71 6/19/70

Memorandum 70-66

Subject: Study 71 - Joinder of Parties

At the June 1970 meeting, the Commission directed the staff to prepare for separate consideration a memorandum dealing with the revision of Section 389 of the Code of Civil Procedure and providing additional background relating to the joinder of "indispensable" and "necessary" parties. Attached to this memorandum are: (1) a copy of the Commission's 1957 printed Recommendation and Study Relating to Bringing New Parties Into Civil Actions; (2) excerpts from two law review comments critical of the 1957 changes: Bringing New Parties Into Civil Actions in California, 46 Cal. L. Rev. 100 (1958)(Exhibit I--pink); and Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960) (Exhibit II--yellow); (3) a draft statute incorporating the suggestions of our consultant in this area (Exhibit III--green). See Research Study, pages 30-38 (attached to Memorandum 70-65).

The staff believes that the criticism expressed concerning the 1957 changes was justified. At that time, Section 389 was amended to provide in part:

> 389. A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

The underscored phrase was not included in the printed recommendation and was not apparently derived from prior case law. See Comment, 46 Cal. L. Rev. 100, 101 (1958); 33 So. Cal. L. Rev. 428, 432-433 (1960). As indicated in the comments, this language could produce unintended consequences.

Section 389 was also amended to direct, if not require, the joinder of persons whenever it would enable the court "to determine additional causes of

action arising out of the transaction or occurrence involved in the action." It is obvious that the Commission did not intend this language to be as broad as it reads. Indeed, as noted by Professor Friedenthal in his study on counterclaims and cross-complaints, a broad literal reading of Section 389 "would mean that every person permitted to be joined would have to be joined."

Apparently, the Commission's intention in amending Section 389 was to clarify the existing definitions of indispensable and necessary parties. As the commentators hoped, the courts have ignored the precise wording of Section 389 and have continued to apply the rules in this area developed by the prior case law. However, the potential problems still exist. Professor Friedenthal concludes:

> [I]t should be clear that a straightforward policy decision is required regarding the compulsory joinder of claims involving multiple parties. If the purpose of joinder is to be limited to situations where actual prejudice, such as inconsistent verdicts, may occur if a person, whether or not indispensable, is not joined, then section 389 should be revised to eliminate the reference to joinder of causes and should be patterned after Federal Rule 19, which was amended in 1966 after careful study and which is limited to situations where absence of a party may result in such prejudice.
>
> If the purpose of compulsory joinder is not only to avoid prejudice but also to promote the general convenience of the court and of the parties and to avoid a multiplicity of suits, then sections 427 and 389 must be altered to say so clearly; they must be harmonized with one another and with those provisions allowing permissive joinder of parties.
>
> On balance the narrower view of Federal Rule 19 seems the most appropriate one for California to adopt. The advantages that may accrue from broad compulsory joinder are outweighed by problems of enforcement and the dangers of unnecessary litigation. [Background Study at 34-35.]

The staff is inclined to agree with our consultant and has accordingly prepared a draft statute incorporating his suggestion. See attached Exhibit III (green). At the July 1970 meeting, the Commission should review this

matter. If the policy decision to revise Section 389 in substantial conformity with Rule 19 is made, the draft statute should be reviewed so that it may be included in our tentative recommendation relating to joinder of causes and parties.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memo 70-66

EXHIBIT I

Comment

BRINGING NEW PARTIES INTO CIVIL ACTIONS IN CALIFORNIA

The 1957 session of the California Legislature endeavored to revise the provisions of the Code of Civil Procedure with respect to the bringing in of new parties in civil actions but, by amending sections 389,[1] which deals with joinder, and 442,[2] concerning cross-complaints, it created many new and perhaps unanticipated problems.

Prior to its amendment section 389 read in part: "when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in . . . ." Although the section spoke in mandatory terms and made no distinction between necessary and indispensable

[1] CAL. CODE CIV. PROC. § 389: "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

"A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.

"When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is willful or negligent.

"When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is willful or negligent.

"Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed and summons thereon issued and served.

"If, after additional conditionally necessary parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials as to such parties or make such other order as may be just."

Prior to the amendment, section 389 provided:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of *real* or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment."

The last sentence of the section as it read prior to the recent amendment is now contained in CAL. CODE CIV. PROC. § 389.5.

[2] CAL. CODE CIV. PROC. § 442: "Whenever the defendant seeks affirmative relief against any [party] *person, whether or not a party to the original action*, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-

parties,[3] it was interpreted by the courts to require the joinder only of an indispensable party and merely to permit, in the discretion of the court, the joinder of a necessary party.[4]

In its report, the California Law Revision Commission stated that section 389 had been subjected to varied interpretations by the courts, and that the purpose of the amendment was to provide explicitly that indispensable parties must be joined and that necessary parties may be joined if the court finds it advisable to do so.[5] In view of the fact that there had been little question as to the meaning of section 389 since the decision in *Bank of California v. Superior Court*,[6] the need for clarification of the section is questionable. Moreover, because of an unfortunate choice of language, it is possible that the amendment has confused, rather than clarified, the California practice with respect to joinder of parties.

In the past the judicial definition of an indispensable party was phrased in terms of the effect of his absence upon his rights, as well as the futility of a judgment without his presence.[7] In defining indispensable parties, section 389 now speaks in terms of prejudicing the rights of the parties before the court, as well as those of the absent party.[8] Further, the section states that the absent party is indispensable if his interests would be *inequitably* affected by a judgment without his presence.[9] Previously, the test had been whether the judgment would *directly* affect the absent party's interest in the subject matter of the controversy before the court. In construing section 389 the courts will be faced with the question of whether these differences in phrascology alter the existing test of a party's classification.

