FUTURE INTERESTS IN FEDERAL COURTS: VIRTUAL REPRESENTATION AND THE RULES OF CIVIL PROCEDURE*

WHEN both substantial and remote interests in property will be affected by federal litigation, joinder requirements may erect a bar to suit by a substantial holder; and the availability of a class action, while perhaps eliminating this barrier for some holders of substantial interests, may prevent others from participating in the assertion of their rights. Rule 19 of the Federal Rules of Civil Procedure [1] requires that all parties held "indispensable," whether as plaintiffs or defendants, must be joined before an action can proceed.[2] An absent party will generally be held indispensable when a controversy cannot be decided without materially affecting his interest.[3] But such indispensable parties are often beyond the court's territorial jurisdiction and can be brought into an action

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*Matthies v. Seymour Mfg. Co., 270 F.2d 365 (2d Cir. 1959), *cert. denied*, 80 Sup. Ct. 591 (1960).

1. FED. R. CIV. P. 19:

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

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

2. 3 MOORE, FEDERAL PRACTICE ¶¶ 19.05, 19.07 (2d ed. 1948) [hereinafter cited as MOORE]; see, *e.g.*, Firemen's Fund Ins. Co. v. Crandall Horse Co., 47 F. Supp. 78 (W.D.N.Y. 1942); McRanie v. Palmer, 2 F.R.D. 479 (D. Mass. 1942).

3. Indispensable parties are
   persons who do not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Shields v. Barrow, 58 U.S. (17 How.) 129, 139 (1854); *accord*, Baird v. Peoples Bank & Trust Co., 120 F.2d 1001 (3d Cir. 1941); Washington v. United States, 87 F.2d 421 (9th Cir. 1936). See also Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1051, 1055-56 (1952).

only when constructive service is possible.[4] Even when process can be served, an indispensable party's citizenship may be the same as an opponent's, thus destroying diversity jurisdiction. Although designed to protect important interests, rule 19's indispensability requirement will have the opposite result when an indispensable absentee is substantially less interested in the outcome of the suit than the parties before the court. For example, holders of future interests in property may have such a remote chance of taking that their interests have almost no financial value. Nonetheless, these persons have been treated as indispensable to actions affecting the property because their interests, however slight, will also be affected.[5] As a result, parties with much at stake, such as life tenants, could be denied relief from a federal forum despite their presence in court and their ability to satisfy federal jurisdictional requirements.

Obstacles to litigation raised by joinder requirements are often avoided, however, through the class action.[6] Under rule 23(a)(1),[7] one or more mem-

4. Service of process in actions in federal district courts can only be made within the territorial limits of the state in which the district court is located, unless a federal statute provides otherwise. FED. R. CIV. P. 4(f). For federal statutes permitting nationwide service, see 2 MOORE ¶¶ 4.33-.34, 4.42. Service is sufficient if made pursuant to the federal rules or "in the manner prescribed by the law of the state in which the service is made . . . in an action brought in the courts of general jurisdiction of that state." FED. R. CIV. P. 4(d). If an action involves real or personal property within the judicial district, however, a federal court may employ constructive service if the requirements of 28 U.S.C. § 1655 (1958) are met. See generally 2 MOORE ¶¶ 4.33-.41.

5. Baird v. Peoples Bank & Trust Co., 120 F.2d 1001 (3d Cir. 1941); see Franz v. Buder, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927); Baker v. Dale, 123 F. Supp. 364 (W.D. Mo. 1954); Talbutt v. Security Trust Co., 22 F. Supp. 241 (E.D. Ky. 1938); Louisville Cooperage Co. v. Rudd, 276 Ky. 721, 124 S.W.2d 1063 (1939); *cf.* Pugh v. Frierson, 221 Fed. 513 (6th Cir. 1915).

Many state cases hold remote holders not indispensable when such persons are virtually represented. *E.g.*, Carroll v. First Nat'l Bank & Trust Co., 312 Ky. 380, 227 S.W.2d 410 (1950); see notes 54-59 *infra* and accompanying text. But if representation is inadequate, their nonjoinder will defeat the action, Baird v. Peoples Bank & Trust Co., 31 F. Supp. 622, 624 (D.N.J. 1940), *aff'd on other grounds*, 120 F.2d 1001 (3d Cir. 1941), and the absentee will not be bound by the decree. Baker v. Dale, *supra*. Thus, courts applying virtual representation to remote holders assume that they would be indispensable but for the representation.

6. *E.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16. How.) 288, 301-03 (1853); Hansberry v. Lee, 311 U.S. 32 (1940) (dictum).

7. FED. R. CIV. P. 23(a):

REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the courts, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

bers of a class may sue or be sued in an action which will bind all members of the class, whether or not they are before the court.[8] Moreover, the citizenship of the representative, rather than that of all members of the class, is considered for diversity purposes.[9] Since due process generally guarantees a day in court to any party who would be bound by a lawsuit's outcome,[10] use of the class action has been sharply limited by two prerequisites. First, the named parties must adequately represent the absentees' interests.[11] Additionally, the federal rules tacitly admit that representation cannot fully replace personal appearance by stipulating that a class action cannot be brought unless the class is "so numerous as to make it impracticable to bring . . . all [members] before the court . . . ."[12] Of course, a court cannot decide the question of impracticability without first deciding who should be counted in the class. When the class action is used as a substitute for actual joinder, the court counts all indispensable parties, that is, all persons who, were there no class action, would have to be joined.[13] Thus, in suits involving numerous future interest holders, a class action permits substantial holders to prevent the nonjoinder of remote holders from blocking litigation. In some situations, however, a profusion of remote holders may be used to deny substantial holders their day in court. When persons with a substantial pecuniary interest in a suit are few and no one else is interested, rule 23's numerosity requirement will

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(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

8. The rule provides for three types of action; the "true" [23(a)(1)], 3 MOORE ¶ 23.08, "hybrid" [23(a)(2)], 3 MOORE ¶ 23.09, and "spurious" [23(a)(3)] class actions, 3 MOORE ¶ 23.10. In a "true" class action the class is limited to persons who would be indispensable were it not for the class suit device. 3 MOORE ¶ 23.08. If the prerequisites of a class action are met, a decree laid down in such a suit binds all persons who would have been indispensable parties in the absence of class action. See Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853).

