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## Third Party Practice–Impleader

Cecil D. Walden  
*University of Kentucky*

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# Notes and Comments

## THIRD PARTY PRACTICE – IMPLEADER

Third party practice, or impleader, a liberal procedure relatively new to practitioners in many jurisdictions today found overwhelming opposition in the common law courts. Common law rules of procedure were at the same time so strict that if a plaintiff inadvertently failed to join a proper party in his suit, he could not correct the mistake by any method, but instead he had to drop his suit and begin an entirely new action.<sup>1</sup>

Furthermore, if a defendant wished to bring a party into the suit, on the grounds that that party was indebted in some way to him by reason of the same transaction out of which the original action arose, he could not do so. Thus the surety on a note could be sued by the holder and his only recourse against the principal was in a subsequent separate action.<sup>2</sup> One justification for the rule was that a plaintiff should not be forced to sue anyone other than the party whom he chose to sue.<sup>3</sup>

The bringing of third parties into a suit is not new in courts of Equity.<sup>4</sup> This is not surprising, in view of the fact that Equity doctrines with respect to parties were quite different from those which prevailed at common law. The main function of these courts in such cases was to give all relief possible, and to adjust in a single suit the rights and duties of all parties, growing out of or connected with the subject matter of that suit.<sup>5</sup>

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<sup>1</sup> 1 CHITTY, PLEADING 1 (16th Am. ed. 1840). As was stated by one testwriter: "The doctrines of common law concerning the parties to actions, their joint or several rights and liabilities, and the form of judgment based upon their respective kinds of right and liability, are the crowning technicality of the system resting upon verbal premises which mean nothing, and built up from these premises by the most accurate processes of mere verbal logic. It was a fundamental principle that no one could be a plaintiff unless he was alone or jointly with the co-plaintiffs entitled to the whole recovery, nor a defendant unless he was alone or jointly with the co-defendants liable to the entire demand. The common law knew no such thing as the making a person plaintiff who did not share the right of recovery, or defendant who was not liable for the whole claim, *merely for the purpose of binding him by the judgment and cutting off any possible right on his part.* (Italics of text writer). The judgment must be one single, entire recovery, both as effects the plaintiffs and the defendants; and no one could be plaintiff who did not thus hold the legal title, even though beneficial interest in the cause of action belong to another." See POMEROY, EQUITY JURISPRUDENCE, 150 (5th ed. 1941).

Federal Bank v. Harrison, 10 Ont. Pr. Rep. 271 (1884).

<sup>2</sup> Bolton v. Donovan, 9 N.D. 575, 84 N.W. 357 (1900); For Kentucky cases see, Wahl v. Lockwood & Gasser, 227 Ky. 183, 185, 12 S.W. 2d 321, 322 (1928); M. Livingston & Co. v. Philley, 155 Ky. 224, 226, 159 S.W. 665 (1913).

<sup>3</sup> CLARK, CODE PLEADING, 408 (2nd ed. 1947).

<sup>4</sup> 1 POMEROY, EQUITY JURISPRUDENCE, 152 (5th ed. 1941).

It was inevitable that even in courts of law an adjustment would be made whereby a defendant to a suit would be given relief when he had a genuine claim over against a third party. Perhaps it is not unusual that this relief eventually found its way into English land law for in old England land was a prized possession. Thus where X sold land to Y, with warranty of title, and Z sued Y to recover the land, Y could vouch X in as warrantor and request or offer an opportunity to X to defend Z's action against him.<sup>6</sup> If Z recovered then Y was obliged to bring an independent action against X to recover on the warranty. Whether or not X complied with Y's request to come in and defend, he was bound by the outcome of the action against his warrantee, and in Y's action against X, Y needed only to show the notice or request, the judgment, and X's warranty to him.<sup>7</sup> The above procedural device, known as "vouching to warranty" actually originated in personal property law but was later adapted to real property law.<sup>8</sup>

Third party practice was provided for in England as a general device as early as 1873.<sup>9</sup> One of the earliest cases on the subject arose in 1876.<sup>10</sup> It involved an action brought by the owner of a ship against the charterer to recover demurrage incurred for failure to unload the vessel with required expedition. The defendant brought in the consignee of the cargo as a third party alleging the latter had neglected to unload the cargo quickly enough, and therefore was liable to the charterer. This procedure was approved by the court. It should be noted that the English statute did not expressly authorize a defendant to bring in a third party who is liable only to the plaintiff.<sup>11</sup>