Section 389 states that a necessary party is one "whose joinder would enable the court to determine additional causes of action" arising out of the subject matter of the controversy before the court. The former verbalization of a necessary

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complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, or file a notice of motion to strike the whole or any part thereof, as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action." (The word "party" in brackets was deleted by the 1957 amendment and the italicized portion added thereby.)

[3] Parties are generally classified into three groups: (1) *proper parties*, who have no interest in the controversy between the immediate litigants, but have such an interest in the subject matter as may be conveniently settled in the suit, and thereby prevent further litigation; (2) *necessary parties*, who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a judgment between those parties; (3) *indispensable parties*, who not only have an interest in the subject matter of the controversy, but an interest of such a nature that a final judgment cannot be made without directly affecting their interests. See, e.g., Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940).

[4] Simmons v. California Institute of Technology, 34 Cal. 2d 264, 209 P.2d 581 (1949); Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940).

[5] CAL. LAW REVISION COMM., RECOMMENDATION AND STUDY RELATING TO BRINGING NEW PARTIES INTO CIVIL ACTIONS 5 (1957).

[6] 16 Cal. 2d 516, 106 P.2d 879 (1940).

[7] Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955); Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937); Warner v. Pacific Tel. & Tel. Co., 121 Cal. App. 2d 497, 263 P.2d 465 (1953); Baines v. Zuieback, 84 Cal. App. 2d 483, 191 P.2d 67 (1948); McKelvey v. Rodriguez, 57 Cal. App. 2d 214, 134 P.2d 870 (1943).

[8] The writer has been able to find only one authority using such language: STORY, EQUITY PLEADINGS § 77 (5th ed. 1852).

[9] No authorities have been found which so use the word "inequitably" in describing indispensable parties.

party was one whose absence would prevent a complete determination of the controversy between the parties already before the court.[10] While this revised language may be interpreted by the courts as simply another way of stating the same test, there are situations where the joinder of a new party would enable the court to determine additional causes of action arising out of the subject matter of the controversy before the court, even though that person's joinder would not be necessary to permit a complete determination of the controversy between the parties already before the court.[11] If this definition is given its literal meaning, the class of persons denominated necessary will be expanded to include many who formerly would have been merely proper parties.

From the foregoing discussion it is apparent that section 389 as amended is susceptible to being construed as laying down new tests for determining the status of a party as indispensable or necessary.[12] It is submitted, however, that it is a practical impossibility to formulate concrete tests for determining the status of the new party. Since the new phraseology used in section 389 apparently has not been used in any cases applying the section before its amendment, there is no guide as to the meaning of the new terms. Furthermore, the California Law Revision Commission indicated that its purpose in proposing the amendment was merely to clarify, not to alter, the existing definition of indispensable and necessary parties. It is therefore to be anticipated that the courts will ignore the unique phraseology of section 389 and will continue to apply the rules as developed in the *Bank of California* case, determining the status of the absent party according to the peculiar facts of each case rather than restricting themselves by attempting to formulate a test applicable to all situations.

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[10] Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955); Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 Pac. 445 (1930); Hahn v. Walter, 60 Cal. App. 2d 837, 141 P.2d 925 (1943). There are apparently no cases using the language now contained in section 389.

[11] An example is the second hypothetical case discussed in connection with section 442. See text at note 24 *infra*.

[12] Two other changes in section 389 bear discussion, but do not relate directly to the subject of this article. In dealing with the sanctions for failure to secure the joinder of a party after having been ordered by the court to do so, section 389 states that "the court may dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is willful or negligent." Formerly the sanction for failure to comply with an order to secure the joinder of a new party was dismissal of the cause of action to which the absent party was indispensable or necessary, as the case may be, such dismissal being compulsory if the absent person was an indispensable party. Warner v. Pacific Tel. & Tel. Co., 121 Cal. App. 2d 497, 263 P.2d 465 (1953); Loock v. Pioneer Title Insurance and Trust Co., 4 Cal. App. 2d 245, 40 P.2d 526 (1935). Also, section 389 states that the court *shall* order in a necessary party if certain conditions are met. Non-joinder of an indispensable party goes to the jurisdiction of the court, requiring dismissal of the action if such party is not joined, and objection to non-joinder of an indispensable party is not waived by failure to assert it in the answer or demurrer. But failure to object to the non-joinder of a necessary party had heretofore caused a waiver. Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940); Smith v. Cucamonga Water Co., 160 Cal. 611, 117 Pac. 764 (1911). See also CAL. CODE CIV. PROC. § 434, which provides that the only objections not subject to waiver are lack of jurisdiction of the court and failure of the complaint to state a cause of action. The courts would probably be reluctant to give this portion of section 389 the interpretation that absence of a necessary party now goes to the jurisdiction of the court and has the same effect as non-joinder of an indispensable party. This language will probably be given the interpretation that the court must order in the necessary party if, in its discretion, it is found to be expedient to do so, thus causing no change in the prior practice. However, the portions of the section dealing with sanctions for wilful or negligent non-compliance with a court order for joinder are explicit and probably will be given literal effect.

Memo 70-66 EXHIBIT II

COMMENT

JOINDER OF PARTIES IN CIVIL ACTIONS IN CALIFORNIA

For some time there has been confusion concerning the joinder of parties in civil actions in California. This confusion has arisen at several levels of the legal process. Most significantly, it has arisen out of a failure of the legislature to provide a concise statement of the field of joinder of parties in a package containing the types, status and characteristics of the various parties along with the legal effects of joinder, misjoinder and nonjoinder.