Rule 23(a)(2)—the "hybrid" class action—requires the presence of specific property which must be managed or distributed. 3 MOORE ¶ 23.09. The "spurious" class action is no more than a permissive joinder device and decrees in these actions have no effect on parties not before the court. 3 MOORE ¶ 23.10. Thus, 23(a)(1) is the major exception to the joinder rules. See Note, 46 COLUM. L. REV. 818, 821 (1946).

9. 3 MOORE ¶ 23.13; see Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948).

10. Hansberry v. Lee, 311 U.S. 32 (1940); see Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1947); Note, 46 COLUM. L. REV. 818 (1946).

11. Hansberry v. Lee, *supra* note 10; Pelelas v. Caterpillar Tractor Co., 30 F. Supp. 173 (S.D. Ill.), *aff'd*, 113 F.2d 629 (7th Cir. 1940). To be adequate, the representative must have substantially the same interest in the outcome of the suit as the absentees. Hansberry v. Lee, *supra* note 10; Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941).

12. FED. R. CIV. P. 23(a). No generally applicable criteria exist to determine when a class has become so large that joinder of all is impracticable. See 3 MOORE ¶ 23.05. *Compare* Atwood v. National Bank, 115 F.2d 861 (6th Cir. 1940) (thirty-nine too few), *with* Citizens Banking Corp. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944) (forty sufficient).

13. See Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403 (5th Cir. 1945).

protect their right to actual joinder. At least some substantial holders will be deprived of this right, however, if the inclusion of persons with a slight financial stake inflates the class and makes possible a representative action in which all substantial holders need not be joined.

These problems are reflected in a recent rule 23 case—*Matthies v. Seymour Mfg. Co.*[14] Under the wills of George and Annie Matthies, substantial property was left in trust for their two children for life with remainders to the children's lineal descendants.[15] Mrs. Matthies' will further provided that if both life tenants died without surviving issue, the property would pass to her "next of kin then surviving."[16] Plaintiff, son of one life tenant, sought to bring a diversity action against the trustees in federal district court to compel, *inter alia*, their removal, restoration to the trusts of property they had wrongfully transferred, and an accounting.[17] At the time of suit both life tenants, their five children, seven minor grandchildren, and twenty collateral relatives of Mrs. Matthies who might take under the "next of kin" provision were living and concerned with the action. All members of the Matthies family, except plaintiff and his minor daughter, were Connecticut citizens. Since defendants were also Connecticut citizens, diversity would be destroyed if indispensability required plaintiff to join any one of his relatives. To avoid joinder, plaintiff initiated a class action on behalf of the lineal descendants and twenty "next of kin." Defendants moved to dismiss, claiming that only the life tenants, their children, and a guardian *ad litem* to represent their grandchildren should be counted in the class;[18] if so, the parties were not sufficiently numerous to make their joinder impracticable, and a class action was unwarranted.[19]

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14. 270 F.2d 365 (2d Cir. 1959), *cert. denied*, 80 Sup. Ct. 591 (1960).

15. 270 F.2d at 368. A full description of the complex interests created by the two wills, and excerpts from the instruments are set out in the lower court opinion. Matthies v. Seymour Mfg. Co., 23 F.R.D. 64, 72-74, 96-101 (D. Conn. 1958).

16. 270 F.2d at 360.

17. *Id.* at 369. Plaintiff filed two actions in the district court. Besides the trust action with which this Note is concerned, he brought a derivative suit on behalf of the Seymour Manufacturing Corporation against the directors of that corporation, alleging a conspiracy to defraud Seymour and a subsidiary. *Id.* at 369. The trusts are major stockholders in Seymour, *ibid.*, and several of the trustees and the attorneys for the trust were also directors of the corporation, and thus defendants in both actions, Brief for Appellant, p. 40. Plaintiff, who was not a stockholder of record in his own name at the time of the alleged misdeeds, bases his right to sue on his beneficial ownership of the trust stock. 270 F.2d at 374-75. He claimed that he could sue as representative of the trust beneficiaries who as a group were equitable shareholders and alternatively that as beneficiary of the shareholder trust he is himself shareholder of the corporation. *Ibid.* The Second Circuit rejected both these arguments, holding that all the beneficiaries must be joined in an action to assert the trust's rights as shareholder of Seymour. *Ibid.* For a discussion of this aspect of the case, see 45 VA. L. REV. 1394 (1959).

