without regard to what occurred in the action in the trial court simply because the interest was labeled as a "joint interest."[73] While deletion of the words "joint interest" from the rules does not in itself solve the problem of determining when in fact a nonjoined person's interest is of such a character that the trial court should refuse to proceed without his joinder or when his absence can be raised for the first time on appeal, the approach taken by the new Texas Rule 39 focuses the inquiry upon the

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66. *Id.* at 892.
67. *Id.* at 892-93.
68. *See* Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 79 YALE L.J. 403 (1965); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pts. 1-2), 81 HARV. L. REV. 356, 591 (1967).
69. *See* Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).
70. TEX. R. CIV. P. 39.
71. For a demonstration of the dissatisfaction with the method of classifying parties under the 1941 rule refer to Soules, *Indispensable Parties*, 1 ST. MARY'S L.J. 65 (1967).
72. TEX. R. CIV. P. 39.
73. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 366 (1967).

factors to be considered in determining when an absent person should be regarded as indispensable. Currently Rule 39 speaks of "persons to be joined if feasible" and persons "regarded as indispensable."[74]

Persons to be joined if feasible are: (1) persons who ought to be joined if complete relief is to be accorded those already parties (all persons who formerly were labeled "insistible"); (2) persons who claim an interest relating to the subject of the action whose ability to protect that interest may be impaired or impeded "as a practical matter" by disposition of the action in their absence; and, (3) persons who claim an interest relating to the subject of the action whose nonjoinder may leave any persons already parties to a "substantial risk" of incurring double, multiple or otherwise inconsistent obligations by reason of the nonjoined person's claimed interest. If an absent person is a "person to be joined as feasible," upon proper motion "the court shall order that he be made a party defendant or an involuntary plaintiff" provided that he is amenable to process. If he is not amenable to process, it must be determined whether he should be "regarded as indispensable."

Assuming that it has been determined that a nonjoined party is a person to be joined if feasible who is not amenable to process, the trial court must determine whether the action should proceed "in equity and good conscience" in the absence of the nonjoined party. The rule enumerates the four factors to be considered by the court in determining indispensability:

> First, to what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties; second, the extent to which, by protective provisions of the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether the 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 non-joinder.[75]

Therefore, the major change in the wording of Rule 39 involved the substitution of practical principles for the abstract concept of "jointness" and the supplementation of the "complete relief" concept with language that directs courts to consider the practical consequences of proceeding in the absence of the nonjoined party. The literal language of the rule contemplates that the absence of an interested party will be raised at trial.

VI. The Issue of Fundamental Error

Under old Rule 39 failure to join persons who were indispensable

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74. Tex. R. Civ. P. 39(a), (b).
75. *Id.* 39(b).

constituted fundamental error which could not be waived.[76]

The United States Supreme Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*[77] clearly disposed of the argument that the indispensable party doctrine is substantive and therefore that the amended rule conflicts with *Erie*,[78] when it rejected the following argument:

> (1) there is a category of persons called "indispensable parties"; (2) that category is defined by substantive law and the definition cannot be modified by rules; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.[79]

Hence, the *Erie* doctrine does not pose a problem in the interpretation of Federal Rule 19. The Court also stated that

> to say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him, puts the matter the wrong way around: A court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.[80]

The *Provident Tradesmens* opinion indicates that, practically, four interests are to be considered in determining whether a nonjoined person should be regarded as indispensable: (1) the interest of the plaintiff in having a forum; (2) the interest of the defendant in avoiding multiple litigation or inconsistent relief or sole responsibility; (3) the interest of the absent party; and (4) the interest of the public in complete, consistent and efficient settlement of controversies by wholes.[81]

The plaintiff's interest in having a forum must be contrasted with the defendant's correlative interest in avoiding multiple litigation or inconsistent relief or sole responsiblity. However, Justice Harlan states that the plaintiff having chosen the forum, the parties defendant "will not be heard to complain about the sufficiency of the relief obtainable against them."[82] Similarly, if the defendant raises the absence of a party at trial, the court should test the strength of the plaintiff's interest in having a forum by determining whether a satisfactory alternative forum exists. But,

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76. Although no all-inclusive definition of fundamental error has been promulgated, error is generally considered to be fundamental if (1) it directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or constitution of Texas, and (2) the record affirmatively shows upon its face that the court rendering the judgment was without jurisdiction over the subject matter. State v. Sunland Supply Field, 404 S.W.2d 316, 319 (Tex. 1966); McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2d 265, 266 (1957); Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979, 983 (1947).

