

1952

Vaughn L. Warr v. The Van Kleeck-Bacon Investment Company et al : Brief of Defendants and Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

VAUGHN L. WARR, et al,
Plaintiffs and Respondents,

— vs. —

THE VAN KLEECK-BACON INVEST-
MENT COMPANY, and THE VAN
KLEECK MORTGAGE COMPANY,
Defendants and Appellants,
JAY LARSEN,
Appellant and Intervener.

BRIEF OF DEFENDANTS AND APPELLANTS
AND
JAY LARSEN, APPELLANT AND INTERVENER

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— vs. —

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KLEECK MORTGAGE COMPANY,
Defendants and Appellants,
JAY LARSEN,
Appellant and Intervener.

Case No. 7872

BRIEF OF DEFENDANTS AND APPELLANTS
AND
JAY LARSEN, APPELLANT AND INTERVENER

PRELIMINARY STATEMENT

This is an appeal by the Van Kleeck Companies, Defendants and Appellants, and by Jay Larsen, Appellant and Intervener, from orders entered in the Fourth Judicial District Court, Uintah County, the Honorable R. L. Tuckett, Judge, presiding, refusing to set aside a default and default judgment entered in favor of the plaintiffs against the defendants and refusing to allow Jay Larsen to intervene in the action.

The action, a suit to have a deed absolute declared a mortgage and removed as a cloud on plaintiffs' title, was instituted by the service of a summons on Don Barr,

defendants' process agent in Utah, on July 31, 1951 (R. 4). 21 days after service of summons, on August 21, 1951, defendants' default was entered by plaintiffs (R. 38). Ten days thereafter or 31 days after service of Summons, on August 31, 1951, a default judgment was entered against defendants (R. 5-6).

Upon learning that a default judgment had been taken against them, defendants took prompt and immediate measures to have the default and default judgment set aside (R. 9-17). After strenuous and diligent efforts in ascertaining the facts, retaining Utah counsel and preparing the necessary papers, defendants by motion dated November 19, 1951, and filed on November 20, 1951, moved the Court to set aside the entry of default and to vacate the default judgment and to permit the defendants to file their answer in the action (R. 9). The motion was made on the ground that the default and default judgment had been taken by reason of defendants' mistake, inadvertence, surprise or excusable neglect, and was based upon the affidavit of merits of defendants, the Notice of Motion, Affidavits of Ross Bray, Charles A. Baer and Don Barr attached to the motion, the Answer of defendants served therewith and all other records in the action (R. 7-9). The motion thus filed on November 20, 1951 was one day less than three months from the date of entry of defendants' default in the action. In defendants' answer attached to the motion, the Court's attention was directed to the fact that, except for the mineral rights, the land and water stock involved in the action had in 1942 been conveyed by Warranty Deed to Jay Larsen (R. 19) by virtue

of a contract to purchase the property dated March 3, 1938 (R. 20-21), and asserted as a defense to the action that Jay Larsen as such fee owner and in possession had not been joined by plaintiffs as a necessary and indispensable party defendant to the action (R. 22).

The above motion of defendants was heard by the Court on December 14, 1951 and taken under advisement (R. 54). By a ruling dated at Provo, Utah, April 26, 1952, and filed May 13, 1952, the Court denied defendants' motion to set aside the judgment and found that defendants had failed to show that their failure to answer was due to mistake, inadvertence, surprise or excusable neglect (R. 31).

Thereafter, three additional motions were filed in the action. On May 23, 1952, defendants filed a supplemental motion to set aside the entry of default and to vacate the default judgment and to dismiss the action, or in lieu thereof to permit the defendants to file their answer in the action, upon the grounds that Jay Larsen, defendants' grantee of the surface rights and water stock, and Carter Oil Company, defendants' lessee of the oil, gas and mineral rights, were necessary and indispensable parties defendant to the action and that such deed and lease were of record and in the abstract and personally known to plaintiffs prior to the commencement of the action (R. 32-37).

On May 23, 1952, Jay Larsen filed a motion to have the Court set aside the default judgment entered against defendants and for leave to intervene in the action as a party defendant and for leave to file his answer in the action upon the grounds that, except for the mineral

rights, he was the fee owner of the land and water stock involved in the action, holding under Warranty Deed from the defendants which deed had been recorded on October 29, 1942, in Book No. 33, Page No. 300, Uintah County records; that he had not learned of the action nor of the default judgment until May, 1952; that the Court's decree vesting title of the land and water stock in plaintiffs in effect constituted the assertion by plaintiffs of an adverse interest against him as the lawful owner in possession of the property, except the mineral rights, and that the default judgment was void in its entirety in that he, an indispensable party to the action, had never been given any opportunity or notice to appear and be joined in the action (R. 39-41).

By motion dated May 24, 1952 and filed on May 26, 1952 defendants moved the Court to reconsider its ruling dated April 26, 1952, and filed on May 13, 1952, denying defendants' motion to set aside the default and default judgment, on the basis of the facts contained in the additional affidavits of H. M. Snyder, Sheriff of Uintah County, Don Barr, Cashier of the Bank of Vernal, and N. J. Meagher, President of the Bank of Vernal, attached to the motion (R. 44-48).

The three motions described above were heard by the Court on June 11, 1952 at Provo, Utah, and the matter taken under advisement (R. 56). By ruling dated July 12, 1952, and filed on July 16, 1952, the Court denied defendants' motion to have the Court reconsider its prior ruling and, in view of the plaintiffs' offer in open court to tender Jay Larsen a quit claim deed to the surface

rights of the land involved, also denied the motion of Jay Larsen to set aside the default judgment and to intervene in the suit (R. 55). The above offer of a quit claim deed by plaintiffs was rejected by counsel in open Court on behalf of Jay Larsen. Jay Larsen continues in his refusal to accept such deed and insists upon his right to intervene in the action and have the default judgment set aside so that the Court upon a trial of the merits can sever the mineral rights from the surface rights and water stock and either upon proof or by plaintiffs' disclaimer, confirm and recognize his ownership and right to possession of such surface rights and water stock under and by virtue of his Warranty Deed from defendants.

Defendants filed their Notice of Appeal on June 12, 1952, from the Court's order entered on May 13, 1952, denying defendants' motion of November 20, 1951.

On August 12, 1952, the defendants and Jay Larsen together filed a Notice of Appeal from the Court's order entered on July 16, 1952, denying defendants' supplemental motions and the motion of Jay Larsen to set aside the judgment and to intervene in the action.

By stipulation between the parties and Jay Larsen, approved by order signed by Mr. Justice McDonough of this Court, both Notices of Appeal are in effect consolidated together as one case on appeal.

STATEMENT OF FACTS

The Colorado National Bank, Denver, Colorado, is testamentary trustee of the Van Kleeck Estate and in this capacity represents the controlling interest of the de-

fendant Van Kleeck Companies (R. 16). Charles A. Baer, Assistant Trust Officer of the Bank, is an officer of both companies (R. 14). Both companies were organized under the laws of Colorado (R. 14). Ross Bray, an associate for many years of the late Mr. Van Kleeck, is likewise an officer of both companies (R. 10).

Over 30 years ago, namely, by Warranty Deed acknowledged May 14, 1921, and recorded on May 24, 1921, in Book No. 23, Page Nos. 102-3, Uintah County records, the defendant Van Kleeck-Bacon Investment Company acquired title from the father and mother of plaintiffs to the following described land and water stock located in Uintah County:

Lots One and Two, and the East half of the Northwest quarter of Section 19, Township 1 South of Range One East of the Uintah Special Meridian, containing 160.84 acres, more or less;
160 shares of the capital stock of the Big Six Irrigation Company. (R. 19).

A photostatic copy of this deed appears in the record (R. 24-5). The deed on its face states: "This deed is not intended as a mortgage" (R. 24). This Warranty Deed was given in lieu of foreclosure proceedings and in extinguishment of a debt in the face amount of \$3,500.00, represented by a note dated April 22, 1920, in the amount of \$2,500.00 and a note dated April 23, 1920 in the amount of \$1,000.00 signed by Joseph F. Warr and Elizabeth Warr, father and mother of plaintiffs, payable and effected in Denver, Colorado, in favor of the defendant,

Van Kleeck Mortgage Company (R. 30). No part of either principal or interest on such indebtedness was ever paid by the Warrs to either of the defendant companies (R. 30). The notes were secured by two mortgages on the above land and water stock, aggregating \$3,500.00, and the conveyance from plaintiff's father and mother to the defendant, Van Kleeck-Bacon Investment Company, was made subject to such mortgages (R. 24). The mortgages and debt were released of record several years later in 1938 at the time Jay Larsen contracted to purchase the surface rights and water stock from the defendant companies.

At the time the aforesaid Warranty Deed was executed and delivered to the defendant, Van Kleeck-Bacon Investment Company, by plaintiffs' father and mother, the parties entered into an option and agreement under which the defendant company agreed to reconvey the property upon the payment before November 1, 1921 of all arrears, taxes, water assessments and expenses (R. 30). The Warrs did not exercise their option, paid no money under the contract, and finally vacated and moved off the property on December 20, 1922 (R. 21 and R. 30). No member of the Warr family was ever heard from again until November 7, 1951, when the defendant companies were shocked to hear of the suit and thereafter learn that a default judgment had been entered in this case in favor of the Warr children (R. 30).

After the Warr family vacated and moved off the premises on December 20, 1922, the defendant company took possession, leasing the land to various tenants and

paying all water assessments and taxes continuously on the land from year to year thereafter until 1938 (R. 18-23).

On March 3, 1938 Jay Larsen contracted to purchase the land and water stock, excepting the mineral rights, for the sum of \$1,000.00, payable in installments (R. 33, R. 30). Larsen entered into possession at the time of such contract and has paid all taxes and water assessments on the property since that time (R. 33-34). Upon final payment of the agreed purchase price and on February 4, 1942, the defendant by Warranty Deed recorded on October 29, 1942, in Book No. 33, Page No. 300, Uintah County Records, conveyed the land and water stock, excepting the mineral rights, to Jay Larsen in fee (R. 39-40). Jay Larsen has used the land as irrigated pasture in his cattle and farming operations (R. 33-4).

On March 15, 1951, the defendant companies signed and executed an oil and gas lease with Carter Oil Company covering the land in question which lease was thereafter recorded and of record prior to the commencement of the present action on July 31, 1951 (R. 35). The lease contains a Warranty of Title by the defendant companies to the Carter Oil Company (R. 36). Carter Oil Company assigned the lease to Stanolind Oil & Gas Company which Company in turn assigned the lease to Phillips Petroleum Company (R. 35). The aforesaid assignments were of record prior to the commencement of the present action on July 31, 1951 (R. 35). On June 23, 1951, plaintiffs executed a document with Carter Oil Company ratifying defendants' oil and gas lease with the same force and

effect as if plaintiffs had been named as Lessors therein (R. 35). No notice of such ratification or assertion of adverse interest in the property by plaintiffs was given to defendant companies, either by plaintiffs or by Carter Oil Company or by anyone else (R. 35). It is admitted that Carter Oil Company paid a bonus of \$75,000.00 to the defendant companies for executing the aforesaid oil and gas lease.

Immediately prior to the execution of the Carter oil and gas lease on March 15, 1951, it became necessary because of deaths of former agents to appoint a new process agent for defendant companies in Utah (R. 30).