18. Brief for Defendants, p. 45.

19. *Id.* at 40-48. Defendant based his motion to dismiss the trust action on several other grounds as well. He claimed that the federal court lacked jurisdiction over the subject matter of the suit, and that the actions were brought collusively to confer

The district court denied the motion. Although recognizing that the actuarial possibility that the "next of kin" would take was "almost nil," the court found that they had "legally cognizable rights" and were therefore indispensable.[20] The court then held that thirty-four was a sufficiently large group to justify a class action. Defendant took an interlocutory appeal[21] from this ruling to the Second Circuit, which reversed with directions to dismiss. The court of appeals first observed that only parties who must be joined should be counted in a class action.[22] To support its conclusion that the collaterals would in no event have to be joined under rule 19, and therefore should not be counted when determining the membership of a class for rule 23 purposes, the court looked to both the substantive law of future interests and the equitable doctrine of "virtual representation," which in some circumstances allows parties before the court to represent absent persons who by definition are not joined.[23]

Two alternative theories explaining the appellate court's holding that the collaterals should not be counted can be offered on the basis of its opinion. Underlying both is the court's finding that the eventual takers among the collaterals will be the persons who would qualify under state law as Mrs. Matthies' next of kin at the time, when, and if, the life tenants die without surviving issue.[24] According to one possible reading of *Matthies*, the court

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federal jurisdiction. Further, defendant alleged that the plaintiff had initiated the actions through malice, secretly offered to compromise them, had violated an agreement to carry on the litigation in federal court, and therefore had "unclean hands" and should not be allowed equitable relief. Matthies v. Seymour Mfg. Co., 23 F.R.D. 64 (D. Conn. 1958). The district court rejected all of defendant's arguments.

20. *Id.* at 75.

21. See 28 U.S.C. § 1292(b) (1958). See generally Comment, 69 YALE L.J. 333 (1959).

22. 270 F.2d at 370.

23. See notes 54-59 *infra* and accompanying text.

24. Defendant argued that under Connecticut law the next of kin, excluding prior takers under the will, would be determined at the time of Mrs. Matthies' death. 270 F.2d at 369. Nineteen of the twenty collaterals, the lineal descendants of her deceased sister, could only take as next of kin as representatives of their ancestor. Thus if the next of kin were determined at testatrix's death, when the sister was living, the interest would have failed on the sister's subsequent decease, and her nineteen descendants would have no possibility of taking. *Ibid.* Both the district court and the Second Circuit rejected defendant's construction of the will, however, and held that all twenty collaterals might take under the limitations to "next of kin." *Id.* at 369.

Neither court nor counsel discussed the future-interests doctrine of worthier title, under which a remainder to next of kin is construed as a reversion and thus voided. See Scholtz v. Central Hanover Bank & Trust Co., 295 N.Y. 488, 68 N.E.2d 503 (1946) (remainder to settlor's next of kin as of the life tenant's death held nugatory under worthier title); Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); GULLIVER, CASES ON FUTURE INTERESTS 93-100 (1959). If this doctrine were applicable, defendants might have reached the result they sought by another route, since even if defeasible reversioners are indispensable under rule 19, Mrs. Matthies' reversion passed on her death to her two sisters and presently would be held half by her living sister and half by those who

held that since it is now impossible to determine which individuals will be so designated, none of the collaterals have an individual interest and therefore should not be counted.[25] But the putative "next of kin" have an interest now as a "group" which would be affected by litigation concerning the trust.[26] This interest, the court found, could only be protected by the joinder of one of the collaterals as their "virtual representative," who should be the only one counted.[27] Under an alternative reading, however, virtual representation was not treated as a mandatory means of joining unknown future takers, but as a discretionary device permitting exclusion of known but remote holders in order to prevent the dilution of the numerosity requirement, "one of the safeguards against . . . indiscriminate use" of the class action.[28] Thus, the court

took from her deceased sister, probably that sister's two children, see 270 F.2d at 369, and/or a surviving widower; thus, even counting reversioners, the class would presumably be too small for a class suit. But the doctrine of worthier title may not apply to testamentary gifts, RESTATEMENT, PROPERTY § 314(2) (1936). *Contra*, GULLIVER, *op. cit. supra* at 96-97. And it may not be Connecticut law. See Phoenix State Bank & Trust Co. v. Buckalew, 15 Conn. Supp. 149 (Super. Ct. 1947) (lower Connecticut court rejects doctrine). *Contra*, Greims v. Bankers Trust Co., 283 App. Div. 783, 129 N.Y.S.2d 493, *aff'd*, 308 N.Y. 718, 124 N.E.2d 335 (1954) (worthier title is a rule of law in Connecticut).

25. The court stated that some of the collaterals "may ultimately be ascertained to have a remote contingent interest in the trust under the limitation to next of kin." 270 F.2d at 369. But it indicated that "no recently ascertainable individuals have an interest under the relevant limitation." *Id.* at 371.

26. The court used the term "group" in two senses. It first spoke of a "group . . . [which] ought to be represented," but said that not all or any of the members of the group can now be ascertained and therefore the group must of necessity appear by representation if it is to appear at all. 270 F.2d at 371. The "group" of twenty living collaterals is certainly "ascertained" and could easily be joined; thus the court must be referring to the group of persons who will be Mrs. Matthies' next of kin under the Connecticut intestate succession statute when the life tenants die. This interpretation is consistent with the theory of the case presented in text—that the living collaterals have no interest under the next-of-kin limitation and the only interest holders are the unknown future takers. But the court also stated that one collateral who should be joined as a "virtual representative" was a member of the "group" it was discussing. *Ibid.* Since no one presently could be a member of the future group, this statement seems to indicate that the court was using the term "group" to refer to the living collaterals, and suggests a second reading of the opinion. See notes 28-32 *infra* and accompanying text.