This comment has as its scope the California law of joinder as it applies to "indispensable parties," "necessary parties," "conditionally necessary parties," and "permissive (or proper) parties" in civil actions. Class actions and representative suits will not be considered.

I. THE INDISPENSABLE PARTY

Historically, there have always been situations where an effective judgment could not be rendered without the presence of a certain party or parties because his or their interests or rights were too inextricably bound up in the matter being litigated.[1] It is from this beginning that our present law of indispensable parties has come.

What parties are indispensable? The case before the court must be of such a nature that the court cannot render an effective judgment without the presence of another, or a judgment rendered would seriously prejudice the rights of a party *not* before the court. There is an overlapping in the controlling statutes in California, primarily because both the old equity rule of joinder[2] and the common law rule[3] have been codified. The equity rule is set out in Code of Civil Procedure, Section 389:

> A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

The common law rule is set out in the same code in Section 382: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants. . . ." As will be shown, these sections embrace both indispensable parties and necessary parties because, as we know them today, joint interests may or may not indicate indispensability.

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[1] POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 114 (4th ed. 1918).
[2] See CLARK, CODE PLEADING, ch. 6 (2d ed. 1947).
[3] *Ibid.*

Section 389 was amended to its present form in 1957, in order to bring it more in line with the case law up to that time.[4] Few cases have been decided under it as amended, but there is ample authority under the old section, which has not been emasculated by the new amendment.

Some examples of "indispensability" will serve to show what considerations must be looked to in delineating indispensable parties. It has been held that in an action to set aside a trust, or determine the interest of a beneficiary in a common trust fund, all the beneficiaries are indispensable[5] because any judgment which is rendered will clearly affect their interest in the trust *res*.[6] But, compare where all the beneficiaries have identical interests such as in the removal of a trustee for breach of trust. Here, the court has said that absent beneficiaries are not indispensable because the nature of the suit is a class action and there is virtual representation.[7] The result may be the same in the case of unborn remaindermen.[8] Where the action is concerned only in rights to the aliquot or liquidated share of one beneficiary and such judgment will not affect the liquidated (or unliquidated) share of other beneficiaries, then those beneficiaries not interested are not even proper parties to the action.[9] In an action to wind up a partnership all the partners are indispensable.[10] In an

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[4]Before amendment it provided: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross complaint to be filed, and summons thereon to be issued and served. . . ."

[5]CAL. CODE OF CIV. PROC., § 369 provides: "An executor or administrator or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. . . ." It has been held that this provision applies only to actions in which the litigation is against, or by a stranger to, the trust, or where the action is not directly determinative of the beneficial shares of the trust. Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145 (1906); De Olazabal v. Mix, 24 Cal. App. 2d 258, 74 P.2d 787 (1937).

[6]Toomey v. Toomey, 13 Cal. 2d 317, 89 P.2d 634 (1939); Hutchins v. Security Trust and Sav. Bank, 208 Cal. 463, 281 Pac. 1026 (1929); Mitau v. Roddan, *supra* note 5; O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236 (1887); Mabry v. Scott, 51 Cal. App. 2d 245, 124 P.2d 659 (1942); De Olazabal v. Mix, *supra* note 5; Loock v. Pioneer Title Ins. & Trust Co., 4 Cal. App. 2d 245, 40 P.2d 526 (1935). *But see* Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955) where the court felt that if all the interests of the beneficiaries were the same, a theory of "class action" would permit exclusion of some of them; Hutchins v. Security Trust & Sav. Bank, *supra*, where by way of dictum the court said if a trust was void as a matter of law the beneficiaries thereunder would not even be conditionally necessary parties.

[7]Under the case of Bowles v. Superior Court, *supra* note 6, this analysis seems feasible, but it would seem implicit that if there is the slightest variance in interests, or adversity of interests, under no circumstances should a co-beneficiary be held to be less than indispensable.

[8]CAL. CODE CIV. PROC. § 373.5. This code section relegates the unborn remainderman to the status of permissible party, but without his joinder it would seem that the judgment rendered would have no res judicata effect upon him.

[9]First Nat'l Bank v. Superior Court, 19 Cal. 2d 409, 121 P.2d 729 (1942) (action to determine whether or not plaintiff was beneficiary); Ward v. Waterman, 85 Cal. 488, 24 Pac. 930 (1890) (reformation of instrument to extent of ½ share).

[10]Rudnick v. Delfino, 140 Cal. App. 2d 260, 294 P.2d 983 (1956).

