satisfy the requirements of the test as defined by Mr. Chief Justice Vinson and Judge Hand.[95] A mechanical "finding" that a clear and present danger exists after a verdict of guilty has been returned affords no additional justification for restricting first amendment freedoms.

The conflicting views in the lower courts as to the essential elements of the crime which the Smith Act proscribes, together with the lack of any certainty as to what conduct will subject one to its sanction point to the need for the Supreme Court to reconsider these issues. It is questionable also whether the manner in which the guilt of the accused under the statute has been determined conforms to the normal standards of proof in criminal prosecutions which impinge constitutionally protected rights. A proper balance between national security and individual freedoms cannot be obtained by dismissing the claims of constitutional protection because of the odiousness of the ideas expressed. It is submitted that the Hand-Vinson interpretation of the clear and present danger test eliminates its former usefulness as a standard for establishing the limits of governmental action in the area of speech. The trial court's interpretation of the statute in the *Dennis* case and its findings as to the essential elements for conviction should be held as furnishing the minimum standard in cases subsequently arising under the act.

INADEQUACIES OF JOINDER PROVISIONS IN INDIANA AND THE NEED FOR REFORM

Recent legislative and judicial action relating to the question of what parties and causes may be properly combined in one action suggests that the inveterate joinder problem remains unsolved.[1] In Indiana

95. See note 81 *supra*.

1. Blume, *Free Joinder of Parties, Claims, and Counterclaims,* JUDICIAL ADMINISTRATION 13 (A.B.A. MONOGRAPH; Series A, No. 11, 1941); Brandeis, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N. C. L. REV. 1 (1946); Dutcher, *Joinder of Parties and Action,* 29 IOWA L. REV. 3 (1943); Ruddy, *Joinder of Parties, Claims,* and *Counterclaims,* 1 J. OF THE MO. BAR 85 (1945); Notes, 4 ALA. L. REV. 303 (1952), 3 GEORGIA BAR J. 54 (1941); Comment, 43 ILL. L. REV. 41 (1948); 51 MICH. L. REV. 1068 (1952), 25 WASH. L. REV. 92 (1950).

Joinder is the problem encompassing the scope of a judicial action, *i.e.,* what subjects and parties may be involved in one suit. A complete analysis of this problem would also consider impleader, intervenor, cross claim, and counterclaim practices. Because of the limits of this Note only parties and causes will be directly analyzed.

Historically, joinder is essentially a pleading problem—what a complaint may contain; but more recently it is a trial problem—what causes may be litigated together and what parties may be joined in one action. Major attention in this Note is directed toward the latter phase of the problem. The historic pleading aspect must not be completely lost sight of, for it is an important factor accounting for the present problem.

the statutory language is vague and uncertain, and considerable confusion pervades court decisions. Two cases recently decided by the appellate court illustrate the scope of the problem and serve as potent reminders that changes are needed in Indiana rules regulating joinder in keeping with modern reform measures in other jurisdictions.

In the case of *Sluder v. Mahan*[2] the owners of separate tracts of land sued to enjoin the Sullivan County Treasurer from collecting taxes assessed against their oil producing properties. The trial court sustained a demurrer by the treasurer and in support of the demurrer on appeal, the appellee argued a misjoinder of plaintiffs on two grounds: First, the parties joined did not have a common interest in the subject matter of the action; second, each party did not have an interest in the relief sought by the other. It was further contended that there was a defect of defendants because the county assessor and auditor were necessary parties to a complete determination of the question involved.

Indiana's joinder of parties sections provide: (1) "all persons having an interest in the subject of the action and in obtaining the relief demanded, shall be joined as plaintiffs;"[3] (2) "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved;"[4] (3) "of the parties in the action those who are united in interest must be joined as plaintiffs or defendants."[5] A literal application of these provisions would defeat both of the appellee's arguments—the owners do have an interest in the determination of the legality of the tax assessments and are interested in obtaining an injunction to prevent the collection of taxes levied solely against oil properties.[6] Even if the assessor and auditor are necessary

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For a general historic background, see 3 MOORE, FEDERAL PRACTICE 18.02 (2d ed. 1948); POMEROY, CODE REMEDIES, 181, 303, 507 (5th ed. 1929); Blume, *A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaim*, 26 MICH. L. REV. 1 (1927); Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571 (1920).

2. 124 Ind. App. ——, 121 N.E.2d 137 (1954).

3. IND. ANN. STAT. § 2-213 (Burns 1949).

The appellee's argument is phrased in the same language as this statute yet relies on Jones v. Rushville Nat. Bank, 138 Ind. 87, 37 N.E. 338 (1894) which neither cites nor interprets the section.

4. IND. ANN. STAT. § 2-219 (Burns 1949).

5. IND. ANN. STAT. § 2-220 (Burns 1949). The section provides in full: "Of the parties in the action those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

6. The pertinent inquiry here is whether each individual owner's interest in his cause of action, which is certainly separate and divisible, is sufficient, because all the parties are similarly situated, to satisfy the "interest in the subject and in obtaining

parties, the section referring to joinder of defendants uses the permissive "may" which implies that the plaintiffs have an election.[7] The court, noting the applicable provisions, allowed the joinder of plaintiffs by applying a "community of interest" test derived from case law[8] and rejected the argument as to defendants on the ground that the collection sought to be enjoined was by statute the sole duty of the treasurer.[9] Without passing on the merits of this decision, it is especially significant that the court resolved both points without evaluating and

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the relief" required by section 2-213. The court did not resolve this question but instead looked to see if there was an equitable basis of jurisdiction for maintaining the action. The court held that the complaint was sufficiently broad to permit the suit. Sluder v. Mahan, 124 Ind. App. ——, ——, 121 N.E.2d 137, 139 (1954). The general rule is that an individual taxpayer cannot get an injunction restraining the collection of an illegal tax because his remedy of recovery of the amount paid is regarded as adequate. There is some conflict as to when an injunction will be allowed. WALSH, EQUITY 558 (1930).

7. The appellee's second argument points out the difficulty of interpreting section 2-219 (note 4 *supra*). The provision appears to be merely an adoption of the old equity quiet title principle. The question is what interpretation should be given to "necessary party." Historically, an equity court would not adjudieate a controversy if a "necessary party" was not present in the action. It would follow that "may" should be construed as mandatory to carry out this meaning. Such an interpretation would require that any person having or claiming any interest adverse to the plaintiff would have to be made a defendant, and this would violate the fundamental canon that the plaintiff may choose whom he will and will not sue.

