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INDISPENSABLE PARTIES IN POOLING CASES

Robert H. Dedman

THIS paper will deal primarily with the perplexing problem of indispensable parties in pooling cases. However, to understand the principles of law governing the determination of indispensable parties in cases where a pooling or unitization agreement is involved, one must first understand the general principles of law governing the determination of indispensable parties in cases generally. It might first be appropos parenthetically to observe that the term "parties" is a technical word which has a precise meaning in legal parlance. It designates the opposing litigants in a judicial proceeding—not only the persons seeking to establish a right but also those upon whom it is sought to impose a corresponding duty or liability. It includes all the persons by whom or against whom a suit, either at law or in equity, is brought. It might further be observed that although modern rules have somewhat relaxed the rigors and formalized requirements traditionally circumscribing the determination of parties in judicial proceedings, there is still a great deal of truth in Joseph Chitty's longstanding remark at the very beginning of his unsurpassed treatise on pleading, "There are no rules connected with the science and practice of pleading so important as those which relate to the persons who should be parties to the proceeding."¹

Of course the determination of parties nowadays is governed primarily by rules of civil procedure. However, for purposes of a broad general understanding of the subject, we should take notice of the fact that courts generally (and particularly the Federal courts) break the general term "parties" down into four sub-classifications, to-wit: "formal," "proper," "necessary," and "indispensable."² This classification is of particular importance in the Federal Courts where great significance may attach to the question of who *may* be parties and who *must* be parties. It must be remembered that where jurisdiction in the Federal courts is founded only on the fact that the suit is between citizens of differ-

¹ CHITTY ON PLEADING (14th AM Ed. 1).

² 39 AM. JUR. 853, 67 C. J. S. 886, *McRanie v. Palmer* 2 F. R. D. 479 (Mass. 1942).

ent states, the action may be brought only in the district where all plaintiffs or all defendants reside.³

“Formal” parties is the term used to designate those persons who have no interest in the controversy but who are required nevertheless by statute or otherwise to be joined pro forma as parties plaintiff or defendant in a judicial proceeding.⁴ A “proper” party to an action or proceeding is a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties. A “proper” party is one without whom the cause might proceed, but whose presence will allow a decree or judgment more clearly to settle the controversy among all of the parties. “Proper” parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who may have an interest in the subject matter of the litigation.⁵ “Necessary” parties to an action or proceeding are persons who have an interest in the subject matter thereof and whose rights may be materially affected or concluded by the judgment or decree therein, and, accordingly, without whom the court will not proceed to a final determination unless the court in the exercise of its discretion should decide that the interests of such parties are so far severable and separable that the court can proceed to final judgment without adversely affecting them.⁶

The real distinction comes between those designated as “proper” or “necessary” parties on the one hand and those designated as “indispensable” parties on the other. Though this distinction has primarily and traditionally been made by the courts, there is still some foundation for it in the present rules of procedure of both the federal and state courts (F.R.C.P.(19b) and T.R.C.P.(39b)); and the present rules, though using slightly different wording,

³ 28 U. S. C. 1391, 1 CYCLOPEDIA OF FEDERAL PROCEDURE 472.

⁴ 39 AM. JUR. 853.

⁵ 67 C. J. S. 889, 39 AM. JUR. 852.

⁶ 67 C. J. S. 890, 6 CYCLOPEDIA OF FEDERAL PROCEDURE (3rd Ed.) 1, *Shields v. Barrow*, 17 How 130 (U. S. Sup. Ct. 1854).

have been held to be nothing more than a recodification of the pre-existing law on the subject⁷—hence the necessity for us to clearly understand the distinction made between “necessary” parties on the one hand and “indispensable” parties on the other. Although, it should be noted that the proper distinctions and classifications are not always clearly made or verbalized in the cases. An examination of the many cases shows that often the word “necessary” is used when the word “indispensable” would be the proper classification and vice versa under the rules laid down in the leading Supreme Court case on the subject, *Shields v. Barrow* and the cases following it.⁸ The definition of “indispensable” parties which forms the framework of all subsequent definitions was laid down by the Supreme Court in said case of *Shields v. Barrow* when it defined “indispensable” parties therein as those “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 determination may be wholly inconsistent with equity and good conscience.”⁹ The subsequent case of *Washington v. United States*¹⁰ more clearly draws the distinction between “necessary” parties and “indispensable” parties when it states that “necessary” parties could perhaps be more appropriately referred to as “conditionally necessary” parties and that “indispensable” parties under such classification should be referred to as “unconditionally necessary” parties. In fact, many suggestions have been made that some other terminology could be found to better indicate the difference involved in the use of the two terms. However, long usage has given the terms “necessary” and “indispensable” a sanction which cannot at the present juncture be overlooked or overridden, and it is accordingly necessary to define their significance in the orthodox language of the past. Perhaps a more modern and comprehensive definition of an “indispensable” party, however, would be that he is a person who not only has an interest in the subject matter of the controversy but an interest of such a nature that a final decree cannot

⁷ 5 TEX. BAR JOURNAL 287; 8 TEX. BAR JOURNAL 19.

⁸ 17 How. 130 (U. S. Sup. Ct. 1854).

⁹ *Ibid.*

¹⁰ 87 F. 2d 421 (9th Cir. 1936).

be rendered between the other parties to the suit without radically and injuriously affecting that interest, or without leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience; and unless such person is made a party, the court will not proceed to a final adjudication.¹¹

The most helpful and concrete suggestion that the writer has seen for determining whether a person is a necessary or indispensable party in a particular situation is set forth in said case of *Washington v. United States* as follows, to-wit: "There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary or indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree, in absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? If, after the court determines that a absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest; then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable."¹²

The burden of procuring the presence of all indispensable parties is on the plaintiff.¹³ Objection to the omission of an indispensable party may ordinarily be raised for the first time in an appellate court by such court on its own initiative or upon motion of either of the parties unless the complaining party himself is

¹¹ 39 AM. JUR. 854, 67 C.J.S. 892, 6 Cyc. OF FED. PROC. 480, *Niles-Bement-Pond Co. v. Iron Molders Union*, 254 U.S. 77 (1920).

¹² *Washington v. United States*, 87 F. 2d 421 (9th Cir. 1936).

¹³ *National City Bank v. Harbin Electric Joint-Stock Co.*, 28 F. 2d 468 (9th Cir. 1928).

responsible for such defect.¹⁴ The determination of indispensable parties is indeed a serious question. The failure to bring in all who are merely formal or proper parties and sometimes necessary parties does not as a rule prevent the court from adjudicating the matter in controversy. But when an indispensable party is omitted, the court will not as a rule even assume jurisdiction, even though it is not possible to obtain service of process upon the omitted party; and, as pointed out above, it is never too late to raise objection to jurisdiction for want of such parties. In retrospect, we can see that to bring in all indispensable parties is an absolute essential. They are the *sine qua non* of a lawsuit—"things without which no" lawsuit can proceed. Since the determination of indispensable parties in most of our cases today are governed by rules of civil procedure, we should here take cognizance of such fact and briefly treat and set forth the most important of the rules with which we are concerned. Federal Rule 19 of the Federal Rules of Civil Procedure has the most universal application throughout the states since it governs the determination of indispensable parties in the Federal courts in all of the forty-eight states. Of course, each of the states has its own rules for its local courts but we could not possibly treat them all in a paper of this nature. However, in addition to Federal Rule 19, we shall set forth Rule 39 of the Texas Rules of Civil Procedure since that is the rule with which most of us in this area are primarily concerned.

Federal Rule 19 reads as follows, to-wit:

"Rule 19. NECESSARY JOINDER OF PARTIES

- (a) **NECESSARY JOINDER.** Subject to the provisions of Rule 23 and sub-division (b) of this rule, persons having a joint interest shall be made parties and joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or in proper cases, an involuntary plaintiff.
- (b) **EFFECT OF FAILURE TO JOIN.** When persons who are not indispensable, but who ought to be parties if complete

¹⁴ 3 AM. JUR. 70, *Sharpe v. Landowners Oil Assn.*, 92 S.W. 2d 146 (Tex. Com. App. 1936); *Calcote v. Texas Pacific Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946) *cert. den.* 91 L. Ed. 671.

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

- (c) **SAME: NAMES OF OMMITED 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 ommitted."

It will be noted that though the foregoing rule uses slightly different language from the definitions hereinabove set forth which were formulated by judicial decision there is still justification for the statement that such rule is really a re-statement and recodification thereof. Rule 39 of the Texas Rules of Civil Procedure reads as follows:

"Rule 39. NECESSARY JOINDER OF PARTIES

- (a) **NECESSARY JOINDER.** Except as otherwise provided in these rules, persons having a joint interest shall be made parties and 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.”

It will be noted that the Texas rule is practically synonymous with the Federal rule except, of course, for the understandable omission of the provision in the Federal rule treating with loss of jurisdiction in cases involving diversity of citizenship. However, it should be noted that a Texas Court of Civil Appeals (Beaumont) stated in *Hicks v. Southwestern Settlement and Development Corp.* that such differences in language as do appear are significant.¹⁵ In this same opinion the court further states that it has little inclination to apply Federal decisions to Texas Rule 39. The writer would respectfully submit that the court in this connection is somewhat bucking the tide for the writer feels that there is a definite and continuing tendency on the part of state courts throughout the nation (Texas being no exception) to more closely follow Federal rules of procedure and co-ordinate and harmonize their own local rules therewith. In his treatise on Rules of Civil Procedure in Texas Mr. Shafer criticizes the Hicks case and points out that the Supreme Court refused writ of error for want of merit so therefore did not endorse the opinion.¹⁶

The phrase “joint-interest” in Rule 39 has been construed in an advisory opinion handed down by the Subcommittee on Interpre-

¹⁵ *Hicks v. Southwestern Settlement & Development Corp.*, 188 S.W. 2d 915, 926 (Tex. Civ. App. 1945) *error ref. w.o.m.*, but cf. 1 McDONALD, TEXAS CIVIL PRACTICE 234, § 3.23 (1950).

¹⁶ SHAFER, GAMMELL'S ANNOTATED RULES OF CIVIL PROCEDURE IN TEXAS 20, 21 (1948).

tation of the Texas Rules of Practice and Procedure in Civil Cases as follows: "The phrase joint interest should be construed to mean those who would be necessary in the sense of indispensable parties under the previous practice, and if, under the previous practice all persons owning portions of an oil lease royalty need not be joined where the owner of a portion of the royalty brings suit against the lessee to recover damages because of the breach of the implied contract of reasonable development, it is not necessary to join them because of the adoption of the 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, though attention should be called to possible relaxations under Subdivisions (b) and (c) of Rule 39 and under Rule 42."¹⁷ Said case of *Hicks v. Southwestern Settlement and Development Corp.*, *supra*, seems in some part to be in conflict with the foregoing advisory opinion without making any direct reference thereto although it has been cited in no subsequent case to such effect. The Hicks case goes into a rather detailed and trail-blazing analysis of Texas Rules 39 and 42 and certainly will receive a great deal of attention by the courts and writers alike in the future.

It has been necessary to set forth above a rather thorough and general treatment of the subject of indispensable parties generally in order that we may more fully understand the more particularized subject of this paper—indispensable parties in pooling cases. It is necessary to have a broad understanding of the general as a background in order to have an intelligent and comprehensive understanding of the particular or specific and be able to see clearly how it fits into the broad general picture and over-all scheme of things. Especially is this true in this field because cases involving pooling or unitization agreements are not a breed of cases separate, distinct and apart from all others, as some would have us believe, but are really in the same class as cases generally, and in all things are governed by the same principles and rules hereinabove set forth. Whether the litigation involving the pooling agreement be a land case, or one in contract, trespass, or tort, the indispensable parties thereto must still be determined in accord-

¹⁷ 5 TEX. BAR JOURNAL 287; 8 TEX. BAR JOURNAL 19.

ance with the foregoing rules. For purposes of a quicker and more intelligent understanding of the cases hereinafter analyzed, all of the foregoing may be briefly summarized into the broad general rule that in a particular case a person need not be made a party defendant therein against whom no relief is sought and who has no interest that may be affected by any decree or judgment rendered in the controversy; or even more succinctly stated, a person who will not be affected by the judgment is not an indispensable party to the suit.

Now that we have attained a broad general understanding of the question of parties, let us proceed into a more detailed analysis of the cases themselves which bear on the question of indispensable parties in suits involving pooling or unitization agreements. It should again be noted, however, that the courts do not always (hardly ever do any more, in fact) draw the distinction that we have above between necessary parties on the one hand and indispensable parties on the other. The federal courts occasionally have to in diversity cases; but, of course, the Texas courts hardly ever do because our state courts never have to worry about diversity as a basis for jurisdiction. Our state courts then almost always use the words "necessary" and "indispensable" collectively and interchangeably.¹⁸ Another interesting thing worth noting in the pooling cases we shall discuss is that the holdings therein on questions of indispensable parties are seldom based upon rules of civil procedure or court interpretations thereof but instead are based primarily on case law which in turn has likewise ignored rules of civil procedure and been content to rely on the old standby definitions hereinabove set forth which, of course, also were formulated by judicial decision. This is true of state and federal courts alike. Of course, the cases basically stay within the framework contemplated by the rules, but they do so without any direct reference thereto. In other words, the question of parties in oil and gas cases at this time is still basically governed by longstanding case law and not by statutory law or rules of civil procedure. In fact, it seems that the treatment of this question by the courts is handled more in the form of substantive law than procedural law.

¹⁸ *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472 (1942).

