

INDISPENSABLE PARTIES AND THE PROPOSED AMENDMENT TO FEDERAL RULE 19

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In March, 1964, the Committee on Rules of Practice and Procedure of the Judicial Conference published a draft of proposed amendments to the Federal Rules of Civil Procedure.¹ These proposals were prepared by the Judicial Conference's Advisory Committee on Civil Rules, and their publication for the purpose of securing comments by bench and bar implies no endorsement of the proposals by the Committee on Rules of Practice and Procedure, the Judicial Conference, or the United States Supreme Court which, under its rule-making power,² would ultimately promulgate any changes it deemed warranted. This article will present a detailed appraisal of one of the most significant proposals, a revision of Rule 19, dealing with necessary joinder of parties.

I

Long before the promulgation of the Federal Rules in 1937, principles of required joinder of parties had evolved in our jurisprudence. The concepts recognized in early nineteenth century decisions of the United States Supreme Court have changed little from that time. In these decisions, the requirements of joinder were held to turn on the relationship which a nonjoined person (that is one not made a party) had to a pending action. Thus in certain situations the interest of the absent person was held to be so closely related to a pending action that he *must* be joined in the action. In other situations, it was held that the interest of an absent person was so closely related to a pending action that he *should* be joined in the pending action, but if his joinder could not successfully be accomplished, it was excused. In these early Supreme Court opinions, largely in equity cases, absent persons who must be joined were termed "indispensable" parties. Those persons who should be joined, in the absence of supervening circumstances, were termed "necessary" or "conditionally necessary" parties.³ The most influential American

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1. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE (March, 1964), reprinted in 34 F.R.D. 325-410 (1964) [hereinafter cited as PRELIMINARY DRAFT].

2. 28 U.S.C. § 2072 (1958).

3. There is another category of parties whose joinder is *not* required. Thus persons whose interest is sufficiently related to the subject of the action that they *might* have joined as plaintiffs or been joined as defendants in the action, but whose absence does not

case dealing with required joinder of parties was the Supreme Court's 1854 decision in *Shields v. Barrow*.⁴ There, in an action brought in federal court to rescind a compromise and settlement agreement which had been reached in a suit to recover amounts unpaid for the purchase of property from him, plaintiff joined two of the endorsers of the original notes securing the purchase price, who also were parties to the settlement agreement, but did not join four other endorsers, or the purchaser of the property, all of whom were also parties to the settlement agreement. Had the absent parties, whose citizenship coincided with the plaintiff's, been joined, the federal court would have lost diversity jurisdiction under the *Strawbridge-Curtiss* rule.⁵ The Supreme Court reversed a decree for the plaintiff,⁶ holding that in the absence of these "indispensable" parties, the court below could not litigate the validity of the compromise agreement.⁷ The Court set out a formulation which has been referred to ever since. Necessary parties were described as:

Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.⁸

Indispensable parties were defined as:

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.⁹

Thus, in *Shields v. Barrow* the nonjoined parties were "indispensable" because to do complete justice the contract had to be undone as to all of the

affect the action, are called "proper" parties. See *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280 (1868); *Williams v. Bankhead*, 86 U.S. (19 Wall.) 563 (1874); 3 MOORE, FEDERAL PRACTICE ¶ 19.02 (2d ed. 1963) [hereinafter cited as MOORE].

4. 58 U.S. (17 How.) 130 (1854).

5. See text accompanying note 133 *infra*.

6. The Court cited the earlier decision of *Russell v. Clarke's Executors*, 11 U.S. (7 Cranch) 69 (1812).

7. Said the Court:

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit, yet each of them was an indispensable party to a bill for the rescission of the contract.

58 U.S. at 139.

8. 58 U.S. at 139.

9. *Ibid.*

parties, not only to the two who were joined.¹⁰ Therefore, the Court said, "it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, . . . the original bill ought to have been dismissed."¹¹ Thus the Court required dismissal of the action since indispensable parties could not successfully be joined, regardless of the effect this might have on the prosecution of the petitioner's claim.

In the definition of "necessary" parties set out in *Shields v. Barrow*, the Court stressed the rule that an equity court attempts to settle entire controversies, bringing before it all those persons having an interest in the outcome of the litigation. However, if the interests of the absent persons are separable from those of the parties before the court, and the court can do justice between the present parties without affecting the absent persons, their joinder is not absolutely required; if their joinder is not feasible, the action may proceed without them.¹² On the other hand, the action may not proceed in the absence of an indispensable party. And an indispensable party is defined as one who not only is interested in the outcome of the litigation, as is a necessary party, but one whose interest is such that his interests will be "affected" by any possible decree which the court could enter. He may also be indispensable if, without his presence, "the termination of the action may be wholly inconsistent with equity and good conscience." The first requirement seeks to pro-

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

Id. at 139-40.

11. *Id.* at 141.

12. In *Washington v. United States*, 87 F.2d 421, 427-28 (9th Cir. 1936), the following test to determine whether an absent party is a necessary party or an indispensable party was prescribed:

From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

See also *Stevens v. Loomis*, 334 F.2d 775 (1st Cir. 1964).

tect the absent person from litigation of his interests without his presence.¹³ The second looks to the protection of the parties presently before the court, and society in general, from repetitious, abortive, and vexatious litigation. Thus a person may be deemed to be an indispensable party, if, without his presence, a defendant in the present litigation will be subjected to double vexation with the possibility of inconsistent results. The absent person must be joined so that he will be bound by the outcome of the present action.¹⁴ Or,

13. See *Washington v. United States*, *supra* note 12; *McShan v. Sherrill*, 283 F.2d 462, 463-64 (9th Cir. 1960):

The complaint filed by appellees asked for a declaration that they owned certain land, including land which may be owned by persons not before the court. The district court granted the relief requested, and thereby placed a cloud upon the title of the absent landowners. A decree so affecting the interests of persons not joined as parties is improper. . . . In *State of Washington v. United States* . . . , the United States had brought an action against lessees of the State of Washington who allegedly were trespassing on lands which the United States claimed had accreted to an island owned by the federal government. The State, lessor of the disputed lands, had not been joined as a defendant, and its motion asking leave to intervene had been denied. This court held that, although a lessor's interest is distinct and severable from that of the lessee, and although the court could have rendered justice as between the parties in the absence of the State of Washington, said State was an indispensable party since the decree would have an injurious effect upon its interests even though it would not be *res judicata* as against the State. The decree rendered by the district court in the instant case has a like injurious effect upon the interests of absent landowners. They were, therefore, indispensable parties who should have been joined.

Also see *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); *Franz v. Buder*, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927) (action brought by remainderman against trustee of testamentary trust to quiet title to his remainder interest and for other relief against the trustee — life tenant, other remaindermen and co-trustee are indispensable parties); *Roos v. The Texas Co.*, 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1947), *cert. denied*, 329 U.S. 782 (1946); 56 YALE L.J. 1088 (1947).

14. See, *e.g.*, *Davenport v. Dows*, 85 U.S. (18 Wall.) 626, 627 (1874), holding that a corporation is an indispensable party in a shareholder's derivative action, brought by a shareholder of a corporation to vindicate a right held by the corporation. The Court said:

Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.

Also see *Young v. Powell*, 179 F.2d 147 (5th Cir.), *cert. denied*, 339 U.S. 948 (1950).

However, the possibility of another suit against a present defendant by an absent person does not always lead to the absent person being declared indispensable. Thus in *Choc-taw & Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), it was held that the United States was not an indispensable party to a suit brought by Indian Nations to recover possession of and establish title to certain lands

the absent person may be one in whose absence the relief sought would be abortive, useless, or incomplete.¹⁵

Under the rule of *Shields v. Barrow*, where an absent indispensable party cannot be brought before the court, the action must be dismissed, even if this greatly inconveniences the present plaintiff, or leaves him entirely without a forum in which his action can be heard.¹⁶ This indispensable parties rule

though the United States would not be bound by the outcome of the suit and could bring a similar action to establish the nations' title to the land. The court held that, whether or not the United States is declared to be an indispensable party, the fact that it has not brought suit and cannot be compelled to bring suit would result in a continuing cloud on defendants' title, and that the equities favor the right of the nations to bring suit, though this subjects the defendants to the possibility of having to defend two lawsuits. And in *Wesson v. Crain*, 165 F.2d 6, 10 (8th Cir. 1948), it was held that two of several beneficiaries of a business trust could maintain an action in federal court to remove a trustee for misconduct. The court said:

The strong probability that any beneficiary of this trust who brings a groundless action against either of the trustees will ultimately find himself charged upon the books of the trust with any expense of litigation to which the trustee is needlessly put, should be sufficient protection against any threat of a multiplicity of suits seeking removal of the trustee.

15. See *Kendig v. Dean*, 97 U.S. 423 (1878). An equity action was brought against an individual defendant to compel him to transfer to complainant's name on the books of a corporation certain shares of stock of the corporation which complainant claimed he owned and which defendant was alleged wrongfully to have transferred to his own name on the corporation's books. The corporation, which had not been made a party to the action, was held by the Supreme Court to be an indispensable party to the action. Said the Court:

Suppose that the court had rendered a decree in the exact language asked for, and Dean should be attached for contempt in refusing to perform it. He could answer very truly that he was not the gas-light company, and had no control of its books or its officers; that he had no means of compelling it to make transfer of this or any other stock on its books; and that it was a corporation governed by its own officers, and was not bound by the decree of the court, and would not perform it. The court would find itself in the position of having made a decree it could not enforce, of attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit.

On the other hand, if the company had been a party to the suit, and the complainant had sustained the allegations of his bill by proofs, the company could have been compelled to restore him to the ownership of the stock on its books, and to treat him in future as one of its stockholders, Dean and it would have been bound by the decree. As it is, the specific relief sought is not within the power of the court, nor, in the absence of the company, is any relief within the equity jurisdiction of the court which can arise out of the frame of the bill.

97 U.S. at 425.

Cf. *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), *cert. denied*, 339 U.S. 983 (1950), discussed in text at note 112 *infra*, where it was held that, in a suit to compel a corporation to issue a dividend, the majority of the members of the corporation's board of directors were not indispensable parties, since the corporation was a party and an effective decree could be rendered without the presence of the directors.

16. See *Franz v. Buder*, 11 F.2d 854, 857 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927). ("Counsel for plaintiff say to hold that such persons were indispensable parties will leave him wholly without a remedy in the premises, for the reason that they are not

of *Shields v. Barrow* and the categories of joinder requirements it laid down have been followed in numerous cases in the federal courts.¹⁷

II

The terminology of joinder requirements grew primarily in equity cases, and stems largely from equitable doctrines; nevertheless, long before the adoption of the Federal Rules of Civil Procedure, a similar theory had entered the realm of law actions. These concepts were applied in law actions generally in terms of "joint" interests. Thus in an action to enforce a contract all joint obligees were required to be before the court; if they could not be, the action failed.¹⁸ On the other hand, if joint obligors were sued, and the joinder of some of the joint obligors could not be obtained, the action could be maintained against those joint obligors whose joinder could be secured.¹⁹ The latter holding was placed upon a reading of a federal statute²⁰ passed in 1839.²¹ Thus, some joint interests absolutely required joinder, while others required joinder only in so far as it was feasible. The development in the law courts was roughly similar to the indispensable parties-necessary parties dichotomy which had developed in equity cases. With the adoption of the Federal Rules of Civil Procedure in 1938, the former separate law and equity

residents either of the State of Missouri or the state of Kansas where plaintiff resides. Such a result would not excuse the failure to join an indispensable party . . .").

17. See, e.g., *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280 (1868); *Williams v. Bankhead*, 86 U.S. (19 Wall.) 563, 571 (1874); *Kendig v. Dean*, 97 U.S. 423 (1878); *Roos v. The Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954).

18. *Farni v. Tesson*, 66 U.S. (1 Black) 309, 315 (1862); *National City Bank v. Harbin Elec. Jointstock Co.*, 28 F.2d 468 (9th Cir. 1928) (suit against bank by one joint depositor should have been dismissed for failure to join other joint depositor, though absent party was not an inhabitant of or found within the District of China); *McAulay v. Moody*, 185 Fed. 144 (C.C.D. Ore. 1911). Moore states:

This rule affords protection to the obligor and generally works no hardship upon the obligees, since normally it is to the interest of the obligees to join in the enforcement of their joint right, and where one refuses he may be made a party defendant or, we believe, an involuntary plaintiff in a proper case.

3 MOORE ¶ 19.11 at 2169.

19. *Clearwater v. Meredith*, 62 U.S. (21 How.) 489 (1859); *Inbusch v. Farwell*, 66 U.S. (1 Black) 566 (1862); *Camp v. Gress*, 250 U.S. 308 (1919).

20. Act of Feb. 28, 1839, ch. 36, § 1, 5 Stat. 321:

[W]here, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit, between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit.

21. See cases cited in note 19 *supra*. And see *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 286 (1868).

procedures were united into a single civil procedure for the federal courts.²² The language of Rule 19, entitled "Necessary Joinder of Parties," (set out in the margin²³) quite naturally reflected this union.

The first sentence of subdivision (a) of Rule 19 states, "Subject to the provisions of Rule 23²⁴ and of subdivision (b) of this Rule, persons having a joint interest shall be made parties . . ." The original Advisory Committee Note to subdivision (a) tells us that this phrase was derived from similar phraseology in former Equity Rule 37.²⁵ However, the analogous phrase in Equity Rule 37 read, "persons having a united interest must be joined. . ."²⁶ Why the change from "united interest" to "joint interest"? And why is the first sentence of Rule 19(a) conditioned by Rule 19(b)?

The answer would seem to be that since the Federal Rules were uniting the practice formerly followed in separate equity and law actions, the draftsmen substituted the generic term "joint"²⁷ for the term "united" which

22. FED. R. CIV. P. 1 & 2.

For the history of the adoption of the Federal Rules and their later development see 1A MOORE §§ 0.501-0.528; *id.* at §§ 0.529-0.531 (Supp. 1963).

23. (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 persons.

(c) SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

This language is unchanged since the original adoption of the rule.

24. Federal Rule 23 deals with class suits. Under its provisions the joinder of otherwise indispensable parties may be dispensed with, where they are "so numerous as to make it impracticable to bring them all before the court," and a class suit can be brought joining one or more of their number who adequately represent the class. See 3 MOORE §§ 23.03-.08.

