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Federal Rules of Civil Procedure--Ancillary Jurisdiction--Third-Party Defendant's Counterclaim Against Plaintiff Without an Independent Basis of Federal Jurisdiction

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victions, be they religiously, morally, or philosophically inspired should be given the same weight by Congress and the courts in determining who may be excused from participating in a war.

Richard D. Pompelio

FEDERAL RULES OF CIVIL PROCEDURE—ANCILLARY JURISDICTION—THIRD-PARTY DEFENDANT'S COUNTERCLAIM AGAINST PLAINTIFF WITHOUT AN INDEPENDENT BASIS OF FEDERAL JURISDICTION—In an action brought in United States district court for breach of contract, negligence and misrepresentation with respect to two construction contracts, movant Revere Copper and Brass, Incorporated [hereinafter Revere] sued Aetna Casualty and Surety Company [hereinafter Aetna] as surety on performance bonds it executed on the two contracts for George A. Fuller Company [hereinafter Fuller]. Fuller had agreed to indemnify Aetna for all losses it sustained on the bonds. Aetna, therefore, impleaded[1] Fuller as a third-party defendant under Rule 14(a) of the Federal Rules of Civil Procedure.[2] Fuller counterclaimed under Rule 14(a)[3] alleging breach of warranty, negligence, wanton and willful misconduct, and misrepresentation on Revere's part. Both Revere

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[1] Federal Rule of Civil Procedure 14 allowing impleader does not establish a right of reimbursement indemnity, nor contribution; but where there is a basis for such right Rule 14 expedites the presentation and in some cases accelerated the accrual of such right. 3 J. MOORE, FEDERAL PRACTICE [hereinafter cited as MOORE]
1403 (2d ed. 1968). *See also.* C. WRIGHT, LAW OF FEDERAL COURTS [hereinafter cited as WRIGHT] § 76 (2d ed. 1970).

[2] Rule 14. Third-Party Practice.
(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY.
At any time after commencement of the action defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaints, hereinafter called third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. *The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. . . . FED. R. CIV. P. 14(a) (emphasis added).

[3] This counterclaim under Rule 14(a) is not a true counterclaim since the parties are not "opposing" prior to its service. MOORE ¶ 14.17.

and Fuller were incorporated in Maryland; therefore, Revere moved to dismiss Fuller's counterclaim alleging it was not supported by an independent ground of federal jurisdiction.[4] The district court denied Revere's motion; consequently, Revere brought this interlocutory appeal.[5] *Held*: Affirmed. A third-party defendant's counterclaim under Rule 14(a) against the original plaintiff comes within the ancillary jurisdiction of the federal courts. *Revere Copper and Brass Incorporated v. Aetna Casualty and Surety Company,* 426 F.2d 709 (5th Cir. 1970).

Rule 14(a) of the Federal Rules of Civil Procedure provides for third-party practice, or impleader, a procedural device whereby a party to an action, because of a claim asserted against him in the original action, may bring in an additional party and claim against such third party. This device is made available to avoid circuitry of action, multiplicity of suits, and inconsistent results, by settling, as far as possible, related matters in one litigation.[6] To adequately protect the impleaded party, or third-party defendant, the Rule provides that he may assert his full defenses and/or counterclaims.

In order to give full usefulness to those rules[7] designed to determine in action the various claims arising from the same transaction or occurrence,[8] the federal courts have retained jurisdiction over claims

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[4] 28 U.S.C. § 1332 (1964) requires, *inter alia,* that for the district courts to have original jurisdiction over civil actions not otherwise based on a federal question that it be between "(1) citizens of different states".

[5] 28 U.S.C. § 1292(b) (1958):

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it with 10 days after entry of the order: *Provided however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.

[6] Wiggins v. Philadelphia, 331 F.2d 521 (3d Cir. 1964); Lesnick v. Pub. Industrials Corp., 144 F.2d 968 (2d Cir. 1944); 1A W. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE [hereinafter cited as BARRON & HOLTZHOFF] § 421 (Wright rev. 1960); MOORE ¶ 14.04; WRIGHT § 76; Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts,* 33 F.R.D. 27 (1964); Holtzhoff, *Entry of Additional Parties in a Civil Action Intervention and Third-Party Practice,* 31 F.R.D. 101 (1963); Note, *Diversity Requirements in Multi-Party Litigation,* 58 COLUM. L. REV. 548 (1958); Note, *The Ancillary Concept and the Federal Rules,* 64 HARV. L. REV. 968 (1951); Note, *Third-Party Practice —Impleader,* 40 KY. L.J. 88 (1950); Comment, 11 OKLA. L. REV. 326 (1958).