As far as can be determined impleader was sanctioned for the first time in this country in an Admiralty case in 1883.<sup>12</sup> This practice, as contemplated by our present Federal Rule 14 was introduced into state procedure in New York by 1922.<sup>13</sup> There the action was also confined to cases in which the third party was liable over to the original defendant, and remains so under the law today.<sup>14</sup> Pennsylvania which adopted the practice in 1929,<sup>15</sup> has amended its provision

<sup>6</sup> JENKS, *A SHORT HISTORY OF ENGLISH LAW*, 110 (2d ed. 1922).

<sup>7</sup> 1 FREEMAN, *JUDGMENTS*, 999 (5th ed. 1925).

DIGBY, *HISTORY OF THE LAW OF REAL PROPERTY*, 80 fn. (4th ed. 1892).

<sup>8</sup> Supreme Court of Judicature Act 36 and 37 Victoriae, C. 66, Sec. 26 (3) (1873).

<sup>9</sup> *Swansea Shipping Co. Ltd. v. Duncan Fox & Co.*, 1 Q. B. D. 644 (1876).

<sup>10</sup> See note 9 *supra*.

<sup>11</sup> *The Hudson*, 15 F. 162 (S.D. N.Y. 1883).

<sup>12</sup> Cohen, *Impleader: Enforcement of Defendants Rights Against Third Parties*, 33 Col. L.R. 1147, 1152 fn. 32 (1933).

<sup>13</sup> N.Y. CIVIL PRACTICE ACT, sec. 193 (a) (Thompson 1946).

<sup>14</sup> Act of April 10, 1929, P.L. 479, sec. 1, amended by P.L. 663, sec. 2

to permit the defendant to implead not only any party liable over to him, but also any party jointly or severally liable to the plaintiff directly<sup>16</sup> Wisconsin, another precursor of federal practice, introduced it in restricted form in 1935,<sup>17</sup> and still requires that the third party be liable over to the defendant before he may be brought in.<sup>18</sup>

So much for the historical development of third party procedures. Let us now turn to the practice as it exists under Federal Rule 14 today<sup>19</sup>

At the outset it is important to note that Rule 14 is strictly procedural. It can establish no substantive right. A substantive right is a necessary prerequisite to the use of the rule.<sup>20</sup> In short, the rule formerly contemplated the bringing in, by the defendant, of a third party in two different situations: (1) where the defendant claimed that the third party was or might be liable to him (the defendant) for the claim asserted against him in the action;<sup>21</sup> or (2) where the defendant claimed that he was not liable to the plaintiff for the claim asserted against him, but that the third party was.<sup>22</sup>

(1931); P.L. 807, No. 125 sec. 1 (1933); and P.L. 2118, No. 428, sec. 1 (1937); 12 PA. STAT. ANN. sec. 141 (Purdon 1938).

<sup>16</sup> *Ibid.*; East Broad Top Transit Co. v. Flood, 326 Pa. 353, 192, Atl. 401 (1937).

<sup>17</sup> Kletecka, *Impleader — A Comparison Between the Wisconsin and the Federal Practice*, 27 Marq. L.R. 202 (1943).

<sup>18</sup> Wis. STAT. secs. 260.19 (3), 260.20 (1945).

<sup>19</sup> FED. R. CIV. P. 14 (1948). The language is as follows: "(a) When Defendant May Bring in Third Party Before the service of his answer a 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 for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. 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. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. As amended Dec. 27, 1946, effective March 19, 1948.

"(b) When Plaintiff May Bring in Third Party. 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."

<sup>20</sup> *Lampert Co., Inc. v. Teppen & Slutzker*, 3 F.R.D. 49 (D. N.J. 1943).

<sup>21</sup> Typical of this group are claims of contribution, indemnity and other forms of secondary liability. See *Saunders v. Goldstein*, 30 F. Supp. 150 (D.C. 1939).

