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NOTES

THIRD-PARTY PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Third-party practice,[1] embodied in Rule 14 of the Federal Rules of Civil Procedure,[2] represents an attempt to curtail multiplicity of actions by providing:

. . . . A defendant may move . . . . for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted, ... the person so served, ... called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's

[1] For more general discussions of third-party practice see Cohen, Impleader: Enforcement of the Defendants' Rights against Third Parties, 33 Col. L. Rev. 1147 (1933); Bennett, Bringing in Third Parties by the Defendant, 19 Minn. L. Rev. 163 (1935); Poteat, Third Party Practice under the New Rules, 25 A.B.A.J. 858 (1939); Third-Party Practice, 70 Sol. J. 406 (1926).

[2] 28 U.S.C.A. following § 723 (c) (Supp. 1939).

liability to the plaintiff. . . . . 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. . . . .

When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Although third-party practice has been used in English courts as early as 1873[3] and in American admiralty since 1883,[4] only a few American jurisdictions have adopted this device.[5] This practice is new to the federal courts except in those jurisdictions in which it was applied pursuant to the Conformity Act.[6]

While the problems raised by Rule 14 are varied, most of them involve the question whether there is one suit with three parties or two suits: one between the plaintiff and the defendant, the other between the third-party plaintiff and the third-party defendant. Subsequent discussion will elaborate this point. Among the problems raised by Rule 14 are:

1. What constitutes the plaintiff's claim for which the third-party defendant must be liable under the terms of Rule 14? Third-party practice has been restricted in some states, notably New York and Pennsylvania, by narrow interpretations of such phrases as "claim" and "cause of action."[7]

2. Is an independent ground of jurisdiction a prerequisite to bringing in a third party? Thus, assume that A, a citizen of Illinois, sues B, a citizen of Indiana. May B bring in C, also a citizen of Indiana (or of Illinois)? There is

[3] Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, § 24 (3); Supreme Court of Judicature Act, 1925, 15 & 16 Geo. V, c. 49, § 39 (1925). For the modern procedure, see Annual Practice, Order 16A, Rules 1–13 (1939). The history of the English practice is traced in Cohen, op. cit. supra note 1, at 1169.

[4] In The Hudson, 15 Fed. 162 (D.C. N.Y. 1883), the defendant was allowed to bring in a ship which it alleged was jointly responsible with it for the claim sued upon. The practice won almost immediately acceptance and was incorporated into admiralty as Rule 59 (1883). Cf. the present more liberal admiralty Rule 56, 28 U.S.C.A. following § 723 (1928).

[5] Ark. Civ. Code (Crawford, 1937) § 108; La. Civ. Code Ann. (Dart, 1932) art. 378–88; N.Y. Civil Practice Act § 193, (2)–(4); Pa. Rules of Civ. Proc. Nos. 2251–8, 332 Pa. cxxiii (1938), superseding the Sci. Fa. Act (Pa. Stat. Ann. (Purdon, 1931) tit. 12, § 141); Wis. Stat. (1937) §§ 260.19, 260.20. The practice has been developed in Texas through judicial decision, Lottman v. Cuilla, 288 S.W. 123 (Tex. Com'n of App. 1926).

It seems that § 25 of the Illinois Civil Practice Act (Ill. Rev. Stat. c. 110, § 149 (1939)) was not intended to provide for third-party practice, but Rules 28–44 of the Municipal Court of Chicago do provide for such procedure. Doubt has been expressed as to their validity since there was no statutory authorization for them. See Gregory, Third Party Practice under the Illinois Practice Act and the Chicago Municipal Court Rules, 1 Univ. Chi. L. Rev. 536, 541 (1934). In Inner Group Financing Corp. v. Halsted Exchange Nat'l Bank, 287 Ill. App. 352, 4 N.E. (2d) 905, and in Jones v. Harris Trust & Savings Bank, 282 Ill. App. 131 (1935), however, judgments were rendered in accordance with the Municipal Court rules without their validity being mentioned.

[6] Rev. Stat. § 914 (1875), 28 U.S.C.A. § 724 (1928).

[7] See notes 10 and 25 infra.

diversity of citizenship, a constitutional ground for jurisdiction,[8] between A and B, but there is no diversity between B and C (or between A and C).

3. May a third party insist upon the fulfilment of the venue requirement of an original action against him?

4. Ought process directed to third-party defendants be extended to run throughout the United States so that third-party actions, like interpleader suits,[9] will not be restricted by the present limits on federal process?

I. WHAT CONSTITUTES THE PLAINTIFF'S CLAIM

Since Rule 14 provides that the defendant may move for leave to bring into the action one liable "to him or to the plaintiff for all or part of the plaintiff's claim[10] against him," the meaning which the courts give to the words "the plaintiff's claim against him [the defendant]" will have an important effect on the availability of the rule. It may be argued that a defendant will not be able to bring into the action one who he alleges is solely liable to the plaintiff for the reason that in such case the third-party defendant is liable not for "the plaintiff's claim against the defendant," but for a separate claim of the plaintiff's. Thus, a defendant sued for injuries caused by his negligence while driving might not be allowed to bring in the driver of another automobile involved in the accident, if he alleged that the other was solely liable. Further, it is doubtful whether a person alleged to be liable for only a part of the plaintiff's claim may be brought in when his liability rests on a different tort or separate contract from that on which the liability of the original defendant rests.[11] The suggested inapplicability of third-party practice to most cases where the third party is alleged to be directly liable, particularly if he is alleged to be solely liable, is further emphasized when it is realized that in few situations of this type is the defendant aided in presenting his defense by bringing in a party who, he alleges, is directly liable to the plaintiff.