action to eject a lessee, the lessor is indispensable.[11] The mortgagor is indispensable in a foreclosure action,[12] but where a mortgagor subsequent to the mortgage gives a deed absolute, intending it to be a mortgage, to a second encumbrancer, the first mortgagee need not join the mortgagor unless he has knowledge that the deed constituted a mere security transaction.[13] According to some authority if a junior encumbrancer is not joined in a foreclosure action on a mortgage, the judgment is binding as between the parties present,[14] though it has no *res judicata* effect on absent junior encumbrancers in their later foreclosure actions. Another view holds that the judgment is a complete nullity if there is failure to join junior encumbrancers.[15] In an action against a sublessee for damages for breach of covenant the lessee-sublessor is not indispensable;[16] but in an action for forfeiture of the sublease, the lessee-sublessor is an indispensable party defendant.[17] And, in an action by one tenant in common to forfeit a lease given by himself, the other tenants in common have an interest in rents and royalties and therefore, are indispensable.[18] In setting aside a fraudulent conveyance, the transferee of the conveyance is indispensable.[19] In an action by one creditor against an assignee for the benefit of creditors seeking an accounting, the other creditors are indispensable,[20] but where an aliquot share (as compared with a pro rata share) is sought by the creditor the others would not be indispensable.[21] Where an action was brought to set aside a civil service eligibility list, not only the civil service officials had to be joined, but also all persons whose names were on the eligibility list.[22] In order to have a county clerk strike the names of certain voters from the registry, those voters sought to be removed must be joined as indispensable parties.[23] Where an action was brought to have an incompetent person's name removed from the ballot, even in the face of a prior adjudication of insanity, it was held that the person whose name was to be removed was indispensable.[24]

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[11]Thomson v. Talbert Drainage Dist. 168 Cal. App. 2d 687, 336 P.2d 174 (1959); Monolith Portland Cement Co. v. Gillbergh, 129 Cal. App. 2d 413, 277 P.2d 30 (1954).

[12]CAL. CODE CIV. PROC. § 726.

[13]Johnson v. Home Owners Loan Corp., 46 Cal. App. 2d 546, 116 P.2d 167 (1941).

[14]Lee v. Silva, 197 Cal. 364, 240 Pac. 1015 (1925); Frates v. Sears, 144 Cal. 246, 77 Pac. 905 (1904); Carpentier v. Brenham, 40 Cal. 221 (1870).

[15]Winn v. Torr, 27 Cal. App. 2d 623, 81 P.2d 457 (1938) (dictum).

[16]Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937).

[17]*Ibid.*

[18]Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 Pac. 369 (1917); Compare CODE CIV. PROC. § 384 providing: "All persons holding as . . . [co-tenants] may jointly or severally commence or defend any civil action . . . for the enforcement or protection of the rights of such party." This would not seem to cover the payment of royalties for the taking of oil from the land, which is tantamount to partition.

[19]Heffernan v. Bennett & Armour, 110 Cal. App. 2d 564, 243 P.2d 846 (1952).

[20]McPherson v. Parker, 30 Cal. 455 (1866).

[21]*Ibid.*

[22]Child v. State Personnel Bd., 97 Cal. App. 2d 467, 218 P.2d 52 (1950).

[23]Ash v. Superior Court, 33 Cal. App. 800, 166 Pac. 841 (1917).

[24]Younger v. Jordan, 42 Cal. 2d 757, 269 P.2d 616 (1954).

As one can see, it is difficult in many cases to tell whether or not a person is so vital to an action as to be indispensable. The status of "indispensable party" does not necessarily depend on one's status in the suit, *e.g.*, merely being a beneficiary of a trust does not insure that one will always be indispensable. In the leading case of *Bank of California v. Superior Court*[25] this test was set out:

> There may be some persons whose interests, rights or duties *will inevitably be affected by any decree* which can be rendered in the action. Typical are the situations where a number of persons have undetermined interests in the same property or in a particular trust fund, and one of them seeks . . . to fix his share, or to recover a portion claimed by him.[26]

The cases in which parties have been held to be less than indispensable are legion.[27] The great failing in not properly determining indispensability seems to lie in failure to see that if the court can give a judgment (even though it is less than is prayed for) which will be enforceable without joinder of another person, that person *is not* indispensable.[28]

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[25]16 Cal. 2d 516, 106 P.2d 879 (1940).

[26]*Id.* at 521, 106 P.2d at 883. (Emphasis added.)

[27]Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955) (beneficiaries not indispensable in action to remove trustee); Jollie v. Superior Court, 38 Cal. 2d 52, 237 P.2d 641 (1951) (action to determine right to aliquot share in winding up partnership); Simmons v. Cal. Inst. of Technology, 34 Cal. 2d 264, 209 P.2d 581 (1949) (promisee's action against third party beneficiary for recision — promisor not indispensable); First Nat'l Bank v. Superior Court, 19 Cal. 2d 409, 121 P.2d 729 (1942) (action to determine right to aliquot share of trust — beneficiaries not indispensable); Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940) (quasi specific performance to attack will — beneficiaries not affected not indispensable); Shea v. City of San Bernardino, 7 Cal. 2d 688, 62 P.2d 365 (1936) (joint and severally liable tortfeasors not indispensable); Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 Pac. 445 (1930) (action for injunction against lessee — lessor not indispensable); Fowden v. Pacific Coast S.S. Co., 149 Cal. 151, 86 Pac. 178 (1906) (joint tortfeasors are not indispensable); East Riverside Irr. Dist. v. Holcomb, 126 Cal. 315, 58 Pac. 817 (1899) (injunction against execution by sheriff — judgment creditor not indispensable); Williams v. So. Pac. R.R. Co., 110 Cal. 457, 42 Pac. 974 (1895) (suit against partnership on partnership obligation — other partners not indispensable); Duval v. Duval, 155 Cal. App. 2d 627, 318 P.2d 16 (1957) (action to have conveyance construed — the purported beneficiaries of a contended trust not indispensable); Everfresh Inc. v. Goodman, 131 Cal. App. 2d 818, 281 P.2d 560 (1955) (suit for conversion — lienholders and conditional sales claimants not indispensable); Williams v. Reed, 113 Cal. App. 2d 195, 248 P.2d 147 (1952) (joint and several obligors not indispensable); Goldsworthy v. Dobbins, 110 Cal. App. 2d 802, 243 P.2d 883 (1952) (suit for specific performance — trust deed holder not indispensable); Harrington v. Evans, 99 Cal. App. 2d 269, 221 P.2d 696 (1950) (suit under permissive use statute — driver of auto not indispensable); Jones v. Feichtmeir, 95 Cal. App. 2d 341, 212 P.2d 933 (1949) (suit for declaratory relief against sublessor by sublessee — lessor not indispensable); Castro v. Giacomazzi Bros., 92 Cal. App. 2d 39, 206 P.2d 688 (1949) (driver not indispensable in action under permissive use statute); Baines v. Zuieback, 84 Cal. App. 2d 483, 191 P.2d 67 (1948) (lessor not indispensable in an action to reform sublease); Hahn v. Walter, 60 Cal. App. 2d 837, 141 P.2d 925 (1943) (several co-guarantors not indispensable); Garcia v. Superior Court, 45 Cal. App. 2d 31, 113 P.2d 470 (1941) (suit against child to support parent — other children not indispensable); Frazzini v. Cable, 114 Cal. App. 444, 300 Pac. 121 (1931) (joint tortfeasors not indispensable); Webb v. Casassa, 82 Cal. App. 307, 255 Pac. 541 (1927) (joint obligees not indispensable); Tujague v. Superior Court, 69 Cal. App. 35, 230 Pac. 198 (1924) (unlawful detainer actions are exceptions to the rule—unjoined parties never indispensable).