25. The Committee Note of 1937 to Rule 19 is set out in 3 MOORE ¶ 19.01[2].

26. EQUITY R. 37, 226 U.S. 631 (1912).

27. Similar language was used in equity actions. Thus all joint obligees were indispensable parties to an equity action to enforce the right held jointly. See *Himes v. Schmehl*, 257 Fed. 69, 71 (3d Cir. 1919) ("The rule that, where the contract is joint, so also is the remedy, likewise prevails in equity").

See also *Gregory v. Stetson*, 133 U.S. 579 (1890).

was associated only with the equity rule. In actions at law, however, a "joint interest" did not always necessitate absolute joinder; the joinder of joint-obligor defendants could be dispensed with when such joinder was not possible.²⁸ The committee therefore conditioned 19(a) on 19(b)²⁹ which in turn incorporated language similar to the Act of 1839³⁰ that the courts had read as permitting the exception that joint-obligor defendants could sometimes be dispensed with. This language, together with provisions taken from the Equity Rules dealing largely with conditionally necessary parties, formed the basis of Rule 19(b).

Reading subdivisions (a) and (b) of Rule 19 together, with their derivations considered, we find that they are supplementary, not mutually exclusive. Thus, under Rule 19, persons holding joint interests must be joined, except when under practice prior to the adoption of the Federal Rules, their interests would have conditionally but not absolutely necessitated their joinder. Moreover, subdivision (b) is not solely a union of the prior rule at law as to the joinder of joint obligors, with the equity provisions for the joinder of conditionally necessary parties. While it does deal primarily with conditional joinder, subdivision (b) begins: "When persons who are not indispensable, but who ought to be parties . . ." The negative implication of this phrase must necessarily be that persons holding interests which prior to the adoption of the Federal Rules would have absolutely required their joinder — i.e. indispensable parties — must be joined. Thus, the term "joint interest" in subdivision (a) need not be considered the sole determinant of interests absolutely requiring joinder. This has been a source of misunderstanding of the rule,³¹ and this misunderstanding is one of the bases of the attack on the rule by the present Advisory Committee.³² Cases have construed the term

28. See text accompanying notes 19-21 *supra*.

29. The Committee Note to Rule 19(b), set out in 3 MOORE ¶ 19.01[2], states:

For the substance of this rule see Equity Rule 39 (Absence of Persons who Would be Proper Parties) and USC, Title 28 § 111 (When part of several defendants cannot be served); *Camp v. Gress*, 250 U.S. 308 (1919). See also the second and third sentences of Equity Rule 37 (Parties Generally — Intervention).

30. The Committee Note, as set out in note 29 *supra*, refers to 28 U.S.C. § 111 (1940). That provision is derived, almost verbatim, from the Act of February 28, 1839, which is set out in note 20 *supra*. The reference is made unmistakably clear by the inclusion of the citation to *Camp v. Gress*, 250 U.S. 308 (1919). The opinion in that case stated: ". . . this is an action on a joint contract, and one of the several joint-contractors is not an indispensable party defendant in such a suit." *Id.* at 317.

In the 1948 revision of the Judicial Code, the Reviser's Note to 28 U.S.C. § 1391 states:

Provision in said section 111, that a district court may proceed as to parties before it although one or more defendants do not reside in the district, and that its judgment shall be without prejudice to such absent defendants, was omitted as covered by Rule 19(b) of the Federal Rules of Civil Procedure.

31. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 346 (1957); COMMITTEE COMMENT TO MICH. CT. R. ANN. 205 (1964).

32. PRELIMINARY DRAFT 86.

“joint interest” in subdivision (a) as incorporating the term “indispensable parties.”³³ While this result is not improper, understanding of Rule 19 would have been enhanced had the courts construed subdivisions (a) and (b) as a unit. Manifestly, there are interests which cannot be characterized as joint interests, without stretching language to its breaking point, yet which traditionally have been held absolutely to require joinder. It is when the “indispensable party” language of subdivision (b) is added to the “joint interest” language of subdivision (a) that Rule 19 is seen to encompass the joinder requirements which prevailed in common law and equity actions in the federal courts prior to the merger brought about by the Federal Rules.³⁴

33. See, *e.g.*, *United States v. Washington Institute of Technology, Inc.*, 133 F.2d 25, 26 (3d Cir. 1943) (“Rule 19(a) . . . requires that those having ‘a joint interest shall be made parties . . .’ This means those who were indispensable parties prior to the rules.”); *Young v. Garrett*, 149 F.2d 223, 228 (8th Cir. 1945); *Shell Dev. Co. v. Universal Oil Prod. Co.*, 157 F.2d 421 (3d Cir. 1946); *Joscar Co. v. Consolidated Sun Ray, Inc.*, 28 F.R.D. 351, 352 (E.D.N.Y. 1961) (“The interpretation given to the phrase ‘joint interest’ is broader than ‘joint obligation’ or ‘joint tenancy.’ The term includes indispensable parties.”).

34. Thus, see the statement of Dean, later Chief Judge, Charles E. Clark, the Reporter of the Advisory Committee on Civil Rules which drafted the Federal Rules, to the Institute on Federal Rules in Cleveland, July 21-23, 1938.

Rule 19 deals with the question of necessary joinder, sometimes spoken of as compulsory joinder of parties. In cases where parties must be joined, the general common law view was that parties having joint rights must sue or be sued together, while in equity there was the case of indispensable parties who always must be joined.

The first of our rules is subdivision (a), a general provision, requiring the joinder of persons having a joint interest, subject to the provisions of Rule 23 (a rule dealing with the exception of class or representative suits) and of the next subdivision of this rule, of which I am now going to speak. . . .

Now, the next subdivision is an attempt to incorporate, by way of statements, provisions both from the equity rules and from the judicial code, for the statutes which are designed to give the court power to go forward with a case, even though important parties are not present.

In a great number of different instances the only situation where the court will not go ahead under these provisions is in the case of what are called in equity indispensable parties, and we felt we could not redefine those terms or change that situation. I think the whole trend of federal decisions has been to cut down the number of parties that are considered indispensable, but that is a matter of judicial decision, rather than for procedural rules.

You will recall that the cases have made a difference between necessary parties and indispensable parties. Necessary parties are those whose presence is necessary if it can be obtained but without the necessity of dismissing the suit if it cannot be obtained. Indispensable parties are those that are absolutely necessary, and the court must stop if it can't secure jurisdiction over them.

So the first provision is for persons who are not indispensable but who ought to be parties if complete relief is to be accorded between those already parties — which is substantially a paragraph [paraphrase?] of the judicial definitions of necessary parties — when such persons 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

III

There was no widespread dissatisfaction with the practical operation of Rule 19.³⁵ The Advisory Committee did not point to a single case which it felt was wrongly decided because of the language of Rule 19. Instead the committee alluded to the "literature"³⁶ which was said to demonstrate how the rule should be "reformed." The proposed rule and the Committee Note thereto, show that the committee was profoundly influenced³⁷ by Professor John Reed's *Compulsory Joinder of Parties in Civil Actions*³⁸ which advocates an abandonment of the *Shields v. Barrow* approach to required joinder.

Initially Professor Reed contends there is no "jurisdictional" reason for decisions holding that in the absence of certain persons a court cannot hear a case.

made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear.

It then goes on: "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."

You will notice, as I just indicated, that we have not attempted to make that rule apply to indispensable parties.

PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 259-60 (Cleveland, Ohio, July 21, 22, 23, 1938).

See also *Wesson v. Crain*, 165 F.2d 6, 8 (8th Cir. 1948) ("Rule 19 made no change in existing law relative to compulsory or dispensable joinder."); *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961).

35. The Committee Note to the proposed rule states:

Although these difficulties cannot be said to have been general, analysis of the cases shows that there is good reason for attempting to strengthen the rule. The literature also indicates how the rule should be reformed.

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36. See note 35 *supra*.

37. The Advisory Committee was also influenced by Prof. Geoffrey Hazard's *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961), a brilliant study of 17th, 18th, and early 19th century cases and treatises dealing with joinder requirements. Hazard maintains that the concept of indispensable parties was unknown to the early equity practice. Instead, joinder requirements were limited to what we now call necessary or conditionally necessary persons. He contends that the indispensable parties rule, as it is known in this country, need never have evolved. From this, the Advisory Committee has apparently concluded that its proposals are a return to the fundamental principles of "the older equity practice." See PRELIMINARY DRAFT 86.

The Committee Note also cited: N.Y. Temporary Comm. on Courts, *First Preliminary Rep.*, Leg. Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, *Twelfth Ann. Rep.*, Leg. Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, *Final Report*, Pt. III, p. 69 (1960); Note, 65 HARV. L. REV. 1050 (1952); *Developments in the Law — Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 879 (1958); MICH. GEN. COURT RULE 205 (effective Jan. 1, 1963); N.Y. CIV. PRAC. LAW & RULES § 1001 (effective Sept. 1, 1963).

As to the New York and Michigan joinder rules, see note 88 *infra*.

38. 55 MICH. L. REV. 327 (1957).

Though a court cannot bind a person not actually before it, his absence does not deprive the court of jurisdiction over those present. He states:

But what about *B*, who is present as a defendant? Plaintiff is not seeking relief against *A* [the absent person], but against *B*. Is the action jurisdictionally defective as to *B*? Courts sometimes suggest that it is, and there, precisely, lies a major difficulty. To the extent that a court's decision affects the parties who are present there is no jurisdictional defect. And as to the parties who are absent, plaintiff of course will not seek relief against them; any such request would be summarily denied. If the court cannot dispose of the claim against *B* without ruling on the rights of *A* at the same time, the court ordinarily ought not to go on but should dismiss. Indeed, if it does go on, the adjudication is void as to *A*, being truly defective in the jurisdictional sense; the court is powerless to bind a person by its judgment in a case in which he is not a party or appropriately represented. It must ever be remembered, however, that the jurisdictional defect relates to *A* and not to *B*, and that refusal to proceed to a claim against *B* is only ancillary or consequential to the problem as to *A*. There is no jurisdictional reason whatever for refusing to render judgment as to *B*.³⁹

Moreover, Professor Reed feels that *Shields v. Barrow*⁴⁰ was harmful, not for its statement of principles, but for its reliance on such terminology as "separable rights." The Court, he maintains, did not adequately assess the extent to which the decree in that case would factually have affected the absent parties nor did it search for ways to shape a decree which would have protected the absent parties, while allowing the plaintiff to vindicate his rights, such as a decree conditioned upon plaintiff's securing a similar decree in another action against the absentees in the present action. Instead, the Court merely said that the rights of the absentees were "inseparable" from those of the present parties and that therefore the court below could make no decree in their absence. This decision, Reed maintains, has led courts to depend too often on mechanical formulas for determining whether an absent party must be joined. Courts have dismissed actions in which, if they had looked to the interests involved, they could have fashioned decrees that protected the interests of the absent person whose joinder could not successfully be obtained, while allowing the action to be prosecuted between those presently before the court. Moreover, even where courts have actually determined the joinder issue in terms of the underlying interests, and reached a "proper" result, too often the use of labels has obscured the process. Reed summarizes his thesis:

Because of the sometimes unfortunate consequences of heavy reliance on *Shields v. Barrow*, both holding and method, the classification in that famous case should be abandoned in favor of an informal, rational balancing of competing interests case by case — interests relating to the helplessness of plaintiff, double vexation of defendant, the possible effect

39. See *id.* at 332-33.

40. See text accompanying notes 4-11 *supra*.

on absent persons, the convenience of the court, and the "equity and good conscience" — in short, the justice — of the end result.⁴¹

In place of joinder requirements rooted in concepts of the power of the court to act, Reed suggests another "formulation of the guiding principles in required joinder cases."⁴² He states that joinder requirements should be recognized as serving certain "interests." Thus: "There are three classes of interests which may be served by requiring the presence of additional parties in an action: (1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice."⁴³ Under Reed's proposed formulation, in determining whether an absent person must be joined, the court would balance these interests against the interest of the present plaintiff in securing as much relief as possible. Thus, with regard to the problem of a decree which might affect the interests of an absent person, he maintains that since a decree cannot "legally" affect the rights of an absent person, it is only to the extent to which a decree rendered in the absence of an interested person will "factually" affect him that the court should be concerned. And this factual effect should be balanced against the interest of the plaintiff:

In short, a court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to avoid an adverse factual effect on the interest of absent persons; on the other is the policy of seeking to give a petitioner as much merited relief as possible . . . [T]he new statement . . . implies, also, that there may be devices available short of an outright judgment for plaintiff or defendant which will not materially harm *A* [the absent person] and yet provide a useful determination.⁴⁴

Because he feels the other "interests" served by joinder requirements are also not rigid requirements, but relative values subject to being outweighed if there are sufficient countervailing considerations, a similar process of balancing would apply to them:

As to the second principle, instead of emphasizing a court's desire to do justice entire rather than by halves — both to avoid double vexation and to conserve judicial resources — the proposed statement calls attention to an obligation on the court to try to devise a way to proceed in the excusable absence of *A* [the absent person] if, otherwise, plaintiff will be unable to obtain a judicial determination of the controversy between himself and defendant.⁴⁵

Professor Reed's work is disarming. Undoubtedly there is much to be learned from his appraisal of the cases and of the terminology courts have used in determining whether the joinder of an absent person is absolutely or conditionally required, and from his suggestions for conditional decrees. But there

41. Reed, *supra* note 38, at 356.

42. *Id.* at 336.

43. *Id.* at 330.

44. *Id.* at 338-39.

45. *Id.* at 339.

is a certain ambiguity in his "proposed formulation." On the one hand it can be read as an adjuration to the courts to seek all possible means of allowing a case to proceed when the alternative is to leave the plaintiff with no forum in which his rights may be adjudicated. To this end the court is to look to practical considerations, determine how much real effect there will be on present parties, on the court system, and on absent persons if the case proceeds without the joinder of the absent persons, and make every effort to shape a decree which will give maximum protection both to the absent persons and the present parties, while granting the plaintiff as much merited relief as possible. If this is what his formulation means, there can be little argument with it. Basically this would not alter the indispensable parties rule as we know it; it would merely encourage the court to appraise the facts before determining that an absent person is indispensable.