One case, however, which appears to be clearly within the terms of the rule is that where a defendant sued in tort seeks to bring in a joint tortfeasor alleging his joint and several liability. Here there seems to be a closer identity of claim.

[8] U.S. Const. art. 3, § 2 (1).

[9] 49 Stat. 1096 (1936), 28 U.S.C.A. § 41 (26) (Supp. 1939).

[10] In Pennsylvania the third-party defendant must be liable for the "cause of action declared upon," Pa. Rules of Civ. Proc. No. 252, 332 Pa. cxxiii (1939); in New York, for the "claim made against such party," N.Y. Civil Practice Act § 193 (2). Third-party practice in these jurisdictions has been much restricted by narrow interpretations of such phrases. In Jones v. Wohlgemuth, 313 Pa. 388, 169 Atl. 738 (1934), the court held that a third party liable over in assumpsit could not be brought in when the plaintiff's claim was in tort. Cf. Nichols v. Clark, Mac Mullen & Riley, Inc., 261 N.Y. 118, 184 N.E. 729 (1933), discussed p. 364 infra. For the English development, see Cohen op. cit. supra note 1, at 1171–76.

[11] The few cases in point have allowed a defendent to bring in a party alleged to be solely liable, Bossard v. McGwinn, 27 F. Supp. 412 (Pa. 1939); Crum v. Appalachian Electric Power Co., 27 F. Supp. 138 (W. Va. 1939); Satink v. Holland Tp., 28 F. Supp. 67 (N.J. 1939); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (Pa. 1939).

In those states where contribution among joint tortfeasors is not permitted, the third-party defendant may object that if he is brought in, the rule against contribution will be altered. In answer to this argument it should be pointed out that the defendant, by alleging direct liability is not seeking contribution strictly; he is merely seeking to encourage the plaintiff to recover a portion of the loss from the third party. It is submitted that to the rule against contribution, which has been severely criticized,[12] the courts should not add a rule prohibiting a defendant from attempting to obtain some apportioning of the liability.

Another objection to bringing in tortfeasors jointly and severally liable is advanced by Moore. He suggests that "strictly C. D. [the original defendant] cannot show that E. F. [the third-party defendant] is liable for plaintiff's several, not joint claim against C. D. It is true that E. F. is liable to the same extent as C. D., but that is because of a claim which plaintiff has, and which he does not assert against E. F."[13] But if Moore's objection is valid, it seems to follow that when, under similar circumstances, *two* defendants are sued, they can bring in one jointly and severally liable with them, on the theory that a *joint* claim is asserted.

Perhaps the third-party situation most clearly covered by the rule is that where a defendant sued in tort seeks to bring in his insurer in a state where, by statute, an injured party may sue the insurance company directly,[14] for here the insurer is liable "*to the plaintiff* . . . . for . . . . the plaintiff's claim against him [defendant]." It may have been to provide for just this situation that the italicized words were inserted, for without them Rule 14 would permit impleader only in cases where the third party is alleged to be "liable over" to the defendant. Or perhaps the simple explanation for the inclusion of these words is that they were copied, without serious question as to applicability, from Admiralty Rule 56. That rule provides: ". . . . the respondent . . . . shall be entitled to bring in any . . . . person . . . . who may be . . . . liable either to the libellant or to such . . . . respondent. . . . ."[15]

It seems, however, more in keeping with the spirit of the rules to hold that the third-party defendant is liable for the plaintiff's claim if the defendant might reduce his liability by proving his allegations against the third-party defendant.

[12] See Gregory, Legislative Loss Distribution in Negligence Actions, 1 (1936); Leflar, Contribution and Indemnity between Tortfeasors, 81 U. of Pa. L. Rev. 130, 131 (1932); Uniform Contribution among Tortfeasors Act (§ 7 of the act, providing for third-party practice, follows the phraseology of Federal Rule 14.)

[13] 1 Moore, Federal Practice 742 (1938).

[14] See Richards, Law of Insurance §§ 504–6 (4th ed. 1932).

[15] This view is advanced by Charles O. Gregory, Associate Professor of Law, University of Chicago Law School. The suggestion that the phrase "to the plaintiff" should be included in Rule 14 first appears in a letter by Fitz-Henry Smith, Jr. to Edgar B. Tolman dated August 6, 1936. In support of his suggestion Smith cites the similar phraseology of Admiralty Rule 56. The words were incorporated in the April, 1937, draft.

