NOTES, COMMENTS and DIGESTS
MONOPOLY VERSUS COMPETITION IN AIR ROUTES
UNDER THE C. A. A.

The meaning of the terms "public interest" and "public convenience and necessity" has long supplied speculative material for administrative agencies charged with the regulation of public utilities.¹ Departing from past legislative custom, the Congress in framing the Civil Aeronautics Act of 1938 established certain factors as being in the public interest and in accordance with the public convenience and necessity. Among them was listed: "Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."²

The questions to which this section gives rise are multifarious. When is competition necessary? Does this language assume the necessity of competition or if deemed unnecessary, does the Board have the power to entirely eliminate competition? These questions can and have arisen in two circumstances, (a) a petition is filed for a new route or an extension of an old one, (b) petitioner asks permission to consolidate, merge, purchase, lease, obtain an operating contract, or acquire control of another company.

Decisions have recently been rendered by the Civil Aeronautics Board in cases involving these questions. The problem is whether these decisions possess indices of sufficient definiteness to indicate an established policy on the part of the Board. For while the Board has said that the disposition of each case "must depend on the particular facts which justify or condemn competition under the circumstances which are peculiar"³ to each case, it must of necessity eventually pick out a pattern of precedent which cannot fairly be ignored.

2. 49 U.S.C.A. §401, 402; 58 Stat. 973, 980 (1938) §2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense;

(e) The regulation of air commerce in such a manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

NOTES, COMMENTS, DIGESTS

Certain broad statements of the Board should be noticed. In the Mid-Continent case, they said: "American air transport has developed upon the principle of stimulating progress by the entrusting to different and competing carriers of alternative and competing routes between major terminals by way of different intermediate points." However, in the American Export case they said: "We conclude that competition is not mandatory especially when considered in relation to any particular route or service. Clearly Congress has left to the discretion of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system." Are these statements consistent? To ascertain this, cases involving, (a) new routes and (b) consolidations should be examined.

New Route Cases

In the All American case, petitioner sought a certificate of convenience and necessity to operate a feeder system between a large number of relatively small communities, without engaging in competition with the existing air lines. Mail and express was to be picked up and discharged by means of a patented device which made it unnecessary to land at each intermediate point. Petitioner held no other operating certificate. Operators of through routes in the area intervened and contended that "the existing air transportation system should be given the opportunity to participate in the development of 'feeder' routes and should not be preceded into this field by new companies." After pointing out that the applicant was a pioneer in a type of service which the established carriers had made no attempt to develop, the Board said: "Any such theory as advocated by the interveners which would result in reserving solely for existing air lines the privilege of providing all additions to the present air-transportation system of the United States is untenable. Our adoption of such a policy would certainly not be consistent with a sound development of air transportation and would not be conducive to the best interests of the foreign and domestic commerce of the United States, the Postal Service and the National Defense."

This statement must be contrasted with the position assumed by the Board in the Dixie Airlines case. Petitioner, without operating experience, applied for a certificate to operate between Pittsburgh, Pennsylvania, and Birmingham, Alabama. However, Pennsylvania Central, an established carrier, contended that logically the route should be given to them. After discussing the difficulties of establishing and maintaining convenient connecting service between independent carriers, the Board awarded the route to Pennsylvania Central, saying: "In reaching this conclusion we recognize the fact that the considerations which led us to this determination would be equally applicable in any case in which an existing air carrier is competing with a company without operating experience for a new route or service. The number of air carriers now operating appears sufficient to insure against monopoly in respect to the

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4. In the Matter of the Application of Mid-Continent Airlines Inc. 2 C.A.B. 63, 93 (1940) Docket No. 3—401 (B)—1.
7. Id. at 145.
8. Id. at 146.
average new route case and we believe that the present domestic air transportation system can by proper supervision be integrated and expanded in a manner that will in general afford the competition necessary for the development of that system in the manner contemplated by the Act. In the absence of particular circumstances presenting an affirmative reason for a new carrier there appears to be no inherent desirability of increasing the present number of carriers merely for the purpose of numerically enlarging the industry."

Though two members dissented on other points, all five Board members concurred in the choice of the carrier and the reason prescribed therefor. Of these, three concurred in the *All American* case decided six months earlier, on which there was likewise no dissent, one member not participating and one not being a member of the Board at that time. Hence, it must be concluded that the Board, though it made no mention of the earlier case, regarded both as consistent.

If the expression of the latter case that in the absence of unusual circumstances development will be achieved through the expansion of existing air carriers, is accepted as the paramount commitment of the Board, then the cases are logically, at least, consistent. The *All American* case constituted an unusual circumstance for the company had a novel and useful patented device which no one else had manifested any interest in exploiting.

The last new route case to be considered is that of the *American Export Airlines*. Petitioner sought authorization to operate between the terminal points, New York, New York, and Lisbon, Portugal. Intervener, Pan American Airlines, contested the application and sought to establish as precedent decisions of other regulatory agencies, particularly the Interstate Commerce Commission under the 1935 Motor Carrier Act, which say that where an operator furnishes the adequate, efficient and economical service required by public interest, duplications will not be authorized. Applicant not only denied the authority of these cases but contended further that under § 2(d) of the Act, the Board was required to establish some competition in air transportation. Rejecting both arguments, the Board said: "We conclude that competition in air transportation is not mandatory, especially when considered in relation to any particular route or service. Clearly Congress has left to the discretion

10. Id. at 51, 52.
12. Motor Carrier Act 49 U.S.C.A. §301: 49 Stat. 543 (1935). The Board cited the following cases: Pan-American Bus Lines Operation 1 M.C.C. 190 (1936). In this case petitioner applied for a certificate of convenience and necessity to continue operation of "limited" motorbus service between New York and Miami. Applicant's operations were begun too late to come under the "grandfather clause." In granting the certificate the commission considered whether the service rendered by other carriers was adequate and whether the proposed service will answer a need or might endanger existing carriers. Clark Common Carrier Application 1 M.C.C. 445 (1937). Petitioner sought a certificate of public convenience and necessity to operate motorbus service between points near Martinsburg, W. Va., and points in Pennsylvania. The Commission denied the application saying "... the maintenance of sound economic conditions in the motor carrier industry would be jeopardized by allowing new operators to enter a field in competition with existing carriers who are furnishing adequate, efficient, and economical service."

The position is taken by Hall, *Certificates of Convenience and Necessity* (1928) 28 Mich. L. R. 279, 293 et. seq. that, except under unusual circumstances, a certificate will not be granted a utility in an area in which a similar utility is already operating unless (1) the existing company is giving inadequate and unsatisfactory service, or (2) the petitioner proposes to render a service different in some respects to the existing service.

of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system ... The disposition of this case must depend on the particular facts which justify or condemn competition under the circumstances which are peculiar to this case." The certificate was granted.