But his formulation is subject to a second reading, to which some of his language gives credence — that all the "interests" which joinder requirements are said to serve are relative to the interest of the present plaintiff. If the proposed formulation has this additional meaning, then it does represent a radical departure from the present indispensable parties rule. The indispensable parties rule has been administered in the federal courts as an absolute, not a relative, rule. When the courts have determined that an absent person is indispensable, either he must be joined, or the action must be dismissed, regardless of the benefit⁴⁶ or burden⁴⁷ to the parties. Granted that a court is free to weigh all the factors, Reed may be taken to imply that having weighed all these factors, a court is then free to proceed without an absent person who would be affected by the decree, no matter how it was shaped, if the court decides on balance that it would be more convenient and fairer to go on without the absent person than to dismiss:

This [new formulation] is fundamentally and materially different from the rigid jurisdictional argument. It is a statement of policy, not unrelated to considerations of due process, in the light of which the court may seek to do maximum justice in any given situation. Although it indicates that the prospect of an adverse effect upon the missing party is a ground for refusing to proceed in his absence, it does not deny that there may, nevertheless, be an opposing and perhaps off-setting consideration which presents appealing arguments in favor of going ahead with the case.⁴⁸

46. There are times when the indispensable parties rule has worked to the *advantage* of the plaintiff. Thus courts have reversed decrees on the merits that were rendered against the plaintiff, where an indispensable party had not been joined. See, *e.g.*, *Kendig v. Dean*, 97 U.S. 423, 426 (1878), discussed in note 15 *supra*. ("The Circuit Court, although it dismissed the bill, did so on the merits, and that decree would bar the complainant from any other suit in which Dean's right to the stock might be contested. It should have been dismissed without prejudice, for want of a necessary party who was not before the court."); *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280 (1868); *Gnerich v. Rutter*, 265 U.S. 388 (1924); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946); 56 *YALE L.J.* 1088 (1947).

47. See note 16 *supra*.

48. Reed, *supra* note 38, at 336.

Similarly, would the court be free, within the bounds of its "discretion," to proceed whatever the risk of double vexation or multiple litigation? Would the tests to be applied in determining whether a court had exceeded its discretion in proceeding without an absent person be similar to the present indispensable parties rule, or would casting the rule in terms of discretion allow greater latitude to the court and a stronger presumption that its solution to the joinder problem was correct?

Reed does not suggest the answers to these questions. Moreover, his work takes little or no cognizance of those cases in which absent persons are held to be indispensable because, without their joinder, an effective decree cannot be fashioned, as in the case of *Kendig v. Dean*⁴⁹ where the absent corporation was held indispensable because the equity court could not render an enforceable decree unless it could bind the corporation. Strictly speaking, in such cases joinder is not required for the protection of the present plaintiff or a present defendant, though these cases might fall under Reed's characterization of "the social interest in the orderly, expeditious administration of justice." However, there seems little room here for the application of his "balancing."

There are many theoretical problems inherent in joinder requirements as we know them today. No doubt some of these problems are caused by the imprecision of language used by courts in ruling on joinder questions. But before a change can be made in the indispensable parties rule, we must come to a fuller understanding of the theory on which that rule rests. Reed begins to assay some of the questions but by no means all of them.

Reed states that since an absent person cannot legally be bound by the outcome of litigation to which he has not been made a party, his absence cannot affect the "jurisdiction" — the power or competency — of the court to render judgment as to those persons present before the court. He says: "Although it seems now well settled that the party defect is not jurisdictional, the erroneous use of the term persists."⁵⁰ This contention has some foundation. Some courts have simply relied upon the term "jurisdiction" when dealing with the absence of an indispensable party,⁵¹ in spite of the fact that *Shields v. Barrow* specifically rejected this course.⁵² Other courts have failed to distinguish between lack of jurisdiction — i.e., power — if an indispensable party is not joined and loss of subject-matter jurisdiction, such as diversity jurisdiction in the federal courts, if an indispensable party were in fact joined.⁵³

49. 97 U.S. 423 (1878); see note 15 *supra*.

50. Reed, *supra* note 38, at 348.

51. See, e.g., *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258, 261 (S.D. N.Y. 1955) ("Unless the absence of an indispensable party is subsequently cured by his joinder, dismissal must result. Such defect is jurisdictional.").

52. See note 104 *infra*. See also *Bry-man's, Inc. v. Stute*, 312 F.2d 585, 587 (5th Cir. 1963).

53. Standing alone as it sometimes does, the phrase "the action is [or should be] dismissed for lack of jurisdiction because of the absence of indispensable parties" does not

Thus without distinguishing the many ways in which the word "jurisdiction" can be used, the citation of cases which say that nonjoinder of an indispensable party is or is not "jurisdictional" tells nothing.

From his premise that joinder is not a jurisdictional issue Reed seems to reason that joinder requirements are susceptible to flexibility based in part on considerations of "equity" and convenience. While the language of some adequately explain the holding or the reasoning leading to the determination. Thus in *Kendig v. Dean*, 97 U.S. 423 (1879), the Supreme Court stated:

We are of the opinion that the Circuit Court had no jurisdiction to try the case, because the gas-light company was an indispensable party to the relief sought in the bill, or to any relief which a court of equity could give.

At least two possible interrelated, though distinct, bases for this holding can be gleaned from the Court's opinion. The action was brought by *Kendig*, a citizen of Tennessee, against *Dean*, a citizen of Ohio. Presumably the action was in the federal court on the basis of diversity of citizenship. Plaintiff sought to compel the individual defendant to transfer to plaintiff's name, on the books of a corporation, certain shares of stock which plaintiff claimed he owned. Defendant was alleged wrongfully to have caused the ownership of the shares on the company's books to be transferred from plaintiff's name to defendant's. The corporation, which was a citizen of Tennessee, was not made a party to the action. The Supreme Court held that the corporation was an indispensable party to the action, since only in the presence of the corporation could an enforceable decree be rendered, because only the corporation could control its own books. The Court said:

As it is, the specific relief sought by plaintiff is not within the power of the court, nor, in the absence of the company, is any relief within the equity jurisdiction of the court which can arise out of the frame of the bill.

Id. at 425.

Presumably the Court meant that without the presence of the corporation the federal court had no power to act. However, the Court might have used the word jurisdiction in the first quoted sentence to refer to subject-matter jurisdiction, *i.e.*, diversity. Had the corporation been joined complete diversity as required by the *Strawbridge-Curtiss* rule (text accompanying note 133 *infra*), would have been lost and the federal court would have been ousted of diversity jurisdiction.

In *Cameron v. McRoberts*, 16 U.S. (3 Wheat.) 591 (1818), suit was brought in federal court by *McRoberts*, stated in the pleadings to be a citizen of Kentucky, against *Cameron*, stated in the pleadings to be a citizen of Virginia, and several other defendants whose citizenship was not alleged in the pleadings. In a bill of review taken from a decree entered for *McRoberts*, *Cameron* asserted that the court had no jurisdiction because the citizenship of the other defendants coincided with that of the plaintiff. In answer to a question certified to the Supreme Court, the Court stated:

If a joint interest vested in *Cameron* and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in *Cameron*, so that substantial justice (so far as he was interested) could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

Id. at 593-94. From this cryptic statement, it is difficult to determine whether the Court meant that if there was a joint interest among all the defendants, the Court had no power to proceed in the absence of one of them. Or whether the *presence* of nondiverse indispensable parties destroyed diversity jurisdiction, since all of the defendants named in the bill had appeared and answered.

See also *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280 (1868) (where the indispensable parties were citizens of the District of Columbia, which was not then considered to be a state for purposes of diversity, court had no "jurisdiction").

cases might be cited for this proposition,⁵⁴ the court in *Washington v. United States*,⁵⁵ which Reed cites to support his premise, reached quite a different conclusion. The court did indeed state that "in cases where there is error in nonjoinder of parties . . . the courts have fallen into common error by designating the error as 'jurisdictional.'"⁵⁶ However, most significantly, the court went on to say: "On the other hand, the nonjoinder of an indispensable party is fatal error, and the court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the court of jurisdiction. . . ."⁵⁷ Thus even if the indispensable parties rule is not one going to the court's jurisdiction, it may nonetheless be a mandatory rule of law, which if improperly applied will subject the court to reversal.

The rationale chosen for the indispensable parties rule can have practical effects.⁵⁸ But courts rarely have wrestled with the theoretical problems involved

54. In *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-67 (1825), the Court, speaking through Chief Justice Marshall, stated:

It is contended that he [plaintiff] is a tenant in common with others, and ought not be permitted to sue in equity, without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion.

However, the Court held that the failure to join the absent tenants-in-common did not warrant dismissal because the pleadings made no showing that they would be affected by a decree. Thus this case, which antedated *Shields v. Barrow*, may stand for the proposition that equity requires all interested parties to be joined, but if a party is only conditionally necessary, his joinder may be dispensed with. See *Russell v. Clarke's Executors*, 11 U.S. (7 Cranch) 69, 98 (1812).

But see *Gauss v. Kirk*, 198 F.2d 83, 85 n.2 (D.C. Cir. 1952), where the Court of Appeals, in a footnote said: "The indispensable parties rule has its origins in equity. . . . Under equity rules the question of indispensability was a discretionary one, *Elmendorf v. Taylor* Though the ordinary case which has arisen since adoption of the Federal Rules of Civil Procedure has been in equity . . . several cases have discussed the principle of indispensability in 'law' actions . . . thus indicating that, since adoption of the new Rules, the old equity criteria of a party's interest is now applied to 'law' actions. The discretion would seem to be present, then, in any form of action brought under the new Federal Rules."

55. 87 F.2d 421 (9th Cir. 1936).

56. *Id.* at 427.

57. *Id.* at 428. See also *American Falls Reservoir Dist. No. 2 v. Crandall*, 85 F.2d 864 (9th Cir. 1936).

58. Thus in *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936), referred to in notes 54-56 *supra*, it becomes clear what the court was driving at when it said that while failure to join an indispensable party was "fatal error," it was not "jurisdictional." The court concluded:

Since the interest of the State of Washington will be directly affected by the decree, we must hold that such state is an indispensable party. As pointed out above, however, the nonjoinder of such State, is not a jurisdictional defect, and therefore we are not prohibited from considering other arguments in the case.

87 F.2d at 431.

Thus the absence of indispensable parties, while it may be grounds for reversing a decree,

since most of the cases dealing with indispensable parties are either initial determinations of or appeals from initial determinations of indispensability. While there may be theoretical distinctions between cases holding that the action is [or should have been] dismissed for lack of indispensable parties depending on whether the ground of the holding is that the court lacks *power* to proceed in the absence of indispensable parties, or it is *fatal error* to proceed in the absence of indispensable parties, or the joinder of indispensable parties would *oust the court of subject-matter jurisdiction*, the distinctions would not show up in the usual case where the determination ends with a lower court dismissal or an appellate order that the case should have been dismissed.

In rare instances, the effect of the rationale chosen can be seen. Thus if absence of an indispensable party goes to the power or competency of a court to act, then it may be thought that a final decree entered in the absence of an indispensable party is void or a nullity, rather than merely erroneous (voidable). In *Dyer v. Stauffer*⁵⁹ the court of appeals considered whether a judgment rendered in the absence of indispensable parties was void and therefore subject to collateral attack.⁶⁰ A bill had been brought to enjoin execution on a default judgment obtained by the United States in an equity suit brought against the stockholders of a defunct corporation for the restoration of sufficient assets to pay the taxes due from the corporation. The defendant stockholders, who had been validly served in the original action, sought the injunction on the ground that the corporation, which had not been a party to the original action, was an indispensable party. The court, affirming dismissal of the injunction bill, stated:

The errors alleged being apparent on the face of the record, there can be no relief at this time, unless there had been such a lack of jurisdiction as to make the decree void, and upon such lack of jurisdiction appellant relies.

It is often said that a court of equity has no jurisdiction of a creditors' bill, if there was no judgment at law, or if an indispensable party is not on the record. This is not an accurate use of the term. If the relief sought is of an equitable character, and the parties against whom it is sought are in court, it is clear that a court of equity has jurisdiction. Upon objection duly made, sometimes without objection, it should decline to proceed without necessary parties or lacking prescribed conditions; but, if it does proceed, its action is erroneous, not void.⁶¹

On the other hand, there is some recent evidence suggesting that the Supreme Court might subscribe to the notion that a judgment rendered in the

does not liminally prohibit the court from going forward and considering other arguments in the case — here whether the state should have been allowed to intervene.

59. 19 F.2d 922 (6th Cir. 1927).

60. See RESTATEMENT, JUDGMENTS §§ 1(c), 2(b), 11 (1942); 1A MOORE ¶ 0.401; 7 MOORE ¶ 60.25[2].

61. 19 F.2d at 922.

absence of indispensable parties is void, and not merely voidable. In *Hanson v. Denckla*⁶² the Supreme Court, in reviewing determinations made by the state courts of Florida and Delaware in a controversy as to the right to part of the corpus of a trust, reversed the Florida decree on the ground that the Delaware trustee did not have sufficient "minimal contacts" with Florida for its courts to assert personal jurisdiction over the trustee consistent with due process. Nor did Florida have in rem jurisdiction over the assets of the trust in dispute. Under Florida law, as found by the Supreme Court, the nonresident trustee was an indispensable party. The Court said:

With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so. As we understand its law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust For that reason the Florida judgment must be reversed not only as to the nonresident trustees but also as to appellants, over whom the Florida court admittedly had jurisdiction.⁶³

This language would seem to be contrary to Reed's statement⁶⁴ that there is no "jurisdictional" reason for refusing to enter judgment as to parties present before the court in the absence of other persons not before the court.

Since a judgment void for lack of jurisdiction is not entitled to full faith and credit,⁶⁵ the court's holding that the Delaware court was not required to give full faith and credit to the Florida decree supports the conclusion that the Court believes that the absence of an indispensable party goes to the power of the court to render a decree. The Court said:

Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment. Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over non-resident defendants Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit — even against parties over whom Florida's jurisdiction was unquestioned.⁶⁶

The language of the Court thus indicates that it believes that where state law determines that an absent person is indispensable, an adjudication without his joinder is a nullity, not only as regards the absent party (here the trustee over whom the Florida court had not validly secured in personam jurisdiction) but also in regard to the parties actually before the court. However, it is not clear from the case whether full faith and credit would be denied a judgment where there was no attempt to assert jurisdiction over an absent indispensable

62. 357 U.S. 235 (1958).