Any discussion of parties in pooling cases logically begins with an analysis of the Texas Supreme Court case of *Veal v. Thomason*¹⁹ for this case not only set the course as far as parties in pooling cases is concerned but by basing its decision on the idea of reciprocal conveyancing also set the course for the whole field of law applicable to pooling and unitization agreements. This was a case brought by Claude A. Thomason to recover the entire title in and to a particular tract of land known as Tract No. 68 in the Bob Slaughter block in Hockley County, Texas. Thomason joined as defendants in the proceeding George T. Veal et ux, R. L. Slaughter, Jr. et ux, and The Texas Company. In 1936, George T. Veal and wife joined with the owners of some twenty-one other tracts in the Bob Slaughter block in the execution of a community or unitized lease in favor of The Texas Company and covering in the aggregate approximately 6,000 acres of contiguous tracts of land. For convenience the several lessors executed separate instruments, in counterpart, instead of all signing the same instrument. Each instrument, however, was identical as to terms and, in addition to the particular lessor's tract therein, described all of other tracts of land in the unitized block. All of the leases have to be construed together then, of course, as a single contract just as though all of the lessors of lands in such block had signed the same instrument.²⁰ In addition to the particular Tract 68 involved in the proceeding, the Veals owned thirteen additional tracts in the block or an aggregate acreage therein of 2025 acres.

The communitized lease contract signed by the Veals, as well as all other similar instruments signed by the other lessors in the unitized block, provided that the unitized block should be operated and developed as one area, and that each land owner who executed a lease in the block would be vested with an interest in the royalty payable on oil, gas or any other minerals produced from any land anywhere in the entire block in the proportion which the acreage of such owner in the block bore to the aggregate number of acres in the whole block at the time of production. Every lease contained the following example in Paragraph 4 (b) thereof, to-wit: "If at any time oil or gas or other minerals is produced from

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

²⁰ 10 TEX. JUR. 286.

said land, this lessor or any other party executing a similar lease on land covered by said block, to lessee herein should own a 100-acre royalty interest and lessee, its successors or assigns, holds under lease in the Unitized Block six thousand (6000) acres, then the lessor herein or lessor in other leases shall be entitled to 100/6000ths of the one-eight or other royalty provided for in this lease. For the purpose of operation and development it is intended that this lease and other similar leases upon land in the unitized block shall be treated as one lease.”²¹

In addition to his general count in trespass to try title the plaintiff, Thomason, included another count in his petition stating that he was attacking the title of the Veals and The Texas Company in and to Tract 68 because of alleged irregularities in a substitute trustee's sale in which the Veals acquired title to such tract prior to their joining in the execution of the communitized lease to The Texas Company. None of the other parties who executed leases in the unitized block were made parties to the suit. The trial court ruled that they were indispensable parties, and offered to continue the case to afford Thomason an opportunity to join them as defendants. Thomason declined to amend his petition, and signified to the court that he did not intend to bring such absent parties into the proceeding. Thereupon the trial court dismissed the case. In an opinion at 144 S.W. 2d 361, the Amarillo Court of Civil Appeals held that the absent parties were not necessary parties to the suit and reversed the trial court's judgment and remanded the cause back to it for trial on the merits. The Court of Civil Appeals held that the absent parties did not fall within the following definition of necessary parties, to-wit: “It has many times been held by the courts of this State that those who are necessary parties to a suit are such persons as have or claim a direct interest in the object and subject matter of the suit and whose interests will necessarily be affected by any judgment that may be rendered therein. Such persons are not only proper parties but are necessary and indispensable parties, plaintiff or defendant. In discussing this matter of necessary parties the Supreme Court in the Fischer case said: ‘It is universally acknowledged that

²¹ 159 S.W. 2d 474.

necessary or indispensable parties includes all persons who have an interest in the subject matter of the suit of such a nature that a final decree cannot be made without either affecting their interest or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.' ”²² (Note the collective and interchangeable use of the terms “necessary” and “indispensable.”) The Court of Civil Appeals held that the absent parties did not acquire any interest in the Veals’ land by virtue of the communitized lease but only a right to share in the proceeds of oil or gas produced therefrom after the same had been reduced to possession at the surface and sold and that the interest of such parties would not necessarily be affected by a judgment rendered in the cause.

The Supreme Court said that it would apply the very same definition of indispensable parties used by the Court of Civil Appeals but would reach a different conclusion in the application thereof. The Supreme Court in an opinion by Justice Critz specifically held as follows: “Measured by the above rule, which no party to this appeal finds any fault with, the royalty owners under the other lease contracts in this unitized block are necessary parties to this suit. There is no escape from this conclusion, because Thomason seeks in this action to obtain a judgment freeing this land from the Texas Company lease, and if this is done by judgment which names such Company only, the royalty owners under the other leases in this unitized block will have had such royalty interest in this land, for all practical purposes, cut off and destroyed without having had their day in court.”²³

The foregoing conclusion on the part of the Supreme Court is clearly a correct decision whether the interest acquired by the absent royalty owners in the Veals’ land under the communitized lease is considered a real property interest or a contractual or personal property interest; for whatever it is, as the court says, the effect of a judgment in the cause in favor of Thomason would be to cut off such interest by freeing the land of the contract establishing same without the parties thereto having had their day in

²² 144 S.W. 2d 361.

²³ 159 S.W. 2d 477.

court. But the Supreme Court was not content to rest its conclusion upon this factor alone, but opines in dictum preceding the foregoing conclusion that the communitized lease effected a reciprocal conveyancing of real property royalty interest between all of the parties thereto which constituted each of the parties thereto an owner of a real property interest in the land of every other party thereto. It is primarily this dictum on the part of the Supreme Court which has caused subsequent courts to apply historical title and conveyancing law to unitization contracts rather than contract law. The dictum referred to in the court's opinion is as follows: "To our minds when we look to the substance and intent of this lease contract considered as a whole, the above recited provisions can have no effect other than to constitute all of the lessors of land in the unitized block *joint owners*, or joint tenants of all royalties reserved in each of the several leases in such block, the ownership being in the proportion which the acreage of each lease contract bears to the total acreage of the unitized block. . . . We have demonstrated that the effect of the lease contract here involved is to vest all the lessors of land in this unitized block with *joint ownership* of the royalty earned from all the land in such block."²⁴ The court then goes ahead to point out that under the established decisions of Texas a royalty interest is a real property interest no matter how the same may be payable.

Perhaps the court felt constrained to find that there was a reciprocal conveyancing of royalty interest between the parties to the communitized lease in this particular case because of the wording in the lease involved therein, but the writer submits that such dictum is not necessary to the conclusion or the holding of the court and that the bench and bar alike should not blindly construe such opinion to mean that every pooling or unitization agreement effects a reciprocal conveyancing of real property interests between all parties thereto. The writer will discuss the significance of the application of historical title and conveyancing law to pooling and unitization agreements later on in this paper.

Although there was a count in trespass to try title in Thomason's petition, since the nature of the proceeding was primarily an

²⁴ *Id.*, p. 476.

equitable one, based upon another count in the petition seeking to have a certain trustee's sale canceled and set aside, there was some doubt after *Veal v. Thomason* as to whether the rules enunciated therein would also be applicable to a straight trespass to try title action involving no equitable principles such as the cancelation of an instrument or the removal of a cloud from title. To recover under his trespass to try title allegation Thomason had to cancel the trustee's sale because until he did so the outstanding legal title would be in the defendants, and in Texas a plaintiff cannot recover in a straight trespass to try title action on the strength of a more equitable *right* if there is an outstanding legal or equitable title in the defendant.²⁵ However, following close on the heels of *Veal v. Thomason* came *Belt v. Texas Company* reiterating and reaffirming the rules announced in *Veal v. Thomason* and stating that the same would in all things be equally as applicable in straight trespass to try title suits.²⁶ The court stated, "Under our practice, it matters little whether the suit be an action in trespass to try title, and therefore an action at law, or a suit to cancel a deed or other instrument, and therefore a suit in equity, the rule of necessary parties is the same."²⁷

Belt v. Texas Company was a trespass to try title action involving the very same lease from George T. Veal et ux to The Texas Company which was involved in *Veal v. Thomason*. W. D. Belt, Jr., the plaintiff, was suing to recover the entire fee simple title in and to six other tracts of land owned by the Veals in the said Bob Slaughter block in Hockley County, Texas, which were also included in said communitized lease hereinabove discussed. Sixty-six persons interested in the unitized block were not made parties; and upon Belt's refusal to do so, the trial court dismissed the case. The Amarillo Court of Civil Appeals held: "The evidence showed that the interest held by The Texas Company was conveyed to it by the oil and gas lease; and the same evidence, together with the oil and gas lease itself, showed that the thirty-nine absent parties named in the motion and the twenty-seven others held interests identical in nature with that held by The Texas Company

²⁵ 1 McDONALD, TEXAS CIVIL PRACTICE, § 208.

²⁶ *Belt v. Texas Company*, 175 S.W. 2d 622, 624 (Tex. Civ. App. 1943) *error ref.*

²⁷ *Ibid.*, p. 624.

and created by the same instrument. The interests held by them are not such as those held by lessors in the ordinary oil and gas lease. The absent parties own their interests in the oil and gas that may be produced from the tracts involved in this suit *by virtue only* of the provisions of the oil and gas lease which require the development and production of the oil and gas. If The Texas Company or its assigns do not produce oil or gas from the land under the lease, the absent parties in effect, are deprived of any interest they may own in the land. If the lease held by The Texas Company should be destroyed and a judgment entered freeing the land from that lease, the interests of the absent royalty owners in the land involved in the suit would be entirely cut off and destroyed. We think, therefore, they are essential and necessary parties to the suit.”²⁸

The plaintiff in the Belt case contended that the question of parties therein was controlled by the earlier Supreme Court case of *Petroleum Producers Company v. Reed*²⁹ instead of *Veal v. Thomason*. *Petroleum Producers Company v. Reed* was an action in trespass to try title instituted by the Petroleum Producers Company et al against M. H. Reed to recover the title and possession of an oil and gas *leasehold estate* in and to a particular tract of land in Duval County, Texas. The question was the superiority of the plaintiff's lease or the defendant's lease. The state of Texas was lessor in both leases and had not been joined as a party to the suit. The defendants filed a plea in abatement upon the ground that the State was an indispensable party to the suit. The Supreme Court held that the State was not an indispensable party to the suit and in the course of its opinion said: “As we have seen, the said defendants claim the oil and gas leasehold estate in a portion of said tract of land, under an oil and gas lease executed by the State. In other words, according to the claim of said defendants, whatever rights which accrued to them, under said lease, belonged to them and not to the State. It is thus seen that the possession which the plaintiffs challenge is in no sense and in no respect the possession of the State, but is that of the defendants themselves. The

²⁸ *Ibid.*

²⁹ 135 Tex. 386, 144 S.W. 2d 540 (1940).

very crux of the question which the plaintiffs propose, in their petition, to litigate is whether, as against the defendants in the suit, the plaintiffs have the right to the possession of the oil and gas leasehold estate for which they sue. Undoubtedly, the plaintiffs are privileged to litigate this question with the defendants in the absence of the state."⁸⁰ In other words, the Supreme Court held that two adverse claimants to the leasehold estate in and to a particular tract of land can litigate the relative superiority of their respective leases in a trespass to try title action without joining their mutual lessor therein. The court did not state whether the major provisions of the two leases (e.g., term, royalty, delay rentals, pooling, etc.) were identical as to the lessor or whether the element of exclusive right to possession inherent in the leasehold estate was the basis for such decision.

The court in the Belt case, after quoting most of the language of *Petroleum Producers Company v. Reed* hereinabove set forth, distinguished the two cases as follows: "From the quotation it will be seen that the estate in controversy in that case (*Petroleum Producers Company v. Reed*) was the *mineral estate that was separated from the entire estate* in the land by the oil and gas lease, and *not the entire estate* in the land. All parties to the litigation recognized the validity of the oil and gas lease executed by the State and the controversy was over the segregated estate created by the oil and gas lease. In the instant case the appellant seeks to recover the *entire* estate in the land, alleging that he acquired same on September 3, 1935, long before the lease in question was executed, and if he should be successful, the oil and gas lease held by appellee would be annulled and destroyed. As we have already said, the record shows that the absent parties own interests in the land *only so long as the oil and gas lease held by The Texas Company remains in existence as a valid lease on the land*. They are therefore vitally concerned, and under the rule of necessary and indispensable parties, so well established by the decisions of the courts of this State, they are entitled to be brought in and given the privilege of litigating their rights."⁸¹ The Supreme Court

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 625.

unqualifiedly refused to grant a writ of error in the case. Note in connection with the observation hereinbefore made that the holdings of neither of the foregoing cases are based either expressly or impliedly on Rules of Procedure.

So, there you have it—the two landmark cases in the field—*Veal v. Thomason* and *Belt v. Texas Company*, both standing for the general proposition that a plaintiff seeking to free his land from a unitization agreement (effected in both of these cases by communitized leases) must make every party thereto or claiming thereunder a party to his suit. Undoubtedly, then, the thought has occurred to the reader that the application of these holdings in a case involving a unitization agreement with hundreds of parties thereto or claiming thereunder would work a severe hardship upon the owner of a small tract in the unit who wanted to litigate his title. The plaintiff would be faced with the unhappy plight of having to make all of those people parties to his suit. The expense and effort involved in running down the titles, heirships, etc., and the cost and effort involved in effecting service and the continual necessity for amending pleadings as parties should die or marry, etc., would make it almost prohibitive for him to bring his suit. In many cases in fact, the procedural obstacles in the path might completely close the courthouse door in the face of a deserving plaintiff and prevent him from litigating his substantive rights. According to these holdings then all parties claiming under the unit agreement may have their day in court even if, as a practical matter, it causes a deserving plaintiff to lose his day in court. The plea in statement in the *Belt* case was based on the absence of only sixty-six parties. Making all of these people parties to the proceeding would in itself be quite a task, but think of the insurmountable obstacles which would confront a plaintiff desiring to litigate the title to a tract of land in the Old Ocean Unit in Brazoria and Matagorda Counties, Texas, when over a thousand parties are claiming thereunder; or think of the eventuality of having to bring into a proceeding the literally thousands of parties who will be claiming under the new Scurry County Unit if a plaintiff wanted to litigate the title to a particular tract of land therein. These are not farfetched examples either. Many towns in Texas

have production within their corporate limits, e.g., the towns of Sweeney and Alvin, both in Brazoria County, Texas, to mention only two of the score or so. Sweeney is in the Old Ocean Unit mentioned above and Alvin is divided into three different gas units. With pooling and unitization inevitably becoming more common, unit agreements with hundreds or even thousands claiming thereunder will become the rule and not the exception.