This case was decided by the same Board members, within the same month as the All American case. Hence, the Board must have regarded these three cases as consistent and indicative of their policy in new route applications. We may say then that this policy, insofar as revealed is that: The Board is not bound by precedent in other fields of transport regulation. While under the Act it has power to establish a monopoly, particularly in relation to individual routes or areas, the Board will, as a matter of policy, foster competition wherever feasible. However, in the absence of unusual circumstances, competition and development will be achieved solely through the expansion of existing air carriers.

Consolidations

Statutorily, the consolidation question is more complicated than the new route cases by the inclusion in addition to § 2(d) of the provision in § 408(b) that the Board shall allow consolidations when requested unless inconsistent with the public interest: Provided that the consolidation will not "result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier." This language unfortunately raises questions as to legislative intent. Does it mean that while the Board under § 2 may establish monopolies in new route cases, it has no such power in consolidation petitions under § 408(b)? Superficially the language of the statute implies as much. In construing § 408(b) the Board has apparently conceded their lack of power to create a monopoly in consolidation cases but has resolved the difficulty by defining monopoly "as a condition embodying a particular degree of control." Hence they conclude that while a consolidation may restrain competition or jeopardize another air carrier, it is prohibited only if it arises from a degree of control which the Board decides constitutes a monopoly of air transportation.

12. Supra note 11 at 31.
14. 49 U.S.C.A. §488 (b), 52 Stat. 1001 (1938) "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract or acquisition of control specified in subsection (a) of this section shall present an application to the Authority and thereafter the Authority shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract or acquisition of control and other persons known to have a substantial interest in the proceeding of the time and place of a public hearing. Unless after such hearing, the Authority find that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract or acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe; Provided That the Authority shall not approve any consolidation, merger, purchase, lease, operating contract or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control ... ."
15. United-Western Sleeper Interchange, 1 C.A.A. Reports 215 (temp.) Docket No. 215 (1940). Here the applicants sought permission for interchange of sleeper equipment on the transcontinental, New York, Los Angeles route. The purpose was to eliminate the inconvenience to passengers necessitated by enforced change from the planes of one company to those of another in the dead of night. T.W.A. filed as intervener. Agreeing with the intervener, the Board considered the case in the light of §408(b). Intervener complained (1) that such an agreement was not in the
The process by which they reach this result is ingenious. They say, first, "monopoly" must be defined. Courts have defined it in two ways, (a) "as embracing any combination the tendency of which is to prevent competition in its broad and general sense," and (b) "as a condition embodying a particular degree of control." They then adopt the latter definition solely on the ground that it makes the phrase in the statute, "and thereby restrain competition" non-repetitious of the preceding word, "monopoly." 16

The Board's statement that two definitions of monopoly exist at law is erroneous. The legal content of "monopoly" has always been restriction of competition and reasonableness has been its measure. 17 Degree of control, meaning control of the market, is the definition used by economists and despite the frequency with which this phrase has graced judicial utterance, it has never been given any intelligible content nor been used as an actual test of monopoly. Judicial precedent holds nothing to support the Board's position.

However, why not adopt the economic definition which in many ways is the sounder approach? We have no objection but what we wish to point out is that by using the Board's method of reading it into the statute, not only do the present difficulties remain undispensed of but new ones are created.

Suppose we accept the economic definition of monopoly. Its antithesis is pure competition, a situation where no seller or buyer has any control over the price of his product. Contrast this with the legal antithesis of monopoly, free competition, i.e., each individual is free to engage in legitimate economic activity, unrestrained by the state, agreements between competitors or predatory practices of rivals. These two types of competition are by no means equivalent for there need be no agreement between them as to whether monopoly exists in a single, given fact situation. It may well be that an economic monopoly may exist in a legally valid situation. 18 But it is difficult to conceive of a legal monopoly, i.e., restraint of competition which would not also tend toward an economic monopoly, i.e., control of the market. Yet it is just this the Board says may happen. Indeed to speak of either free or pure competition at all is highly conceptual as restraints and controls are practically omnipresent. In either case, when governmental regulation of business is in issue, the principal question is not as to what constitutes a monopoly, but what is to be the public interest, (2) it would take away much of interveners business, i.e. jeopardize to another air carrier, and (3) it would give United a virtual monopoly of all west coast business. The Board held that the added convenience to passengers by eliminating a change of planes was in the public interest, that it would not jeopardize the intervenue or restrain competition within the meaning of the Act. The petition was granted.

16. Id. at 23 (mimeo. page no.)

17. The history of the treatment of the word "monopoly" at the hands of the court is adequately discussed in, Mason, Monopoly in Law and Economics, (1937) 47 Yale L. J. 34. The farthest any court has ever gone in using the degree of control test was United States v. Standard Oil Co. of New Jersey, 47 F(2d) 288 (C.C.A. 2d, 1931) which considered, (1) the merged concerns' share of sales in the local markets, (2) inter-company competition in the area, their size and number, (3) Potential competition. However, the Court concludes "Competition is the antithesis of monopoly. In a sense any elimination of competition is a movement in the general direction of monopoly... It is only when this lessening is with an unlawful purpose or by unlawful means, or when it proceeds to the point where it is or is threatening to become a menace to the public that it is declared unlawful." Such language is applicable solely to legal and not economic monopoly.

The Board failed to cite this case and those cited by them are of lesser authority.

18. The classic example of this is the Cream of Wheat case, Great A. and P. Tea Co. v. Cream of Wheat Co. 227 Fed. 46 (1915), wherein legally no monopoly was found. Economically, there was. The question though of whether it was an economically bad monopoly is another issue.
degree of restraint or control allowed. Hence for the Board to adopt one definition in preference to the other solely on the ground that certain degrees of restraint do not constitute a monopoly is fictional. In fact their choice is the worse horn of the dilemma for restraint of competition is a potential factor in market control. Thus the statute is repetitious under their definition as well and the statutory mandate that a monopoly shall not be created remains.

Assume for the moment the correctness of the Board's definition and construction of the § 408(b) proviso, what result follows? Such an interpretation creates two tests of a consolidation's validity. In the words of the Board, they are: "(1) whether or not the agreement is adverse to or inconsistent with the public interest... and (2) whether or not the agreement will result in creating a monopoly..." Purportedly these two tests are distinct. However, the first is the same as the public interest test obtaining in the new route cases wherein the monopoly-competition issue is always considered. Clearly then, both tests go to the monopoly-competition question. Hence any difference between them must be one of degree. Under the public interest test § 2, the Board has said it possesses full power to create a monopoly in new route cases. Then it must be true that it has no such unlimited power in consolidation cases because of the requirements of the second test, i.e., the § 408(b) proviso.

