SOME ASPECTS OF THE RULE OF REPRESENTATION.

Possibly one of the most extended, as it is one of the most elementary, principles of our jurisprudence, is that everybody who has not forfeited his rights or status, or been deprived of them through his own inability to enforce them, is entitled to have the aid of a court in asserting them, and is equally entitled to the aid of a court in defending himself against the assertion of the rights of some other person; and indeed, the rights of those who have not of their own motion the ability to invoke the aid of a court are so safeguarded that they may not be affected except under the supervision of a court. The courts of different jurisdictions may be differently constituted, and the quality of justice dispensed may vary in different communities; yet, whatever differences may exist in the conception of justice or whatever infirmities may occur in its practical administration, the right of everybody to have his cause heard is recognized as one of those basic rights which are accepted alike in forensic discussion and in the opinions of grave and able judges.

Notwithstanding the generality of the right to be heard, it is not without some well-established exceptions, in which persons whose rights are being litigated may not only not be heard, or notified so that they may be heard, but even are not permitted to be heard. It is with respect to some aspects of these exceptions that this article is written.

Contrary to the general rule, therefore, it has been definitely determined that there are cases in which for one reason or another the interests of a person not a party to the proceeding may be adjudicated, because they are substantially identical with the interests of someone else who is a party, and whose rights will be adjudicated in it. A creditor's bill is an instance of this character. Some actions against unincorporated associations furnish other instances. In such cases, the rights of the person who is not a party are said to be represented by the person with identical interests

who is a party, and the rule, or exception to the rule, which permits it, is called the rule of representation or of virtual representation.

The particular class of cases to which attention is here directed, in which the rule of representation is invoked, relates to instances of divided interests in real estate, where, in litigation concerning the land, only certain of the holders of present interests are required to be made parties, and the rights of the holders of other and more remote interests are adjudicated because they are presumed to be represented by the owners who do appear as parties.

It is manifest that in the event of a complex settlement, it would be extremely burdensome to bring into court the holders of remote interests which in many cases are of almost illusory value. Indeed, at the date of application to court for the relief sought, the persons who ultimately get the property may be unborn. It is quite impracticable that the court should be without the power to grant the relief until the birth of issue or the final determination of the class who may become entitled.

The question has also been considered with reference to estates held in trust. In a sense, the trustee represents all *cestui que* trusts, and perhaps completely represents them so far as relates merely to what may be called the current administration of the trust, but in litigation concerning the disposition of the corpus of the trust estate, as in cases of the sale or mortgage of lands held in trust, requiring the authority of the court, the trustee does not represent the *cestui que* trusts to the extent that the representation, on the record, of those *in esse* may be dispensed with.

An early statement of the rule of representation, as applicable to the question under discussion, was given in *Hopkins* v. *Hopkins,* 1 Atk. 580 (1738), where Lord Hardwicke says that

"it is an established rule that it is sufficient to bring the trustees before the court together with him in whom the first remainder of the inheritance is vested, and all that come after will be bound by the decree though not *in esse,* unless there be fraud and collusion between the trustees and the first person in whom a remainder of inheritance is vested."

An examination of this case will disclose that the statement of the rule was given by way of illustration, and not as affecting the question to be decided. It is none the less an explicit statement of an established practice, and has been generally so referred to in later cases. The facts in that case were that a testator devised his estate to trustees in trust for Samuel, the only son of his cousin John, for life, and on Samuel's decease, for the first and every other son of his body to be begotten successively and the heirs male of the body of every such son respectively, and for want of such issue, if John should have other sons, then to them upon like limitations and so through his daughters and finally to his cousin Hannah. The remainderman ultimately entitled brought his bill for a settlement by the trustees and an account of profits. The case turned on the sufficiency of the trust estate to support contingent remainders and is frequently cited to establish such sufficiency. The complex character of the limitations appealed to the humor of the chancellor, who remarked that the testator could not frame a will whereby no one should take his estate, otherwise, it is likely he would have done it. The reason of the need of a particular estate to support contingent remainders was stated to be that there must be a tenant of the freehold to perform services, to answer to a precipe and all writs to be brought concerning the realty, or otherwise there would be a failure of public service and public justice; and that in equitable estates the trustee performs this function. This statement has been rather unwarrantably quoted to support the position that the trustee is the representative of the *cestui que* trusts for all purposes.[1]