<sup>22</sup> A test was formulated for this group of cases by Judge Lühring, District of Columbia, in *Crim v. Lumberman's Mutual Casualty Co.*, 26 F. Supp. 715, 719

One of the first problems raised was whether the language that the defendant "may move" to bring in a third party plus the words "if the motion is granted" certain results will follow, imply that the right to bring in a third party under Rule 14 is left to the discretion of the court. This question was answered affirmatively by the Court of Appeals of the District of Columbia.<sup>23</sup> A distinction was drawn between Rule 14 and Admiralty Rule 56,<sup>24</sup> and it was concluded that such a right was within the sound discretion of the court. In view of the language of the rule, such a result must have been expected. So long as the courts formulate fairly uniform principles in exercising their discretion, the purpose of the provision will be carried out, but it is arguable that such a policy cannot be achieved and that it might be well to provide by amendment for impleader by the defendant as a matter of right.

The rule provides that a defendant may bring in a third party "who is or *may be liable* to him for all or part of the plaintiff's *claim* against him." The above italicized words are particularly significant. In construing the word "*may be liable*" the courts have held that the accrual of a right can be accelerated. Thus where a restaurant X purchases contaminated food from Y Company which under state law is not obligated to indemnify X until it suffers a loss, when Z customer who ate the food sues X, X may implead Y in the suit.<sup>25</sup> Clearly X has suffered no loss merely by the commencement of the suit. However, under the language of the rule X's claim against Y is accelerated.

In construing the word "claim," federal courts have, whenever possible, given effect to the intention of the draftsmen of the rules, that is to get away from the narrow concepts of the "cause of action" and to substitute the idea of the claim as a "*group or aggregate of*

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(D.C. 1939). A typical case is one involving joint tortfeasors. See *Burns v. American Chicle Co.*, 29 F. Supp. 773 (E.D. N.Y. 1939). It is important to note that this second group above has been eliminated by the deletion of the words "or to the plaintiff" in Rule 14, in the amendment of Dec. 27, 1946 effective March 19, 1948.

<sup>23</sup> *General Taxicab Ass'n v. O'Shea*, 109 F. 2d. 671 (App. D.C. 1940); See, also, *State of Mo. ex rel and to use of Ward v. Fidelity & Deposit Co. of Md.*, 197 F. 2d. 327 (C.A. Mo. 1950); *Baltimore & Ohio Ry. Co. v. Saunder*, 159 F. 2d. 481 (C.C.A. W. Va. 1947); *Goodard v. Shasta S. S. Co.* 9 F.R.D. 12 (D.C. N.Y. 1949); *Rutherford v. Pennsylvania Greyhound Lines*, 7 F.R.D. 245 (D.C. Ohio 1947); *Bull v. Santa Fe Trail Transp. Co.* 6 F.R.D. 7 (D.C. Neb. 1946). Where the discretion is abused, the court will be reversed. See *Sporia v. Pennsylvania Greyhound Lines*, 143 F. 2d 105 (C.C.A. Pa. 1944).

<sup>24</sup> 28 U.S.C.A. Admiralty Rule 56, wherein it is stated that the claimant or respondent "shall be entitled to bring in any other vessel or person," and thus in admiralty impleader is a matter of right.

<sup>25</sup> *Jueb v. B/G Foods, Inc.*, 2 F.R.D. 238 (D. Minn. 1942).

*operative facts giving ground or occasion for judicial action.*"<sup>26</sup> The courts have not hesitated in giving the word a liberal interpretation.<sup>27</sup>

The language of the rule seems fairly unambiguous. nevertheless federal courts have been forced to dispel the idea that under it any related controversy could be brought into the case. A good example of this is seen in the case of *Barnard-Curtiss Co. v Maehl*.<sup>28</sup> There it was held that a contractor being sued by a subcontractor for labor and materials could not bring in the only creditor who is asserting a claim for work done on the premises. Other cases have upheld the proposition.<sup>29</sup>

It is true that Rule 14 is fairly general in its terms as to whom may be brought into the action.<sup>30</sup> However, it has been recognized that the right to join others is not without limits. A particularly perplexing problem has arisen where cases of joint tort-feasors are concerned. A divergence of views in various states as to when the defendant has a substantive right against the third party has offered a serious obstacle to the determination by the courts as to when one may take advantage of this procedure. A few states still retain the old common law rule that joint tort-feasors are in *pari delicto* and have not right of contribution<sup>31</sup>, but it is not applied where one party may be impleaded as third party defendant.<sup>32</sup> Another scheme permits the right of contribution only between those tort-feasors in *pari delicto* who have been joined by plaintiff in the original action.<sup>33</sup> In New

<sup>26</sup> CLARK, CODE PLEADING, 146 (2d ed. 1947).