At the suggestion of the Colorado National Bank, the defendant companies selected and appointed as their process agent in the State of Utah, Don Barr, Cashier of the Bank of Vernal. The Bank of Vernal was the correspondent bank in Vernal, Utah, of the Colorado National Bank (R. 30—Baer deposition). He was carefully selected after discussions with various officers of the Colorado bank because he was situated in Vernal, was cashier of the bank and was a young man (R. 30). Don Barr, early in March, 1951, accepted the appointment as process agent in Utah for the defendant companies (R. 26-29, R. 53, R. 46). He was given no specific instructions concerning his duties as process agent, nor was there any need to give any such instructions, for he clearly understood that his only duty was to forward to the offices of the defendant companies in Denver, Colorado, any papers served on him pertaining to the Van Kleeck Companies (R. 46, 26-29).

On July 31, 1951, sometime during the working day, H. M. Snyder, Sheriff of Uintah County, walked into the Bank of Vernal for the purpose of serving the summons and complaint in this action on Don Barr, the defendants' process agent in Utah (R. 45). At the time Barr was working behind the second teller's window on the left as you go in the main entrance of the bank (R. 45). The Sheriff walked up to the window and speaking through the cage said he had some papers for him (R. 45). Barr asked what they were and the Sheriff gave the papers to him indorsing the service on them at the time (R. 45). According to the Sheriff's clear recollection, Don Barr handed the papers back and said "These papers are not for me"; "There must be some mistake, these papers are for Vaughn Warr, not Don Barr." (R. 45). The Sheriff pushed the papers back and said he was going to leave them nevertheless (R.45).

Sheriff Snyder, in his affidavit (R. 45) stated:

"I have a clear recollection of the incident and there is no doubt in my mind whatsoever that Don Barr made an honest mistake in misapprehending the import of the papers being served upon him because of the close similarity between the name Vaughn Warr and his own name, Don Barr." (R. 45).

Mr. N. J. Meagher, President of the Bank of Vernal, was in the Bank on the day the Sheriff came in. After the Sheriff left he walked over and said to Mr. Barr: "Don, what were those papers the Sheriff brought in?" Mr.

Barr replied: "There was some mistake. The papers did not pertain to me or the Bank. They were for a man by the name of Warr." (R. 47). Mr. Meagher likewise affirmed that Mr. Barr as Cashier had always discharged his duties in a highly conscientious, careful, prudent and competent manner (R. 47).

Don Barr himself affirms that but for his mistake in apprehending that the papers in the action were intended for Vaughn Warr rather than himself, by reason solely of the similarity in the two names, and if he had noticed or had his attention called to the Van Kleeck names, it would have immediately recalled to mind his appointment, approximately four and one-half months earlier, as process agent for the Van Kleeck companies and he would have immediately forwarded such papers to the Companies in Denver, Colorado (R. 46). At the time of service he did not remember or have his appointment specifically in mind (R. 53) but the fact of such appointment would have been immediately recalled to mind if he had seen or had his attention called to the Van Kleeck name and if he had not made the honest mistake of thinking that the papers were meant for Vaughn Warr instead of Don Barr (R. 46). Whatever happened to the papers nobody knows; they did not turn up at the bank or elsewhere (R. 26-29).

21 days after the service as aforesaid, plaintiffs entered defendants' default (R. 38). Ten days later, upon the sole testimony of plaintiffs' counsel, the Court found that the Warranty Deed from plaintiffs' father and mother under which both defendants, as grantee, and

Jay Larsen, as defendants' grantee, claim their respective interests, was not a deed but an unforcedclosed mortgage, outlawed by the Statutes of Limitation of Utah (R. 5-6). By the judgment, the Court decreed:

"1. That the plaintiffs are the owners and entitled to the possession of the following described realty and water stock in Uintah County, State of Utah, to-wit:

Lots One and Two and the East half of the Northwest quarter of Section 19, Township 1 South, of Range 1 East, of the Uintah Special Meridian; and all petroleum and mineral rights therein; and
160 shares of the capital stock of the Big Six Irrigation Company." (R. 5).

By paragraph 5 of the judgment, plaintiffs were awarded their costs of Court (R. 6). The Court likewise found that the mortgage and conveyance were void because the defendants were non-qualified Colorado corporations doing business in Utah (R. 5-6). This was not the fact (R. 18-23).

Plaintiffs in their complaint, although alleging that the deed was a mortgage whose foreclosure was outlawed by the statute of limitations, made no offer to pay any sum against the unpaid mortgage debt or interest. They made no offer to pay any of the taxes or water assessments which have been paid on the property for 30 years. They made no offer to pay for any improvements on the property (R. 2-3). In their complaint, plaintiffs did not ask the Court to decree that they were the owners and

entitled to the possession of the mineral rights only; they alleged in paragraph 4 of their complaint that they were the owners and entitled to the possession of the entire interest in the 160.84 acres, as described, and 160 shares of the capital stock of the Big Six Irrigation Company (R. 2). In their prayer, they asked:

“1. That the plaintiffs be declared to be the owners of the above described realty and water stock;” (R. 3).

The default judgment conformed with this prayer for relief and vested complete and entire ownership in the realty and water stock in plaintiffs (R. 5). The cause of action was single and indivisible; the judgment was single and indivisible (R. 3-5).

Both at the time of the commencement of the action on July 31, 1951, and on August 31, 1951, when the hearing was held and the default judgment entered by the Court, plaintiffs knew both personally and from the abstract of title introduced in evidence, that Jay Larsen was the record owner and in possession of the land, excepting the mineral rights, and the water stock as well. They also knew of defendants' lease to Carter Oil Company of the mineral rights, and of the assignments of such lease (R. 32-7, R. 39-41). Although Jay Larsen, Big Six Irrigation Company, Carter Oil Company, and its assignees, were and are all available for service of process in this action, no effort was made to join them in the action notwithstanding their known interests in the property (R. 32-7). At no time from December 20, 1922, when the

Warr family actually vacated and moved off the premises, until November 7, 1951, when John Cook of the Carter Oil Company happened to advise Ross Bray in Denver of the suit (R. 11) did the plaintiffs or any member of the Warr family ever at any time assert any adverse interest or claim any interest whatsoever in the property against the defendant companies or against Jay Larsen, the defendants' grantee of the surface rights and water stock (R. 30, 33, 40).

The defendant companies, upon first being apprised of the suit on November 7, 1951, took immediate and vigorous steps to have the default and default judgment set aside (R. 10-17). Jay Larsen, on hearing of the suit for the first time in May, 1952, likewise took immediate steps to intervene in the action and protect his interest in the property under and by virtue of his Warranty Deed from defendants (R. 39-41).

QUESTIONS PRESENTED

Two primary questions are presented to this Court for determination. The first is whether the District Court erred in refusing to grant the timely motion of defendants to set aside the default and default judgment by ruling that the honest mistake of Don Barr was inexcusable. The second question is whether the default judgment should have been set aside by the District Court because necessary and indispensable parties to the action were not joined and were not permitted to join in the action. Although we respectfully suggest that the District Court's rulings should clearly be reversed on both

grounds we take up first for discussion the well-established principle that the non-joinder of necessary and indispensable parties requires a reversal of the District Court's rulings in the circumstances of this case.

POINT I

A DEFAULT JUDGMENT MUST BE SET ASIDE WHEN, BY TIMELY MOTION, THE FACT THAT A NECESSARY AND INDISPENSABLE PARTY HAS NOT BEEN JOINED IN THE ACTION IS BROUGHT TO THE ATTENTION OF THE COURT.

NATURE OF THE CASE

The present action instituted by plaintiffs is in the nature of an equitable action to cancel or set aside a deed absolute on the ground that the deed was in fact a mortgage whose foreclosure by the mortgagee was outlawed by the provisions of Sections 104-2-6 and 104-2-22 of the Utah Statutes of Limitation and was void because the defendants were not at the time their interests were acquired qualified to do business in Utah. Plaintiffs' cause of action sought to invalidate *in its entirety* the recorded warranty deed of their father and mother executed and delivered in 1921, over 30 years ago, which conveyed in fee simple 160.84 acres of land located in Uintah County and 160 shares of the capital stock of the Big Six Irrigation Company. These allegations were made notwithstanding that the deed on its face stated "This deed is not intended as a mortgage" and notwithstanding that the deed was executed and delivered not to secure but to extinguish the mortgage indebtedness in lieu of foreclosure

proceedings. The deed itself was made subject to the two earlier mortgages executed by plaintiffs' father and mother and these mortgages were later released of record in 1938.

Plaintiffs, even on their theory that the deed was a mortgage, made no offer to pay any part of the mortgage debt or interest thereon and made no offer to pay up any part of the 30 years of back taxes and water assessments which have been paid by defendants and Jay Larsen, nor did they offer to pay for any of the improvements which have now made the land extremely valuable for its use alone as irrigated pasture.

Plaintiffs alleged and the Court decreed that the deed in its entirety was "only of the nature of a mortgage" and as such void and outlawed. By judgment of the Court the entire fee ownership of the 160.84 acres of the described realty and 160 shares of the capital stock of the Big Six Irrigation Company was vested in plaintiffs. Plaintiffs' cause of action did not sever the mineral rights from the land and water stock, nor did the Court's judgment.

Plaintiffs knew when they filed the action on July 31, 1951 and their counsel knew 30 days later when he testified in the action and the Court signed the default judgment, that Jay Larsen was in possession and the record fee owner of the described land and water stock, excepting the mineral rights, and they likewise knew that defendants had previously divested themselves by lease to the Carter Oil Company of the oil, gas and mineral rights.

Notwithstanding that the deed to Jay Larsen and the lease to Carter Oil Company were both known to plaintiffs, they made no effort to join either in the action. In fact, a few days before instituting the action against defendants, plaintiffs attempted to get Carter Oil Company out of the picture by adopting and ratifying defendants' oil and gas lease with that Company. This maneuver, unknown to defendants, eliminated the possibility of Carter Oil Company's insisting on intervening in the action to uphold its oil and gas lease from defendants. It also left Carter Oil Company in the position where, unless the Court requires it to be joined, it can now sit back in a neutral position and attempt to recover the \$75,000.-00 paid to defendants if the present default judgment is allowed to stand.

Jay Larsen, as defendants' grantee of the surface rights and water stock, however, was not eliminated from the picture by plaintiffs prior to the commencement of the action. Although known to be the fee owner of record of the surface rights and water stock he was not joined as a party to the action. He holds 160.84 acres of irrigated pasture and the 160 shares of stock in the Big Six Irrigation Company under warranty deed from a grantee whose deed by default judgment in this action has in its entirety been declared null and void. His chain of title, with one link out, has been rendered unmerchantable by the Courts' judgment. A quit claim deed from these plaintiffs, he thinks, is a poor substitute for a court decree. He insists upon his right not in an independent action, but in this action, to have the Court's judgment

set aside and modified to recognize his fee ownership in the surface and water stock. He does not think that the Court should cloud his title by formal judgment and then without permitting him to be a party to the action attempt to force him to accept a quit claim deed from these plaintiffs.

The truth of this case is somewhat about as follows: The Warr children somehow or other got wind that this tract of land which their father and mother had deeded away 30 years ago was now one of the most valuable tracts of oil land in the Roosevelt Pool. Without having asserted any claim whatsoever against the property for 30 years they took the blind chance of acquiring some interest by filing suit. By a peculiar, if not incredible, series of circumstances default judgment resulted in their favor. Fortunately for defendants Don Barr is not the only one who made a mistake in this action. Plaintiffs made the mistake of not joining Jay Larsen as a party defendant as the authorities hereafter cited clearly demonstrate.