Since, however, the right to bring in a third party is not absolute upon qualifying under the terms of the rule,[16] the court should also consider whether a defendant will be aided in presenting his defense or relieved of possible hardship by bringing in a party alleged to be directly liable. Normally, a defendant will be able to present his defenses equally well without the presence of a party who he alleges is liable for the claim sued upon. Assuming, however, that the third-party defendant is added, if the plaintiff does not amend, the third party should move to be dismissed from the action, for no one is claiming relief from him. If, despite plaintiff's failure to amend, the third party is not dismissed, and is found by a special verdict to be solely liable for the plaintiff's claim, the plaintiff should not be able to recover a judgment against him since the third party would have had no reason to present his defenses. The plaintiff, however, may be estopped by the verdict from suing him in a separate action.[17]

A recent case, *Crim v. Lumberman's Insurance Co.*,[18] indicates a different approach to the question of what constitutes the plaintiff's claim. An automobile liability insurance company was sued on an oral contract of settlement after the Statute of Limitations had run on the claim against the insured. It alleged that it was not liable for the plaintiff's claim since it had made no oral contract, but that the plaintiff's lawyer was solely liable to him for failing to bring suit against the insured within the statutory period. In allowing the third party to be introduced the court adopted a joinder test—whether the plaintiff could have joined the third-party defendant and the defendant originally, according to the rules for joinder.[19] The court apparently relied on the clause in Rule 14 which allows the plaintiff to amend in order to assert against the third-party defendant any claims he might have asserted originally. It is submitted that this sentence was intended to confer a privilege on the plaintiff and was not intended as a test by which to determine whether a third party could be brought in. It is difficult to see how any question to be litigated in the main action could involve the attorney. Even assuming that from the accident only one claim accrued to the plaintiff which he may assert against the lawyer, the insured, and the insurer, still the attorney's presence will not aid the insurer in freeing itself from liability. The result in this case illustrates the advisability of requiring the defendant to show that the presence of the third party will assist him in freeing himself from liability. It is important that third-party practice, a valuable procedural device, be not permitted to degenerate into just another tool employed by defendants to delay and complicate the action.[20]

[16] Federal Rule 14 gives a conditional right only: ". . . . the defendant may move for leave to bring into the action. . . . ."

[17] Cf. compulsory counterclaims under Rule 13(a).

[18] 26 F. Supp. 715 (D.C. 1939). [19] Federal Rules 19 and 20.

[20] This seems to have occurred to some extent in Pennsylvania. See The Pennsylvania Supreme Court Rules Regulating Joinder of Additional Defendants by Scire Facias, 13 Temple L.Q. 506, 511 (1938).

When liability over is sought, the problem of identity of claim appears in a different light. Here in one sense there can never be an absolute identity of claim between the plaintiff and the third-party plaintiff since the latter must always allege and prove at least one additional fact in addition to those alleged by the plaintiff, viz., the ground on which the third party is liable over. From this fact and from the words of the rule, "liable to him [the defendant] . . . . for the plaintiff's claim . . . ." it may be argued that in this situation no identity of claim was deemed necessary. The apparent ease of application of the rule is illusory when the widely varying types of cases in which liability over may be sought is considered. Thus, where a close similarity of claims exists as, for instance, when an insurer is brought in on a liability policy, the case seems to be within the ambit of the rule, for the insurance company has contracted to indemnify the defendant for precisely the event alleged to have happened.[21] But, when the claims are less related the applicability of the rule is not so clear. Because of unrelated character of the issues the court may invoke its discretion in denying the right to bring in the third party. Thus, in a recent case,[22] defendant, sued on a negligence theory for injuries caused by a stone in nuts covering an ice-cream bar, moved to bring in the firm from which it had purchased the nuts used in the manufacture of the bars, alleging that it was liable over on an implied warranty of fitness. It should be noticed that the issue in the first case is whether at some point in the manufacture a stone was allowed to get into the nuts, while the issue in the supplementary suit is whether stones were in the nuts when purchased. Although a motion to dismiss the third-party complaint on the ground that it failed to state a claim on which relief could be granted was dismissed, still if the motion had been based on the dissimilarity of issues, the court might have dismissed the third-party complaint or ordered a separate trial under Rule 42(b). Or suppose that the defendant sought to recover for breach of warranty not only on the nuts sold to the plaintiff, but also on other quantities purchased at the same time. The third-party defendant may argue that the plaintiff's claim for which the third-party defendant must be liable by the terms of Rule 14 is for, and can only be for, nuts which the plaintiff has purchased, so that recovery for warranties on any other purchase of nuts is improper.

Again, the plaintiff's claim may be predicated on two theories although the third-party defendant will be liable only if a certain one is proved. Thus, in a New York case,[23] an engineering firm was sued for negligently recommending a defective insulating material and for its negligent installation. The court held

[21] But courts are loath to allow insurance companies to be impleaded because of the known prejudice of jurors against them, Jacobs v. Pellegrino, 154 Misc. 651, 277 N.Y. Supp. 654 (1935); Gowar v. Hales, [1928] 1 K.B. 191 (C.A.).

[22] Saunders v. Goldstein, 30 F. Supp. 150 (D.D.C. 1939); cf. William v. Flagg Storage Warehouse Co., 128 Misc. 566, 220 N.Y. Supp. 124 (1927), aff'd 221 App. Div. 788, 223 N.Y. Supp. 925 (1927).

[23] Nichols v. Clark, MacMullen & Riley, Inc., 261 N.Y. 118, 184 N.E. 729 (1933).

that the defendant could not bring in the manufacturer of the insulation since the "causes of action" were not the same: judgment might be entered for the plaintiff because of the defendant's negligent work, a basis of recovery for which the third-party defendant would not be liable over. Since, as shown above, there can never be strict identity of claim where liability over is asserted, it is submitted that whether a third party "liable over" may be brought in under the terms of Rule 14 should be decided by ascertaining whether there is a similarity of facts and issues to be decided[24] between the plaintiff and the defendant on the one hand and the defendant and third-party defendant on the other.[25] Even though the terms of the rule are satisfied, however, the court still should not allow a third party to be brought in if by so doing the action will become unnecessarily complex or if the plaintiff will be unduly delayed.