77. 390 U.S. 102 (1968).

78. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See also* Hanna v. Plumer, 380 U.S. 460 (1965).

79. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 (1968).

80. *Id.* at 119.

81. *Id.* at 109-11.

82. *Id.* at 111.

failure by the defendant to raise the absence of a nonjoined party at trial "properly forecloses any interest of theirs."[83] The defect can be waived and is not considered jurisdictional in nature. Therefore, if the parties before the court of trial do not raise the absence of a person, they will normally be precluded from raising the matter on appeal.

The interest of the absent person must, however, also be considered. The reason for considering the absent party's interest is that although he will not normally be bound by principles of res judicata,[84] his interest may be impaired or impeded as a practical matter.[85] When the absence of a person who should have been joined in the lower court is noticed for the first time on appeal by the appellate court, the effect that the proceedings below and the judgment rendered have on the absent party can be determined. It is therefore possible to decide whether the absent person should be regarded as indispensable on a practical basis. The matter has been litigated and the extent to which the absent party's interest has been impaired or impeded, if any, can be analyzed. Justice Harlan states that when the risk of harm or loss is not trivial, the appellate court should modify the judgment on equitable principles if the absent party has not purposely bypassed the proceeding.[86] The rule permits the shaping or framing of relief so that the absent party's interest is preserved and protected. However, if it can be determined that the absent party purposely bypassed the proceeding when he could have intervened, the court should determine whether this factor forecloses equitable protection of the absent party by modification of the decree.[87] Lastly, the public's interest in the efficient and economical operation of our judicial system requires the appellate court to preserve as much of the prior proceeding as possible.[88]

If the analysis utilized by the United States Supreme Court in *Provident Tradesmens* is utilized by Texas appellate courts in construing Texas Rule 39, the concept of fundamental error should virtually disappear from appellate decisions involving Rule 39. As the following paragraphs show,

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83. *Id.* at 112.

84. A nonjoined person may, however, be bound by the doctrine of collateral estoppel where he controls the action or where his interests are adequately represented. *See, e.g.*, Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363-64 (Tex. 1971), *citing* RESTATEMENT OF JUDGMENTS § 84 (1942). *See also* Ramos v. Horton, 456 S.W.2d 565, 568 (Tex. Civ. App.—El Paso 1970, no writ). Refer to note 86 *infra.*

85. The classic situation involves one in which the nonjoined person claims an interest in a particular fund which constitutes the subject matter of the litigation. An award of the *res* to a party may lead to its dissipation prior to the time the nonjoined person has any ability to protect his or her interest.

86. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 114 (1968); *see* Traders & Gen. Ins. Co. v. Richardson, 387 S.W.2d 478 (Tex. Civ. App.—Beaumont 1965, writ ref'd) (intervention required by joint owner of cause of action). *See also* Price v. Couch, 462 S.W.2d 556 (Tex. 1970).

87. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 366 (1967).

88. *See* F. JAMES, CIVIL PROCEDURE § 9.18, at 418 (1965). *See also* Bank of California Nat'l Ass'n v. Superior Court, 16 Cal. 2d 516, 106 P.2d 379 (1940).

it is now apparent that the Supreme Court of Texas intends to interpret new Rule 39 in light of the principles enunciated in the *Provident Tradesmens* case.

VII. Texas Cases Interpreting Rule 39

The most significant Rule 39 case to date is *Cooper v. Texas Gulf Industries, Inc.*[89] In *Cooper*, the spouses acting together bought realty and the property was conveyed to both of them. In an action that did not include the wife, the husband brought suit against the grantor to rescind the transaction in 1970 (suit 1). The suit was dismissed with prejudice. Subsequently, in 1971, a suit for similar relief was brought by the husband and wife jointly. The grantor sought summary judgment on the basis of res judicata asserting that both the husband and wife were bound by the prior judgment despite the fact that the wife did not participate in suit 1. The husband argued that suit 1 was not res judicata as to either spouse because the wife was an indispensable party to the prior litigation, thereby rendering the entry of any judgment fundamental error. The supreme court held that Mrs. Cooper was not an indispensable party in suit 1. The court made the following rulings:

(1) It will "be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined."[90]