WHO ARE PROPER, NECESSARY AND INDISPENSABLE PARTIES

The new Utah Rules of Civil Procedure, expressing old law, classify parties into proper, necessary and indispensable parties. Both in the Federal Courts and in this State:

- (a) *Proper* parties are those who may be joined in the action at the discretion of plaintiff.

(b) *Necessary* parties are those who *should* be present and joined in the action and without whom the Court may not proceed except where “jurisdiction over them can be acquired only by their consent or voluntary appearance.”

(c) *Indispensable* parties are those who *must* be present and joined in the action.

See: 65 Harvard Law Review at page 1050; *Washington v. United States*, 87 F. (2d) 421, (CCA9) (1936):

“The absence of an ‘indispensable’ party is fatal to the maintenance of a suit. The Court normally will dismiss even where it is impossible to bring the absent person before the Court, or where his joinder would destroy jurisdiction. Thus the requirement of joining indispensable parties may not only permanently deprive the plaintiff of a federal forum, but also prevent recovery in any court.” 65 H.L.R. 1050.

Under Rule 19(a) of the Utah Rules of Civil Procedure, it is provided that “persons having a joint interest *shall* be made parties and be joined on the same side as plaintiffs or defendants.” This rule is, of course, subject to the provision of Rule 23 relating to “class actions” which has no applicability to the present situation.

Furthermore, Rule 19 (b) reads as follows:

“(b) Effect of Failure to Join. *When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the*

Court as to service of process, 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 can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons.” (Italics supplied.)

Subsection (c) of Rule 19 likewise provides:

“(c) Same: Names of Omitted Persons and Reasons for Non-Joiner to be Pleaded: In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, or 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.”

Again, Rule 21, entitled “Misjoinder and Non-Joiner of Parties” provides in part:

“Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”

The above Utah Rules were taken from the Federal Rules of Civil Procedure and show clearly that there can be no dispensing with indispensable parties as the following commentary shows. The commentary is taken from Vol. 6 of the Cyclopedia of Federal Procedure, 2nd Edition:

Para. 2135 states:

"It has been said the Rule 19 attempts to give some definitions to the distinction between indispensable parties and necessary parties, and that the distinction between 'necessary' and 'indispensable' parties is recognized in Rule 19 (b) of the new Federal Rules of Civil Procedure. It is obvious, however, that the rule does not purport to define the distinctions." (Citing cases.)

Para. 2136 states:

"The fundamental importance of indispensable parties from a procedural standpoint is reflected in the well-settled general rule, necessarily as true since the advent of the Federal Rules of Civil Procedure as before, that where an indispensable party is absent the court may not grant any relief. Consequently, in the absence of indispensable parties dismissal of the suit is proper." (Citing cases.)

It is therefore clearly established law that the absence of an indispensable party is fatal to the maintenance of a suit and when brought to the attention of the Court requires either a complete dismissal of the suit and the vacation of any judgment rendered therein or the indispensable party must be joined so that the court may proceed with the action.

"The rules of indispensability have been formulated largely to protect an absent interested person or the defendant. The defendant may protect in his own interest; even where he cannot object in his own right, he may rely on the interest of the absent person." (65 HLR 1050).

The only exception to this rule is where the person to be protected, by his own inequitable conduct, is precluded from raising the objection. Examples of this are where the defendant and the absentee conspire to suppress the fact of indispensability from the Court or where the defendant had sworn that certain persons had no interest he could not thereafter raise the issue of their indispensability. This exception obviously had no application to the present situation.

The test for determining indispensability is still that laid down in *Shields v. Barrow* in 1855, 17 How. 130, by the United States Supreme Court, where it was stated that indispensable parties are

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

In *Houston Real Estate Investment Company v. Hechler*, 44 Utah 64 (1914) the Supreme Court of Utah stated as follows: (page 78)

“In view of what has been said, we feel constrained to hold that, where A’s property is attached in an action by B against C, A, as a matter of right, may intervene in B’s action, and in that action have determined his right to or interest in the property.”

ARE GRANTEES AND LESSEES OF RECORD PRIOR TO THE COMMENCEMENT OF AN ACTION NECESSARY AND INDISPENSABLE PARTIES?

The authorities clearly establish that a defendant's vendee and lessee are necessary and indispensable parties to the action.

With respect to the general principle involved, we refer first to the case of *Shields v. Barrow*, 17 How. 130 (1855), which involved a situation where a vendor had sold certain plantations and slaves to a citizen of Louisiana for \$227,000. He received payments aggregating about \$107,000. Some of the notes being unpaid, the vendor instituted an action against the vendee. This action was settled by the vendor agreeing to take the property back upon the payment of an additional sum of money which was secured by the notes of six individuals, four of whom lived in Louisiana, and two in Mississippi. Becoming dissatisfied with this arrangement the vendor instituted suit seeking to have this settlement agreement set aside and to have his rights under the original agreement restored. The two Mississippi residents only were joined as defendants, the vendee and his four indorsers all from Louisiana not being joined.

Mr. Justice Curtis stated; page 139 and 140:

“The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be

made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the act of congress of February 28, 1839, (5 Stat. at Large, 321, par. 1) nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree. * * *

“A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.”

In *United States v. Central Pacific R. Co.*, 11 Fed. 449 (1882) the United States brought a suit against the railroad to vacate certain patents on the ground of mistake in the issuance of the patents to the railroad as a part of its land grant. The action was dismissed because the defendant's grantees were indispensable parties and had not been joined in the action.

The court (per Sawyer, C.J.) stated:

“* * * there is another point upon which the present bill must be dismissed, as to all the lands and patents in question. The Central Pacific Rail-

road Company is the only defendant, and before the filing of the bill it had conveyed all the lands in question and ceased to have any interest in the subject-matter in controversy. Not a person who had any interest in the matter in controversy when the bill was filed has been made a party to this suit. The court is asked to vacate patents to large quantities of land held by numerous parties under these patents without anybody having an interest in the lands being a party to the suit. The parties in interest are not only proper but indispensable parties. No decree can be rendered annulling or affecting the title of parties to land without their presence. They are entitled to their day in court. *Shields v. Barrow*, 17 How. 130; *Coiron v. Millandon*, 19 How. 113; *Barney v. Baltimore City*, 6 Wall. 285; *Ribon v. Railroad Co.*, 16 Wall. 450; *Railroad Co. v. Orr*, 18 Wall. 475. The defendant in this suit, having no interest in the subject-matter involved, is not even a necessary, if a proper, party to the bill to annul the patents. To vacate the patents on this bill would be very much like foreclosing a mortgage upon lands, in a suit against a mortgagor not personally liable for the debt secured, after he has conveyed the mortgaged lands, without making the owner of the lands a party. All the indispensable parties are omitted from the bill, and those not necessary to be made parties are sued."

In *New Mexico v. Lane*, 243 U. S. 52 (1917), the State of New Mexico brought a suit against the Secretary of the Interior and the Commissioner of the General Land Office asking that a tract of land which the Interior Department had awarded and sold as coal land to an entryman under the coal land law be decreed to be the property of the

State under the school-land grant and that the issuance of a patent to the entryman be enjoined.

The Supreme Court of the United States dismissed the suit on grounds which included the fact that the entryman, having purchased the land and paid the price was an indispensable party to the granting of the relief prayed.

Mr. Justice McKenna stated, p. 58:

“It would seem, besides, that under the averments of the bill Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof.”

In *South Penn Oil Co. v. Miller*, 175 Fed. 729 (1909) the Circuit Court of Appeals for the Fourth Circuit held that a court cannot adjudicate rights under conflicting oil leases of the same property, executed by different lessors, and each providing for the payment of royalties, in a suit between the lessees to which the lessors are not parties. The Court, speaking through Judge Goff, stated:

“We also think the record discloses the fact that parties absolutely essential to the proper disposition of the questions decided by the court below were not before it, and that consequently, even had the subject-matter of the controversy been properly within its jurisdiction, the court could not have effectively disposed of it. Neither the lessors of the complainants, nor of the defendants, were made parties to the suit, and yet the final decree disposed of the funds in which they were

interested, and decided the title to the property which they claim to own in fee simple. It takes from the one and gives to the other set of claimants portions of the land claimed, respectively, by those not made parties. It adjudges that the complainants are the owners, by virtue of their leases for oil and gas, of the real property in dispute that is located to the west of a certain line, although such property is claimed in fee simple by the lessors of the South Penn Oil Company, who were not permitted to defend their titles. The receiver is directed to turn over to the complainants the oil wells on the land so situated west of that line, thereby giving to complainants' lessors the royalty due from said wells, which is also claimed by the lessors of the defendant the South Penn Oil Company. And, again, the South Penn Oil Company is adjudged to be the owner of the wells found to be on the east side of said line, on land the title to which is claimed by the lessors of complainants, who are thereby deprived of the royalties due from the wells so given to the South Penn Oil Company. Clearly, these lessors are not deprived of their rights, or bound by said decree; nor are they estopped by it from litigating to protect their interests. Evidently the decree of the court below could not finally and effectually dispose of the controversy, as the lessors referred to were indispensable parties, and those claiming under it would hold defective titles."

In *United States v. Bean*, 253 Fed. 1 (1918), the United States brought a suit against G. E. Bean, County Treasurer of Seminole County, Oklahoma, to enjoin and prevent the County Treasurer from selling and conveying certain lands for delinquent taxes which had been allotted

and formerly owned by the Seminole Nation or Tribe of Indians. The government contended that under the Federal laws these lands were inalienable save on approval of the court. The Circuit Court of Appeals speaking through Judge Sanborn dismissed the action upon the ground that the purchasers of the lands from the County Treasurer were indispensable and had not been joined as parties to the action.

“From the complaint and the decree the facts conclusively appear that this suit has been commenced, prosecuted, and a decree has been rendered against the party who has no real interest in the property in litigation, and that none of the real parties in interest adverse to the claim of the complainant have been made parties to the suit, or have appeared or been heard therein. The taxes of which complaint is made have been levied, the lands upon which they were levied have been sold to pay them, certificates of the sales thereof have been executed and delivered, the certificates and any liens they evidence are held either by the county, or by other purchasers at the sales, or from the county, or by their successors in interest; but neither the county (Revised Laws Oklahoma, sec. 1501), nor any of the purchasers at the sales, nor any of the holders of the certificates of sales, are parties to this suit, and as they have not been made parties, and have not been heard, or had any opportunity to be heard in this suit, nothing that the court below has adjudged and nothing that this court has decided herein is or can be binding upon them, or upon any parties claiming under them, or even upon the court below, or upon this court, when, if ever, the claims, rights, and interests of

these parties who are not present in either of the courts are presented by them for adjudication.

“But the decree, by its terms, annuls their certificates, destroys the liens they claim, removes all these as clouds upon the titles, without any notice to or hearing by them, and this decree doubtless has been, or, if permitted to stand, will be, spread upon the records of the titles to these lands. It cannot fail injuriously to affect—nay, practically to destroy—the value of the claims and rights of these holders of certificates, because it bears on its face no adequate notice that they are not bound by it. ‘The established practice of courts of equity to dismiss the plaintiff’s bill,’ says the Supreme Court, in *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235, 22 Sup. Ct. 308, 322 (46 L. Ed. 499), ‘if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by counsel. *Shields v. Barrow*, 17 How. 130 (15 L. Ed. 158) *Hipp v. Babin*, 19 How. 271, 278 (15 L. Ed. 633); *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black, 545 (17 L. Ed. 333)’ To the same effect is the opinion of this court in *Hawes v. First Nat. Bank*, 229 Fed. 51, 57, 59, 143 C. C. A. 645, 651, 653.