II. JURISDICTION

The early case of *Strawbridge v. Curtiss*[26] established the principle, often qualified but never overruled, that where federal jurisdiction is based on diversity of citizenship,[27] there must be diversity between all the plaintiffs and all the defendants.[28] This rule becomes important when it is impossible to show diversity between the third party and one or both of the original parties. Rule 14 contains no express requirement of independent federal jurisdiction, nor does Official Form 22[29] require its allegation. In view of the express provisions of Rule 13(h) on counterclaims and cross-claims, permitting the addition of new parties only on condition of the court's securing jurisdiction over them, it can be argued that independent jurisdictional grounds were deemed unnecessary

[24] The third-party defendant must be liable over to the party who seeks to bring him in. It is not sufficient that he be liable over to another defendant, Tullgren v. Jasper, 27 F. Supp. 413 (Md. 1939).

[25] The Pennsylvania Scire Facias Act as amended in 1937 (Pa. Stat. Ann. (Purdon, 1938), § 141) allowed a third-party defendant to be brought in provided he was liable "for the cause of action declared upon or because any question or issue, relating to . . . . the subject matter of the litigation is substantially the same as a question or issue arising between the plaintiff and the defendant. . . . ." But the new Pennsylvania Rules of Civil Proc. No. 2252, 332 Pa. cxxiii (1939) omits the "question or issue" phrase. The 1937 amendment was copied from the English rule, Annual Practice Order 16A, Rule 1(c) (1939).

[26] 3 Cranch (U.S.) 267 (1808).

[27] This article is confined to diversity problems, but questions similar to those here discussed arise when jurisdiction over the original defendant rests on some other ground enumerated in Article 3, Section 2 (1) of the Constitution, while the nature of the third party's liability is such that he could not have been sued in the federal courts. See, for example, Willing v. Pennsylvania Co., 16 F. Supp. 953 (Pa. 1936).

[28] On the scope of federal jurisdiction generally, see Schulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393 (1936). The historic background of diversity jurisdiction is traced by Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928). See also Third Party Practice and Diversity Jurisdiction: A Conflict, 53 Harv. L. Rev. 449 (1940).

[29] Form 22 is to be used for motions to bring in third-party defendants.

in third-party practice. An analysis of the two situations corroborates this argument. Under Rule 14 the third-party defendant must be liable for the plaintiff's claim. Hence, it may be said, only one claim is involved and any issues litigated with the third-party defendant are merely ancillary to the main suit. But a counterclaim is a different claim from the plaintiff's and, hence, so far as third parties are concerned, independent jurisdictional grounds are necessary. None of the members of the Advisory Committee who have expressed themselves have made this distinction, however. In fact, several have stated that independent jurisdictional grounds would be required in actions under Rule 14.[30]

Litigants may suggest that in finding jurisdiction, cases where the third-party plaintiff alleges that the third-party defendant is directly liable to the plaintiff should be distinguished from those in which reimbursement is sought, on the theory that in the former instance there is but one action, while in the latter there are two: the original suit between the plaintiff and the defendant, and an ancillary one between the defendant and the third-party defendant. Hence, one may say, the test of jurisdiction when direct liability is alleged should be whether the plaintiff, A, might have joined the third-party defendant, C, as a co-defendant,[31] while if the claim is for reimbursement the test should be whether there is diversity (or other federal basis for jurisdiction) between the third-party plaintiff, B, and C.[32] It follows that if B claims C is directly liable with him, C cannot be brought in when he is a citizen of the plaintiff's state

[30] Mr. Mitchell was of the opinion that when liability over was alleged, a defendant could not bring in a citizen of his own state, Amer. Bar Ass'n, Institute on Federal Rules, Washington, D.C., 1938, at 340 (1939). See also Dean (now Judge) Clark's remarks, ibid., at 60. Note the following remarks of Major Tolman:

"Mr. Chandler. Suppose a party whom the defendant attempts to bring into court happens to be a resident of the same state in which the plaintiff resides, what about the question of diversity?

Mr. Tolman. He cannot be brought in. . . . .

Mr. Robinson. He cannot be brought in unless he could have been originally sued?

Mr. Tolman. That is it . . . . ," H. R. Hearings on the Rules of Civil Procedure and on H. R. 8892, 75th Cong. 3d Sess., at 105 (1938).

[31] This was the test in Osthaus v. Button, 70 F. (2d) 392 (C.C.A. 3d 1934), where defendant who alleged that the third-party defendant was directly liable was not allowed to bring in a co-citizen of the plaintiff. But see Fisher v. Yellow Cab Co., 16 Pa. Dist. & Co. 251 (U.S. D.C. Pa. 1931) and Willing v. Pennsylvania Co., 16 F. (2d) 953 (D.C. Pa. 1936). The Osthaus case throws considerable doubt on the recent district court decisions sustaining jurisdiction in similar cases (see cases cited note 48 infra).