8. Sluder v. Mahan, 124 Ind. App. ——, 121 N.E.2d 137 (1954). The court in support of this "community of interest" holding cities as authority language in Heaggy v. Black, 90 Ind. 534, 169 N.E. 355 (1883) to the effect that a number of taxpayers may unite to enjoin the collection of an illegal tax affecting each of them separately if the act injures them all in a like manner—the exact point raised by the appellee's demurrer. However the language in the case is only dicta. The court cites, in all, four Indiana cases on the "community of interest" facet, none of which are directly on point. Heaggy v. Black, *supra,* allowed a joinder of two separate landowners to enjoin a trespass on the basis that the authority under which the act was to be done was itself void. One case permitted a joinder of persons holding separate rights to contest the validity of a tax assessment based upon repairs to a public drainage ditch upon the principle of "at least avoiding a multiplicity of suits." Quick v. Templin, 42 Ind. App. 151, 85 N.E. 121 (1908). Another sanctioned a joinder of 11 different property owners proceeding on one general right to abate a nuisance. Tate v. Ohio, 10 Ind. 174 (1858). The last case held that realtors, dismissed from the police force of the city of Marion, had a common interest in setting aside the dismissal order of the Board of Police Commissioners even though their several interests which might follow would be separated and distinct. Shira v. Indiana, *ex rel.* Ham, 187 Ind. 441, 119 N.E. 833 (1918). It is obvious from these cases that no one principle may be stated in support of the "community of interest" rule. The primary basis for all the holdings appears to be the policy of avoiding a multiplicity of suits. One thing is certain: The court in the *Sluder* case had no authority in point for its holding.

9. The court's decision indicates it failed to grasp the appellee's second argument. In effect, the treasurer contends that, should the court construe the action to be equitable in nature, then to be consistent it must make a complete determination of the question involved as was the practice in equity prior to the code. This would make the assessor and the auditor necessary parties without whose presence the action would not lie. STORY, EQUITY PLEADING § 72.

applying the statutory provisions expressly governing joinder of parties.[10]

Another aspect of the joinder problem arose in the case of *Dalby v. Public Service Company of Indiana.*[11] An individual who had suffered both personal and property damage by a single act of the defendant assigned the property damage claim to an insurance company and proceeded himself on the personal injury claim. The court allowed such procedure holding that the defendant's wrongful act gave rise to two separate causes of action.[12] Although this decision is not without

10. The Indiana court has experienced considerable difficulty when confronted with joinder of party questions. For example, in one case they used the three radically different sections interchangably. "Under the statute all who are united in interest must be joined as plaintiffs or defendants. §§ 2-213, 2-219, 2-220, Burns' 1946 Replacement." Yarde v. Yarde, 117 Ind. App. 277, 279, 71 N.E.2d 625 (1946). *Compare* Lake Erie R. Co. v. Hobbs, 40 Ind. App. 511, 518, 81 N.E. 90, 92 (1907), *with* Grover v. Marott, 192 Ind. 552, 557-58, 136 N.E. 81, 82-83 (1922). Each case tries to construe the three provisions together and each reaches an opposite result as to their application.

Several cases have attempted to read some meaning into the difference between the two sections governing joinder of plaintiffs, §§ 2-213 and 2-220. "It is the settled rule in this state . . . all persons who unite as plaintiffs must have an interest in the subject of the action. But this rule is not to be interpreted so as to require that the interest of all the plainiffs who so unite must be equal, or that such interest may not be legally severable. All . . . must have some common interest in respect to the subject-matter of action, and each must be interested, at least to the extent that all who join as plaintiffs have some relief in respect to the subject-matter of the suit." Troxel v. Thomas, 155 Ind. 519, 521, 58 N.E. 725, 726 (1900). *But cf.* Spencer v. McGuffin, 190 Ind. 308, 320, 130 N.E. 407, 411 (1920): "If two or more parties to a contract will have a common interest in the damages to be recovered for its breach, and their respective interests in severalty are not fixed and determined by the contract, but must be determined from a consideration of their respective interests in and relation to the subject-matter of the contract as established by proof, they must join as plaintiffs." *Accord,* Hadley v. Hobbs, 12 Ind. App. 351, 352, 39 N.E. 523 (1894): "It is a statutory provision that all persons having an interest in the subject of the action must be joined as plaintiffs." The court, for this proposition, cites § 263 of R. S. 1881 which is identical to § 2-213. This is supposedly the permissive joinder of plaintiffs section. See also Pittsburgh R. Co. v. Verbarg, 89 Ind. App. 177, 166 N.E. 29 (1928); National Fire Insurance v. Gellman, 83 Ind. App. 219, 144 N.E. 154 (1925); Continental Insurance Co. v. Blair, 65 Ind. App. 502, 114 N.E. 763 (1917).

11. 119 Ind. App. 405, 85 N.E.2d 368 (1949).

12. *Id.* at 420, 85 N.E.2d at 374. "We think an injury to property, resulting from the same tortious act, gives rights to two causes of action, and that the appellee, as a result of the personal injuries received and the damages done to the house and furnishings had two separate causes of action—one, for personal injuries and one for property damage."

The code "cause of action" has been the subject of a long and heated dispute. Regardless of which reasoning is adhered to one must agree that the concept is at best very troublesome and uncertain. To cite only a few of the many able writings interpreting this phrase see POMEROY, CODE REMEDIES § 350 (5th ed. 1929); CLARK, CODE PLEADING 72 (2d ed. 1947); McCaskill, *Actions and Causes of Action,* 34 YALE L.J. 614 (1925); Gavit, *The Code Cause of Action: Joinder and Counterclaims,* 30 COLUM. L. REV. 802 (1930); Arnold, *Code Cause of Action Clarified by the Supreme Court,* 19 A.B.A.J. 215 (1933); Wheaton, *The Code Cause of Action—Its Definition,* 22 CORN. L.Q. 1 (1936).

