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Comments

COMPULSORY JOINDER OF UNWILLING PLAINTIFFS IN CIVIL ACTIONS

I. THE COMMON LAW PROCEDURE

At common law those parties who were jointly interested were required to join to sue. However; if one of the jointly interested parties would not join as a plaintiff to bring an action where the right was joint, the other plaintiff or plaintiffs could use his name in bringing the action upon indemnifying the unwilling party against costs. Thus, in an action by joint owners to recover a fund,¹ and in an action by joint obligees against the obligor,² the plaintiff who wanted to bring the action could use the name of the unwilling party upon indemnifying him against costs. Similarly, where a contract was made with a firm, both partners were required to sue, and if one partner were unwilling, the other might use his name after posting an indemnity bond.³ In an action of detinue by two of three joint owners of personal property they were allowed to join the unwilling owner as co-plaintiff upon indemnifying him against costs.⁴

At one time this seemed to be an approved practice in Missouri. *McAllen v. Woodcock*⁵ was an action of ejectment brought by a corporation in which a trustee of the corporation was made co-plaintiff without his knowledge or consent. The court asserted:

We see no objection to allowing [the trustee] to be retained among the plaintiffs when his co-plaintiffs gave a bond to indemnify him against costs. He was one of the trustees and properly named as a plaintiff. . . .⁶

II. COMPULSORY JOINDER UNDER THE FEDERAL RULES—THE INVOLUNTARY PLAINTIFF

Compulsory joinder in the federal courts is provided for by Rule 19(a) of the

1. *Gray v. Wilson*, 19 Tenn. 394 (1838).

2. *Williams v. Pacific Sur. Co.*, 66 Ore. 151, 127 Pac. 145 (1912); *Sweigart v. Berk*, 8 S. & R. 308 (Pa. 1822); *Petrie v. Bury*, 3 B. & C. 353, 107 Eng. Rep. 764 (K.B. 1824).

3. *Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S.W. 139 (1910); *Vernon v. Jefferys*, 2 Str. 1146, 93 Eng. Rep. 1091 (K.B. 1741).

4. *Bolton v. Cuthbert*, 132 Ala. 403, 31 So. 358 (1902).

5. 60 Mo. 174 (1875).

6. *Id.* at 180.

Federal Rules of Civil Procedure.⁷ Parties to actions in federal courts are classified as indispensable, necessary, proper or formal. There are many excellent statements of the meaning and proper application of these classifications.⁸

The words "indispensable" and "necessary" seem to be synonymous. It is suggested that "conditionally necessary" would be a more apt term to signify what parties are included in the necessary party classification.⁹ That is, the parties in this group should be joined if it is feasible because they are desirable parties, but they are not indispensable parties in the sense that the court cannot proceed without them.

The provision in Rule 19(a) of the federal rules that "in proper cases" an indispensable party may be made an involuntary plaintiff can probably be attributed to the statements of Chief Justice Taft in *Independent Wireless Tel. Co. v. Radio Corp. of America*.¹⁰ In that case an exclusive licensee of a patent was permitted to join the patent owner, who was outside the jurisdiction of the lower court, as an involuntary plaintiff in a suit for an injunction and an accounting brought against one who allegedly was violating the licensee's rights under the patent. This provided a method of going on with the suit where the patentee was beyond the jurisdiction of the court and could not be served with process.

In a commentary on the involuntary plaintiff provision of the federal rule it is said that:

[T]he rule may be applied only where some substantive relation between the parties permits—only where there is some trust relationship permitting a party to sue in the name of another.¹¹

This commentary raises the problem as to whether or not an involuntary plaintiff could be assessed with costs if the defendant prevailed. It was thought that he probably was not liable for costs, but if so, he should be able to demand indemnification from the original plaintiff.¹² Since the involuntary plaintiff has not submitted himself to the jurisdiction of the court, it is probable that a counterclaim cannot be maintained against him.

The desirability of importing the classification of parties used in the federal courts into other jurisdictions has been strongly recommended as theoretically

7. FED. R. CIV. P. 19(a) reads as follows:

Subject to the provision of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

8. See generally, 2 BARRON & HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (rules ed. 1950); 3 MOORE, FEDERAL PRACTICE ¶ 19.02 (2d ed. 1948); 65 HARV. L. REV. 1050 (1952).

9. See, 2 BARRON & HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE § 511, at 53 (rules ed. 1950); 3 MOORE, FEDERAL PRACTICE ¶ 19.02 (2d ed. 1948).