63. *Id.* at 254-55.

64. See text accompanying note 39 *supra*.

65. U.S. CONST. Art. IV, § 1; RESTATEMENT, JUDGMENTS § 11 (1942); 7 MOORE ¶ 60.25[2].

66. 357 U.S. at 255.

party, rather than a constitutionally defective attempt, and whether such a decree would be void or merely voidable as between the parties actually before the court. Nor is it clear whether the forum state's characterization of an absent party as not indispensable must always be recognized by a second state.

A recent Supreme Court decision raises the implication that failure to join an indispensable party might, under some circumstances, amount to a denial of due process of law. If this implication is correct, then the indispensable parties rule may sometimes be thought of as a rule of constitutional law, adding still another theoretical dimension. In *Western Union Tel. Co. v. Pennsylvania*⁶⁷ proceedings were brought by the Commonwealth of Pennsylvania in a Pennsylvania state court to escheat certain obligations of the Western Union Telegraph Co., the proceeds of undeliverable telegraphic money orders. Western Union asserted no claim to these proceeds, but the proceeds potentially were subject to escheat to states other than Pennsylvania. The Supreme Court held that a judgment of escheat which did not protect Western Union from claims which might be, and apparently would be, asserted by other states, could not be rendered consistent with due process, and that such a state court judgment could not protect Western Union from possible double liability, since Pennsylvania's courts could not secure jurisdiction over other states which might assert conflicting claims to the same property.⁶⁸ The court pointed out, however, that an alternative forum was potentially available — the United States Supreme Court itself, which has original jurisdiction of suits between states. The full ramifications of this case have yet to be explored.⁶⁹ At the very least, it indicates a concern on the part of the Court for protecting defendants against double liability — one of the functional justifications of the joinder rules.

These then are some areas of theoretical doubt which must be resolved by the courts to evolve a consistent theory of required joinder. It is difficult to reformulate a rule that is not fully understood, and to expect an understandable result.

The solution to the problem of the theoretical underpinnings of indispensable parties may lie in the possibility that there is actually more than one indispensable parties rule. The considerations might not be the same in cases holding that an absent person is indispensable because he would be affected by a decree, as they are in cases holding that an absent person is indispensable because defendant would be subjected to more than one suit if the absent

67. 368 U.S. 71 (1961).

68. The Court said:

It is plain that Pennsylvania courts, with no power to bring other states before them, cannot give such [full hearing and a final authoritative determination]. . . . They have not done so here; they have not attempted to do so. As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand. When this situation developed, the Pennsylvania courts should have dismissed the case.

368 U.S. at 80.

69. See LOUISELL & HAZARD, *PLEADING AND PROCEDURE, STATE AND FEDERAL* 429 (1962).

party were not joined.⁷⁰ Still different considerations may be involved in cases holding that an absent person is indispensable because an effective decree cannot be rendered in his absence. Yet in discussions of the problem language from one type of case is freely imported into another.

Professor Reed's work is of great value when seen as an attempt to explore some of the foundations of the indispensable parties rule. Unfortunately the Advisory Committee has taken Reed's work not as a beginning step toward evolution of a consistent theory of required joinder, as it was probably intended to be, but as a final blueprint for the changes in Rule 19 which the Advisory Committee now proposes. Nowhere did Reed indicate that the goals he advocated could be achieved by the simple expedient of amending the Federal Rules.

IV

The most striking feature of the proposed rule (set out in the margin)⁷¹ is the total elimination of the term "indispensable."⁷² In place of present Rule

70. See note 14 *supra*, indicating a possibility of greater flexibility in the latter situation.

71. RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) PERSONS TO BE JOINED IF FEASIBLE. Whenever a "contingently necessary" person, as hereafter defined, is subject to service of process and his joinder would not deprive the court of jurisdiction over the subject matter of the action, he shall be joined as a party in the action. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties before it or ought to be dismissed. The factors to be considered by the court include: first, to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the contingently necessary person would be adequate; fourth, whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of contingently necessary persons who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

72. See text accompanying note 107 *infra*.

19's indispensable party-conditionally necessary party bifurcation, the proposed rule would substitute the single term "contingently necessary person." A person defined in subdivision (a) of the proposed rule as "contingently necessary" is to be joined if he is subject to service of process and his joinder would not deprive the court of subject-matter jurisdiction. He is to be dismissed from the action if he objects to venue, and his joinder would render the venue of the action improper.⁷³ Retained is the language from the present rule with respect to joinder as a defendant, or in a proper case an involuntary plaintiff, a party who should join as a plaintiff but refuses to do so.

The terminology of subdivision (a) is apparently meant to distinguish "contingently necessary persons" from merely "proper" parties whose joinder is never required.⁷⁴ Yet the factors it lists in defining a "contingently necessary person" are strikingly similar to language which the courts have relied on in terming absent persons *indispensable* parties. Decisions have held that a person is indispensable where "complete relief cannot be accorded in his absence among those already parties",⁷⁵ or where

he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest⁷⁶ or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.⁷⁷

The first sentence of proposed subdivision (b) reflects the "rational balancing" advocated by Reed:⁷⁸

If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties before it or ought to be dismissed.

It is this sentence which seems to work a significant change from the present Rule 19 and might be read as a revision of the indispensable parties rule. It seems to place the determination of whether a "contingently necessary person" must be joined ultimately in the discretion of the district court. We have seen that subdivision (a) defines "contingently necessary persons" in terms which courts have used to characterize indispensable parties. The first sentence of subdivision (b) then states that when a contingently necessary person cannot

73. The sentence in the proposed rule reads: "If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action." Presumably the first phrase is to be read to mean that the joined party must make a timely and valid objection to venue as it affects him. But this is not clear from the present wording. The last phrase "he shall be dismissed from the action" does not take into account the possibility of transferring the action to a district where venue would be proper, pursuant to 28 U.S.C. § 1406(a). See note 129 *infra*.

74. See note 3 *supra*.

75. See note 15 *supra*.

76. See note 13 *supra*.

77. See note 14 *supra*.

78. See text accompanying note 41 *supra*.

be joined the court is to determine whether it *ought* to proceed or to dismiss the action. This leads inescapably to the question of whether the court may, in its discretion, proceed without the joinder of those who, under the existing rule, would have been "indispensable" parties.

There follows in subdivision (b) an inclusive, but not exclusive, list of factors which the court is to consider in determining whether to go on, without the absent contingently necessary person, or to dismiss. There is no apparent hierarchy of values assigned to these interests used in the balancing test. Thus, the first factor to be considered is: "to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to him or those already parties." The third factor to be considered is "whether a judgment rendered in the absence of the contingently necessary person would be adequate." And the fourth factor is "whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder." Can the fourth factor overbalance the first and third? Would the proposed rule allow the court to proceed without an absent person where it concluded that to dismiss would greatly inconvenience the present plaintiff, though a decree rendered without the absent person might be inadequate, or might prejudice the absent person or present parties? If so, the new rule amounts to an overruling of *Shields v. Barrow* and its progeny, for those cases hold that without the joinder of the indispensable party the action must be dismissed even where dismissal would cause great inconvenience to the present plaintiff.⁷⁹ That the proposed rule would condone some unstated degree of prejudice to present parties or the absent person is indicated by the second factor listed in subdivision (b): "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided."

Proposed Rule 19(d),⁸⁰ which resembles language now found in present Rule 19(a), supports the conclusion that joinder under the proposed rule is never absolutely required. Thus Rule 23, dealing with class suits,⁸¹ no longer conditions the joinder requirements of Rule 19(a), but the total rule is in some unspecified way "subject" to Rule 23. Further, the phrase in the present Rule 19(a), "subject to the provisions . . . of subdivision (b) of this Rule," a phrase which was indicative of the intention of the drafters of present Rule 19,⁸² is eliminated.

The proposed rule is ambiguous and unclear. Taking its wording alone, it is difficult to ascertain how much the proposed rule is intended to break with the past. On the one hand, the proposed rule might be read, as the committee seems to have intended it to be read, to eliminate the term "indispensable" and to make the joinder of all absent persons conditional, subject

79. See text accompanying note 16 *supra*.

80. Proposed Rule 19(c), with appropriate changes in wording is similar to present Rule 19(c).

81. See note 24 *supra*.

82. See text accompanying notes 24-34 *supra*.

to being dispensed with if there are sufficient "countervailing considerations." On the other hand, the rule could be read as having no effect on the present indispensable parties rule.

A disparity of readings could in part be caused by disagreement as to the meaning of the term "contingently necessary person." Does this term include both indispensable and conditionally necessary parties under present Rule 19 or does it refer only to conditionally necessary persons under present Rule 19? Results in cases might differ depending on the theory of the indispensable parties rule to which the court subscribed. Some courts would believe that the indispensable parties rule exists apart from Rule 19 and cannot be changed by rewording Rule 19. Even if Rule 19 is cast in terms of discretion, they would reason that the indispensable parties rule would limit this discretion since the absence of a truly indispensable party goes to the basic power of the court or is a rule of law which the Federal Rules cannot change. Other courts, believing that joinder requirements are governed solely by the Federal Rules, would determine that if the rule is rewritten as proposed, trial courts would have discretion, within the somewhat amorphous bounds of equity and good conscience, to proceed without an absent person whose joinder would cause the action to fail.

Just as trial courts might differ in interpreting their own role under the proposed rule, so courts of appeals might also disagree whether casting the rule in terms of discretion actually gives the trial court greater latitude to determine whether a case may proceed without an absent person and erects a stronger presumption that the determination made by the district court was correct. Some appellate courts might limit their review to cases where there is "gross abuse of discretion"; others would apply the same standards for review as they apply today under the indispensable parties rule.

That it is not far-fetched to predict that the proposed rule might be read as dealing only with what are presently called conditionally necessary parties, leaving the concept of indispensable parties alive but unaccounted for in the Rules, is illustrated by the fact that the proposal has already been given just such a reading by a distinguished judge. In *Stevens v. Loomis*,⁸³ while discussing the differences between indispensable and conditionally necessary parties and confusion by the courts between the two, Judge Aldrich stated:

There are, broadly, under the [R]ule [19], and prior thereto, three classifications of parties; indispensable, necessary (sometimes called conditionally necessary) and formal. A court cannot proceed in the absence of an indispensable party, but will proceed in the absence of a merely formal party. Whether or not it should proceed in the absence of a necessary party is a matter of discretion.⁸⁴

Subsequently, in a footnote, Judge Aldrich said:

An extensive re-writing of Rule 19 is presently proposed to eliminate confusion which has arisen regarding various aspects of the rule and

83. 334 F.2d 775 (1st Cir. 1964).

84. *Id.* at 777.

to clarify grounds for exercising the court's discretion. The new rule omits all reference to indispensable parties, consistent with the view that what are indispensable parties is a matter of substance, not of procedure.⁸⁵

Thus, according to Judge Aldrich, while a court has discretion to proceed in the absence of a conditionally necessary party, a court cannot proceed in the absence of an indispensable party, and this requirement antedates the Federal Rules. Therefore he limits the proposed new rule to clarifying "grounds for exercising the court's discretion," that is, as to conditionally necessary parties. Judge Aldrich's understanding of the proposal is further indicated in another footnote where he gently takes the Reporter of the Committee to task for citing two cases "referring to indispensable parties when he is discussing only necessary parties."⁸⁶ But the cases to which Judge Aldrich refers were cited in the Committee Note with reference to a court deciding, under the proposed rule, whether it can proceed without a *contingently necessary person*. Thus, Judge Aldrich either believes that contingently necessary persons under the proposed rule are synonymous with conditionally necessary persons under the present rule or understandably overlooks the distinction. His disagreement with the Committee Note might have been even stronger. Virtually all the cases cited by the committee to illustrate the court's exercise of discretion with regard to "contingently necessary persons" are cases determining whether given persons are indispensable parties.⁸⁷

85. *Id.* at 778 n.7.

86. The Judge said in this footnote,

We note, with great deference to the learned reporter to the Advisory Committee on the Civil Rules . . . that even he cites, without comment, cases referring to indispensable parties when he is discussing only necessary parties. See subdivision (b) of the Committee Note to the proposed amendment of Rule 19, citing *Roos v. The Texas Co.*, 2 Cir. 1927, 23 F.2d 171, *cert. denied*, 277 U.S. 587 . . . *Niles-Bement-Pond Co. v. Iron Moulders Union*, 1920, 254 U.S. 77 . . .

334 F.2d at 777.

Roos v. The Texas Co. is set out at notes 114-15 *infra*. Unquestionably both cases deal with indispensable parties.