Blume disposes of this phrase very neatly by placing it within the proper perspective in the joinder problem. "In the case of injury to person and property on one tort occasion, procedural convenience dictates that the damages resulting from the

authority, it gives rise to an interesting paradox. Should the plaintiff win the personal injury action, the insurance company may later argue res judicata on the issue of negligence contending it has privity with the injured party.[13] If the plaintiff loses, the insurance company could argue that to bar their property damage claim on an estoppel basis would deprive them of their day in court.[14] Both arguments are basically sound, and either considered by itself presents a strong policy favoring the insurance company.[15]

Suppose that the Public Service Company tried to avoid this situation by objecting to Dalby's suit on the ground of defect of plaintiffs in that both the injured party and the insurance company were "united in interest" and thus must join as plaintiffs in one action.[16] Before the court could resolve this question, it would have to consider two additional provisions. The first allows a plaintiff to unite in one complaint a cause of action for personal injuries and a cause for property damage where both arise out of the "same transaction,"[17] and the other provides

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tort . . . be recovered in one action. . . . It has been traditional to differentiate between personal rights and property rights. To think of rights of the two categories as constituting one right calls for a new pattern of thought—one difficult to form. It is easier to think in terms of a rule requiring that claims arising on one tort occasion be joined in one action." Blume, *Required Joinder* of *Claims,* 45 MICH. L. REV. 797, 800 (1947).

13. "Privity" is a term denoting that a person not directly a party to a law suit is nonetheless bound by or entitled to the benefits of the rules of res judicata because of his relation either to the parties or the subject matter of the prior action. RESTATEMENT, JUDGMENTS § 83, comment a (1942). Under § 90, illustrations 7 and 8, the insurance company would be entitled to take advantage of a favorable determination in Dalby's action.

14. The argument here would be that Indiana subscribes to the two distinct causes of action theory. Therefore, if the causes are not the same and different parties are involved, none of the rules of res judicata should apply. See CLARK, CODE PLEADING 485 (2d ed. 1947).

15. To allow the insurance company to take advantage of a favorable outcome and yet not be bound by an unfavorable decision is grossly unfair to the defendant. To recognize that the insurance company is in privity with Dalby compels the rejection of the two distinct causes theory.

16. The greatest stumbling block for this argument is encountered at the very outset; it requires a favorable interpretation of "united in interest" to incorporate persons holding separate rights which relate to one subject matter, in this case the negligence of the Public Service Company of Indiana. There has been little discussion in the cases as to what this term means. See GAVIT, 2 INDIANA PLEADING AND PRACTICE 5248 (1942). Clark interprets this phrase to cover all necessary parties, as that term was known in the equity practice. CODE PLEADING 359 (2d ed. 1947). Pomeroy appears to say that all persons previously considered holders of joint rights would be "united in interest" as that term is used in the code. CODE REMEDIES § 114 (5th ed. 1929).

17. IND. ANN. STAT. § 2-304 (Burns 1949): "Hereafter the plaintiff, by his complaint, may unite, in one pleading for affirmative relief, in separate paragraphs thereof, a cause of action for injuries to person and a cause of action for damage to property, where such causes of action so pleaded arose out of the same transaction; and where such paragraphs of complaint are submitted for factual findings, the court in its decision and the jury by its verdict, as the case may be, shall designate therein the finding on each separate cause of action."

that in all actions charging negligence the complaint may unite both personal injuries and damage to personal property if both or either arise out of the "same accident or occurrence."[18] Though neither section was cited or relied upon in deciding the *Dalby* case, the legislature by phrasing the sections in the permissive implicitly authorized two actions if a plaintiff so elected. The sections do not attempt to cover the problem of the instant case in which two plaintiffs hold the claims,[19] but it logically follows that two plaintiffs holding the claims should not be forced to sue in one action. Yet a literal application of section 2-220 would authorize the inconsistent result and require the injured party and the insurance company to join as plaintiffs in one action.[20]

This facet of the joinder problem can be further complicated by the introduction of another person who might also be liable, for instance, an agent of the Public Service Company. Should the injured party and the insurance company join as plaintiffs in suing the agent and the principal in a single action, the result would be open to conjecture. Neither section providing for the joinder of such claims conceives of the situation involving more than one plaintiff. On the other hand, the joinder of parties section embodies broad enough terminology to permit

18. IND. ANN. STAT. § 2-305 (Burns 1949): "In all actions hereafter commenced charging negligence as the cause of personal injuries, or death, and also as the cause of damage to personal property, or as causing such damage alone, and where both such personal injuries, or death, and such damage to personal property, or either thereof, arose out of the same accident or occurrence, the complaint thereon may unite both such elements of damages claimed to have so resulted from such negligence, either in the same or separate paragraphs thereof. . . ."

19. In a recent Washington case a wife brought an action individually and as administratrix of her husband's estate to recover damages for personal injuries to herself and for the wrongful death of her husband. She obtained a verdict and judgment on both claims. On appeal the judgment was affirmed, no mention being made of the impropriety of joining the two claims, even though in a similar case only three years before in the same court where the question of joinder was not in issue, the court had gratuitously stated that the causes could not be joined. 25 WASH. L. REV. 92 (1950). This fact situation would appear to fall directly within the language of section 2-305, and this joinder would be permitted in Indiana. Washington reached this result without a statute comparable to the one in Indiana.

The significant point to be considered when two plaintiffs are involved is that section 2-304 uses the phraseology "the plaintiff, by his complaint" which would seem to preclude using the statute when more than one plaintiff is involved unless the court would accept a privity argument. See notes 13, 17 *supra*. Section 2-305 speaks only of "the complaint" implying that if joinder of parties rules are complied with, the joinder would be permitted. See note 18 *supra*.

20. This example points up the difficulties which develop when joinder is mandatory. See Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797 (1947). Res judicata and splitting of a cause of action are component factors to be considered in working out this phase of the joinder problem.

a joinder of these defendants.[21] In what is ordinarily considered a case at law, such as the suit for damages posed in the hypothetical, the court has generally construed the joinder of party provisions very strictly. If two plaintiffs join in suing a defendant on a legal claim, they must show "joint rights" to recover,[22] and if two defendants are sued, a "joint liability" in addition must be shown.[23] On the other hand, if the action appears equitable in nature, the Indiana cases are in accord with the *Sluder* case in allowing liberal joinder.[24] In all probability the hypothetical posed would be doomed on an attack for misjoinder.[25]

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21. Section 2-219, authorizing permissive joinder of defendants, uses very broad terminology. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff. . . ." See note 4 *supra*. Section 2-213 governing permissive joinder of plaintiffs does not incorporate such liberal phraseology. It requires ". . . an interest in the subject of the action, and in obtaining the relief demanded."