No doubt the reader has thought by now that our rules of civil procedure must certainly provide for class actions and that authority to bring a class action should afford some relief in situations of this nature. As a matter of fact, both the Texas Rules of Civil Procedure and the Federal Rules of Civil Procedure do contain provisions authorizing class actions (T.R.C.P. No. 42 and F.R.C.P. No. 23). Texas Rule 42 provides as follows: "Rule 42: Class Actions—

- (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
 - (1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
 - (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
 - (3) several, and there is a common question of law or fact affecting the several rights and common relief is sought.
- (b) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in Paragraph (1) of Subdivision (a) of this rule notice of the

proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in Paragraphs (2) or (3) of Sub-division (a) notice shall be given only if the court requires it.”

Federal Rule 23 contains provisions identical in terminology with Texas Rule 42 above.

However, the interpretation and application that the courts have thus far made of these rules would not appear to offer much encouragement for relief in the class of actions with which we are concerned in this paper. One of the most important cases interpreting, restricting and limiting Rule 42 is *Hicks v. Southwestern Settlement and Development Corporation*.⁸² This was a suit in trespass to try title and for damages, brought by Mrs. Bertha Neyland Hicks and 103 other persons as plaintiffs against the Southwestern Settlement and Development Corporation and others as defendants. They alleged fee title in themselves in and to the Adolpho Sterne League in Tyler County, Texas, and sought damages of \$810,000 against the defendants for wrongful possession of said land and the appropriation of oil and gas therefrom. The plaintiffs were suing as the heirs of Thomas Collier. Among other pleas the defendants filed a plea in abatement stating that there were 574 other persons who were also the heirs of Thomas Collier but had not been made parties to the suit. The trial court sustained the plea in abatement and, upon plaintiff's refusal to amend, dismissed the suit. The Beaumont Court of Civil Appeals after first observing that in a *trespass to try title* action the right of a tenant in common to recover the entire tract from one who had no title was a “substantive right” which had not been diminished by the rules of civil procedure went ahead further to observe that this right of independent action on the part of the co-tenant was no more firmly established than was the right of the defendants in an *action for damages for injury to property* to require that all tenants in common owning such property should be made parties to the suit to prevent a multiplicity of action. After a rather exhaustive discussion of the seeming conflict between these two rules,

⁸² 188 S.W. 2d 915 (Tex. Civ. App. 1945), *error ref. w. o. m.*

the court concluded as follows: "On independent consideration of the trespass to try title statutes, and the Rules of Procedure into which some of these statutes have been carried, we conclude that these statutes and rules do not confer authority upon a tenant in common to maintain the combined action for title and for damages free of and without the joinder of his co-tenant, and that said statutes and rules do not obviate the rule of parties which is applicable to a simple suit for damages."⁸³

In other words, one co-tenant can try his title in and to a particular tract of land without joining his co-tenants in the suit, but when he brings a suit for damages to the land or a suit jointly for title and damages, his co-tenants are indispensable parties to the suit.

The plaintiffs contended that Rule 42 authorized them to maintain their suit as a class action without the joinder of their tenants in common. The court first stated that the plaintiff could not rely on Rule 42 because they did not *plead* that they were suing as representatives of a class and did not *prove* that they would be adequate representation for the class; to-wit: "Rule 42 provides for class actions, and does not apply unless the intention to sue on behalf of a class is evidenced by appropriate pleading. Such pleading is not before us. Appellants have alleged fee title in themselves and thus have the appearance of denying title to their tenants in common. Neither does the rule apply unless the members of the class actually before the court adequately represent the class; this is as much a requirement of due process as it is a provision of the Rule, *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 ALR 741; and adequate representation must be proved as a fact. Such proof is not before us."⁸⁴ The court went ahead further to state, however, that even if the plaintiffs had made proper class suit allegations, they still could not have relied on Rule 42, sic: ". . . we hold that the omitted tenants in common, whose title is not owned by appellants and for whom they do not stand as trustees, would not be bound by the judgment, whether the appellants do or do not insert proper class suit allegations in their peti-

⁸³ *Ibid.*, p. 922.

⁸⁴ *Ibid.*, p. 923.

tion. It seems reasonable to say that in the situation where appellants cannot recover title for their omitted tenants in common, they cannot litigate the title vested in said tenants; what appellants do not have the right to recover as representatives, they ought not to have the power to lose in that capacity. Turning to the appellants case for damages, we find the same state of authority and substantially the same basis therefor. . . . As stated above in another connection, if the plaintiffs cannot recover the shares of their tenants in common, they cannot litigate the rights of their tenants in common to those shares; what the plaintiffs do not have the right to recover they ought not to have the power to lose. These matters preclude an application of Rule 42, to the issues made by appellant's petition; for if the judgment will not be *res judicata* as to the omitted tenants in common it will not, as regards the shares or interest of said omitted tenants, bind the appellees. The estoppel of the judgment must be mutual. *Davis v. First National Bank*, 139 Tex. 36, 161 S.W. 2d 467, 144 ALR 1; 26 Tex. Jur. 211, Par. No. 452."⁸⁵

After holding that the plaintiffs could not only rely upon Rule 42, the court went into a rather detailed discussion of Rule 39 and held that Rule 39 would require the joinder of the omitted co-tenants except for an equitable exception thereto which may be called into play when "the parties 'are so exceedingly numerous that it would be impracticable to join them without great delay and inconvenience; . . . in these and other accepted cases the objection of want of parties will not, in general, be allowed to prevail; for, to require such persons to be made parties, would be equivalent to a dismissal of the suit and would amount to a denial of justice.'"⁸⁶

Though the court was not willing to allow a formal written rule (Rule 42) to relax the requirements of Rule 39, as apparently the draftsmen thereof had intended, the court did apply an unwritten and discretionary exception thereto based upon the equitable principles that equity will afford relief when formal legal rules are too rigorous. It cited several cases supporting this equitable excep-

⁸⁵ *Ibid.*, pp. 924 & 925.

⁸⁶ *Ibid.*, p. 927.

tion and the considerations it recites for applying the exception in this case are worthy of quotation to demonstrate some of the difficulties invariably attendant to a suit involving numerous parties, as follows:

We hold as a matter of law that the tenants in common here are exceedingly numerous within the true intent and meaning of this exception, and further hold that it would be impractical within the meaning of said exception for appellants to make them all parties to this suit. The petition names 104 plaintiffs, of whom perhaps 17 are formal parties. Plaintiffs include residents of fifteen counties in Texas and two parishes in Louisiana; two come from Michigan, and one from Puerto Rico. The pleas in abatement now list 574 additional heirs of Tom Collier and tenants in common of appellants who are described as necessary parties to this suit. It is with more than casual interest that we have searched for some evidence or some statement to the effect that these were all of such heirs, but we have not found such evidence or such a statement in the record. It seems of direct significance to the application of the exceptions noted that appellees amended their pleas in abatement twice; that their first amended plea in abatement listed 512 such heirs and that sixty-three additional heirs were named in the second amended pleas, on which the trial court acted. It now appears that five persons who were named in said first amended pleas are dead; that three persons named in said pleas are now described as married women, and that mistakes in the names of several individuals have been discovered and corrected. The first amended pleas are not in the transcript; they have been adopted and described generally in defendants' second amended pleas, but we have observed that among the sixty-three additional heirs are residents of four additional states, namely, of two counties in New Mexico, one county in Arizona, two counties in Georgia, and one county in Florida. These sixty-three persons also include residents of three additional parishes in Louisiana and nine additional counties in Texas. Among these sixty-three, one unknown person, a formal party, is referred to; no addresses are given for two persons; and eight minors are listed, without reference to guardianship. Although we have no information respecting the status and residence of the 512 heirs listed in the first amended plea, we feel safe in assuming that they are as diversely scattered about the United States and are of as varied a status as are the sixty-three additional persons named in the second amended pleas. . . . As we have pointed out in some detail above every issue raised by the pleadings can be determined between the parties without the presence of the omitted tenants in common and without injury to their interests. The injury which may result to appellees from a multiplicity of units on the causes

of action before us is more than counterbalanced by the injury which might result to appellants if the exception noted was not applied, for otherwise appellants, if they comply with the provisions of Section (a) of Rule 39, might be denied the right to maintain their action.³⁷

The judgment of the trial court was reversed and the cause remanded for trial on the merits.

The only reason that an equitable exception of this nature is really not much help is that a plaintiff has to run the calculated and many times costly risk of whether or not the trial judge's discretion in applying the exception or not in a particular case will stand up on appeal. Then, if the exception is applied, there is still the further question as to whether or not the trial judge in the exercise of his judicial discretion required the joinder of the proper percentage of plaintiffs and/or defendants to fairly insure adequate representation of the class. The plaintiff will have to litigate these questions all the way to the Supreme Court every time at great delay and expense before he will know whether he has properly complied with all the *procedural* requirements necessary to get him before the court to litigate his *substantive* rights. If the trial judge rules that the exception applies and allows him to try his case, there is still a good chance that it will all be to no avail if an appellate court substitutes its discretion for that of the trial judge as it did in the *Knious* case hereinafter discussed. Or if the trial judge rules against the plaintiff, he has to go all the way to the Supreme Court, as in the *Hicks* case, on a procedural matter before he can litigate his substantive rights. And we all remember the old adage that "Slow justice is no justice."

It further would not appear that the equitable exception applied in the *Hicks* case would afford any relief to a plaintiff in a case like *Veal v. Thompson* or *Belt v. Texas Company* where the exceedingly large number of omitted parties are defendants (instead of plaintiffs) who would have their interest cut off if the plaintiff should prevail without having had their day in court. In the *Hicks* case the only impediment to the application of the exception therein was the possibility of a multiplicity of actions on the part of the omitted plaintiffs against the defendants. The court felt that

³⁷ *Ibid.*, p. 928.

this possibility was more than counterbalanced by the injury which would result to the plaintiffs if the exceptions were not applied. In other words, in cases of this nature, since a plaintiff has no formal legal rules to rely upon, his standing in court must depend upon what has been described as the thin ice of judicial discretion instead of the firm foundation of legal right.

Even a liberal application of formal legal Rule 42, however, would still put a plaintiff in court only on a discretionary basis. Because before a plaintiff can maintain the class action authorized in Rule 42, the trial court must first find, in the exercise of its judicial discretion that the persons constituting a class are so *numerous* as to make it *impracticable* to bring them before the court and that those of the class who are before the court will *fairly insure* the *adequate representation* of the omitted parties. The case of *Matthews v. Landowners Oil Association*³⁸ is fairly illustrative of this point and of the further point that a plaintiff apparently will have to walk a pretty fine line to avail of the relief afforded by Rule 42. The facts of this case are somewhat similar to those of *Veal v. Thomason* and *Belt v. Texas Company*. The suit was a class action designed to cancel certain mineral conveyances and leases. It was brought by W. O. Matthews and twelve other named plaintiffs, all residents of Crosby County, Texas, against Landowners Oil Association and twenty-three other named defendants. The thirteen named plaintiffs sought to represent all Crosby County landowners who were similarly situated as against the twenty-four named defendants as representatives of all others who claimed or held an equitable or beneficial title to any of the minerals in lands underlying the conveyance and leases sought to be canceled. Plaintiffs alleged that it would be difficult and impractical to make all of these beneficiaries parties to the suit. They also alleged that the persons named and described as class defendants were fairly representative of all the defendants set out as members of the pool by Landowners Oil Association in its plea in abatement.