Why this difference? Realistically what matter it if monopolies be created by the establishment of new routes or the consolidation of existing carriers. What justification exists for creating a greater degree of control through new routes than through consolidations? Or, consider the case of the consolidation of non-competitors. Measured by the degree of control exercised, a non-competitive merger may be more monopolistic than a merger of competitors, yet how much difference is there between the merger of non-competitors and the creation of a new route. This seems to do little more than rest the decision on the procedural manner in which the case arises.

Finally, is there any realistic distinction between the Board's two tests of a consolidation's validity? Under the first, public interest, the Board must establish "competition to the extent necessary." But the Board has said, if competition is not necessary they have the power to establish a monopoly. Under the second test, they say a monopoly is prohibited but the decision rests with them whether a condition creates a monopoly. May they not, by refusing to designate a situation monopolistic, obtain the same result under the last test as under the first? Why then the two tests?

The solution can be much simpler. Section two states the Act's declared policy. In case of doubt or conflict, it should control. Instead of engaging in the gyrations demanded by the Board's approach, the much easier solution lies in regarding the proviso of § 408(b) as a particularization of § 2(d) as relates to that section. Hence the inquiry in any case is solely, to what extent is competition necessary?

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19. "It is impossible to separate markets into those that are competitive and those that are monopolistic." Mason, Supra, note 17.
22. But observe the position taken by Examiner Pound in the United Air Line merger case. Said he, "it is pretty clear that there is no actual competition between United and Western." Hence he reasoned that the proviso of §408(b) had no application. This is, of course, true if the legal definition of monopoly is accepted.
23. For a discussion of this entire question from a slightly different aspect...
With this in mind, let us digress a moment to examine the results actually reached by the Board in the two cases decided by it. In the United Air Lines case, petitioner sought approval for merger or purchase of Western Air Express. The Board assumed the dual test of a consolidation's validity discussed above but in their consideration of the case purported never to reach the second test, i.e., the § 408(b) proviso, because they held the consolidation not to be in the public interest, the first test. Yet the Board's findings were, (1) that the approval of the application would give petitioner too great a predominance in the area to be consistent with the national needs, and (2) that the elimination of Western would not serve to maintain and encourage competition to the extent necessary in that section of the country. What other is this than the monopoly-competition question?

In support of its denial the Board said: "The congressional intent was to safeguard against the evils of unrestrained competition on the one hand and the consequences of monopolistic control on the other. In attaining this objective the Act seeks a state of competition among air carriers to the extent required by the sound development of the industry. The maintenance of such constructive competition we believe will be best served at the present state of the industry's development by a reasonably balanced system of air transportation in every section of the country." This is clearly the language which the Board talks in the new route cases and agrees with the general theories which they have there propounded.

In the Marquette Air Lines case authorization was sought for the sale of its assets to T. W. A. The Board granted permission. In so doing they again followed the dual test, (a) that it was not inconsistent with the public interest, (b) that it did not conflict with the first proviso of § 408(b). As to the latter, they said, "The test here is whether the proposed acquisition will result in giving T. W. A. the degree of control of air transportation or some phase thereof within the particular section of the nation embraced in this proceeding, necessary to constitute a monopoly therein."26

The Board here is clearly insisting on the economic concept of monopoly. Though the process whereby they insert it into the Act is erroneous, the Board is clearly correct in using it. This is illustrated by the procedure which properly should be followed in any given case whether new route or consolidation, either of competitors or non-competitors.

(I) The Board should consider the feasibility of competition, it having

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26. See note (1940) to JOURNAL OF AIR LAW 359. This should likewise be fitted into the broader problems discussed in Hamstra, Two Decades—Federal Air Regulation in Perspective, (1941) 12 JOURNAL OF AIR LAW 105.
26. Id. at p. 8. The Board cited the United-Western Sleeper case, 1 C.A.A. Reports 215 (temp.) Docket No. 215 (1940) as being in accord.
25. In the instant case the Board laid considerable stress on the fact that the applicants were non-competitors. Contrast this with the manner in which the Board strained in the United merger case to find competition between the applicants as a reason for denial of consolidation. This approach is dangerous if the Board desires to follow the degree of control test. The applicant's competitiveness may have no relation to degree of control.
complete power to establish a monopoly in proper situations. Feasability is determined by the inquiry, is the present or immediately available traffic sufficient to economically sustain two or more carriers. The traffic inquired of is that flowing between major terminals, the question of parallel line competition seldom arising in the air transport field. In close cases, a presumptive need of competition exists.

(II) Finding competition desireable, the inquiry is, what must be done to obtain it, or conversely, how much may be done without destroying it? This question seldom arises in new route cases but in consolidations, particularly those involving large systems covering vast areas, it may assume primary importance. Here the degree of control test finds its true use and the question is: What degree of control will be permitted? The term "monopoly" other than as used in economic theory is only a shorthand designation of any control exceeding this limit. Restraint of competition and jeopardy to other air carriers, mentioned in the statute, are two of various instruments for determining the theoretical line of demarcation. Generally, however, the economists' emphasis is on control of the supply or price of a product. Product is defined in terms of consumer choice. Price of course is not important in the public utility field for rate regulation displaces competition.

If the Board is actually aware of the course upon which it has embarked, it should be encouraged. Acceptance of the degree of control test demands an economic inquiry into what situations will be in the public interest. Public interest cannot be determined categorically for it is not always served in the same manner, and a formula rendering the solution of this question automatic has yet to be devised. For the future the Board's efforts should be bent toward the formulation of controlling tests. Toying with the words of the statute as to what constitutes a monopoly will obtain exactly nothing.

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27. Suppose, for example, that Eastern Air Lines and Northwest Air Lines petitioned for permission to consolidate. Clearly these lines are not competitors being solely east and west of Chicago respectively. If the legal approach to monopoly is taken the problem is almost unapproachable for no restraint of competition can be found. But if we define monopoly in terms of control the issues may then be articulated, viz. the effect of the establishment of a new transcontinental route and better services offered to localities.

28. "The sources of evidence of control of the market are known: The behavior of prices and outputs, the relation of prices and costs, profits before and after the combination, share of the market controlled, the existence of business practices such as price discrimination, price stabilization." Mason, supra note 17 at p. 42.

29. This whole question should be compared with what has been done under the Interstate Commerce Act which required the commission to formulate a plan for the consolidation of railroads. What has occurred has been adequately detailed by Scharfman. The Interstate Commerce Commission (see particularly p. 430 et. seq., Vol. IIIA.) (1936). See also, Eastman, Regulation of Railroads, 73d Cong. 2d., Sen. Doc. 119 (Jan. 20, 1934).