[7] Rules 13, 14 and 24. *See* Lesnick v. Pub. Industrials Corp., 144 F.2d 968 (2d Cir. 1944); 64 HARV. L. REV., *supra* note 6.

[8] Lesnick v. Pub. Industrials Corp., 144 F.2d 968 (2d Cir. 1944); Note, *Ancillary Jurisdiction—Rule 14,* 51 NW. L. REV. 354 (1956). *Contra,* Note, *Five Years of Third-Party Practice,* 29 VA. L. REV. 981 (1943).

which otherwise lack independent grounds for federal jurisdiction. Such claims are held ancillary[9] to the main action, and therefore, supported by its grounds for federal jurisdiction.[10] The instant case is the first appellate decision involving the question of whether a third-party defendant needs independent jurisdictional grounds to support a counterclaim against the original plaintiff. Six district court cases have dealt with the issue, but their decisions are divided.

In *Morris, Wheeler and Company, Incorporated v. Rust Engineering Company,*[11] the District Court for Delaware held in 1945 that it had no jurisdiction to adjudicate the counterclaim brought by the third-party defendant against the plaintiff because both were Pennsylvania corporations. The court analogized this situation to one where the plaintiff amends his complaint to include the third-party defendant, an action that already had been held to require independent federal jurisdiction.[12] The court clearly refused to hold that this type

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[9] The concept of ancillary jurisdiction was established in federal courts long before the promulgation of the federal rules. Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co., 426 F.2d 709 (5th Cir. 1970). If a claim is found to be ancillary or "logically related" to the main suit the jurisdictional requirements may be disregarded:

> A federal court has ancillary jurisdiction of the subject matter of a counterclaim if it arises out of the transaction or occurrence that is the subject matter of an opposing party's claim of which the court has jurisdiction. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961).

See also Moore v. N.Y. Cotton Exch., 270 U.S. 593 (1926); BARRON & HOLTZHOFF § 424; Wright § 76; Fraser, *supra* note 6; Comment, 62 COLUM. L. REV. 1513 (1962).

[10] The doctrine of ancillary jurisdiction, however, appears to be in a metamorphosis, from which it will emerge a greater thing. Courts have held that a counterclaim arising out of the same transaction as the plaintiff's claim need not have independent jurisdiction, since the counterclaim is ancillary to the plaintiff's claim. In such a case, additional parties, who are only severally liable, may be brought in on the counterclaim regardless of ensuing lack of diversity. A cross claim arising out of the same subject matter as the original action is ancillary and requires no independent jurisdictional basis, even though permissive. In an interpleader action based upon diversity between the stakeholder and the two claimants (both of identical citizenship), the court may retain jurisdiction of the controversy between the claimants after the stakeholder has dropped out of the action because the dispute between the claimants is ancillary to the main action. Intervention of right also is uniformly permitted without regard to citizenship of the intervenor on the ground of ancillary jurisdiction; and this principle has been extended even to permissive intervention. Intervention has even been permitted without regard to citizenship in a spurious class action. From these illustrations it is clear that ancillary jurisdiction is expanding and is sufficiently broad to permit a third-party defendant to assert a claim against the plaintiff. Comment, 11 OKLA. L. REV. 326, 329-30, (1958).

[11] 4 F.R.D. 307 (D. Del. 1945). Note that this was prior to the 1946 amendment to Rule 14 which specifically provided for a third-party defendant's counterclaim. In this case, the third-party defendant's counterclaim was brought under Rule 13.

[12] Friend v. Mid-Atlantic Transp. Co., 153 F.2d 778 (2d Cir. 1946); MOORE

(Continued on next page)

of claim came within the court's ancillary jurisdiction. The court also relied on the express prohibition of Rule 82 against expanding federal jurisdiction through the Federal Rules of Civil Procedure.[13]

The District Court for the Southern District of New York did not agree with the Morris case. Instead, in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappj*,[14] the court held that the third-party defendant's counterclaim "clearly arose out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."[15] The counterclaim, because it fulfilled this requirement, was allowed despite the fact that the original plaintiff and third-party defendant were citizens of the same state. The court also noted that the original third-party claim was ancillary.