[28]See generally Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940).

What is the effect of nonjoinder of an indispensable party? This seems to have been problematic in the past, but it would seem that the reason problems have arisen is because there has been confusion between the terms "necessary" and "indispensable" by a use of the former to include the latter. As can be seen from the analysis above, where a party is indispensable, any judgment rendered by the court without that party present is a nullity because it is an attempt to adjudicate the rights of a person not before the court. Thus, it is stated in the cases that without the presence of indispensable parties the court is without jurisdiction (over the subject matter) and any judgment rendered is open to both direct and collateral attack.[29] The Code of Civil Procedure provides:

> When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court *shall* dismiss without prejudice all causes of action as to which such party is indispensable.[30]

This mandatory dismissal rule seems to voice the rule of the cases and relates nonjoinder of indispensable parties to the subject matter jurisdiction of the court.

How and when can nonjoinder of an indispensable party be raised? Since this matter goes to the jurisdiction of the court,[31] it may be raised at any time in the proceedings and is not waived by a failure to seasonably object.[32] Since it is not waived, it may be raised on appeal,[33] or by writ of prohibition restraining the lower court from proceeding with the action without ordering joinder of the indispensable party.[34] At the initiation of the action, it may be raised either by answer[35] or demurrer.[36] Although there is no authority, it seems possible that a motion to strike might also be a proper vehicle for such objection in some instances.[37]

There is one great problem area under the 1957 amendments to Section 389. That is, what is the effect of the language that a person is indispensable when his absence ". . . would seriously prejudice any party

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[29]Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937); Soloman v. Redona, 52 Cal. App. 300, 198 Pac. 643 (1921).

[30]CAL. CODE CIV. PROC. § 389. (Emphasis added.)

[31]Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937).

[32]CAL. CODE CIV. PROC. § 434 provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state . . . a cause of action." It has been held that this waiver does not apply to the objection of nonjoinder of an indispensable party. Toomey v. Toomey, 13 Cal. 2d 317, 89 P.2d 634 (1939); Hartman Ranch Co. v. Assoc. Oil Co., *supra* note 31; Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145 (1906); Miracle Adhesives v. Peninsula Tile Ass'n, 157 Cal. App. 2d 591, 321 P.2d 482 (1958).

[33]*Ibid.*

[34]See cases cited throughout this comment in which superior court is a party defendant.

[35]CAL. CODE CIV. PROC. § 433.

[36]*Id.* at § 430.

[37]*Id.* at § 435.

before the court . . . ?" As seen above, traditionally in California this has not been a case of indispensability, but, rather, merely a case of parties being necessary. The first problem is to determine what is meant by "seriously prejudice." But, of even more importance is the determination of what parties the language covers. As will be discussed below, it is normally the case that a joint obligee or joint obligor is a necessary party, and this code section seems to describe the type of case involving a joint obligation.

What possible constructions could be placed upon this language? It could be argued that the legislature intended to elevate joint obligees and joint obligors to the status of indispensable parties, and thereby make their nonjoinder jurisdictional. This argument could also be applied to joint tortfeasors as will be shown below. This hardly seems wise, however, because failure to join these parties is not such a serious defect that there should be a dismissal of the action, and a total denial of resolution of the case as it exists. On the other hand, the court could construe the section as creating a new class of indispensable parties; a class where failure to seasonably object to nonjoinder would constitute a waiver. It would seem that this construction would run counter to the law as it has been in California, and elsewhere; and, in fact, this very illusory construction would lead only to greater confusion and anomaly. Probably the best thing that the court can do is to try to ascertain the legislative intent, which was probably merely to codify the law as it existed and not to change the law. Under this rationale, the court could construe the section in the light of the other sections dealing with joinder of parties[38] and allow no change in the law as it existed at the time of the amendment. Even if the court does not choose to ignore this language, it could emasculate it by placing an extremely strict construction on the factual question of what constitutes the necessary "serious prejudice." This, too, would have the effect of avoiding the harsh jurisdictional effect of nonjoinder, in all but the hardest of cases.