“It is a familiar and just rule that no court may directly adjudicate a person’s claim of right, unless he is actually or constructively before it. It is an established rule of practice in the conduct of suits in equity in the federal courts that every indispensable party must be brought into the court or the suit must be dismissed. And an indispensable party is one who has such an interest in the

subject-matter of the controversy that a final decree cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Seminole County and each of the other holders of certificates of sale or of liens which they claim upon any of the lands described in the complaint which the plaintiff seeks to affect by this decree, was an indispensable party to this or any suit to avoid or injuriously affect his certificate or claimed lien. And as Justice Curtis said in *Shields v. Barrow*, 58 U.S. (17 How.) 130 138, at 141 (15 L. Ed. 158) :

‘It being clear that the Circuit Court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons,’ the original bill ought to have been dismissed.”

In *Knickerbocker Ice Co. v. Hofstater*, 32 Fed. (2) 184 (1929), the Circuit Court of Appeals, Second Circuit, held that the doctrine of the vendee’s indispensability to an action, however, should not be extended so far as to include a mere prospective purchaser. Judge Chase stated :

“The trial court was right in denying the motion to dismiss for want of jurisdiction. Rabenold was not a vendee. What is said concerning a vendee in *New Mexico v. Lane*, 243 U. S. 52-58, 37 S. Ct. 348, 61 L. Ed. 588, does not apply here. At most, Rabenold was only a prospective vendee, who was affected by this suit only in that its decision might influence his decision to buy or not to buy.”

In *Miller v. Klasner*, 140 Pac. 1107 (1914), the Supreme Court of New Mexico had under consideration a case almost on all fours with the one at bar.

The appellee had instituted a suit to enjoin appellant from interfering with his right to the use of a stated amount of water of an irrigation ditch. The appellant answered and filed a cross-complaint. A referee was appointed by the court to take testimony. The referee served a written notice of the time and place of hearing. Geo. W. Prichard, Esq. of Santa Fe, appellant's attorney on receiving this notice advised the referee he could not attend and also stated he would advise his client so she could make other arrangements. The referee thereupon sent a notice by registered mail to appellant but this letter was missent to Roswell by the postal authorities and was not received by appellant until sometime after the hearing. She heard nothing from her attorney.

The referee took testimony and the court upon motion and without notice to appellant considered the referee's report and rendered judgment thereon awarding appellee two-thirds of the ditch and a one-third interest to Ellen Casey, who was not a party to the suit, but who appeared to be the mother of appellant. From the record it appeared that the appellant was either the agent of her mother, Ellen Casey, or was a tenant in common with her mother and others to the lands involved.

After the above judgment was rendered, the appellant for various reasons moved to have the same set aside and vacated. The motion was denied and the cause appealed.

The Supreme Court of New Mexico stated :

“Appellant contends that the court should have vacated the decree, because she had no opportunity to defend her rights. Waiving this question, however, the judgment in question should have been set aside, because it appears from the decree itself that Ellen Casey was a necessary and indispensable party to the action. It is a familiar and fundamental rule that a court can make no decree affecting the rights of a person over whom it has not obtained jurisdiction, or between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. *Shields et al. v. Barrow*, 17 How. 130, 15 L. Ed. 158. In this case appellee’s right to the relief which he sought necessarily depends upon a determination of his right to the use of the ditch and water as against Ellen Casey, or the principals, represented by appellant. Until this right was determined the court could not rightfully enjoin appellant from using the water, as the representative of these absent parties. The injunction was necessarily predicated upon the prior determination of these rights. The interest of Ellen Casey was necessarily so interwoven with the interests of the parties to this suit that no decree could possibly be made, affecting the rights of those before the court, without operating upon her interest. Such being the case, she was an indispensable party, without whom the court could not lawfully proceed. *C.S.M. Co. v. V. & G.H.W. Co.*, 1 Sawyer, 685, Fed. Cas. No. 2,990. When this fact was developed by the evidence, even though it had not

been raised by the pleadings, the court should have taken notice of the same and have directed that the cause stand over, in order that such party could be brought in. As was said by the Massachusetts Supreme Court, in the case of *Schworer v. Boylston Market Association*, 99 Mass. 285: 'If there be an omission of an indispensable party, so that a complete decree cannot be made without him, the court will itself, *ex mero motu*, take notice of the fact, and direct the cause to stand over, in order that such new party may be added.'

"2. While it is true, the general rule is that a defendant must take advantage of the defect of parties by demurrer or answer, failing in which the objection is waived, still this rule does not apply to an indispensable party, and where the court may not proceed to a decree or judgment without his presence. *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063; *Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166.

"3. The only remaining question then is whether the objection that there is the want of a necessary and indispensable party can be taken after a judgment by default, by motion to set aside the judgment. This question was answered in the affirmative by the Supreme Court of Texas, in the case of *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77. The court said: 'The court should not render a judgment, there being the want of a necessary party to a suit. The defendant in such a case has a right to presume that the court will not enter an erroneous judgment against him, and hence should not be held in default until the necessary party is brought before the court. If judgment by default be taken, it should be set aside upon motion; and in case the motion be overruled it will be reversed upon appeal or a writ of error.' See, also, *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S. W.

599, and Black on Judgments (2d Ed.) Chapt. 325, where the author says that a judgment taken by default will be set aside as irregular, when it appears that a real party in interest was not made a party defendant.

“This being true, the trial court should have sustained appellant’s motion to vacate and set aside the judgment. For its failure so to do the judgment must be reversed and the cause remanded, with instructions to sustain the motion to vacate the judgment, and to proceed no further until the necessary parties are made parties defendant by amendment, and that upon appellant’s failure to do this the suit be dismissed, unless by amendment issue can be joined, that the rights of others will not be affected by the judgment; and it is so ordered.”

In *Vincent Oil Co. v. Gulf Refining Co.*, 195 Fed. 434 (1912), the Circuit Court of Appeals for the Fifth Circuit held that an oil company which was assignee of an undivided half interest in an oil lease and was in exclusive possession and operating the property, was an indispensable party to a suit to establish the validity of a prior lease, the necessary effect of which would be to invalidate its own, and also, even if it were not a party, to interfere with its exclusive possession.

The court stated:

“The decree sought would interfere with the possession of the Producers’ Oil Company, which is now exclusive of the complainant, and would place the complainant in join possession. It would set up the Staiti lease and cancel the Hooks lease,

which is the source of the title held by the Producers' Oil Company. It is true that the decree would not be binding on the Producers' Oil Company, but surely that company should be before the court to be heard in a case affecting its possession and the source of its title."

For other similar cases see: *Page v. Town of Gallup*, 191 Pac. 460 (New Mex.) (1920); *Egyptian Novaculite Co. v. Stevenson*, 8 Fed. (2) 576 (CCA 8) (1925).

In *American Mutual Building & Loan Co. v. Jones*, 117 P (2) 293 (1941), the Supreme Court of Utah held in a quiet title suit that the lower court in joining Utah County as a party defendant, *on its own motion*, was correct and proper where the County had title to the property by virtue of a valid auditor's deed.

Justice Pratt, speaking for the Court, stated:

"The order of the lower court making Utah County a party was not an error. The County had good tax title. Its subsequent failure to make a valid sale did not affect its title. Plaintiff had no title. To adjudicate that the title of Robert Jones is void does not accomplish anything for plaintiff with valid title standing in the County. The Court could not adjudicate against the County without making the County a party."

In *Ebell v. Bursinger*, 70 Tex. 120, 8 S.W. 77 (1888), plaintiff brought a suit to cancel a deed conveying to the defendant certain real property in trust for the defendant's daughter, Anna Ebell, on the ground that the conveyance was procured by threats and intimidation. No

answer being filed the plaintiff took judgment by default. Defendant filed a motion to set aside the judgment, which was overruled. One ground of the motion was that the beneficiary under the deed had not been made a party to the suit. In reversing the lower Court's ruling the Court stated (at page 77) :

“Two questions are presented by the assignment: First, was the cestui que trust a necessary party to the suit? And second, can the objection for want of a necessary party be taken by motion in the Court below after default or upon appeal?”

After holding that the beneficiary was a necessary party the Court then considered the question whether the objection could be taken after a judgment by default. After holding in the affirmative, the Court stated, page 78 (SW) :

“The court should not render a judgment, there being the want of a necessary party to the suit. The defendant in such a case has a right to presume that the Court will not enter an erroneous judgment against him and hence should not be held in default until the necessary party is brought before the Court. If judgment by default be taken, it should be set aside upon motion; and, in case the motion be overruled, it will be reversed upon appeal or a writ of error.”

In *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S.W. 559 (1895), the Court held that the non-joinder of necessary parties defendant could be first made even on appeal.

With respect to the water stock involved in this action we quote from *Iron City Sav. Bank v. Isaacsen*, 164 S. E. 520 (1932) where the Supreme Court of Virginia stated, page 528:

“The only other equitable relief prayed is an injunction against the Southeast Lumber Export Company, Inc. and its president restraining them from transferring on the books of the corporation the 139 shares of the stock of the corporation standing thereon in the name of Irma Isaacsen, which had been assigned and transferred to her by Henri Isaacsen.

“The right of the complainant to such an injunction is predicated entirely upon its right to have the stock transfer from Henri Isaacsen to Irma Isaacsen set aside; and the granting of such an injunction would necessarily affect the rights and interests of Irma Isaacsen in and to the shares of stock. Therefore, she was an indispensable party to this bill both in its aspect of a bill to set aside the stock transfer and in its aspect of a bill for an injunction. This being so, until the court had acquired jurisdiction of her person, or had acquired such control over these shares of stock as to give it jurisdiction to proceed against this stock as a res upon an order of publication as to her, it had not acquired actual jurisdiction to grant a permanent injunction restraining the corporation, or its president, from transferring these shares of stock on the books of the corporation.”

The Court's attention is also invited to *Barguette v. Del Curts*, 163 P (2) 257, at page 260, where the Supreme Court of New Mexico stated:

“That an indispensable party defendant has been omitted may be raised at any time.”

THE PRESENT JUDGMENT CONSTITUTES A CLOUD ON JAY LARSEN'S TITLE.

Although prior to the filing of the *Lis Pendens* and the entry of the default judgment in this case, Jay Larsen was the fee owner of record of the 160.84 acres of land, excepting the mineral rights, and the 160 shares of stock of the Big Six Irrigation Company, both land and water stock are now vested by Court decree in plaintiffs in an action to which Jay Larsen as such fee owner of record was not made a party. He now holds as grantee from a grantor whose title has been completely divested by the Court and declared null and void. This assertion by plaintiffs of adverse interest in his property by formal judgment entered by the Court below is a cloud on his title.

As to what constitutes a cloud of title, we invite the Court's attention to the annotation "What Constitutes Cloud on Title Removable in Equity" contained in 78 A.L.R., pages 24 to 313; also *Gardner v. Buckeye Savings & Loan Company*, 108 W. Va. 673, 152 S. E. 530, 78 A. L. R. 1; *Homewood Realty Corporation v. Safe Deposit & Trust Company*, 160 Md. 457, 154 Atl. 58, 78 A. L. R. 8; *Briggs v. Industrial Bank*, 197 N. C. 120, 147 S. E. 815, 78 A. L. R. 20; *Trustees of Schools v. Wilson*, 334 Ill. 347, 166 N. E. 55, 78 A. L. R. 22.

