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FEDERAL PROCEDURE-IMPLEADER UNDER RULE I4-LACK OF DIVERSITY OF CITIZENSHIP BETWEEN ORIGINAL PLAINTIFF AND THIRD-PARTY DEFENDANT

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FEDERAL PROCEDURE—IMPLEADER UNDER RULE 14—LACK OF DIVERSITY OF CITIZENSHIP BETWEEN ORIGINAL PLAINTIFF AND THIRD-PARTY DEFENDANT—Plaintiff, a citizen of Connecticut sued defendant, a citizen of Ohio, for injuries received when the car in which plaintiff was a passenger collided with a truck driven by defendant. Defendant removed the case from a Connecticut state court to a federal district court and then obtained an order citing plaintiff's husband, a citizen of Connecticut and the driver of the car in which plaintiff was riding, as a third-party defendant under Rule 14 of the Federal Rules of Civil Procedure.[1] Defendant had no claim against the third-party by Connecticut substantive law which does not recognize contribution be-

[1] Federal Rules of Civil Procedure, Rule 14, 28 U.S.C. (1940) § 723 et seq. "a. When Defendant May Bring in a Third Party. Before the service of his answer defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, 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 plaintiff's claim against him."

tween tort-feasors. Plaintiff then amended to include a claim against the third-party defendant. The motion of the third-party defendant to dismiss for lack of jurisdiction was denied.[2] A jury verdict was found against the defendant upon which judgment was entered and they appealed. *Held*, the judgment against the third-party defendant reversed for lack of jurisdiction. A third party may not be impleaded as defendant when he is liable to the plaintiff alone and both are citizens of the same state, federal jurisdiction not otherwise appearing. *Friend v. Middle Atlantic Transp. Co.*, (C.C.A. 2d, 1946) 153 F. (2d) 778.

How far Rule 14 should authorize the expansion of an action without independent jurisdictional grounds has never been clear.[3] Despite Rule 82, which states that the Rules of Federal Procedure are not to enlarge jurisdiction, many courts have interpreted Rule 14 broadly with the result that they require no new jurisdictional grounds for the third-party suit. This view is strengthened because a jurisdictional averment is unnecessary in the form for impleader, official form 22.[4] The cases arising under Rule 14 can be divided into three classes according to whether the defendant alone has a claim against the third party, the defendant and the plaintiff both have such a claim, or the plaintiff alone has one. The principal case is in the third class. Where the defendant alone has a claim against the third-party defendant the cases since the adoption of Rule 14 have uniformly dispensed with jurisdictional requirements.[5] In the majority of situations, both defendant and plaintiff have a claim against the party impleaded. Here too, diversity of citizenship between the defendant and the third-party defendant is not required. Defendant's claim against the impleaded party is considered ancillary. A more difficult problem arises when diversity is lacking between the original plaintiff and the third-party defendant. But the weight of authority is that he may be impleaded. Such was the holding of the court in *Bossard v. McGwinn*,[6] which arose in circumstances similar to those of the principal case except for the fact that contribution between joint tort-feasors is allowed in Pennsylvania.[7] There had been no amendment by the plaintiff in that case. In *Sklar v. Hayes*,[8] which arose in Iowa, the court extended this doctrine to allow an amendment by the original plaintiff saying, "To hold otherwise would be to deny practical effect to Rule 14 of many cases." The decision was, however, severely criticized in *Herrington v. Jones* [9] and *Johnson v.*

[2] Principal case, (D.C. Conn. 1945) 61 F. Supp. 101.

[3] The commentators in general advocated a liberal interpretation allowing great expansion. Willis, "Five Years of Federal Third-Party Practice," 29 VA. L. REV. 981, 998 (1943).

[4] "On examination of official form 22, it seems to me that the Committee (that formulated the rules) and the Supreme Court adopted this view, since the form for the third-party complaint, unlike the forms for original complaints, omits any allegation of jurisdiction." Crum v. Appalachian Power Co., (D.C. Va. 1939) 27 F. Supp. 138 at 139.