Liberal advances made in regard to joinder of defendants should be made to apply also to plaintiffs and causes of action. Unduly narrow rules in regard to any one of the three is sufficient to suppress free joinder movements. See Note, 37 COLUM. L. REV. 462 (1937).

22. See Brown v. Critchell, 110 Ind. 31, 7 N.E. 888 (1886); Hyatt v. Cockran, 85 Ind. 231 (1882); Parker v. Small, 58 Ind. 349 (1877); Lipperd v. Edwards, 39 Ind. 165 (1871). The rule is sometimes stated that for a complaint to be sufficient upon a demurrer it must present a good cause of action in favor of all plaintiffs.

23. See GAVIT, 2 INDIANA PLEADING AND PRACTICE § 250 (b), (g) (1942). Clark points out that despite the broad language of the permissive joinder of defendants statutes the decisions indicate little advance from the common law rules. See CLARK, *op. cit. supra* note 12 at 382.

24. See Spencer v. McGuffin, 190 Ind. 308, 130 N.E. 407 (1920) (fraud); Carmien v. Cornell, 148 Ind. 83, 47 N.E. 216 (1897) (enjoin payment of claims of fraudulent creditors); Heaggy v. Black, 90 Ind. 534 (1883) (avoid a multiplicity of suits); Tate v. Ohio, 10 Ind. 174 (1858 (public nuisance); GAVIT, *op. cit. supra* note 23 at § 2480(b).

25. The Alabama court, faced with a similar fact situation and in spite of a statute expressly permitting joinder of a principal and an agent as defendants, rendered three inconsistent decisions in three hearings of the same case. Sibley v. Odum, 257 Ala. 292, 58 So.2d 896 (1952). Plaintiff was injured while riding as a passenger and brought suit against two defendants jointly, the owner and the driver of the automobile, for a cause of action arising out of an accident involving the automobile. The third paragraph of the complaint which was upheld against attack by a demurrer alleged that the driver, acting as agent and within the scope of his authority, willfully and wantonly injured the plaintiff by driving the automobile at a high rate of speed so that the automobile was wrecked injuring the plaintiff. The jury returned a verdict for the plaintiff which was set aside and a new trial granted because the jury had inconsistently acquitted the agent of liability while finding the owner liable. On appeal the Supreme Court of Alabama first affirmed, holding that, where an employer and employee were sued in tort, the liability of the employer rested solely on the negligence of the employee. The court went on to say that the demurrer should have been sustained because paragraph three was bad in that it was a joinder of trespass and case—cause of action in case against the master and trespass against the servant. The Alabama statutes expressly permit the joining of an agent and his principal. ALA. CODE § 138 (1) (1940). On rehearing the Alabama Supreme Court held this statute void, as being inconsistent and impossible to execute. In a third hearing of the case the second holding was withdrawn, and the court held that it would not pass on the constitutionality of the statute because such a finding was not necessary to the determination of the

Indiana's principal joinder provisions which were enacted in 1852 remain substantially unaltered.[26] This is surprising in light of the fact that these rules were discarded as unworkable many years ago in the jurisdiction which formulated them.[27] The joinder of party sections were taken almost verbatim from the Field Code and are still intact.[28] The authorities are unanimous that the framers of these provisions attempted to adopt the equity rules to govern joinder under the codes.[29] One writer suggested that the test of "community of interest" was a more accurate statement of the equity principle than the Code standard, "interest in the subject of the action and in obtaining the relief."[30] Both

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case. This leaves Alabama's joinder problem in a hopelessly confused state. Note, 4 ALA. L. REV. 303 (1952).

26. IND. REV. STAT. §§ 17, 19, 70, 72 (1852).

27. The joinder of party sections set out in notes 3, 4, 5 *supra* were enacted in New York in 1848. NEW YORK, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING §§ 97, 99 (1848). By 1919 New York's joinder of parties provisions had been changed to conform to the English practice looking to a free joinder movement. NEW YORK, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE §§ 209, 211-13, 269 (1919). In 1935 the New York legislature passed new amendments to the joinder provisions in order to remove the chaos brought about by the courts' interpretations of the earlier provisions. See Note, 21 CORN. L.Q. 371 (1936). In March, 1949, the New York legislature again amended the Civil Practice Act regarding joinder. This amendment merely codified the court decisions on the subject. See Legis. Note, 24 ST. JOHN'S L. REV. 166 (1949).

New York's plight under the various rules has been common knowledge. See Notes, 37 COLUM. L. REV. 462 (1937); 33 CORN. L.Q. 589 and 597 (1948); 32 YALE L.J. 384 (1922); 35 YALE L.J. 85 (1925). Indiana stands firm in ignoring these changes made through the last 30 years in the very state which first devised the code joinder rules.

28. There have been no amendments to these sections. The statutes quoted at length in notes 3, 4, and 5 *supra* are identical with sections 17, 18, 19 of the 1852 Revised Statutes. See note 26 *supra*

Comparison of Indiana's joinder of parties provisions with sections 97, 98, 99 of the Field Code, cited in note 27 *supra,* reveals that the Indiana legislature replaced the "may" in the section generally thought to authorize permissive joinder of plaintiffs with "shall"—§ 17 of Indiana's Revised Statutes and § 97 of the Field Code. If "shall" was used intentionally to indicate that the Commissioners interpreted the provision as establishing a mandatory joinder rule, then it would render meaningless § 2-220 which sets up a mandatory joinder rule.

Even in the New York practice the interpretation of "may" was originally in doubt. See VOORHEES, NEW YORK CODE § 117 n (2d ed. 1852).

29. NEW YORK, FIRST REPORT OF THE COMMISSIONERS ON PLEADING AND PRACTICE § 99 n (1848); CLARK, *op. cit. supra* note 12, at 358; GAVIT, *op. cit. supra* note 23, § 248(b); POMEROY, *op. cit. supra* note 12, § 113; Blume, *A Rational Theory for Joinder of Causes of Action and Defences and for the Use of Counterclaims,* 26 MICH. L. REV. 1, 18 (1927); Hinton, *An American Experiment with the English Rules of Court,* 20 ILL. L. REV. 533 (1926).