II. Necessary Parties

It is in this area of the law that the greatest difficulty has been found both in the definition of terms, and in the determination of the legal effect of nonjoinder. To begin with, in California we are plagued with a codification of both the common law rule of mandatory joinder and the rule used at equity.[39] As a result of this admixture there are overlapping statutes. Fundamentally, under the common law, persons having joint interests had to be joined. Nonjoinder of such persons was considered fatal. The courts of equity discarded this mechanical rule and adopted

[38] *Id.* at §§ 379, 382, 383, 430 and 434.

[39] As indicated, the common law rule of joinder is found in § 382 of the code, and the equity rule in § 389.

in addition to the class of indispensable parties a class of parties who were not so vital to the litigation before the court.[40] This class often took in persons who were united in interest and whose joinder was mandatory under the common law system. In equity, nonjoinder of these parties was not fatal if it could be shown that it was not possible or practicable to join them. These parties had such an interest that they ought to be joined, but their interest was not so great that nonjoinder should be fatal to the action. This result followed either because there could be a partial adjudication between the parties already present or else because a decree rendered between the present parties would not have such a profound effect on the rights of absent parties: their rights could be adjudicated at a later time. As stated in the *Bank of California* case:

> The . . . classification includes persons who are interested in the sense that they might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others. These . . . may perhaps be "necessary" parties to a complete settlement of the entire controversy or transaction, but are not "indispensable" to any valid judgment in the particular case. They should normally be joined, and the court . . . will usually require them to be joined, in order to carry out the policy of complete determination and avoidance of multiplicity of suits. But, since the rule itself is one of equity, it is limited and qualified by considerations of fairness, convenience and practicality.[41]

Hence, where there is such a party, upon seasonable objection the court should order him to be joined, but if it is impossible to find the party, or to get jurisdiction over his person, or for some other reason he cannot be brought in, then the action should proceed as to those parties who are present. Obviously, it is crucial that the indispensable party be distinguished from the necessary party.

What parties are necessary parties? Although there is confusion in the cases,[42] and in the 1957 amendments to the Code of Civil Procedure,[43] joint obligees have traditionally been considered to be necessary parties.[44] The reason that the joint obligee is not an indispensable party plaintiff is because the obligor may set up the judgment in the first action as a set-off in an action by the absent obligee. Also, if the absent obligee has a right to a portion of the recovery he may bring

[40] POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 114 (4th ed. 1918).

[41] Bank of California v. Superior Court, 16 Cal. 2d 516, 523, 106 P.2d 879, 884 (1940). (Emphasis added.)

[42] Cases decided before 1940 seem to be the chief offenders. However, after the *Bank of California* case was decided (with its extensive discussion of the subject), a great amount of the confusion was dispelled.

[43] See text, "Conditionally Necessary Parties," *infra*.

[44] Williams v. So. Pac. R.R. Co., 110 Cal. 457, 42 Pac. 974 (1895); Webb v. Casassa, 82 Cal. App. 307, 255 Pac. 541 (1927).

an action against the obligee present for partition, or to impress a trust, or some other proper remedy, and thus protect his rights.[45] Note here, that the court may render a judgment stating the findings in such a manner as to save the rights of the absent party. It will be noticed further that the obligee has a remedy even though his co-obligee is absent; there is not a jurisdictional result such as would follow if the party were held indispensable. If the obligor seasonably objects to the nonjoinder, the court *ought* to join the absent obligee; thus saving multiplicity of litigation and lessening the hardship placed upon the party before the court. That is, the obligor will not have to defend another, subsequent action by the absent obligee.

Joint obligors present a somewhat more complicated problem. In California, joint obligors have been held to be necessary parties.[46] However, the obligor has a special hardship put upon him if his co-obligor is not joined in the action where the subject matter is a joint obligation. At common law, the obligee could not maintain an action without joining both obligors.[47] Under the equity rule joint obligors had to be joined unless joinder was not possible because of absence from the jurisdiction or some similar consideration.[48] Under our code, a suit on a joint obligation may proceed to judgment even though all the obligors are not served with process.[49] Also, under California's "joint debtor" statute a joint judgment debtor may go against his co-obligor for amounts he has been held for on execution of the judgment against him which amount to an excess over his pro rata share.[50] But, the appearing obligor is only entitled to this contribution *where the non-appearing obligor has been named in the action.*[51] This situation well-illustrates how the necessary party rule works since here is a case where nonjoinder will most definitely prejudice the party before the court. Since it is not even necessary that the joint obligor be served, but only named, there should never be an excuse for failure to order him in at least for the purpose of adding his name to the action in order to protect the appearing obligor. Finally, it will be noted that where obligors or obligees are jointly and severally

[45]See generally, 2 WILLISTON, CONTRACTS § 329 *et seq.* (rev. ed. 1938).

[46]Farmer's Exch. Bank v. Morse, 129 Cal. 239, 61 Pac. 1088 (1900); Grisingher v. Shaeffer, 25 Cal. App. 2d 5, 76 P.2d 149 (1938); Kawamoto v. Sawano, 110 Cal. App. 610, 294 Pac. 415 (1930).

[47]CLARK, CODE PLEADING § 56 (2d ed. 1947).

[48]*Ibid.*

[49]CAL. CODE CIV. PROC. § 414 provides: "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants." CAL. CODE CIV. PROC. § 989 provides: "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 414 of this code, those who were not originally served with the summons, and did not appear in the action may be . . . [ordered] to show cause why they should not be bound by the judgment."

[50]CAL. CIV. CODE § 1432; CAL. CODE CIV. PROC. § 709.