While the problem of the Civil Aeronautics Board is different, insofar as they arrived on the scene before too many operators had become established, may they not also profitably give consideration to the problem's broader aspects? It is believed that such statements as uttered by them in the Dixie case indicate a disposition on their part to do so.
ANCILLARY JURISDICTION IN THE FEDERAL COURTS

It has long been recognized that the statutory jurisdiction of the federal courts is implemented by an ancillary jurisdiction lacking express statutory authorization. One phase of this ancillary jurisdiction, viz., the third party practice, has been the subject of extensive development in other courts and has recently been a topic of much comment by legal writers. However a study of the cases reveals that the relation of the third party practice or impleader device to other related ancillary procedures is confused.

The courts have been prone, both to use the general term “ancillary” without designating or defining the specific type of situation involved and to cite cases involving one type of ancillary action in support of another. Although the doctrine of ancillary jurisdiction has been reaffirmed by many courts, and the word “ancillary” has been used by federal courts for approximately 125 years in the disposition of suits, the scope of the doctrine is by no means clearly defined today.

Scope of the Ancillary Doctrine

The use of variant types of ancillary actions is premised upon the theory that ancillary jurisdiction is essential to the independence and self-sufficiency of the federal courts. But since courts have loosely used the term “ancillary,” which is at best vague, and since new instances of ancillary suits constantly arise, classification of ancillary types is difficult. Hence most legal writers have been content to list the various types. However, at least one writer, while expressly manifesting his awareness that his classification was illustrative

Admiralty Practice: 1 Moore’s Federal Practice 749; Cohen, supra, at 1167.
English practice: Bennett, supra, at 168-173; 1 Moore’s Federal Practice 756; Cohen, supra, at 1169 and appendix.
3. Shulman and Jaegerman, Some Jurisdictional Limits on Federal Procedure (1936) 45 Yale L. J. 353, 417; Clarke and Moore, A New Federal Civil Procedure, II, Pleadings and Parties (1935) 44 Yale L. J. 1291; and others not so recent had advised the establishment of a federal procedure which would permit the third party practice. Since this procedure was created (the new Federal Rules became effective on Sept. 16, 1938), much has been written concerning the problems created by this and other ancillary proceedings. For more specific discussions, see note, (1940) 7 U. of Chi. L. R. 359; note (1929), 26 Va. L. R. 117; note (1940), 68 Harv. L. R. 449; note (1924), 27 Va. L. R. 376.
rather than scientific, has attempted classification. In order to facilitate an understanding of certain recent developments in the ancillary jurisdiction of the federal courts, a representative classified list of types of ancillary proceedings is here offered. The differentiation used for classifying the types depends primarily on the status and interest of the parties, rather than on the legal reasoning or result. If such a distinction exists, courts err when they cite cases involving one type of ancillary action in support of another.

(A) Ancillary jurisdiction exercised under inherent judicial powers as a matter of necessity:

1. Suits Primarily Involving Property (insolvency and foreclosures).

In certain situations, after the discharge of a debtor, the bankruptcy courts may stay an action in a state court because it is unduly burdensome for the discharged bankrupt to plead his discharge. Thus, a bankruptcy court has ancillary jurisdiction to preserve the advantages of its judgment of discharge.

2. Enforcement and Protection of Court Processes.

A bill to enjoin a pending federal action or to prevent abuse of the process

8. Williams, Jurisdiction and Practice of Federal Courts (1917), 89, classified ancillary jurisdiction with respect to (a) property in actual or assumed control, and (b) matters of record and process. In a later book, Williams expanded this classification as follows: "By a broad generalization, the true ancillary jurisdiction may be said to exist with respect to two subject-matters, namely: (a) property within or treated as within, the court's possession or administrative control; (b) the records, processes, judgments and decrees of the court in the principal cause. This classification is not scientific, because no clear line can be drawn separating the classes. Class (a) might be subdivided into (1) cases where there is actual possession, and (2) where jurisdiction has been acquired over the res, but it has not been, or by reason of its nature cannot be, taken into actual possession." Williams, Federal Practice (Second Ed., 1927) 273-280.

9. This is not intended to be a complete or exclusive classification, but is presented mainly as an aid to discussion of the cases in this comment. Such a classification is subject to, and can readily be expanded to include other types of ancillary suits not under consideration, especially new classes as they are created. The distinction between the classes is not rigid, and a given case may fall within more than one class, e.g., Local Loan Co. v. Hunt, 292 U.S. 234 (1934), which could come under both classes 1 and class 2. Although this classification is based on the situation existing under the new Federal Rules, reference to the cases cited will reveal that this is not the actual situation, since most of the cases arose prior to the adoption of the new Rules. However, since the applicable Rules are a codification, in part, of some previously existing useful practices, it is a helpful coincidence that the same classification can also be applied to cases arising subsequent to the new Rules.

It is worth noting that interpleader suits have also been considered ancillary, thus eliminating the necessity for independent jurisdiction. Bossard v. McGwinn, 27 F. Supp. 412 (D.C. Pa. 1939); Kravas v. Great Atlantic and Pacific Tea Co., 193 U.S. 93 (1904), also be applied to cases arising subsequent to the new Rules.

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10. For a discussion of the ancillary jurisdiction of bankruptcy courts, which is a field in itself, see 1 Collier on Bankruptcy (14th Ed. 1940) 291.


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12. Enforcement and Protection of Court Processes.

A bill to enjoin a pending federal action or to prevent abuse of the process
of such court is addressed to the court as an ancillary proceeding. Where the United States has consented to be sued, and the plaintiff sues and obtains a decree, subsequent proceedings on the same decree may be maintained without any additional consent on the part of the Government.

(B) Purely procedural exercises of ancillary jurisdiction, which are not essential but exist because of convenience:

3. Cross Claims and Counter-Claims.

Where jurisdiction of a plaintiff’s claim is based on federal grounds, and the defendant’s counter-claim has no such grounds, it cannot be brought as an independent action in the federal courts; nevertheless, the Supreme Court has held that jurisdiction over the plaintiff’s claim affords sufficient basis to adjudicate the defendant’s counter-claim.

4. Third Party Impleader.

A federal District Court having jurisdiction over principal actions for the death of plaintiffs’ decedents in an airplane crash caused by a defective engine cylinder manufactured by the defendant, has ancillary jurisdiction over the subject-matter of such defendant’s third party complaint, charging the party imploed thereby with negligence in selling to the third party plaintiff a forging used in manufacturing the cylinder.

5. Intervention.

When a federal court has jurisdiction over a cause or a res, other parties whose citizenship would not have allowed them to institute the suit, may intervene to assert their rights though they could not have had original process.