The controversy gathered momentum, when in 1953 in *Shverha v. Maryland Casualty Company*,[16] the District Court for the Eastern District of Pennsylvania dismissed a third-party defendant's counterclaim against a fellow citizen of Pennsylvania for lack of federal jurisdiction. The court, adopting the rationale of Professor Moore, drew the analogy similarly made in the *Morris* case:

> Since as we have seen, the plaintiff may avail himself of this procedural right only where there is an independent jurisdictional ground to support his claim against the third party, it must follow that if the third party takes the initiative to assert a claim against the plaintiff there must be independent jurisdictional grounds in support thereof.[17]

To further complicate matters, in 1959 the District Court for the Southern District of New York in *James King and Son v. Indemnity Insurance Company of North America*[18] ignored its earlier decision in *Bernstein* and adopted *Shverha;* thereby dismissing the third-party defendant's counterclaim against a fellow citizen of New York for the lack of independent jurisdictional grounds. The third-party defendants in this case tried to assert that, since their counterclaim was by definition compulsory, they would be barred from ever raising the claim again. The court held that, because it lacked jurisdiction over the

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(Footnote continued from preceding page)

¶ 14.27; Note, *Diversity Requirements in Multi-Party Litigation*, 58 COLUM. L. REV. 548 (1958); Comment, 11 OKLA. L. REV. 326 (1958). *Contra*, Fraser, *supra* note 6; Holtzhoff, *supra* note 6.

[13] Rule 82. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . . FED. R. CIV. P. 82.

[14] 9 F.R.D. 557 (SDNY 1949).

[15] *Id.* at 558.

[16] 110 F. Supp. 173 (E.D. Pa. 1953).

[17] *Id.* at 175.

[18] 178 F. Supp. 146 (S.D.N.Y. 1959).

claim, its dismissal thereof would be without prejudice. Also a factor in the decision was that the court seemed disinclined to provide the third-party defendants

> . . . with a right which they could not enjoy in a New York court, where a third-party defendant may not counterclaim against the original plaintiff unless the plaintiff amends his complaint to include direct claims against the third-party defendant.[19]

The District Court for the Eastern District of Pennsylvania in 1962 also changed its mind. In *Heintz and Company v. Provident Tradesman Bank and Trust Company*,[20] the court expressly rejected *Shverha* and refused to dismiss a third-party defendant's counterclaim because it lacked the requisite federal jurisdictional amount. This court's rationale was based on the doctrine of ancillary jurisdiction. Equating the criteria for a Rule 13(a) compulsory counterclaim[21] with that of the third-party defendant's counterclaim, the court felt that, since the Rule 13(a) counterclaim was by definition ancillary,[22] and, therefore, required no independent grounds of jurisdiction, neither should the third-party defendant's counterclaim. The possibility of collusion which had operated to keep a plaintiff's claim against a third-party defendant from being declared ancillary was held by the court to be remote here since the third-party defendant is an involuntary party to the action.

The latest district court case to consider the issue is *Union Bank and Trust Company v. St. Paul Fire and Marine Insurance Company*.[23] In this case, the District Court for Nebraska in 1965 dismissed the motion to strike the third-party defendant's counterclaim for lack of independent jurisdictional grounds. This court, like the court in *Heintz*, felt that the third-party defendant's counterclaim was certainly within the scope of the doctrine of ancillary jurisdiction.

In the *Revere* case, the Court of Appeals makes a survey of the preceding cases as well as the treatises and current legal literature.[24]

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[19] *Id.* at 148. This is contrary to the rights of a third party under Federal Rule 14(a).

[20] 30 F.R.D. 171 (E.D. Pa. 1962).

[21] Rule 13. Counterclaim and Cross-Claim
(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . . FED. R. C|1. P. 13 (a).

[22] *See* note 9 *supra*.

[23] 38 F.R.D. 486 (D. Neb. 1965).

[24] 426 F.2d at 711 n.4.