[51]*Id.* at § 709.

liable or have a joint and several claim, the absent party is clearly never a necessary party.[52]

When must objection be raised regarding nonjoinder of a necessary party? The courts have held that the nonjoinder of a necessary party must be raised by answer[53] or demurrer,[54] or it is forever waived, and not open on appeal.[55]

What is the effect of nonjoinder of a necessary party?

It has been held that where there is no objection made to the nonjoinder of a necessary party the court may proceed and any judgment or decree it renders is a binding adjudication on all present parties. It does not go to the subject matter jurisdiction of the court.[56] Where the objection is raised and overruled erroneously, such ruling can be raised on appeal and reversal will be granted providing prejudice can be shown.[57] Where the objection is sustained and the court orders the absent party brought in, upon a failure to so bring him in the court may, in its discretion, dismiss the action.[58] However, if it can be shown that it is impossible to bring in the absent party for one reason or another, then the court should proceed to judgment in the action before it.[59]

III. Conditionally Necessary Parties

In 1957, Section 389 of the Code of Civil Procedure was amended and the following provision created:

> A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the same transaction or occurrence involved in the action is a conditionally necessary party.
>
> When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without

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[52]Williams v. Reed, 113 Cal. App. 2d 195, 248 P.2d 147 (1952).

[53]Cal. Code Civ. Proc. § 433.

[54]*Id.* at § 430; Farmers Exch. Bank v. Morse, 129 Cal. 239, 61 Pac. 1088 (1900).

[55]Cal. Code Civ. Proc. 434; Williams v. So. Pac. R.R. Co., 110 Cal. 457, 42 Pac. 974 (1895); Everfresh Inc. v. Goodman, 131 Cal. App. 2d 818, 281 P.2d 560 (1955); Castro v. Giacomazzi Bros., 92 Cal. App. 2d 39, 206 P.2d 688 (1949); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P.2d 720 (1944); Kawamoto v. Sawano, 110 Cal. App. 610, 294 Pac. 415 (1930); Webb v. Casassa, 82 Cal. App. 307, 255 Pac. 541 (1927) (dictum).

[56]*Ibid.*

[57]Walker v. Etcheverry, 42 Cal. App. 2d 472, 109 P.2d 385 (1941); Gregg v. Stark, 128 Cal. App. 434, 17 P.2d 766 (1932); Wiseman v. Sklar, 104 Cal. App. 369, 285 Pac. 1081 (1930) (holding no error).

[58]Cal. Code Civ. Proc. § 389.

[59]Shell Dev. Co. v. Universal Oil Prod. Co., 157 F. 2d 421 (3d Cir. 1946); Fed. R. Civ. P. 19 (b).

> prejudice any cause of action asserted by a party whose failure to comply with the court's order is willful or negligent.

It is difficult to tell whether or not this code section was meant to completely supplant the old section and so to include that group of parties which had heretofore been called "necessary."

To begin with, it seems that we must proceed unaided by case authority construing this section and deciding this point. It seems further, that if the amendment was an attempt to dispense with prior confusion and to bring all parties which had been called "necessary" under an all inclusive label of necessary, it fell short. As has been shown above, the traditional necessary party was the person who was a joint obligor or joint obligee. This being the case, it is clear that the language in Section 389 doesn't even cover this situation. The definition of a "conditionally necessary" party is a party which would permit the court to solve *additional* causes of action. Where there is a joint obligation there is *one* cause of action against, or in favor of, more than one person.[60] Not more than one cause of action. Therefore, it would seem that this section does not even cover the traditional situation of a "necessary" party, but rather delineates a group of parties which were called necessary in the past, but weren't involved in a joint obligation. For example, this type of party might well be involved in an action where there is an assignment of contractual rights. The mere action by an assignee against the obligor does not necessitate the bringing in of the assignor-obligee as a conditionally necessary party in the normal situation because, *inter alia*, the assignor is no longer the real party in interest.[61] However, where the defendant-obligor wishes to set up a defense he has against the assignor in the action by the assignee, the assignor should be a conditionally necessary party defendant.[62] This will save the defendant-obligor from bringing a separate suit to assert the defense or set-off against the obligee-assignor. Assuming that the obligor asserts the defense against the assignee and prevails, it will save an action by the assignee against the assignor for breach of implied warranty of the assignment.[63] Also, if there were a partial assignment, there would be a case of conditionally necessary parties involved if the debtor wished to have all of the obligation considered. Note that this is a case of one cause of action, but it is split so as to make the various portions several rather than joint, and there would thus be no *res judicata* effect on obligees not present.

As can be seen, there is a relatively narrow set of circumstances where the new section can be used; it is at least questionable whether or not

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[60] *E.g.*, Williams v. So. Pac. R.R. Co., 110 Cal. 457, 42 Pac. 974 (1895).

[61] CAL. CODE CIV. PROC. § 367; CLARK, *op. cit. supra* note 51, at 165.

[62] This assumes a defense arising before the assignee gave notice to the obligor. A defense arising after notice could not be asserted unless of a specific type. See CAL. CODE CIV. PROC. § 368.

[63] RESTATEMENT, TORTS § 175 (1938).

the section has only served to confuse the law more, rather than to clarify it. If it were meant to settle for once and for all the problem of separating the indispensable from the necessary party, it is clearly inadequate. If it were merely meant to deal with certain parties called necessary in the past and throw all other parties heretofore called necessary into that class covered in Section 382, then it has been successful. The effect of non-joinder of conditionally necessary parties seems clear from the statute.