In *Finch* v. *Finch*, 2 Ves. 491 (1752), much the same statement of the rule is given, and the same suggestion, by way of explanation, of the necessity for the rule. A bill was filed for the execution of the trusts under the will of Lord Nottingham. The bill was by Edward, a younger son, and his son, praying that Henry, the elder brother, make discovery whether he was married and had any issue male. Lord Hardwicke recognized that one of the purposes

[1] *Barclay* v. *Lewis* 67 Pa. St. 319.

of the discovery was to make the proceedings effective, and said:

"It is admitted to be necessary to bring the first person entitled to the remainder and inheritance of the estate, if such is in being. It is true if there is none such in whom the remainder of the inheritance is vested, in being (as if none of the sons of this family had issue male at all), then it is impossible to say the creditors are to remain unpaid and the trust not to be executed until a son is born. If there is no first son born, the court must take the facts as they stand."

This case seems to intimate that it would be sufficient in the absence of remaindermen *in esse* to bring in the life tenant only.

In *Reynoldson* v. *Perkins,* Ambler 564 (1769), it appeared that a testator had devised mortgaged land to his son and his heirs, but in case his son should die without issue then to his three daughters. A foreclosure of the mortgage was had under a bill in which the daughters were not joined. Subsequently a bill to redeem was filed by one who had bought a daughter's share for a trifle, a fact not without influence on the judgment of the court, which characterized the bill as an experiment. The rule was stated to be that

"the first tenant being a party to the bill was sufficient. He sustained the interest of everybody and those in remainder were considered as ciphers. It would be very inconvenient if the remaindermen were necessarily to be parties."

The reason for the rule is here clearly its convenience, not that the holder of the first vested estate of inheritance possessed some actual right to represent those who should come after.

The next and perhaps the most important case is *Lloyd* v. *Johnes,* 9 Ves. Jr. 37 (1803), both as illustrating the inherent difficulties of the question and as pointing out what was then regarded as the real reason of the rule as stated by Lord Hardwicke. There was an appointment in 1744 by Thomas Pryse with successive limitations in favor of John Pugh Pryse for life and to his first and other sons in tail male, then to Lewis Pryse and his sons, then to James Lewis and his sons in tail male, with remainder to Thomas Lloyd and the heirs male of his body. The bill was filed

in 1799 by the eldest son of Thomas Lloyd, the intermediate limitations having failed. It appeared that in 1766 John Pugh Pryse through the connivance of his solicitor had procured a sale of the estate to one Johnes, which sale proved subsequently to have been fraudulent. In 1776 proceedings were begun for a common recovery but never consummated. If these proceedings had been completed the plaintiff in 1799 would have been barred. Lord Eldon, in discussing whether the plaintiff should have continued the old proceedings or should file a new bill, emphasized the difficulty of the subject.

"The question," he said, "involves a subject to which from the difficulties it presents to my mind after much consideration, I do not state myself to do justice; what are the principles and what are and ought to be the doctrines with respect to a suit in this court by a prior tenant in tail as affecting subsequent remaindermen, and by existing remaindermen, as affecting or not the rights of persons subsequently coming *in esse* but having interests prior to those upon whose interests the bill is filed. The subject is pregnant with great difficulty. It has been so treated by those who have considered it most; and I do now allude to Lord Redesdale's Book, which is a wonderful effort to collect what is to be deduced from authorities speaking so little what is clear, that the surprise is not from the difficulty of understanding all he has said, but that so much can be understood. . . . There are very few decided cases upon this which are intelligible, none sufficiently intelligible to require much attention except the two cases referred to by Lord Redesdale in Brown's Parliamentary cases, and it is very dangerous to trust to loose doctrines in old cases, before it was established, *for convenience*, that it is sufficient to bring the first tenant in tail before the court."