87. See the following cases cited in PRELIMINARY DRAFT 90-91: *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955) (owner of patent was indispensable party in suit for declaratory judgment brought against licensee; case transferred to forum where suit by licensor was pending.); *A.L. Smith Iron Co. v. Dickson*, 141 F.2d 3 (2d Cir. 1944) (owner of patent not a necessary party in suit for declaratory judgment as to validity of patent brought against owner's licensee, where owner did more than merely license patent and used the licensee to enforce its patent; court used language in terms of balancing interests); *Ward v. Deavers*, 203 F.2d 72 (D.C. Cir. 1953) (absent party was indispensable in regard to relief of rescission of contract, but court should have considered whether other relief was possible, as to which the absent person would not be indispensable); *Miller & Lux, Inc. v. Nickel*, 141 F. Supp. 41 (N.D. Cal. 1956) (considering the relief sought and the possibility of the court granting relief which would not affect absent persons, the absent persons were not indispensable parties); *Roos v. The Texas Co.*, 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928); *Atwood v. Rhode Island Hosp. Trust Co.*, 275 F. 513 (1st Cir. 1921), *cert. denied*, 257 U.S. 661 (1922) (in equity action to determine the validity of the residuary clause of a will, court vacated its earlier

If the proposed rule is adopted in its present form, Judge Aldrich's construction of the rule would probably be the one that the courts wouldulti-

opinion holding that an absent person, who might be entitled to \$3,000 from the residuary estate, was an indispensable party, and held that since the rights of the absent person could be protected in a decree, she was not indispensable); *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961) (in a suit to procure a decree that an oil and gas lease had been terminated and forfeited, the members of a "unit operating agreement" for the joint development with other tract and lease owners of oil and gas lands, that lessee had entered, were not indispensable parties. The court held that plaintiff in the present action was not attacking the validity of the unit operating agreement, and that unlike other operating agreements, the present one did not involve a cross-conveyancing of land. Even if the pleadings in the present action could be construed as an attack on the unit agreement as well as the lease, the other parties to the agreement would still only be considered necessary parties under Rule 19(b), since a decree in the present action could be entered limited to the lease and not affecting the unit operating agreement.); *Hudson v. Newell*, 172 F.2d 848 (5th Cir. 1949), *modified*, 174 F.2d 546 (5th Cir. 1949) (in suit with regard to title to oil-producing land and an accounting for royalties, and other relief, court could grant relief with regard to the parties who are present. Relief of cancellation of adverse deeds could not be granted as to adverse claimants not present in court. Parties to unit operating agreement were not indispensable parties where plaintiffs specifically disclaimed in the court of appeals any intention of interfering with the unitization agreements.); *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940); *Gauss v. Kirk*, 198 F.2d 83 (D.C. Cir. 1952) (Proposed vendors not indispensable parties in suit by proposed vendee against real estate agent to secure the return of his deposit toward the purchase of real estate. Court applied indispensable parties rule in terms of balancing interests, and adverted to failure of defendant-real estate agent to protect himself from asserted possibility of double recovery by interpleading possible rival claimants to the deposit in his hands.); *Abel v. Brayton Flying Serv., Inc.*, 248 F.2d 713 (5th Cir. 1957) (Majority shareholder in corporation was not indispensable party plaintiff in suit by corporation to secure amount due under contract and foreclose chattel mortgage securing indebtedness. Court noted that defendant did not file a counterclaim seeking relief from shareholder, and that such a counterclaim needed no independent grounds of jurisdiction to support it.); *Parker Rust-Proof Co. v. Western Union Telegraph Co.*, 105 F.2d 976 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939) (Absent person would have been indispensable party to suit to obtain a decree authorizing the commissioner of patents to issue a patent, but defendant's inequitable conduct in failing to disclose the interest of the absent person until it was too late to serve the absent person defeated defendant's right to object to the nonjoinder of the absent person. Moreover, the absent person had notice of the suit and could have intervened to protect his interests.); *Johnson v. Middleton*, 175 F.2d 535, 537-38 (7th Cir. 1949) (where intervenor was an indispensable party to the action as originally brought and his citizenship destroyed complete diversity upon his intervention, the action was properly dismissed); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948) (same); *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947) (prior to their intervention absent co-tenants of plaintiffs were not indispensable; their intervention did not oust the federal court of diversity jurisdiction); *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), *cert. denied*, 339 U.S. 893 (1950); *Fitzgerald v. Haynes*, 241 F.2d 417 (3d Cir. 1957) (absent local unions were indispensable in suit involving assets of the locals; their joinder would not impose hardship on plaintiff, although it might oust the federal court of diversity jurisdiction); *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952) (defendants who were dismissed from the action were indispensable; though their presence would destroy complete diversity, they may be joined in a state-court action); *Warfield v. Marks*, 190 F.2d 178 (5th Cir. 1951), *cert. denied*, 342 U.S. 887 (1951).

mately settle on,⁸⁸ despite the apparent contrary intention of the drafters of the proposed rule. Eventually it would be interpreted together with the ex-

88. New York and Michigan have adopted necessary joinder rules which were influential in the drafting of proposed Rule 19. See note 37 *supra*.

N.Y.C.P.L.R. § 1001 (1963), entitled "Necessary Joinder of Parties," reads:

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

Professor McLaughlin's Supplementary Practice Commentary (McKinney's Consol. Laws of N.Y. Book 7b, 1964 Cum. Ann. Pocket Part) to § 1001 shows the predicted reaction to such a joinder statute. He states:

The principal difference between this statute and its predecessor, CPA § 193, is the omission of the terms indispensable and conditionally necessary parties. It will be recalled that under former practice an indispensable party *had* to be joined, and if jurisdiction could not be obtained over him the action had to be dismissed. A conditionally necessary party, on the other hand, had to be joined only when jurisdiction could be acquired over him. Inability to accomplish jurisdiction excused joinder of such a person. While these terms are no longer employed in the CPLR, a reading of 1001 makes clear that the concepts are very much alive.

1001(b) states that if jurisdiction can be obtained over a necessary party, it must be done. If it cannot be obtained, then the court must decide whether to proceed without the absent party. To guide the court in its determination, five considerations are proposed by the statute. The answers to the questions posed by these considerations lead directly to the distinction between indispensable and conditionally necessary parties. In short, there are still some persons who *must* be joined or the action, dismissed (indispensable), while if no serious prejudice will be done by proceeding without a person over whom jurisdiction cannot be obtained (conditionally necessary), the action may continue. The CPA [the Civil Practice Act which was superseded by the CPLR] cases, therefore, should continue to control.

The Michigan statute, MICH. GEN. COURT RULE 205 (1963), significantly differs in wording, in one aspect. Among the considerations, listed in subrule 205.2, which the court is to take into account in determining whether to proceed without essentially interested persons is: "(1) whether a *valid* judgment may be rendered in favor of the plaintiff in the absence of the person not joined." (Italics added.)

Contrast this language with that found in N.Y. C.P.L.R. § 1001(b) "whether an *effective* judgment may be rendered. . ." (italics added). And with proposed Rule 19(b) which

isting law of indispensable parties, in much the same way as courts read the Act of 1839,⁸⁹ and a similar equity rule, to be conditioned by the existing case law of indispensable parties.⁹⁰ But even if the courts eventually settle upon this interpretation, along the way many trial courts may be led into reversible error by the ambiguity of the proposed rule.

Perhaps doubt as to the meaning of the proposed rule could be alleviated if the Advisory Committee came to grips with the theoretical problems involved. If there were a committee note which explained what the committee was intending to do, and how it anticipated that the proposed rule would be applied, interpretation of the rule might be easier. But the present Committee Note is singularly uninspired. The committee's confusion between what it deems to be a desirable state of the law and what the law *is* at present, is illustrated by the following quotation from its note:

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.⁹¹

Thus alluding to Reed's article, the committee assumes that if the indispensable parties rule does not rest on concepts of "jurisdiction" in the sense of power, it is not a mandatory rule.⁹² In the first place, it is by no means clear that the rule does not rest on concepts of power.⁹³ Merely stating that it does not answers

states "whether a judgment rendered in the absence of the contingently necessary person would be *adequate*. . ." (italics added). While the Michigan rule avoids the use of the word indispensable, it may be speculated that the indispensable parties rule is preserved by this language dealing with the validity of a judgment in the absence of an essentially interested person.

89. See note 20 *supra*.

90. See note 104 *infra* and accompanying text.

91. PRELIMINARY DRAFT 85-86. Further, citing Hazard, note 37 *supra*, the Report states: "The foregoing propositions were well understood in the older equity practice. . ." But Hazard was speaking of the practice antedating *Shields v. Barrow*. What of the practice since *Shields v. Barrow*?

92. The Committee Note states further: "In some instances courts have not undertaken the relevant inquiry or have been misled by the 'jurisdiction' fallacy." PRELIMINARY DRAFT 87. Presumably this refers to Reed's statement quoted in text at note 39 *supra*.

93. See the discussion of *Shields v. Barrow* in text accompanying notes 4-11 *supra* and note 104 *infra*, and the statement from *Hanson v. Denckla*, 357 U.S. 235 (1958), set out in text accompanying notes 64 & 66 *supra*.

See also the following statement of Moore: "But the concept of indispensability goes beyond federal jurisdiction and touches the very power or right of the court to make an equitable adjudication, where an indispensable party is not before it." 3 MOORE ¶ 19.05, at p. 2146.

nothing. Second, even if the rule is not grounded in concepts of power or competency, it still may be a mandatory rule of law, administered in terms of fatal error.⁹⁴ Third, the above quotation adds to the belief that the proposed rule would permit a court to go on without an absent person despite adverse effect on the absent person or the subjection of present defendants to the risk of double vexation, limited only by the court's equitable discretion and good conscience.⁹⁵

The committee completely ignores the role of precedent in determining joinder requirements. Is every joinder question under the proposed rule to be decided *ad hoc*? What of the cases in which the Supreme Court or other appellate courts have determined that in certain situations a given absent party is or is not indispensable? Thus where the Supreme Court has determined that a given superior government official is an indispensable party in a suit against an inferior official⁹⁶ or that the corporation is an indispensable party in a shareholder's derivative action,⁹⁷ are these precedents no longer binding? Does the proposed rule attempt to overrule prior case law? If so, on what basis of authority? The wording of the proposed rule might lead to such a conclusion. Whether or not this is intended, should not the committee at least have discussed the question?

The Committee has totally overlooked the question of the authority of the Supreme Court to promulgate a Federal Rule which would have the effect of modifying the indispensable parties rule. The Rule-Making Act, under which the Supreme Court is given the authority to promulgate the Federal Rules of Civil Procedure, states:

The Supreme Court shall have the power to prescribe . . . the practice and procedure of the district courts of the United States Such rules shall not abridge, enlarge or modify any substantive right⁹⁸

Thus the question to be answered is: does the indispensable parties rule affect "substantive rights" within the meaning of the Rule-Making Act.⁹⁹ If an absent person has a "substantive right" against an adjudication which would affect him in his absence, then a change in joinder requirements which would allow the action to proceed without his joinder might be thought to affect a substantive right. Similarly, if a present defendant has a "substantive right" against the substantial risk of multiple vexation where absent plaintiffs have not been joined, a change in joinder requirements reducing the necessity of joining such absent persons might be thought to affect a substantive right. We may also recall Judge Aldrich's statement that "what are indispensable parties is a matter of substance, not procedure."¹⁰⁰

94. See note 56 *supra*.

95. See text following note 79 *supra*.

96. See note 120 *infra*.

97. See note 14 *supra*; note 142 *infra*.

98. 28 U.S.C. § 2072 (1958).

99. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13, 14 (1941).

100. *Stevens v. Loomis*, 334 F.2d 775, 778 (1st Cir. 1964).

Until we have an adequate theory of what the indispensable parties rule is, it is hardly possible to determine whether it is a rule of substantive law. It would seem that the indispensable parties rule is a rule of substantive law if failure to join an indispensable party goes to the court's "power to render a decree," is "fatal error," or is, in itself, a violation of due process of law. On the other hand, if joinder requirements are merely means of adjudicating rights, and, within the confines of fairness which procedural due process always requires, are discretionary rules, as both Reed and the committee seem to believe, then joinder requirements may be thought to be procedural for purposes of the Rule-Making Act, and therefore subject to change by amending the Federal Rules.¹⁰¹

Significantly, the drafters of *present* Rule 19 apparently believed that they could not affect the indispensable parties rule.¹⁰² The Supreme Court, in *Shields v. Barrow*,¹⁰³ indicated that the indispensable parties rule existed apart from statute or the Equity Rules, which were the forerunners of the Federal Rules.¹⁰⁴ Moreover, Federal Rule 82 reads: "These rules shall not be con-

101. It might be argued that joinder of parties in a federal court is a matter of procedure, and subject to change under the Rule-Making Act. Moore states: "Whether parties are indispensable should be determined by the federal court according to federal, rather than state rules, because while state law, in non-federal matters, will determine the substantive rights of the parties [under *Erie R.R. v. Tompkins*], the matter of whether the joinder is proper or necessary is in part a procedural one governed by Rules 17(a), 19, 20 and 23, and in other respects jurisdictional insofar as the classification of parties . . . is necessitated by the principles of federal jurisdiction and venue." 3 MOORE ¶ 19.07, at 2152-53. Cf. *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950), *cert. denied*, 339 U.S. 983 (1950). But merely because we look to federal law, rather than state law to determine joinder requirements, does this render them "procedural" in the sense of the Rule-Making Act, whether or not they are "procedural" for purposes of *Erie* (i.e., determinable by federal law rather than state law)? Moore's statement does not necessarily lead to this result, since he presumes that joinder requirements incorporate prior practice. 2 MOORE ¶ 19.05. And prior practice incorporates doctrines laid down by the United States Supreme Court in *Shields v. Barrow* and subsequent cases. Therefore it can be said that joinder requirements in the federal courts, while determinable by federal law, are not solely controlled by the Federal Rules. Or that Rule 19 is a methodology for implementing joinder requirements which partly exist over and above that rule.

102. See the statement of Judge Clark set out in note 34 *supra*.

In *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946), the court of appeals stated: "The question of indispensable parties is primarily a matter of equity jurisprudence, sometimes of due process of law. . . ." There is some evidence that the Supreme Court considers requirements of joinder to be related to due process. See the discussion of *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961), in the text at note 67 *supra*. If joinder requirements are elements of due process, then as has been said with regard to problems arising in class suits: "no quirks of rule-making could get rid of the 'due process' clause or the general policy in favor of a day in court." CHAFFEE, *SOME PROBLEMS OF EQUITY* 228 (1950).

103. 58 U.S. (17 How.) 130 (1854).

104. There the Court spoke of the effect of the Act of 1839, see note 20 *supra*, and a similar equity rule [Equity Rule 47, later Equity Rule 39 (1912), see *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936)]. Said the Court:

This act relates solely to the nonjoinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an in-

strued to extend or limit the jurisdiction of the United States district courts. . . ." If failure to join an indispensable party goes to the court's "jurisdiction" in a competency sense, a change in Rule 19 allowing the joinder of previously indispensable parties would seem to fly in the face of Rule 82.

Nor can the foregoing questions be answered in the absence of an adequate explanation of what the committee believes the proposed rule would accomplish.