When the jurisdiction of a federal court has once fully attached by reason of the diverse citizenship of the parties, or where a cause begun in a state court is removed to a federal court for the same reason, the question of jurisdiction will not be affected by any subsequent substitution or change of parties.18

Ancillary jurisdiction exists both at law and in equity, and, in variant degrees, it is characteristic of every court of justice. However, because of the difficulties of joinder in law actions previous to the new Federal Rules of Civil Procedure, and the contrasting greater flexibility of suits in equity, the procedural development of ancillary jurisdiction in these courts has lacked uniformity. However, since the provision of procedural machinery by the new Rules, the effectiveness of such procedures as the impleader practice have made the popularity of ancillary jurisdiction as great at law as it was in equity previously.19

Development of the Theory and Use of Ancillary Jurisdiction

A. Rationale.20

The definitive statements of most legal authorities appear to found the doctrine of ancillary jurisdiction on the basic principles of justice, necessity and celerity. Ancillary jurisdiction exists because of the relation of the incidental proceeding to the principal case over which original jurisdiction already exists. This relation alone creates and establishes such ancillary juris-

a claimant of land to enjoin a sale by a marshal under a levy made to collect a judgment obtained against the supposed owner of the land, although there was no diversity between the claimant and the marshal. See also Louis-san Francisco Ry. Co. v. McShan, 259 Fed. 323 (D.C. Mo. 1918); Compton v. Jessup, 68 Fed. 263 (C.C.A. 9th, 1895); Widman v. Hubar, 88 Fed. 800 (C.C. Cal., 1898), in which a bill in equity by a third person to enjoin prosecution of an action at law pending therein was held ancillary to the action, and the court took jurisdiction without regard to the citizenship of the parties. Snow v. Railroad Co., 12 Fed. 1 (C.C. Texas, 1882). 91 Am. L. Rev. 1101, has an excellent development of the intervention phase.

18. Conversely, if the action was not originally cognizable in a federal court, the substitution or addition of parties possessing a different citizenship will not entitle them to invoke federal jurisdiction. Jarebo v. Temple, 38 Fed. 212 (C.C. Kansas, 1893). See also Clarke v. Mathewson, 37 U.S. 164 (1838); Harwell v. Hay, 101 U.S. 112 (1881); Harris v. Hess, 10 Fed. 92 (C.C.N.Y. 1882); State of Texas v. Lewis, 12 Fed. 1 (C.C. Tex., 1882). Also, Stewart v. Lunn, 110 U.S. 61 (1884).

19. The term of the ancillary proceeding is not determined by the character of the principal case. The ancillary proceeding may be an equitable action while the original proceeding is an action at law, and vice versa. Logan v. Patrick, 9 U.S. 228 (1809); Carey v. McMillan, 239 Fed. 359 (C.C.A. 9th, 1923); Lamb v. Ewing, 54 Fed. 269 (C.C.A. 8th, 1895). The distinction between original or independent, and ancillary or supplemental, proceedings, while in some few respects coincident with the distinction in equity pleading between original and supplementary, is not the same, for when applied to jurisdiction, the term "ancillary" has a broader significance than when applied to pleadings in equity. Milwaukee Company v. St. Paul Company, 69 U.S. 609, 663, 634 (1864). See Carey v. Huston Texas Railway, 161 U.S. 115 (1896); Krippendorf v. Hyde, 110 U.S. 276 (1884).

20. Apparently, the courts have been interested only in the general phraseology "ancillary," and have construed principles to be generally applicable to almost all "ancillary" situations, although recognizing the creation of the rule quite in a particular ancillary situation. Consequently, there has developed a general law of ancillary proceedings, rather than a specific set of laws governing each type of ancillary suit.

21. Doke, Federal Procedure, (1928) 229; 51 Corpus Juris Secondum 156; Williams, Jurisdiction and Practice of Federal Courts (1917) 87, says: "It must be remembered that the actual accomplishment of justice is the very ratio essendi of course and their investiture with jurisdiction. That purpose would not be satisfied, in the present fallibility of human nature, were the powers of the court to end with the rendition of a paper decree. That decree must be enforced and put into actual, and final effect within the territorial jurisdiction between the parties and their privies. It is therefore settled that the jurisdiction persists, until the judgment, in its true intent and meaning, be completely satisfied; and in the pursuance of this satisfaction, all co-ordinate courts, and especially the
diction." However, through the exercise of this jurisdiction, federal courts have extended their judicial power over many matters which the apparently strict limitations of the Constitution as defined and further limited by legislation would seem to foreclose. Ordinarily, a suit in which the constitutional requisites of jurisdiction cannot be alleged is not within the purview of the federal courts. However, though when viewed independently a suit cannot sustain itself jurisdictionally, it may be supported because of its incidental or supplemental relation to the principal case, which gives the suit its ancillary character.

This is instanced in the case of *Drumright v. Texas Sugarland Co.*, where a mortgagee and former equitable owner of property joined as plaintiffs to sue the purchasers of the property. They asked for foreclosure of the mortgage or for the declaration of an equitable lien or for recission. However, because the former equitable owner had the same citizenship as one of the defendants, the action could not be maintained on the basis of ordinary federal jurisdiction. Inasmuch as the equity owner was not a necessary party to the suit, he was dismissed. However he then filed a petition of intervention, which was allowed. Thus ancillary jurisdiction allowed the court to adjudicate the same rights which were foreclosed to it on the basis of its original jurisdiction.

Many arguments early devised to overcome this federal jurisdictional deficiency have persisted to this day. One of the soundest rationales devised to support a case lacking the constitutional or statutory requirements for an original proceeding was that advanced in the case of *Minnesota Company v. St. Paul Company*. This case established that the incidental suit was not original but ancillary; hence no independent grounds of jurisdiction were necessary as in original actions. As stated by Mr. Justice Nelson: "The principle federal and state courts, are entitled to pursue as against each other, within the limits of their jurisdiction, their independent and untrammeled ways toward that consummation." See also, id. at 82-83. Gumbel v. Pitkin, 124 U.S. 131 (1888); Freeman v. Howe, 65 U.S. 450 (1860); Compton v. Jessup, 68 Fed. 263,279 (C.C.A. 6th, 1896).


23. Art. III, §2 contains the following grounds for the exercise of federal judicial power, of which the first two are the most common: diversity; federal question; admiralty, cases affecting ambassadors and other public ministers; citizens of the same state claiming land grants from different states; where the United States is a party; controversies between states.

24. Sec. 24 of the Judicial Code, 28 U.S.C.A. §41, constitutes the Congressional outline of the requisites of the 'original jurisdiction' of the federal courts, and adds a monetary requirement of $3,000.

25. 16 F.(2d) 657 (C.C.A. 5th, 1927).


27. 69 U.S. 605 (1845).

28. Art. III, §2 of the Constitution does not mention original actions, but merely defines the limits of the judicial power of the United States. However, the Federal Code, in establishing the jurisdiction of the federal district courts, embodies two Constitutional limitations, diversity and a federal question, and places an additional limitation, viz. $3,000. These requisites apply to original actions; but ancillary jurisdiction has made it possible to dispense with these requirements in certain cases. An ancillary action is usually considered as "supplemental," but a better word would be "incidental," for a counter-claim in not supplemental, yet still considered ancillary.

