tinuances of any civil case without consent of the Court. It is recognized that the pre-trial Justice will grant some latitude concerning continuances at pre-trials, but once the case has left the pre-trial calendar, the rules of Court specifically provide that postponements may not be granted except for cause arising after the completion of pre-trial and not due to fault of the parties or their attorneys. (Sec. 6 Rule 22½.) The Court has felt it imperative to the clearing up of the calendar that continuances of cases on the ready-for-trial calendar should not be granted except under unusual conditions. As we have endeavored to stress, all jurisdictions have found pre-trial procedure has been effective only where the final trial has followed the completion of the pre-trial within a period of not longer than from two to four weeks.

After pre-trial, the Court may find it necessary to permit amendments to pleadings. Of course provision for amendments after trial is made by the new Federal Rules of Civil Procedure. But amendments after pre-trial are to be discouraged. The time for making amendments is at pre-trial and the policy of the Court will be to permit them only where it would be unjust or harsh to do otherwise.

Between September 18th and October 2nd, 1939, there should be pre-tried a sufficient number of cases to start off six Justices of our Court who are assigned to conduct final trials of civil cases. This is not easy to accomplish. But it can be done if you will continue your fine cooperation with the Court. Notice for pre-trial hearings for the first several days already have been sent to counsel. May I ask that when you receive these notices, you will set about in earnest to prepare your cases for pre-trial, discuss possible settlements with your clients and come to Court with full knowledge of your cases and with power to act. If you do so, the program of the Court will not drag. The importance of the program has been stressed. Its initiation has resulted after hard work in preparation. Moreover, it has been interesting to note the extent that Judges and counsel in other States have made inquiries of our Court with regard to our program, and it is believed that if through a continuance of the fine spirit of cooperation which already has been manifested between Court and counsel in this City, the dockets of our Court are aided, and litigants, counsel and witnesses are benefited, a contribution to the cause of justice will be made not only here but in other parts of our country where pre-trial procedure and improvements in the Courts are being given consideration.

THIRD PARTY PRACTICE UNDER THE NEW RULES

BY J. DOUGLASS POTEAT
*Professor of Law, Duke University Law School**

SOME years ago when a fellow Congressman concluded his speech, Tom Reed of Maine remarked, "That man never speaks without adding to the sum of human ignorance." Such a person has his place even in the halls of Congress. The presence of at least one such on a program of the Fourth Judicial Conference is, I maintain, an essential blessing. For nothing is so enervating as exposure to unremitting intelligence without a break or cut-off. Indeed, it may be that my invitation from Judge Parker, who is sensitive to the necessity of balance in any program, was motivated by some such consideration. That the incandescent brilliance of the Judiciary and of the Bar be diffused to a more gentle candle glow by a kindly haze of academic innocence may be what he had in mind for me. His suggestion of a topic, at any rate, is consistent with this idea. For if one will scratch the surface of the simple language of Rule 14, on third party practice, and push down to the cluster of brain-twisting combinations and variations which lie beneath, he will find, I believe, a power to perplex nowhere surpassed in the whole body of the Rules. Within the allotted minutes I could not so much as hint at these more complex problems, even if this were the thing to do. That it is obviously not the thing to do releases me to point up one or two features of the practice which, if they are less recondite, are, however, not less important.

Since it is the plaintiff who starts a law suit, traditional procedure, both common law and code, has assumed that he alone should be allowed to run the show as he pleases. Thus if a plaintiff is damaged by the joint tort of two persons, he may sue both or either alone, securing a joint or a several judgment which he may execute as and when he pleases. Or, having sued both, he may drop one at a time or request the jury to ignore the presence of one and to bring in a verdict against the other. What Mr. Chitty has been pleased to call this "right" of the plaintiff to proceed thus is simply the description of an exclusive control of the law suit accorded by a system which at the same time permits no sharing of that prerogative of control by those on the defendant's side of the case. That a defendant jointly alleged to be responsible to a plaintiff should be entitled to have his brother in the act present in the adjudication of his own liability, if that presence inconveniences neither plaintiff nor the court too greatly, would seem to be procedurally salutary. And to tell the truth, that one joint tort feasor should be denied the right of contribution is a principle which has more historical respectability than it has good sense or fairness. Rules of procedure, however, have nothing to say about this substantive injustice of the no-contribution principle. But the England which in 1799 had originated the rule of no-contribution between joint tort feasors did in the last half of the next century set up a third party practice by which those defendants who could be made to contribute might be brought in by a defendant sued alone. And this procedural start has carried the third party practice device into the framework of several of our own states, notably New York, Pennsylvania and Wisconsin. Those of you who

*Address delivered at the Conference of the Fourth Judicial Circuit at Asheville, N. C.

are familiar with admiralty practice know of the comparable device embraced in the present Rule 56.