The reasoning underlying the proposed rule seems to be as follows: Professor Reed believed that what many courts do *in fact* in determining joinder requirements is first "rationally" to decide whether an absent person should or should not be joined. If they determine that the absent person should be joined he is labeled indispensable; if his joinder is not to be required, he is labeled only necessary. Other courts use labels such as separable rights to beg the question or to predetermine the question without looking to the facts of the case. Therefore, Reed believed, since courts have broad discretion¹⁰⁵ in labeling an absent person indispensable or merely necessary, and since labels such as "inseparable rights" and "united in interest" either hide the actual basis on which the court has made its determination or cause the court to base its determination on the wrong factors, the labels should be abolished and courts should directly look to the underlying interests involved. If this is in conflict with *Shields v. Barrow* and its progeny, then the courts should "abandon"¹⁰⁶ these decisions. To the committee, the simplest way of achieving this goal was to tell the federal courts, by means of a change in Rule 19, that hereafter they are to look to the underlying interests and disregard terminology such as "joint interest" and "indispensable party" found in present Rule 19. The Committee Note states:

The subdivision does not use the word "indispensable" which has often been employed in the past as descriptive of persons in whose absence an action *should* be dismissed. "Indispensable" has suggested some iron

terest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established. . . . The act says it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in *Mallow v. Hinde*, 12 Wheat., 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court." So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the last case mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule.

58 U.S. at 141.

105. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 356 (1957).

106. See text accompanying note 41 *supra*.

rule of joinder based on categorization of rights, whereas a different approach is taken in the present subdivision.¹⁰⁷

The only matter that this "different approach" overlooks is one hundred and ten years of decisions by the Supreme Court and lower federal courts. The treatment of indispensable parties by the courts has not been a model of clarity. But generally speaking, the courts have treated the determination of indispensability as if it were not a discretionary determination but rather a search for the proper application of a mandatory rule. It is easy to say that the difference between the two are merely semantic; they are not. The differences are theoretical and practical.

Most important, the Supreme Court itself has demonstrated no intention of abandoning the approach taken in *Shields v. Barrow*.¹⁰⁸

V

A change in Rule 19 is not needed if its main purpose is to inform the federal courts that they can and should look to the practical realities of each case in determining whether the joinder of an absent person is absolutely required, since they have long done so, and since there is ample precedent in the cases for the federal courts to follow. Thus cases have held that a person who, in other contexts would be declared indispensable, need not be joined where relief can be given which would not adversely affect his rights.¹⁰⁹ The Supreme Court has adverted to "the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."¹¹⁰ And it has stated that "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not"¹¹¹

A good example of a court looking at the realities of the case in determining indispensability is Judge Goodrich's opinion in *Kroese v. General Steel Castings Corp.*¹¹² There suit was brought by shareholders of a corporation to compel the corporation to declare a dividend. The district court held that

107. PRELIMINARY DRAFT 91 (emphasis added).

108. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51, 52 (1954), in which the Court, quoting from *Shields v. Barrow*, held that the insured tortfeasor is not an indispensable party in a suit brought against its insurer under the Louisiana direct action statute.

109. See *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1874). See also *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954); *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); cases cited in note 87 *supra*.

There is also authority for the proposition that joinder of otherwise indispensable holders of remote future interests may be dispensed with when these interests are adequately represented by present parties to the litigation. See *Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, 271 F.2d 740 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960); Note, 69 *YALE L.J.* 816 (1960).

110. *Bourdieu v. Pacific W. Oil Co.*, 299 U.S. 65, 71 (1936).

111. *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U.S. 77, 80 (1920).

112. 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950).

at least a majority of the members of the board of directors of the corporation should be joined as defendants. Plaintiff said that there was no one state or federal district in which a majority of the members of the board could be served, and the district court dismissed the complaint for lack of indispensable parties. The court of appeals reversed, and held that under the circumstances even a majority of the directors were not indispensable parties. The corporation was a party defendant. And the court reasoned that if after a trial the corporation is found to be legally required to declare a dividend, the directors would not be called upon to exercise any business discretion. The law would compel the dividend, and if the directors refused to vote the dividend, the court could impose onerous alternatives on the corporation, such as sequestration of assets, until the corporation complied. Thus, analyzing the realities of the case, the court of appeals determined that since an adequate and effective decree could be rendered without the presence of the absent directors, they were not indispensable parties.¹¹³

A contrasting result, following similar methodology, is seen in Judge Learned Hand's analysis in *Roos v. The Texas Co.*¹¹⁴ In that case recovery was sought because of the mismanagement of certain oil leases. As a result of earlier disputes over the management of the property, a contract had been entered into which provided that plaintiff was to receive one half the proceeds of the oil leases, subject to a one-fourth interest in this amount to be paid to plaintiff's attorneys. The plaintiff's interest was "forever charged" with the interest of the attorneys, though the plaintiff's share and the attorneys' share were to be paid separately by the developer of the leases. Suit was brought against the corporation to which the developer's interest had eventually been conveyed. But the attorneys were not made parties to the action. Judge Hand explored the contractual basis of the action and the possibility of shaping a decree which would protect the interests of the absentees. Since he found that the interests of the absent attorneys could not adequately be protected in a decree, the judgment of the lower court dismissing the action for lack of indispensable parties was affirmed.¹¹⁵

113. Cf. *Kendig v. Dean*, 97 U.S. 423 (1878).

114. 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928).

115. *Id.* at 172-73:

[W]e cannot ignore the charge of the attorneys' one-fourth interest upon the joint share of themselves and the plaintiff. . . . We can interpret it in no other way than as giving them a lien upon, and therefore a priority in, any payments made upon that half. . . . It means that, in the event of a default by Brooks in paying to them their share of income actually due, the attorneys should have a lien upon the whole amount due.

If this be correct, then it is plainly a violation of the contract to allow the plaintiff to recover three-fourths of the moneys due, leaving the attorneys to recover their one-fourth by a separate suit. By hypothesis this money is already due, and the defendant, vice Brooks, has failed to pay it. It should pay both, no doubt; but, there being a default, as between the two the attorneys are preferred. Thus only can their lien be preserved. . . . It leaves the attorneys in a very different position from that stipulated to allow the plaintiff to make off with his share, leaving them

In cases dealing with suits against federal officers, the Supreme Court has looked to practical considerations in determining whether a superior government official is an indispensable party to a suit brought against a local subordinate government official. If the superior federal officer, whose official residence is usually in the District of Columbia, is held to be indispensable, the venue and service of process requirements of the federal courts might put the plaintiff to the hardship of having to bring his action in the District of Columbia. In *Williams v. Fanning*¹¹⁶ the Court held that the Postmaster General was not an indispensable party to a suit to enjoin a local postmaster from carrying out a local postal fraud order issued by the Postmaster General. The Court distinguished those cases which required the joinder of the superior official and stated that the rule was:

that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.¹¹⁷

Here the superior was not indispensable since "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court."¹¹⁸ Moreover, in *Shaughnessy v. Pedreiro*¹¹⁹ the hardship of bringing the action in the District of Columbia was itself one of the practical considerations which the Court took into account in determining that the Commissioner of Immigration and Naturalization was not an indispensable party to a suit brought against a district director of immigration to declare a deportation order void.

to sue the defendant for theirs, and, if they are unsuccessful, to pursue the plaintiff personally. . . .

It would at first blush seem true that the decree might provide for this by impounding a third of the plaintiff's recovery in the registry of the court for the attorneys' benefit, but there are difficulties also in that. The plaintiff might succeed in recovering less than the full amount actually due upon the joint interest. He might even claim less than the attorneys would be content to accept. Certainly in his accounting his proof might fail to establish all that they might prove. To reserve only a third of this recovery would not therefore protect the attorneys. On the contrary, their lien extends to one-third, not of what he recovers, but of what is the true unpaid income which he should recover. Only in a suit to which they are parties, and by the decree in which they are estopped, can that be established so as to conclude them. Hence, it is impossible to ascertain how much of the plaintiff's recovery must be impounded, and the whole would have to be retained, which is in substance a denial of any relief at all.

Therefore the case appears to us to be one where the rights of the beneficiaries are so entangled with one another that it is practically impossible in the decree to protect those who are absent. They are indispensable to any dealing with the case at all.

Although *Roos* was decided before the Federal Rules were adopted, nothing in the present Rule 19 would preclude the same analysis.

116. 332 U.S. 490 (1947).

117. *Id.* at 493.

118. *Id.* at 494.

119. 349 U.S. 48 (1955).

However, significantly, the Court did not overrule cases which held that in other situations a superior government official *is* an indispensable party, and that if jurisdiction cannot be obtained over the superior official in the place where the action is brought, the action must be dismissed.¹²⁰

Thus it is amply clear that the federal courts may and should and do look to the facts of the case in determining whether an absent person is truly indispensable. This is not inconsistent with the indispensable parties rule which calls for dismissal of the action if an indispensable party cannot be joined. If the Advisory Committee deems it important enough to emphasize to the federal courts this obligation, it should consider whether that can be accomplished by the publication of an additional committee note to existing Rule 19.¹²¹ This would fulfill much of the apparent purpose of the proposed revision, without the difficulties which a change in the language of the rule itself would engender.

VI

Even if all the questions raised by the language of the proposed rule are answered, the proposal does little to meet the basic problem involving joinder requirements. In our legal system, the desirable goal of joining all persons having interests closely related to a pending action is often thwarted by conceptions of territorial jurisdiction of courts, venue, and subject-matter jurisdiction.

State courts' inability to secure jurisdiction over persons whose joinder is required is largely a result of constitutional theories thought to be demanded by our federal system, which are recognized and defined in the celebrated case of *Pennoyer v. Neff*.¹²² There it was held that due process demanded that to secure in personam jurisdiction service of process had to be accomplished within the borders of the forum state. To secure valid in rem or quasi in rem jurisdiction, it was held that property which was the subject of the action must be located within the borders of the state, although once the res is present within the state substituted or constructive service may validly be made outside the state.

120. In *Gnerich v. Rutter*, 265 U.S. 388 (1924), it was held that the Commissioner of Internal Revenue was an indispensable party in a suit brought against a federal prohibition director restraining him from giving effect to a particular restriction embodied in a permit issued under the National Prohibition Act to the plaintiffs. See also *Webster v. Fall*, 266 U.S. 507 (1925); *Johnson v. Kirkland*, 290 F.2d 440 (5th Cir. 1961), *cert. denied*, 368 U.S. 889 (1961). See also cases cited in 3 MOORE ¶ 19.16.

The hardship created by these cases has been greatly alleviated by the Act of October 5, 1962, discussed *infra* at note 151.

121. Such a procedure was followed by the Advisory Committee on Civil Rules in its Committee Report of October, 1955, to Rule 8, set out in 2 MOORE ¶ 8.01[3]. Said the Committee: "Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee."

122. 95 U.S. 714 (1877).

While the basic principles of *Pemoyer* have not been altered, recent years have seen the approval of in personam service beyond the borders of the state upon persons who have had sufficient "minimum contacts" with the state to fulfill the requirements of due process. Thus in personam service pursuant to state "long-arm" statutes, which validly predicate service on the doing of some act within the state or having an effect in the state, such as driving an automobile, entering a contract, or committing a tort, has been held not to violate due process.¹²³ But where the person served outside the state has not had the "minimum contacts" with the state required by due process, the service is invalid.¹²⁴ Thus, despite the growth of state long-arm statutes and the possibility of extraterritorial service in in rem and quasi in rem actions, it is still often impossible to secure the joinder of persons outside the state having a substantial interest in a pending state court action. If the absent persons who cannot validly be served are deemed by state law to be indispensable parties, the action must be dismissed.¹²⁵

The federal courts are hampered even more than the state courts in their ability to bring before a single tribunal all persons having a substantial interest in a controversy. Initially there are territorial limitations on the service of process in a federal action which are akin to the limitations on state court jurisdiction. These territorial limitations, earlier based solely on statute and later on the Federal Rules, have in the past precluded service beyond the borders of the state in which the district court is held, in the absence of a federal statute permitting such extra-territorial service in specified actions.¹²⁶ Recent amendments in the Federal Rules have permitted service under the circumstances and in the manner provided in state long-arm statutes, permitted original quasi in rem actions to be initiated in federal courts, and have increased the instances in which service beyond the borders of the state, in which the district court is held, may be made.¹²⁷ However, the territorial limitations on service of process in a federal action presently are a substantial barrier to bringing all interested parties before a single federal tribunal. If the absent person is indispensable and cannot be validly served, and does not voluntarily appear or waive lack of proper service,¹²⁸ the action must be dismissed.

123. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Doherty v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951). See 2 MOORE §§ 4.25, 4.41—1.

124. *Hanson v. Denckla*, 357 U.S. 235 (1958).

125. *Ibid.*

126. See 2 MOORE § 4.42.

127. FED. R. CIV. P. 4(e), (f), as amended effective July 1, 1963. See 2 MOORE §§ 4.32, 4.42.

128. As to voluntary appearance or waiver of improper service in the federal courts see 2 MOORE §§ 4.02[3], 12.12, 12.13, 12.22, 12.23.

Federal venue statutes limit the *places* where an action can be brought, and thus pose another impediment to the successful joinder of all interested parties. If there is no other federal court to which the action may be transferred,¹²⁹ and timely¹³⁰ objection has been made by the party as to whom venue is improper, he must be dismissed from the action.¹³¹ Yet if this person is deemed to be an indispensable party, his dismissal precludes the federal court from hearing the action.¹³²

A third restriction thwarting joinder of all strongly interested parties in federal actions which are based on diversity of citizenship is the rule of *Strawbridge v. Curtiss*¹³³ which requires that in a diversity action when the parties are properly aligned as to their interests,¹³⁴ and disregarding the citizenship of merely formal parties,¹³⁵ the citizenship of each person joined as a plaintiff must be diverse from the citizenship of each person joined as a defendant. The court held in *Shields v. Barrow*¹³⁶ that in a federal action based on diversity of citizenship, where the absent person is deemed to be an indispensable party, yet his joinder would destroy the complete diversity required by *Strawbridge v. Curtiss*, the action must be dismissed.

Though diversity suits provide the most common examples of actions dismissed because the character of an indispensable party precludes his joinder, in rare instances other absent parties might have the same effect in suits not based on diversity. Thus if the absent indispensable party is a state, which cannot be sued in the federal court by a citizen of another state,¹³⁷ or which

129. 28 U.S.C. § 1406(a) (1958) provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

See 1 MOORE ¶ 0.146[1]—[5].