<sup>27</sup> *Jones v. Waterman Steamship Corp.* 155 F 2d 992 (C.C.A. 3d 1946); See, also, *Fruit Growers Cooperative v. California Pie and Baking Co., Inc.*, 2 F R. D. 415 (E.D. N.Y. 1942); *Balcoff v. Teagarden*, 36 F Supp. 224 (S.D. N.Y. 1940). In the latter case, Judge Knox said: "To sanction the narrow construction proposed by plaintiff would be tantamount to an emasculation of Rule 14, with a consequent loss of its beneficent objectives."

<sup>28</sup> *Barnard-Curtiss Co. v. Maehl*, 117 F 2d 7 (C.C.A. 9th 1941).

<sup>29</sup> *Heitman v. Davis*, 119 F 2d 975 (C.C.A. 7th 1941). (The stockholders of a national bank, sued on their liability as such, may not bring in the only creditor of the bank in an attempt to attack his claim and the validity of the assessment); *John N. Price & Sons v. Md. Casualty Co.*, 2 F.R.D. 408 (D. N.J. 1942) (A surety company, sued on a materialmans bond, could not implead subcontractors and materialmen who had asserted claims on the board.)

<sup>30</sup> The language is that, "A person, not a party to the action, who is or may be liable for the claim asserted by the plaintiff may be brought in." *Supra*, note 19.

<sup>31</sup> Many states have changed or done away with this rule either by court decision or by statute. See Note 45 HAR. L.R. 369 (1931), collecting and analyzing the American statutes; Notes 85 A.L.R. 1091 (1933); 122 A.L.R. 520 (1939); 141 A.L.R. 1207 (1942).

<sup>32</sup> *George A. Fuller Co. v. Otis*, 245 U.S. 489, 38 S. ct. 180 (C.C.A. D.C. 1918).

<sup>33</sup> N.Y. CIVIL PRACTICE ACT, sec. 211 (a) (Thompson 1941); TEXAS REV. STAT., Act 2212 (Vernon s 1936), *Baylor University v. Bradshaw*, 52 S.W 2d 1094; WEST VIRGINIA CODE ANN., sec. 5482 (1949), *Baltimore & Ohio Ry. Co. v. Saunders*, 159 F 2d 481 (C.C.A. W Va. 1947); Judge Parker said: " for it is clear that, under

York City, if a person is not brought into the action by the plaintiff, then he is not one who "is or may be liable to the defendant" within S. 193(2) allowing impleader,<sup>34</sup> even though he was a joint tort-feasor, since under S. 211(a)<sup>35</sup> there is no claim for contribution until a joint money judgment has been recovered against two or more defendants, and if secured, until more than the claimant's share has been paid.<sup>36</sup> This result reached under a New York court's interpretation of its statutes on impleader and contribution between tort-feasors best illustrates the fact that Rule 14 is merely a procedural device which can be taken advantage of only if a substantive right exists.<sup>37</sup>

It is not surprising that in view of this result the circuit court of appeals in New York refused to allow impleader in a case resting on diversity jurisdiction. Since in New York a defendant had no right to contribution, except where plaintiff joined the other party, it was held that Rule 14 could not be resorted to in federal court in New York to implead a joint tort-feasor.<sup>38</sup>

If state law permits contribution among tort-feasors whether or not plaintiff has sued them all at the outset, there is plainly no problem, and defendant may join them.<sup>39</sup> If he fails to do so his substantive right of contribution is not thereby affected.<sup>40</sup>

Federal courts have found further problems involved in the impleader of insurers. There is always a possibility that juries will be prejudiced if they know the defendant is insured. Of course this need not be considered if the case is tried by court without a jury. Suppose a policy contains a clause stating that no action will lie against the insurer until a judgment has been rendered against the insured. It has been held that such a "no action" clause is directly opposed to the policy of Rule 14 and is of no effect.<sup>41</sup> There is nothing inconsistent in this result since it has already been shown that the accrual of a right against a third party may be accelerated.<sup>42</sup>

It is provided by Rule 14 that the defendant may make his motion

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the law of West Virginia, contribution may be had among joint tort feasors, not with respect to any inchoate liability, but only as to a joint judgment which has already been obtained against them.