27. The court differentiated inclusion of one collateral as representative of the eventual takers from the inclusion of one or more as interest holders in their own right, 270 F.2d at 371. The court may have felt constrained to join a collateral in this capacity rather than permitting representation by one of the lineals because of the rule that representation is inadequate if the best possible representative of the absent parties is not joined. See Moseley v. Hankinson, 22 S.C. 323 (1883) (unborn remainderman not bound when available living party with same interest not joined); Longworth v. Duff, 297 Ill. 479, 130 N.E. 690 (1921); Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580, 598 (1936) [hereinafter cited as Roberts]; RESTATEMENT, PROPERTY § 181 (1936); *cf.* Pugh v. Frierson, 221 Fed. 513 (6th Cir. 1915); Caine v. Griffin, 232 S.C. 515, 103 S.E.2d 37 (1958). *But cf.* Stowe v. Campbell, 390 Ky. 32, 160 S.W.2d 325 (1942); Goff v. Renick, 156 Ky. 588, 161 S.W. 983 (1913); Note, 37 KY. L.J. 96 (1947).

28. 270 F.2d at 370.

noted that the twenty named collaterals are not the only persons who may be "next of kin" at the death of the life tenants. "Innumerable interested persons" may exist, and if Ruth Wooster and the nineteen Merrills are to be counted, "so ought every relative of Annie now living who could possibly take as 'next of kin.' "[29] Counting all these persons would create a class sufficiently numerous to warrant a rule 23 action, thus allowing plaintiff to "avoid the obligation to join those whose joinder is . . . essential."[30] But since the doctrine of virtual representation would permit a court to dispense with their actual joinder in a rule 19 context, they should not be counted.[31] Such a use of virtual representation, unlike the theory first presented, rests on an assumption that the collaterals have an interest. Persons without an interest are never joined,[32] and thus would never be counted. And, if the collaterals had no interest, no need would exist to protect the numerosity requirement through virtual representation as a basis of their exclusion. Whatever the grounds for exclusion, the court counted only the fourteen lineals and one "representative" from the collaterals and held that fifteen is not so large a group as to make the joinder of all impracticable.

If, in the court's view, the collaterals had no present interest in the trust—the first explanation of the *Matthies* holding offered—the Second Circuit's opinion would appear incompatible with principles of future interests, and would conflict with earlier federal cases on indispensability. Since the gift over to Mrs. Matthies' "next of kin" creates a reminder in those persons who fit that description, each collateral would be a remainderman, who could take upon the occurrence of two contingencies: one, the death of all the lineals; two, his survival as the collateral with closest consanguinity to Mrs. Matthies. Thus, the twenty collaterals would be contingent remaindermen, and would be interest holders even though the chance that their interest would ever become possessory is slight.[33] Further, the holder of such an interest has been

29. *Id.* at 372.

30. *Ibid.*

31. *Id.* at 370; *cf.* note 13 *supra.*

32. Rule 20 permits the joinder as plaintiffs of any persons who assert rights arising out of a single occurrence or transaction. 3 MOORE ¶ 20.05. But parties with no interest in a trust or other property cannot assert rights in that property. Thus a person with no legal or equitable interest in a trust cannot bring an action against the trustee for an accounting. In re Workman's Estate, 156 Ore. 333, 68 P.2d 479 (1937); Ross' Estate, 312 Pa. 36, 167 Atl. 365 (1933); 4 BOGART, TRUSTS § 969 (1948). Nor can a person with a bare expectancy bring an action to quiet title or restrain waste. Pidcock v. Reid, 145 Ga. 103, 88 S.E. 564 (1916); 1 SIMES & SMITH, FUTURE INTERESTS § 400 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

33. Read literally, it [the term "future interest"] would indicate that the "interest" was a "future" one only, or, in other words, that the holder of a future interest had no present legal relations with respect to the property. If this were true, "future interest" would not describe a legal concept, but merely (like "expectancy") a factual possibility of receiving property in the future. But these assumptions would be erroneous. The courts recognize and protect . . . the relationship of the

held indispensable under rule 19;[34] in a case cited by the district court but not mentioned above, the Third Circuit held that all known persons who might take under a limitation to "next of kin" similar to that in *Matthies* were indispensable to an action brought by the life tenants against the trustees.[35] *Matthies'* failure to distinguish this case, or to cite cases which support a "no interest" theory, indicates that the opinion did not actually turn on findings that the collaterals had no interest and therefore were not indispensable.[36] A finding of indispensability is compatible with the court's result, since the doctrine of virtual representation, relied upon in the opinion, is normally employed to permit nonjoinder of persons otherwise indispensable.[37] The Second Circuit's resort to this equitable doctrine can be explained, therefore, as a means of excluding indispensable, but extremely remote, holders from the counted class. Thus, while the first theory of *Matthies*—collaterals not

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holder of a future interest to the property which he is later to enjoy . . . [a relationship] merged in the abstract concepts called "title" or "ownership" or "interest." GULLIVER, CASES ON FUTURE INTERESTS 4-5 (1959). See also *id.* at 202.

34. Baird v. Peoples Bank & Trust Co., 120 F.2d 1001 (3d Cir. 1941); see Franz v. Buder, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927); Baker v. Dale, 123 F. Supp. 364 (W.D. Mo. 1954); Talbutt v. Security Trust Co., 22 F. Supp. 241 (E.D. Ky. 1938).