He then discussed the question whether there is a distinction between the case where the plaintiff comes in by way of succession (as a son of a tenant in tail) or by way of new limitation (as in the present case) and concluded that the difference was not considerable. This distinction is, however, made much of in a more recent case.[1] Then, with more particular reference to the matter now under discussion, Lord Eldon added:

"A Court of Equity in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purpose of suit, and for those purposes does not look beyond the estate tail in a suit, aiming by the decree to bind the right to the land. I distinguish between cases where the suit is founded upon contract

[1] *Baylor's Lessees* v. *Dejarnette*, 13 Grattan 152.

by the tenant in tail, and a suit to bind the land in respect to charges created by the author of the gift and imposing them therefore upon all who take per formam doni. In the latter the remainderman has a clear interest in the event of the suit of the prior tenant in tail."

With respect to this question, therefore, he holds that while there is no judgment in point, yet if it be taken that the first tenant in tail represents the inheritance, then those whose interests the tenant in tail represents ought to have the benefit and bear the disadvantage of testimony given before the hearing; the degree of advantage cannot affect the principle. Notwithstanding, however, the right of the plaintiff to maintain a new bill, he refused to disturb the fraudulent sale because

"these (the fraudulent acts) being the acts of two tenants in tail at the time who might have *suffered recoveries* of the rest of the estate, it is very difficult at this period to impeach the sale."

Thus it will be seen that the reason assigned by Lord Eldon for the rule was at one time convenience, and at another time the power which lingered in the first tenant in tail to bar the remaindermen by suffering a recovery. In the somewhat earlier case of *Fletcher* v. *Toliet,* 5 Ves. Jr. 3 (1799), Lord Loughborough had held that in case arising after a lapse of forty years the court would not go beyond the tenant in tail in possession and hold it necessary to make the reversioner a party; but this case does not shed much light on the rule.

In *Gifford* v. *Hort,* 1 Sch. & Lef. 386 (1804), a bill was filed by a remainderman under a settlement made in 1739 against one in possession who derived his title through a fraudulent sale. In 1801 a tenant in tail who was a predecessor in title of the plaintiff had proceeded in the Exchequer, which for some reason had dismissed his bill. Lord Redesdale held the case over in order to permit the plaintiff to apply to the House of Lords for leave to appeal from the Exchequer decree by making himself a party by supplemental bill. The House of Lords referred the matter to a committee, and the appeal was allowed. In discussing the matter in the Court of Chancery, Lord Redesdale had said:

"It having been repeatedly determined that if there be a tenant for life, remainder to the first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred; this is now considered the settled rule of the courts of equity and of necessity; the danger of holding otherwise in the present case would induce me to hesitate very much even if I thought there was less of authority on the subject, but at the same time I do confess that I do not find the precise, distinct authority that enables me to say that the point has come completely in discussion before a court of equity, indeed, the argument shows that it is not completely so decided."

It is somewhat difficult to determine just what idea is intended to be conveyed by the court, unless it be that there was no *reasoned* decision which determined the rule. The Supreme Court of the United States in commenting on this case said that it decided that it was sufficient to bring before the court the first tenant in tail, although he be an infant incapable at law of barring remaindermen, for the reason

"that where all the parties are brought before the Court that can be brought before it, and the Court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive."[1]

Cockburn v. *Thompson,* 16 Ves. Jr. 326 (1809), while not a decision upon the question, contains so pertinent a statement by Lord Eldon of the law as it was then understood, that it may be considered. A bill was filed by several on behalf of themselves and other proprietors of the Philanthropic Annuity Association. Plea for failure to join all who were named, and giving names of others. Lord Eldon overruled the plea.