Its decision centered on the applicability of the doctrine of ancillary jurisdiction to third-party defendant counterclaims. Most helpful to the court was the application of the doctrine to other multiple party dilemmas,[25] especially intervention under Rule 24(a).[26] The Court felt that Fuller could have intervened into this action, as well as having been brought in as a third-party defendant.[27] Consequently, since an intervenor of right has been held to be able to counterclaim against the original plaintiff without an independent basis of federal jurisdiction,

> [i]t would be anomalous to hold that Fuller could have asserted its counterclaim against Revere free of any jurisdictional impediment if it had taken the initiative of intervening, and yet hold that since Fuller was brought into this action involuntarily as a third-party defendant, its counterclaim must satisfy the requirements of strict diversity and thus fail.[28]

In adopting this analogy between Fuller as a third-party defendant and an intervenor, the court rejected the argument restricting the third-party defendant's claims against the plaintiff because they are analogous to those of the original plaintiff against the third-party defendant. The court held the situations converse because the plaintiff was a voluntary party[29] to the action while a third-party defendant was not. This, asserted the court, was important in strictly applying ancillary jurisdiction where the possibility of collusion or fortuitous circumvention of the jurisdictional requirements exist. In emphasizing this difference, the court made it clear that the plaintiff must have independent jurisdictional grounds for any claim he asserts against the third-party defendant despite its holding in the instant case.

The last hurdle the court met was that of Rule 82 and the general

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[25] *See* note 10 *supra.*

[26] Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. FED. R. CIV. P. 24(a).

[27] Intervention is permitted as a matter of right under FED. R. CIV. P. 24 despite an absence of requisite jurisdiction over the intervenor's claim if it can be shown that his interests are not sufficiently represented, or that he may be barred from bringing a subsequent action, or otherwise be deprived of an adequate remedy. Comment, 8 UTAH L. REV. 145, 147 n.14 (1964).

Cf. Northeast Clackamas County Elec. Coop., Inc. v. Cont. Cas. Co., 221 F.2d 329 (9th Cir. 1955).

[28] 426 F.2d at 716.

[29] *Accord,* Fraser, *supra* note 6; 58 COLUM. L. REV., *supra* note 6.

trend to restrict federal jurisdiction.[30] The court did not feel that its decision to allow the counterclaim broadened the scope of ancillary jurisdiction. Instead, by applying the doctrine to the third-party counterclaim it provided "opportunities for involving the doctrine, which, as has been seen, was already well established when the rules became effective, in additional situations."[31] In summary, the Court argued that jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case. The court maintained its decision was based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent.

The merits of this decision hinge on the validity of its application of the doctrine of ancillary jurisdiction to the third-party defendant's counterclaim. The previous cases to the contrary had not so applied the doctrine because (1) the plaintiff's claim against the third-party defendant is not within the doctrine and (2) Rule 82 expressly prohibits the Federal Rules from expanding federal jurisdiction.

The policy behind the doctrine of ancillary jurisdiction and Rule 14 is the same.[32] The requirements for a third-party counterclaim and those of ancillary claims are the same.[33] Consequently, the parties and issues involved in the counterclaim are already before the court because of the original action. It would seem, therefore, the court's decision to apply the doctrine in this case would logically follow. The fact that as an intervenor Fuller could have asserted his counterclaim without challenge further cements this logic.[34]

Plaintiff's claims against third-party defendants are generally required to have independent jurisdiction to "prevent possible circumvention of the diversity of citizenship requirement through collusion between a plaintiff and friendly defendant."[35] Professor Moore, the proponent for dismissing third-party defendant's claims, asserts that because the counterclaim is brought on the third-party defendant's "initiative"[36] it should be dismissed unless supported by

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[30] 1 MOORE ¶ 0.71; 32 AM. JUR. 2d *Federal Practice and Procedure* § 76 (1967). *Cf.* Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379 (1960); Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383 (1960); 64 HARV. L. REV., *supra* note 6.

[31] 426 F.2d at 717.

[32] *Supra* note 6, and accompanying text.

[33] *See* notes 2 and 9 *supra.*

[34] 426 F.2d at 716.

[35] Comment, 8 UTAH L. REV. 145, 148 (1962).