[32] In Sperry v. Keeler Transportation Co., 28 F. (2d) 897 (D.C. N.Y. 1928), and in Wilson v. United American Lines, Inc., 21 F. (2d) 872 (D.C. N.Y. 1927), a defendant was not allowed to bring in a citizen of his own state where liability over was alleged. Franklin v. Meredith Co., 64 F. (2d) 109 (C.C.A. 2d 1927), and Lowery v. Nat'l City Bank of New York, 28 F. (2d) 895 (D.C. N.Y. 1928), where third parties were allowed to be brought in to obtain reimbursement, are distinguishable on the ground that in the latter cases the co-citizenship existed between the plaintiff and the third-party defendant.

since A would have been unable to join him under the rule of *Strawbridge v. Curtiss*. Furthermore, it is difficult to say that the court has an ancillary jurisdiction over C. Such an argument may be made when liability over is sought on the theory that there are two actions, one ancillary to the other, but when direct liability is alleged there can be said to be but one action and that cannot be ancillary to itself. Jurisdiction may be sustained, however, by analogy to those cases holding that after jurisdiction has attached, it is unaffected by the intervention of a third person as a party defendant.[33] But the rationale for refusing to allow a third-party defendant to be brought in in this case is that the plaintiff should not be allowed to achieve indirectly what he cannot achieve directly. Furthermore, as suggested in Part I of this note, the presence of the third party will frequently be unnecessary to dispose of the claim asserted against the original defendant.

When liability over is alleged, the need for establishing independent jurisdiction over the third-party defendant seems obviated by the ancillary character of the controversy between the third-party plaintiff and the third-party defendant. This ancillary character is implicit in the rule. It permits the third-party defendant to assert defenses to the plaintiff's claim, makes the establishment of the defendant's liability to the plaintiff a condition precedent to a finding of the third-party defendant's liability, and binds the third-party defendant by the adjudication in the main action. In fact, so intimate is the connection of the third-party defendant to the original controversy and so significant is his part in the main suit that there may be said to be but one action with one plaintiff and two defendants as to whom there is complete diversity, and of this type of action the court admittedly has jurisdiction. Under this view there should be no objection to litigating the issues between the co-citizen defendants, in view of the strong analogy to the old equity practice permitting cross-bills between co-citizens provided they were related to the main action.[34] The objection to this theory is that it would apparently necessitate a showing of diversity between the plaintiff and each defendant, a requirement which would defeat jurisdiction if the third-party defendant were a citizen of the plaintiff's state. A court anxious to extend its jurisdiction in order to avoid hardship would probably overlook the latter difficulty simply by denominating ancillary the controversy with the third-party defendant.

When liability over is asserted, the claim against the third-party defendant may also be called ancillary on the ground that his presence is necessary to dispose completely of the main controversy which is already properly in the federal court. In *Moore v. New York Cotton Exchange*[35] the court granted the de-

[33] See cases cited note 36 infra.

[34] Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258 (1910); American Realty Co. v. Big Indian Mining Co., 146 Fed. 166 (C.C. Mont. 1906); Morgan's L. & T. R. & Steamship Co. v. Texas Central R. Co., 137 U.S. 171, 189 (1890) (jurisdiction sustained on a cross-bill between co-citizens where there was property before the court).

[35] 270 U.S. 593 (1926).

fendant injunctive relief on a non-federal counterclaim, even though it dismissed the plaintiff's bill which alleged, with substantial cause, a violation of the anti-trust laws. If the basis of the decision is the broad ground that after jurisdiction attached the court could grant all relief necessary to dispose of the action, then it is arguable that a third party allegedly liable over may be brought in to grant the defendant complete relief, just as the defendant in the *Moore* case was granted complete relief on his counterclaim. Of course, it should be recognized that the relief given in the *Moore* case did not extend beyond the parties to the original suit, and for this reason the case probably does not authorize adding new parties without an independent jurisdictional basis. In one sense, however, the third-party case is even stronger for granting the defendant relief since the plaintiff's claim has not, by hypothesis, been dismissed.

The clue to deciding the problem of whether independent jurisdictional grounds are necessary when liability over is alleged may appear from intervention cases which seem to hold that where a party has an absolute right to intervene no independent jurisdictional basis need be shown between the intervenor and the party with whom he has an adverse interest.[36] While these cases apparently indicate that complete diversity is not a constitutional requirement, it should be pointed out that in the classic instances in which the right is absolute, namely, when the intervenor claims an interest in the property before the court and when the intervenor is inadequately represented in an action binding on him,[37] ancillary jurisdiction over the intervenor may be supported on the ground that the processes of the court should not be used to perpetrate injustice on an absent party. While in actions brought under Rule 14 there is no question of hardship to an absent party, the third-party plaintiff may, in some cases, be severely prejudiced if the liability of his indemnitor must be decided in a separate action since the first judgment may not be binding upon the third party. Hence, if possible hardship is an important factor in calling an action ancillary, then the results reached in the absolute right of intervention cases afford a persuasive analogy. If, however, the third-party plaintiff is merely convenienced by bringing in the third-party defendant, then those cases requiring independent jurisdictional grounds where the right to intervene is conditional only[38] seem most suggestive. For generally in such instances the would-be intervenor loses nothing if intervention is denied. Furthermore,

[36] Krippendorf v. Hyde, 110 U.S. 276 (1884); Phelps v. Oaks, 117 U.S. 236 (1886). But cf. Drumright v. Texas Sugarland Co., 16 F. (2d) 657 (C.C.A. 5th 1927). For a full discussion, see Moore and Levi, Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements, 47 Yale L. J. 898, 926 (1938).

[37] See Moore and Levi, Federal Intervention I. The Right to Intervene and Reorganization, 45 Yale L.J. 565, 581 (1936). Federal Rule 24(a) gives an absolute right under the same circumstances.