"The strict rule is that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests; but, that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application. Accordingly there are several well-known cases of exception, and without going through them all, I will mention one instance of not applying it to persons having valuable interests in real estate, namely, where it has been held sufficient to bring before the court the first person having an estate of inheritance, though it cannot be denied that persons having present immediate valuable interests in the same

[1] *McArthur* v *Scott,* 113 U. S. 340.

real estate may become most deeply affected by what is done here in their absence.

"When the court for convenience dispenses with the presence of parties the principle leads it by future arrangement to find out the means of giving them an opportunity in some shape of coming in. . . . The court must always be open to questions upon the carriage of the cause, applications for rehearing, &c., and I should upon principle find the means, if not supplied by precedent, of giving a creditor coming in after the institution of a suit the opportunity of supporting his interest better than the plaintiff could."

The same principle was acted on by the House of Lords in *Gore* v. *Stackhouse,* 1 Dow. 31 (1813), where a collusive foreclosure in 1733 was set aside on a bill filed in 1796 by a tenant in tail shortly after his title accrued, and Lord Eldon there stated that

"It was clear equitable law, that in order to make a foreclosure valid against all claimants, he who had the first estate of inheritance must be brought before the court, and even then the intermediate remaindermen for life ought to be brought before the court to give them the opportunity of paying off the mortgage if they thought proper."

The rule was somewhat broadened in its application to a partition brought by a tenant for life with remainder to his sons in tail, in *Gaskill* v. *Gaskill,* 6 Sim. 643 (1836). The plaintiff had no issue, and the purport of the decision seems to be that, in such a case, in partition, the decree would be binding on his sons when *in esse.* On the other hand, the rule was limited in *Goodess* v. *Williams,* 2 Y. & C. 595 (1843), where it was stated as matter of common understanding that when a person is seised in fee of an estate having that seisin liable to be defeated by a shifting use, conditional limitation or executory devise, the inheritance is not represented merely by the person who has the fee liable to be defeated. This very clear case omits all consideration of convenience or necessity, and rests its conclusion on the power of the holder of the first estate of inheritance to bar subsequent limitations.

In *Fordyce* v. *Bridges,* 2 Phil. Ch. 506, the rule of representation by the first tenant in tail was held not to apply to Scotch entails.

In 1841 the thirtieth General Order was adopted providing that

"in all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds or the rents and profits in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

This order was variously interpreted, it being held to apply where the will gave a power of sale but no power expressly to give discharges for proceeds of sale [1] and in cases of suits by parties beneficially interested as well as in suits by persons claiming adversely to the estate,[2] but on the other hand, it was held not to apply in cases in which trustees had only a qualified power of sale.[3]

It is thus seen that the development of the rule of representation, so far as relates to the matter now under discussion, has advanced from a rather obscure origin, through a somewhat wavering explanation, now asserting the power of the first vested estate to bar remote interests, and now alleging the question to be one of convenience or necessity. This double view is also expressed by the two text writers who have most adequately considered the question, with the further qualification that generally where contingent remaindermen are *in esse,* their presence cannot safely be dispensed with.

In Mitford on Equity Pleadings 174, the rule is laid down as follows:

"Contingent limitations and executory devises to persons not in being, may in like manner be bound by a decree against a person claiming a vested estate of inheritance, but a person in being claiming by way of executory devise and not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a

[1] *Savery* v. *Barber,* 4 Hare 125.
[2] *Osbourne* v. *Foreman,* 2 Hare 656.
[3] *Lloyd* v. *Smith,* 13 Sim. 457; *Miller* v. *Huddlestone,* 13 Sim. 467.

party to a bill affecting his rights (citing here authorities). These authorities establish the doctrine that while, as a general rule, the contingent remaindermen are necessary parties, yet where they are not *in esse* at the time and there is before the court a person entitled to a prior vested estate of inheritance, then, if the persons entitled to the prior life estate and the trustee are parties, the court may make a decree that will conclude the rights of such contingent remaindermen, but they do not warrant the idea that contingent remaindermen who are *in esse* and can be made parties can be safely dispensed with."