(2) The practice whereby the husband could act for and represent the wife in an action concerning their jointly managed community property by virtue of the doctrine of virtual representation was abolished by the provisions of the Texas Family Code. The wife is like any other jointly interested individual. Therefore, the judgment of dismissal with prejudice against husband in suit 1 is not res judicata with respect to the wife's rights.[91]

(3) The omission of one of the spouses as a party in an action concerning their jointly managed community property does not, however, render the judgment void. The judgment binds the husband spouse who was a party "except to the extent that it might have to be disregarded in giving all the relief to which she may show herself entitled."[92]

Therefore, in *Cooper* the supreme court held that Mr. Cooper could not avoid the binding force of a judgment against him in a suit brought by him alone to rescind a transaction under which Mr. and Mrs. Cooper purchased land from the grantor, while ruling that Cooper's wife was a joint owner of the land. The supreme court assumed that the land involved

89. 513 S.W.2d 200 (Tex. 1974), *noted in* 52 Texas L. Rev. 1410 (1974).
90. 513 S.W.2d at 204.
91. *Id.* at 202, 205. *But see* note 86 *supra.*
92. 513 S.W.2d at 205.

in *Cooper* was jointly managed community property as indicated by the conveyance of the land to the spouses jointly.[93] Section 5.22 of the Texas Family Code provides that the jointly managed community property cannot be disposed of by one spouse acting alone.[94] Although some very questionable authority exists for the proposition that joint management also means several management in the context of section 5.22 of the Texas Family Code,[95] it appears that the factual situation in *Cooper* involves an instance where the legislature has made rights joint and not several.[96] Since, however, the outcome of suit 1 was unfavorable with respect to the relief claimed by Mr. Cooper, the court's ruling that the outcome of suit 1 is conclusive as to Mr. Cooper's rights "except to the extent that it might have to be disregarded in giving [the other spouse] all the relief to which [he or] she may show [himself or] herself entitled"[97] is perfectly consistent with the *Provident Tradesmens* analysis. However, the opinion should not be construed to stand for the proposition that joint is synonymous with joint and several.[98]

The supreme court reiterated its holding in *Cooper* in the case of *Dulak v. Dulak*.[99] In *Dulak* the husband and wife purchased land for which they gave a joint note. The land was conveyed to both spouses. The husband subsequently procured the release of the note from the seller. Suit was later brought against the husband to cancel the release as procured by undue influence. Judgment was rendered against the husband in the trial court. On appeal, the husband contended that the wife was an indispensable party to the suit presumably because of her joint interest in the land and her joint execution of the purchase money note payable to the seller as well as the deed of trust which was also jointly executed. As in *Cooper* suit 1, no party raised the absence of the nonjoined spouse until after the entry of final judgment. The court of civil appeals affirmed, holding that the wife was bound by the trial court's judgment under the doc-

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93. *Id.* at 202.

94. TEX. FAMILY CODE ANN. § 5.22(c) (1975).

95. *See, e.g.*, Williams v. Portland State Bank, 514 S.W.2d 124, 126 (Tex. Civ. App.—Beaumont 1934, writ dism'd by agr.). For a result which seems premised upon the conclusion that joint management also means several management refer to McGee, *Marital Property Rights Under the Texas Family Code and the Equal Creditor Opportunity Act*, 30 PERSONAL FIN. L.Q. REP. 14, 17 (1975).

96. Traditionally, joint obligees have been considered to be indispensable parties plaintiff. Joint obligors had to be joined as defendants but if an obligor was unavailable the action could proceed without that person. *See* F JAMES, CIVIL PROCEDURE § 9.22, at 430 (1965); *see, e.g.*, Barlow v. Linss, 180 S.W. 652, 653 (Tex. Civ. App.—El Paso 1915, writ ref'd) (joint obligees).

97. 513 S.W.2d at 205. Although it appears that the judgment in suit 1 would have to be completely disregarded in order to protect the wife's interest, the court could fashion a remedy, such as the granting of a damage award to Mrs. Cooper which would not require a total disregard of the judgment with prejudice against Mr. Cooper.

98. *See* McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 88-90 (1975).