[38] Fulton Nat'l Bank of Atlanta v. Hozier Intervener, and Smith, 267 U.S. 276 (1925); Asher v. Bone, 100 F. (2d) 315 (C.C.A. 9th 1938). But cf. Wichita R. Co. v. Public Utility Com'n, 260 U.S. 48 (1922).

if independent jurisdictional grounds are held unnecessary in actions under Rule 14, the third party may often argue that he is being forced into an action into which he could not have intervened, for his joinder would have been held to oust the court of its jurisdiction.

Interpleader[39] furnishes perhaps the strongest argument for holding that independent jurisdictional grounds over a third-party defendant are unnecessary. There is authority holding that a stake-holder may, by a strict bill of interpleader,[40] join co-citizen claimants,[41] and that by a bill in the nature of a bill of interpleader he may join a citizen of his own state and litigate issues with him.[42] If jurisdiction over a co-citizen claimant be sustained in order to prevent the stake-holder from being held twice liable, then, in actions under Rule 14, when liability over is asserted, a like argument may be made. Although the defendant does not risk double liability, still if the one liable over to him must be sued in a separate action, the question of the original defendant's liability to the original plaintiff frequently will not be res judicata as to the third party. This argument will not apply, however, where direct liability of the third-party defendant to the original plaintiff is alleged.

But deciding jurisdictional questions by considering whether direct liability or liability over is alleged will cause difficulties. Thus, in *Kravas v. Great Atlantic and Pacific Tea Co.*,[43] the plaintiff, a citizen of Pennsylvania, sued the tea company, a New Jersey corporation, for injuries caused by the defective condition of premises leased by it. The defendant was allowed to bring in its landlord, also a citizen of Pennsylvania, alleging first, that the lessor was in control of that portion of the premises which caused the harm, and second, that if the court found that the defendant was in control, the lessor was liable over to it by reason of certain covenants in the lease. If jurisdiction over the lessor had been sustained on the ground that the allegation of liability over created an independent suit the parties to which were of diverse citizenship, would the plaintiff be denied recovery if direct liability were proved on the ground that no diversity could be shown between the plaintiff and the third-party defendant? In the *Kravas* case the court sustained jurisdiction, basing its

[39] For examples of statutory interpleader see 49 Stat. 1096 (1936), 28 U.S.C.A. § 41 (26) (Supp. 1939) and 39 Stat. 541 (1916), 49 U.S.C.A. § 97 (1929) (interpleader by carriers).

[40] A strict bill of interpleader differs from a bill in the nature of bills of interpleader in that in the latter the stake-holder has a ground for equitable relief other than possible double liability. Thus, he may dispute the extent of his liability to a claimant. See Chafee, The Federal Interpleader Act of 1936, 45 Yale L.J. 963, 970, 1161 (1936).

[41] Mallers v. Equitable Life Assurance Society, 87 F. (2d) 233 (C.C.A. 7th 1936), cert. den. 301 U.S. 685 (1937), noted 51 Harv. L. Rev. 168 (1937). On the Interpleader Act of 1936, 49 Stat. 1096 (1936), 28 U.S.C.A. § 41 (26) (Supp. 1939), see in general Chafee, op. cit. supra note 40.

[42] Cramer v. Phoenix Mutual Life Ins. Co., 91 F. (2d) 141 (C.C.A. 8th 1937), cert. den. 302 U.S. 739 (1938); New York Life Ins. Co. v. Cross, 7 F. Supp. 130 (N.Y. 1934).

[43] 28 F. Supp. 66 (Pa. 1939).

decision on *Bossard v. McGwinn*[44] where the action against the third-party defendant was held "ancillary." Suppose the third-party defendant had been a citizen of New Jersey and that direct liability only had been alleged and jurisdiction sustained on that ground, but that at the trial the evidence showed that the third-party defendant was merely liable to the defendant. It would be a waste of the court's time and the litigant's money to refuse to permit the defendant to amend its pleadings in order to recover. Yet this unfortunate result will be necessary on any theory distinguishing between direct liability and liability over; otherwise defendants will allege either type of liability which will confer jurisdiction and then take advantage of the amendment device, if necessary.

If the above distinctions be disregarded, it may still be argued that the court has jurisdiction over parties who could not have been joined originally, or whom the defendant could not have sued in the federal courts in a separate action. The requirement of *complete* diversity between plaintiffs and defendants in actions founded on diversity of citizenship is apparently imposed, not by the Constitution, but rather by the courts through a strict interpretation of the statute conferring diversity jurisdiction, partly to prevent dockets from becoming overburdened, partly to prevent the litigation of suits between co-citizens in the federal courts by the addition of nominal parties, and partly to avoid expanding federal jurisdiction in order to avoid a renewal of the demand for curtailing the federal judiciary. This explanation is supported by the fact that while in the analogies discussed above[45] (counterclaims, cross-claims, interpleader, and intervention) the courts speak in terms of ancillary jurisdiction, still in each instance the courts do qualify the rule of *Strawbridge v. Curtiss*.

As indicated above, analogies are available to sustain federal jurisdiction in most third-party cases, but as also indicated no one theory sustains jurisdiction in all cases. Therefore, the maximum effect of Rule 14 can be obtained only by holding that independent jurisdictional grounds are unnecessary as to third parties. While this result was not reached in the cases decided under the Conformity Act either where direct liability[46] or where liability over[47] was alleged,

[44] 27 F. Supp. 412 (Pa. 1939).