In the *Buckeye case*, p. 5 of A. L. R., the West Virginia Court stated:

“What is a cloud? Black’s Law Dictionary defines it to be an outstanding claim or incumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question. In 32 Cyc. 1314, the general rule is stated: ‘A cloud, such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce.’ The attributes generally recognized as necessary to create a cloud are that the claim must be (1) apparently valid, and (2) capable of embarrassing title.”

The cases establish that a mere verbal claim or oral assertion of ownership or a mere apprehension on the part of a property owner that an adverse claim of title or interest may be asserted against him, does not constitute a cloud on title. On the other hand, assertions in judicial proceedings have been held to constitute a cloud on title. See 78 A. L. R. 43.

The Utah case of *Schenck v. Wicks*, 23 Utah 576, 65 Pac. 732 (1901) is cited on page 27 of the A. L. R. Annotation. In the *Schenck case*, this Court stated, page 581:

“A cloud on a title is something, such as a mortgage, deed, or judgment, etc., which shows prima facie some interest in a third party in or to the property adverse to the person vested with the real title to the same, or to one having an interest therein.”

Under the authorities, by the judgment of the Court below it is clear that Jay Larsen's title to his irrigated pasture and to his water stock has been clouded. His right to possession has been placed in jeopardy. The merchantability of his title has been seriously damaged.

RIGHT OF JAY LARSEN TO INTERVENE IN ACTION.

Again, there can be no doubt of Jay Larsen's right to intervene in this action and that the Court below erred in denying his motion to set aside the judgment and to intervene as a party defendant.

Even if Larsen had acquired his interest in the property while the action was pending or even after the default judgment was entered, he would still have standing to contest the validity of the judgment below. See: 104 A. L. R. 697 and annotation under heading: "Nonparty who acquires interest in property pending action or after judgment as within benefit of statute or rule providing for opening, vacating or setting aside of judgments." It is there stated, page 697:

"While strangers to the record, unless authorized by statute, ordinarily have no standing on which to base an application to open, vacate, or set aside a judgment, it is by no means true that the right to move for the vacation of a judgment is strictly limited to the parties to the action, where the interests of a non-party will be affected by the judgment."

See, also, Rule 25(e) of Utah Rules of Civil Procedure relating to transfer of interest while an action is pending.

In the present case, Jay Larsen acquired his interest many years prior to the suit, having gone into possession in 1938 under a contract to purchase and receiving his warranty deed from defendants thereunder in 1942. His fee interest was personally known and known of record to plaintiffs. His right to intervene under the authorities and under the Utah rules is clear.

In *Guenther v. Funk*, 274 N. W. 839 (1937), the Supreme Court of North Dakota stated the general rule as follows:

“The general rule is that none but the parties to a judgment can have it set aside; and that a stranger to the record, who was neither a party nor privy to the action, cannot move to vacate the judgment.

“This general rule, however, is subject to the exception that persons, not nominal parties to the action or successors in interest, but whose rights are injuriously affected thereby, may, under proper circumstances, have a judgment vacated. 1 Freeman on Judgments, Sec. 260 et seq.; 34 C. J., p. 345.”

Freeman on Judgments, 5th Ed., Sec. 260, states:

“When Third Persons May Apply.—The rule that none but parties to the judgment are permitted to interfere admits of exceptions, excluding from its operation persons not nominal parties to the action, but who are necessarily affected by the judgment, and who have equities entitled to be protected from its operation.”

Different types of cases are then listed such as intervention by a judgment creditor in action against debtor, beneficiary in action against trustee, landlord in action against tenant, comptroller in action against city, indemnitor in action against indemnitee, persons prejudicially affected in proceedings against property, etc.

Jay Larsen is in privity with defendants as their grantee. His interests in both land and water stock have been prejudicially affected in that plaintiffs, within a period of 30 days, were able by default judgment to have such property and the right to possession vested in themselves. As defendants' grantee, Jay Larsen is no stranger to the record. The title to his property has been vitally affected.

It is, of course, well established that a third party will not be allowed to intervene in an action to remove cloud on title even though, claiming title to the premises, he does not rely upon any source of title sought to be established in the action. For example, the North Carolina Supreme Court in *Moore v. Massengill*, 41 S. E. (2d) 655, 170 A. L. R. 147 (1947) stated:

"The only question presented on this appeal is simply this: May a third party, who claims title to the premises involved in an action to remove cloud upon title, but who is not relying upon any source of title sought to be established in such action, be permitted to interplead and have her independent claim of title adjudicated therein? Our decisions do not so hold."

This rule has long been the law in Utah and was first expressed in *Moore v. Wilson*, 1 Utah 187, where it was held in a quiet title suit that there was a misjoinder of parties defendant where the defendants claimed title from no common source. The Court stated:

“This is sufficient to dispose of the case, for the defendants having totally distinct claims, and having title from no common source, cannot in such a case as this, be joined in the same proceedings.”

On the other hand, where a third party is in privity of estate claiming title from a common source with the defendant he may and should be intervened in the action. On this question, we invite the Court's attention to Annotation in 170 A. L. R., pages 149-156, entitled “Who May Intervene in Suit to Quiet Title”. This annotation refers to the decision of this Court in *West Point Irrigation Ditch Co. v. Moroni & Mt. P. Irrigation Ditch Co.*, 14 Utah 127, 46 P. 762 (1896) as holding that in a suit to determine the plaintiff's rights to the waters of a river, the owners of an irrigation ditch deriving its water supply from the river had a right to intervene in the action.

The above annotation refers to the following cases:

Knotts v. Tuxburg (1917), 69 Ind. App. 248, 117 N. E. 282, where it was held to be the duty of the Court to admit a railway company as a defendant after introduction, as the last item of evidence in the trial of a quiet title action, of a certified copy of a deed, which described

lands including those in controversy, executed in favor of the railway company by one of the defendants.

West Point Oil & Gas Co. v. Dunn (1929; Tex. Civ. App.), 18 S. W. (2d) 267, where the purchaser of a portion of a 200-acre tract was permitted to intervene in an action brought by the vendor to remove an alleged void mortgage as a cloud upon the title to the entire tract in order to protect herself on her warranty to the purchaser, the court saying that the intervenor "was vitally interested in this matter, and if it were necessary in order to remove such cloud, to cancel any instruments which affected the title to his land, he was not only a proper, but a necessary party."

Squarely supporting Jay Larsen's right to intervene and not distinguishable from the case at bar is the case of *Montgomery v. Beck* decided by the Supreme Court of California in 1928 and reported in 272 Pac. 1058. The Court there held that the successor in interest to property, whose interest was acquired prior to the commencement of the action, was entitled to intervene in the action after the entry of default against his predecessor. The Court stated, pages 1058-9:

"This appeal was submitted upon an order to show cause, the respondent having presented and filed no brief herein. This action was one to quiet title to certain real property. One of the defendants named therein was the Los Angeles Realty Syndicate, a defunct corporation, jurisdiction over which was obtained by service of process upon one of the former directors and then existing trustees thereof. The trustees were not made

parties to said action, and they permitted said defunct corporation to be in default, and the default thereof upon the proof of such service was entered in the action. Thereafter the appellant, W. D. Ashbaugh, made application for leave to intervene in the action, alleging himself to be the owner of the premises in question as the successor in interest of said defunct corporation; and in his amended complaint, in support of his application, he set forth the foundation of his title and ownership of said premises as consisting in a judgment obtained by him against said Los Angeles Realty Syndicate prior to the institution of the present action, decreeing him to be the owner of said premises.

“(1) The plaintiff’s opposition to said application for intervention was twofold, consisting, first, in the contention that the default of said defunct corporation, having been duly entered before the making of said application for leave to intervene constituted a sufficient ground for the denial of the same. There is no merit in this contention. An intervener claiming title to property adverse to both the plaintiff and the defendant named in an action to quiet title cannot be prevented, as to his right, to intervene therein by the fact that one or all of the named defendants may have suffered a default. *Morgan v. Bonyng*, 157 Cal. 295, 107 P. 312; *Townsend v. Driver*, 5 Cal. App. 581, 90 P. 1071.

“(2) The second ground of opposition to the appellant’s asserted right to intervene was based upon certain affidavits filed in opposition thereto, based upon the rather insufficient averments of the applicant’s original cross-complaint in intervention. Upon the presentation thereof, however, the trial court granted the said applicant leave to

present an amended complaint which definitely set forth, as the basis of his right to intervene, the judgment obtained by him against the Los Angeles Realty Syndicate prior to the institution of the present action, decreeing him, as against said defunct corporation, to be the owner of the premises in question. No objection having been presented by the plaintiff as to the form or sufficiency of said amended complaint in intervention, it is apparent that it sufficiently stated such an adverse interest in, and ownership of, the premises as should have entitled the applicant to an order permitting him to intervene in this action, and the denial by the trial court of his right so to do must be held to be such an abuse of discretion as will compel a reversal of its order made herein in so far as the same purported to deny to the appellant leave to file his answer and cross-complaint in intervention. It is not necessary to consider that portion of said order which consisted in a denial of the application for an order setting aside the default of the Los Angeles Realty Syndicate, since, irrespective of the entry of such default, the applicant had, as we have been, a right as an adverse claimant of said premises to appear and intervene herein.

“The order is reversed.”

To the same effect is *Crofton v. Young*, 119 P. (2d) 1003 (1941) (Calif.), where the intervener's predecessor was named by plaintiff as sole defendant. Against the argument that a litigant has the right in a quiet title suit to select his own defendants, the Court stated, page 1006:

“It clearly appears from the record before us that the entire interest of the original defendant, the bank, had been assigned to Neal and that he was the real party in interest and should have been made the defendant. Without his presence the issues in the quiet title action could not properly have been determined.”

See, also: *Johnston v. Medina Improvement Club, Inc.*, 116 P. (2d) 272 (Wash.) (1941); *Salina Canyon Coal Co. v. Klemm, et al*, 76 Utah 372 (1930).

Under the foregoing cases and under the specific provisions of Rule 22 relating to Interpleader, and Rule 24, relating to Intervention, of the Utah Rules of Civil Procedure, Jay Larsen’s right to intervene in the action cannot be questioned.

DENIAL OF JAY LARSEN’S MOTION TO INTERVENE ON THE GROUND OF PLAINTIFFS’ OFFER OF A QUIT CLAIM DEED TO THE SURFACE RIGHTS WAS ERROR.

The minute entry (R. 56) of the hearing on June 11, 1952, at Provo, states in part:

“During argument Mr. Pugsley tendered in open Court a quit claim deed of all right, title and interest in and to the surface of real estate and water stock referred to in the judgment subject to the reserving a right to all mineral, oil and gas interest in the property to Jay Larsen.”

The Court’s ruling denying Jay Larsen’s motion to intervene (R. 55) states in part:

“In view of the plaintiff’s offer made in open Court to tender Jay Larsen a quit claim deed to the surface rights of the land involved, the motion of Jay Larsen to set aside the judgment by default and to intervene in the suit is denied.”