99. 513 S.W.2d 205 (Tex. 1974).

trine of virtual representation.[100] The supreme court, despite the abolition of the doctrine in the context of joint management community property, held that failure to name the spouse did not constitute a jurisdictional defect and cited *Cooper* as governing authority.[101]

In analyzing *Dulak*, it becomes clear that Mrs. Dulak was a party to be joined if feasible because she had an interest in the subject of the action, the cancellation of a release which concerned her individual liability and marital property as security. Similarly, her joinder was feasible because she was amenable to process. However, the supreme court properly concluded that she should not have been regarded as indispensable. This conclusion is sound under modern Rule 39 analysis because (1) the plaintiffs chose the parties and the forum and cannot complain about the sufficiency of the relief obtainable; (2) the defendant did not complain of her absence at trial and his interest is foreclosed; (3) Mrs. Dulak's interest needs no protection on appeal because the supreme court concluded that there was insufficient evidence to establish that Mr. Dulak exercised undue influence in securing the cancellation of the release—hence the release was ultimately not cancelled;[102] and (4) the public's interest in judicial efficiency was protected by preserving as much of the case as possible.

VIII. Substantive Indispensable Parties

The Supreme Court of Texas does not have the power to make and establish rules of procedure which are inconsistent with laws enacted by the Texas legislature.[103] It could be argued that when the legislature enacts a statute which makes rights enforceable jointly, but not severally,

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100. 496 S.W.2d 776, 782 (Tex. Civ. App.—Austin 1973), *rev'd*, 513 S.W.2d 205 (Tex. 1974). Under the doctrine of virtual representation, in certain situations a person may be bound by a judgment under the principles of res judicata even though he or she is not even a formal party to the action. The doctrine is generally applied where the nonjoined person is considered to be adequately represented by another person who has an identical interest and when it is practically necessary to bind nonjoined persons in order for a court to render an effective judgment. *See* Mason v. Mason, 366 S.W.2d 552, 554 (Tex. 1963) (trusts); F. James, Civil Procedure § 11.28, at 592 (1965). *See also* Note, 52 Texas L. Rev. 1410 (1975). Of course, the most common application of the doctrine today is in class action litigation. *But see* Hicks v. Southwestern Settlement & Dev. Corp., 188 S.W.2d 915 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.).

101. 513 S.W.2d at 207. *See* Tex. Rev. Civ. Stat. Ann. arts. 1986-87 (1964). Where joint obligors are primarily liable on a contract they may be sued "either alone or jointly with any other party thereon." *Id.* art. 1986. *See also* Swinford v. Allied Fin. Co., 424 S.W.2d 298 (Tex. Civ. App.—Dallas), *cert. denied*, 393 U.S. 923 (1968); Nelson v. Seidel, 328 S.W.2d 805 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). When one joint obligor is not primarily liable on the contract, "unless judgment also be entered against such other principal obligor . . . ." except when he "resides beyond the limits of the State, or . . . cannot be reached by the ordinary process of law, or . . . his residence is unknown . . . or . . . he is dead, or actually or notoriously insolvent . . . no judgment shall be rendered." Tex. Rev. Civ. Stat. Ann. art. 1987 (1964).

102. 513 S.W.2d at 210.

103. Tex. Const. art. V, § 25.

the legislature has created a category of persons who must be regarded as indispensable as a matter of substantive law.[104] Hence, the analysis utilized by Justice Harlan in *Provident Tradesmens* that no class of predefined indispensable persons existed for *Erie* purposes, which the Texas Supreme Court may have adopted, should be considered in a context of the supreme court's rule-making power.[105]

The case of *Hinojosa v. Love*[106] clearly illustrates the dilemma. Love and the bank were joint payees of a note within section 3.116(b) of the Uniform Commercial Code.[107] Plaintiff Love sued the sole maker of the note. Judgment was rendered in favor of Love against Hinojosa by default. Hinojosa raised the absence of the bank in his motion for new trial which the trial court overruled. The court of civil appeals held that the bank was an indispensable party, by virtue of section 3.116(b) (under substantive law).[108] The appellate court interpreted section (c) of Rule 39 as placing on the plaintiff the burden of pleading and proving why he should be entitled to proceed in the absence of an indispensable party.[109] In substance, the opinion utilizes the joint interest analysis used prior to the amendment of Texas Rule 39 in defining the bank as an indispensable party in whose absence the court did not have jurisdiction to proceed because of fundamental error.