35. Baird v. Peoples Bank & Trust Co., *supra* note 34. In this case testator left a large estate in trust, the income to be divided between his two children while they both live. The power to dispose of one half of the principal by will was given to either child who died leaving a surviving spouse or issue. If the other child had previously died without spouse or issue, the power of disposition extended to the entire estate. In default of exercise of the powers, the principal was to be divided among the surviving wife and issue. If both children died without spouse or issue and without having exercised the power the income would go to the testator's mother for life and then the *res* was to vest one half in the "surviving next of kin" of the testator's wife and one half in the testator's next of kin "then surviving." The life tenants (testator's children) were married, but had no children. The district court found that the life tenants, their spouses, and the eight presumptive takers under the "next of kin" provisions were indispensable parties even though joinder of one of the "next of kin" would destroy diversity. Baird v. Peoples Bank & Trust Co., 31 F. Supp. 622 (D.N.J. 1940). The Third Circuit affirmed the district court's dismissal of the action for failure to join an indispensable party, holding that "the presence of the remaindermen is indispensable in an action by life tenants relating to the corpus of the trust fund." 120 F.2d at 1003.

36. The district court had held that the collaterals have contingent remainders in trust. 23 F.R.D. at 74, 100-01. This holding rejected defendant's argument that the collaterals had no interest and would not be even "necessary" parties in a non-class action since their chances of taking were so remote as to be a "bare expectancy." Brief for Defendants, p. 46. Defendant did not repeat this "no interest" argument on appeal. He urged exclusion of nineteen of the collaterals because the will should be construed as giving them no chance of taking whatsoever, see note 24 *supra*, but did not deny that the collaterals would be remaindermen if this construction were rejected, brief for Appellants, pp. 15-20.

37. Note 5 *supra*; see, *e.g.*, McArthur v. Scott, 113 U.S. 340 (1885) (dictum); Baird v. Peoples Bank & Trust Co., 31 F. Supp. 622, 624 (D.N.J. 1940) (dictum), *aff'd on other grounds*, 120 F.2d 1001 (3d Cir. 1941).

counted because, having no interest, they are not indispensable parties—would simplify the law of the case, the second interpretation offered would harmonize *Matthies* with prior case-law and would make meaningful the court's description of virtual representation as a "necessary corollary" of rule 23's numerosity requirement.[38]

The *Matthies* opinion's adoption of virtual representation in a rule 23 context is premised, therefore, on a belief that that doctrine provides an exception to rule 19's joinder requirements. Use of the term virtual representation may be misleading, however, as it denotes no single doctrine. Virtual representation and the concept of the class action embodied in rule 23(a) spring from the same historical roots,[39] and courts have used the terms "virtual representation" and "class action" interchangeably. Thus several courts have stated that rule 23, or similar state provisions, are codifications of virtual representation.[40] The term has also been used to describe the class-suit requirement that the representative have an identity of interest with ("virtually" represent) members of the class not joined.[41] Finally, the doctrine appears in future-interest cases as a means of allowing holders of future interests to represent absent holders of like or similar interests whose joinder would be impracticable or inconvenient. Thus when contingent remaindermen are beyond the reach of service,[42] are extremely numerous,[43] or are unborn or unascertained,[44] persons before the court have been held to represent them.[45] Virtual representation in this context resembles a 23(a) action, but its use is not limited by 23(a)'s numerosity requirement.[46] Except for this future-interest doctrine, all con-

38. 270 F.2d at 370.

39. See Roberts 588-89; STORY, EQUITY PLEADINGS §§ 141-51 (9th ed. 1879); Note, 2 How. L.J. 111, 112 (1956). See aso White v. Quisenberry, 14 F.R.D. 348 (W.D. Mo. 1953); cases cited note 40 *infra*.

40. See, *e.g.*, White v. Quisenberry, *supra* note 39; Lonsford v. Burton, 200 Ore. 497, 267 P.2d 208 (1954); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 198 P.2d 514 (1948).

41. Nunnelly v. First Fed. Bldg. & Loan Co., 107 Utah 347, 154 P.2d 620 (1944).

42. Bofil v. Fisher, 24 S.C. (3 Rich.) Eq. 1 (1850) (remaindermen in France); *cf.* Moseley v. Hankinson, 22 S.C. 323 (1883).

43. *E.g.*, Longworth v. Duff, 297 Ill. 479, 130 N.E. 690 (1921); Caine v. Griffin, 232 S.C. 562, 103 S.E.2d 37 (1958); Faber v. Faber, 76 S.C. 156, 56 S.E. 677 (1906); See McKenzie v. L'Amoureux, 11 Barb. 516 (N.Y. Sup. Ct. 1851) (class of four).

44. *E.g.*, Powell v. Childers, 314 Ky. 45, 234 S.W.2d 158 (1950); Langstaff v. Meyer, 305 Ky. 116, 203 S.W.2d 49 (1947); Caine v. Griffin, note 43 *supra*.

45. See Roberts 580-600; Comment, 5 HASTINGS L.J. 199, 205-12 (1954); Note, 37 KY. L.J. 96 (1948); Note, 48 HARV. L. REV. 1001, 1002-03 (1935); 4 SIMES & SMITH § 1803.

46. Virtual representation is used whenever necessary to allow the action to continue. See text at note 56 *infra*. The drafters of the *Restatement of Property* apparently felt that representation of future interests holders lay outside the principles of the ordinary class suit. During the drafting of the *Restatement* sections on virtual representation, Prof. W. Barton Leach observed that

> . . . the doctrine of representation may be misleading as a name in causing someone to think that it is actually personal representation similar to the representation

cepts of virtual representation are subsumed by rule 23(a).[47] Thus, the *Matthies* court must have meant to approve employment of "virtual representation" only in cases involving future interests; and by distinguishing that doctrine from a rule 23 class action and stating that virtual representation allows the nonjoinder—and therefore the exclusion from the class counted—of persons held indispensable under rule 19, the court must have assumed that representative actions outside rule 23 are available under the federal rules.