30. Yankwich, *Joinder of Parties in the Light of Recent Statutory Changes,* 2 So. CALIF. L. REV. 315, 345 (1929). "Story complained of the impossibility of formulating . . . a universal theorum as a test in which to cast the doctrine of joinder in equity. Calvert's attempt so to do, showed the varied language which chancellors had used to express the idea of community of interest which was at the basis of joinder in equity.

"This being so, it should not surprise that, in giving effect to the principles we

tests are currently utilized in Indiana.[31]

These provisions establish two classes of parties—permissive and mandatory. Those persons held to be "united in interest" must be joined.[32] It is difficult if not impossible, under this test, to show in any controversy at what point a person's interest in the suit is such as to make him a mandatory rather than a permissive party. A very good reason exists why this facet of the joinder problem has never been worked out. Any person held to be "united in interest" with the plaintiff must be joined as plaintiff, or if he is reluctant, then he may be brought into the action as a defendant;[33] yet, if he is outside the jurisdiction of the court, and the issue is properly raised, the principal action would conceivably be dismissed.[34] Thus, the classification scheme is impractical in application. The utility of the concept of mandatory parties is its possible use to reach consistent results in situations similar to that presented in the *Dalby* case.[35]

The original joinder of causes section also remains with only minute changes having been made.[36] This provision establishes classes of causes

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have discussed, which seek to make the practice at law conform to equity practice,—there is not certainty in the formulation of definite rules."

31. See, *e.g.*, Sluder v. Mahan, 124 Ind. App. ——, 121 N.E.2d 137 (1954); Jones, Treasurer v. Rushville National Bank, 138 Ind. 87, 37 N.E. 338 (1894); Heaggy v. Black, 90 Ind. 534 (1883). *But see* Gilbert v. Lusk, 123 Ind. App. 167, 106 N.E.2d 404 (1952); Grover v. Marott, 192 Ind. 552, 136 N.E. 81 (1922); Tate v. Ohio, 10 Ind. 174 (1858).

32. IND. ANN. STAT. § 2-220 (Burns 1949).

33. This is identical to the former equity practice. CLARK, *op. cit. supra* note 12, at 354.

34. See note 5 *supra*. There is language in at least one case which says that when a person is made a defendant beeause he refuses to join as a plaintiff, it is sufficient to allege a refusal without stating any reason. Wall v. Galvin, 80 Ind. 447 (1881).

However, if a person considered "united in interest" were held to be equivalent to a "necessary party," there is language in at least three cases that the action would be dismissed if he were not present. See Hutchenson v. Henson, 121 Ind. App. 546, 98 N.E.2d 688 (1951); Eilts v. Moore, 117 Ind. App. 27, 68 N.E.2d 795 (1946); Bittinger v. Bell, 65 Ind. 445 (1879. This was the argument advanced in the *Sluder* case. See note 9 *supra*.

35. See note 16 *supra* and accompanying text.

36. Gavit, *The Joinder of Actions in Indiana*, 7 IND. L.J. 470 (1932).

Indiana's provision for joinder of eauses of action now reads: "The plaintiff may unite several causes of action in the same complaint, when they are included in either of the following classes:

First. Money demands on contract.

Second. Injuries to property.

Third. Injuries to person or character.

Fourth. Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld.

Fifth. Claims to recover the possession of real property, with or without damages, rents and profits for the withholding thereof, and for waste or damage done to the land; to make partition of and to determine and quiet the title of real property.

Sixth. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistake.

which may be joined upon the sole basis of the character of the claims and perceives of joinder of causes only between one plaintiff and one defendant.[37] This section is a carryover of the old common law with its writ system notions of joinder of causes.[38] There are three additional joinder measures of limited scope which indicate a radical departure in underlying policy objectives and afford some insight into the current legislative attitude toward joinder questions.

Section 2-303 provides that "when an action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment."[39] While it must be conceded that this section was drafted specifically to allow a creditor to proceed in one action to obtain a judgment on his debt and to set aside a fraudulent conveyance,[40] it represents a modification of the reasoning incorporated in the basic joinder of causes section and signifies that the legislature was aware that there were patent shortcomings in the rules enacted in 1852.[41] The actual effect of the modification is obscured because nowhere is the phrase "cause of action" used, and the statute is phrased in ambiguous terms of a "complete

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Seventh. Claims to foreclose mortgages; to enforce or discharge specific liens; to recover personal judgment upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedents' estates when such property has passed to heirs, devisees or their assigns; to marshal assets; and to substitute one person to the rights of another, and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered. IND. ANN. STAT. § 2-301 (Burns 1949).

37. Gavit, *supra* note 36, at 473.

38. "The practice of joining causes of action at common law did not have its origin in the statute or some wise legislator, or in the decision of some learned judge, but in the laziness or carelessness of the chancery clerks. . . . The writ gave the court power to try the very action, or actions, mentioned therein, and no other.

"It thus appears that the privilege of joining causes of action depended wholly upon the way in which the writ happened to be worded; and this was a matter entirely within the control of the chancery clerks." Blume, *supra* note 29, at 4.

39. IND. ANN. STAT. § 2-303 (Burns 1949). The statute further provides: "When several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials, for the furtherance of justice."

40. McIntosh v. Zaring, 150 Ind. 301, 49 N.E. 164 (1897), suggests that this section broadens the previous equity rule in such cases.

41. Section 2-301, quoted in full in note 36 *supra*, and § 2-303, note 39 *supra*, were enacted as sections 70 and 72 of the 1852 Ind. Rev. Stat. By its very terms 2-303 appears to remove the limitations established by sub-sections 1, 6, and 7 of 2-301. The question is raised as to why these limitations were concurrently enacted with the provision which appears to make them ineffectual.