<sup>34</sup> See note 14 *supra*.

<sup>35</sup> See note 32 *supra*.

<sup>36</sup> *Ward v. Iroquois Gas Co.* 258 N.Y. 124, 179 N.E. 317 (1932); *Fox v. Western N.Y. Motor Lines*, 257 N.Y. 305, 178 N.E. 289 (1931); *Price v. Ryan*, 255 N.Y. 16, 173, N.E. 907 (1930).

<sup>37</sup> Gregory, *Tort Contribution Practice in New York*, 20 Corn. L.Q. 269 (1935).

<sup>38</sup> *Bates v. Miller*, 133 F. 2d 645 (C.C.A. 2d 1943).

<sup>39</sup> *Gray v. Hartford Accident & Indemnity Co. v. Robison*, 31 F. Supp. 299, 32 F. Supp. 335 (W.D. La. 1940).

<sup>40</sup> *Union Paving Co. v. Thomas*, 9 F.R.D. 612 (D.C. Pa. 1949).

<sup>41</sup> *Jordan v. Stephens*, 7 F.R.D. 140, 142, (W.D. Mo. 1945).

<sup>42</sup> See note 24 *supra*.

*ex parte*, if he moves before the service of his answer, or on notice to the plaintiff if he moves thereafter. The motion is for "leave as third party plaintiff to serve a summons or complaint upon a person not a party to the action." The form of the summons and complaint is provided for in form 22, appended to the rules. The complaint is served by the same method as other complaints,<sup>43</sup> and should have a copy of the plaintiff's complaint attached.<sup>44</sup>

The rule states, "The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim."<sup>45</sup> This protects the impleaded party by giving him an absolute right to assert any defenses available to the defendant. Thus a binding adjudication will not violate due process.<sup>46</sup>

Whenever a third party has been impleaded, whatever claim the plaintiff has against the third party defendant may be asserted by him with one limitation, that there must be an independent ground of federal jurisdiction to support the claim.<sup>47</sup> If plaintiff does not wish to assert his claim he need not do so.<sup>48</sup> The defendant has a parallel right which is subject to the same jurisdictional restriction.<sup>49</sup>

The provision of Rule 14 as to counterclaim and cross claims<sup>50</sup> are governed by Rule 13.<sup>51</sup> Essentially here is how the two rules function together. If AB sues CD who impleads XY, then XY "must" counterclaim against CD in any situation covered by Rule 13 (a) since XY and CD are "opposing parties" within the meaning of Rule 13.<sup>52</sup> XY "may" counterclaim CD in any situation governed by Rule 13 (b) XY may not counterclaim against AB under Rule 13 since they are not "opposing parties." Under Rule 14(a) he may assert any claim against AB which he has, and if he does so, then he and AB become "opposing parties" and AB must counterclaim against XY in the cases covered by Rule 13(a) and may counterclaim under Rule 13(b) If AB asserts a claim against XY under Rule 14, then XY must counterclaim against AB pursuant to Rule 13(a) and may counterclaim pursuant to Rule 13(b).

<sup>43</sup> FED. R. CIV. P. 4 (1948).

<sup>44</sup> *Snyder v. Le Roy Dyal Co., Inc. v. Robinsky*, 1 F.R.D. 362 (S.D. N.Y. 1940).

<sup>45</sup> See note 19 *supra*.

<sup>46</sup> See the Advisory Committee note to Rule 14, 28 U.S. C.A. p. 541.

<sup>47</sup> *Hoskie v. Prudential Ins. Co. of America v. Lorrac Real Estate Corp.*, 39 F. Supp. 305 (E.D. N.Y. 1941).

<sup>48</sup> *Herrington v. Jones*, 2 F.R.D. 108 (E.D. La. 1941).

<sup>49</sup> *Morris, Wheeler & Co., Inc. v. Rust Engineering Corp. v. Plain Corp.*, 4 F.R.D. 307 (D. Del. 1945).

