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Civil Procedure—The Indispensable Party Doctrine and Federal Rule 19

The troublesome application of the indispensable party doctrine at common law and under old rule 19 of the Federal Rules has in recent years been the subject of intensive scholarly examination and criticism¹ which led directly to a complete clarification and re-writing of rule 19.² Both the validity and effectiveness of the revised rule, however, have already been seriously questioned by the third circuit in *Provident Tradesmens Bank & Trust Co. v. Lumbers Mut. Cas. Co.*³ A combination of the court's poorly articulated objections to rule 19 and its overall confusion in analysis indicates that the revision has not only created new difficulties but failed to resolve completely the old, at least as far as the third circuit is concerned.

The modern indispensable party practice owes its origin primarily to *Shields v. Barrow*,⁴ which defined three groups of parties: "proper" or "formal"—parties who *can* be joined if desired; "necessary"—parties interested in the action who *should* be joined if at all possible in order to do complete justice and minimize litigation; and "indispensable"—parties who *must* be joined or the suit dismissed if their interests are not "separable" from the interests of those already joined. Basically the determination of indispensability is a question of weighing the interests of the courts in completing all common litigation efficiently in one suit, the interests of the defendant in protection from multiple vexation, and the interest of the absent party in not being adversely affected by the outcome.⁵ Many courts analyzed the problem in that way. Other courts, however, apparently misled by the emphasis in *Shields* on the undefined concept of "separability" and the ideal of doing "complete justice," lost sight of the basic interests outlined above. Some mechanically

¹ See generally, Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965) [hereinafter cited as Fink]; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) [hereinafter cited as Hazard]; Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957) [hereinafter cited as Reed].

² Order, 39 F.R.D. 213, 218 (1966). It became effective July 1, 1966.

³ 365 F.2d 802 (3d Cir. 1966).

⁴ 58 U.S. (17 How.) 130 (1855); see also, *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936).

⁵ Reed at 330-40, 356.

applied technical and abstract classifications such as "joint interest," "united in interest" or "separability," when a closer examination would have revealed, for instance, that the absent party could in no way have been affected by the outcome of the suit.⁶ Others felt they had to dismiss if all possible claims arising out of the same transaction could not be litigated in the one action before them.⁷ Still others made the mistake of thinking that a judgment would bind the absent party to his detriment and thus held there was no "jurisdiction" over parties already joined,⁸ in spite of the fact that no judgment can *legally* affect anyone not a party to the action.⁹ Because of the hardship of dismissal often occasioned by rulings of indispensability, some states enacted remedial statutes making "joint" obligations joint and severable so that a court could proceed without an absent party who could not be served with process.¹⁰ Although old rule 19 was intended to elicit an examination and a balancing as the common law doctrine often did,¹¹ the rule's confusing language helped perpetuate many of the errors¹² and some courts refused to apply it at all in the indispensable party situation.¹³

⁶ *Id.* at 355-56. See also FED. R. CIV. P. 19, Comment, 39 F.R.D. 89, 91 (1966).

⁷ See *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952), criticized in *Hazard* at 1288-89.

⁸ See *Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *cf. Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946); see also *Reed* at 332-34, 343.

⁹ *Reed* at 343. It is, of course, possible for a party to be *factually* injured by a judgment in his absence if, for example, a fund to which he has a claim is exhausted so that his claim, though legally unimpaired, is worth nothing as a practical matter. It is this kind of factual injury that provoked the issue of indispensability in *Provident Tradesmens*. See *Reed* at 336.

¹⁰ See 2 WILLISTON, CONTRACTS § 336 (3d ed. 1959) (collecting statutes). The effect of calling a party indispensable in federal court is often dismissal, either because that party cannot be served with process or his joinder would destroy diversity. It is probable, however, that a state court will term the same party indispensable as well, and if he is out of the state court's jurisdiction, the plaintiff will have no forum in which to prosecute his suit.

¹¹ See *Fink* at 430-31.

¹² See FED. R. CIV. P. 19, Comment, 39 F.R.D. 89, 90-91 (1966). The rule arguably equated "indispensable" with the phrase "having a joint interest" and as a result, many courts continued to look to the technical catchwords as automatic indications that certain parties were indispensable. In addition, the use of the word "jurisdiction" in 19(b) was misleading, for while it was intended to refer to the subject matter of the action, some courts interpreted it to mean that the absence of an indispensable party itself deprived the court of jurisdiction over the parties already joined.