It is against this historical background that the third party practice of Rule 14 gains meaning. The Rule has been discussed at this and other conferences though I observe that it has evoked less discussion than a great many of the other less complicated provisions. But be that as it may, an attempt to re-mirror these discussions would be as out of place here as it would be tiresome. And I shall make no effort to do this. This is certainly not the place to attempt a prolonged analysis of the many variations and complexities in third party practice permitted by the Rule. These are sleeping dogs which on this occasion must be allowed to slumber on. I shall only note the implications of a single point or two which seem to be worth thinking about. The first is an obvious one which, however, unless it is kept in clear focus may result in the blurring of interpretations as the procedure is invoked under distinct and differing situations.

Under the Rule there are two classes of defendants made amenable to its terms. They are:

One: A party who "is or may be liable to the plaintiff." That is to say, whose joinability is in no sense dependent upon a legal relationship existing between the original defendant (the third party plaintiff) and the third party defendant. A defendant who proceeds against such a third party under the Rule is in effect tendering to the plaintiff another defendant with the suggestion that the plaintiff bring this party within the arena of the legal fight by an appropriate amendment of his complaint. On the effect of the plaintiff's declining to amend his complaint so as to bring within the framework of his complaint the third party defendant, I shall have a word or two in a moment.

When directed against a third party defendant "who is or may be liable to the plaintiff," what is the test for determining whether the third party complaint shall be allowed? It was recently stated by Judge Luhring of the District of Columbia District Court, in the case of *Crim v. Lumbermen's Mutual Casualty Co.*, 26 F. Supp. 715. The facts in this case are these: The plaintiff, while riding on a Maryland highway in an automobile with a boy whose father was insured by the defendant insurance company, received personal injuries in an accident in which the son was killed. It is stated that Maryland has no family car doctrine, so the plaintiff's claim was against the deceased, not his father, and by the Maryland statute it had to be asserted within six months. No action was brought by the plaintiff within the statutory period and she now sues the company which had the liability insurance on the car in the District on a double-barreled complaint: (1) that the defendant had orally agreed that if the plaintiff would not file suit it would pay her claim for injuries; and (2) that by reason of the insurance company's fraudulent representation the plaintiff had been induced to abandon her suit against the deceased in Maryland.

Before answering, the insurance company moved for leave to make plaintiff's attorney a party. Leave was granted and summons and third party complaint were filed. It was alleged in the third party complaint that plaintiff's failure to sue within the statutory period was due to her attorney's negligence and if there were any liability to the plaintiff, it was that of her attorney, not the casualty company.

The third party defendant moved to dismiss the third party complaint on the ground that "the *claim* set forth in the third party complaint against him *is different* from the claim set forth in the declaration" and therefore the third party procedure under Rule 14 was inapplicable.

The court overruled this motion, however, saying in effect that whether or not the claim asserted against the original defendant and that set out in the third party complaint are the same or are different is immaterial. If the plaintiff might properly have sued the third party defendant with the original defendant in the first instance, then the third party defendant was properly subject to impleader. The court observed that either the original defendant or the third party defendant is liable to the plaintiff—if one is liable then the other is not. There is here, then, no legal relationship between the third party plaintiff and third party defendant. It is obvious that the third party plaintiff is not seeking contribution from the third party defendant. Indeed, there can be no basis for contribution. What, then, is the foundation for the joinability of the third party defendant here? Judge Luhring states it thus:

> "If the claim set out in the third party complaint might have been asserted against the third party defendant had he been joined originally as a defendant, it follows that the defendant is entitled, as a third party plaintiff, to bring in such third party defendant. To determine whether such a joinder is permissible requires a consideration of Federal Rules 18, 19 and 20."

The criterion, then, which Judge Luhring invokes is the simple question whether or not, under Rules 18, 19 and 20 embodying the liberal provisions for joinder of claims and parties, the plaintiff might in the first instance have joined the third party defendant (the plaintiff's lawyer) with the third party plaintiff (the insurance company). And since the answer was *yes*, the third party process was allowed.

The second class of third party defendants embraced within the Rule are those whose presence in the litigation depends upon the existence of a legal relationship between the original defendant and the third party defendant. Typical of this class is the right of reimbursement by a surety against a principal; contribution between joint tort feasors—if by the local statute contribution is permitted—i.e., a joint responsibility or a secondary responsibility shared by the third party plaintiff and the third party defendant which responsibility or liability is owed by both either jointly or secondarily, but owed to the plaintiff.