10. 269 U.S. 459 (1926).

11. *The Involuntary Plaintiff*, 4 FED. RULES SERV. 907 (1941).

12. *Id.* at 908-09.

and practically desirable.¹³ Others feel that a classification in state courts into necessary parties, proper parties, and improper parties would be more practical, with the indispensable classification being an unnecessary one.¹⁴

One of the most recent and the most useful articles on compulsory joinder asserts that:

Nearly all decisions dealing with required joinder of parties give obeisance to a few early judicial pronouncements, which in turn are based on two simple principles of equitable origin. . . . The two principles have been stated in many forms, but always it seems possible to reduce the statement to the two fundamental ideas: that a court cannot adjudge the rights of an absent person, and that a court should avoid inconclusive determinations.¹⁵

The same author proposes the following for a test of compulsory joinder:

[A] court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to *avoid an adverse factual effect on the interests of absent persons*; on the other is the policy of seeking to *give a petitioner as much merited relief as possible*. . . . The mechanical application of rules that have become almost cliches is more likely to miscarry than a thoughtful balancing of legitimate, competing interests.¹⁶

III. COMPULSORY JOINDER OF UNWILLING PLAINTIFFS IN MISSOURI

A. In General

The first statutory provision for compulsory joinder in Missouri was enacted in 1849 and provided as follows:

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the petition.¹⁷

In 1889 a provision was added making the statute applicable to both actions at law and suits in equity.¹⁸ In 1943 the present compulsory joinder statute was enacted.¹⁹ The words "united in interest" were changed to "joint interest." The statute eliminated the requirement for stating in the petition why the person who should have been joined as a plaintiff was made a defendant. The provision that the statute would apply to both actions at law and suits in equity was not included.

13. See 29 CALIF. L. REV. 731, 733 (1941).

14. See 48 HARV. L. REV. 995, 996 (1935).

15. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331 (1957).

16. *Id.* at 338-39.

17. Mo. Laws 1849, at 76, § 7.

18. § 1994, RSMo 1889.

19. § 507.030, RSMo 1949. All statutory reference hereafter, unless otherwise indicated, to RSMo 1949. Missouri School of Law Scholarship Repository, 1960

Two early Missouri cases held that the practice of making a defendant of an unwilling plaintiff, which was formerly permitted only in equity pleadings, did not apply in an action at law to recover money due joint obligees.²⁰ Professor Bliss noted²¹ that later statutory enactments, referring to the Revised Statutes of Missouri of 1889, section 1994, had changed the rule of these cases.²² However, the rule of these cases was not changed by including in section 1994 the sentence: "This section will apply to both actions at law and suits in equity."²³

Mr. Charles L. Carr has said that subsection one of section 507.030 should be given a meaning consistent with the provision of the former statute²⁴ requiring that the petition state the reason why a person who should be joined as a plaintiff is joined as a defendant. He has also said that subsection one of this statute includes indispensable parties while subsection two applies to permissive or necessary parties.²⁵ This would seem to indicate that a distinction is to be maintained between indispensable and necessary parties. However, "indispensable" seems to be used in the same sense as "necessary" in the Missouri cases.²⁶ Therefore, throughout the remainder of this Comment the term "indispensable" will be used in discussing those parties who must be joined. The reader, in turning to the cited cases, will find the court using either "necessary" or "indispensable" in the sense that "indispensable" is used in the federal courts, i.e., meaning those parties who must be joined before the court will proceed with the action.

B. Necessary or Indispensable Parties

1. Actions Involving Contracts

Section 431.110 provides that contracts that are joint by common law shall be construed to be joint and several. An early case held that this statute has no application to a right vested in two jointly, and in such a case neither party can, without the consent of the other, maintain an action looking to the enforcement of the right.²⁷ Therefore, joint obligees are indispensable parties. And if any joint obligee or joint promisee refuses to join as a plaintiff in an action brought at law,

20. *Rainey v. Smizer*, 28 Mo. 310 (1859); *Clark v. Cable*, 21 Mo. 223 (1855).

21. BLISS, CODE PLEADING § 77, at 123 n.23 (3d ed. 1894).

22. See footnote (f) to § 1994, RSMo 1889.

23. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 374 n.81 (1957); 6 Mo. L. REV. 364 (1941).

24. § 583, RSMo 1939.