¹³ *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 219 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946); *cf. Chidester v. City of Newark*, 162

The recent scholarly literature exploded many of the misconceptions that grew around the old rule, and the revision that followed reflects the impact of Professor Reed's analysis. While the court in *Provident Tradesmens* discussed only the old rule,¹⁴ its treatment of the case would probably have been the same had it applied the new.¹⁵

The litigation leading up to *Provident Tradesmens* arose out of a two vehicle accident in which all but one of the parties were killed, including the responsible driver who was operating a borrowed car. Provident, as administrator of the estate of Lynch, a passenger, sued the driver's estate in federal court and obtained a default judgment. Lumbermens, the car owner's insurer, had refused to defend, claiming the driver was not within the scope of the owner's permission at the time of the accident and thus not covered by the policy. Provident then brought the present declaratory judgment action which involved the issue of permission and Lumbermens' liability. The driver's estate was joined as a defendant, and the two other claimants, whose state court actions against the owner were still pending, were joined as plaintiffs; the owner was not joined. The issue of Lumbermens' liability was determined in Provident's favor by the court which directed verdicts for two plaintiffs and by a jury which found for the third.¹⁶

F.2d 598 (3d Cir. 1947); *United States v. Washington Institute of Technology, Inc.*, 138 F.2d 25 (3d Cir. 1943) (in both cases the third circuit ruled that indispensable parties under rule 19 were those who were indispensable *prior* to the rule; in determining their existence, then, the court did not look to the rule for standards).

Old rule 19 contained a negative implication which lent itself to that interpretation and allowed the court in *Provident Tradesmens* to say that "Rule 19, in terms, relates only to 'necessary parties' and specifically excludes from its sweep 'indispensable parties.'" 365 F.2d at 811. The revision contains no such negative implication.

¹⁴ The new Rule 19 became effective July 1, 1966, when the appeal in the present action was pending. Although the Order of the Supreme Court amending the Rules is directed at the district courts and cases there pending, Order, 39 F.R.D. 213 (1966), and probably does not include appeals, the court here raised the question itself and thus arguably should have applied the new Rule.

¹⁵ Although the court indicated its recognition of the revision only once, 365 F.2d at 806, it is quite possible that the entire opinion was directed exclusively at the substance of the new rule. It was already well settled in the third circuit that the standards of old rule 19 did not apply in the indispensable party situation (see note 13 *supra*), and unless the court was implicitly discussing the new rule, most of its lengthy opinion was superfluous.

¹⁶ 218 F. Supp. 802 (E.D. Pa. 1963). Two verdicts were directed for the two estate plaintiffs because the only witness on the scope of permission, the

On appeal, the third circuit after a rehearing en banc, held 5-2 that the owner was an indispensable party, an issue raised sua sponte despite the provision in rule 12(h)(2)¹⁷ of the Federal Rules that the indispensability question is waived after trial on the merits. Judgment was vacated and the cause remanded with directions to dismiss the action. The court reasoned that depending on the outcome of the state court actions against him, the owner might have to share the proceeds of his limited insurance policy with claims against the driver and thus might lose a measure of protection if there were a judgment declaring the insurer liable in this action. The possibility of such an adverse effect on the owner's interest as a result of the declaratory judgment made him an indispensable party under *Shields v. Barrow*,¹⁸ and the lower court should never have proceeded without him. The indispensable party doctrine, the court emphasized, is a rule of substantive law which rule 19 cannot alter or affect without violating the Enabling Act.¹⁹ In the dissenting opinion, Judge Freedman argued that the court should try to preserve the jury verdict. The owner's interest could be protected, he suggested, simply by shaping a decree that would stay execution on the insurance policy until the state court actions against the owner were concluded. At that time the owner, if found liable, could assert his claim of superiority to the insurance fund and relitigate the issue of permission.

There are three possible interpretations of the majority opinion, ranging from complete rejection of the substance of new rule 19 to almost complete acceptance, with important reservations as to its outer limits. There is much at first glance to support an interpretation that the court is rejecting outright the substance of the new rule; the majority opinion is confusing and inconsistent, however,

owner, was ruled incompetent to testify under the Pennsylvania Dead Man's Act, PA. STAT. ANN. tit. 28 § 322 (1958) and there was thus no evidence to rebut the Pennsylvania presumption that a dead man operates a borrowed car within the scope of his permissive use. The lower court ruled the owner incompetent to testify on the ground that his interest was adverse to that of the two estates because he stood to lose a measure of his insurance protection in this suit. The owner could, of course, testify as to the other plaintiff who was not killed in the accident. The third circuit based its finding of possible adverse affect on the owner's interest entirely on the district court's determination of adverse interest for purposes of the Dead Man's Act. 365 F.2d at 805.

¹⁷ FED. R. CIV. P. 12(h)(1) before the revision.