The plaintiff, W. O. Matthews and wife, had executed an oil and gas lease to the Landowners Oil Association on land in Crosby

³⁸ 204 S.W. 2d 647 (Tex. Civ. App. 1947) *error ref. n. r. e.*

County, Texas, as had each of the other named plaintiffs or their predecessors in title. All of the leases were similar, differing only as to dates, lessors, and property descriptions. The plaintiffs further alleged "that the appellee, Landowners Oil Association, was grantee and lessee in numerous other conveyances of oil, gas and other minerals covering thousands of acres of land in Crosby County; and in many cases the grantors of such leases and conveyances are dead, leaving such lands, either by will or by virtue of the law of descent distribution to many persons; that in many cases such grantors have sold and conveyed the lands to various grantees who have become segregated to the original rights of the grantors; that the various grantors, the various legatees, and such persons who have inherited by virtue of the laws of descent distribution are scattered over the United States and in some cases are located beyond the seas; that the number of individuals owning land in Crosby County and not named in the appellants' petition as party plaintiffs are about fifty-five in number and are so numerous that it would not be practical for the named appellants to locate and bring before this court each person owning any of the minerals in land situated in Crosby County covered by leases and conveyances similar to that executed by the appellants W. O. Matthews and wife and the other named appellants to the Landowners Oil Association; and therefore, it has been necessary for the appellants to resort to a class action."³⁹

The leases all purported to create a pool of the interest of the various lessors in the royalties resulting from production on any of the lands in the pool and the participation of every member in such production was to be in proportion to his contributions of acreage to the pool. The Matthews land was to be placed in the acreage pool known as Pool One, which according to the lease was to consist of no less than 25,000 acres and no more than 500,000 acres. The plaintiffs contended that they had made the proper class suit allegations and that the proof supported their pleadings. The court held that since the suit was for the cancellation of written instruments all parties claiming thereunder were indispensable parties to the suit and that neither the plaintiffs' pleadings nor

³⁹ *Ibid.*, p. 648.

proof supported their contention that they should be able to relax this requirement by maintaining a class action. The court pointed out a couple of unfortunate mistakes that the plaintiffs had made in their petition in that the plaintiffs' petition did not adequately reflect how certain named plaintiffs enumerated therein had succeeded to the interest of the original grantors in two of the instruments who were not made parties to the suit. In the court's opinion this in itself was a fatal error on the part of plaintiffs. The court further supported its conclusion, however, by stating that this case is controlled by the cases of *Veal v. Thomason* and *Belt v. Texas Company*, sic: ". . . we see no difference between the cases cited and this case. In the two cases the court was concerned with a unitized block composed of many contiguous tracts, obtained from numerous owners who had an interest in the mineral royalty in proportion of the amount of acreage each had contributed to the block. In this case we are concerned with a pool, comprising many non-contiguous tracts in three states obtained from numerous owners, whose interest in the oil and gas royalty is determined in proportion to the amount of acreage each has in the pool. Should the appellants obtain a judgment freeing their land from the conveyances to the Landowners Oil Association, each of those who have royalty interest in the pool will have their lease canceled and the pool dissolved without having had their day in court."⁴⁰

The real significance of the opinion, however, is found in the portion thereof dealing with the question of class actions which though recognizing the authority to bring class actions under Rule 42 states that the requirements thereof were not sufficiently complied with in this case, to wit: "Where the numbers of those interested is so great as to make difficult or impossible the joinder of all such persons, or where some are not within the jurisdiction of the court or because their whereabouts are unknown, or under circumstances where if all were made parties, the death of some would delay or even prevent a decree, our courts under the provision of Rule 42, Texas Rules of Civil Procedure, recognize the right of a few such persons to sue, or to be sued, for themselves and all others similarly situated and thus represent the entire class

⁴⁰ *Ibid.*, p. 651.

or body of interested persons. . . . In a class representative suit, the rights and interest of the persons bringing the suit may not be different from those of the class they seek to represent, and this fact must appear from the plaintiff's allegations and proof. 39 American Jurisprudence 921. In this case the rights and interest of the various persons who contributed to Pool One could be different. There was nothing before the court to show that the interest of all parties defendant were identical. *Hasberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 ALR 741. Nor does the record reveal that any effort was made on the part of the appellants to show the trial court that the number of persons not named as plaintiffs or defendants was too numerous and that it would be impractical to bring them before the court. With the exception of the number of persons owning the lands in Crosby County, alleged to be fifty-five in number, the appellants failed to allege the number of other persons not made parties plaintiff or defendant, saying only that they were so numerous as to render it impractical to bring them before the court. The question of whether or not the number of parties plaintiff or defendant was so great as to make it impractical to bring them before the court, was a question to be determined by the trial court; and we assume, where the record reveals nothing to the contrary, that the trial court exercised a proper judicial discretion in sustaining the appellee's place in abatement. *Southern Ornamental Iron Works v. Morrow*, Tex. Civ. App., 188 SW 2d 915. *Hicks v. Southwestern Settlement & Development Corporation*, Tex. Civ. App., 101 SW 2d 336.⁴¹ The court is to be admired for refusing to substitute its discretion for that of the trial court when the record does not clearly reflect an abuse thereof on the part of the trial court.

There is an excellent discussion of the general subject of class actions by Harold Hoffman in the *Texas Law Review*.⁴² The article provides a more detailed discussion of Rule 42 as it would apply to other types of class actions such as corporation shareholder's suits or assessment suits in mutual insurance company cases, together with a discussion of the application of the doctrines of res

⁴¹ *Ibid.*

⁴² 25 TEX. L. REV. 64.

judicata and stare decisis to Rule 42 and an analysis of the leading cases on the subject. Another excellent treatment of the subject may be found in the section entitled "Class Actions" in McDonald's *Texas Civil Practice*.⁴³ It seems that one of the problems inherent in class action suits is to see that those chosen to represent the class are really bona fide representatives of the class. It is easy to see how a plaintiff in a class action suit might be inclined to join in the suit those individuals out of the defendants' class who would be least likely inclined to make a very strong defense of their position for one reason or another. They could be judgment proof or sympathetic to plaintiff's position or apathetic or antipathetic toward the defendants or might even have other considerations which might cause them to gain if plaintiffs won the suit. For absent parties to a suit to be bound by a judgment therein when they were represented therein only by parties of this nature would be the grossest miscarriage of justice imaginable. It has been said for this reason that class actions are open invitations to collusion. Collusion of this nature could be exceedingly difficult for even an exceptionally alert judge to detect. A recent class action case wherein a plaintiff apparently did carefully select the defendants to be joined as representatives of the class under Rule 42 was *Knioum v. Slattery*.⁴⁴ This was a case to remove certain restrictive covenants in a dedicated subdivision in Corpus Christi, Texas. Only two owners of lots in the subdivision were joined as defendants and these two defendants did not resist the removal of the restrictions. The trial court entered judgment freeing the subdivision of the covenants as against not only the two named defendants but also "against *all persons* owning or holding any interest in and to property situated in the subdivision."⁴⁵ The appeal was perfected by owners of other interests in the subdivision (lots, liens, etc.) who intervened to resist the removal of the restrictions. The Court of Civil Appeals held that the trial court had abused its discretion and reversed and remanded the cause, sic: "as we view it, Rule 42 provides for an exceptional procedure whereby a plaintiff may secure relief in certain specified cases by invoking

⁴³ 1 McDONALD, TEXAS CIVIL PRACTICE, 269 *et seq.*, § 3.43 *et seq.*

⁴⁴ 239 S.W. 2d 865 (Tex. Civ. App. 1951) *error ref.*

⁴⁵ *Ibid.*, p. 866.

the principal of virtual representation. However, in order to do so, he must conform with the provisions of the rule. A plaintiff must name such defendants as will insure adequate representation on behalf of all who are sued. This requirement is obviously not met by naming two persons as defendants who agree with the plaintiff's position in the litigation and who contest none of the allegations of the petition. Defendants friendly to plaintiff cannot agree on behalf of the class they supposedly represent that the plaintiff is correct, and thus waive the rights and claims of the class. *City of Houston v. Mann*, 139 Tex. 640, 164 SW 2d 548. . . . A member of a class although not an actual party to the suit, can be bound only when true representatives of his class are made parties so that he may receive adequate representation. *Matthews v. Landowners Oil Association*, Tex. Civ. App. 204 SW 2d 647; 1 *McDonald Texas Civil Practice* 277, Par. 334, *Class Actions*. We think it obvious that the requirements of Rule 42 were not complied with in this case. The named defendants who agree with plaintiff were not truly representative of the class of owners who are opposed to plaintiff. . . . We hold that the trial court abused the discretion vested in it by law in holding that the named defendants were representative of the classes of persons affected by this suit."⁴⁶ The Supreme Court unqualifiedly refused writ of error. The omitted parties in this case were fortunate in being able to protect their rights by getting wind of the case and seasonably intervening therein, and by successfully prevailing upon the appellate courts to substitute their discretion for that of the trial court. Cases like this cannot help but cause the courts to be exceedingly cautious in the application of Rule 42.

It would seem that Rule 42 is a step in the right direction and could afford considerable relief in the type of actions with which we are concerned in this paper; however, the writer does not honestly believe that the rule will really prove to be very helpful in these types of suits or used very much because of the dangers and difficulties necessarily attendant thereto as to all parties concerned — plaintiffs, defendants, and courts alike. The only cases thus far in this field as hereinabove set out certainly would not be cal-

⁴⁶ *Ibid.*, pp. 868, 869.

culated to afford much encouragement. We really will not know what the possibilities of the rule are, however, insofar as parties in pooling cases are concerned, until the Supreme Court writes an opinion thereon in a case somewhat similar in nature to *Veal v. Thomason*, *Belt v. Texas Company* or *Matthews v. Landowners Oil Association*. It will be remembered that the Supreme Court did not endorse the opinion in either the Hicks or the Matthews case. In the Hicks case writ refused for want of merit and in the Matthews case the notation "no reversible error" was noted on the refusal of writ. Because of the negative holding in the *Knioum* case, it is hard to say what the Supreme Court's implied endorsement of the opinion therein (un-qualifiedly refusing writ) might portend in trying to guess the attitude the Court will have in a Rule 42 case with facts similar to those of *Veal v. Thomason* or *Belt v. Texas Company*.

For the present at least it would seem that plaintiffs caught in the unhappy plight of having to litigate a question concerning a tract of land which happens to be in a unit are either going to have to make all of the parties claiming under the unit parties to the suit because of *Veal v. Thomason* and *Belt v. Texas Company* or be able to distinguish the facts of their case and show that the holdings and reasoning of the *Veal* and *Belt* cases are not applicable thereto. Another alternative of adopting the unit and asking to be substituted therein, if successful, in place of the defendant will be hereinafter discussed. To make the distinction, however, will be exceedingly difficult even if one does exist, because one of the great pities of the oil industry is that the holdings of *Veal v. Thomason* and *Belt v. Texas Company* have in most part been grossly misunderstood by courts and lawyers alike to a point where it is generally regarded now that any time pooling or unitization is even mentioned in a lawsuit that every party remotely interested in such pooling or unitization is an indispensable party to the suit, and that the suit cannot proceed without his joinder. The writer earnestly believes, however, that many courts are now at the stage where they realize that an indiscriminate and unreasoned application of *Veal v. Thomason* and *Belt v. Texas Company* will seriously impede the wider utilization of pooling and unitization and

the progress toward the more orderly and economical development of oil and gas reservoirs that pooling and unitization will inevitably bring. It is the writer's earnest belief that enlightened courts will do much to start explaining, limiting, and distinguishing the holdings of *Veal v. Thomason* and *Belt v. Texas Company* wherever possible.

Some exceptions and possibilities already exist in certain situations. We have already discussed the case of *Petroleum Producer's Co. v. Reed*⁴⁷ wherein the Supreme Court held that a lessor royalty owner of a particular tract of land is not an indispensable party in a suit between adverse claimants to the leasehold estate thereon. This case was recently cited by *Magnolia Petroleum Co. v. Storm*⁴⁸ to such effect as follows: "It has been held the owner of the royalty is not a necessary party to a suit to recover the leasehold estate. *Petroleum Producers Co. v. Reed*, 135 Tex. 386 144 SW 2d 540 (T)."⁴⁹ In a recent Fifth Circuit case (*Sun Oil Co. v. Humble Oil and Refining Co.*)⁵⁰ between adverse lessees both claiming title to the leasehold estate in a tract of land under separate leases from the state, it was again held that the common lessor, the state, was not an indispensable party to the suit. These holdings would suggest that where the question to be litigated in a particular suit is the relative superiority of two leases covering a particular tract of land and no relief whatsoever is sought against the common lessor royalty owner under said leases and even though one of the lessees has executed a unitization agreement, the lessees may still nevertheless litigate over the contested leasehold estate without having to join their lessor and a fortiori without having to join the lessors of other lessees who might also have executed the unit agreement; that is, of course, if neither of the

⁴⁷ 135 Tex. 386, 144 S.W. 2d 540 (1940) but cf. *DeGrazier v. Parnell Oil Corp.*, 109 S.W. 2d 1109 (Tex. Civ. App. 1937) *error dismissed*, and *Burquette v. Del Curto*, 49 N.M. 292, 163 P. 2d 257 (1945).

⁴⁸ 239 S.W. 2d 437 (Tex. Civ. App. 1950) *error ref. n.r.e.*

⁴⁹ *Ibid.*

⁵⁰ 190 F. 2d 191 (5th Cir. 1951); modifying and affirming 88 F. Supp. 658 (D.C. Tex. 1950); *Rehearing denied* 191 F. 2d 705. Apparently when the lessees are claiming under separate leases from separate lessors, however, the lessors are indispensable parties to the suit. *South Penn Oil Co. v. Miller*, 175 F. 729 (4th Cir. 1909); *Lawrence v. Sun Oil Co.*, 76 F. Supp. 155, affirmed 166 F. (2d) 466.

lessee litigants is trying to cancel the unit agreement of the proceeding.

This was substantially the factual situation that existed in the case of *Nadeau v. Texas Co.*⁵¹ In that case the plaintiff and the defendant were each lessees, adversely claiming the title to the leasehold estate in and to a particular tract of land under separate leases from the same lessor. The defendant lessee had entered into a unitization agreement with other parties not before the court. In holding that such absent parties were not indispensable parties to the suit, the court said: "Lastly it is contended that the action should have been abated until all the persons who had signed the unit and pooling agreement with the defendant for lands in the section in question were brought in as necessary parties to a complete determination of the controversy. The controversy here was whether the lease of the defendant company was valid as against (the lease of) the plaintiff. No attempt was made to quiet the title of the plaintiff as against the whole world, or any other person than defendant. *Plaintiff might have brought such an action but he did not . . .* They are not necessary parties to the settlement of the controversy litigated between the plaintiff and defendant."⁵²

In fact, a recent case of the Fifth Circuit had a very similar set of facts, *Whelan v. Placid Oil Co.*⁵³ The Court held in that case, however, that *Veal v. Thomason* was controlling and could not be distinguished. The suit was in trespass to try title. It was brought by Placid Oil Co., Gulf Oil Corporation, and Stanolind Oil and Gas Co. against D. E. and R. J. Whelan to try title to an undivided one-half interest in and to the $\frac{7}{8}$ ths leasehold estate in and under a tract of one-hundred and forty-six acres of land situated in the Betty Humpries Survey, Harrison County, Texas, and for an accounting. Plaintiffs and defendants were claiming under separate leases. The lessor royalty owners under both leases were the same parties — the heirs of W. N. Peal. They were not joined

⁵¹ ___ Mont. ____, 69 P. 2d 586 (1937).