Although the court of civil appeals improperly failed to recognize the admonition of the supreme court in *Cooper* that the amendment to Rule 39 replaced the historical and classical approach to joinder of parties,[110] it is interesting to speculate how the supreme court would have decided *Hinojosa v. Love*. If *Hinojosa* is correct in its result, although the term joint interest was removed from Rule 39, it was not removed from the substantive law of commercial paper by the amendment of the procedural rule. However, if the *Provident Tradesmens* analysis apparently adopted by the Texas Supreme Court in *Cooper* is utilized, since the defendant failed to raise the absence of the bank at trial, his interest is properly foreclosed.[111] Moreover, it is clearly possible to protect the interest of the bank by remanding the case for determination of the bank's interest, if any, in the final judgment obtained by Love against Hinojosa in the trial court. There is no reason why the judgment should be voided except to the extent that it might

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104. *See, e.g.*, Crickmer v. King, 507 S.W.2d 314 (Tex. Civ. App.—Texarkana 1974, no writ). *See also* Clear Lake Apartments, Inc. v. Clear Lake Util. Co., 537 S.W.2d 48 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

105. *See also* TEX. R. CIV. P. 108. For a consideration of the potential constitutional limitation on the supreme court rule-making power refer to Sampson, *Long Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023, 1033 n.20 (1975).

106. 496 S.W.2d 224 (Tex. Civ. App.—Corpus Christi 1973, no writ).

107. TEX. BUS. & COMM. CODE ANN. § 3.116(b) (Tex. UCC 1968).

108. 496 S.W.2d at 226.

109. *Id.* at 227.

110. Cooper v. Texas Gulf Indus., Inc., 513 S.W.2d 200, 203 (Tex. 1974).

111. Counsel raised the absence of the bank in a motion for new trial. 496 S.W.2d at 226.

have to be subsequently modified in giving the bank all relief to which it may show itself entitled. One could support *Hinojosa* by arguing that the interest of the public in complete, consistent, and efficient settlement of controversies by wholes does not include an interest in preserving default judgments. However, Texas has observed no particular solicitude for defaulting parties.[112] There is no reason to do so here, unless of course there is a class of indispensable parties defined by substantive statutory law.

A determination that legislation has created a small class of predefined indispensable persons would provide a functional exception to the required joinder of parties principles enunciated in *Provident Tradesmens* and apparently adopted by the Texas Supreme Court in *Cooper*, except that it is difficult to distinguish *Cooper* from *Hinojosa*. Section 3.116 (b) of the Texas Uniform Commercial Code makes the right to enforce a note payable to *A* and *B* a joint right.[113] Section 5.22 of the Texas Family Code makes the right to manage jointly managed community property joint.[114] Mr. Cooper had no more legal capacity under the substantive law of marital property to dispose of joint management community property alone by a rescission suit than did Love to enforce the joint note. Therefore, unless the fact that Love won his case by default (if Love lost, the bank could not possibly have been prejudiced, nor could Hinojosa have been subjected to double liability) whereas Mr. Cooper lost suit 1 is controlling, it is submitted that the two cases cannot be reconciled. Hence *Hinojosa* may have been decided incorrectly. While it can be argued that the Texas Supreme Court is proscribed from making rules that are substantive, the criticism of Federal Rule 19 as substantive and its successful rebuttal by Justice Harlan should suffice to silence criticism of the Texas Supreme Court in adopting and properly interpreting Texas Rule 39.[115]

The supreme court has not been called upon to again discuss the proper interpretation of Rule 39 since *Dulak*. However, several courts of civil appeals have attempted to resolve interpretative problems in connection with Rule 39. In *Phillips v. Teinert*,[116] decided before *Cooper* and *Dulak*, although no party raised the matter at trial, the court of civil appeals reversed the lower court judgment where a husband who, with his wife, had sued for injuries sustained in an automobile accident, died between time of suit and the time of trial. The basis of the reversal was that his estate, heirs, or legal representatives succeeded to his cause of action and therefore had a direct interest in the subject matter of the suit that