[45] It is usually stated that there must be admiralty jurisdiction over a third party in order to bring him in under Admiralty Rule 56, 28 U.S.C.A. following § 723 (1928), whether direct liability is alleged (The Goyaz, 281 Fed. 259 (D.C. N.Y. 1922), aff'd 3 F. (2d) 553 (C.C.A. 2d 1924); Rudy Patrick Seed Co. v. Kokusai Kisen Kabushiki Kaisha, 1 F. Supp. 266 (N.Y. 1932); Luckenbach S.S. Co. v. Central Argentine Co., 298 Fed. 344 (D.C. N.Y. 1924)) or liability over (Aktieselskabet Fido v. Lloyd Braziliero, 283 Fed. 62 (C.C.A. 2d 1922), cert. den. 260 U.S. 737 (1922); Lamborn & Co. v. Compania Maritimi del Nevrion, 19 F. (2d) 155 (D.C. N.Y. 1927)). It is doubtful, however, whether the cases actually go beyond requiring independent federal jurisdiction over the new party.

[46] See note 32 supra. [47] See note 33 supra.

still it has been adopted by the district courts in cases decided under the new rules.[48]

Unless independent jurisdictional requirements are held to be unnecessary, Rule 14 may become practically a nullity, for the requisite diversity is most likely to be present when the third-party defendant is a citizen of neither the defendant's nor the plaintiff's state, yet in these two jurisdictions, where suit will generally have to be brought, it will be almost impossible to bring in a third party because of improper venue and inability to serve effective process.

III. VENUE

In contrast to the jurisdictional difficulties which arise from constitutional restrictions, venue problems are wholly statutory. Section 51 of the Judicial Code[49] provides that "where jurisdiction is founded only on the fact that the action is between citizens of different States" venue lies in the district of residence of either the plaintiff or the defendant,[50] but in other cases in the defendant's district only. A recent federal decision[51] held that in an action based on diversity of citizenship, a defendant could bring in a co-citizen on the theory that no independent jurisdictional grounds need be shown as to the third-party defendant since the action against him is ancillary to the main action. But, the court added, venue as to the third-party defendant lay in his district only, not in the plaintiff's district where the suit arose, since as to the third-party defendant the action was not "founded on" diversity of citizenship but on the court's "ancillary jurisdiction." Hence, the more liberal venue provisions for diversity actions did not apply.

It is submitted that the court ought not to have considered jurisdiction over the third-party defendant as "founded on" the court's "ancillary jurisdiction" as opposed to diversity jurisdiction. The scope of federal jurisdiction is determined by the Constitution[52] and cannot be added to by the courts. Whatever right the court may have to adjudicate claims against the third-party defendant is predicated on its jurisdiction over the main action, which rests on

[48] Jurisdiction has been sustained where a co-citizen of the plaintiff was alleged to be directly liable to the plaintiff, Bossard v. McGwinn, 27 F. Supp. 412 (Pa. 1939); Crum v. Appalachian Electric Power Co., 27 F. Supp. 138 (W. Va. 1939); Satink v. Holland Tp., 28 F. Supp. 67 (N.J. 1939); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (Pa. 1939). Likewise a co-citizen of the defendant may be brought in where liability over is sought, Morrell v. United Air Lines Transport Corp., 29 F. Supp. 757 (N.Y. 1939); Schram v. Roney, 53 Dept. of Justice Bull. on Fed. Rules 27 (D.C. Mich. 1939); see also Tullgren v. Jasper, 27 F. Supp. 413 (Md. 1939); Lewis v. United Air Lines Transport Co., 29 F. Supp. 112 (Conn. 1939).

[49] 49 Stat. 1213 (1936), 28 U.S.C.A. § 112 (Supp. 1939).

[50] On construction of this section of Section 51 of the Judicial Code see 7 Univ. Chi. L. Rev. 397 (1940).

[51] Lewis v. United Air Lines Transport Co., 29 F. Supp. 112 (Conn. 1939).

[52] U.S. Const. art. 3, § 2(1).

diversity of citizenship; thus, the venue provisions of diversity actions ought to apply. The third-party defendant is amply protected by the limits on federal process, which generally speaking does not run beyond state lines. The court in this case further stated that if it conceded that venue should be determined according to the basis of jurisdiction of the main action, still since the suit between the plaintiff and the defendant had been removed from a state court, jurisdiction was founded on the Removal Statute,[53] and not on diversity of citizenship. In reply to this reasoning, it should be pointed out that the suit was "founded on" the removal statute only in the sense that without the statute there would be no right to remove. The phrase "jurisdiction is founded only on the fact [of diversity]" as used in Section 51 of the Judicial Code, refers to diversity as distinguished from the other grounds enumerated in the Constitution. The removal statute is an enabling statute only: it can create no new ground of jurisdiction. The issue of proper venue ought not to turn on whether the suit had originated in the federal courts or had been removed from a state court before the third-party defendant had been brought in.