¹⁸ 58 U.S. (17 How.) 130 (1855).

¹⁹ 28 U.S.C. § 2072 (1964), which provides in part that "such rules shall not abridge, enlarge, or modify any substantive right . . ."

both in what it says and the authority it cites, and there is equal support to counter this view. Quoting dictum from a recent case in the first circuit,²⁰ the majority states that "what are indispensable parties is a matter of substance, not of procedure"²¹ and later makes the assertion that rule 19 cannot modify "the standards by which the existence of an indispensable party may be determined."²² In yet another passage the majority contends that there is nothing in an early Supreme Court decision²³ to merit its citation as a "flexible and imaginative adaptation of remedies in disregard of the indispensable party doctrine."²⁴ These statements justify an interpretation that the majority is condemning the new rule's standards for determining indispensability by balancing the interests of the defendant, plaintiff, absent party and courts, and taking into account any imaginative decree that might lessen injury to the absent party. Instead, the majority intimates, it will continue to apply the indispensable party doctrine as it existed prior to the adoption of the rules in 1938.²⁵ In a formalistic, abstract classification of rights typical of that doctrine, the court said that since the "interests of the insurer and insured are identical, their interests are joint,"²⁶ ergo in an action against the insurer, the insured is indispensable.²⁷ If, indeed, the absent party could have been protected by the dissent's proposed decree,²⁸ it is not difficult to interpret the majority

²⁰ *Stevens v. Loomis*, 334 F.2d 775, 778 n.7 (1st Cir. 1964). In his opinion, Judge Aldrich discussed the proposed new rule in its preliminary form and the Advisory Committee Comment thereto, *id.* at 777 n.4. The formulation of the rule at that time contained no reference at all to the words "indispensable parties," and Judge Aldrich made the not illogical assumption that the Rule was intended only to clarify existing rules for necessary parties, leaving indispensable parties out of its scope entirely. See also Fink at 424-26.

²¹ 365 F.2d at 806. (All italicized in original.)

²² *Id.* at 812. The authority quoted was *dictum* in *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886, 890 (9th Cir. 1961), a case which is ironically cited with approval by the Advisory Committee, FED. R. CIV. P. 19, Comment, 39 F.R.D. 88, 92 (1966).

²³ *Payne v. Hook*, 74 U.S. (7 Wall.) 425 (1869).

²⁴ 365 F.2d at 810.

²⁵ See notes 13 & 15 *supra*.

²⁶ 365 F.2d at 809.

²⁷ This is an example of some of the court's inconsistent reasoning which indicates that much of its language cannot be meant seriously. The characterization here of the insurer and the owner as having a joint interest is totally irrelevant to the indispensability question actually raised by the court—the "joint" claims of the owner and *driver*.

²⁸ 365 F.2d at 811, 816 n.16.

to say implicitly that on its face new rule 19 violates the Enabling Act.

There are three indications, however, that this interpretation is unsatisfactory. In the first place, the court relied in part on *Roos v. Texas Co.*,²⁹ a case which demonstrates the kind of flexible analysis³⁰ the Rules' Advisory Committee has recommended for the new rule.³¹ The reasoning is as follows: the absent party will be factually injured by a judgment here if he is not joined; joinder will defeat diversity; true, it is possible to frame a decree that will protect the absent party; that decree, however, would defer the plaintiff's recovery to the indefinite future and thus be a virtual denial of relief; therefore, the case must be sent back to the state court where all parties can be joined and the funds paid out at once. The court's reliance on *Roos*, then, is certainly inconsistent with the first interpretation that the court is applying rigid, technical classifications and disregarding the practical consequences. In the second place, the court on three separate occasions asserts that the indispensable party doctrine accords a "substantive right to a person to be joined as a party to an action when his interests may be affected by its outcome."³² This is somewhat different from the contention that rule 19 cannot affect the standards by which the *existence* of an indispensable party is determined, for those mechanical and formalistic standards often foreclose any examination of the facts to determine exactly what an absent party's interest is. Finally, the majority opinion emphasizes that a declaratory judgment action is procedural, not equitable, in nature.³³ In pointing this out, the court is merely asserting that a tribunal in such a proceeding has *less* leeway to continue in the absence of interested parties than it would if it were sitting in equity. But the very recognition of the distinction, however unreal that difference is,³⁴ belies the notion

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

³⁰ 365 F.2d at 811, 816 n.16.

³¹ FED. R. CIV. P. 19, Comment, 39 F.R.D. 89, 93 (1966).