130. 28 U.S.C. § 1406(b) states: "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue." See 1 MOORE ¶ 0.146[6].

Under the Federal Rules, objection to venue may be made in the answer or by motion to dismiss for improper venue, and the defense may be consolidated with other defenses raised by motion. FED. R. CIV. P. 12(b). But the defense of lack of venue is waived if a motion under Rule 12 is made and the motion to dismiss for improper venue is not joined with such motion, or, if no motion under Rule 12 has been made, if the defense is not raised in the answer or reply. FED. R. CIV. P. 12(g), (h). See generally 2 MOORE ¶¶ 12.07, 12.12, 12.22, 12.23.

131. *Camp v. Gress*, 250 U.S. 308 (1919). But one defendant cannot object to the venue as to a second defendant. See *id.* at 316.

132. See *ibid.*

133. 7 U.S. (3 Cranch) 267 (1806).

134. Before determining whether complete diversity is present, the federal court will align the parties as plaintiffs or defendants according to their true interests in the litigation, regardless of their designation in the pleadings. See 3 MOORE ¶ 19.03.

135. The citizenship of a purely formal party, such as a guardian ad litem, where the plaintiff is an infant and must sue through a guardian ad litem, is immaterial for purposes of determining diversity jurisdiction. See 3 MOORE ¶¶ 17.04, 19.02.

136. 58 U.S. (17 How.) 130 (1854).

137. See, e.g., *In re Ayers*, 123 U.S. 443 (1887).

asserts sovereign immunity, the action is subject to dismissal.¹³⁸ Similarly, if the United States is deemed an indispensable party, and she has not waived her sovereign immunity, her absence necessitates dismissal of the action.¹³⁹

Herein lies the dilemma which joinder requirements create. On the one hand there is the desire to bring all those interested in a controversy before the court so that the whole controversy may be settled in one action. On the other hand, required joinder sometimes has the effect of causing the entire action to fail. At the least, the plaintiff is put to the expense and trouble of starting his action again in another forum. At the worst, if there is no forum before which all those persons who are deemed indispensable may be brought, the plaintiff may be entirely precluded from bringing his action.

There is, however, a significant distinction between the problem as it exists in state courts and the problem in the federal courts. The territorial limitations on service of process in state courts are based on the constitutional requirement of due process. The barriers to joinder of interested persons in federal courts are largely based on the Federal Rules or federal jurisdictional statutes. Thus the territorial limitation on service of process in the federal courts within the United States is controlled by Rule 4 of the Federal Rules of Civil Procedure. Venue in the federal courts is of statutory origin. And the *Strawbridge v. Curtiss* rule as to complete diversity is based on a reading of a federal jurisdictional statute.¹⁴⁰ The barriers to joinder of interested persons in federal actions are thus more readily susceptible to change than is the constitutional barrier in state court actions.

Rather than attacking some of these barriers to joinder the emphasis of the committee proposal is on finding ways of proceeding in a lawsuit where there are absent interested parties, whose presence might deprive the plaintiff of a forum. The goal should be in precisely the opposite direction — toward the joinder of as *many* vitally interested parties as possible, to facilitate the settlement of entire controversies in a single lawsuit.¹⁴¹ To the extent that joinder requirements are watered down, and emphasis is placed upon proceeding without absent interested parties, controversies are fragmented and lawsuits multiply. We should seek ways of achieving fewer lawsuits, not more lawsuits, while maximizing the possibility of assuring the plaintiff at least one forum where he can prosecute his action.

Congress has, at times, provided for dealing with specific problems created by the indispensable parties rule. In a stockholder's derivative action, for

138. In *Cunningham v. Macon & B.R.R.*, 109 U.S. 446, 451 (1883), it was held that the action was properly dismissed where the state was an indispensable party. See also *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936).

139. See *Wells v. Roper*, 246 U.S. 335, 337 (1918); *Belknap v. Schild*, 161 U.S. 10 (1896); cases cited in 3 MOORE ¶ 19.15.

140. See text at note 176 *infra*.

141. Cf. *Reed*, *supra* note 105, at 339: "But emphasis on reducing the number of adjudications is not needed in cases troubled by required joinder. The need is for recognition of the possible inability of the plaintiff to proceed at all, anywhere, if foreclosed here."

example, suit is brought by a stockholder in behalf of the corporation, whose stock he holds, to vindicate a right of the corporation asserted against other persons. It has been held that the corporation is an indispensable party in such an action.¹⁴² Problems of venue and the territorial limitations on the process of courts, to which we have alluded,¹⁴³ were a stumbling block to the prosecution of many stockholder's derivative actions. Thus assume that plaintiff-shareholder resides in state A. The corporation, which is a named defendant to the action, we shall assume is incorporated and does all its business in state B. The defendants, who are alleged to have defrauded the corporation reside, let us say, in state C. Under applicable venue provisions if the action was in federal court on the basis of diversity, venue was proper in either the plaintiff's or the defendants' place of residence.¹⁴⁴ And service of process in a federal action was formerly limited to the *district* in which the action was pending.¹⁴⁵ In the assumed situation, there was no district in which the action could be brought against all the defendants, including the corporation, in which venue would be proper as to all, and service of process could be made upon all the defendants. Congress responded to the need by adopting, in 1936, a statute which provided that in stockholder's derivative actions, venue could be laid in any district where the *corporation* could have sued the same defendants.¹⁴⁶ And where the suit was laid in such venue, the act further provided that process could be served on the corporation in any district where it is organized or licensed to do business or doing business.¹⁴⁷ Thus rather than a legislative abrogation of the requirement of joining the corporation, deemed by the courts to be an indispensable party, Congress provided a means whereby the action could be brought with all the indispensable parties before the court.

Similarly, Congress recently met problems created by the decisions which held that superior government officials, often officially residing only in the District of Columbia, were indispensable parties in suits brought against subordinate government officials.¹⁴⁸ Though the plaintiff might have had limited means, he was often compelled by these decisions to bring his suit far from his home. To some extent the Supreme Court had mitigated this requirement by a practical construction of the indispensable parties rule.¹⁴⁹ But it had

142. *Davenport v. Dows*, 85 U.S. (18 Wall.) 626, 627 (1874); *Greenberg v. Giannini*, 140 F.2d 550, 554 (2d Cir. 1944) ("... it has been settled law for over a century... that the wronged corporation is an indispensable party to a shareholder's action." Where service of process was not properly made upon the corporation, the complaints were properly dismissed.).

143. Text accompanying notes 122-32 *supra*.

144. Former 28 U.S.C. § 112 (1940), now 28 U.S.C. § 1391(a) (1958).

145. Prior to the adoption of Rule 4(f) of the Fed. R. Civ. P., see note 153 *infra*.

146. Act of April 16, 1936, c. 230, 49 Stat. 1213. The statutory venue provision is now contained in 28 U.S.C. § 1401 (1958).

147. This extraterritorial service of process provision is now contained in 28 U.S.C. § 1695 (1958).

148. See note 120 *supra*.

149. See text accompanying notes 116-19 *supra*.

by no means eliminated the problem.¹⁵⁰ Finally in 1962, Congress dealt with the situation in a manner resembling that with which it had treated stockholder's derivative actions. Recognizing the indispensability of certain superior federal officials and federal agencies, it expanded the number of places where such suits could be brought and provided for service of process by certified mail beyond the territorial limits of the district in which the action is brought.¹⁵¹

Again what Congress did was not to pretend that the indispensable parties rule does not exist, or to overturn determinations of the federal courts that certain parties were indispensable; rather it broke down the barriers created by service of process and venue requirements, which had prevented hearing the controversy in a convenient federal forum with all the indispensable parties present.

The Advisory Committee itself took a step in the same direction in drafting an amendment to Federal Rule 4(f), which was promulgated by the Supreme Court in 1963. Rule 4(f) was amended to provide an additional exception to the general rule that service in a federal action may be made only within the borders of the state in which the district court is held. Rule 4(f) thus now includes the following proviso:

persons who are brought in . . . as additional parties to a pending action pursuant to Rule 19, may be served . . . at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial¹⁵²

Thus under present Rule 4(f) an indispensable or a conditionally necessary party to an action pending in a federal court is subject to in personam service of process in the United States within 100 miles of the federal court though he is outside the state in which the district court is held.¹⁵³

150. Note 120 *supra*.

151. Act of October 5, 1962, Pub. L. 87-748, § 2, 76 Stat. 744, which added 28 U.S.C. § 1391(e) to the Judicial Code. Section 1391(e) reads:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

See generally 2 MOORE ¶ 4.29.

152. FED. R. CIV. P. 4(f). See 2 MOORE ¶ 4.42[2].

153. The validity of this provision cannot be doubted. Prior to the adoption of the Federal Rules of Civil Procedure, service of process in a federal court action was limited to the *district* in which the federal court was held, except in the very limited instances in which a federal statute permitted process to run over a wider area. Rule 4(f) extended the territorial limits of effective service to include all of the *state* in which the district

One of the main stumbling blocks to the joinder of indispensable and conditionally necessary parties in federal actions would be eliminated if the reach of process were extended even further in order to add such parties to actions pending in the federal courts. The 1963 amendment to Rule 4(f) was a useful first step. It may be regarded as a test of the feasibility and desirability of extraterritorial service to bring indispensable and conditionally necessary parties before the court. But the 100-mile limit is arbitrary.¹⁵⁴ In certain instances process may run "across" the borders of two states under the 100-mile rule. If process can now run across two states, why not amend Rule 4(f) to provide for service upon persons who are brought in to a pending action pursuant to Rule 19 to be made anywhere within the United States? Moreover, even service outside the United States in this context is not beyond the scope of the Federal Rules.¹⁵⁵

court is held. The validity of the extension was upheld by the Supreme Court in *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946). See 2 MOORE ¶ 4.42[1]. Therein, the Court indicated that the rule need not have stopped at the borders of the state. The Court said: "... Congress could provide for service of process anywhere in the United States. ... Congress, having omitted so to direct, the omission was supplied by Rule 4(f). . . ." 326 U.S. at 442-43. Thus, while the *Murphree* case was directly concerned with service outside the district but within the state in which the district court is held, it is applicable to service outside the state as well.

154. The 100-mile limit is akin to a similar provision in Federal Rule 45(e) (1) for the service of a subpoena to compel attendance at a hearing or trial. See Advisory Committee's Note of 1963 to Rule 4(f), set out in 2 MOORE ¶ 4.01[23]. See also 2 MOORE ¶ 4.42[2], 5 MOORE ¶ 45.09.

155. FED. R. CIV. P. 4(i) contains alternative provisions for service in a foreign country, when such service is authorized under Rule 4(e). See 2 MOORE ¶ 4.45. If Rule 4(f) were amended to provide for federal process to run anywhere outside the state in which the district court is held in order to bring in additional indispensable or conditionally necessary parties, a corresponding amendment could be made to Rule 4(i) so that these practical alternatives for effecting service in foreign countries would be applicable to service under Rule 4(f).

Of course, merely amending Rule 4 would not, of itself, render such service in a foreign country constitutionally valid. In determining the validity of service in a federal action made outside the United States it would seem that the fifth amendment requirements of due process imposed upon the federal courts would be similar to the fourteenth amendment requirements of due process imposed upon service of process in state court actions. See *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 738 (E.D. Tenn. 1962), citing *Green, Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961), and RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 3, 1956) § 38. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Assuming this to be true, then the cases dealing with the validity of judgments in state court actions based on service made outside the forum state are applicable by analogy to service in a federal action made outside the United States. In *Millikan v. Meyer*, 311 U.S. 457, 462, the Supreme Court stated:

Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.

It also stated that the adequacy of such service so far as due process is concerned "is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an

Of course there are other implications if process is permitted to be served anywhere outside the forum state to bring in additional indispensable and conditionally necessary parties to a pending action. Being summoned to an action 100 miles away is not the same as being summoned to an action 3,000 miles away. However, the extension proposed to deal with the joinder problem would not amount to "nationwide service of process," since it would be utilized only to bring in *additional* parties to a pending action, not as a means of initial service to bring in original parties. Undoubtedly in some instances this might result in hardship. But the hardship would usually be overbalanced by the benefit to the present parties to the action, and to the legal system, in having entire controversies determined. Particularly is this true if without such service the plaintiff would otherwise be unable successfully to prosecute his action in *any* court, state or federal.

And even the hardship — such as it may be in our age of rapid transportation — may be alleviated in other ways. Transfer of a federal court action to a more convenient forum is today contemplated by 28 U.S.C. section 1404(a).¹⁵⁶ To permit transfer under this section, the court must determine that it be "for the convenience of parties and witnesses, in the interest of justice."¹⁵⁷ The effectiveness of this provision is presently limited by language therein which states that transfer may only be made to a district where the action "might have been brought." This language has been interpreted to mean that an action may only be transferred to a district where venue would have been proper and service of process could have been made upon all the defendants had the action initially been brought there.¹⁵⁸ The usefulness of transfer would be enhanced if this limiting language were omitted by Congress. However, though transfer is thus of only partial utility, it nonetheless exists as a possibility where an absent indispensable or conditionally necessary party is summoned far from the place in which the federal action is pending.

opportunity to be heard." *Id.* at 463. Therefore as to a person domiciled in the United States it would seem that valid in personam service could be made upon him in a foreign country by a form of service reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. See *Blackmer v. United States*, 284 U.S. 421 (1932). The alternatives provided in Rule 4(i) fit this description. See also § 10 of the Act of Oct. 3, 1964, 78 Stat. 995, amending 28 U.S.C. § 1783 (1958).

In order to secure valid in personam jurisdiction upon a person not domiciled in the United States, a similar mode of service would have to be utilized. In addition, in order for service to be valid, the person served would have to have had sufficient "minimum contacts" with the United States to comport with due process. And it may be thought that a federal statute — analogous to a state long-arm statute — would be needed on which to predicate such service. See text at notes 123-24 *supra*.

156. 28 U.S.C. § 1404(a) (1958) reads:

For the convenience of the parties and witnesses, in the interest of justice a district court may transfer any civil action to any other district or division where it might have been brought.

See generally 1 MOORE ¶ 0.145.

157. 28 U.S.C. § 1404(a) (1958), note 156 *supra*. See 1 MOORE ¶ 0.145[5].