In Calvert on Parties p. 49 the rule is stated somewhat differently as follows:

"This modification of the general rule has been adopted on the grounds partly of necessity, partly of convenience, and upon a principle of justice to persons entitled to remote interests."

"Another important principle in favor of the doctrine is that in the person of the first tenant in tail there is brought before the court one whose interest is of such a nature as to insure his giving a fair trial to the legal right. This last principle seems to have established the limit to the number of interests which may be represented by the person entitled to the first estate of inheritance. . . . They are interests which depend upon the first estate which, together with that estate, make up the fee simple. . . they are interests which the tenant in tail can destroy and which for that very reason there is a special propriety in empowering him to defend."

"Those persons only will be considered as represented, either by the tenant in tail or by the tenant for life, whose interests such tenant in tail or the child of such tenant for life would have the power of barring."

And again on p. 193 the power of barring is assigned as the real reason.

Coming now to the American authorities, much the same divergence of view is observable. Both reasons are assigned for the rule, and the same distinction between contingent remaindermen *in esse* and those not *in esse* is noticeable, and the further distinction between suits affecting the trust property and those not affecting the relation of the *cestui que* trusts to it.

The question was considered at some length in *McArthur* v. *Scott*, 113 U. S. 340 (1884), in which a testator devised to his executors in trust to pay the income to his children and their issue until the youngest grandchild who might live should reach the age of twenty-one. After that and the decease of all his children, the lands were to be inherited equally by his grandchildren, or their children, if deceased. This was held to create equitable vested remainders in the

grandchildren subject to open to let in grandchildren born after testator's death and subject to be divested as to any grandchild dying during the pendency of the particular estate leaving children. A statute of Ohio authorized the probate of the will, but allowed an appeal by bill. Such bill was filed by a son and his children *in esse* against the other children and their children *in esse,* and the children were appointed guardians *ad litem.* By what was apparently a consent decree the probate was reversed. It was held in a subsequent and much later proceeding by a grandchild born after testator's death, that the trustees were necessary parties and that there was no one on the record to represent the unborn grandchildren and great grandchildren.

The discussion took a wide range. It was held that the general rule was that all the members of a class of residuary legatees or next of kin must be made parties, but that where they are numerous and the court is satisfied that it has enough before it to secure a fair trial of the issue, it may proceed to a hearing, the decree probably being without prejudice to the rights of those who are not made parties or who do not come in before decree; and that often a trustee with large powers sufficiently represents the beneficiaries.

In *Carey* v. *Brown,* 92 U. S. 171 (1875), the distinction is recognized between suits which are brought to recover the trust property or reduce it to possession and in no wise affect the relation between the trustee and his beneficiaries, in which it is unnecessary to make them parties, and suits in which that relation is involved.

In *Campbell* v. *Stokes,* 148 N. Y. 23 (1894), there was a bill for partition of lands held upon limitations similar to those in *McArthur* v. *Scott,* and it was held that whether the remainders were vested or contingent the persons in being when the partition action was commenced and presumptively entitled to possession on the death of the life tenant were necessary parties, and in *Leggett* v. *Mutual Life Ins. Co.,* 64 Barb. 23, the same principle was asserted with respect to a foreclosure proceeding and it was held that the trustees could not and did not represent the grandchildren. In *Nodine* v. *Greenfield,* 7 Paige 544, in a foreclos-

ure bill it was held that parties having vested estates in remainder subject to open must be joined, but that as to future or contingent estates it was sufficient to bring in the first vested estate of inheritance.