³² 365 F.2d at 805, 809, 812. The court at one point speaks of a party's substantive right to be joined when his rights *will* be affected, in contrast to *may* be affected. The court here was faced with the latter situation, for the owner might not be found liable in the state courts, either on the question of the driver's negligence or the issue of permission.

³³ 365 F.2d at 809-10.

³⁴ The Court seems to be overlooking the fact that while a declaratory judgment action is procedural, it is also discretionary: "The flexibility inherent in the declaratory procedure indicates that there may be times when the court will be able to proceed without prejudicing the rights of absentees,

that the court intends blindly to apply such catchwords as "joint interest" in ruling on indispensability in all cases. These inconsistencies, then, somewhat discredit the first interpretation and indicate that the court meant something other than a complete rejection of rule 19.

A second interpretation can be made that the court was accepting one possible view of the new Rule and rejecting another—that it actually did go beyond a mechanical approach to balance the underlying factors, but that it dismissed because it would not accept what might be considered a fundamental change in the old rule and the common law doctrine in its best application. It has been recognized that the new rule is subject to two readings.³⁵ The first is that the revision is merely intended to clarify and strengthen the old rule in light of cases that misconstrued it or failed to apply it at all; this much is certainly clear from the Advisory Committee Comment.³⁶ The second reading is that Professor Reed's proposed formulation³⁷ and the new rule 19 could be taken to mean that having weighed the four factors enumerated in rule 19(b), 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 party than to dismiss."³⁸ The Advisory Committee Comment supports this reading of the rule as well.³⁹ In addition, the Comment points out that the idea of proceeding even though a decree would not fully protect the absent party was "well understood in the older equity practice"⁴⁰ of the 17th and 18th centuries. There is, however, an intervening line of authority begin-

although the same result would be more difficult to reach under stricter procedures." *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258, 260 n.2 (S.D.N.Y. 1955). See also Reed at 354-55 n.94: "[T]he declaratory judgment may be shaped, as an equitable decree, to accomplish the possible." (Emphasis added.)

³⁵ Fink at 415.

³⁶ See note 14 *supra*.

³⁷ Reed at 336.

³⁸ Fink at 415. (Emphasis added.)

³⁹ "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. FED. R. CIV. P. 19, Comment, 39 F.R.D. 88, 89 (1966).

⁴⁰ *Id.* at 90. See Hazard for a history of that practice.

ing roughly with *Shields v. Barrow*⁴¹ in the 19th century which has apparently ruled out this particular proposition. Even the cases cited by the Advisory Committee as examples of a "shaping of relief" by which prejudice may be averted or "lessened" seem to indicate on the contrary that the relief shaped must be without *any* substantial prejudice to the absent party.⁴² The second reading of the new rule, then, may be disregarding this authority and may be the source of the Third Circuit's objections to the revision.

The second interpretation that the majority opinion is merely rejecting the latter reading of the new rule is supported by those same considerations analyzed above as countering the first interpretation: the court's reliance on *Roos v. Texas Co.*, its assertion of a party's substantive right to be joined, and its emphasis on the nonequitable nature of declaratory judgment. As pointed out above, the court, in basing its decision in part on *Roos*, accepts an approach that requires a court to weigh the underlying factors before coming to a final decision on indispensability. It is just intimating by its otherwise sweeping language that it will not balance away any injury to an absent party no matter how strongly other considerations call for proceeding without him. It is perhaps this hesitancy to sanction any irrevocable injury to an absent party that the court was referring to when it asserted so often that a person has a *substantive* right to be joined to an action when his interests may be affected by its outcome. Finally, we have seen that the court's emphasis on the non-equitable nature of the present action is a recognition that a court *can* balance, though how far it can go may vary with the kind of action brought. That emphasis may also be an attempt to underscore the court's rejection of the second reading of rule 19 insofar as the revision purports to incorporate the old equity practice of proceeding with an action despite injury to an absent party. If, in this situation, the dissent's suggested decree could be completely effective, the majority's concern over some injury to the owner is then somewhat off the mark. But if the owner's interest could not adequately be protected by any decree, the majority may

⁴¹ 58 U.S. (17 How.) 130 (1855).