A significant feature of 2-303 is the severance power granted to the court to order separate trials for any of the causes united "for the furtherance of justice." This clause denotes that the legislatures were aware that the provision would allow joinder of more than one cause of action; yet, the legislatures still empowered the court to determine whether the causes joined under it could be conveniently tried together. This indicates that as early as 1852 there was an awareness of the two separate phases of the joinder problem—the pleading and trial aspects. See note 1 *supra*.

remedy" and joining such other "matters." The complete remedy concept is broad enough to cover more than one cause of action which are as a practical matter only separate claims for different elements of damage: for instance, personal injury and property damage as in the *Dalby* case, where both claims rest upon the same subject of the action, namely, the defendant's negligence. The main objective of this provision appears to be a furthering of the equity principle of complete relief in one action. Some of the reasoning behind the basic joinder section is also carried over into this section in that the statute speaks in terms of situations "arising out of contract." This implies not one but any number of unrelated contracts, and "contract" is to be understood in its broadest sense, encompassing, for example, judgment and debts.[42] The only limitation would seem to be that a complete remedy lies only against one party or that party and the persons whose interests are intermingled with him. This may indicate a broader objective of the provision, *i.e.,* unlimited joinder whenever necessary for a complete remedy between two parties. The term "contract" is flexible enough to establish considerable freedom of joinder of causes should it be considered desirable. There is no question that this section is broad enough to authorize the joining of a tort and a contract claim arising out of one simple contractual relationship. A federal court in construing this statute allowed such a joinder,[43] but the Indiana appellate court, in at least one case, reached the contrary result.[44]

Section 2-304 enacted in 1937 definitely asserts the policy hinted at in the last section, namely, causes distinctly different in nature may be joined where they arise out of a single transaction.[45] Here the phrase "cause of action" is not disguised in other language. This section allowing only the joinder of causes for personal injuries and for damage to property is narrower than section 2-303 which permits the joinder of all other "matters" as may be necessary for a complete remedy. On the other hand, the test "arising out of a single transaction" is broader than that of "arising out of contract" notwithstanding the fact that the latter

42. Gavit reaches much the same conclusion in his analysis of this section and some of the cases interpreting it. Gavit, *The Joinder of Actions in Indiana,* 7 IND. L.J. 470, 545 (1932).

43. St. Joseph Loan & Trust Co. v. Studebaker Corporation, 66 F.2d 151 (1933).

44. Typical language encountered in the Indiana cases is: "It is not sufficient that the actions joined should be on money demands, or for the recovery of money. The demand must also arise out of contract. Therefore, an action to recover money for a tort cannot be joined with one to recover on a demand arising out of contract. This was the rule before the code was enacted. And the code has not changed it." Miami County Bank v. Indiana, *ex rel.* Peru Trust Co., 61 Ind. App. 360, 374, 112 N.E. 40, 45 (1915), citing WORKS, INDIANA PRACTICE.

45. See note 17 *supra.*

may be interpreted to include all contracts between the parties while the former is limited to one transaction. It is readily apparent that some of the broad improvements incorporated in 2-303 are carried over into 2-304. Under a literal interpretation, both provisions could easily apply to the same fact situation.[46]

Section 2-305 completes the entanglement; in an action charging negligence it permits joinder of a cause for personal injuries, including wrongful death, with a cause for damage to personal property where both arise out of the "same accident or occurrence."[47] This provision adds little to the potential scope of section 2-303 and 2-304 if liberally interpreted. It does introduce the new terminology "same accident or occurrence," but it is unlikely that this section will be interpreted differently than the "same transaction" standard of section 2-304.[48] One innovation may result from interpretation of the section. Since it does allow the uniting of a cause for damage to personal property with an action for wrongful death, it appears to authorize one person to sue on two claims which he may hold in different capacities.[49] From this reasoning it is only a short step to the contention that the section is also broad enough to permit more than one person to join in an action as plaintiffs where two or more claims arise out of the "same accident or occurrence."[50]

Under the prevailing rules in Indiana a lawyer can avoid the joinder problem by utilizing fictionalized pleading. Through this technique a

46. For instance, A carrying his suitcases enters a taxicab, as a first step in a long business trip. The taxi is involved in an accident as a result of the operator's negligence. A is severely injured and his suitcases are demolished. Subsequently, A sues the taxicab company asserting both personal injuries and property damage. Are these matters which "arise out of contract" and "necessary for a complete remedy" within section 2-303 or are they claims arising from the "same transaction" as required by section 2-304?

47. IND. ANN. STAT. § 2-305 (Burns 1949), cited in note 18 *supra.*

The problem of supplying a meaningful interpretation for this provision is complicated by the fact that this section was enacted in 1943, six years after the rule-making power was vested in the Supreme Court. However, the section is procedural in nature, and, following the theory that any procedural acts of the legislature are valid if not inconsistent with acts of the Supreme Court, this statute would be valid to the extent it does not conflict with any of the other joinder rules. The contrary position would be that delegation to the Supreme Court constituted an exclusive grant of authority and the legislature had no power to enact such a measure.

48. The three tests operating to limit the special joinder provisions are: "arises out of contract," "same transaction," "same accident or occurrence." No Indiana case has arisen in which the court has been called upon to distinguish the three.

49. The wife suing on the two claims in the Washington case, see note 19 *supra,* is illustrative of this argument. An exact analogy would be presented if the claim on her own behalf was a personal property damage cause instead of one for personal injury.

50. The Indiana cases hold that, under the section 2-301 provision for joinder of causes of action, the parties must not only be the same; they must be identical. For example, a husband cannot join an action for his personal injuries with an action for the death of his wife. Gavit, *supra* note 36, at 477.

joint right or joint obligation or a request for equitable relief is set out in the complaint to support a joinder which would otherwise be struck down.[51] While use of fictionalized pleading to bypass harsh, if not unnecessary, court dogmas has been an accepted practice for years, a simpler solution would be to change the court rules which create the need for fictions. Often the lawyer will bypass troublesome joinder considerations because his opponent will be uninformed as to the correct practice in raising joinder questions and thus will be deemed to have waived possible objections.[52] Finally, since erroneous joinder rulings are not sufficient grounds for reversal, the trial court will often be unaware of the correct practice.[53] The restraining influence of outdated joinder rules on the scope of judicial actions is thus not readily observable, and as a result, the pressures for procedural reform have not been directed toward the modernization of joinder statutes. An enlightened court, through its rule making power,[54] could easily adopt measures to correct this chronic problem. In the past, unfortunately, the court has hindered modernization of joinder principles by disregarding legislative enactments,[55] using different statutory measures interchangeably,[56] failing to adequately differentiate between causes, and

51. GAVIT, *op. cit. supra* note 23, at 1796. "The practical effect is that a plaintiff may in most instances protect himself against the consequences of the non-joinder of parties by joining parties who might finally be held to be proper or necessary and by asserting a joint or common right or liability."