⁵² *Ibid.*

⁵³ 198 F. 2d 39 (5th Cir. 1952), Vol. 1, No. 4, O&G Rep. 2499; *Rehearing denied*, 198 F. (2d) 671.

as parties to the suit. The plaintiffs were claiming under a ten-year lease which had been executed by the Peals on August 18, 1937. On March 12, 1947, and within the primary term of said lease, the lessee therein, Placid, had joined with its lessor the Peals in the execution of a unitization agreement placing said land in a unit with other lands. The owner of half of the minerals under the Peal land did not join in the execution of the unit agreement. Placid completed a producing well on the unit, but not on the Peal land, during the primary term of the lease. This well perpetuated the lease as to the Peals who had joined in the execution of the unitization agreement but not as to the owner of the other half of the minerals who didn't. After the expiration of the primary term, the Peals joined with the owner of the other half of the minerals in the execution of a lease to the Whelans (defendants) who drilled a producing well on the Peal land. Gulf Oil Corporation and Stanolind Oil and Gas Co., the other lessees in unit, joined with Placid as plaintiffs in the suit. No other parties were joined in the suit. The trial court overruled the defendants' motion to dismiss (for want of indispensable parties) and rendered judgment for the plaintiffs on the merits. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial court on the question of parties and remanded the cause to the trial court with instructions to dismiss the suit for want of indispensable parties, sic:

Appellant's principal contention is that the trial court erred in overruling the motion to dismiss. Appellant contends that the various owners of royalty interest under appellees' Dee Knox Unit, who were not made parties, are indispensable parties whose interest in the subject matter of this suit would compel their alignment as parties plaintiff and the joinder of said parties, all of whom are citizens of the State of Texas, would deprive the court of jurisdiction based upon diversity of citizenship.

As we have shown, this is a suit between adverse lessee claimants for title to and possession of an undivided one-half interest in a mineral leasehold estate. Such being the nature of the present controversy, it follows that Placid must either establish its title against the Whelans or lose it. Placid does not challenge the trial court's findings that the primary term of its lease from the Peal heirs expired without any production from the 146 acre tract covered by the lease. Consequently,

it can claim a leasehold in the Peal heirs' one-half of the minerals only by virtue of unitization agreement and the production from acreage elsewhere in the unit. Since this must be and is the basis of Placid's claim, it follows that all of the other mineral owners who have joined in the unitization agreement have an interest in the Peal Heirs' one-half of the minerals. *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472. This is true for the reason that the unitization agreement vests all the lessors of land in the unitized block with joint ownership in all the unitized reserves in place in the unit — the ownership being in the proportion which the acreage each member contributed to the pool bears to the total acreage in the unitized block. *Hudson v. Newell*, 172 F. 2d 848.

It is clear and we hold that the parties named in the motion to dismiss are necessary and indispensable parties.⁵⁴

The Circuit Court took no notice whatsoever of the plaintiff's contentions that the suit *involved only the leasehold estate and had nothing whatsoever to do with the royalty estate* and that under *Petroleum Producers Co. v. Reed* and *Nadeau v. Texas Co.* plaintiffs had the right to litigate the title to the leasehold estate without having to join the common lessor royalty owner thereunder or any other absent royalty owners who couldn't gain or lose anything whatsoever no matter what the outcome of the suit. The plaintiffs contended that the absent royalty owners had no interest whatsoever at stake in the controversy between the opposing lessees over the leasehold estate only. No party to the suit sought in any way to cancel or set aside the unit agreement under which the absent royalty owners were claiming. The absent royalty owners would in no way have had their interest cut off and destroyed without having had their day in court as was the case in *Veal v. Thomason* and *Belt v. Texas Co.* where the absent parties in those cases had interests in the tract involved in the suit "by virtue only" of the communitized lease. In both the *Veal* and *Belt* cases the plaintiffs were suing for the entire unencumbered fee simple estate in and to the tracts of land involved. They were suing to establish absolute title in themselves as to the surface and minerals and to clear the land of the lease which had been jointly executed (in counterpart) by the parties not before the court. If the lease fell, the interest of the absent parties fell. Certainly in such a case the absent

⁵⁴ *Ibid.*

parties were indispensable parties to the suit and entitled to their day in court. However, such was not the case in *Whelan v. Placid*. In *Whelan v. Placid* the plaintiffs were not suing for the entire estate in the land. They were suing for the leasehold estate. The royalty estate was not in issue. Further, in the *Whelan* case the absent parties did not hold their interest in the tract involved "by virtue only" of a lease sought to be annulled in the suit as did the absent parties in the *Veal* and *Belt* cases. In the *Whelan* case the absent parties were claiming under the unitization agreement dated March 12, 1937. This was an entirely separate instrument from both of the leases involved in the suit. No matter what happened in the suit, the absent parties would still be claiming under their unitization agreement. Their interest would in no way stand or fall with one of the leases in the suit as was the case in *Veal v. Thomason* and *Belt v. Texas Company*. The court in *Belt v. Texas Co.* clearly recognized both of these distinctions — the question of whether the suit concerned the entire estate in the land or only the leasehold estate therein and whether the absent parties were claiming "by virtue only" of one of the leases involved in the suit. The court distinguished *Petroleum Producers Co. v. Reed* as follows: "From the quotation it will be seen that the *estate in controversy* in that case was the *mineral estate* that was separated from the entire estate in the land by the oil and gas lease, and *not the entire estate* in the land. . . . In the instant case the appellant seeks to recover the *entire estate* in the land. . . . As we have already said, the record shows that the absent parties own interests in the land *only so long as the oil and gas lease held by the Texas Company remains in existence as a valid lease on the land*. They are therefore vitally concerned and, under the rule of necessary and indispensable parties so well established by the decisions of the courts of this state, they are entitled to be brought in and given the privilege of litigating their rights."⁵⁵

Apparently the Circuit Court fell into error because of its fallacious assumption that since the plaintiffs had to rely upon the unitization agreement as one of the muniments in their chain of title (to extend the lease by production after the expiration of the

⁵⁵ *Belt v. Texas Co.*, 175 S.W. 2d 622, 625 (Tex. Civ. App. 1943) *error ref.*

primary term) and since the validity of such agreement was thereby brought into question that all parties thereto were indispensable parties to the controversy between the lessees over the leasehold estate. The net effect of such opinion is to hold that in a trespass to try title suit every party to every instrument relied upon by plaintiff in his chain of title is an indispensable party to the suit, since the plaintiff must rely upon the validity of every instrument in his chain of title to prevail. This is absurd. If such were the law, it would for all practical purposes deprive a deserving plaintiff of the right to try the title to his land, especially if he has a long chain from the sovereignty. To require the joinder of every party to every instrument relied upon by a plaintiff in a title suit would be to effectually bar the courthouse doors to title litigation. Certainly *Whelan v. Placid* will never be cited for this proposition. If the *Whelan* suit had come up during the primary term of the plaintiff's lease, thereby obviating the necessity of introducing the unitization agreement, apparently the Circuit Court would not have required the joinder of all parties to the agreement.

The reason the writer is discussing *Whelan v. Placid* in such detail is that it is an excellent example of the general misunderstanding prevalent among the bench and bar alike of the holdings of *Veal v. Thomason* and *Belt v. Texas Co.* It is an excellent example of the erroneous belief nowadays that every time a pooling or unitization agreement is even mentioned in a judicial proceeding that every party thereto or claiming thereunder is an indispensable party to the suit. If *Whelan v. Placid* went unchallenged and unexplained, it would serve as another barrier to a better understanding of *Veal v. Thomason* and *Belt v. Texas Co.* and a possible solution, short of legislation, to the serious problem of indispensable parties in pooling cases. A detailed analysis of *Whelan v. Placid* is further justified because it not only raises the question of possible exceptions to *Veal v. Thomason* and *Belt v. Texas Co.*, but because it also raises the question of how relevant in pooling cases are the holdings on parties in *cancellation* and *co-tenancy cases*. Citations to cancellations and co-tenancy cases, which involve the question of parties, are sprinkled through nearly all the cases and discussions dealing with the subject of parties in

suits concerning pooling and unitization agreements. Therefore, no paper discussing this general subject would be complete unless it contained an analysis of these cases and their possible relevance to cases like *Whelan v. Placid* and other cases in the field. The Defendants in *Whelan v. Placid* cited many cancellation cases although there was no attempt on the part of any party in that case to cancel any instrument or agreement. *Whelan v. Placid* was a suit in trespass to try title; and no instruments are cancelled in trespass to try title though the validity of many may be brought into question. If either of the parties to *Whelan v. Placid* had been suing to set aside the unit agreement, then that, of course, would have been one of the direct issues in the suit and all parties thereto or claiming thereunder would have been indispensable parties to the suit under the established rule that all parties to an agreement or claiming thereunder are indispensable parties to a suit to cancel, annul or set the same aside. In every oil and gas case with which the writer is familiar where any party to the proceeding is seeking to cancel or set aside any instrument or agreement, the courts have uniformly held that every party thereto or claiming thereunder was an indispensable party to the suit. We have already hereinabove discussed the case of *Matthews v. Landowners Oil Association*⁵⁶ wherein it was held that every party claiming under those "certain mineral conveyances and leases" sought to be cancelled therein were indispensable parties to the suit and that the plaintiffs had not adequately complied with the class action provisions of Rule 42 to enable them to be relieved of the burden of joining all those absent parties in a suit. The suit of *Calcote v. Texas Pacific Coal and Oil Co.*⁵⁷ was a suit "to cancel a lease to explore for oil, gas and other minerals" wherein the court held that non-participating royalty owners who bought their interest subject to the lease and, therefore, had "vested interests in the lease" were indispensable parties to the suit. The question of indispensable parties had not even been raised in the trial court or for that matter in the Circuit Court of Appeals by the litigants, but the court on its own motion raised the question and dismissed the suit for want of indispensable parties—thereby, no doubt, in-

⁵⁶ 204 S.W. 2d 647 (Tex. Civ. App. 1947) *error ref. n.r.e.*

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

delibly impressing upon the plaintiffs the importance of this question. *Bishop v. Sanford*⁵⁸ was a Texas case wherein the question of indispensable parties was raised for the first time on appeal. The court likewise held that grantee in a royalty deed from a lessor to a particular tract of land were indispensable parties to a suit by the lessor for cancellation and rescission of the oil and gas lease covering said land.

The case of *Hunt v. McWilliams*⁵⁹ was an interesting case before the Supreme Court of Arkansas involving cancellation. It was a suit by a landowner for cancellation of an oil and gas lease insofar as the same covered the west forty acres of an eighty-acre tract. Non-participating royalty owners under such west forty-acre tract were not joined in the suit. The court held that the cancellation of the lease would affect the rights of the absent royalty owners notwithstanding the fact that the trial court's decree authorizing cancellation provided that it should not affect the rights of such royalty owners. In a well-reasoned opinion the Supreme Court said:

The decree authorizing McWilliams to cancel the lease contains a provision that it shall not affect the rights, if any, of the non-participating royalty owners 'in the west forty.' Unfortunately cancellation of itself affected the holders of these interests, for the decree cleared the way for the landowner to contract anew. This later lease may or may not be advantageous to the old royalty grantees; but the fact remains that their rights to oil and gas taken from property under a lease existing when the royalties were conveyed were destroyed as to *that* lease, and this was done while they were legally absent. This does not mean that, as non-participating royalty owners, they would have to be consulted in circumstances where a new lease could be legally negotiated.⁶⁰

Perhaps some of the motivations in the backs of the court's minds in these cancellation cases involving non-participating royalty owners is revealed in the following quotation from said opinion, to-wit:

It is conceivable (though not suggested in this case) that collusive

⁵⁸ 35 S.W. 2d 800 (Tex. Civ. App. 1931) *error dismissed*.

⁵⁹Ark....., 240 S.W. 2d 865 (1950).

⁶⁰ *Ibid.*

action between lessor and lessee could so adversely affect royalty grantees as to destroy or impair their property rights.⁶¹

The Supreme Court of Texas in *Shell Oil Co. v. Howth*⁶² left no room for doubt as to Texas' position on this question, as follows:

Furthermore, it appears that after Howth executed the lease to the Shell Company, he conveyed a part of his interest in the royalty retained to other parties. These vendees were not made parties to this suit. They were necessary parties to this action to cancel the original lease.

In the *Howth* case the Supreme Court cited the earlier case of *Sharpe v. Landowners Oil Association*⁶³ which was a suit "to cancel an oil, gas and mineral lease in Lamar County."⁶⁴ The lease had been executed by E. R. Stubblefield and wife to Landowners Oil Association and covered two tracts of land. After the execution of the lease Stubblefield and wife conveyed one of the tracts, subject to the lease, to Sharpe, the plaintiff, who brought suit to cancel the lease on that tract. Stubblefield and wife were not joined as parties to the suit although they still owned the other tract covered by said lease and had been receiving benefits thereunder. In an excellent summarization of the rule, the court held "It is settled beyond all question in this state that in a suit to cancel a written instrument all persons whose rights, interests, or relations with or through the subject matter of the suit will be affected by the cancellation are necessary parties." The court cited numerous authorities to support this position.