Indeed, examination of rule 19, together with its history, reveals no necessity for making rule 23(a) the sole exception to compulsory joinder. True, rule 19's wording may support an argument of exclusiveness since its requirements are explicitly "subject to the provisions of rule 23."[48] But rules 19 and 23(a) were intended to restate the law as it existed under previous equity practice,[49] and future interest holders could be virtually represented under the old Equity Rules.[50] Moreover, situations exist in which federal courts are obliged to substitute a representative action not governed by rule 23 for actual joinder under 19. Thus, future interests are often created in persons not yet born; for example, a devise to *A* for life and then to his children gives a contingent remainder to any children later born to *A*, even though *A* is childless at the time of the gift.[51] Since any decision made in the absence of such unborn children will affect their interests, they have been held "indispensable."[52]

> of a client by an attorney or of a group of defendants in a class labor injunction suit, whereas the doctrine of representation is merely a statement of the circumstances under which a court feels that it is probable that substantial defendable interests of the unborn person will be defended through the fact that there is in existence a person whose interests are identical and who was given notice of the proceeding.

Reporters & Advisors, Restatement of Property, American Law Institute, Minutes of Conference at Birmingham, Nov. 18-25, 1933, p. 18 (papers in Yale Law Library).

47. Rule 23 is the federal equivalent of state class suits, see 3 MOORE ¶ 23.03, and includes a requirement of adequate representation, 3 MOORE ¶ 23.07.

48. FED. R. CIV. P. 19(a).

49. Wesson v. Crain, 165 F.2d 6 (8th Cir. 1948); System Fed'n 91, Ry. Employees Dep't v. Reed, 180 F.2d 991 (6th Cir. 1950); 3 MOORE ¶ 19.05. See advisory committee note to rule 23, in U.S. Supreme Court, *Rules of Civil Procedure for the District Courts of the United States*, S. Doc. No. 101, 76th Cong., 1st Sess. 240 (1939); RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE ABA INSTITUTE ON FEDERAL RULES 263 (Dawson ed. 1938) (remarks of Dean Charles E. Clark).

50. Montgomery v. Equitable Life Assur. Soc., 83 F.2d 758 (7th Cir. 1936); Stewart v. Oneal, 237 Fed. 897, 902 (6th Cir. 1917); see McArthur v. Scott, 113 U.S. 340 (1885); American Baptist Home Mission Soc'y v. Bowman, 274 Fed. 354, 356 (6th Cir. 1921); Dahlgren v. Pierce, 263 Fed. 841, 845 (6th Cir. 1920); Pugh v. Frierson, 221 Fed. 513 (6th Cir. 1915).

51. See, *e.g.*, Montgomery v. Equitable Life Assur. Soc., *supra* note 50, at 762; Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938); 4 SIMES & SMITH § 1804.

52. See Baker v. Dale, 123 F. Supp. 364, 370 (W.D. Mo. 1954) (Whittaker, J.); Mortimore v. Bashore, 317 Ill. 535, 148 N.E. 317 (1925); Irvin v. Clark, 98 N.C. 437, 4 S.E. 30 (1887).

But, because actual joinder under rule 19 is impossible, parties before the court have been permitted to represent them.[53] Admittedly, recognizing non-23 representation of persons whose joinder is clearly impossible does not compel acceptance of a virtual representation doctrine which permits nonjoinder of known, living, "indispensable" parties. Even in this situation, however, virtual representation may introduce desirable flexibility into federal joinder rules. For example, the existence of persons with no meaningful concern with the outcome of a lawsuit, but who hold future interests making them "indispensable," may prevent substantial holders from suing;[54] yet speedy settlement of disputes involving future interests benefits the community as well as the individuals intimately involved.[55]

Nonetheless, rule 23—in particular, its numerosity requirement—protects against misuse of representative actions, and adoption of other exceptions to rule 19's joinder provisions may conflict with an underlying policy of the federal rules. But a virtual representation exception in cases involving future interests, while allowing litigation to proceed at the instigation of a substantial holder, will adequately protect absentee interests. First, virtual representation should be allowed to take the place of actual joinder only when necessary to permit continuation of litigation.[56] Thus, although diversity jurisdiction generally assumes that a state forum is not a complete substitute for a federal court,[57] virtual representation might be denied when a state-court action is possible. Furthermore, representation of any kind is allowed only if the repre-

53. *E.g.*, Baker v. Dale, *supra* note 52, at 370; Stewart v. Oneal, 237 Fed. 897, 902 (6th Cir. 1917). For state cases, see Powell v. Childers, 314 Ky. 45, 234 S.W.2d 158 (1950); Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659 (Dist. Ct. App. 1942), *cert. denied*, 317 U.S. 670 (1943); Hunt v. Gower, 80 S.C. 80, 61 S.E. 218 (1908); 4 SIMES & SMITH § 1804; Roberts 582-87; Note, 37 KY. L.J. 96 (1948); Note, 48 HARV. L. REV. 1001 (1935).

54. See notes 4-5 *supra* and accompanying text.

55. What may be harmful to an individual property holder or litigant harms the community at large because it restricts alienation. This principle reflects a strong bias against dead hand control of property and the concentration of wealth, as well as the desire to foster as free a market in property as possible. If the sale or transfer or determination of interests in property could be blocked whenever future interests have been created in persons who cannot be joined, the principles of free alienability would be defeated. 1 SIMES & SMITH § 6; Schnebly, *Restraints Upon the Alienation of Legal Interests: I*, 44 YALE L.J. 961-66 (1935); see Bofil v. Fisher, 24 S.C. (3 Rich.) Eq. 1, 6 (1850) (discussion of need to bind absent holders).