158. *Hoffman v. Blaski*, 363 U.S. 335 (1960). *Cf.* *Dill v. Scuka*, 193 F. Supp. 803 (E.D. Pa. 1961).

Needless to say, all problems of required joinder would not be solved by an extension of service of process beyond the state in which the district court is held. But this would be a good start along paths that are already tried, utilizing concepts which are familiar to federal courts and those who practice before them. Problems of venue and subject-matter jurisdiction would remain. However, it is significant that these problems are largely susceptible to legislative solution, though they are beyond the scope of the Federal Rules.¹⁵⁹

Venue in federal actions is generally geared to the residence of the parties. In an in personam action in the federal court based on diversity, venue is proper in the district where all plaintiffs or all defendants reside¹⁶⁰ except where defendants reside within different districts of the same state; in that situation, venue may be laid in any district of that state in which one or more of the defendants resides.¹⁶¹ In an in personam action not based on diversity, venue is proper only in the district where all the *defendants* reside,¹⁶² except where defendants reside within different districts of the same state, in which event venue may be laid in any district of that state in which one or more of the defendants resides.¹⁶³ Or venue may be prescribed by one of the numerous special venue provisions contained in other federal statutes.¹⁶⁴

There are various possible solutions to the venue problem, as it affects required joinder of parties. The simplest solution, and one which would leave venue generally geared to residency, would be a special venue provision which would state that where venue is proper as to the original parties in an action, an indispensable or conditionally necessary party who is added to the action in order to grant complete relief cannot object to venue. In *Camp v. Gress*¹⁶⁵ the Supreme Court refused to read the venue statute then on the books to hold that where venue was proper as to some of the parties, others could not object.¹⁶⁶ But the Court did not hold that Congress was without authority to relax venue requirements in order that entire controversies might be settled.¹⁶⁷ Today there are situations where certain claims are said to be

159. FED. R. CIV. P. 82 reads: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

And the Rule-Making Act, note 98 *supra*, prohibits the Rules from affecting any "substantive" right.

160. 28 U.S.C. § 1391(a) (1958). See 1 MOORE ¶ 0.142[3].

161. 28 U.S.C. § 1392(a) (1958). See 1 MOORE ¶ 0.143.

162. 28 U.S.C. § 1391(b) (1958). See 1 MOORE ¶ 0.142[4].

163. 28 U.S.C. § 1392(a) (1958). See 1 MOORE ¶ 0.143.

164. See 1 MOORE ¶ 0.144.

For examples of special venue provisions which were enacted specifically to deal with problems created by the indispensable parties rule, see notes 146 & 151 *supra*.

165. 250 U.S. 308 (1919).

166. Unlike the present venue statute dealing with diversity actions, which refers to the district where *all* plaintiffs or *all* defendants reside, note 160 *supra*, the statute then on the books provided that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 250 U.S. at 310. Suit was brought in a district where some of the defendants resided, but the plaintiff did not. A defendant who also did not reside in the district, the Court held, could assert lack of venue as to himself.

167. In fact, it specifically approved a venue statute which had that result. The Court referred to then § 52 of the Judicial Code, the forerunner of present 28 U.S.C. § 1392(a)

ancillary to matters already pending in the federal court. In such situations, it is generally held that the person summoned to defend such a claim cannot raise a venue objection. For example, since a third-party claim is said to be ancillary to the main action pending in federal court, it is held that a third-party defendant may not object to venue.¹⁶⁸ There is thus both legislative¹⁶⁹ and judicial¹⁷⁰ precedent for a provision drawn along the suggested lines.

Other more general solutions to problems of venue have been advocated, and these would also affect joinder requirements. One possibility would be to gear venue generally to service of process, rather than to residency.¹⁷¹ If a party were properly served with process issuing out of a federal court, venue would be proper in that federal court. If the previously advocated change in Rule 4(f), widening the reach of process to add conditionally necessary or indispensable parties to a federal action, were adopted, then under a venue provision where venue is geared to service, venue would be proper as to the additional party who is properly served under the proposed Rule 4(f).

Another possible solution is to widen the choices of venue presently available to include the place where the subject of the action arose as a proper venue.¹⁷² This increase in choices of venue would greatly enhance the possibility that venue would be proper as to an added conditionally necessary or indispensable party. In certain special venue provisions, Congress has recently provided for this added choice of places where a federal action may be brought.¹⁷³ But a possible disadvantage of a venue statute which would include such a choice of venues is that it might be difficult to administer and could breed appeals in which the question was simply where the action actually arose.

(1958), which provided that where a state contains more than one judicial district and "if there are two or more defendants, residing in different districts of the State, it [a suit not of a local nature] may be brought in either district." 250 U.S. at 314-15. Thus under § 52 venue was proper as to the defendant who resided within the state but outside the judicial district in which the action was brought. In rejecting the contention that defendant who lived *outside the state* could not object to venue as to himself, the Court stated: "If Congress . . . had intended that it should establish a rule with reference to defendants resident in different States contrary to the construction placed by the overwhelming weight of authority . . . it would have expressed that intention in unmistakable language." *Id.* at 315-16.

168. *United States v. Acord*, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954). See general discussion and citation of cases in 3 MOORE ¶ 14.28[2].

A similar result has been reached as to additional parties brought in under Fed. R. Civ. P. 13(h) to grant complete relief in the determination of a compulsory counterclaim, deemed to be ancillary to the main action. *Lesnik v. Public Industrials Corp.*, 144 F.2d 963 (2d Cir. 1944) (extended discussion by Judge Clark). See general discussion and citation of cases in 3 MOORE ¶ 13.39.

169. See note 167 *supra*.

170. See note 168 *supra*.

171. See Moore, *Problems of the Federal Judiciary*, 35 F.R.D. 305, 311 (1964).

172. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION: BETWEEN STATE AND FEDERAL COURTS 36, 137-38 (Tent. Draft No. 2, April 30, 1964).

173. See the Act of October 5, 1962, set out in note 151 *supra*, and the Act of December 23, 1963, 77 Stat. 473, adding subdivision (f) to 28 U.S.C. § 1391 (1958).

The third major obstacle to joining absent interested parties in diversity actions is the complete diversity requirement of *Strawbridge v. Curtiss*.¹⁷⁴ It seems doubtful that the constitutional grant of diversity jurisdiction to the federal courts requires complete diversity between all plaintiffs on the one side and all defendants on the other.¹⁷⁵ The opinion in *Strawbridge* was a reading of the existing diversity statute, not of the Constitution.¹⁷⁶ Moreover, Congress has permitted less than complete diversity in actions under the Federal Interpleader Act.¹⁷⁷ The federal courts have found ways around the complete diversity requirements of *Strawbridge* in the concepts of ancillary jurisdiction,¹⁷⁸ and the class suit.¹⁷⁹ There thus seems to be no insurmountable

174. 7 U.S. (3 Cranch) 267 (1806).

175. See Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEXAS L. REV. 1, 28 (1964); Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957); ALI SUDBY, *op. cit. supra* note 172, at 176-86. Cf. Shields v. Barrow, 58 U.S. (17 How.) 130, 145 (1854).

176. The Court was considering the question of diversity jurisdiction of a suit where "Some of the complainants were alleged to be citizens of the State of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiss, who was averred to be a citizen of the state of Vermont. . . ." 7 U.S. at 267. The Court analyzed the problem solely in terms of "the words of the act of congress" and held that jurisdiction could not be supported. *Ibid.* See also *Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

177. 28 U.S.C. § 1335(a) derived from the Federal Interpleader Act of 1936, states: "The district courts shall have original jurisdiction of any civil action of interpleader . . . if (1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming. . ." This language has been interpreted to mean that there need only be diversity between any *two* adverse claimants. The coincidence of citizenship between other adverse claimants or between the stakeholder and any claimants will not oust the federal court of jurisdiction. *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141 (8th Cir.), *cert. denied*, 302 U.S. 739 (1937); Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957).

It might be argued, however, that a suit under the Interpleader Act is an action based on a federal statute and does not look to the diversity grant of jurisdiction under Article III of the Constitution, but rather to Article III's grant of jurisdiction of cases arising under the laws of the United States. This construction of a predecessor of the present Interpleader Act seems to have been rejected by the Supreme Court in *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 71 (1939).

178. Thus it is held that a third-party action is ancillary to the main suit in which it is asserted, and therefore where a third-party defendant is impleaded in a suit based upon diversity, there need not be diverse citizenship between the third-party plaintiff and the third-party defendant. See, *e.g.*, *Foster v. Brown*, 22 F.R.D. 471 (D. Md. 1958); *Cumberland Milling Co. v. Trenton Grain Co.*, 22 F.R.D. 328 (W.D. Ky. 1958). Or between the plaintiff in the main action and the third-party defendant. See, *e.g.*, *Sheppard v. Atlantic States Gas Co.*, 167 F.2d 841 (3d Cir. 1948); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified on other grounds*, 210 F.2d 375 (2d Cir. 1954); *Smith v. Philadelphia Transport Co.*, 173 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 819 (1949). See also 3 MOORE ¶¶ 14.25, 14.26.

And see the discussion by Judge Clark in *Lesnik v. Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944).

Similarly, it has been held that a compulsory counterclaim is ancillary to the main claim and where an additional party is brought in under Rule 13(h) for the granting of complete relief in a compulsory counterclaim raised in a diversity action, there need not be diversity of citizenship between the added party and the counterclaimant. See, *e.g.*, *Galli-*

barrier to Congress providing for minimal diversity to alleviate problems created by joinder requirements. A statute could be drawn which stated that where an additional indispensable or conditionally necessary party is joined in an action in the federal court based on diversity, where prior to his joinder diversity was present, jurisdiction would remain even if the added party's citizenship coincided with that of a party joined on the opposite side of the litigation.

If the foregoing or similar¹⁸⁰ proposals were adopted with regard to service of process, venue, and diversity jurisdiction, the federal courts would have the ability to join most indispensable and conditionally necessary persons in a single action. And the joinder of such indispensable or conditionally necessary persons would not cause the action to be dismissed, thereby denying plaintiff his forum. On the contrary, because of the limitations on the power of state courts to secure jurisdiction over absent persons, the federal courts might furnish an unduplicated forum for the expeditious settlement of entire controversies.

The distinctions between indispensable and conditionally necessary parties would diminish in importance, since in most instances both could be joined in a pending action. But the distinctions would not entirely disappear, and the indispensable parties rule would remain. There might be persons considered to be indispensable, but who could not be found, or who could not validly be served abroad. There might be indispensable parties such as the United States, or a state, whose joinder would preclude the court from going forward with the action. But these situations would be rare. They would be minimized by the practical approach to indispensability which courts have shown. If only these very isolated problems remained, after the other proposed solutions were adopted and had had ample opportunity to be tested in practice, then perhaps a new, judicially-fashioned indispensable parties rule might evolve.

more v. Dye, 22 F.R.D. 250 (E.D. Ill. 1958); Markus v. Dillinger, 191 F. Supp. 732 (E.D. Pa. 1961). See also 3 MOORE ¶ 13.39.

179. In a class suit, the citizenship of the representative party of record is looked to, rather than the citizenship of the members of the class whom he represents, in determining whether there is complete diversity. Thus the representative of record might represent members of a class whose citizenship coincided with that of the parties joined on the other side of the litigation. See 3 MOORE ¶ 23.13 at 3483.

180. The American Law Institute is studying proposals with regard to the problems raised by the desire to join parties residing in different states who have a substantial interest in the outcome of litigation. See ALI STUDY, *op. cit. supra* note 172. Some of the proposals for changes in service of process, diversity jurisdiction and venue requirements in federal courts resemble the proposals put forward above. However, they would break with the past to a greater extent than would the proposals I have suggested. Nonetheless, they merit careful study. Unfortunately, the ALI Report also contains other proposals which would severely limit, if not emasculate, diversity jurisdiction. The ALI proposals dealing with "dispersed necessary parties" are rendered unduly complex because they assume the adoption of the companion proposals limiting diversity. The first are as helpful as the second are uncalled for. See Moore & Weckstein, *supra* note 175; Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963).

CONCLUSION

The proposed revision of Rule 19 should not be adopted. When understood in terms of its historical background, the language of the present rule is not confusing and the courts have found little or no difficulty in applying Rule 19.

The scholarly criticism which underlies the proposed amendment was not primarily directed at Rule 19, but fundamentally was directed at the canons of required joinder which existed in law and equity actions in the federal courts prior to their merger with the adoption of the Federal Rules. The indispensable parties rule which, in the federal courts, is applied by means of Rule 19, was enunciated by the United States Supreme Court, and has been applied in case after case by that Court, and by the lower federal courts. While the courts are far from clear as to the theoretical basis of the rule, the rule itself is not obscure. Basically it holds that a court may not render a decree in the absence of a person whose interests may be affected by that decree or without whose presence a just and equitable decree cannot be entered. Scholarship can be and has been worthily applied in searching the meaning of these terms and their proper application; but scholarship cannot cause the rule to vanish.

The language of the proposed revision is ambiguous and unclear. The wording of the proposed revision seems to give federal courts discretion to proceed in the absence of formerly indispensable parties, but the Advisory Committee has failed to explore the questions of whether a change in the federal rule could validly have this effect, and whether the Supreme Court would have the power to promulgate such a change in the Federal Rules.

Undeniably the indispensable parties rule sometimes puts the federal courts to a cruel choice: whether to proceed without absent persons whose interests might be affected by any decree entered or whose presence is required for the entry of a complete, just, and viable decree, or to dismiss the action and thereby perhaps deny the present plaintiff any forum in which his action may be heard. This problem can best be attacked, not by seeking ways to proceed without interested persons, which inevitably has the effect of fragmenting lawsuits, but by searching for the means for bringing all interested persons before a single forum so that whole controversies may be expeditiously settled.

For this reason, the more desirable answers would seem to be an extension of service of process in the federal courts to bring in absent indispensable and conditionally necessary parties; a relaxation of venue requirements as to such parties, and a relaxation of complete diversity requirements in regard to such absent parties. These changes, which may be made readily by the Court and by Congress, would meet the real problem involving joinder requirements — the largely artificial barriers which today prevent complete and expeditious adjudications of entire controversies in the federal courts.