The distinction between an ancillary and an original action may sometimes become so faint as to be indistinguishable, but the theory is nevertheless a dependable basis on which to allow relief to a party who would otherwise be remediless. This is instanced by the case of *Johnson v. Christan*, 108 U.S. 645.
is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice ... is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties." On this basis, a federal district court may entertain an ancillary action even though the ordinary jurisdictional requisites are not present.

A variation of this concept, involving the application of a familiar principle, may be expressed thus: When jurisdiction of a given property or subject matter once attaches, the court having that jurisdiction may consider and dispose of any suit involving such property or subject-matter, even though this supplemental suit may lack independent jurisdictional requirements.

Another major argument which may support a case that cannot stand by itself is less legal than equitable, but conforms more to the layman's notion that the courts exist primarily for the purpose of doing justice. This theory, originating on the equity side of the court, was that the equity powers of a court enabled it to consider and dispose of any case which it believed essential to a final disposition of the principal case at hand, independent of the jurisdictional limits of its ordinary power. This theory, necessitating the adoption of the concept that an ancillary suit is an extraordinary equitable remedy, was later extended to include actions both at law and in equity.

Based upon these theories, the ancillary doctrine supplemented the jurisdiction of the federal courts to such an extent that fears were expressed of undue expansion. Hence there was a shift of emphasis from sustaining the doctrine as a convenient device to preventing a possible nullification of the Constitution's restrictive provisions relative to federal judicial power.

This produced the following formula: A federal court having jurisdiction of a civil action is vested with ancillary jurisdiction over a supplemental proceeding dependent upon the principal suit even though the supplemental proceeding, viewed independently, lacks the attributes of federal jurisdiction, provided the subject-matter of the supplemental proceeding was: "(1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the

(1888). A bill in equity was filed to release lands from a deed of trust and to remove a cloud upon the title arising out of a sale. The Supreme Court announced, on looking into the record, "we can find no evidence of the jurisdiction of the Circuit Court ... Joel Johnson is the sole defendant, but there is no allegation as to his citizenship, nor does that appear anywhere in the record." The decree below was reversed. The plaintiffs in the equity suit then called the attention of the court to a paragraph of the bill which set forth that by virtue of the sale which they sought to set aside, the defendant in the equity suit (Johnson) had previously instituted a suit in ejectment on the law side of a federal district court and "your complainants, not admitted to interpose their equitable defense to the same he did ... obtain judgment in ejectment against them." The Supreme Court admitted that it had overlooked this allegation, and that it was sufficient to give the Circuit Court (ancillary) jurisdiction of the case without any averment of the citizenship of the parties. The suit in equity was merely an incident of, and ancillary to, the ejectment suit, and no other court than the one which rendered judgment in ejectment could now interfere with it or stay process in it on the ground set forth in the bill.

31. Compton v. Jessup, 68 Fed. 263 (C.C.A. 6th, 1895): "Every court has inherent equitable power to prevent its own processes from working injustice to anyone, and may entertain a petition by the aggrieved person ... by ancillary or dependent bill in equity, and may afford such relief as right and justice require."
judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to the property in the custody of the court in the original suit."33 This formula, first advocated in *Campell et al. v. Golden Cycle Mining Co. et al.*,34 was not a retreat from the then existent doctrines of ancillary jurisdiction but had the effect of limiting further expansion. Many cases supported this limitation for an interim.35

However, these restrictions failed to permit the development of ancillary procedure in situations where it later was most needed.36 Consequently, the pressure of expansion resulted in a broader framework of which *Moore v. New York Cotton Exchange*37 was one of the first cases to embody. This case established that a federal court having jurisdiction over the principal suit has ancillary jurisdiction to entertain and determine a counter-claim, even though the main suit is dismissed on the merits, and the counter-claim, viewed independently, lacks the requisites of federal jurisdiction. The counter-claim is regarded an ancillary in order that a complete disposal of the controversy may be had.38

Thus the present status of ancillary jurisdiction's scope may be stated as, once jurisdiction over the main controversy has attached, a court may grant all relief necessary to dispose of the action.39 The doctrine of the *Moore* case has been accepted by modern courts as an authoritative recognition that the field of ancillary jurisdiction is broader than previously understood—distinctly broader than indicated by such opinions as *Campell v. Golden Cycle Mining Co.* 40

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33. 141 Fed. 610 (C.C.A. 8th, 1905).
34. Further development in the field resulted in the addition of a fourth provision (by the same judge who originated the three previous provisions); "(4) to prevent relitigation in other courts of the issues heard and adjudged in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective." Pell v. McCabe, 256 Fed. 512,515 (C.C.A. 2d, 1919).
35. As evidenced by the case of *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), there may be ancillary suits which are not supplemental to the original suit, and the trial of which can be had independently of the original suit. Such a suit would be within the ancillary jurisdiction of a court, yet not within these three provisions. Cf. 1 Moore Fed. Prac. 449; Wenner v. Graves, 255 Fed. 586 (C.C.A. 2d, 1919). But see Lion B. Co. v. Karatz, 262 U.S. 77 (1923). Intervention and some other procedural uses of ancillary jurisdiction essentially require the addition of bringing in of new parties. In conflict with this practice are definite statements by some authorities indicating that no suit can be considered ancillary if it involves the addition of new parties to the controversy. American Surety Co. v. Lawrenceville Cement Co., 36 Fed. 25,31 (C.C. Me., 1899). See also Williams, op cit note 8 at 83; Campbell v. Golden Cycle M'n. Co., 141 Fed. 610 (C.C.A. 8th, 1905); Anglo-F. P. Co. v. McKelvey, 65 Fed. 539 (C.C.A. 8th, 1894). Cf. Barfield v. Zenith T. and R. Co., 9 F. (2d) 204 (D.C. Ohio, 1924); Freeman v. Howe, 65 U.S. 450 (1860): "It would seem from a remark in the opinion [referring to Dunn v. Clarke, 33 U.S. 1 (1834)] that the power of the court was limited to a case between parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law."
39. 141 Fed. 610 (C.C.A. 8th, 1905): Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D.C. Conn., 1939). Cases cited in 4 Wm. L. R. 43-7 hold that a counter-claim may be retained for affirmative relief after the principal bill has been dismissed on the merits, even if the counter-claim has no independent basis of federal jurisdiction. (Based on former Equity Rule 30.) Cf. Fidelity Bond and Mortgage Co. v. Grand Lodge, I.O.O.F., 41 F. (2d) 326 (C.C.A. 6th, 1930), holding that a settlement of the principal suit deprives the court of jurisdiction over the ancillary claim.
B. The Third Party Practice and Venue.