The test for the joinability of a third party defendant in this context is obviously not the same as that used in the case just referred to. That this is true is made abundantly clear by an opinion as yet unreported, handed down as recently as May 1. The case is *Tullgren v. Jasper*[1] and a much too closely edited report of Judge Chesnut's opinion on the case appeared in the U. S. Law Week, upon which I must rely. Here the plaintiff, a passenger in a taxicab, was injured in a collision between the taxicab and a truck. She sued alleging joint liability on the part of five defendants, as follows: the taxicab driver, the taxicab owner, an association of taxicab operators, the driver of the truck, and the owner of the truck. The defendant *association of taxicab operators* sought by third party process to implead the liability of the owner of the truck. The theory of the third party plaintiff was that if the defendants were held liable to the plaintiff, then under a Maryland statute the owner of the truck would be liable for contri-

1. Subsequently reported in 27 F. Supp. 413.—Ed. Note.

bution and under another Maryland statute the insurer of the truck owner would be liable if the truck owner defaulted in making payment. But it should be noted that there had been no default by the insured and no refusal to defend by the insurer.

Recourse to the third party process was denied and support for this ruling was predicated upon an implication drawn from a sentence in the Rule to the effect "that the third party defendant is bound by the adjudication of the third party plaintiff's liability." This, it was said, "seems to imply some direct relationship either *ex delictu* or *ex contractu* between the original defendant and the third party defendant." And finding "no such relationship," a denial of the third party process followed.

The concluding sentence of the report of the case —not a quotation from the opinion—is this:

"The valid objection in the instant case is not the fact that the insurer is secondarily liable to the insured but the fact that there is no relationship between the insurer (the third party defendant) and the association of taxicab drivers."

Under the criteria suggested by these two cases it seems clear that a relationship between the third party defendant and the original plaintiff, or a relationship between the moving defendant (the third party plaintiff) and the third party defendant—either of these relationships will support third party process.

To which of these alternatives is the sentence in the Rule to the effect that "The third party defendant is bound by the adjudication of the third party plaintiff's liability to the plaintiff as well as of his own to the plaintiff or to the third party plaintiff" relevant? It would seem to be relevant only if the legal status of these two parties is sufficiently identical as respects the plaintiff that proof of the plaintiff's allegations will impose liability on both parties alike, as, e.g., a joint tort or a joint contractual liability. And if liability of the third party defendant is based upon grounds other than those originally alleged by the plaintiff (as was the case, for example, in the *Crim* case) an adjudication of the claim against the original defendant will not be binding upon the third party defendant.

Does it not, then, come down to this? One who is or may be liable to the plaintiff is amenable to third party process and obviously the absence of any legal relationship between the third party plaintiff and the third party defendant is immaterial. The sole inquiry is that suggested in the *Crim* case, namely, whether the plaintiff could have joined the third party defendant in the original suit.

One who is or may be liable to the original defendant (the third party plaintiff) is also amenable to third party process. And in this class of cases, represented by the problems raised by the *Tullgren* case, the existence of a relationship between the defendants which may support a claim under the Rule is certainly prerequisite. Thus the criteria for determining the amenability of parties to third party process vary as the circumstances of the cases invoking this procedure vary.

Now to recur to the point deliberately passed over a moment ago. We have noted that the plaintiff may amend his complaint so as to assert a claim against the third party defendant. But you observe that he cannot be compelled to do so. The language of the Rule is: "The plaintiff *may* amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant." But suppose the plaintiff does not so amend. What effect will this have on the litigation?

At the Institute on the Federal Rules held in Washington Dean, now Judge, Clark, in response to a question on this point, had this to say:

"It was held in New York, where the citing in may be only of someone liable to the defendant, that the plaintiff could not make claim against the new person. That is, it was really only a private fight between the first defendant and the newly-cited defendant. But we have tried to make it broader. Nevertheless it is still possible for the plaintiff to say, 'Well, even though you brought him in, I am not going to have anything to do with him. I don't want to make any claim against him. You can make whatever claim you want, but I refuse to do so.' That is still permissible, although the probability is that the plaintiff will say, 'Well, I want to get a complete judgment, and I will amend and make my claim against the new party that is brought in'."

The Wisconsin court has held under that state's third party practice act (somewhat like Rule 14) that if plaintiff declines to amend, the case resolves itself into two law suits: (1) that of the plaintiff against the original defendant, and (2) that of the original defendant against the third party defendant for contribution—both of which are tried simultaneously. Now let us suppose a case which might well be a commonly recurring one—plaintiff is injured in a collision of two cars, one belonging to A and one to B. Plaintiff sues A alone. A proceeds under Rule 14 to bring B into the litigation. A's third party complaint against B might properly take this form (since alternative pleadings are permissible under the Rule): (1) You, B, not I, were negligent in this wreck and your negligence caused plaintiff's injury; but (2) if I were also negligent with you I am entitled to contribution if plaintiff recovers a judgment against me.