The court's language indicates that it was groping for an equitable basis for the action. Sluder v. Mahon, 124 Ind. App. ——, ——, 121 N.E.2d 137, 139 (1954).

52. Most objections to joinder are strictly procedural in nature, and, if not raised at the appropriate time and in the correct manner, they are waived. Under Indiana law the correct practice of questioning joinder is as follows: Under the demurrer statute, a defendant may demur for a defect of parties, either plaintiffs or defendants, apparent on the face of the complaint. However, "defect" is construed to mean too few parties; thus the defendant must demur for insufficient facts to a complaint where one of the plaintiffs appears from the complaint to have no interest. If the error does not appear on the face of the complaint the defendant must answer. As to the validity of a joinder of causes of action, the correct method is to demur for misjoinder. If the defendant answers and goes to the merits, the question is waived. GAVIT, *op. cit. supra* note 23, at §§ 248, 250, 254.

"But even though there be a defect of parties plaintiff or a misjoinder of causes of action . . . appellant by joining issue and going to trial waived the error." Johann Realty Corp. v. Kirkpatrick, 99 Ind. App. 70, 76, 189 N.E. 843, 846 (1934).

53. Section 2-1009 provides: "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." IND. ANN. STAT. (Burns 1949). This is supported by section 2-1013: ". . . no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined."

"Besides, upon appeal, improper joinder of parties will be disregarded." Chicago and Southeastern R. Co. v. Kenney, 159 Ind. 72, 78, 62 N.E. 26, 28 (1902).

54. IND. ANN. STAT. § 4-109 (Burns 1949).

55. There are a number of cases in which applicable joinder rules were not cited or applied. See, *e.g.*, Brunson v. Henry, 140 Ind. 455, 39 N.E. 256 (1894); The Lake Erie and Western Railroad Company v. Priest, 131 Ind. 413, 31 N.E. 77 (1891).

56. See note 10 *supra.*

causes and party problems,[57] and insisting on supplementing statutory provisions with an "inherent equity power"[58] thereby unnecessarily muddling the already difficult joinder question.

Writers have continually pointed out the inter-relation of causes and parties which makes any isolated analysis of either of little help in handling cases involving the other.[59] Where the causes are related in that they result from one transaction, whether there are multiple parties or not, definite advantages would be gained from litigating the causes in one action.[60] The critical point within the joinder problem, however, is the necessity of recognizing a distinction between the joinder of unrelated causes in the two party situations and such a joinder in the multiple party situation. While it may be argued that, in both, the ultimate consideration is convenience in the administration of justice, an old New York chancery case is a forceful example indicating that joinder of unrelated causes in the multiple party case may always be inconvenient. In that case the court pointed out that to allow this type of joinder against several defendants, part of whom have no interest or connection with some of the subjects, puts these defendants to unnecessary delay, trouble, and expense in answering and litigating matters in which they are not concerned.[61] In the two party situation these objections are not valid because the plaintiff or defendant is involved in each subject joined whether they are related or not, and the only valid reasons for not allowing unlimited joinder relate to the ability of the court efficiently to adjudicate the action.[62] Acknowledging this distinction and

57. See, *e.g.,* Boonville Nat. Bank v. Blakely, 166 Ind. 427, 76 N.E. 529 (1905); The Cincinnati H. & D.R. v. Chester, 57 Ind. 297 (1877); Goodnight v. Goar, 30 Ind. 418 (1868).

58. See, *e.g.,* Doherty v. Holliday, 137 Ind. 282, 284 (1893): "This is a proceeding in equity and in our view appellees were properly joined as plaintiffs without the aid of the statute." Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1, 111 N.E. 932 (1916).

59. See Blume, *supra* note 29, at 30; Note, 37 COLUM. L. REV. 462, 467 (1937); Comment, 32 YALE L.J. 384 (1922). See also 1 AM. JUR, *Actions* § 68 (1936).

60. The underlying premise here is that if the controversy in issue involves one transaction, *i.e.,* a series of occurrences forming a connected whole, then an equity court to avoid a multiplicity of suits will make a complete determination of the question involved, settling the respective rights and duties of all the parties. An equity bill of peace is the forerunner of all modern day policy arguments for free joinder. Carr, *Some Aspects of Joinder of Causes,* 5 FORDHAM L. REV. 452 (1936). See Demarest v. Holderman, 157 Ind. 467, 62 N.E. 17 (1901).

61. Newland v. Rogers, 3 Barb. Ch. 432 (1848).

62. Thus, in one sense even if the claims asserted are the result of separate occurrences, when only one plaintiff and one defendant are involved the claims are related. Each party is interested in the adjudication of every claim. It might be argued that this situation is analogous to the complete remedy concept of section 2-303. See note 39 *supra* and accompanying text.

anticipating that the supreme court will utilize its rule making authority, the only remaining problem is what form the change should take.

Other jurisdictions have enacted a variety of rules in attempting to cope with the various perplexities of joinder. The most extreme position is found in an Idaho provision which requires a plaintiff to join claims for personal injuries and personal property damage arising from a single transaction; if either claim is not joined, it is barred in a subsequent action.[63] The rule could be rationalized on the basis that the two claims are elements of damage of one cause of action thus merely representing an adoption of the common law principle against splitting a cause of action.[64] A more realistic analysis recognizes that, at least historically, the two claims would constitute distinct causes.[65] Regardless which view is accepted, present day canons of convenience and consistency suggest that the two claims be litigated in one action.[66] This statute, like its Indiana counterpart, fails to recognize that two parties may hold the claims required to be joined.[67] The Idaho rule has somewhat of a severe penalty, but there is some justification for it in that the controversy in question will be litigated only once. A similar rule in force in some jurisdictions requires a party to pay costs of suits on claims which might have been joined in earlier actions.[68] This rule is in the nature of a compromise measure—not as severe as barring a second action, yet penalizing the plaintiff for failure to join. Neither rule strikes at the

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63. IDAHO CODE ANN. § 5-606 (-7) (1948): "Injuries to property: Provided, that where injuries to person and to personal property arise out of the occurrence or transaction, causes of action may be united in the same complaint, and separate actions for such injuries are hereby prohibited."

64. The cause of action arises from the wrongful act of the defendant; since his act is single, the cause must be single, and the plaintiff's injuries occasioned by the tort are merely items of damage arising from the same wrong. Clark, *The Code Cause of Action,* 33 YALE L.J. 817, 829 (1924).