Proceeding into the discussion of this aspect of the case, we again invite the Court’s attention to the fact that plaintiffs in this action did not bring a suit to quiet title to mineral rights. They brought a suit to set aside and cancel a deed to 160.84 acres of land in fee and 160 shares of stock in the Big Six Irrigation Company. They did not sever the mineral rights in their complaint; nor were the mineral rights severed in the default judgment. They asked for and were adjudged the owners and entitled to the possession of the whole works,—lock, stock and barrel. Being faced with the long list of authorities establishing the necessary and indispensable status of Jay Larsen as a party to the suit, and being unable to amend their default judgment to have it give a different kind of relief than that prayed for in their complaint, plaintiffs attempted to work their way out of their dilemma by the clever maneuver of tendering him a quit claim deed to the surface rights and water stock in open Court. The maneuver was successful. Without letting Jay Larsen be a party to the suit, the Court thus indirectly permitted plaintiffs to amend their judgment.

From a practical standpoint, from Jay Larsen’s point of view, the quit claim deed by itself would be worth little. It is doubtful that such a deed dated now or any other time would clear his title. He doesn’t know whether

plaintiff's father or mother left a will; he doesn't know whether their estates are being probated; he doesn't know whether the plaintiffs constitute all of the heirs of Joseph F. Warr and Elizabeth Warr; he doesn't know if any judgment creditors might have rights against the property; he doesn't know whether plaintiffs, after giving the quit claim deed would then turn around and institute suit against him to have it set aside and cancelled just as, in this action, they sought to and did have their father's and mother's warranty deed set aside. Then, too, he would be in the dark with respect to the question of value of use and occupancy of the premises for the years of possession prior to the date of the deed. In short, he doesn't want the deed, won't accept the deed, and, not having been made a party to the action, shouldn't be forced to accept the deed.

From the legal standpoint the question then is,—Must Jay Larsen be forced to institute an independent action against plaintiffs (at the expense of defendants under their warranty deed) to clear his title, or will his clearly established right to intervene in this action be recognized?

We suggest that Jay Larsen be allowed to intervene because the Court below erred in denying his petition. In denying Jay Larsen's motion on the sole ground of plaintiffs' offer of a quit claim to the surface rights and water stock, the Court below recognized that Jay Larsen had some interest in the property. The plaintiffs themselves in making the offer publicly and of record recognized that their 30-day default judgment was erroneous

and illegal with respect to the surface rights and water stock held by the defendants' grantee.

We quote from Rule 54 (c) (2) of the Utah Rules:

“(2) Judgment by default. *A judgment by default shall not be different in kind from or exceed in amount, that specifically prayed for in the demand for judgment.*” (Italics supplied.)

The note under the above rule states:

“* * * also, the word ‘specifically’ was inserted on line 8 to make sure that a general prayer for relief would not be sufficient to grant relief different than that ‘specifically’ requested * * *”

The above rule is to be compared with the old rule in the Code of Civil Procedure, Sec. 104-30-5, which only stated that the relief “cannot exceed” that demanded in the complaint.

Plaintiffs, having gotten by default judgment “specifically” what they requested, could not thereafter modify their judgment to sever the mineral interests from the property covered by the judgment. To modify the judgment, the Court would first have to set it aside and the case would then be on the merits which is exactly where, in this case, plaintiffs don’t want the case to be.

The attention of the Court is invited to the provisions of the Judicial Code, Sections 104-40-12 and 13, concerning the service of process and the rendition of judgments in quiet title suits. These sections seem to imply that all persons with known interests should be

joined and unknown persons, as well, who claim some interest in the property.

As Jay Larsen was in possession and claiming adversely to plaintiffs, Rule 9 (a) (3) would seem to infer that if the plaintiffs did not know his name he should at least have been listed as "Unknown".

Under Utah practice, the authorized procedure which should have been followed by the Court below was to have granted Jay Larsen's petition to intervene. Plaintiffs could then have disclaimed as to him and the case tried on the merits between plaintiffs and defendants with respect to the oil rights only. Section 104-40-3 of the Judicial Code relates to disclaimer. Or the plaintiffs could have amended their complaint to restrict it to a suit over the mineral rights. Either way, Jay Larsen would have been eliminated and his rights protected.

A case closely resembling the case at bar is *Townsend v. Driver*, (1907) 5 Cal. App. 581, 90 P. 1071. This case was an appeal from the judgment quieting title and from an order denying a motion to vacate such judgment. Plaintiff had filed his complaint but did not joint appellants as parties to the action. The Court granted appellants leave to intervene and each complaint in intervention alleged that the interveners were the owners of specified portions of the land described in the complaint.

Thereupon the plaintiff's attorneys filed in the Clerk's office a written direction to the Clerk to enter a dismissal of the action as to the intervening defendants. Afterwards, and without notice to the interveners, the Court ordered the default of the defendants who had not

been included in the dismissal order and gave judgment against such defendants. The Court likewise decreed that plaintiff was the owner and in possession of the premises described and quieted plaintiff's title therein. In such judgment it was recited that plaintiff, by his attorneys, had dismissed as to certain defendants which were named, but neither in the order to the Clerk nor in the judgment were the interveners designated as such, nor did it appear that any order was made by the Court vacating its order granting leave to intervene unless the recital in the judgment had such effect.

Thereafter, interveners moved the Court to set aside its judgment because they had been given no notice of the trial of the action. This motion was denied and from the order refusing to vacate the judgment appellants filed their appeal. The Court stated, page 1072:

“The action to quiet title is one for the recovery of real property. *South Tule, etc. Ditch Co. v. King*, 144 Cal. 455, 77 Pac. 1032. The real property so sought to be recovered is, therefore, the subject-matter of such action. The order of the superior court granting leave to intervene determined that interveners had an interest in the matter in litigation, and under section 387, Code of Civil Procedure, were entitled as parties to avail themselves of all of the procedure and remedies to which the defendants were entitled for the purpose of defeating the action or resisting plaintiff's claim. *People v. Perris Irr. District*, 132 Cal. 290, 64 Pac. 399, 773. It appears from the bill of exceptions that interveners served and filed their complaints, setting forth the grounds upon

which their intervention rested, due service of which is certified in the bill, which must be accepted as service upon all parties to the action, as required by Section 387, Code of Civil Procedure, and the claim to the subject matter is an interest adverse to both plaintiff and defendants. The only relief sought, however, by these complaints in intervention, was that plaintiff take nothing and that interveners recover costs. Under the law, their position was thereafter that of "plaintiff in intervention, uniting with the defendant in the cause in resisting the demands of plaintiff in the cause." *St. Charles R. R. Co. v. Fidelity, etc. Co.*, 33 South 574, 109 La. 491. The inaction of the defendants in permitting their default does not preclude intervenor from his relief."

The plaintiffs and the Court below have recognized Jay Larsen's interest. He should have been allowed to intervene. The *Townsend case* quoted above holds that after such intervention, the plaintiff, without disclaiming or modifying his complaint with respect to the interveners, could not proceed to dismiss the action as to them only and take default against the non-intervening defendants. The above opinion of the California Court seems in harmony with Rule 41 of the Utah Rules relating to the dismissal of an action, and it is apparent that under this rule, after Jay Larsen is allowed to intervene, plaintiffs would not be allowed to dismiss the action as against him except on such conditions as the Court deems proper which would require, of course, the rendition of such a judgment as would not put a cloud on Jay Larsen's title to the property.

From the foregoing authorities it is clear that the plaintiffs' offer of a quit claim deed to the surface rights and water stock was not a proper ground on which to deny the clear right of Jay Larsen to intervene in the suit to protect his interest in the property.

UPON BEING APPRISED THAT A NECESSARY AND INDISPENSABLE PARTY TO THE SUIT HAD NOT BEEN JOINED THE COURT BELOW SHOULD HAVE DISMISSED THE ACTION.

Reference has been made heretofore to the provisions of Rule 21 relating to the misjoinder and non-joinder of parties. Under this rule, of course, misjoinder of parties is not ground for dismissal of an action. However, the non-joinder of an indispensable party does render the action subject to dismissal.

Rule 12 (b) set forth the defenses and objections which shall be asserted by a pleading or by a motion. Reference is made under subdivision (1) to lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim on which relief can be granted, and of significance here, (7) "failure to join an indispensable party".

Under Rule 12 (h) it is provided that all defenses and objections are waived unless made by a motion or if no motion has been made, in the answer or reply, except that the defense of "failure to join an indispensable party" may be made by a later pleading if one is permitted or by motion for judgment on the pleadings or

at the trial on the merits. It is thus seen that the failure to join an indispensable party is a special matter and fatal to the maintenance of a suit.

The objection of Jay Larsen's necessary and indispensable status was timely raised by defendants in their first motion filed with the Court on Nov. 20, 1951 and was within the allowable period prescribed by Rule 60 (b) which governs motions made to the Court to obtain relief from a final judgment. Rule 60 (b) prescribes a three months' limitation on reasons 1, 2, 3 and 4 of said Rule, which do not include the objection of non-joinder of an indispensable party. It is therefore probable that a longer time limit would be allowed in advancing this ground which would perhaps be included under No. 7, the catch all provision of Rule 60 (b). This point, however, is academic here for the reason mentioned above, namely, that the motion to set aside the judgment rendered by the Court below both for the reason of lack of an indispensable party and entry of the judgment due to the defendants' mistake, inadvertence, surprise or excusable neglect was filed within the period of three months from the date of the entry of default and also the default judgment.

Defendants' motion of November 20, 1951 was based, among other things, on the affidavit of merits and the proposed answer of defendants filed with the motion which answer sets up as a complete defense to the action (R. 22) the non-joinder of Jay Larsen as a necessary and indispensable party to the action. The objection having been timely made and properly made, the Court should

then have dismissed the action or in lieu thereof required by order the plaintiffs to join Jay Larsen as a party to the action, and Carter Oil Company, as well, if complete relief is to be accorded between the interested parties.

Jay Larsen's status was again brought to the Court's attention by the supplementary motion of defendants to have the Court reconsider its ruling. It was again advanced by defendants' further supplemental motion made solely on the ground of Larsen's indispensability (and Carter Oil Company as well), and finally it was advanced by Jay Larsen's own motion to have the judgment set aside and to intervene in the action.

SETTING ASIDE JUDGMENT AT INTERVENTION OF JAY LARSEN WILL SET IT ASIDE AS TO DEFENDANTS.

We come next to the important question whether if Jay Larsen is allowed to intervene and the judgment set aside as to him, the judgment must likewise be set aside as to the defendants.

We have heretofore discussed the authorities which establish the right of a third party to intervene in a quiet title suit as a party defendant where his title is derived from a common source with that sought to be established in the action. For example, in 118 A. L. R. 1401-2, in annotation entitled "Joinder of claims to separate parcels in suit to quiet or to remove cloud on title or to determine various claims to land", reference is made to the case of *White Point Oil and Gas Co. v. Dunn*, (1929 Tex. Civ. App.) 18 S.W. (2d) 267. This case held in an action to cancel an alleged void mortgage covering

an entire tract of land that an intervener who has purchased with a warranty of title a part of the tract is a necessary party to the suit. See *Buchanan Coal Co. v. Smith*, (1914) 115 Va. 704, 80 S. E. 794.

Freeman on Judgments, 5th Ed., Sec. 101, states:

“In case of a default by one or more of several defendants as to whom but one judgment is proper, judgment against the parties in default should not be entered until the case is finally disposed of as to the others.”

Again, in Sec. 259, the Rule is expressed:

“If a judgment prejudicially affects two or more persons, either of them may move for its vacation and, if proper cause is shown, may obtain relief.”

The matter is more fully covered by an annotation in 78 A. L. R. 938 under the heading “Successful Defense by One Co-defendant, or a Finding for ‘Defendants’ as inuring to the benefit of defaulting defendant”. At page 939 the general rule is stated as follows:

“The question whether a successful defense by some of several codefendants may inure to the benefit of a defaulting defendant is dependent upon the nature, scope, and extent of the defense interposed by the answering defendants, and, to some extent, upon the joint or several nature of the right asserted.