In *Smith* v. *Gaines,* 39 N. J. Eq. 545, and *Tyson* v. *Applegate,* 40 N. J. Eq. 305, the same view was taken. In the former it was held that in the absence of a present absolute power of sale in the trustee, the *cestui que* trusts must be parties, and the court stated that the rule of representation was incapable of definition and that much must be left to the discretion of the court. In the latter, it was held that all *cestui que* trusts must be joined where they are not so numerous as to make it impossible and highly inconvenient to include them. These conclusions are based solely on convenience or necessity.

In *Long* v. *Long,* 62 Md. 33 (1883), the other reason for the rule was impliedly given. The will limited the land to trustees for certain children for life and on their death for their children. In 1833 a bill was filed for the sale of the land and all the children joined. In 1880 a bill for partition was filed on the theory that the grandchildren were not concluded by the earlier proceedings and it was so held, although it was contended that the children were the heirs at law and represented the unborn grandchildren. The court followed the rule of *Goodess* v. *Williams,* 2 Y. & C. 595, that where a person holds an estate liable to be defeated by a shifting use, conditional limitation or executory devise, the inheritance is not represented except as against himself or those who take under him; but that it is otherwise with respect to personal estate and then especially those not *in esse* are bound.

In *Williamson* v. *Jones,* 43 W. Va. 562, it was held that remaindermen are not represented by a life tenant and a trustee, but otherwise where the owners of the particular estate and the first vested estate in remainder are joined.

In *Harrison* v. *Walton,* 95 Va. 721, in a proceeding to charge real estate with debts, all the remaindermen *in esse* were brought in and this was held sufficient under the rule of *Gifford* v. *Hort;* and in *Baylor's Lessees* v. *Dejarnette,*

13 Grattan 152, a contingent remainderman not *in esse* at the inception of the suit, and who came into being before decree, but was not joined, was nevertheless barred and the rule was stated that where the first vested estate of inheritance is joined, a contingent remainderman is barred whether *in esse* or not, and where there is no vested estate of inheritance it is sufficient to bring in the life tenant and especially where the contingent remainderman is the son of the life tenant. It can scarcely be deduced from the cases, however, that parenthood is a sufficient basis of representation. In a later case *Faulkner* v. *Davis,* 18 Grattan 651, while following, in the main, the earlier case, the court regarded the rule as requiring all parties in being to be brought in, the rule being said to be one of necessity and convenience.

In *Mosely* v. *Hankinson,* 22 S. C. 323 (1884), the court held that the general rule was that contingent remaindermen are necessary parties if *in esse,* but that where they are not *in esse* it is sufficient to bring the owner of the prior estate of inheritance, or perhaps if there is no prior vested estate of inheritance then the life tenant and the trustees.

In *Hall* v. *Hall,* 146 Ill. 246, the convenience rule is followed to the end that unborn contingent remaindermen are barred by a decree which disposes of interests of living contingent remaindermen of like character, and this theory receives further emphasis in *Denegre* v. *Walker,* 114 Ill. App. 240 (1904), where it was held that if all parties *in esse* are joined the decree will bind those not *in esse,* as their interests are identical with those in being; it being stated that the opposite rule would sacrifice the rights of the living to those of posterity. Attention, however, was called to the fact that the application was merely to execute a lease to carry out the intention of the testator and not to convert real estate into personalty, a thing not to be done except under urgent necessity.

In North Carolina, the rule of convenience is followed but restricted, and it has been held that there must be one of each class of remaindermen before the court.

In *Cannon* v. *Barry,* 59 Miss. 305, the right of representation by the holder of the first estate of inheritance was

recognized only when that estate was vested and that the rule did not apply to contingent remaindermen.