Assuming the substantive right of a party to recover against a third party defendant, two difficulties originally lay in the path of his recovery in a federal court, where his citizenship was identical with that of the third party defendant, namely, jurisdictional and procedural requirements. The jurisdictional requirement stems from Article III, Section 2 of the Constitution which states that the federal judicial power shall extend to controversies between citizens of different states. The leading case of Strawbridge v. Curtiss in interpreting the Judiciary Act implementing this provision, held that where any plaintiff and any defendant have a common citizenship, federal courts cannot entertain the action. It would seem therefore, that the Constitutional limitations preclude the federal courts from assuming jurisdiction. However, if the theory of ancillary jurisdiction is applied, the federal judicial power may then extend to such a controversy. The second obstacle, namely the procedure for the exercise of this type of ancillary action existed until the promulgation of Rule 14 of the new Federal Rules of Civil Procedure, which established an independent federal third party practice.

40. Prior to the new Rules, while a substantive right of recovery existed, it could only be exercised by separate actions, if the suit was originally brought in the federal courts. However, numerous cases involving the third party practice were generally held to be separable controversies requiring an independent basis for the court's jurisdiction. Sperry v. Keeter Transportation Lines, 28 F. Supp. 420 (D.C. N. Y., 1935); Root v. Wisconsin Central R.R., 259 Fed. 150 (D.C. N. J., 1926).


42. For example: P of state 1, sues D of state 2, in the federal district court of either state on the jurisdictional basis of diversity. D impleads A, a citizen of state 3, alleging A to be solely liable in the suit. The diversity problem may arise when A attempts to resist the impleader by alleging lack of diversity between himself (the third party defendant), and D (the third party plaintiff). The problem would also arise if A was a citizen of state 1, for A could argue that there will be one judgment rendered, affecting P as plaintiff and A as third party defendant, therefore the court should not assume jurisdiction of the third party controversy because of the lack of diversity. If the court does assume jurisdiction under these circumstances, it is apparent that the formula of Strawbridge v. Curtiss (all plaintiffs must be able to sue all defendants) will not be satisfied. This diversity problem occurs in addition to the venue problem, which will be discussed in more detail later. The venue problem arises when A is from state 3, in such a case, there is no diversity problem, but there is the problem of whether or not A is entitled to be sued in the district wherein he is resident.


44. Rule 14, 28 U.S.C.A., following §723c. The theory of the third party practice, and its recognition by legal authorities, is not a recent development. The practice extends back to 1875, in England, and is well developed in the Admiralty courts of the United States, having first appeared there ten years later (1885). It has been in use in several states for some time, but procedural difficulties have until now hampered its development in the federal courts. There is still no absolute right to implead; it is within the discretion of the court whether or not to allow it. Apparently, the greatest use of the impleader provision is in the tort field. Rule 14 is set out primarily as a pleading rule, which further demonstrates that the delay in its federal development was procedural. On the English practice: Bennett, Alternative Parties and the Common Law Hangover, (1933) 32 Mich. L. R. 36, 38-42; 1 Moore's Federal Practice §14.04; Supreme Court of Judicature Act (1873) c. 66, §106, 24(3). For the Admiralty practice: 1 Moore §14.03; The Hudson, 15 Fed. 162, 163 (D.C. N. Y., 1888); Admiralty Rule 34—promulgated 1815. But see: The Goyaz, 281 Fed. 259 (D.C. N. Y., 1922); New Jersey Ship, etc. v. Davis, 291 Fed. 617, 619 (D.C. N. Y., 1922); Jensen v. Bank Line, Ltd., 28 F. (2d) 154 (D.C. Ga., 1926); holding that the practice involves the use of an original action requiring pleadings as such, and must be within maritime jurisdiction. This is in effect a denial that Rule 14 stems from the practice developed under Admiralty Rule 56. For a discussion of the state practices: Bennett, 19 Minn. L. R. 163.
But other problems relating to third party impleader have appeared, the most pressing of which is the venue question. This is further complicated by use of the term "jurisdiction over the person," which has been misleadingly applied to diversity, but more correctly viewed, relate to venue.46 Venue refers to the place of trial, and is a personal privilege which can be waived. The difficulty in the impleader situation arises when the impleaded party objects to the venue. As previously observed, he cannot raise the diversity issue in the impleader action because of the ancillary nature of an impleader.46 And, as the original suit rests on diversity, he may not object to jurisdiction over the subject matter. But may he raise the plea of venue? Can a court avoid this plea by regarding the suit as ancillary, or is the ancillary concept available only with respect to matters involving jurisdiction? The law on this point is at present unsettled, and the considerations on both sides make it one difficult of determination.

In the case of Morrell v. United Air Lines Transport Corp.,47 the court held that the third party controversy, being an ancillary cause of action, did not need to meet the venue requirements of an independent cause of action. However, in Lewis v. United Air Lines Transport Corp.,48 a case almost identical with Morrell v. United Air Lines Transport Corp. as pertains to the impleader, it was held, that as to parties first brought into the case by the "so-called ancillary bill," such bill, regardless of the relation of its subject-matter to the original action, was "necessarily for purposes of jurisdiction over the persons of the new defendants an 'original action' within the meaning of Section 51 (on venue) of the Judicial Code."49

Federal courts were previously not required to satisfy independent venue requirements in ordinary ancillary proceedings.46 The effect of Rule 14 (providing for the impleader practice) has been to bring third party suits within the

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45. The Effect of Extra Jurisdictional Decisions, (1940) 34 Ill. L. R. 567.
49. Id. at 117. It has been suggested that a third party summons should be considered ancillary for the purpose of avoiding the limitations as to venue. In this regard it may be argued that ancillary process, as distinguished from the "original process" referred to in the venue statute, is available to bring in as parties to the ancillary suit only those who are already parties to the original cause, and not new parties. As to these new parties sought to be brought into the ancillary suit, it partakes of the nature of an original suit, and the process is governed by the rule as to service and venue applicable to original process. Since the impleaded party cannot be brought into the suit without service, he may have the usual objections of an ordinary defendant as to venue. Pacific R.R. of Mo. v. Missouri Pacific R.R. Co., 111 U.S. 503.522 (1884), also in 3 Fed. 772 (C.C. Mo., 1880); Manning v. Berdan, 132 Fed. 772 (C.C. N. J., 1904). To the effect that third party process may not be served outside of the state in which the action is pending (Rule 82), see F. and M. Skirt Co. v. Wimpfheimer and Bro., 27 F. Supp. 239 (D.C. Mass., 1939).
ancillary control of the federal courts. Therefore it has been suggested that the litigation of the original suit being properly begun in a federal court, a complete disposition of the entire controversy necessitates that the third party be impleaded irrespective of the venue requirements of an independent action. The purpose of Rule 14 is to dispose of, in a single action, all related controversies arising out of one transaction or occurrence. However, this argument fails to effectuate Rule 82, which says: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of the actions therein." As can be seen, this gives rise to two conflicting schools of thought, namely, those who may oppose and those who may favor extension of the ancillary doctrine to include venue.