<sup>50</sup> See note 19 *supra*.

<sup>51</sup> FED. R. CIV. P., 13 (1948).

<sup>52</sup> *Ibid.*



One further and perhaps the most perplexing problem confronting federal courts under Rule 14 was that relating to jurisdiction and venue. Early commentators anticipated that the jurisdictional aspects of the procedure would be troublesome.<sup>53</sup> The question is one of great practical importance since strict requirements could altogether defeat the purpose of the rule.<sup>54</sup> The real problem lay in a requirement such as diversity of citizenship. Suppose the defendant and the impleaded party were both citizens of the same state? The courts have generally settled the whole question by declaring that third party proceedings are merely "ancillary" to the main action and thus require no separate ground of jurisdiction.<sup>55</sup>

It appears that if third party impleader is "ancillary" for jurisdictional purposes then it should also be so for purposes of venue and at least one judge has expressed opinion to that effect.<sup>56</sup> However, there has been a sharp conflict in this question and in two Federal decisions handed down only a few days apart contrary results were reached.<sup>57</sup> Although the third party may often be inconvenienced, yet this fact appears to be outweighed by the advantages to be gained in allowing impleader over an objection based upon lack of proper venue, and such is the weight of authority.<sup>58</sup>

The primary purpose of this note has been to acquaint lawyers with the general background of the procedure, its problems and their solutions existing under Federal Rule 14 today. To Kentucky, the concept that a defendant may, with the courts permission, become a plaintiff against a new party who is or may be liable to the defendant for all or part of the plaintiff's claim is entirely new. The theory of our court has been very much like that of the early common law courts. That is, a plaintiff is entitled to choose whom he may sue, and he cannot be required to suffer strangers, against whom he is asserting

<sup>53</sup> Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291, 1322, (1935).

<sup>54</sup> *Crum v. Appalachian Electric Power Co.*, 27 F Supp. 138, 139, (S.D. W Va. 1939). Judge McClintic said: "If the narrow construction claimed by the Coal Company is put upon Rule 14, it will be found that in the most numerous class of cases in federal jurisdiction, the rule will be absolutely useless."

<sup>55</sup> *Sheppard v. Atlantic States Gas Co. of Pa.*, 167 F 2d. 841 (3rd Cir. 1948); *Pyzvnski v. New York Cent. R. Co.*, 7 F.R.D. 302 (D.C. N.Y. 1946); *Shannon v. Massachusetts Bonding & Ins. Co.*, 62 F Supp. 532 (D.C. La. 1945); *Hoskie v. Prudential Ins. Co. of America*, 39 F Supp. 305 (D.C. N.Y. 1941).

<sup>56</sup> *Morrell v. United Air Lines Transport Corp.* 29 F Supp. 757, 758 (S.D. N.Y. 1939).

<sup>57</sup> *Lewis v. United Air Lines Transport Corporation*, 29 F Supp. 112 (D. Conn. 1939); *Ibid.*

<sup>58</sup> *Miller v. Hano*, 8 F.R.D. 67 (D.C. E.D. Pa. 1947); *Moncrief v. Pennsylvania Ry. Co. v. Joiner*, 73 F Supp. 815 (E.D. Pa. 1947); *Lesnik v. Public Industrials Corp.* 144 F 2d 968 (2nd Cir. 1944).

no claim, to be brought in by the defendant.<sup>59</sup> Our civil code provides that: "The court may determine any controversy between parties before it, if it can do so without prejudice to others; if it cannot do so, it must require such other persons to be made parties, or must dismiss the action without prejudice."<sup>60</sup> This provision can be resorted to by the parties or the court only where the party sought to be brought in is indispensable to a complete determination of the suit.<sup>61</sup> A further provision is made for the filing of a cross-petition by a defendant against a "co-defendant, or a person who is not a party to the action, or against both" This will not be permitted, however, "except upon a cause of action which affects, or is affected by the original cause of action"<sup>62</sup> The scope of the above language, in so far as the word "affects, or is affected by" are concerned, is not clear, and has given the Kentucky court some trouble.<sup>63</sup> The words "cause of action," however, definitely rule out the possibility of a cross petition against a third person for indemnity or contribution, since no cause of action for either can arise until the present defendant has been adjudged liable and has paid the judgment.<sup>64</sup> It is clear that our practice cannot be extended to the broad limits comprehended by Rule 14.