In *Colquitt v. Gulf Production Co.*,⁶⁵ the state was held to be an indispensable party in a suit by a lessor to cancel a lease providing for royalty and rental payments to the state even though it was admitted that the state owned no interest whatsoever in the land underlying the lease at the time of its execution, did not join in the execution thereof, and had acquired no outright conveyances of any interest thereafter. Although the state was mistakenly recited to be a third party beneficiary under the lease, it was never-

⁶¹ *Ibid.*

⁶² 138 Tex. 357, 159 S.W. 2d 483, 491 (1942).

⁶³ 127 Tex. 147, 92 S.W. 2d 435 (Tex. Com. App. 1936) *adopted*.

⁶⁴ *Ibid.*

⁶⁵ 25 S.W. 2d 989 (Tex. Civ. App. 1930).

theless held to be an indispensable party to the suit to cancel same.

The court said:

The obligation to pay this royalty is contingent upon production of oil and gas. The judgment herein (cancelling the lease), as shown above precludes that possibility, and does necessarily and adversely affect the contractual rights of the state with respect to the royalty. In this situation the state is an indispensable party to the suit.⁶⁶

The Kansas Supreme Court case of *Toklan Royalty Corp. v. Panhandle Eastern Pipeline Co.*⁶⁷ is another case upholding the inviolability of the rule requiring joinder in cancellation cases. That was a suit to cancel a contract to purchase gas. The owner of oil and gas leases on 6400 acres of land, as seller, entered into a gas sales contract with the defendant as buyer. Subsequently, the owners of 60% of 3200 acres of leases out of the 6400 block sued the defendant buyer for cancellation of the contract and joined as defendants in the proceeding the owners of the other 40% of such 3200-acre block. None of the owners of the other 3200 acres of oil and gas leases covered by the contract were joined in the suit. The Court said:

It would not do for us to consider whether this contract should be set aside with only 50% of the owners of the working interest in the wells provided for under the contract here. There is grave danger that such an adjudication would jeopardize the rights of the parties not in court.⁶⁸

As pointed out in the "Discussion Notes" under this case in the *Oil and Gas Reporter*,⁶⁹ this case suggests the problem that when a gas purchase contract covers a large area with numerous owners that the procedural difficulties in bringing suit might be analagous to those posed in pooling cases, as hereinabove discussed. The Reporter suggests that when parties enter into a contract of the nature involved in this suit that they consider the advisability of making it severable. Certainly the purchasers cannot be counted on to forward this suggestion, for they could hardly be expected to want to make it easy for the other parties thereto to sue to set the same aside.

⁶⁶ *Ibid.*

⁶⁷ 172 Kan. 305, 239 P. 927 (1952), 1 OIL AND GAS REPORTER 1064.

⁶⁸ *Ibid.*

⁶⁹ 1 OIL AND GAS REPORTER 1070.

It goes without saying, of course, that all of the owners of an oil and gas lease are indispensable parties to a suit seeking to cancel same—But apparently even this question had to be litigated before the Supreme Court of Louisiana in the case of *Jamison v. Superior Oil Co.*⁷⁰

Two other cases, which involve overriding royalty interests, merit consideration in this connection though they technically were not suits for cancellation. The case of *Rogers National Bank v. Pewitt*⁷¹ was a recent Texas case wherein the plaintiff was seeking to impose an overriding royalty interest (carved out of a senior lease) on a junior lease on the theory of conspiracy—that the owner of the junior lease and his predecessors in title had worked in collusion with the common lessor to free the land of the original lease and destroy plaintiff's override. Prior to the suit the owner of the junior lease had pooled the same with another lease owned by him by declaration of unit as authorized in both leases. There apparently was no separate unit agreement. None of the persons claiming under the unitized junior lease, other than the defendant lessee (and two of his partners in interest) were made parties to the suit. The court held that they all were indispensable parties to the suit because plaintiff had not alleged a constructive trust against the defendant as owner of the junior lease, and, therefore, that plaintiff would not be able to recover against the defendant out of his junior leasehold estate but would have to rely on the continued existence of the senior lease. The court said that if the judgment upheld the senior lease it in effect would "invalidate," "vitiolate" and "cancel" the junior lease. In other words, the court held that for the plaintiff to recover under his pleadings the senior lease would have to be upheld and if this were done in would amount to a cancellation of the junior lease and the rights of all parties claiming thereunder. The facts of this case are somewhat analagous to the facts of *Nadeau v. Texas Co.*, hereinabove discussed, which it will be remembered reached a different result. Both suits involved leases which had been pooled with other parties not before the court. The major distinction seems to be that the court in the *Nadeau* case was not as inclined to broaden the

⁷⁰ ___ La., ___, 57 So. 2d 896 (1952), 1 OIL AND GAS REPORTER 1684.

⁷¹ 231 S.W. 2d 487 (Tex. Civ. App. 1950).

pleadings of the plaintiff so as to force him to clear his title as against anyone other than the defendant sued. Further it would seem from the opinion in the *Pewitt* case that if the plaintiff had framed his pleadings differently, he could have relegated his suit to a contest concerning only the leasehold estate, thereby obviating the necessity of bringing in absent royalty owners who would not be affected by the judgment since any recovery he might have of his override would be out of the defendant's leasehold estate. Apparently the validity *vel non* of the senior lease was not really in question in the suit since apparently the owner thereof was not a party to the suit and the opinion contains no evidence that either the court or the litigants thought he should be. Before leaving the case, one important distinction should be noted between this case and *Whelan v. Placid*. The absent parties in this case were claiming under the land in question "by virtue only" of the junior lease, and the court apparently considered that their interests would stand or fall with the junior lease whereas in the *Whelan* suit the absent parties were claiming under a separate agreement from the two leases in controversy therein and their interest would remain in full force and effect no matter what happened to the two leases involved.

The other case worthy of note involving an override was the Fifth Circuit case of *Keegan v. Humble Oil and Refining Co.*⁷² This suit was brought by plaintiff to establish title to an undivided one-sixth interest in a tract of land on which Humble Oil and Refining Co. held an oil and gas lease burdened by an overriding royalty interest. The owner of this overriding royalty interest was not joined as a party to the suit. The court held that the owner of the override under the Humble's lease was an indispensable party to the suit. In so holding the court said:

We prefer, however, to rest our decision on the absence of the owners of the overriding royalty interest. This is an interest carved out of the lessees' share of the oil as distinguished from the owners' share. . . . Their interests are so bound up with Humble Oil & Refining Company that the relief prayed for in the bill divesting Humble of its leasehold would deprive them of their rights to share in the oil produced. These

⁷² 155 F. 2d 971 (5th Cir. 1946).

parties have no reversionary interest separable from their right to receive a portion of the oil produced. A decree depriving them of such interest without being heard could not be legally made, since no court can make a direct adjudication on rights of parties not before it.⁷³

The last case on cancellation for consideration is the Fifth Circuit case of *Hudson v. Newell*.⁷⁴ This was a case to establish title to four tracts of land in the State of Mississippi and for cancellation of all adverse deeds and leases. On the question of cancellation the court held that all parties claiming under the instruments sought to be cancelled were indispensable parties to the suit as follows:

It is clear as above stated that no cancellation as prayed of all adverse deeds, nor even of those made by Mrs. Hudson, can be decreed unless every person interested under them is before the court. The *Calcote* case, *supra*, was one of cancellation of an instrument. The leading case of *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, was a case of rescission, which is the equivalent of cancellation. We know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless *all parties to it, or their successors in interest*, are before the court.⁷⁵

Part of the lands involved in the suit had been placed under unitization agreements which had parties thereto and claiming thereunder that had not been joined in the suit. On the question of unitization the court held as follows:

The question of 'unitization' and its connection with indispensable parties remains. A number of the claimants not joined have no interest unless through unitization of their lands with those in suit. In Mississippi, as elsewhere, the number of permissible oil wells is limited, and to secure production from small tracts not entitled to a well each, several tracts are united by formal recorded agreement to be served together by a single well, the production from which is to be prorated according to acreage among the several tract owners. Such units, before the filing of these suits, had been duly formed, in part from lands included in the suits. The question is whether the owners of other unitized lands acquired such an interest or title in those in the suit that they must be joined in order to grant even partial relief. The district judge held that in Mississippi the oil in place is, as in Texas, conveyed by

⁷³ *Ibid.*

⁷⁴ 172 F. 2d 848 (5th Cir. 1949); *modified and affirmed on re-hearing*, 174 F. 2d 546.

⁷⁵ *Ibid.*, p. 852.

oil leases, royalty sales, and other formal recorded contracts, and that a unitization contract vests joint ownership jointly in all the unitized reserves in place and in the royalty oil produced from the well, citing *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472. While no Mississippi authorities in point are cited, we believe this to be correct, so that all these owners must be parties, or the unitized lands must be excluded from any decree. No adoption by plaintiffs appears of the unitization of their lands.⁷⁶

The plaintiffs took heed of the last sentence of the above quotation and on rehearing offered to so amend their pleadings as "to adopt and ratify such unitizations and to seek only to substitute themselves for their adversaries in title in such unitizations without affecting in any manner the rights of the other parties thereto."⁷⁷ The court said:

If this is done such other parties will not be affected by such relief and are not indispensable parties to the suits. Paragraph 6 of the opinion is therefore withdrawn, and the disclaimer and agreement to ratify and adopt the unitizations above referred to will, as is therein proposed, be made a part of the mandate to the district court which shall cause the appellants to so amend their pleadings and prayers with reference to the unitized lands as to seek a decree, if they establish their title, which shall substitute themselves for their adversaries in title without affecting the rights of the other parties to the unitization agreements who are not before the court. This done, the suits may proceed without the presence of these absent parties.⁷⁸

This possibility on the part of plaintiffs in pooling cases will be more fully hereinafter discussed.

Hudson v. Newell was cited by the court in *Whelan v. Placid* for the proposition that a unitization agreement constitutes all parties thereto as joint owners of all the unitized reserves in place underlying the unit. As will be noted from the quotation above, *Hudson v. Newell* had in turn relied upon *Veal v. Thomason* for such proposition.

Actually, it would seem that *Hudson v. Newell* supports the contention of the plaintiffs in *Whelan v. Placid* that they were entitled to try only the title to the leasehold estate as against only the de-

⁷⁶ *Ibid.*, p. 852.

⁷⁷ 174 F. 2d 546.

⁷⁸ *Ibid.*

endants joined, under the theory that in trespass to try title a plaintiff can try as much of his title as he wants to plead as against whoever and only whoever he cares to have his title cleared. Only those joined would be bound by the judgment. The following language in the court's opinion would appear to indicate that the three judges to that opinion would recognize the distinction between cancellation suits and trespass to try title actions and the different rules applicable thereto governing the determination of indispensable parties, sic: "The original complaints asked a decree that the plaintiffs are the true owners of the land and of the mineral rights therein and of the oil and gas removed from it by the defendant oil companies. If they can prove the land and oil are theirs we see no reason why they should not have judgment for them *against those sued; possible claimants not in court would not of course be bound by the result.* If such claimants' title is shown as a defense their interests can be saved from the decree. But the next prayer that all the adverse deeds be *cancelled* cannot be granted if there are any persons interested under them who are not before the Court."⁷⁹ The court in this case exercised admirable restraint in not broadening the plaintiffs' pleadings to force him to try titles other than his own. This is evident not only in the above quotation but in the five-judge opinion rendered on rehearing, allowing the plaintiffs to acquiesce in the unit and ask for substitution therein if successful in the suit. This relieved plaintiffs of the burden of litigating with parties against whom no relief was sought and who would not be adversely affected by the judgment.⁸⁰

As to the relevancy of the *co-tenancy* cases in suits involving pooling and unitization agreements, we have already hereinabove, at page 23 hereof, discussed the co-tenancy case of *Hicks v. Southwestern Settlement & Development Corp.*⁸¹ wherein it will be remembered it was held that one co-tenant can try his title in and to a particular tract of land without joining his co-tenants in the suit, but that when he brings a suit for damages to the land or a suit jointly for title and damages all his co-tenants are indis-

⁷⁹ 172 F. 2d 848, 851.

⁸⁰ 174 F. 2d 546.

⁸¹ 188 S.W. 2d 915 (Tex. Civ. App. 1945) *error ref. w.o.m.*

pensible parties to the suit and that Rule 39 did not change this. It will further be remembered that in the *Hicks* case the court held that Rule 42 was not applicable under the facts of that case, but that the court would invoke an equitable exception to Rule 39 to enable the plaintiffs to proceed without joining their other co-tenants, although it was a suit jointly for title and damages where-in Rule 39 would have required a joinder of all omitted co-tenants. The recent Fifth Circuit case of *McComb v. McCormack*⁸² was a case which originated in Texas and pretty well summarized the Texas law on this question as follows: "Under the Texas law: '... one tenant in common may maintain an action of trespass to try title without joining his co-tenant.' ... one tenant in common may maintain an action of trespass to try title against a stranger. ... "The term "stranger," as here used, means one who claims by title other than that asserted by the plaintiffs; or, more strictly speaking, one who, in deraining title, does not in any way connect himself with that asserted by plaintiff.'" The Fifth Circuit Court was quoting from the early Texas Supreme Court case of *Pilcher v. Kirk*.⁸³ To further support its conclusion, the Fifth Circuit also cited and quoted from the recent Texas Supreme Court case of *Kirby Lumber Corp. v. Southern Lumber Co.*,⁸⁴ which made Texas' position on the question of co-tenancy unmistakably clear and recited some of the reasons for the rule, as follows: "It is true that Mattie Lockhart's tenants in common were parties to the Pederson suit, but tenants in common do not claim through or under each other, and there is no such privity between them that a judgment for or against one of them, affecting title to land, will bind the others. ... It is undoubtedly true that in this state one tenant in common may recover the whole land as against a stranger, and that the recovery will inure to the benefit of his co-tenants. The rule prevails in most of our states, but is not universal. ... The true principle would seem, however, to be that each tenant in common is entitled to the enjoyment of the entire premises undisturbed by any one except his co-tenants, and therefore it is proper that he should have the right to dispossess a

⁸² 159 F. 2d 219, 224 (5th Cir. 1947).