[5] 46 COL. L. REV. 468 at 469 (1946); 53 HARV. L. REV. 449 at 454 (1939). The leading case illustrating this point is Tullgren v. Jasper, (D.C. Md. 1939) 27 F. Supp. 413, decided on other grounds.

[6] Bossard v. McGwinn, (D.C. Pa. 1939) 27 F. Supp. 412.

[7] Pa. Laws (1939) Act 376, § 1, p. 1075.

[8] (D.C. Pa. 1941) 1 F.R.D. 594, 4 FED. RULES SERV. 275 (1941).

[9] (D.C. La. 1941) 2 F.R.D. 108.

Sherrard.[10] The latter case, as well as *Hoskie v. Prudential Ins. Co. of America,*[11] stressed the point that to allow plaintiffs to proceed in such circumstances would be to open the door to collusive suits with friendly defendants.[12] These cases also held that a plaintiff's claim against the third party is not truly ancillary, but is in fact co-ordinated with the original claim. By the weight of authority, therefore, it appears that although a defendant may implead a third party, the plaintiff may not amend his complaint to claim against the impleaded party where diversity of citizenship between them is lacking.[13] Nor can plaintiff obtain judgment without amending, since Rule 14 is an adaptation of Admiralty Rule 5, under which an amendment is a necessary preliminary to recovery from an impleaded party.[14] In cases where the plaintiff alone has a claim against the third-party defendant there is even less reason to call such a claim ancillary. Jurisdiction is, of course, not lacking from the absence of diversity between the original defendant and the third-party defendant in such a case, but where the original plaintiff and the third party share a common citizenship there is no jurisdiction to entertain the plaintiff's claim.[15] The decision in the principal case solves this problem by stating that not only may the plaintiff not amend in such a case, but when the third party is liable solely to the original plaintiff and diversity of citizenship does not exist between those two parties, defendant should not be allowed to implead the third party.[16] This prevents a third party from being impleaded when neither of the original litigants can properly proceed against him, but impleader is not denied when either the defendant alone or both the defendant and the plaintiff could do so. The court did not rule on plaintiff's right to amend where both original parties have claims, nor did it express any opinion on that situation, beyond admitting defendant's right to implead in those circumstances.[17] The problem of plaintiff's claim against third parties is eliminated in the proposed amendments to the Federal Rules of Procedure, whereby defendant will no longer be able to implead a party on the basis of liability to plaintiff.[18]

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[10] (D.C. Mass. 1941) 2 F.R.D. 164.

[11] (D.C. N.Y. 1941) 39 F. Supp. 305.

[12] It has been suggested that the danger of collusive suits is minimized by the provision that the right to bring in a third-party is discretionary with the court. 46 COL. L. REV. 468 at 472 (1946).

[13] In Herrington v. Jones, (D.C. La. 1941) 2 F.R.D. 108, it was held that not only could plaintiff not amend his complaint, but that his voluntary action in attempting to do so destroyed what jurisdiction the court had possessed.

[14] Thompson v. Cranston, (D.C. N.Y. 1942) 2 F.R.D. 270, affirmed in Brown v. Cranston, (C.C.A. 2d, 1942) 132 F. (2d) 631, 148 A.L.R. 1178 1028 [Writ of certiorari denied, 319 U.S. 741, 63 S. Ct. 1028 (1943)].

[15] Commentary, Federal Jurisdiction in Third-Party Practice, 6 FED. RULES SERV. 766 at 767 (1943). This article considered the Sklar case a mere declaration of liability.

[16] Principal case at 779. Since the case arose on plaintiff's amendment rather than on defendant's motion to implead the third party, the court need not have gone so far.

[17] Principal case at 780.

[18] Principal case at 780, Second Preliminary Draft of Proposed Amendments to Rules of Civil Procedure, May 1945, Rule 14 (a) and note thereto.