⁴² See, e.g., *Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); *Ward v. Deavers*, 203 F.2d 72 (D.C. Cir. 1953); *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928); *Miller & Lux, Inc. v. Nickel*, 141 F. Supp. 41 (N.D. Cal. 1956). See also cases cited in *Provident Tradesmens Bank & Trust Co. v. Lumbermans Mut. Cas. Co.*, 365 F.2d 802, 810 (1966); *Fink* at 433.

be making the objection that rule 19's command to proceed could amount to an unconstitutional denial of due process.⁴³

There is an obvious difficulty with the above interpretation. While the court insists that the owner has a substantive right to be joined, it is clear that his joinder in the declaratory action would accomplish nothing⁴⁴ except to force dismissal for lack of diversity.⁴⁵ Thus the court must have had something else in mind in its ruling on indispensability, and the possibility of dismissal as an end in itself suggests a third interpretation which may be the most proper one to make. The Court may simply have decided, without stating the reasons, that all of the litigation arising out of the accident should have been confined to the same state court. The considerations leading to such a decision could have prompted dismissal even under the new rule 19. The conditional decree deferring a possibly decreased recovery for an indefinite period, for instance, would come close to denying any relief at all to the plaintiff. The inadequacy of relief is the third of the four factors to be weighed under the new rule,⁴⁶ and was the basis for the dismissal in *Roos v. Texas Co.*⁴⁷

Furthermore, the shaping of relief itself would have entailed considerably more difficulties than the dissent, perhaps, anticipated.

⁴³ See Note, 80 HARV. L. REV. 678, 682 (1967); see also Reed at 336. Cf. *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961), which may cast constitutional doubt on the analogous problem of subjecting a party presently in the action to double liability to other plaintiffs not parties to the suit, and thus not bound by it. See JAMES, CIVIL PROCEDURE § 9.17 (1965).

⁴⁴ Since the state court actions would still be pending, the owner would have no basis for claiming a share in the insurance fund, and the court would still have to resort to a decree to protect him. Thus, the owner would be only a formal party to the action and could do no more than he has already done—testify. In fact, the owner would probably prefer *not* to be a party, for then he would be entitled to the benefit of a judgment in this action were it in favor of the insurer, see *Hinchey v. Sellers*, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959); but he would not have been bound had it gone the other way, *Makariw v. Rinard*, 336 F.2d 333 (3d Cir. 1964).

⁴⁵ Joinder would put Pennsylvanians on both sides of the suit.

⁴⁶ FED. R. CIV. P. 19(b) provides in part:

The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or to 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 person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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

Lynch, for instance, would presumably be entitled to interest on the judgment until paid,⁴⁸ and the insurer would argue that it should not have to pay it since the court is responsible for the delayed recovery. Absolving the insurer of liability for some of the interest during the stay of execution, however, would require considerable administrative red tape.⁴⁹ Further, the insurer might have to pay interest on Lynch's *entire* judgment against the driver, even if that judgment exceeded the policy limits or the decreased insurance coverage allotted to Lynch upon assertion of claims by the owner under the terms of the proposed decree.⁵⁰ In addition, there may be far greater problems relating to the legality of giving the owner a claim of superiority, or even of apportioning the funds on a pro-rata basis; these difficulties involve the second factor under rule 19(b), and will be examined more fully below.

Finally, it is clear that the plaintiff will have an adequate remedy in state court—the fourth factor to be considered under the new rule 19. It is not much of an answer to say that since the plaintiff has waited eight years, it is unfair to make him start all over again;⁵¹ the decree itself would defer his recovery anyway. In fact, the court might have had positive reasons for thinking that this litigation should have been in state court from the start⁵² and that a Federal court is really an improper forum. A state court, for instance, could better deal with the problem of distributing the funds if all suits were consolidated; the possibility of any unreasonable disparity in recovery by different plaintiffs would be lessened; and difficulties with interest payments and settlement⁵³ would be less likely to arise. The

⁴⁸ This would include, in addition to interest on the judgment against the insurer, interest on the judgment against the driver, for which many policies provide even though the insurer is not legally bound until there is a judgment against it. See *Alford v. Textile Ins. Co.*, 248 N.C. 224, 103 S.E.2d 8 (1958); 7 AM. JUR. 2d *Automobile Insurance*, § 197 (1963).

⁴⁹ See *Commercial Union Ins. Co. v. Adams*, 231 F. Supp. 860 (S.D. Ind. 1964), where the court stipulated that sizeable funds interplead by the insurers would be invested by the court to offset costs.

⁵⁰ See Annot., 76 A.L.R.2d 979 (1961). In some jurisdictions, the interest owed by the insurer is computed on the basis of the policy limits alone. See, e.g., *Alford v. Textile Ins. Co.*, 248 N.C. 224, 103 S.E.2d 8 (1958).

⁵¹ 365 F.2d at 820 (dissenting opinion). Plaintiff would have to seek a declaratory judgment in a state court under PA. STAT. ANN. tit. 12, § 831 (1953).

⁵² Had Lynch sued both the driver and the owner as the other plaintiffs did, he would not have had diversity and would have had to start in state court.