⁸³ 55 Tex. 208 (1881).

⁸⁴ 145 Tex. 151, 196 S.W. 2d 387 (1946).

stranger to the title. Because the adverse occupant is dispossessed and because the possession of one tenant in common is ordinarily deemed the possession of all, one who is not a party to the suit receives the benefit of a recovery by another. It does not follow, however, that, for the reason that he indirectly receives the benefit of the recovery it is in any sense his suit, or that, as between him and the defendant, either of them is estopped by the judgment."⁸⁵

The recent Sixth Circuit case of *Kentucky Natural Gas Corp. v. Duggins*,⁸⁶ first adhered to the above rule in holding that under Kentucky law and under Federal law with respect to determination of indispensable parties on the question of diversity of citizenship, one tenant in common may sue in ejectment in order to recover his interest in land without joining the other tenants in common, since a tenant in common in such action is seeking to recover his aliquot portion of the land involved and each tenant in common has a similar separate right. However, the court went ahead further to state that this rule would not apply in a suit where cancellation of an indivisible contract is sought, as follows: "The rule does not apply when tenants in common seek to cancel or rescind a lease of oil and gas. In such an action it is the rule that all the tenants in common must unite on account of the contract involved being an entire and indivisible one. *Union Gas & Oil Co. v. Gillem*, 212 Ky. 293, 298, 279 S.W. 626. The general rule seems well settled both by Federal law and Kentucky law that in an action to rescind a contract all of the parties to the contract are indispensable parties. *Shields v. Barrow*, 17 How. 130, 58 U.S. 129, 138, 139, 15 L. Ed. 158. . . ."⁸⁷

It is worthy of note that the recent Third Circuit case of *Chidester v. City of Newark*⁸⁸ in construing *Rule 19* of the Federal Rules of Civil Procedure also held that one co-tenant may sue for his aliquot share without joining his co-tenant, sic: ". . . We therefore hold that, in this case, the tenants in common not joined are not indispensable parties, for while they may be interested in the out-

⁸⁵ *Ibid.*, p. 389.

⁸⁶ 165 F. 2d 1011 (6th Cir. 1948).

⁸⁷ *Ibid.*, p. 1016.

⁸⁸ 162 F. 2d 598, 601 (3rd Cir. 1947).

come of this action, their interests are not 'joint' and would not be affected by the judgment herein; nor would their absence prevent complete justice as between the parties who are involved, the suit being for an aliquot share only."

The most recent Texas Supreme Court case on this question is *Humble Oil & Refining Co. v. Blankenburg*⁸⁹ which cited as controlling the earlier Supreme Court case of *Steddum v. Kirby Lumber Co.*:

Steddum v. Kirby Lumber Co., 110 Tex. 513, 221 S.W. 920, holds that the owner of an undivided interest may recover the entire interest in the land provided he shows his ownership of a definite undivided interest and that the defendant is a trespasser or a stranger to the title.

It is further worthy of note in this connection that the relationship created between lessor and lessee by the ordinary oil and gas lease is one of "co-tenancy." In the Texas Supreme Court case of *Shell Oil Co. v. Howth*,⁹⁰ wherein the plaintiff Howth had leased the land in question to the defendant Shell Oil Co., the Supreme Court held: "Under this lease the Shell Company was a co-tenant of Howth." A 1950 Fifth Circuit case, *Yates v. Gulf Oil Corp.*⁹¹ followed this holding in quoting with approval from page 190 of Volume 31A of Texas Jurisprudence as follows: "A lessor and lessee in an oil and gas lease are co-tenants. . . ."

The writer has treated the foregoing co-tenancy cases at such length because it has been suggested that since lessors and lessees have been held to be co-tenants that the foregoing co-tenancy cases and the reasoning behind the holdings therein should do much to bolster the holdings of such cases as *Petroleum Producers Co. v. Reed*, etc. (hereinabove discussed) and enable a lessee to proceed alone without joining royalty owners in cases similar to *Nadeau v. Texas Co.* and *Whelan v. Placid*, where cancellation is not involved. It has even further been suggested, and with some logic at that, that since such cases as *Veal v. Thomason*, *Hudson v. Newell*, and *Whelan v. Placid* have held that all parties claiming under a unitization agreement are joint owners or co-tenants of

⁸⁹ 149 Tex. 198, 235 S.W. 2d 891 (1951).

⁹⁰ 138 Tex. 357, 159 S.W. 2d 483 (1942).

⁹¹ 182 F. 2d 286 (5th Cir. 1950).

the mineral estate covered thereby that the foregoing co-tenancy cases are authority for the proposition that one co-tenant claiming under such agreement could try at least the title to his undivided interest in the unitized estate without joining all his co-tenants, and even further that if the defendant in the proceeding is a stranger to the title, the co-tenants bringing suit could recover the entire title to such unitized estate as against said defendant for the benefit of all co-tenants of such unitized estate—that is, of course, if the suit is not also for damages and does not seek cancellation of the unit agreement. In other words, if the owner of a tract in a unit wanted to sue a trespasser on his land these cases would hold that he could bring a trespass to try title action by himself against such trespasser for the entire estate in the surface and for his aliquot share of the unitized mineral estate underlying his land (or if the trespasser is a stranger to the title, for all of the mineral estate—any recovery to be jointly for the benefit of himself and his co-tenants). In the foregoing example there would be no need whatsoever to join all of the parties claiming under the unit agreement. Sure, the plaintiff may be claiming under a unit agreement with other co-tenants not before the court and the validity of the unit agreement may even be brought into question if the plaintiff introduces it in evidence, but that does not mean that every co-tenant claiming under the agreement is an indispensable party to the suit any more than would be all the co-tenants claiming under the same single deed in a suit brought by one co-tenant claiming thereunder against a third party and without joining his co-tenants as the courts have uniformly held he is entitled to do and even though the validity of the common deed will no doubt be brought into question when the same is introduced in evidence by the suing co-tenant as it must nearly always be. Because numerous co-tenants are claiming under the same deed, as they frequently are, does not mean that all of these co-tenants are indispensable parties in a suit by one co-tenant claiming under such deed even though the validity thereof may be brought into question because the suing co-tenant has to rely thereon in his title suit. In fact, it is quite to the contrary. The courts have uniformly held that such other co-tenants are not indispensable parties to a

suit for title brought by one of the co-tenants. In the writer's opinion the foregoing co-tenancy cases were wisely decided, and their potentialities in this field cannot be ignored. The writer predicts, in fact, that these co-tenancy cases, in the absence of remedial legislation in this field, are going to come in for a great deal of attention and citation in cases involving pooling and unitization agreements, and that the courts will allow them to somewhat relax the misconceived extensions being attached onto the holdings of *Veal v. Thomason* and *Belt v. Texas Co.* through misunderstanding.

It would seem that in pooling cases, however, that these co-tenancy cases will afford more relief when it is the plaintiff who is claiming under a unit agreement than when it is the defendant who has joined in a unit. This would be true, because in the case of a defendant who is joined in a unit you have the question of possibly cutting off the rights of absent parties without giving them their day in court; whereas in the case of a plaintiff claiming under a unit the only question is whether he should be forced to litigate the title of parties other than his own. The co-tenancy cases have held that he should not be forced to litigate anyone's title other than his own and have refused to broaden the pleadings. They wisely hold that the possibility of a multiplicity of actions against a defendant is more than counter-balanced by the injustice which would result in forcing a plaintiff to plead and prove up titles other than his own. Of course, only parties to the suit would be bound by the judgment. Absent parties would not be affected, except at no expense to themselves, they may be able to profit by the experiences of the co-tenant that sued if they are similarly situated. It seems that one of the problems confronting many of the courts that have written on this subject is that they just don't understand the mechanics of a title suit, the introduction of evidence therein and the relative rights and positions of the parties thereto. They may be writing and deciding cases thereon, all right, but that still doesn't seem that they really realize what they are doing in this field.

In the writer's opinion there is no question, in the light of the foregoing authorities, that *Whelan v. Placid* was incorrectly decided. In that case it was the plaintiffs who were in a unit, and

not the defendants. Furthermore, the co-tenancy cases apparently will allow only one co-tenant of the unitized leasehold estate to bring the suit; but in the Whelan suit, to be on the safe side and to allow for recovery of the entire leasehold in the event the defendants therein were not held to be strangers to the title, all owners of the leasehold estate in the unit joined in the suit as plaintiffs. Unless *Whelan v. Placid* is thoroughly understood and properly evaluated, it will serve not only to close the doors of the Federal Courts to oil and gas litigation where jurisdiction is based on diversity (because of the inevitable spread of pooling and unitization and the resultant impossibility of attaining the absolute diversity required among the large number of parties involved), but if relied upon by the State Courts will serve as a practical matter to close their doors as well to oil and gas litigation because of the procedural difficulties and expense necessarily involved in making scores, hundreds, or even thousands of people parties to a suit. It will serve to reserve the courts only for the wealthy.

In summary then, we see that when a plaintiff is confronted with the problem of filing a lawsuit over a tract of land which happens to be under a pooling or unitization agreement, he has the following possible courses of action open to him.

1. He can make every party thereto or claiming thereunder parties to his suit if, as a practical matter, this is not prohibitive.

2. He can bring a class action under Rule 42. As pointed out hereinabove, the writer does not believe that this will prove to be of much help in pooling litigation.

3. He could hope for an equitable exception like that applied by the Court of Civil Appeals in *Hicks v. Southwestern Settlement and Development Corp.*⁹² The *Hicks* case was decided in 1945. The writer knows of no case where this has been tried since then. This in some measure speaks for itself. The objections to this course of action were pointed out earlier.

4. He could try to distinguish his case and hope that his facts are such that he could come under some of the possible exceptions

⁹² 188 S.W. 2d 915 (Tex. Civ. App. 1945) error ref. w.o.m.

to *Veal v. Thomason* and *Belt v. Texas Co.* suggested hereinabove; e.g., *Petroleum Producers Co. v. Reed*, co-tenancy cases, etc. The co-tenancy cases would appear to be his best bet in this connection.

5. In his pleadings, if it is the defendant who has joined in a unit, the plaintiff could adopt the unit and request to be substituted therein in place of the defendant, if he is successful. Note—this, of course, would not be available to him if he is the one who is in the unit, and some courts would even hold there is no way for him to avoid putting the unit in issue—*Whelan v. Placid*. Adopting the unit and asking for substitution therein it is a practice that has been used several times, to the writer's knowledge, here in Texas. The question naturally comes to mind, however, as to whether this device is sufficient to avoid the requirements of *Veal v. Thomason* and *Belt v. Texas Co.*, and whether a court like that sitting in *Whelan v. Placid* would not force the plaintiff to broaden his pleadings. Does *Veal v. Thomason* vest the absent parties with such an interest in the tract involved that the plaintiff cannot risk leaving them out of the suit? Is the question of "substitution" a matter of justiciable interest as to such absent parties—especially if it is the operator of the unit who is sued and who has active duties to perform? To the writer's knowledge no appellate court in Texas has yet had occasion to render an opinion on this question. The Texas courts may or may not follow the Fifth Circuit case of *Hudson v. Newell*,⁹³ which, it will be remembered, did allow, on rehearing, the plaintiff's plea for substitution to obviate the necessity for joining all parties claiming under the unit. The writer believes the Texas courts should and will follow *Hudson v. Newell*. There would seem to be no reason not to. It doesn't seem that the other parties to the unit could complain, in the absence of a clause in the unit agreement restricting alienation on the part of the parties thereto. Under most unit agreements the rights of the parties thereto are freely assignable. Substitution would merely be a forced assignment of the affected parties' interest.

There is one aspect of substitution, however, which merits con-

⁹³ 172 F. 2d 848 (5th Cir. 1949); modified and affirmed on rehearing, 174 F. 2d 546.

sideration. It has been said—why worry about the problem presented by *Veal v. Thomason*, when the plaintiff can just ask to be substituted in the unit in place of the defendant and avoid the procedural obstacles obstructing the adjudication of his substantive rights. The only thing wrong with it is that it is an admission that we are allowing procedural obstacles to prevent what may be a deserving plaintiff from obtaining his substantive rights. If a trespasser happened on plaintiff's land and joined in the execution of a unitization agreement with a thousand other people while thereon, the rightful owner of the land would have the same pooled for all intents and purposes without his consent because a procedural obstacle would prevent him from protecting his substantive rights. If he brought suit against the trespasser, the best he could do insofar as his minerals are concerned, would be to ask for a substitution in the unit in place of the trespasser who had executed the unit agreement. Should a man have an important right like that taken away from him because of the inability of the courts to provide him a forum into which he can come as a practical matter for the protection of his rights? This situation would suggest an excellent way for those getting up a unitized block to force an unwilling owner of land in the block to come in under the unit—get someone to go upon the holdouts' land, assert a spurious claim thereto, and execute the unit agreement. The procedural obstacles this would place in the plaintiff's path if he wanted to set the unit aside in so far as it affected his land, would, as a practical matter, amount to forcing him to sign the unit. As has been said before: "Can justice be so blind?"