56. Pugh v. Frierson, 221 Fed. 513 (6th Cir. 1915); see Moseley v. Hankinson, 22 S.C. 323 (1883); 4 SIMES & SMITH § 1809; 1 AMERICAN LAW OF PROPERTY § 4.90 (Casner ed. 1952); 3 *id.* § 13.13; Roberts 594-98; Note, 37 KY. L.J. 96, 102 (1948); *cf.* Geary v. Butts, 84 W. Va. 348, 99 S.E. 492, 494 (1919). *But see* Powell v. Childers, 314 Ky. 45, 234 S.W.2d 158 (1950); Longworth v. Duff, 297 Ill. 479, 130 N.E. 690 (1921); Edwards v. Harrison, 236 S.W. 328 (Mo. 1921).

57. 1 MOORE ¶ 0.60 [8.—4]; see Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) (the Constitution "entertains apprehensions" that state courts may not be impartial to non-residents).

sentative will adequately protect the interests of the absentees.[58] As an additional protection, a federal court could, under its broad equitable powers, require that notice be given to represented persons.[59] With these safeguards, virtual representation in future interests cases would not conflict with the policies behind 23's numerosity requirement, and seems a permissible and often beneficial exception to 19.

But *Erie R.R. v. Tompkins*[60] may prevent federal courts from adopting such a virtual representation exception. Some federal courts hold that whether a party is indispensable is "substantive" for *Erie* purposes and must therefore be determined by a state law.[61] And, since rule 19 makes indispensability and joinder correlative,[62] a court's decision to employ virtual representation to avoid compulsory joinder may be considered a holding on indispensability. But persons virtually represented are nonetheless "indispensable";[63] thus,

58. McArthur v. Scott, 113 U.S. 340 (1884); Fischer v. Porter, 263 Ky. 372, 92 S.W.2d 368 (1936); Weberpals v. Jenny, 300 Ill. 145, 133 N.E. 62 (1921); Downey v. Seib, 185 N.Y. 427, 78 N.E. 66 (1906); 4 SIMES & SMITH § 1804; GULLIVER, CASES ON FUTURE INTERESTS 290-91 (1959); Roberts 589-94.

59. Notice is not required in a "true" class suit where representation is adequate. *Cf.* Hansberry v. Lee, 311 U.S. 32, 40-44 (1941). But it has been suggested that the scope of the class action could be extended to permit a decree binding on absentees when the class is only united by a common question of law or fact, if notice were given to absentees. Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir. 1952). A dictum of Mr. Chief Justice Stone's in *Hansberry* supports the constitutionality of such a procedure. 311 U.S. at 43. Virtual representation is similar to the "true" class suit, and courts do not require notice to be given absentees. But because representation can never fully replace actual joinder, a court may feel that representation is never adequate until all known interest holders have been given notice and thus an opportunity to intervene. *Cf.* Mullane v. Central Hanover Nat'l Bank & Trust Co., 339 U.S. 306 (1950). Though a person "adequately represented" does not have a right to intervene, FED. R. CIV. P. 24(a)(2), representation which is adequate for virtual representation purposes may nevertheless be inadequate for intervention purposes, *Developments in the Law—Multi-Party Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 900 (1958). Virtual representation may be analogized to rule 23(a) for intervention purposes, however, in which case representation considered adequate to permit nonjoinder will normally be sufficiently adequate to preclude intervention. *Id.* at 941.

It has also been held that virtual representation is inapplicable when absentees hold vested interests. Card v. Finch, 142 N.C. 140, 54 S.E. 1009 (1906); 1 AMERICAN LAW OF PROPERTY §§ 4.38, 4.90 (Casner ed. 1952). *But see* 4 SIMES & SMITH § 1805.

60. 304 U.S. 64 (1938).

61. Strachan v. Nisbet, 202 F.2d 216 (7th Cir. 1953); Dunham v. Robertson, 198 F.2d 316 (10th Cir. 1952); Campbell v. Pacific Fruit Express Co., 148 F. Supp. 209 (D. Idaho 1957); *cf. Developments in the Law—Multi-Party Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 888-89 (1958). *Contra*, Hertz v. Record Publishing Co., 219 F.2d 397 (3d Cir. 1955); De Korwin v. First Nat'l Bank, 156 F.2d 858 (7th Cir. 1946); Jenkins v. Westinghouse Elec. Co., 18 F.R.D. 267 (W.D. Mo. 1955); Du Vaul v. Miller, 13 F.R.D. 197 (W.D. Mo. 1952); 3 MOORE ¶ 19.07. *Compare* Kroese v. General Castings Corp., 179 F.2d 760 (3rd Cir.), *cert. denied*, 339 U.S. 983 (1950) (following state law) (*semble*), *with* Hertz v. Record Publishing Co., *supra*, (federal law applies—citing *Kroese*).

62. See note 2 *supra* and accompanying text.

63. See notes 5 & 37 *supra*.

even if state law dictates indispensability, it may have no concern with nonjoinder by reason of representation. *Erie* may, however, further prohibit a federal court from entertaining an outcome-determinative representative action not available under state law.[64] But a federal doctrine of virtual representation used to avoid joinder of remote holders beyond the reach of process would be outcome-determinative only in the rare instance where state law provides no procedural device permitting continuation of an action when a remote holder cannot be joined.[65] Moreover, employment of virtual representation to avoid joinder of an insignificant future-interest holder who is amenable to service but whose presence in the action would destroy diversity might be regarded as a problem of federal jurisdiction—whether or not to allow expansion of diversity jurisdiction in this manner—outside the scope of *Erie*.