Since Section 51 of the Judicial Code provides that venue in diversity actions shall be in the plaintiff's or in the defendant's district, the question arises whether the plaintiff or the third-party plaintiff will be considered "plaintiff" for venue purposes. In *King v. Shepard*,[54] where liability over was sought against a Missouri corporation brought into the action by a citizen of Oklahoma who was being sued in Arkansas by a citizen of that state, the court held that the third-party defendant could successfully raise the objection of improper venue. The court reasoned that as to the third-party defendant, the plaintiff was the third-party plaintiff. Hence, venue lay in Oklahoma or in Missouri, but not in Arkansas. The court considered the case as consisting of two actions, and hence construed "plaintiff" as used in the statute to mean "third-party plaintiff." But, since as pointed out above in discussing jurisdictional problems, the third-party defendant may assert defenses to the plaintiff's claim and since he is bound by the adjudication of the defendant's liability to the plaintiff,[55] it is somewhat artificial to say that there are two actions; hence the court could well have decided that the plaintiff as to the third-party defendant was the original plaintiff. But if the plaintiff is to be so considered and if, as can hardly be denied, the third-party plaintiff also stands in relation of plaintiff to the third-party defendant, then the third-party defendant may argue that venue is bad under the rule requiring co-plaintiffs who reside in different states to sue in the defendant's district of residence only.[56] This argument applies, of course, where the suit is in the third-party plaintiff's district as well. On the other hand, it may be urged with equal force, at least when direct liability is alleged by the third-party plaintiff, that the action looks as if it consisted

[53] 18 Stat. 470 (1875), 28 U.S.C.A. § 71 (1927).

[54] 26 F. Supp. 357 (Ark. 1938).

[55] Federal Rule 14.

[56] Smith v. Lyon, 133 U.S. 315 (1890).

of one plaintiff and two defendants and not as if there were two plaintiffs and one defendant. Hence, it seems that when the suit is in the third-party plaintiff's district, the third-party defendant can object to the venue, for while co-defendants who reside in different districts of the same state may be sued in the district of residence of either,[57] still co-defendants who reside in different states may not be so joined.[58] As pointed out above, however, any distinction based on whether direct liability or liability over is alleged is difficult to sustain in practice, for third-party plaintiffs will allege both types of liability if by so doing they can secure venue or jurisdiction. No one theory as to the nature of these third-party actions will serve to sustain venue in all cases.

Since Rule 82 provides that the new rules shall not be construed to extend the venue of actions and since it is not the province of the courts to repeal legislation, the venue requirements for original actions should not be held unnecessary as was done in *Morrell v. United Air Lines Transport Co.*,[59] the facts of which were similar to those of the *King* case. In the *Morrell* case the court held that since there was no necessity for independent jurisdictional grounds over the third-party defendant, venue requirements of an independent action need not be met.

The court's reasoning seems to ignore the different considerations which underlie the two requirements. Jurisdictional requirements are imposed on federal courts by general provisions of the Constitution in furtherance of a policy to maintain a balance between the states and the federal government. The venue qualifications, however, are specific statutory provisions intended to protect parties sued against hardship and inconvenience. A court, it would seem, is sooner justified in expanding the scope of federal jurisdiction to prevent the working of individual injustice than it is in serving the convenience of one set of litigants (plaintiffs) at the expense of another set (defendants) when to do so necessitates controverting an express legislative policy to protect the latter group.

IV. SERVICE OF PROCESS

Since the process of the federal court does not run beyond state lines[60] except where expressly extended by statute, the effectiveness of Rule 14 will be severely impaired unless process is made to run throughout the United States, as in

[57] Rev. Stat. § 740 (1875), 28 U.S.C.A. § 113 (1927).

[58] Camp v. Gress, 250 U.S. 308 (1919).

[59] 29 F. Supp. 757 (N.Y. 1939).

[60] Federal Rule 4(f). Under the former practice, process did not run beyond the district, Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422 (C.C.A. 2d 1916); Tauza v. Pennsylvania R. Co., 232 Fed. 294 (D.C. N.Y. 1916). Nor did process run from one division to another of the same district when the divisions were created by statute, Barfield v. Zenith Tire & Rubber Co., 9 F. (2d) 204 (D.C. Ohio 1924). Cf. Standish v. Gold Creek Mining Co., 92 F. (2d) 662 (C.C.A. 9th 1937). The above rules were somewhat relaxed by statute. See, for example, Rev. Stat. § 740 (1875), 28 U.S.C.A. § 113 (1927) (defendants who reside in different districts of the same state may be sued in the district of residence of either).

interpleader actions.[61] Although the possibility of hardship to the defendant is not quite as striking as in interpleader suits, nevertheless, the delay between a judgment for the plaintiff and a judgment against one liable over to a defendant may prove burdensome. The interests of the third-party defendant could be protected by a clause requiring the third-party plaintiff to post a bond for the third-party defendant's costs whenever the latter lived without the state (unless his residence was within approximately 150 miles of the court). Security for costs is not new in our law and may in fact be required in petitions for temporary injunctions under Rule 65 (e).[62]

The need for extension of process is strikingly illustrated in metropolitan areas which embrace several states, as, for example, Chicago (Illinois, Michigan Wisconsin, and Indiana) and New York (New York, Pennsylvania, New Jersey, Maryland, Connecticut, Delaware, and Massachusetts).

[61] 49 Stat. 1096 (1936), 28 U.S.C.A. § 41 (26) (Supp. 1939).

[62] Cf. Alderman v. Whelen Drug Co., 15 Dept. of Justice Bull. on Fed. Rules 28 (D.D.C. 1939) (court may require a non-resident third-party plaintiff to deposit security for costs).