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112. *See* Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 998 (1950). *But see* Deen v. Deen, 530 S.W.2d 913, 915-16 (Tex. Civ. App.—Fort Worth 1975, no writ).
113. TEX. BUS. & COMM. CODE ANN. § 3.116(b) (Tex. UCC 1968).
114. TEX. FAMILY CODE ANN. § 5.22(c) (1975).
115. Refer to text accompanying notes 77-79 *supra*.
116. 493 S.W.2d 584 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

would necessarily be affected by any judgment rendered. Hence, they were indispensable parties to the suit and the error was fundamental. Although no one filed a suggestion of death in the case, the result reached by the court of civil appeals appears to be entirely inconsistent with the principles enunciated in *Cooper* and *Provident Tradesmens.* While the opinion does not reflect the amount of the judgment, the decedent and his wife had judgment rendered for them jointly. The setting aside of this judgment seems a strange way to protect the estate, heirs, or legal representatives who succeeded to the decedent's cause of action. The public's interest in preserving as much of the prior proceeding as possible was not considered by the appellate court. Consequently, the case appears to be of dubious precedential value. However, the same court of civil appeals, subsequent to the supreme court's decision in *Cooper,* properly held in *Huffington v. Upchurch*[117] that two ex-partners who did not claim an interest in an oil and gas prospect which was the subject matter of the litigation were not indispensable parties where a matter of absence was raised for the first time after verdict.

The case of *Williams v. Saxon*[118] also appears to adopt the analysis utilized by the supreme court in *Cooper.* In an action brought against the husband without the joinder of his spouse for specific performance to convey certain community property, the purchaser prevailed in the trial court. The husband, for the first time on appeal, contended that his wife was an indispensable party to the action since it involved community property which constituted the family homestead and that the judgment was void because of the wife's interest in the subject matter of the litigation. The appellate court concluded that Rule 39 did not preclude the entry of a valid and binding judgment insofar as the husband's rights were concerned except to the extent that the judgment might have to be disregarded in according the wife her homestead rights.[119]

Several courts of civil appeals have recently considered Rule 39 in the context of probate proceedings. In *Jennings v. Srp*[120] the Corpus Christi Court of Civil Appeals concluded that all devisees and legatees named in a will are indispensable parties to an action to contest the will and that when a construction or contest of the will could result in any of the estate passing by intestate succession, the heirs-at-law of the decedent are also indispensable parties, and the trial court was without jurisdiction to proceed without them. In the case of *Soto v. Ledesma,*[121] the Corpus Christi Court of Civil Appeals also held that when a purported will has been offered for probate but has not been admitted to probate, the parties named in the

117. 523 S.W.2d 44, 52 (Tex. Civ. App.—Houston [14th Dist.] 1975), *rev'd on other grounds,* 532 S.W.2d 576, 580 (Tex. 1976).
118. 521 S.W.2d 88 (Tex. Civ. App.—San Antonio 1975, no writ).
119. *Id.* at 91.
120. 521 S.W.2d 326 (Tex. Civ. App.—Corpus Christi 1975, no writ).
121. 529 S.W.2d 847 (Tex. Civ. App.—Corpus Christi 1975, no writ).

purported will are not interested parties contemplated by Rule 39. A third probate case, *Glover v. Landes*,[122] was decided by the Houston Court of Civil Appeals. The court held that devisees of a proponent of a will who died during the pendency of an action to set aside an order admitting a will to probate could not be indispensable parties where a suggestion of death of the proponent was filed under Rule 151 and the legal representative of the proponent's estate was substituted for the proponent. The three foregoing probate cases appear not to have utilized the type of analysis mandated by the Texas Supreme Court in *Cooper* and *Dulak*. The mechanical analysis apparently utilized by the courts of civil appeals is at variance with modern Rule 39 analysis.[123]

IX. Conclusion

The Texas Supreme Court has adopted the analysis enunciated by Justice Harlan in *Provident Tradesmens Bank & Trust Co. v. Patterson*.[124] Henceforth, it will be rare indeed when an appellate court properly determines that the trial court lacked jurisdiction to adjudicate a dispute when the nonjoining person's absence is raised for the first time on appeal by one of the parties in the trial court, at least insofar as the judgment affects parties who participated in the trial, directly or indirectly, or who purposely bypassed the proceedings. The doctrine of fundamental error should no longer protect persons from the binding force of judgments when they have had the opportunity to raise the absence of the nonjoined person and waived it. It is submitted that the new Rule 39 methodology is a significant improvement. The "joint interest" analysis which had its genesis in early common law principles of required joinder should be laid to rest. It has caused enough trouble.

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122. 530 S.W.2d 910 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

123. *See, e.g.*, Griffith v. Conard, 536 S.W.2d 370 (Tex. Civ. App.—Corpus Christi 1976, no writ); McBurnett v. Gordon, 534 S.W.2d 370 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (examples of proper result without detailed analysis). *See also* Tex. Rev. Civ. Stat. Ann. art. 1982 (1964).

124. 390 U.S. 102 (1968).