Therefore a suit on one element of damage would constitute splitting and a second action would be barred. RESTATEMENT, JUDGMENTS § 62 (1942).

65. Gavit, *supra* note 36, at 487.

The English rule is to the effect that injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes. The leading case on this point is Brunsden v. Humphrey, 14 Q.B.D. 141 (1884). Majority rule in this country is contra. See Vasu v. Kohlers, Inc., 145 Ohio 321, 61 N.E.2d 707 (1945).

66. Blume, *supra* note 20.

67. The *Dalby* case is illustrative. See notes 11 and 12 *supra* and accompanying text.

68. See, *e.g.,* IND. ANN. STAT. § 2-3007 (Burns 1949); N.M. STAT. ANN. 25-1-2 (1953); 20 C.J.S., *Costs* § 257 (1920); Annot. 6 A.L.R. 623 (1920).

An analogus rule exists in regard to counterclaims. 20 C.J.S., *Costs* § 261 (1920). The Federal Rules preclude a counterclaim arising from the same transaction if it is not asserted in the original action. 3 MOORE, FEDERAL PRACTICE 13 (2d ed. 1948). Indiana's rule in regard to counterclaims is consistent with the position on failure to join. See IND. ANN. STAT. § 2-1010 (Burns 1949).

difficult problem in this area which is that more than one person may hold the claims.

Michigan permits free joinder of either legal or equitable claims but no intermixture of the two.[69] The rule presumably is based on the notion that the nature of the claim will determine the type of proceeding on each issue. The wisdom of this is doubtful because legal and equitable matters have long been allowed to be combined in the same case. The only real difference between the two is that the relief award is different; most of the codes include a general policy provision specifying that the court may administer either legal or equitable relief, or both, in one action whenever warranted.[70]

The Federal Rules,[71] English practice,[72] New York and other liberal code states permit unlimited joinder of causes when only two parties are involved.[73] Each of these jurisdictions also grant discretionary power to the courts to separate causes for trial when convenience requires.[74] The statutory standard which guides the courts in exercising this descretion varies widely in phraseology.[75] Regardless of the test adhered to, the significant fact is that unlimited joinder of unrelated causes even between only two parties eventually costs more in the way of confusion than is gained by avoiding additional actions between the same parties. Thus the practical problem is formulating a test which will allow joinder of simple causes and yet preclude joinder when the disadvantages outweigh the advantages. One can readily forsee the host of interpreta-

69. MICH. COMP. LAWS § 608.1 (1948). Other states having a similar provision have removed this historic limitation. For a general discussion of joining legal and equity actions, see 1 AM. JUR., *Actions* §§ 72, 88 (1936).

70. Indiana's statute which is typical provides: "There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action. . . . All courts which are vested with jurisdiction both in law and equity may . . . administer legal and equitable remedies in favor of either party, in one and the same suit, so that the legal and equitable rights of the parties may be enforced and protected in one action. IND. ANN. STAT. § 2-101 (Burns 1949).

71. FED. R. CIV. P. 18(a).

72. Under the English rules the only limitation on the joinder of claims is that an action for recovery of land can not be joined with other actions not relating to the land unless by leave of court. ENG. RULES OF SUPREME COURT, O. 18, r. 2, ANN. PRAC. (1945).

73. Arizona, Colorado, Kansas, Missouri, New York, Wisconsin, and Wyoming have rules substantially similar to Fed. R. 18(a). See Clark, *supra* note 14, at 443.

74. See Clark, *supra* note 14, at 469 n. 135. Indiana vests a discretionary severance power in the court under section 2-303. See notes 39 and 41 *supra*.

75. Federal Rule 42 (b) provides for severance "in furtherance of convenience or to avoid prejudice." "Furtherance of justice" is the Indiana language, see note 39 *supra*. The Michigan terminology is "the convenient administration of justice." MICH. COMP. LAWS § 608.1 (1948). The Illinois statute speaks of severance "if they cannot be conveniently disposed of." ILL. ANN. STAT. 104.044 (Jones 1935). New York works within "interests of justice" notions. N.Y. CIV. PRAC. ACT § 248 (1949).

tions which will be read into any general language having as its goal these objectives.

The reform of joinder provisions should be grounded on the principle of one action for one controversy; related causes should be litigated together. The labeling process within the rule—two causes of action, different elements of damage, several theories of recovery, or additional matters to afford an adequate remedy—is unimportant. This process is merely a way of stating a conclusion that the subjects are related. Where only two parties are concerned, a mandatory joinder rule could operate to compel joinder of all claims arising from the transaction being litigated. In a controversy where multiple parties are involved, anyone who either directly or indirectly is injured or anyone who possibly will be held responsible as a result of the litigation should have notice and, at least, the opportunity of being present before the court in the action if only in a representative capacity. To require their presence would be impossible under present day jurisdictional limitations.

Beyond this minimum the idea of permitting joinder of unrelated causes gives rise to many disadvantages as well as benefits. In the two party situation the principal advantages from joining unrelated causes are avoidance of a multiplicity of suits, elimination of whatever expense is incurred by a second service of process, and conceivably, some saving of time; these are balanced against confusion, prejudice, and inefficient judicial administration. Admittedly, when the unrelated causes are relatively simple, real benefits accrue from permitting joinder. In the abstract, unlimited joinder is the ultimate goal to be sought, but as a practical matter joining unrelated causes invites complexities because of the many motions, defenses, and counterclaims to which the causes give rise. Under present procedural practices, as many times as not, inconvenience will result from a free joinder of unrelated causes even in the two party situation.[76] In the multiple party situation the disadvantages are more readily apparent, and no jurisdiction has permitted such joinder.[77] While procedural reform involves inherent difficulties, over a hundred years of uncertainty is sufficient indication that Indiana's historic joinder concepts are inadequate to support any rational, modern-day joinder policy.

76. A plaintiff drawing up a complaint should be allowed to incorporate every claim he has against the defendant. At the trial, the defendant should be allowed to move the court to sever any unrelated claim upon a showing of sufficient cause. Even if the defendant should not so move, the court on its own initiative should be empowered to sever if necessary to efficiently adjudicate each controversy in issue between the parties. The guiding test for the court should be the resulting complexities of each independent case.

77. See discussion on this point in 5 FED. RULES SERV. 822 (1942).