6. Or the prospective plaintiff could just forget the matter. This is not as facetious as it sounds. I am sure there have been many plaintiffs in Texas who just had to give up the question of litigating their substantive rights when faced with the procedural obstacles these pooling cases present. The title to the minerals under many a tract of land in Texas has been cured by putting the same in a large unit. Some of the best title insurance in the world, under the present law, is to place a tract of land in a large unit. It must be remembered that many of the possibilities and exceptions hereinabove outlined are not generally known. The general

belief prevailing about parties in pooling cases now is that every party claiming under the unit involved is an indispensable party to the unit no matter what the relative positions of the parties are or what issues are at stake.

The foregoing possible courses of action open to our hypothetical plaintiff under the present status of the law are certainly not very inviting and should cause much discomfort to those whose responsibility it is to see that our courts are accessible to dispense justice. Possible suggestions as to how the parties, themselves, under the present status of the law, might try to alleviate this situation in advance, at the time the unit is created, are:

1. To designate in the unit agreement one of the parties thereto (probably the operator) as an agent for service of process for all claiming under the unit and file such agreement of record.⁹⁴ The party so designated would be authorized to accept service for all. The only thing wrong with this suggestion is that it presupposes that the parties to the unit want to make it easier for themselves to be sued. I respectfully submit that such will seldom be the case. Certainly the major oil companies (who, incidentally, usually prepare the forms for the unit agreements) cannot be counted upon to make themselves easily accessible to title litigation (nor should they be), and for that matter the royalty owners executing a unit agreement are not as likely to be concerned over preserving the right to sue with facility as they are over making themselves inaccessible to suit. Once their title is in such a condition that they are invited to join a unit, they are going to be considerably more concerned over getting sued than they are over preserving the right to sue with facility. It must be remembered, too, that, under the foregoing co-tenancy cases, it should be easier for a person in a unit to *bring* a suit than it would be for some third party to bring suit against a party to the unit.

2. Another suggestion is that the unit could voluntarily be made into a corporation with the parties thereto owning stock therein in the proportion of their percentage participation in the mineral estate, thereby relegating the problem of service to the

⁹⁴ Cook, "Rights and Remedies under Unit Operation," INSTITUTE ON OIL AND GAS LAW AND TAXATION, (Third Annual), p. 158, and consult for further suggestions.

simple one of merely effecting service on a corporation. Because of the double taxation aspects of a corporation under present day tax law, it is doubtful if this suggestion will receive any favor; and certainly the parties to a unit should not be forced to incorporate by legislation. Such legislation, if enacted, would sound the death knell of unitization, in the absence of a change in tax law.

3. Other suggestions have been made as to how the parties to the unit might voluntarily insert provisions therein making themselves more accessible to suit. The writer, as hereinabove indicated, does not believe there is enough incentive to the parties to the unit agreement to ever expect anything to come of these suggestions.

No, if anything is to be done to relieve this situation, the writer earnestly believes it will have to be done by legislation. The tack remedial legislation should take, in the writer's opinion, should be along the lines of providing that when a tract of land under a unit agreement is involved in a lawsuit that constructive service can be made on every party claiming under the agreement by actually serving with citation and copy of plaintiff's petition the operator of the unit (or in the case of an operating committee, any number thereof) together with the individual owners of the particular tract of land involved who contributed the same to the unit. The legislation need go no further other than perhaps to provide that any final judgment entered in the cause would bind all parties to the unit agreement if service were actually perfected on the parties to the unit agreement if service were actually perfected on the parties designated. The operator and the parties who contributed the title being questioned to the unit were chosen as the agents to be served because they are the ones who probably have the most at stake in the suit, and would best be calculated as a class to see that the unit is adequately represented in the proceeding. The operator in most instances, especially if there is production on the unit, will have the addresses of all parties entitled to share therein or be able easily to obtain such a list from a pipeline purchaser who may be making disbursements directly to the unit owners. The law need not provide the steps an operator must

take in the event of being served in the manner provided. The parties to the agreement will have adequate incentive to cover this eventuality in this unit agreement. It may be that the operator in the agreement would be required to mail notice (perhaps even registered notice) to every party claiming under the unit at the time suit is brought as reflected by the addresses on file in the operator's office—or some such provision. In any event, the costs and effort involved in sending such notices, if the same were required in the agreement, would be relatively simple compared to the usual effort and expenses involved in effecting formal service. The agreement could provide that the cost of mailing out such notices would be either borne by the unit or by the individuals thereto who contributed the title that is being questioned. The writer is not really too concerned over the provisions the parties can place in the agreement to afford adequate protection for all claiming thereunder in the event of such constructive service. He is satisfied that the ingenuity of the parties concerned will be adequate to safeguard their rights.

Actually, such a law, if adopted, would just be a little more detailed class action procedure for pooling litigation. This would suggest, then, that it should take the form of a new rule of civil procedure promulgated by the Supreme Court; and maybe it should. An interested person would probably find it to be easier to acquaint the Supreme Court with the problem than the Legislature, and therefore be able to obtain earlier action in this field. However, it may be that statutory action would be necessary. A statute, properly worded, might smack more of substantive law of which the Federal Courts would have to take notice than a rule of civil procedure (even though it is dealing with land titles and the Federal Courts have apparently looked upon some of our trespass to try title rules as substantive in nature). Suffice it to say, in the drafting of the law, some consideration should be given to what effect it would have on the Federal Courts in Texas. The question of diversity should be considered, and in connection therewith thought given to whether the parties served should be the only ones called parties with nothing said about absent and unnamed parties as being parties to the proceeding by virtue of constructive

service. It is readily apparent the difference this might make on the question of diversity.

In connection with the possibility of remedial legislation in this field, one other fact is worthy of note. Who will want to take the ball and run with it to see that some form of remedial legislation is enacted? Certainly the large oil companies, I would imagine, are going to be content to leave the law where it is on the question of parties. As pointed out earlier, they could not hope for better title insurance. This relegates the job, then, to some more or less disinterested individual, or some law professor or judge. If anything is to be done, it looks like some one in one of the latter two categories above will have to do it.

Since this is a paper treating with the question of pooling and unitization, before concluding, brief mention should be made of the mess the courts are getting themselves into by trying to apply historical title and conveyancing law to pooling and unitization agreements. As pointed out hereinabove, most of this stems from the idea of reciprocal conveyancing set out in the dictum of *Veal v. Thomason*.⁹⁵ In *Veal v. Thomason* a holding that all of the parties to the unit involved in the suit were joint owners and cotenants of the mineral estate covered thereby was not necessary to the decision rendered on the question of parties, which was the real issue of the suit. Whether the parties were joint owners of the mineral estate, or not, the court would still have reached the same decision on the question of parties. The absent parties were claiming under a unitized lease that the plaintiff was trying to clear off his land. Whether their rights in plaintiff's land were real property or contractual interests, they still had rights which would have been destroyed if the contract under which they were claiming was destroyed. Under this theory they were clearly indispensable parties to that suit. As a further illustration of this point, no question of title was involved in the case of *Toklan Royalty Corp. v. Panhandle Eastern Pipeline Co.*,⁹⁶ hereinabove discussed. That case only involved a gas sales contract under which absent parties were claiming. They were held to be indispensable parties be-

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

⁹⁶ 172 Kan. 305, 239 P. 2d 927 (1952), 1 OIL & GAS REPORTER 1064.

cause some of their contractual rights might be destroyed if the contract under which they were claiming was destroyed as to any land thereunder. By pointing this out, the writer is not in any manner challenging the holdings on parties on in those cases. In fact, the writer thinks they were correctly decided. What the writer is trying to do is to point out that there is a distinct difference between the reasoning behind those holdings on parties and that behind those treating unitization agreements as the reciprocal conveyancing of historical land titles instead of contractual arrangements for the more orderly and economical development of oil and gas reservoirs as they should be considered. The mess the courts are getting themselves into by trying to apply historical title and conveyancing law to unitization agreements is not properly within the purview of this article, but excellent examples thereof may be found in two articles by Ralph B. Shank entitled "Pooling Problems"⁹⁷ and "Some Legal Problems Presented by the Pooling Provisions of the Modern Oil and Gas Leases,"⁹⁸ respectively, appearing in the *Texas Law Review*, and a lecture delivered by Cecil W. Cook to the Third Annual Institute on Oil and Gas Law and Taxation entitled "Rights and Remedies Under Unit Operation."⁹⁹

Some recent cases, worthy of brief mention here, however, have indicated that the courts are beginning to realize at last that the application of historical title and conveyancing law to pooling and unitization agreements could serve not only to tie land titles up in knots, but also to greatly impede the progress of pooling and unitization and place the courts in the position of allowing (yea, even manufacturing) legal restraints which will retard the more orderly and economical development of oil and gas reservoirs and greatly reduce the ultimate recovery therefrom of one of our most vital natural resources. They are doing this because of the idea of reciprocal conveyancing. It is submitted, however, that in the great majority of pooling and unitization agreements the parties thereto do not intend to effect cross assignments of the historical titles to their mineral interests; and where there are no

⁹⁷ 28 TEX. L. REV. 662.

⁹⁸ 23 TEX. L. REV. 150.

⁹⁹ THIRD ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION, p. 101.

words of grant in the agreement the courts should not hold that they have. In fact, many recent unitization agreements contain provisions expressly negating any possibilities that such agreements might be construed as effectuating or intending to effectuate cross assignments between the parties thereto. One of the recent cases affording a note of encouragement in this connection is the Texas Supreme Court case of *Knight v. Chicago Corp.*,¹⁰⁰ wherein it was held that a lessee's entering into a pooling agreement with another lessee did not amount to the assignment of an "undivided interest" out of the lease which would have authorized the lessor to terminate same. Another case giving some encouragement in this connection was *Bogges v. Milam*,¹⁰¹ wherein the Court said:

'In our opinion, the so-called *unitization agreement does not effect a merger of title*. Under its express terms the leases of the fifty-three acres and of the one hundred and sixteen acres not in conflict with its terms remained in effect. It *consolidates only the contractual interests under the leases . . .*'

The last of these three recent cases affording encouragement, and the one that really gets at the point is *Sohio Petroleum Co. v. Jurek*,¹⁰² which held as follows:

Appellants contend that since Lot 3-B has been combined with other tracts as a consolidated unit by declaration made by Sohio Petroleum Company and The Chicago Corporation, dated May 26, 1949, there was vested in each owner of a separate tract in the pool or unit a proportionate interest in every other tract in the unit, and therefore, as to Merle and H. M., the holders of these other tracts in the unit were innocent purchasers. We are of the opinion that the point is not well taken. *Unitization is a conservation measure to permit economical and orderly development*. The cases cited by appellants in support of their theory are: *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472; *Belt v. Texas Co.*, Tex. Civ. App. 175 S.W. 2d 622, writ refused; and *French v. George*, Tex. Civ. App., 159 S.W. 2d 566, writ refused.

In the *Belt* case cited, different land holders had jointly executed a community lease. In a suit brought by one lessor to set aside this lease, it was held that all land owners were necessary parties. In the *Veal* case, the facts and holdings are similar to those in the *Belt* case,

¹⁰⁰ 144 Tex. 98, 188 S.W. 2d 564 (1945).

¹⁰¹ 34 S.E. 2d 267 (W. Va. 1945).

¹⁰² 248 S.W. 2d 294 (Tex. Civ. App. 1952).

except for convenience, the several lessors executed separate instruments instead of all signing the same paper, which instruments, however, were identical as to terms and described, all of the tracts of land in the unitized block. In the *French* case, the holding was merely to the effect that where several owners of adjoining tracts unite in a single lease for the development of oil and gas as a single tract, the royalty must be divided among the lessors in the same proportion that the area of the tract owned by each bears to the total area covered by the lease. We are of the opinion that these cases are not in point and that *the other land owners in this unit have acquired no such interest in Lot 3-B as to constitute them joint owners of the mineral interest thereunder.* (Underlining supplied by author.)

It will be noted that the unit in this case was formed by unit declaration as opposed to the joint execution of a unitization agreement by all parties interested. However, the writer does not believe that this distinction would have caused the court in the *Jurek* case to have reached a different conclusion if the unit involved therein had been formed by unitization agreement executed by all interested parties. Suffice it to say that the *Jurek* case is a big step in the right direction, and should do much to encourage other courts to take a more enlightened approach to this subject.

Oliver W. Hammonds and George E. Ray, in an article entitled "Unitization of Oil and Gas Properties," appearing in the current issue of *Taxes Magazine*, did an excellent job of summarizing the writer's position on this subject as follows:

Since pooling and unitizing basically are methods of developing and operating either leases or fields as a single lease or unit, it is submitted that the reasoning in the *Sohio* case is more realistic and more in keeping with the intention of the parties than the reasoning in those cases which speak of pooling as conveyancing. The right of the parties to share in the unit production results not from a grant of the historic title, but from the agreement of the parties that the leases shall be operated as a single lease or unit. The fact that the end result is the same does not justify a holding that the title has been conveyed—a result which would subject a method of development and operation to the many historic rules applicable to conveyancing. It is a case of the shoe not fitting the foot.¹⁰³

Since each oil and gas reservoir as a whole is the natural unit

¹⁰³ *TAXES MAGAZINE* (March 1953), p. 199-200.

for the more orderly and economical development of oil and gas therefrom, it is inevitable that pooling and unitization will play an ever-increasingly important role in the oil and gas industry and in the economy of our state. The holdings of our courts on the questions discussed in this paper will do much to encourage or impede this progress. The courts have it within their power to either hinder or encourage the greater utilization and conservation of our most valuable wasting asset. The writer has earnestly endeavored in the preparation of this paper to focus attention on some of the most critical problems in this field, and in all humility hopes that his efforts, in some small way, may help serve to bring about early solutions thereto.

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