25. 1 CARR, MISSOURI CIVIL PROCEDURE § 64, at 138 (1947).

26. *Miltenberger v. Center W. Enterprises*, 251 S.W.2d 385, 389 (St. L. Ct. App. 1952); *Loewenberg v. de Voigne*, 145 Mo. App. 710, 718, 123 S.W. 99, 102 (St. L. Ct. App. 1909) *Ellis v. Springfield-Southwestern Ry.*, 130 Mo. App. 221, 225, 109 S.W. 74, 76 (St. L. Ct. App. 1908). *But see Casper v. Lee*, 245 S.W.2d 132, 139 (Mo. 1952) (en banc).

27. *Parks v. Richardson*, 35 Mo. App. 192 (St. L. Ct. App. 1889); *Elmer v. Copeland*, 141 S.W.2d 160 (St. L. Ct. App. 1940), cert. quashed sub nom. *State ex rel. Elmer v. Hughes*, 347 Mo. 237, 146 S.W.2d 889 (1941) (en banc)

he cannot be made a defendant under section 507.030.²⁸ However, in equity joint obligees who refuse to join as plaintiffs can be made defendants.²⁹ This difference in result should never have been reached after the statute was specifically made applicable to actions at law in 1889. Since the joint promisee cannot join his co-promisee and is left without a remedy, this result has been characterized as a "you-made-your-bed, now-lie-in-it" attitude. The Supreme Court of Missouri has indicated that if the question were to come before it directly on appeal it would permit the joint promisee to join the other promisee as a defendant under the statute. The court said:

[I]f this question (whether under the statute one joint obligee may sue alone) were here on appeal we feel it would be our duty to examine it anew. . . . [S]uch a rule of law results in 'an abhorrent result'.³⁰

In an action for breach of contract to deliver goods to two persons, both are indispensable parties.³¹ Where the maker of a note is suing the surety, after the surety has converted the chattels mortgaged to him for indemnity, for an accounting and to have the note paid from the value of the chattels, the holder of the note is an indispensable party.³² Where the members of a firm of attorneys have prosecuted an action and one member of the firm collects the fee, in an action by a member of the firm to recover his portion of the fee from the partner who collected, the other members of the firm are not indispensable parties. They may each sue for and recover their aliquot portion of the fee independently in an action at law.³³

2. Actions Involving Real or Other Property

To determine what parties plaintiff are indispensable in this type of action it is necessary to consider what type of relief the plaintiff is asking for and what type of legal interest is asserted. Where the interests are distinct and the plaintiff seeks only to protect his interest, the fact that others may have like interests is immaterial and they are not indispensable parties.³⁴ Section 524.030 provides that two or more tenants in common may join in an action of ejectment for the recovery of the estate owned by them in common. But if a lessee promised to pay

28. *State ex rel. Massman Constr. Co. v. Shain*, 344 Mo. 1003, 130 S.W.2d 491 (1939); *Priest v. Oehler*, 328 Mo. 590, 41 S.W.2d 783 (1931); *Peters v. McDonough*, 327 Mo. 487, 37 S.W.2d 530 (1931); *Slaughter v. Davenport*, 151 Mo. 26, 51 S.W. 471 (1899); *Henry v. Mt. Pleasant Township*, 70 Mo. 500 (1879); *Elmer v. Copeland*, *supra* note 27; *Koller v. Shannon County Bank*, 74 S.W.2d 271 (Spr. Ct. App. 1934); *Townsend v. Roof*, 210 Mo. App. 293, 237 S.W. 189 (Spr. Ct. App. 1922); *Frumberg v. Haderlein*, 167 Mo. App. 717, 151 S.W. 160 (St. L. Ct. App. 1912); *Lemon v. Wheeler*, 96 Mo. App. 651, 70 S.W. 924 (K.C. Ct. App. 1902); *White v. Dyer*, 81 Mo. App. 643 (St. L. Ct. App. 1899); *McLaran v. Wilhelm*, 50 Mo. App. 658 (St. L. Ct. App. 1892); *Park v. Richardson*, 35 Mo. App. 192 (St. L. Ct. App. 1889).

29. *Priest v. Oehler*, *supra* note 28.

30. *State ex rel. Elmer v. Hughes*, 347 Mo. 237, 241-42, 146 S.W.2d 889, 891 (1941).

31. *Lemon v. Wheeler*, *supra* note 28.