IV. Some Questions About Joint Tortfeasors in California Today

Historically, joint tortfeasors and concurrent tortfeasors have been considered liable jointly and severally;[64] under the majority rule in the United States there is no right to contribution allowed between concurrent tortfeasors,[65] but there *is* contribution allowed between joint tortfeasors where the tort is not intentional or malicious.[66] As a result of this rule it would seem that where there are joint tortfeasors (or concurrent tortfeasors if a jurisdiction allows contribution among them), those absent should be conditionally necessary parties so as to protect the defendant from the expense of another suit and avoid multiple actions. In California, under a 1957 statute, contribution is allowed where there is a "joint judgment."[67] Conceivably, this may be used to support the proposition that the trial court can grant or disallow the right to contribution by the type of judgment it renders, without more, and especially without regard to whether or not the tort was one involving joint acts or concurrent acts. Therefore, in all actions against joint or concurrent tortfeasors in California it is arguable that absent tortfeasors should be conditionally necessary parties.[68]

It is also arguable, although remotely so, that in California joint or concurrent tortfeasors are indispensable parties. This would follow from the reasoning that since by rendering a "joint judgment" the trial court may bestow a right to contribution upon the present tortfeasor, to deny him the joinder of an absent tortfeasor will deny him the privilege of contribution, and thus cause "serious prejudice to a party before the court," in the language of Section 389. It is submitted that this is a bizarre result, but not totally impossible under the language of Section 389 as it exists today.

However, the great majority of the cases in California regarding this point have been decided before Section 389 was enacted and there is no

[64] PROSSER, TORTS § 46 (2d ed. 1955).
[65] *Ibid.*
[66] *Ibid.*
[67] CAL. CODE CIV. PROC. § 875 provides: "Where a money judgment has been rendered *jointly* against two or more defendants in a tort action there shall be a right of contribution among them. . . ." (Emphasis added.)
[68] It is emphasized that the law prior to 1957 is *contra* and that there is presently no authority for this contention.

authority to support the foregoing speculation. Under the great weight of authority in California, such tortfeasors have heretofore been held to be mere proper parties defendant.[69]

The joint and concurrent tortfeasor situation is to be distinguished from those where indemnity is permissable against a third party by the defendant (for example, where a defendant-master seeks to indemnify himself against a servant-tortfeasor for whose act he is held liable under the doctrine of *respondeat superior*). Here, the California rule is that the indemnitor is a conditionally necessary party.[70]

With one possible exception, there is seldom if ever a problem of compulsory joinder of plaintiffs in tort actions. The one exception is where joint owners of property, real or personal, sue for a tort resulting in injury to the property. Normally, the rule elsewhere has been that where an act precipitated an injury to land held in joint tenancy, the co-tenants had to join in order to bring the action for compensation, and their status was that of conditionally necessary parties (if they were tenants in common they might well be indispensable parties).[71] California by statute provides that any co-tenant may bring an action for damage to the land,[72] and hence in California there would never be a situation where any co-tenant would be indispensable or conditionally necessary in an action for property damage. But, note well that this statute *does not* apply to an action for other than damages in actions such as for partition which determine rights of owners *inter se*, all the owners are clearly indispensable.[73]

Memorandum 70-66

EXHIBIT III

Draft Statute

An act to amend Section 389 of the Code of Civil Procedure, relating to parties to civil actions.

The people of the State of California do enact as follows:*

Section 1. Section 389 of the Code of Civil Procedure is amended to read:

389. ~~A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.~~

~~A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.~~

~~When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.~~

* This preface will be deleted if and when the section is incorporated in the comprehensive bill.

~~When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.~~

~~Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed and summons thereon issued and served.~~

~~If, after additional conditionally necessary parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials as to such parties or make such other order as may be just.~~

(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter 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. If he has not been so joined, the court shall order that he be made a party.

(b) If a person as described in subdivision (a)(1) or (2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) 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; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) or (2) who are not joined, and the reasons why they are not joined.

(d) Nothing in this section affects the law applicable to class actions.

Comment. Section 389 is revised to substitute practically in its entirety Rule 19 of the Federal Rules of Civil Procedure for former Section 389. Basically, as amended, Section 389 requires joinder of persons materially interested in an action whenever feasible. When joinder cannot be accomplished, the circumstances must be examined and a choice made between proceeding on or dismissing the action. The adequacy of the relief that may be granted in a person's absence and the possiblity of prejudice to either such person or the parties before the court are factors to be considered in making this choice. However, a person is regarded as indispensable only in the conclusory sense that in

his absence the court has decided the action should be dismissed. Where the decision is to proceed, the court has the power to make a legally binding adjudication between the parties properly before it.

Under the former law, an indispensable party had to be joined in the action; until and unless he was, the court had no jurisdiction to proceed with the case. See, e.g., Irwin v. City of Manhattan Beach, 227 Cal. App.2d 634 (1964). This absolute rule has been changed; however, practically speaking, the change is perhaps more one of emphasis. The guidelines provided in Section 389 are substantially those that have guided the courts for years. See Bank of California v. Superior Court, 16 Cal.2d 516 (1940). These guidelines should require dismissal in the same circumstances where formerly a person was characterized as indispensable.

Section 389 no longer deals specifically with necessary or conditionally necessary parties. However, they may still be joined where necessary and desirable "to carry out the policy of complete determination and avoidance of multiplicity of suits." Bank of California v. Superior Court, supra at 523. See Code of Civil Procedure Sections 378, 379.