Now suppose plaintiff declines to amend his complaint so as to assert a claim against B, preferring to go on down the road in his litigation against A alone. Does this foreclose A in his claim on the first part of his third party complaint, namely, that it was B's negligence exclusively that caused plaintiff's injury? The Rule says that the third party plaintiff may proceed against a third party defendant who may be liable to him *or to the plaintiff* for *all* or part of the plaintiff's claim against him. Does this mean that the original defendant may shift all the liability for plaintiff's claim to the third party only if the original plaintiff amends his complaint? If B does not, he, A, is stymied? Furthermore, if A's third party complaint be allowed to stand and in the absence of the plaintiff's amendment the parties go to trial on both features of the third party plaintiff's claim against the third party defendant, suppose a jury should bring in a verdict against B alone. Would it be possible for the *plaintiff* to levy execution against B thereon? And if not, could it be argued that plaintiff, having elected to confine his claim to one against A and having declined to amend so as to assert a claim against B and having lost his case against A, would now be precluded from another day in court on a case against B?

Again on the assumption of the Wisconsin court that when plaintiff declines to amend, the case is resolved into two law suits: (1) the plaintiff against the original defendant, and (2) the original defendant against the third party defendant, suppose a verdict is rendered in favor of plaintiff against A on the first

phase. This would mean that a separate verdict would be rendered in favor of A against B for contribution or reimbursement as the case may be on the second phase. Suppose it now develops that A is execution-proof. Will A's judgment against B for contribution support a direct levy of execution by plaintiff against B for the whole amount of the debt?

These are a few of the questions which on this point, it seems to me, may be legitimately raised. There seems to be nothing explicit in the Rules to point the answers. Certainly I need not try to give them. It is judges who must resolve perplexities; I should be content with the lesser and simpler rôle of stating a few of them.

To ease up with a short footnote to the problem of third party practice most discussed in conferences, viz., whether third party practice must proceed in accordance with considerations of jurisdiction and venue peculiar to the federal courts? You know, of course, that the answer of the commentators has been quite generally an unequivocal *no!* We have their commitments to this effect in the conference reports and significant also is the absence of any allegation of jurisdiction in Form 22—that proposed for third party practice. The ancillary character of this procedure is assumed to be sufficient to by-pass *Strawbridge v. Curtis* with its requirement of complete diversity between all plaintiffs and all defendants. And certainly if this is not so, the scope of third party practice will be greatly narrowed.

Moreover, recent judicial sanction of the Committee's position was given in *Crum v. Appalachian Electric Power Co.*, 27 F. Supp. 138 (April 3, 1939) in which the fact that the third party defendant was a citizen of the same state as plaintiff—urged as a ground for dismissing the third party complaint—was said by Judge McClintic to be irrelevant. This is simply to say that federal jurisdiction once established by virtue of diversity of citizenship, may not be embarrassed by the presence of a third party defendant who could not have been sued in the federal court by the plaintiff in the first instance. But is it also to say that considerations of jurisdiction and venue may be wholly ignored? This seems to have been the assumption of counsel in a case recently before Judge McLellan of the Massachusetts District Court.[2]

In Judge McClintic's case the objection of the third party defendant was not that under the federal venue statute it was not answerable to suit in the Southern District of West Virginia. It was rather that federal diversity of citizenship jurisdiction was destroyed by its presence in the suit since the state of incorporation of both plaintiff and the third party defendant is West Virginia. But suppose that the third party defendant had been a citizen of North Carolina, in which event there would have been present no diversity of citizenship question; but the amenability of a North Carolina corporation to suit in the District Court of West Virginia would still remain. This question may be stated in terms of the extraterritoriality of the West Virginia Court's process, for it is essentially that and nothing more. Rule 4(f) gives validity to the service of process (other than a subpoena) "anywhere within the territorial limits of the State in which the district court is held and where statute of the United States so provides, beyond the territorial limits of that state." In the absence of such United States statute authorizing service beyond the territorial limits of the state, it would seem that service of the West Virginia process on an hypothetical North Carolina third party defendant would run head on into Rule 82 which, of course, denies a construction of the Rules that would extend or limit the jurisdiction of the district courts or the venue thereof. Judge McLellan in the case referred to, finding "no special statute applicable to third party practice authorizing service of process in another state," dismissed a third party complaint filed in the Massachusetts District Court against a Rhode Island corporation which could be served only in that state. Doubtless a Congressional enlargement of third party process, making it valid extraterritorially, would obviate this deficiency, if indeed it be a deficiency. But in the present statutory context the third party process, at least in this particular, must still respect district court jurisdictional lines.

ROBERT N. MILLER
Chairman, Committee on Communications

2. The case is F. & M. Skirt Co. Inc. vs. Wimpfheimer & Bro. Inc. and was subsequently reported in 27 F. Supp. 239.—Ed. Note.