“The courts are agreed with practical unanimity that in actions against several defendants

jointly, where the defense interposed by the answering defendant is not personal to himself, (as is the defense of infancy, coverture or bankruptcy on the part of the pleader), but common to all, as where it goes to the whole right of the plaintiff to recover at all, as distinguished from his right to recover as against any particular defendant, or questions the merits or validity of the plaintiff's entire cause of action in general, or his right to sue, such defense, if successful, inures to the benefit of the defaulting defendants both in actions at law and suits in equity, with the result that final judgment must be entered not merely in favor of the answering defendant, but also in favor of the defaulting defendants."

See also, cases cited under VII of Annotation, p. 945 A. L. R. Vol. 78, entitled "Applications of rule where defense negatives right of plaintiff to sue or to recover at all." Reference is made to the case of *Minium v. Solel*, (1916) (Mo.) 183 S. W. 1037, which involved a suit against a City and another defendant to quiet title to land. The City defaulted and the other defendant defended on the ground (1) that the strip of land in controversy was a public alley of the defendant city, and (2) that the defendant himself had title to the land. The Court held that a judgment by default could not be entered against the City because the claim of the other defendant was founded upon the City's title so that a successful defense by such defendant necessarily demonstrated that the plaintiff had no cause of action against the City.

It is, of course, clear in the case at bar that Jay Larsen's title is founded upon the defendants' title. A successful defense by Jay Larsen to the action would necessarily demonstrate there was no cause of action against the defendants. At page 950 of 78 A. L. R. the applicable law is stated as follows:

"Where, in suits in equity against several defendants jointly interested in the outcome of the controversy, the plaintiff fails to make a case or to prove his cause of action as against the denial of his right to relief by one of the defendants, he cannot have a final decree as against the defendant against whom a decree pro confesso is entered by default, since the plaintiff in such case must recover on the strength of his own case, and by his failure to make out a case he disproves the equity of his entire cause.

"Thus, in a suit in equity to quiet title to land, against several defendants, privies in title, some of whom answered denying the right of the plaintiff to relief, and others defaulted, it was held that unless the complainant proved his claim as against the answering defendants, he could not have a decree as against the defaulting defendants. The Court said: 'But it must be remembered that complainant makes his claim against such defendants upon the same title or right that he does against those that did appear, and none other. The right he was bound to establish so as to satisfy the chancellor that he should have relief, though there had been no appearance by any of the defendants. And though neither of the defendants had answered, if the proof made shows a want of equity in complainant's case, he must fail in his action. . . . And he should have no greater relief against

those in default than against those who have in fact answered. (Citing cases)

The Court's attention is also invited to the annotation in 155 A. L. R. p. 66 entitled "Opening mortgage foreclosure decree to bring in omitted parties". This annotation shows that the Courts have been liberal in reopening judgments of foreclosure upon the ground that various parties having an interest in the property had not originally been joined in the action.

POSITION OF CARTER OIL COMPANY:

As heretofore indicated, the plaintiffs, by ratifying defendants' oil and gas lease with Carter Oil Company, have put the latter in a neutral position to date. This so-called law-suit ratification by Carter, however, does not make Carter a stranger to this case. Although presumably paying rentals to both plaintiffs and defendants at present, when oil comes, a double royalty will not be paid. The one royalty will merely be impounded pending the outcome of this litigation. The suit with respect to the mineral rights is in substance a suit by two interested claimants against the potential fund of royalties. It is generally held in the "Fund" cases that the holder of the fund must be joined in the action in order that effective relief can be accomplished by the Court between the various parties to the action. Examples of this are suits against an insurance company by two or more persons claiming the proceeds of insurance policies and suits between the beneficiaries of a trust fund. See 65 Harvard Law Review 1050-9.

It would appear, therefore, that the Court, on its own motion, or the motion of others, should join Carter Oil Company along with Jay Larsen, in order that complete and effective relief may be granted by the Court in this case.

PLAINTIFFS, ALTHOUGH ASKING FOR EQUITY, HAVE NOT DONE EQUITY.

As heretofore pointed out, plaintiffs in filing their action to have their father and mother's warranty deed set aside, and cancelled, as an outlawed and void mortgage, made no offer to pay any portion of the mortgage debt or interest thereon, nor any part of the taxes and water assessments which have been paid on the property by defendants and Jay Larsen for a period of over 30 years. They made no offer to pay for any of the improvements on the land.

In some states there is a grave doubt in the first place whether a mortgage can be removed at all as a cloud on title by the courts in an action by the mortgagor or his successors. For example, in *Coombs vs. Coombs*, 249 Ky. 155, 60 S.W. (2d) 368, 89 A.L.R. 1098, the court stated:

“A cloud, such as requires the intervention of a Court to remove, would seem to be one that the applicant for its removal had neither created nor was under any personal obligation to discharge, or remove; and for which reasons we repeat that it is even doubtful if the Arkansas Court had jurisdiction to relieve the land in that State from the lien that defendant had put upon it.”

On the other hand the general rule appears to be as follows, taken from 164 A. L. R. 1393, in annotation entitled "Statute of Limitations or Presumption of Payment from Lapse of Time as Ground for Affirmative Relief from Debt or Lien":

"In the application of the general rule that the statute of limitations may not be asserted as a ground for affirmative relief, in conjunction with the equitable maxim that 'he who seeks equity must do equity', the majority of courts, in the absence of a statute, declaring a different rule, hold that a court of equity will not, at the suit of a mortgagor or his successor in interest, cancel a real estate mortgage or other security given for a debt, for the purpose of removing a cloud of quieting title, where the only ground urged for such relief is that the statute of limitations has run against the right to enforce the encumbrance, while the debt secured remains unpaid; in such case equity will require the plaintiff to do equity or offer to do equity by paying or offering to pay the lien."

See also p. 1396 where the above rule is held applicable to the heirs of a mortgagor. Furthermore, the long delay of over 30 years in asserting any adverse interest in the property and until after their father and mother were dead and not until the discovery of oil adjacent to the property, shows that the plaintiffs have an unmeritorious action, long since barred by laches.

See *Sanders v. Flenniken*, 21 S.W. (2d) 847, 180 Ark. 303.

THE ASSESSMENT OF COSTS AGAINST DEFENDANTS WAS ERROR.

Paragraph 5 of the default judgment (R. 6) awarding plaintiffs their costs of Court was contrary to the provisions of Section 104-40-3 of the Judicial Code.

THE COURT MAY IMPOSE REASONABLE CONDITIONS TO THE VACATING OF A DEFAULT JUDGMENT.

Defendants in the Court below stated that they would be glad upon the setting aside of the default judgment to accept such terms as the Court saw fit to impose, including costs, disbursements, fees, etc., of plaintiffs. See 21 A. L. R. (2d) 863.

JUDGMENT BELOW UNLESS SET ASIDE WILL BE A PROLIFIC SOURCE OF LITIGATION.

Unless Jay Larsen and Carter Oil Company are joined in this action as necessary and indispensable parties, the judgment below will only provoke more lawsuits. The tests of indispensability are grounded not only on conceptions of fair play which permit all interested parties to have their day in Court. They are grounded on practical considerations as well. These considerations have been said to be (1) Effect on absent person, (2) Danger of inconsistent decision, (3) Multiplicity of suits, and (4) the Rendition of hollow judgments. Each of these has application here.

Jay Larsen's interests, and those of Carter Oil Company as well, have been vitally affected by the judgment below. Larsen's title has been clouded and damaged.

Carter is presumably paying two sets of rentals and knows not from whom it holds.

If Jay Larsen is forced to bring an independent action, the decision in that case will be contrary to and inconsistent with the judgment rendered in this case. The issue of his case is the issue of this case. His defense is the defendants' defense. Contrary judgments would have been rendered by the same Court on the same identical issue.

Multiplicity of suits in the present circumstances, is not merely probable but certain. The judgment below rings hollow and settles nothing. The warranties of title to Carter and Jay Larsen are involved. The validity of defendants' oil and gas lease as affected by the judgment below would certainly be tested in further litigation. The Colorado Bank's duties to its trust beneficiaries would require a real and genuine effort to secure a test of the validity of the lease not on the basis of the present judgment but on the merits.

In view of the foregoing, defendants, respectfully suggest that the default judgment below be set aside on the ground that necessary and indispensable parties were not joined as parties defendant and given an opportunity to be heard in the action.

POINT II.

THE DISTRICT COURT ERRED IN FINDING THAT THE DEFENDANTS HAVE FAILED TO SHOW THAT THEIR FAILURE TO ANSWER WAS DUE TO MISTAKE, INADVERTENCE, SURPRISE OR EXCUSABLE NEGLECT

AND IN DENYING DEFENDANTS' MOTION TO SET ASIDE AND VACATE THE DEFAULT AND DEFAULT JUDGMENT.

The Court below (R. 31) denied defendants' motion to set aside the judgment and ruled that the innocent and honest mistake of Don Barr, defendants' process agent in Utah, was inexcusable. Defendants' supplemental motion to have the Court reconsider its ruling was also denied (R. 55). This was, we respectfully submit, error. The error lies in the refusal of the District Court to give any practical consequence to the policy now embedded in the new Utah Rules of Civil Procedure that the Rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." Rule 1 (a).

Rule 55 (c) provides:

"(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b)."

Rule 60 (b) provides in part:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice, relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

“The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order or proceeding was entered or taken * * *.”

The Summons in this action was served on July 31, 1951. The default was entered August 21, 1951, and the default judgment entered on August 31, 1951. Three months from the entry of default thus expired on November 21, 1951. Defendants' motion was filed on November 20, 1951, the day before the deadline.

Defendants first heard “that some kind of a suit had been filed” against them on November 7, 1951, through a telephone call to Ross Bray, an officer of both defendants, from John Cook, of the Carter Oil Company (R. 11). That afternoon Bray dispatched a letter to the Clerk of the District Court in Vernal asking for the name of plaintiffs' attorney to write to “as no summons or notice of any kind has ever been served upon either Company.” Cook called back an hour or so later the same day advising the suit had been filed by the Warr family and giving the name of the Warr attorneys, Pugsley, Hayes & Rampton. Bray, that afternoon, then called Don Barr, Cashier of the Bank of Vernal, in Vernal who said he recalled no papers having ever been served on him and that he would investigate. Bray also called Mr. Baer that afternoon at the Colorado National Bank, which bank as testamentary trustee has the controlling interest in the Van Kleeck companies. Baer, an officer of both companies, is Assistant Trust Officer of the Bank. Bray also tried to reach Malcolm Lindsay, President

of the Van Kleeck Mortgage Company, but did not reach him till the following morning. Bray, after consulting with Lindsay, called Baer at the bank and asked him to order through Don Barr at Vernal certified copies of the complaint, summons, sheriff's return and decree.

That same morning, November 8, 1951, Baer called Don Barr at Vernal who informed him he "had not heard of any such suit ever having been filed against the companies." (R. 15). Baer asked Don Barr to secure the court papers in the action right away and send them to Denver air mail special delivery. The papers did not arrive on Friday, November 9th. Baer came into the bank on Saturday morning, November 10th, a day on which the bank is normally closed, to see if the papers had arrived. Photostatic copies of the papers had arrived Saturday morning, except for the complaint. That morning Baer conferred with Bray, the bank's attorneys, Blood, Silverstein and Torgan, and again called Don Barr long distance on the telephone for the complaint. Baer went to the bank on Monday, the Armistice Day holiday, but the complaint had not arrived. The complaint arrived on the morning of Tuesday, November 13th. In the meantime, Mr. Lindsay, President of the Mortgage Company, died on November 11th, 1951.