⁵³ See note 58 *infra*.

inappropriateness of a Federal court as a forum seems to have been a weighty factor in many rulings on indispensability that resulted in dismissal;⁵⁴ courts have even sent cases down to the state courts under the cloak of indispensability where actually the absent party would in no way have been injured, legally or factually, by a federal court judgment.⁵⁵

Thus, a combination of incomplete relief, possible impracticality of the shaped decree, and the availability and perhaps desirability of another forum might well call for dismissal here even under a liberal application of the new rule. The nub of the dissenting opinion is that the jury determination of permission ought to be preserved if at all possible; but these factors could even outweigh that consideration when it is remembered that the owner is probably going to relitigate the same issue again himself. Even under this interpretation, of course, the court is still issuing a definite caveat: the court will not proceed to judgment in a future case in the absence of a party who would be injured thereby, no matter how strongly other considerations call for preserving the action. Such a warning would explain much of the court's categorical, sweeping language; it was merely pointing out, in a strong way, that there is a very long line of precedent that the new rule 19 may be disregarding.

The foregoing analysis of the court's decision, of course, is based on its rather inadequate view of the protective decree and the owner's need for protection. Any evaluation of the result that should

⁵⁴ *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928) ("There is no apparent injustice in the result. . . . why the suit should be brought here it is difficult to see." *Id.* at 173); *Fitzgerald v. Haynes*, 241 F.2d 417 (3d Cir. 1957) ("[I]f the joining of these principal parties in interest should reveal that the controversy is essentially a local one among Pennsylvanians, and thus *not a diversity case*, the result would be no more than the relegation of the suit to the forum in which it belonged from the beginning." *Id.* at 420). (Emphasis added.)

⁵⁵ *E.g.*, *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); *American Ins. Co. v. Bradley Mining Co.*, 57 F. Supp. 545 (N.D. Cal. 1944). The court may well have had other unstated reservations against allowing Lynch to prosecute his claim alone in Federal court. It may have been concerned that a jury in a similar situation might be more generous than if actively faced with having to award damages for three plaintiffs against limited insurance coverage. It may have been concerned that the insurer's refusal to defend in Federal court which lead to a default judgment may have prejudiced the other plaintiffs and the owner to the extent that a defense could have meant less damages and less of an inroad on the insurance fund. Finally, the insurer was prepared to challenge the application of the statutory presumption which resulted in two directed verdicts against it; the court may have preferred not to deal with that question, leaving it to the state court.

have been reached, however, requires an unassuming examination of the feasibility of the proposed decree, and, more fundamentally, of the precise injury to which the owner allegedly was subject. Superficially, at least, the correctness of the court's decision could logically be seen to turn on the decree's feasibility. Thus, if the dissent's proposal can fully protect the owner with a minimum of red tape, it would seem that the court was wrong in ruling the owner indispensable under the reasoning of the first two interpretations, and possibly under the third. On the other hand, it would seem to follow as well that if the decree cannot protect the owner, then the court was correct—the owner had to be a party to the action that would now be brought at the state level where, all claims being joined, the court could more easily distribute the funds. It is precisely here, however, that Judge Freedman's otherwise well documented dissent fails for want of authority.⁵⁶ In fact, it is not clear at all that a court could properly order a pro-rata distribution of the funds; it is even less clear that it could grant superiority to the owner.

While there appears to be no direct authority on this question, *claimants* involved in separate actions generally take on a "first in time, first in right" basis; in other words, priority to the insurance fund is accorded on the basis of priority of judgment.⁵⁷ Much of the rationale underlying this rule would apply equally in this situation where there are conflicting claims between insureds.⁵⁸

⁵⁶ See note 57 *infra*.

⁵⁷ *E.g.*, *Ligouri v. Allstate Ins. Co.*, 76 N.J. Super. 204, 184 A.2d 12 (Ch. 1962); *David v. Bauman*, 24 Misc. 2d 67, 196 N.Y.S.2d 746 (Sup. Ct. 1960); see generally, Comment, *Pro-Rating Automobile Liability Insurance to Multiple Claimants*, 32 U. CHI. L. REV. 337 (1965); Annot., 70 A.L.R.2d 416 (1960). The only authority apparently cited by the dissent for giving the owner proration or superiority consisted of two early Supreme Court cases decided in 1859 and 1909 which naturally do not deal with automobile liability insurance, 365 F.2d at 819 n.9.