[36] Nor are we troubled by the fact that the third-party defendant has taken the 'initiative to assert a claim against plaintiff. . . .' An intervenor under Rule 24(b) has quite clearly initiated litigation and yet intervention needs no independent jurisdictional grounds. Heintz and Co. v. Provident Tradesmans Bank and Trust Co., 30 F.R.D. 171, 174 (E.D. Penn. 1962).

independent grounds of jurisdiction. This argument not only ignores the other instances in which ancillary jurisdiction has saved auxiliary claims but it also ignores the fact that as to collusion (the *raison d'etre* of the authority against ancillary jurisdiction for claims of plaintiff's against third-party defendants),

> . . . a third-party defendant cannot assert a claim unless the plaintiff has first instituted an action. Even then, unless the third-party defendant has some control over the defendant, he cannot be assured of being impleaded. Thus it is highly improbable that a third-party defendant could collude to avoid the jurisdictional requirements.[37]

Also, the plaintiff by bringing the action in federal court, submitted himself to all claims arising out of the transaction which is the subject matter of the litigation.

The court, by holding that the third-party defendant's counterclaim is within its ancillary jurisdiction, did not extend jurisdiction in contravention of Rule 82:

> While Rule 82 provides that the other rules shall not be construed to extend or limit the jurisdiction of the Federal courts . . . , it was not felt [by commentators on the Federal Rules] that the extension of recognized concepts of ancillary jurisdiction to practice under Rule 14 did any violence to this limitation.[38]

The accomplishment of the doctrine of ancillary jurisdiction may be thus discrediting, but that may be remedied by Congress or the courts themselves. It seems obvious that the third-party defendant's counterclaim is within the recognized doctrine of ancillary jurisdiction.

The third-party defendant's counterclaim was rightfully held to be within the district court's jurisdiction. This protects Fuller from possible inconsistent results of two trials based on what would have to be similar facts. In a time of crowded court dockets the holding also seems to be in accord with the purpose of the Federal Rules to "secure the just, speedy, and inexpensive determination of every action."[39]

It does not seem that hearing Fuller's counterclaim would have increased the burden on the court nor frustrated the purpose for imposing jurisdictional requirements. To the extent that there is any prejudice or hardship worked on the plaintiff by his having to defend against the counterclaim, his remedy is adequately provided

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[37] 8 UTAH L. REV., *supra*, note 27, at 147.
[38] 29 VA. L. REV., *supra* note 8 at 998.
[39] FED. R. CIV. P. 1.

for in Rule 42(b) which provides the trial court with broad discretion to grant separate trials.[40]

W. Stokes Harris, Jr.

IMPEACHMENT OF WITNESS CREDIBILITY BY USE OF PAST CONVICTION EVIDENCE—KENTUCKY COURT OF APPEALS ADOPTS A NEW RULE.—Over seventy years ago James Thayer laid the foundation for the modern trends in evidence law. Thayer proposed that "unless excluded by some rule or principle of law, all that is logically probative is admissible."[1] Since that time, courts have moved steadily toward an open door policy of admissibility, closing that door only when confronted with irrelevant or prejudicial material.[2] The effect of this liberalization of admissibility has been to place a greater burden on the trial judge to define relevancy and to instruct on the weight of evidence, and a greater burden on the whole system to assure witness credibility.

Most crucial to our judicial system is the assumption that judges and juries can believe what witnesses say. To assure this critical element of credibility, a number of devices have evolved within the judicial system.[3] The most effective of these is the operation of cross-examination as a part of the advocacy tradition.[4] Cross-examination is particularily suited for credibility testing since it inevitably probes the weaknesses and inconsistencies in the fabric of testimony. It is this effectiveness as a credibility test which partially accounts for the trend toward liberality in the scope of cross-examination.[5]

The most serious test of witness credibility occurs when cross-examination is used as a vehicle for impeachment. As the Thayer-initiated trend toward greater admissibility has spread, the methods

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[40] Rule 42. Consolidation; Separate Trials
(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

[1] J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 265 (1898).

[2] *See* Ladd, *Credibility Tests-Current Trends*, 89 U. PA. L. REV. 166, 167 (1940).

[3] The most obvious of these is the requirement that witnesses be sworn to tell the truth and the development of sanctions to be applied in the event of perjury. For a discussion of other credibility tests, *see* Ladd, *supra* note 2, at 167-71.

[4] Ladd, *supra* note 2, at 167-71.

[5] *Id.*