In Pennsylvania the questions under discussion are largely referable to the Act of April 18, 1853, known as the Price Act. This provides that all persons having a present or expectant interest in the premises must be joined, and while considerable laxity of practice was formerly usual, there can be little doubt of the necessity of complying with the express provisions of the Act. The explanatory comments on the Act by its draughtsman enforce this view.[1] Prior to this, the partition Act of June 3, 1840, expressly provided for the protection in such proceedings of unborn children, usually accomplished by a trustee of record to represent them.

A review of the cases thus discloses the absence of any consistent rule for the determination of the question of parties or if a rule be assumed to exist, the absence of any consistent explanation of it. It seems clear that the necessity for the appearance of remote remaindermen has been generally dispensed with, but it is not in the least clear that any established rule has been followed by which to determine when or to what extent such appearance has been deemed unnecessary. The equitable practice which permitted the holder of the first vested estate of inheritance to represent subsequent interests dependent on it has the advantage of definiteness, but is open to two objections. In the first place it hinges upon the theory that the holder of such estate has the power of destroying the subsequent estates, for instance by a common recovery. Such power either no longer exists or else has fallen into such disuse as to be no longer logically available as the explanation of a living principle. The fact that estates tail may be barred, as in Pennsylvania, by deed or judicial sale is scarcely better explanation of a rule which was established long before the statutes authorizing these methods of barring, and which prevails in jurisdictions where such statutes do not exist. Even under such a statute as the Price Act of Pennsylvania, where land may be relieved of a contingent remainder or executory devise, these estates are not destroyed but are

[1] Price on Act Relating to Real Estate.

transferred to the fund produced by the sale or mortgage of the land, and it is probably necessary in order to accomplish this result that the holders of such estates, if *in esse,* should be made parties to the proceedings.[1] In the second place, this practice does not cover all of the cases which are likely to arise, and some other theory must be adopted for the cases not included. It has been seen that inasmuch as shifting uses or executory devises, or generally those estates which are not subject to destruction at the hands of the holder of the first estate of inheritance, cannot be disposed of by such a practice, some other rule must be adopted.

The second view, that of convenience, or necessity, while somewhat vague in its application, would nevertheless seem to be the one, perhaps the only one, which is now actually available. Even in some of the older cases it is referred to as an explanation of the decree of the court conjointly with the other view, possibly on the theory that the first vested estate of inheritance was a convenient or necessary stopping-place in the search for parties. If, however, it is recognized as the true explanation of the practice, it would seem dangerous to adopt an easy standard which in one aspect is a false one.

Is there any standard outside of the discretion of the chancellor on the question of convenience or necessity for the determination of parties in this class of litigation? It would seem that there is.

In the first place, in all questions touching the administration of trust estates, as distinguished from questions relating to charges upon the estate itself or the conversion of the corpus of the estate, there would seem to be no necessity for joining any one beyond the trustees themselves in whom has been vested that administration. While, to some extent, remaindermen are interested, yet their interest is slight in comparison with the hardship of requiring persons dealing with trustees on matters of administration to bring in all parties who have or may come to have an interest in the estate.

In all other matters, the question is, whether convenience

[1] *Smith* v. *Schwarz,* 209 Pa. St. 79.

or necessity shall be the guiding principle. Convenience of legal administration may properly be sought, where the only effect of inconvenience is mere inconvenience to litigants in the assertion of legal rights; but where convenience of legal administration involves either a refusal of such rights or an omission to consider them, it is manifest that convenience becomes an extremely unsafe guide. Then what is the significance of necessity in such cases? Merely that all persons should be made parties who are *in esse,* and who at the inception of the litigation would become entitled if the contingencies of the devise or settlement then happened or definitely failed, regardless of the improbability of such event. Such a rule is definite and in accord with the fundamental principle of the law which preserves to every one his legal rights until he is judicially deprived of them after a hearing; and while it must be confessed that some of the cases do not adopt it, some do, and it has been now more than a century since Lord Redesdale said that the authorities did not warrant the idea that contingent remaindermen who were *in esse* and who could be made parties could be safely dispensed with.

L. L. Smith.