Our courts are overcrowded, and the same principal reason which brought about the adoption of impleader by the federal courts—expediency in the settlement of suits—applies here. There is no doubt that an impleader provision could be helpful. If such a right were granted then a defendant could settle his claim for indemnity or contribution in the same suit wherem his liability is tested. In cases where a defendant's liability is only secondary a second suit against the party primarily liable is almost certain. Thus where the City of Louisville was forced to pay a judgment recovered against it for injuries received by a traveler due to a defective metal pipe laid in a sidewalk, it was permitted to recover in a later suit against the abutting owner who was primarily bound to keep the sidewalk in

<sup>59</sup> Consolidated Coach Corp. v. Wright, 231 Ky. 713, 719, 22 S.W. 2d 108, 110 (1929); Wahl v. Lockwood & Gasser 227 Ky. 183, 185, 12 S.W. 2d, 321, 322 (1928); M. Livingston & Co. v. Phillely, 155 Ky. 224, 226, 159 S.W. 665 (1913).

<sup>60</sup> KY. CODE CIV. PRAC. ANN. sec. 28 (Carroll's 1948).

<sup>61</sup> CLARK, CODE PLEADING 409 (2d ed. 1947).

<sup>62</sup> KY. CODE CIV. PRAC. ANN. sec. 96 (3) (Carroll's 1948).

<sup>63</sup> An attempt was made to analyze this language in the case of Wahl v. Lockwood & Gasser, 227 Ky. 183, 187, 12 S.W. 2d 321, 323 (1928). See also, City of Georgetown v. Groff, 136 Ky. 662, 124 S.W. 888 (1910); Fritts v. Kirchdorfer, 136 Ky. 643, 124, S.W. 882 (1910); Longhrdige v. Cawood, 97 Ky. 533, 31 S.W. 125 (1895).

<sup>64</sup> Consolidated Coach Corp. v. Wright, 231 Ky. 713, 730, 22 S.W. 2d 108, 111 (1929).

repair.<sup>65</sup> If the defendant city could have impleaded the abutting owner, the second suit would have been avoided.

Even more important is the fact that an impleader provision permits litigants to participate in litigation vitally important to their ultimate liability. In Kentucky if X is injured through the negligence of A and B, a right of contribution between A and B is inchoate from the date of the creation of relation between the parties giving rise to common liability. But, the right is not complete, so as to be enforceable, until there has been "actual payment" of the common obligation. Only then may A or B ask for and get contribution from the other.<sup>66</sup> Suppose X should join A and B in a suit for damages? No issue can arise between the defendants, since neither has been forced to pay any thing as yet. A verdict is directed in A's favor on the question of negligence. B cannot object to this and yet if a judgment is rendered against him and he later sues A for contribution he may be met by a plea of *res judicata*.<sup>67</sup> Had B been permitted in the original action to become a plaintiff against A, he possibly could have introduced more thorough proof of A's joint negligence and thereby established B's right to contribution.

If third party impleader were adopted as a part of our civil procedure there is no doubt that some problems would arise, but these could be met and disposed of in much the same way that federal courts have disposed of problems arising under Rule 14. It is submitted that Kentucky should adopt the federal rule as it is today

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<sup>65</sup> *City of Louisville v. Nicholls*, 158 Ky. 516, 165 S.W. 660 (1914); See *Brown Hotel Co. v. Pittsburgh Fuel Co.* 311 Ky. 396, 224 S.W. 2d 165 (1949); *City of Owensboro v. Skillman*, 155 Ky. 108, 159 S.W. 659 (1913) (Although it was found that the plaintiff in this second action was actually the party primarily liable and thus he had no right to indemnity, if defendant here could have been impleaded in the original suit, a second action would have been avoided.)  
owner, the second suit would have been avoided.

<sup>66</sup> *St. Lewis v. Morrison*, 50 F. Supp. 570 (D.C. Ky. 1943); *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S.W. 2d 16 (1932).

<sup>67</sup> *Hargis v. Noel*, 310 Ky. 542, 221 S.W. 2d (1949).