On the morning of Tuesday, November 13th, Baer consulted with Bray, the bank's attorneys, Blood, Silverstein and Torgan, and with Mr. Merritt H. Perkins, head of the Trust Department of the Colorado National Bank about the immediate retention of Utah counsel. Around the middle of the day, November 13th, Mr. Perkins called

C. M. Gilmour at Salt Lake City, Utah, and employed Messrs. Dey, Hoppaugh, Mark & Johnson to act as counsel in the matter for the Van Kleeck companies. Conferences in Denver were immediately called, Baer's affidavit being executed in Denver on Friday, November 16th, and Bray's affidavit on Saturday, November 17th. Don Barr came up to Salt Lake City and executed his affidavit on Monday, November 19th. Defendants' motion, affidavit of merits, proposed answer, and other papers attached to the motion, were filed with the Court in Vernal on Tuesday, November 20th, 1951.

These facts are set forth somewhat extensively to show with what diligence defendants moved in taking immediate steps to have the default judgment entered in this case set aside.

The facts as they developed with relation to the service of Summons in this action on Don Barr, defendants' process agent in Utah, are perfectly clear.

Approximately four and one half months only after his appointment as defendants' process agent, namely, on July 31, 1951, sometime during the working day, Sheriff H. M. Snyder of Uintah County walked into the Bank of Vernal to serve the papers in this action on Don Barr. Barr, at the time, was behind the second teller's window on the left as you go in the main entrance of the bank. The Sheriff walked up to the window and said he had some papers for him. Barr asked what they were. The Sheriff gave him the papers, writing the service on them at the time. Barr then said to the Sheriff: "These papers are not for me" and handed them back. Barr

then stated: "There must be some mistake, these papers are for Vaughn Warr, not Don Barr." The Sheriff then pushed the papers back under the grill and said he was leaving them with him nevertheless.

The Sheriff, in his affidavit (R. 45) stated:

"I have a clear recollection of the incident and there is no doubt in my mind whatsoever, that Don Barr made an honest mistake in misapprehending the import of the papers being served upon him because of the close similarity between the name Vaughn Warr and his own name, Don Barr."

Mr. N. J. Meagher, President of the Bank of Vernal, was in the bank the day the Sheriff came in. After the Sheriff left, Meagher walked over to Barr and said: "Don, what were those papers the Sheriff brought in?" Barr replied: "There was some mistake. The papers did not pertain to me or the bank. They were for a man by the name of Warr" (R. 47).

Don Barr has filed three affidavits (R. 26, 46 and 53). They show that:

(a) He accepted the appointment as defendants' process agent in Utah in March, 1951.

(b) He received no specific instructions concerning his duties, nor did he expect any, because he knew and realized that his sole and single duty was merely to forward any papers pertaining to the Van Kleeck companies to their offices in Denver, Colorado, and that he had no other or further authority to act for the companies.

(c) He noticed the name Vaughn Warr on the papers exhibited to him by the Sheriff but did not see or have his attention called to the names of the Van Kleeck companies on such papers.

(d) Because of the similarity between his own name, Don Barr, and that of plaintiff, Vaughn Warr, he made the mistake of thinking that the papers were intended for Vaughn Warr.

(e) He stated to the Sheriff that there must be some mistake.

(f) The Sheriff did not explain why he was serving him or attempt to correct his mistaken impression concerning for whom the papers were intended.

(g) He never saw the papers again and no one knows what happened to them.

(h) If he had seen, but for his mistake, the names of the Van Kleeck companies on the papers, it would have immediately recalled to mind his appointment, a short time before, as their process agent in Utah and he would immediately have forwarded the papers to the companies in Denver, Colorado.

There seemed to be a slight conflict in Barr's first two affidavits in that in the second one (R. 53), which plaintiffs' secured from him the morning of the hearing in Vernal, he stated that when served with process "he had forgotten about the fact" that he had been appointed. In his first affidavit (R. 26) however, he had said that if he had seen or had his attention called to the Van Kleeck names he would have forwarded the papers to the companies in Denver (R. 27, para. 5). To clear up this apparent conflict, in his third affidavit (R. 46) Barr stated that

if his attention had been called to the Van Kleeck names it would have immediately recalled to mind the fact of his appointment. In other words, what he meant by "forgotten" was that on the day in question his appointment as process agent was not in mind but that it would have been called to mind if he had seen or had his attention called to the Van Kleeck names. The Van Kleeck name is itself unusual. Barr had just been appointed agent a few months before and the possibility that his appointment was buried in his memory beyond recall is of course absurd. The plaintiffs have made no effort to controvert Barr's last affidavit.

Cases from numerous jurisdictions, including Utah, have been especially lenient in setting aside judgments where the agent or attorney was the only one at fault. Where the principal was also shown to be at fault a somewhat stricter attitude is observed in the cases. With this in view, plaintiffs in the Court below laid great stress on the claimed dereliction and negligence of the defendant companies and the Colorado National Bank in not giving Don Barr detailed instructions concerning his duties. The short and complete answer, of course, to this argument is that there were not any duties attached to the appointment except one, and that was merely to forward any Van Kleeck papers served upon him to Denver, Colorado. In accepting the appointment, Barr knew and realized that this was his only and exclusive duty. How then can the defendants be charged with some fault or negligence in not putting into writing, after Barr's written acceptance of his appointment, the

one and only duty which Barr, as agent, already knew and realized was his only duty.

We point out also the care with which Barr himself, as Cashier of the Bank of Vernal, was initially selected and appointed after discussions with officers of the Colorado National Bank and at the suggestion of the Colorado bank. When the cashier of a bank is selected, one would ordinarily be thought to be selecting just about as reliable and dependable a type of person as it is possible to select under any circumstances.

We come then to the pertinent question whether Don Barr's honest mistake was so inexcusable that the Court below was correct in refusing to set aside the default judgment entered against his principals, the defendants and appellants herein.

In *Brown v. Beck*, 169 P. (2d) 855, the Supreme Court of Arizona stated:

"A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted. Jeremy, Eq. Jur. 358. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence. Bisph. Eq. Par. 185."

Barr's mistake was in erroneously apprehending that the papers brought into the Bank at Vernal by the Sheriff were not intended for him. He made this mistake, not dishonestly or fraudulently, but for the simple reason that he thought the papers were for Vaughn Warr, not Don Barr. The mistake was caused by the close similarity

of the two names. It was an innocent mistake, an honest mistake, and one that had a plausible and legitimate reason behind it. It is this reason, we think, which makes the mistake excusable.

Plaintiffs argue, and the Court below felt, that Barr's reason was no excuse, that his mistake was absolutely and utterly inexcusable. However, we point out to the Court that on this basis the liberal policy of Rule 60 (b) would have little if any reasonable scope of practical application. Courts have repeatedly set aside judgments, for example, where the papers on being mailed by the process agent are lost or misdirected in the mails, or where, by reason of a mix-up in a lawyer's office, a lawyer does not appear in court to defend his client's action. In a strict sense there is no excuse for mail being lost or misdirected or for a lawyer not attending to his client's business or for any mistake for that matter. All the Rule requires is that there be a legitimate reason for the mistake.

See: *Huntington Cab Co. v. American Fidelity & Casualty Co., Inc.*, 4 F.R.D. 496; *United States v. Mutual Const. Corporation*, 3 F.R.D. 227; *Rawlins v. Wilson*, 187 P. (2d) 322; *Bernards v. Grey*, 218 P. (2d) 597; *Brown v. Beck*, 169 P. (2d) 855; *Friedrich v. Roland*, 213 P. (2d) 423; *Dinke v. Bowes*, 176 P. (2d) 81; *Reynolds v. Gladys Belle Oil Co.*, 243 P. 576; *Barney v. Platte Valley Public Power & Irrigation Dist.*, 23 N.W. (2d) 335.

Particular attention of the Court is invited to the California case of *Friedrich v. Roland*, decided in 1950, cited above, which involved a mistake not of an agent

but of the defendant herself. She failed to answer because when served with summons she believed she no longer had any interest in the property involved. The reason for her erroneous belief was the fact that she was unaware that a property settlement agreement she had signed did not in fact convey her interest in certain community property. Just prior to the filing of her motion she learned she did have an interest. The refusal of the trial court to set aside the default judgment was reversed by the appellate court. The Court stated:

“Sound policy favors the determination of actions on the merits.”

Freeman on Judgments, 5th Ed., Vol. 1, page 474, summarizes the mistake cases as follows:

“The grounds of mistake most frequently relied upon for relief are in the fact of the service of process, or in the date at which the party served must appear, or at which the action is set for trial. Because the lower courts exercise a discretion with which the appellate courts are loath to interfere, as well as from other causes, there is not an entire harmony of decision upon these subjects, but we think it a fair inference from the reported cases that if the court is convinced that the alleged mistake was an honest one and was the sole cause of the moving party's not being represented at the trial or not appearing in the action in due time, relief will be granted.”

And again, at pages 494-5, it is stated:

“And greater leniency is shown in some cases where a party is obliged to act through agents. Thus relief was given to a city where summonses had never come to the knowledge of the city attorney because of the neglect or inadvertence of the mayor or those in charge of his office.”

In *Utah Commercial Bank v. Trumbo*, 17 Utah 198, this Court stated:

“The policy of the law is that every man shall have his day in Court before judgment shall be entered against him, and where a judgment by default has been entered, and within the proper time a good defense to the action in which the judgment was rendered is made to appear, and it be shown that the default was entered through excusable neglect or mistake, the default will be vacated, and the judgment set aside to permit a trial on the merits. It is true that ordinarily the setting aside of a judgment by default rests within the sound legal discretion of the court, and the appellate court will not interfere, but where, as in this case, it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate court will control such discretion, and set aside the illegal action. Such discretion does not confer upon the court an arbitrary power beyond that of review. It is an impartial legal discretion, which cannot be employed to the injury of any subject, but must be exercised fairly, reasonably, and in accordance with the established principles of law. The power of the court to set aside judgments

by default is recognized and conferred in section 3005, R. S. Utah, and should be liberally exercised, for the purpose of directing proceedings and trying causes upon their substantial merits; and where the circumstances which led to the default are such as to cause the court to hesitate, it is better to resolve the doubt in favor of the application, so that a trial may be secured on the merits."

The adjudicated cases and the new Rules clearly show that the need for judicial repose must give way to the overriding policy of the law which is that every man is entitled to his day in Court and to a just trial on the merits of his cause.

Defendants in this case, by timely motion, show good cause why the judgment below should be set aside. They have shown diligence, have filed affidavits of merits and tendered an answer which if found true upon a trial of the cause would constitute a complete defense to the action. They likewise offer to reimburse plaintiffs for the costs and expenses which plaintiffs have been put to in connection with the default judgment here sought to be set aside.

CONCLUSION

Either on the ground that necessary and indispensable parties have not been joined in the action or on the ground that the Court below erred in holding Don Barr's mistake to be inexcusable or on both grounds, defendants and Jay Larsen respectfully pray the Court to reverse the orders and rulings of the Court below so

that they may have their day in Court at a trial of the cause upon the merits.

Respectfully submitted,

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