32. *Simpson v. Bantley Realty Co.*, 142 Mo. App. 490, 126 S.W. 999 (Spr. Ct. App. 1910).

33. *State ex rel. Jackson v. Bradley*, 193 Mo. 33, 91 S.W. 483 (1905).

plaintiffs, who were tenants in common, jointly a certain monthly sum for rent, the action to recover such rent must be brought by the tenants in common jointly.³⁵ For all injuries to the realty and claims for occupation of the realty tenants in common must join.³⁶ Joint owners of personal property must join in an action to recover for conversion of the property or to recover in assumpsit for its value.³⁷

3. Actions Involving Legal Title

In any suit in which legal title will be affected by the decree of the court, the persons who hold legal title should be joined. This is true even though it is only bare legal title such as that held by a trustee holding for security. Thus, where title is held in tenancy by the entirety, the wife is an indispensable party in an action to cancel a deed for fraud.³⁸ A grantor is an indispensable party in an action to cancel a note and deed of trust securing the note, where the grantor has conveyed with covenants of warranty.³⁹ After foreclosure of a mortgage, all mortgagees with an unascertained interest in the amount recovered should be joined where the suit is by one mortgagee against another for contribution.⁴⁰ In an action on a note secured by a mortgage on property in trust, and to sell the property by judicial sale, the beneficiaries of the trust are indispensable parties.⁴¹ A husband and wife by joint deed conveyed to a railroad a right of way with a covenant by the railroad to build an underpass. In an action on the covenant the wife is an indispensable party.⁴²

In a suit to set aside a deed given at a foreclosure sale, a trustee holding a deed of trust on the property sold was held not to be an indispensable party.⁴³ It was thought that he had no interest to be harmed. A dissenting opinion asserted that since the trustee was charged with a fraudulent conveyance, he was an indispensable party. A plaintiff-grantee, suing in ejectment, claimed an undivided one-half interest under a deed to himself and another; the other grantee was held not to be an indispensable party.⁴⁴ Such a plaintiff may sue for and recover his interest independent of the other grantee.

4. Actions Involving a Fund or Estate

All claimants are usually indispensable parties where the purpose of the suit is the disposition of a fund or an estate. Thus beneficiaries under a contested will are indispensable parties.⁴⁵ Where plaintiffs loaned money to a guardian of an

35. *Churchill v. Lammers*, 60 Mo. App. 244 (K.C. Ct. App. 1895).

36. *Lumerate v. St. Louis & S.F. R.R.*, 149 Mo. App. 47, 130 S.W. 448 (Spr. Ct. App. 1910).

37. *Seay v. Sanders*, 88 Mo. App. 478, 486 (St. L. Ct. App. 1901).

38. *Baker v. Lamar*, 140 S.W.2d 31 (Mo. 1940).

39. *Henry v. Bank of Wentworth*, 302 Mo. 684, 259 S.W. 462 (1924).

40. *Carr v. Waldron*, 44 Mo. 393 (1869).

41. *Roden v. Helm*, 192 Mo. 71, 90 S.W. 798 (1905).

42. *Ellis v. Springfield-Southwestern Ry.*, *supra* note 26.

43. *Casper v. Lee*, *supra* note 26.

44. *McNear v. Williamson*, *supra* note 34.

45. *Machens v. Machens*, 263 S.W.2d 724 (Mo. 1953).

aged man, and defendant, the sole heir, contested payment of this money after the death of the ward, the sole heir was held to be a proper party, though not an indispensable party, and the administrator of the estate was an indispensable party.⁴⁶ Where the petition showed there were seven heirs jointly interested in an indebtedness and the action was brought by only three of the heirs, all seven were said to be indispensable parties.⁴⁷ In a suit by distributees in pursuit of a fund which had come into the hands of a trustee under the will of the deceased administrator of the mother's estate, all distributees as well as residuary legatees must be made parties.⁴⁸ In a suit to recover a misappropriated trust estate, an heir of a deceased beneficiary should be a party as well as the administrator.⁴⁹

5. Other Actions

In an action by a father to annul the marriage of a minor daughter, the father is an indispensable party.⁵⁰ In an action by a school district to prevent disbursement of taxes paid by a water company to school districts other than plaintiff, the school board is an indispensable party.⁵¹