Opposition to extension may be based on the grounds that it infringes the customary privileges of a defendant, and that it conflicts with the principle of strict statutory construction. The ancillary device has resulted in expansion of federal jurisdiction beyond that expressly provided for in the Constitution and further limited by supporting statutes; therefore, the term "ancillary" may be regarded as producing a forbidden result. It may be argued that Rule 14 was not intended to deprive an impleaded party of his usual procedural objections, and that as applied to venue, the third party action should be considered original. Under this view, use of the ancillary doctrine would be limited to giving a court jurisdiction (judicial power) over a controversy, but it would not be used to alleviate procedural deficiencies preventing the effective exercise of this jurisdiction.

A converse position would favor the absolute extension of ancillary powers to cover this phase. The analogy of the practice prior to the new Rules, if applied to the impleader situation under the Rules, would eliminate the venue difficulty. Further, since jurisdiction (judicial power) over the parties and the controversy already exists, by virtue of the ancillary nature of the proceeding, this procedural defect should not hamper a final and complete disposition of the entire controversy. This is substantiated by the absence, in Official Form 22, of any allegation of jurisdiction or venue, nor is it required by Rule 14. And finally, if ancillary jurisdiction is to be used at all to give a court jurisdiction of a proceeding, it should include all aspects of procedure, which should be the secondary considerations.

However, these two opposed positions may not be the only solution of the venue question. Further light may be shed by other pertinent considerations. The venue privilege is created by statute, the impleader practice by a procedural rule of court. In addition to the convenience to court procedure, the

52. 26 Va. L. R. 376.
54. This is used for motions to bring in third party defendants. See 4 Ohlinger's Fed. Prac. 485 (1939).
55. §51 Judicial Code, 28 U.S.C.A. §112. Venue is generally regarded as a matter of procedure, although the privilege of immunity from suit except in the particular district specified by statute has been held to be a matter of substantive law in Durabilt Steel Locker Co. v. Berger Mfg. Co., 21 F. (2d) 139,141 (D.C. Ohio, 1927).
56. The general purpose of the Rule providing for the impleader practice is to combine two actions which should be tried together to save the time and cost of reduplication of evidence, and to obtain consistent results from similar evidence. In an address broadcast on the National Radio Forum hour
purpose of the impleader practice is to promote the convenience of an original plaintiff or a third party plaintiff, while the purpose of the venue statute is to promote the convenience of a defendant and to avoid a burden which might exist if he were compelled to answer in any district or wherever found. Therefore, with some danger of over-simplification, the issue may be narrowed down to a balance of conveniences.

A result more equitable than either of the views above expressed may be obtained by adopting the theory of a balance of conveniences. Under this theory, the hindering effect of venue on federal procedure would be eliminated by placing it in the discretion of the trial judge. As with other discretionary matters, the decision of the trial judge should be reversed only for abuse of discretion. Such reversals are, in practice, comparatively rare. The entire third party proceeding should correctly be viewed as ancillary, but the court should, in its discretion, throw the balance with regard to venue in favor of the party most inconvenienced. In this way, there need be no iron rule, and the venue objection would be neither denied nor allowed in all cases, but would be permitted only where extension of the ancillary doctrine would be too inconvenient to the third party defendant. Only when it is recognized that the primary consideration is, after all, convenience, can the elasticity of the ancillary structure be molded to include the proper phases of jurisdiction.

The application of this system of deciding venue requires the construction that neither Rule 82 nor the venue statute prohibit the extension of the ancillary

on November 21, 1938, Solicitor General (now Attorney General) Robert H. Jackson discussed the new rules of civil procedure for the federal courts promulgated by the Supreme Court by authority of act of Congress. A study of the work of the appellate courts had shown that for several years 49.8% of all their cases were disputes over procedure. The new rules, it was hoped, would enable lawyers to cease devoting half their time "not to what the decision should be, but how a decision should be reached." Their purpose is to "give litigants a prompt, fair, and inexpensive trial on the merits, regardless of technicalities." It is interesting to note the legislative intent with regard to the general scope of the rule as applied to jurisdictional considerations. Appearing before the Committee on the Judiciary of the House of Representatives on March 9, 1938, Maj. Edgar B. Tolman said: "Under Rule 14, a man is sued alone on a joint and several obligation, he may file a petition to bring in the others who are liable and make them parties to the action ... Take a man who is liable on a contract and who has taken a bond from another man to perform the work in due time and indemnify him from liability. Now, under the present law he could not make that man a party to his suit. This Rule permits you to bring in the man who is liable to you and in the one hearing you dispose of the question of his liability to indemnify you without the delay and expense of another action. Now, the Rule goes one step further. It is new in ordinary lawsuits but it is a hundred years old in the admiralty courts. Following that analogy, a man may very well deny his liability and in addition may show that another person is responsible and bring that person in, and the court or jury may hear the case against both of them, and place the responsibility where it lawfully belongs." Citing with approval the admiralty practice, strongly urged this extension of the rule. The bringing in of third parties is still a matter of discretion with the court and not of right.

Addressing the Judicial Conference of the Fourth Circuit regarding the second draft of the proposed Rules, Edward H. Hammond said: "The rule on bringing in, as parties, persons who were not original parties to the suit, has been broadened so as to permit the bringing in, by a party against whom a claim is asserted, of parties who are or may be liable to the party asserting the claim for all or part thereof. Under the old rule only persons who are or may be liable to the party bringing them in for all or part of the claim asserted were permitted to be thus brought in. Admiralty lawyers, citing with approval the admiralty practice, strongly urged this extension of the rule. The bringing in of third parties is still a matter of discretion with the court and not of right. Under the Admiralty rule it is a matter of right."
network to include the venue phase. The considerations of statutory interpretation and legislative intent with which the courts have heretofore been concerned are then eliminated, and the primary consideration is whether the court should deny or permit the objection to venue in a given case. Behind this decision are the interests of convenience and substantial justice; i.e., the usual characteristics of ancillary jurisdiction. Since the application of the impleader practice is within the court's discretion, the decision as to venue should also rest on this basis, rather than on the refinements of legal theory.

It is realized that practical considerations under the present system have led lawyers to require that venue be fixed and certain, readily ascertainable before trial to avoid reversal on the ground of improper venue. However, the amount of litigation decided on this point indicates that this method has not obtained the desired result. It is believed that discretionary venue as here suggested, would result in a desirable flexibility in federal procedure.

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