⁵⁸ The insurer should not have to determine the value of all potential claims in order to settle with each on a pro-rata basis (this is particularly true here since the owner may win in the state court); the dockets would be overburdened if no one claim could be settled until all actions had come to completion; ratable distribution would interfere with the insurer's contractual right to settle, Comment, 32 U. CHI. L. REV. 337, 339, 340 & n.14 (1965). A particularly acute settlement problem could arise in the case. If a decree were granted staying execution, Lynch might prefer to settle in order to get his funds now. But the insurer might settle too high, opening himself to liability if the court were later to order proration for the owner's benefit. Conversely, the insurer might be able to drive a very hard bargain with Lynch by a threat that the latter would receive very little if the owner were to get a claim for superiority. If the owner were

On the other hand, pro-rata distribution has been allowed where all suits have been joined in one action, or the insurance company has used the device of interpleader after all claims have been reduced to final judgment.⁵⁹ Because of these exceptions, it is possible here, for instance, that following a stay of execution, the insurer might interplead to allow proration. It may even be possible in the future to interplead in federal court where, as in *Provident Tradesmens*, there are claims still outstanding; the Ninth Circuit recently rejected interpleader where all claims had not come to judgment,⁶⁰ but the Supreme Court has granted certiorari.⁶¹ Furthermore, it might be possible to order an equitable apportionment at the request of the owner by analogy to surety law, where the surety can ask the court to direct application of the debtor's involuntary payments ratably between the latter's secured and unsecured obligations.⁶² Aside from these rather unlikely possibilities, however, it is quite possible that a federal court would have no authority to direct proration here. The fact that apportionment can be had if all claims are joined in one suit may be one more reason why the court reversed, or why it should have. If all these claims had been joined in state court at the start, much of the difficulty would not have arisen. It would thus seem that since the legality of a protective decree is doubtful, the owner would be adversely affected by a judgment in his absence, and the court was correct in ruling him indispensable to the action and therefore dismissing it.

Unfortunately, a closer examination of the apportionment problem leads inevitably to exactly the opposite conclusion. The court's

then found *not* liable, the insurer would have escaped the entire accident with very little liability.

⁵⁹ *E.g.*, *Burchfield v. Bevans*, 242 F.2d 239 (10th Cir. 1957); *Century Indem. Co. v. Kofsky*, 115 Conn. 193, 161 Atl. 101 (1932). Proration has even been allowed in one state court where the insurer interplead *before* all claims had been adjudicated, *Underwriters for Lloyds v. Jones*, 261 S.W.2d 686 (Ky. 1953); *but see*, *Burchfield v. Bevans*, 242 F.2d 239, 243 (10th Cir. 1957).

⁶⁰ *Tashire v. State Farm Fire & Cas. Co.*, 363 F.2d 7 (9th Cir. 1966).

⁶¹ *State Farm Fire & Cas. Co. v. Tashire*, 35 U.S.L. WEEK 3110 (U.S. Oct. 11, 1966).

⁶² *Cf.*, *F. D. Cline Paving Co. v. Southland Speedways, Inc.*, 250 N.C. 358, 108 S.E.2d 641 (1959). It is, of course, a stretched analogy to call the driver a debtor, the plaintiffs creditors, and the owner a surety who is seeking to have the debtor's agent, the insurer, apply funds ratably between debts on which the owner is also liable and debts on which the driver is liable alone, particularly where there is not one creditor but three. Normally, where there is a voluntary payment, the debtor or creditor may apply the proceeds as desired.

dismissal was quite improper precisely because the owner's interest cannot be protected by any court at this stage of the litigation. What the above analysis overlooks is the fundamental fact that the question of indispensability was raised, not at the original suit against the driver, but at the declaratory judgment proceeding against the insurer. If the issue had been raised at Lynch's original action in federal court before he obtained his judgment against the driver, Lynch would then have been sent back to the state court for lack of diversity and presumably he would have been forced to get a judgment along with the other plaintiffs. In that situation, the insurance fund could have been apportioned. But raising the problem at this stage is futile, because Lynch has already won the race to judgment and is already entitled to priority in the fund over the state court plaintiffs who have yet to get a judgment against the owner. The state court plaintiffs have thus *lost* their rights to share equally in the fund, and likewise, the owner has lost his right to equal protection from it. It is probable, then, that both a federal *and* a state court would be legally required to *refrain* from "protecting" the owner and the plaintiff suing him. Thus, clearly a ruling at this late stage that the owner is indispensable because of a potential loss of protection is patently erroneous—legally, he *cannot* be protected in any court.