Use of virtual representation under 19 to avoid joinder does not necessarily support its use, as in *Matthies*, under rule 23(a) to prevent inflation of a class with remote holders. To prevent possible misuse of the class action, a court must be able to determine who has such a remote interest that he should not be counted. This determination cannot be made by judging remoteness against some absolute standard, but only after a comparison of the interests of all holders. In order to value the interest of any one holder a court will have to consider the total value of the property, the nature of the specific interest in that property, and the probability that the interest will become possessory.[66] Once the present worth of each interest is approximated, a court can then scrutinize the entire group of interest holders and determine the point at which interests become so slight that inclusion of persons beyond that point prejudices the right of more substantial holders to actual joinder. Virtual representation, however, will not help courts draw the line between inclusion and exclusion,

64. See Note, 68 YALE L.J. 1182, 1192-98 (1959).

65. State statutes provide a variety of devices to facilitate litigation when future interests holders cannot be joined. When the holders are unknown, they may be served by publication. See, *e.g.*, COLO. REV. STAT. ANN. §§ 118-10-20, 118-10-21 (1953); FLA. STAT. ANN. § 66.04 (1943); ME. REV. STAT. ANN. ch. 172, §§ 48, 50, 51 (1954); N.Y. REAL PROP. LAW § 360; WIS. STAT. ANN. §§ 32.04, 32.05, 75.50, 260.21(1), 276.02, 276.51 (1957). Many states provide for the appointment of a guardian *ad litem* to represent unborn and minor interest holders. *E.g.*, CONN. GEN. STAT. §§ 45-54 (1958); N.Y. REAL PROP. LAW § 107-g; N.Y. DECED. EST. LAW §§ 19(d), (e); PA. STAT. ANN. tit. 12, §§ 1695, 1699 (1953). When the action is for the sale, exchange, mortgage or lease of land, some statutes provide for the extinguishment of future interests held by unborn or unkown persons. *E.g.*, CONN. GEN. STAT. § 52-499 (1958); N.Y. REAL PROP. LAW §§ 107-c, 107-g, 107-i; VA. CODE ANN. § 8-703.1 (1950).

66. For a discussion of methods of valuation see 1 AMERICAN LAW OF PROPERTY § 2.25 (Casner ed. 1952) (life estates). The Internal Revenue Service issues tables which provide a means of valuating contingent interests for tax purposes. U.S. INTERNAL REVENUE SERVICE, TREASURY DEP'T, ACTUARIAL VALUES FOR ESTATE AND GIFT TAX (1955). Since complex dispositions such as that in *Matthies* involve contingencies and probabilities which cannot be computed, such as the probability that a life tenant will have no more children, any computations based on actuarial valuation will be only an estimate of the "actual" value of the interests.

since the doctrine bases its approval of nonjoinder on factors not relevant to a decision not to count. A contingent remainderman with a sufficient financial stake to be counted in a class action may be nevertheless virtually represented in a rule 19 action. Or, a contingent remainderman may have too slight an interest to be counted under 23, but if no need for representation exists, should be joined in a nonclass action.[67] Thus importation of a notion of virtual representation from a rule 19 context into rule 23 will not aid a court attempting to gauge remoteness of interest for purposes of counting.

Determination of remoteness must be made, therefore, after an independent analysis of the present value of the interests involved. But courts may hesitate to make differentiations among indispensable parties without invocation of precedent. A court refusing to count remote holders could therefore analogize its action to nonjoinder under rule 19 and explain its decision, as did the Second Circuit, as a variation of the traditional equitable doctrine of virtual representation. That doctrine recognizes the hierarchical structure of future interests, subordinating the rights of lesser interests to those of highly ranked holders. Further, if an exception reflecting this hierarchy can be carved out of joinder rules, a similar exception can be read into 23's numerosity requirement. And adoption of virtual representation under rule 23 would not require a "subinfeudation" of indispensable parties in every class action;[68] virtual representation under rule 19 would be limited to future interest cases, so that incorporating this doctrine into rule 23, although as a doctrinal tool in the determination of remoteness, should ensure a similar restriction.[69] On the other hand, reliance on the words "virtual representation" to allow exclusion under 23 causes confusion, and may result in erroneous application of joinder precedents to the exclusion problem. And courts may be reluctant to engraft a doctrine, heretofore used to avoid joinder and thus facilitate litigation, on rule 23, where it is to be used to prevent a suit. But whatever name is ultimately applied, *Matthies* seems correct in recognizing an exclusion principle as a necessary complement to rule 23's numerosity requirement.

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67. See text at note 56 *supra.*

68. *Contra,* Matthies v. Seymour Mfg. Co., 2 FED. RULES SERV. 2d 23a.13, Case 1, at 15 (2d Cir. Nov. 24, 1959) (dissenting opinion of Clark, J.) (denial of petition for hearing *en banc*).

69. Judge Clark, in his dissent, felt that the court's holding, if broadly applied, would severely curtail the usefulness of rule 23(a), and saw no way to keep a virtual representation exception within tolerable bounds. *Id.* at 15-16. But the disparity of interests involved in *Matthies,* while an inherent aspect of disputes concerning future interests, will not generally be found in other areas of the law. Of course, cases may be imagined in other areas which would raise equally acute problems, but courts there may deny exclusion, in order to limit the exclusion principle to those types of situations in which disparity of interest will be most exaggerated and will occur most frequently.