C. Making an Indispensable Plaintiff a Defendant

1. Cases Involving the Right

Where one of two joint owners of the proceeds from the sale of cattle was attempting to recover the proceeds after they had been converted the court held that the plaintiff had to unite his joint owner as a co-plaintiff or as a defendant.⁵² In a petition to set aside a deed of trust, formerly owned by a testator, where the petition stated that he left a duly probated will, the heirs are indispensable parties, and those who refused to join could be made defendants.⁵³ A surety on a note secured by a chattel mortgage took possession of the mortgaged property, refused to sell the property according to the terms of the mortgage and also refused to pay the notes. The maker of the notes sued for an accounting and for payment of the notes. It was held that the holder of the notes, a bank, could be made defendant if it refused to join as a plaintiff.⁵⁴ In a suit by one partner who alleged that the defendant debtor, and the plaintiff's partner, had combined fraudulently to release a debt owed to the partnership, the plaintiff could properly join his partner as a co-defendant where he would not join as a plaintiff in the action.⁵⁵

46. *Williams v. Vaughn*, 253 S.W.2d 111 (Mo. 1951) (en banc).

47. *Spurlock v. Burnett*, 170 Mo. 372, 70 S.W. 870 (1902).

48. *Picot v. Bates*, 39 Mo. 292 (1866).

49. *Butler v. Lawson*, 72 Mo. 227 (1880).

50. *Cox v. Denny*, 34 S.W.2d 528 (Spr. Ct. App. 1931).

51. *School Dist. No. 24 v. Neaf*, 148 S.W.2d 554 (Mo. 1941).

52. *Seay v. Sanders*, *supra* note 37.

53. *Overton v. Overton*, 131 Mo. 559, 33 S.W. 1 (1895).

54. *Simpson v. Bantley Realty Co.*, *supra* note 32.

55. *Anable v. McDonald Land & Mining Co.*, 144 Mo. App. 303, 128 S.W. 38 (Spr.

2. Service

It is said to be elementary that no court can enter a judgment of any kind affecting the rights of any individual without some sort of legal service.⁵⁶ When an indispensable party is joined as a defendant because of a refusal to join as a co-plaintiff there would seem to be no question that a judgment would affect his rights. The provisions of section 506.110 providing for service of process should apply to the involuntary defendant although in fact his interest may be the same as that of a plaintiff, and he should therefore be served by the plaintiff.

3. Venue—Claims for Relief by the Unwilling Plaintiff Joined as Defendant

A question may arise as to the proper venue of an action when the unwilling plaintiff is made a defendant. If after being brought into the suit as a defendant he then wishes to assert his claim against the actual defendant or a claim against the plaintiff who made him a party, then a controversy may arise as to the nature of the claim thus asserted. The case of *Donohoe v. Wooster*⁵⁷ discusses these problems. In that case a joint promisee of a contract joined another joint promisee as a defendant in an action on the contract. It was held that the promisee who refused to join was not a defendant within the meaning of the venue statute. The action was properly brought in the county of the actual defendant. The court asserted that:

[The plaintiff joined as a defendant] must take one of two positions—either that he wishes to participate with the plaintiffs in such recovery as may be had against [the actual defendant], or that he does not desire any benefit from the action. In either view his attitude will be substantially that of a plaintiff. In the one case that of a plaintiff asserting his right to recover; in the other, that of a plaintiff who waives such right.

It is apparent, therefore, that it is only in a narrow and technical sense that it can be said that the complaint states a cause of action against [the plaintiff made a defendant]. While he was properly made a party defendant by virtue of the provisions of section 382, the plaintiffs cannot on the facts alleged obtain any relief against him. Nor can his action in asserting or waiving a right to participate in the recovery affect the rights which the plaintiffs are here attempting to assert against [the actual defendant].

It is suggested by the appellants that [the plaintiff joined as a defendant] may by appropriate pleadings seek relief adverse to the plaintiffs. But in seeking any such relief it is clear that [the plaintiff joined as a defendant] would . . . in reality assume the position of a plaintiff setting up a new cause of action by a new complaint.⁵⁸

Therefore, if the involuntary defendant wishes to claim against the actual defendant after being brought into the suit, it might be wise for him to intervene as a plaintiff

56. *State ex rel. Keller v. Porterfield*, 283 S.W. 59, 60 (K.C. Ct. App. 1926).

57. 163 Cal. 114, 124 Pac. 730 (1912); accord, *State ex rel. Jackson v. Bradley*,

supra note 33.

58. 163 Cal. at 117, 124 Pac. at 731.