The same conclusion can be reached by a far simpler and more obvious route, however, if the question initially raised is not *how* to protect the owner, but whether he *needs* protection in the first place. The only argument for giving the owner priority in the funds of his own policy is that he has paid the premiums and thus ought to have first claim on their proceeds. But the entire insurance fund will ultimately be paid out on his behalf, no matter how it is distributed to each claimant. The owner will have the full benefit of the policy, for he is liable in any event for injury caused by the driver and his premiums give him protection against that liability. Thus, if the Court were to reduce Lynch's share of the fund by one-half, it is true that the owner would have that much more to apply to claims against him arising out of the state court actions. But it is also clear that Lynch would now pursue the owner for the other half of his original judgment, and the owner would have gained nothing in the end. In other words, any proceeds paid out now from the policy will eventually go to reduce the owner's ultimate

liability. The only situation where the owner could gain from a proration would be if the driver were solvent and could himself pay that portion of Lynch's judgment not collectible from the insurance fund.⁶⁸ In this case, the entrance of a default judgment against the driver's estate would seem to indicate that it is insolvent; even if it were not, however, the legal roadblocks to proration discussed above still face the court. The problem, then, of finding a way to protect the absent owner is largely irrelevant, for he probably is not subject to injury to start with. And if he cannot be adversely affected by a judgment, quite obviously he is not indispensable.

While many of these difficulties may never have occurred to either the majority or the dissent, there can be no question that rule 19, old or new, calls for their recognition. The irony of *Provident Tradesmens* is that the revised rule's emphasis on shaping imaginative relief to protect absent parties led both the majority and the dissent away from ever inquiring whether the owner needed protection in the first place—the very error the old rule was primarily revised to correct.

Because of the court's sweeping, contradictory language and the potential disparity between those consequences considered and those overlooked, it is difficult to state precisely the effect of *Provident Tradesmens*. Because of the uncertain need for, or legality of, any protective decree that might have been shaped for the absent party, it is equally hard to judge what should have been the proper decision, were the new rule definitely applicable. Perhaps the fairest conclusion is that the court did balance some competing factors which were based on an inadequate view of the facts, deciding a state court was the more proper forum to deal with many of the difficulties of relief that in actuality were probably more illusory than real. It is just as fair to say, however, that the court indicates in no uncertain terms its unwillingness to sanction any injury to an absent party no matter how strongly other considerations call for proceeding with the action. Unfortunately, the case did not provide the best factual context for testing the second reading of the rule because the owner probably does not need any protection and thus, necessarily, could not be adversely affected by the declaratory

⁶⁸ If the driver had unlimited personal funds, of course, there would be absolutely no possibility at all of adversely affecting the owner's interest no matter how the insurance funds are paid out, for he would then be able to satisfy his right of indemnity against the driver.

judgment. Indeed, the litigation was too far advanced to warrant any constructive interference, either to find some injury that required protection or to send the case back to the state courts where it, perhaps, belonged from the start. The court should have considered the indispensability question waived as the Federal Rules clearly provide.⁶⁴

C. B. GRAY

Conflicts—Forum Non Conveniens in North Carolina

The plaintiff with a transitory cause of action¹ has available a wide selection of forums for suit, limited only by considerations of obtaining service of process.² Hence, a defendant often finds himself fortuitously subjected to suit in a forum highly inappropriate for the conduct of his defense and without legitimate counter-balancing advantage to the plaintiff. To combat this unnecessary and oppressive burden in particular cases, courts and legislatures have devised various means by which the plaintiff is precluded from prosecuting his suit within certain inconvenient forums.³ The doc-

⁶⁴The Supreme Court has granted certiorari, 35 U.S.L. WEEK 3303 (U.S. Feb. 28, 1967) (no. 806).

¹"Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place." *Brady v. Brady*, 161 N.C. 325, 326, 77 S.E. 235, 236 (1913); *Bunting v. Henderson*, 220 N.C. 194, 16 S.E.2d 836 (1941). "[B]ecause of the history and forms of the common law, there are certain actions which are safely brought only in a particular locality. These are called local actions, and all others are transitory." *Currie, The Constitution and the Transitory Cause of Action*, 73 HARV. L. REV. 36, 66 (1959).

²In transitory actions the defendant may be sued in any jurisdiction where he may be found. *McDonald v. MacArthur Bros. Co.*, 154 N.C. 122, 69 S.E. 832 (1910). Common law venue rules were designed to obtain jurisdiction over evasive defendants. See generally *Foster, Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930). Note recent expansion of jurisdiction over defendants. *E.g.*, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

³Congress has enacted a statute, 28 U.S.C. § 1404(a) (1964), which provides: "For the convenience of 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 *Comment*, 8 STAN. L. REV. 388 (1956), for a discussion of the statute's effect and scope, as well as references to numerous other periodical comments. As to actions in sister states to enjoin the plaintiff from proceeding in the inappropriate forum, see generally *Messner, The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial*