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THIRD-PARTY PRACTICE IN ADMIRALTY: ANCILLARY JURISDICTION

by Barton R. Bentley

The United States Constitution states that the judicial power of the United States shall extend "to all Cases of admiralty and maritime Jurisdiction . . ."\(^1\) The federal district courts have jurisdiction over admiralty and maritime matters pursuant to 28 U.S.C. § 1333.\(^2\) Prior to 1966 federal admiralty practice was governed by procedural rules separate from those pertaining to civil procedure. The device of impleader governed by Admiralty Rule 56\(^3\) has long been one of the prominent characteristics of admiralty practice.\(^4\) Under Admiralty Rule 56 federal courts did not recognize the concept of ancillary jurisdiction,\(^5\) and required that a third-party claim have an independent basis of admiralty jurisdiction.\(^6\) In 1938 the Federal Rules of Civil Procedure introduced impleader into federal civil practice under rule 14.\(^7\) Civil impleader has adopted the concept of ancillary jurisdiction.\(^8\)


3. Admiralty R. 56, 254 U.S. 707 (1920), provided in part as follows:
   In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter.

Admiralty impleader was originally embodied in Admiralty R. 59 which dealt with collisions. See 7A J. Moore, Federal Practice ¶ 30, at 302-03 (1966) [hereinafter cited as Moore]. In 1921 the practice was recodified in Admiralty R. 56. See generally C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1465 (1971) [hereinafter cited as Wright & Miller].

4. See 6 Wright & Miller § 1465, at 339.

5. Ancillary jurisdiction with respect to federal courts refers to the concept that if the court has jurisdiction of the main action, it may, incident thereto, hear any supplementary proceeding which is ancillary to or dependent on the main action, regardless of any independent basis of federal jurisdiction. See Krippendorf v. Hyde, 110 U.S. 276 (1884); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860); Iowa v. Union Asphalt & Roadoils, Inc., 409 F.2d 1239 (8th Cir. 1969); Compton v. Jesup, 68 F. 263 (6th Cir. 1895). See generally C. Wright, Federal Courts § 9, at 19-21 (1970) [hereinafter cited as Wright].


7. At the time of its adoption, rule 14 copied the admiralty impleader practice which gave the defendant the right to implead someone who may be liable directly to
which has proven to be a useful tool in promoting judicial efficiency with respect to third-party practice.

In 1966 admiralty practice was merged into the Federal Rules of Civil Procedure.\(^9\) Rule 14(c) was added to the federal rules, and embodies the substance of former Admiralty Rule 56.\(^10\) This procedural unification led to some discussion of the possible end of the separate and distinct admiralty jurisdiction, and the extension of ancillary jurisdiction over third-party claims in admiralty under rule 14(c),\(^11\) but this has not transpired. While the policy reasons for extending the concept of ancillary jurisdiction to third-party practice pertaining to maritime claims seem as strong as those behind the civil rules, there are certain constitutional and historical barriers to such an extension.\(^12\) The most authoritative discussion of the subject is \textit{McCann v. Falgout Boat Co.},\(^13\) where it was held that rule 14(c) does not permit impleader in a maritime suit without an independent basis of federal, and perhaps admiralty, jurisdiction.\(^14\) While this case still represents the prevailing rule,\(^15\) it has been attacked as contrary to the policy of the federal rules of avoiding circuity of action and of having all causes arising from a common nucleus of fact decided in one proceeding.\(^16\) Futhermore, subsequent decisions by the Second and Fifth Circuit Courts of Appeals have cast some doubt as to the continued efficacy of the \textit{McCann} holding.\(^17\)

This Comment explores the development of third-party practice in admiralty, and, in particular, the rules behind the concept of ancillary jurisdiction and the possible application of ancillary jurisdiction in admiralty impleader. The primary thesis is that there is a reasonable solution which will avoid the traditional logic that non-maritime third-party claims cannot be within the ancillary jurisdiction of a federal court sitting in admiralty.

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9. \textit{McCann v. Falgout Boat Co.},\(^13\) where it was held that rule 14(c) does not permit impleader in a maritime suit without an independent basis of federal, and perhaps admiralty, jurisdiction.\(^14\) While this case still represents the prevailing rule,\(^15\) it has been attacked as contrary to the policy of the federal rules of avoiding circuity of action and of having all causes arising from a common nucleus of fact decided in one proceeding.\(^16\) Futhermore, subsequent decisions by the Second and Fifth Circuit Courts of Appeals have cast some doubt as to the continued efficacy of the \textit{McCann} holding.\(^17\)

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10. FED. R. CIV. P. 14(c) in part provides:

\begin{quote}
When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff.
\end{quote}


14. Id. at 41.


I. THIRD-PARTY PRACTICE IN ADMIRALTILITY

Prior to 1966 Admiralty Rule 56 provided that in any suit a claimant or respondent could implead any person or vessel who may be liable either to the libellant or to the claimant or respondent, if the liability arose out of the same matter as the principal claim. The distinctive feature of the rule is found in the provision permitting the defendant to implead not only someone who may be liable to him for the plaintiff's claim, but also someone who may be directly liable to the plaintiff, such as joint, alternate, or successive tortfeasors. This procedure is especially desirable in admiralty where most losses are insured, often by different underwriters, and an arbitrary choice by the plaintiff of the particular party to bear the loss would not be equitable.

A. The Procedural Merger of 1966

In 1966 admiralty practice was brought under the Federal Rules of Civil Procedure in hopes of extending the benefits of modern procedural advantages to admiralty cases. The draftsmen decided, however, that certain maritime procedures such as the distinctive impleader practice should be retained. To accomplish this, rule 14(c), which represents the substance of the admiralty impleader practice existing under Admiralty Rule 56, was added to the federal rules. Rule 14(c) provides that the defendant may implead a party "who may be wholly or partly liable, either to the plaintiff...

19. ADMIRALTY R. 56; see note 3 supra. See also 7A MOORE ¶ .30, at 301-02.
20. See Note of the Advisory Committee on the 1966 Amendment to rule 14, 28 U.S.C. APPENDIX—Rules of Civil Procedure 7753 (1970). An interesting point is raised by the overlap of rules 14(a) and 14(c). Rule 14(a) permits the defendant to implead a party obligated to indemnify him for the plaintiff's claim against the defendant. Rule 14(c) authorizes the defendant to implead another party when there may be an indemnity obligation, or where the third party may be liable directly to the plaintiff. The doctrine of ancillary jurisdiction would apply to an indemnity claim under rule 14(a). Thus the defendant in an admiralty suit has the choice of utilizing either rule 14(a) or rule 14(c) as a means of seeking indemnity against a third party. See Saus v. Delta Concrete Co., 368 F. Supp. 297 (W.D. Pa. 1973). See also 6 WRIGHT & MILLER § 1465, at 346-47.
21. See Colby, supra note 9, at 1272. This practice was first permitted in The Hudson, 15 F. 162 (S.D.N.Y. 1883), where the court noted several factors which make impleader particularly desirable in admiralty cases, including: the possibility of inconsistent results in separate actions, the alternative of possibly conducting multiple actions based on the same facts, and the possibility of the third party disappearing if jurisdiction and control over him (or it) were not established immediately. Id. at 168-70. See also British Transp. Comm'n v. United States, 354 U.S. 129 (1957); Ohio River Co. v. Continental Grain Co., 352 F. Supp. 505 (N.D. Ill. 1972); Bilkay Holding Corp. v. Consolidated Iron & Metal Co., 330 F. Supp. 1313 (S.D.N.Y. 1971); Van Nood v. Federal Barge Lines Inc., 282 F. Supp. 890 (E.D. La. 1968); Monarch Indus. Corp. v. American Motorists Ins. Co., 276 F. Supp. 972 (E.D.N.Y. 1967).
22. See note 9 supra.
24. See Notes of the Advisory Committee on the 1966 Amendment to Rule 14, supra note 20. The reason for this was primarily the historical tradition behind ADMIRALTY R. 56. See note 21 supra.
25. Notes of the Advisory Committee on the 1966 Amendment to Rule 14, supra note 20. See generally 7A MOORE ¶ .54[3], at 396; 6 WRIGHT & MILLER § 1465, at 342.
or to the third-party plaintiff. . . ." 27 The rule thus preserves the defendant's right to demand judgment in favor of the plaintiff directly against the third-party defendant as was traditionally allowed by Admiralty Rule 56, 28 and also permits a claimant to become a third-party plaintiff. 29

Under rule 9(h) of the federal rules the plaintiff may invoke admiralty jurisdiction, and therefore rule 14(c), when the suit is cognizable in admiralty and when there is an alternative basis for federal subject matter jurisdiction by specifically identifying the complaint as one in admiralty. 30 When the only basis for federal jurisdiction is admiralty jurisdiction, rule 14(c) is invoked automatically. 31

The 1966 amendments to rule 14(a) added the concluding sentence to that rule, which indicates that the third-party complaint, if within the admiralty and maritime jurisdiction, may be brought in rem against a vessel, cargo, or other property which is subject to maritime arrest. 32 If the plaintiff's complaint is not identified as one in admiralty under rule 9(h), and the last sentence of rule 14(a) is inapplicable due to the in personam nature of the action, the defendant may avail himself of the special admiralty provisions only by following the general impleader practice under rule 14(c), or by instituting a separate admiralty suit. 33 In either case, the defendant must designate his claim as one in admiralty pursuant to rule 9(h). 34 Under rule 14(c) the liability of the third-party defendant must arise out of "the same transaction, occurrence, or series of transactions or occurrences" 35 as the original claim. This language is substantially the same as the language of Admiralty Rule 56 which stated that the third-party claim must be one "growing out of the same matter" as the principal claim. 36

The fact that an action is cognizable in admiralty does not necessarily mean that it may not be brought at "law," 37 The common law theory of concurrent admiralty and civil jurisdiction was incorporated into the Judiciary
Act of 1789, which granted admiralty jurisdiction to the federal courts "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." Thus, if the plaintiff seeks an in personam judgment for damages where the common law is competent to give the remedy, the plaintiff has his choice of either invoking admiralty jurisdiction through the use of rule 9(h), or seeking his common law remedy. An example of such a situation would be a case where a longshoreman may assert his claim for personal injuries suffered by reason of unseaworthiness in a suit involving admiralty jurisdiction by identifying the claim as one in admiralty under rule 9(h), or he may sue at "law" for negligence.

B. The Consequences of the Plaintiff's Choice

The importance of the plaintiff's choice lies in the fact that there is no constitutional right of jury trial in admiralty. The 1966 amendments to the Federal Rules of Civil Procedure added subdivision (e) to rule 38, providing that "[t]hese rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." Thus, if the plaintiff designates his claim as one in admiralty, it is one properly cognizable in admiralty, and it satisfies federal jurisdictional requirements, there will be no jury trial of the issues. If the plaintiff sues at law, there is a right of jury trial guaranteed by the seventh amendment. The decision of whether or not to invoke admiralty jurisdiction is often based on litigation strategy pertaining to the relative preference of a jury trial as opposed to a trial by the court.

38. Judiciary Act of 1789, § 9, 1 Stat. 76, 77. The language currently reads: "The district courts shall have original jurisdiction . . . of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1970).
40. See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962); Gyorgi v. Partrediet Atomena, 58 F.R.D. 112 (N.D. Ohio 1973). Another example involves an injured seaman's claim against his employer under the Merchant Marine Act of 1920, 46 U.S.C. §§ 861-89 (1970) (the Jones Act); (1) because of unseaworthiness; and (2) for maintenance and cure. He may bring this action in a state court and enjoy a jury trial on all the issues. See Fed. R. Civ. P. 9(h). His suit in state court under the Jones Act is not removable. Or, he may choose to sue in federal court and invoke admiralty jurisdiction. If he does not invoke admiralty jurisdiction, the federal court would have jurisdiction at "law" and this includes a right of jury trial under the Jones Act. See Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963); Haskins v. Point Towing Co., 395 F.2d 737 (3d Cir. 1968); Saus v. Delta Concrete Co., 368 F. Supp. 297 (W.D. Pa. 1973). See generally 7A Moore ¶ 59[3], at 418-19.
43. A suit is properly cognizable in admiralty by virtue of the maritime nature of the claim. See note 1 supra.
44. U.S. Const. amend. VII; see Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962), where a jury trial was extended to the shipowner's third-party claim against the stevedoring company.
45. See generally 7A Moore ¶ 59[3], at 417-20.
While there is no constitutional right of jury trial in admiralty cases, no constitutional impediment would preclude trial by jury in admiralty. There is no constitutional right to a non-jury trial in admiralty.

With respect to third-party practice in admiralty, there is likewise no constitutional right to a jury trial on the issues raised by a third-party claim. However, as will be developed later, problems arise in this context when the defendant in an admiralty case attempts to implead someone based on a non-maritime claim.

II. Ancillary Jurisdiction

A. Ancillary Jurisdiction with Respect to Civil ImpLedger

Federal courts have long recognized the doctrine of ancillary jurisdiction. Under this concept, if the court has jurisdiction over the main action, it may, as an incident to that action, take jurisdiction over other matters raised by the case without an independent basis of federal jurisdiction. Thus, a federal court may hear proceedings which are ancillary to the principal action regardless of the factors which normally control jurisdiction.

The advent of the Federal Rules of Civil Procedure in 1938 sanctioned broadened procedures for joinder, including impleader. However, rule 82 explicitly stated that the rules were not intended to expand the ordinary prin-

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47. Note however, that rules 38 and 39 control the demand and waiver of jury trial, and if the plaintiff properly invokes admiralty jurisdiction, there is no right of jury trial. See note 41 supra. See also Notes of the Advisory Committee on the 1966 Amendment to Rule 9(h) which states that "[i]t is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute." 28 U.S.C. APPENDIX—Rules of Civil Procedure 7745 (1970).

48. See Sanchez v. Loyd W. Richardson Constr. Corp., 56 F.R.D. 472, 473 (S.D. Tex. 1972), where the court stated that "when a third-party defendant 'who may be wholly or partly' liable is brought into an admiralty . . . case by virtue of Rule 14(c) . . ., he is not entitled to a jury trial." See also Cantey v. Flensburger Dampfercompagnie Harald Schult & Co., 55 F.R.D. 127 (E.D.N.C. 1971).

49. This Comment will limit its discussion as much as possible to the concept of ancillary jurisdiction with respect to third-party practice in admiralty. The related doctrine of pendent jurisdiction will not be independently examined. Many authors have ignored the distinction entirely and have treated the two concepts as synonymous. See Comment, supra note 16; Note, Pendent Jurisdiction in Admiralty, 18 WAYNE L. REV. 1211 (1972). There is, however, a distinction between the two concepts. Ancillary jurisdiction deals with the situation in which additional parties are added to a case or in which existing parties assert new claims among themselves. Pendent jurisdiction pertains to joinder by the plaintiff of multiple claims, one of which is within federal jurisdiction, while others lack independent federal jurisdictional grounds. See I W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97 (C. Wright ed. 1960).


52. See notes 5, 8 supra.

53. See Wright §§ 70-80, at 293-354.
principles of jurisdiction; yet, strict adherence to traditional rules of jurisdiction would have severely limited the effectiveness of the broadened joinder and impleader provisions. Two approaches were utilized by federal courts to escape the grasp of the prohibition contained in rule 82. One theory which has been utilized with respect to impleader is the view that ancillary jurisdiction over rule 14 third-party claims is not an extension of jurisdiction, but merely a recognition that rule 14 sanctions the procedure of impleader which rests conceptually upon the idea that a "claim" is comprised of a core of facts which give rise to rights which flow both to and from a defendant. Under this view a federal court with jurisdiction of the principal claim necessarily has ancillary jurisdiction over other matters flowing from that claim.

The other theory found authority in pre-federal rules cases for the doctrine of ancillary jurisdiction, and thus reasoned that there was in fact no expansion of jurisdiction inconsistent with rule 82. By utilizing these theories federal courts have been able to adopt a concept of ancillary jurisdiction which has permitted the broad provisions in the rules pertaining to joinder and impleader to be reconciled with federal jurisdictional requirements. Under federal civil practice impleader falls within the ambit of the doctrine of ancillary jurisdiction. If there is a basis for federal jurisdiction between the original parties, no independent grounds for federal jurisdiction are required to implead a third party under rule 14(a). This allows federal courts in impleader actions to effectuate the policy of avoiding circuity of action and of trying an entire case arising from one set of facts in one proceeding.

B. Ancillary Jurisdiction with Respect to Admiralty Impleader
Prior to 1966

Under Admiralty Rule 56 the doctrine of ancillary jurisdiction over non-maritime third-party claims was not recognized. This non-recognition can be traced to The Ada, a case involving a contract which was partly mari-

55. See Wright & Spiro §§ 76, at 336.
60. See cases cited note 58 supra.
62. 250 F. 194 (2d Cir. 1918). The issue was actually in some doubt prior to The Ada. In Evans v. New York & P.S.S. Co., 163 F. 405 (S.D.N.Y. 1906), the court treated the right to assert a non-maritime cross-claim against a co-defendant as the equivalent of a non-maritime third-party claim, and allowed an extension of ancillary
time and partly non-maritime, where it was held that the jurisdiction of federal courts sitting in admiralty was limited exclusively to maritime matters.\(^6\) This view was bolstered in *Central Leather Co. v. The Goyaz*,\(^6\) where the court stated that construing rule 56 so as to permit third-party impleader of non-maritime claims would be "beyond the power of the court, because it would not be a regulation of practice, but would extend the jurisdiction of the District Court to include nonmaritime subjects."\(^6\)

The question was again considered in *Aktieselskabet Fido v. Lloyd Braziliero*,\(^6\) where the owners of a vessel sued its charterers who, in turn, impleaded a third party on a breach of warranty theory. The court held that the charterers were not liable, and, relying heavily on *The Goyaz*, found that there was no jurisdiction over the third-party claim.\(^6\) The court reasoned that rule 56 had been derived from former Admiralty Rule 59, and that rule 56 must be read with the maritime limitation which was present in rule 59.\(^6\) The court further argued that the power of the Supreme Court to set forth rules of procedure did not include the power to expand the limitations of admiralty jurisdiction.\(^6\) Finally, the court concluded that any such extension of jurisdiction could lead to violations of the third-party defendant's right of jury trial on the non-maritime legal issues.\(^7\) This very line of reasoning has subsequently become the basis of post-unification decisions holding that there may be no impleader of non-maritime third-party claims in an admiralty suit.\(^7\)

It has also been concluded that extension of ancillary jurisdiction over non-maritime third-party claims in an admiralty suit might work to deprive the impleaded party of his right of jury trial.\(^7\) It is certainly true that an admiralty court could not constitutionally deprive a third-party defendant of his right to a jury determination of the non-maritime legal issues raised by a third-party claim.\(^7\) It is not clear, however, that extension of the doctrine of ancillary jurisdiction would necessarily have this result. In examining jurisdiction over the non-maritime claim. This holding was based on the policies behind *Admiralty R. 59*, the general policy of admiralty impleader as expressed in *The Hudson*, 15 F. 162 (S.D.N.Y. 1883), and the policy favoring judicial economy in having the entire action settled in one lawsuit. However, the holding in *Evans* was contrary to an earlier decision, *Salisbury v. Seventy Thousand Feet of Lumber*, 68 F. 916 (S.D.N.Y. 1895), which had rejected a similar argument.

\(^{63}\) 250 F. 194, 195 (2d Cir. 1918).
\(^{64}\) 281 F. 259 (S.D.N.Y. 1922), aff'd, 3 F.2d 553 (2d Cir. 1924), cert. denied, 267 U.S. 594 (1925).
\(^{65}\) 281 F. at 261.
\(^{66}\) 283 F. 62 (2d Cir.), cert. denied, 260 U.S. 737 (1922).
\(^{67}\) Id. at 72-74.
\(^{68}\) Id.
\(^{69}\) Id. at 73-74.
\(^{70}\) Id. at 74.


\(^{72}\) See *Texas Menhaden Co. v. Palermo*, 329 F.2d 579 (5th Cir. 1964).

\(^{73}\) The seventh amendment would emphatically bar any denial of the right of jury trial. *U.S. Const.* amend. VII; see *Korbut v. Keystone Shipping Co.*, 380 F.2d 352 (5th Cir. 1967); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961).
analogous decisions in other areas it seems clear that the third-party defendant's right to a jury trial on legal issues raised by a third-party claim must be preserved. Even though there is no constitutional right to a jury trial in admiralty, there is likewise no constitutional right of parties in an admiralty suit to a *non-jury* trial. Thus, it does not follow that the extension of ancillary jurisdiction over a non-maritime third-party claim must necessarily work to deprive the third-party defendant of his right of jury trial on the legal issues. A part-jury trial could be used to preserve the right of jury trial as to the legal issues.

C. Ancillary Jurisdiction with Respect to Rule 14(c) Claims: The Post-Unification Problem

While the rules with respect to ancillary jurisdiction over third-party claims in admiralty had been fairly well settled under Admiralty Rule 56, the unification of the civil and admiralty rules raised the opportunity for challenging the accepted view that there may be no impleader of a non-maritime third-party claim in an admiralty suit. The first case to raise this issue after the unification was *McCann v. Falgout Boat Co.*, where the court held:

[T]here can be no non-maritime impleader in an action where the jurisdiction of the district court is based exclusively upon the maritime nature of the plaintiff's claim for relief—absent independent [federal], and perhaps admiralty, jurisdiction over the third party or the subject matter of the third-party complaint.

In *McCann* the plaintiff was a seaman who brought suit in admiralty against the operator of the vessel to recover damages from an injury caused by negligence and the unseaworthiness of the ship. The defendant ship operator impleaded the doctor who had attended the plaintiff's hand on the theory that the doctor had contributed to the injury. The court regarded the claim against the doctor as entirely separate from that of the seaman against the ship operator, and thus non-maritime in nature. Judge Noel

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74. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), where the Supreme Court held that a jury trial must be made available for the legal issues raised by a compulsory counterclaim in spite of the fact that the principal suit was in equity for a non-jury remedy. *See also* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

75. *See* notes 46, 47 *supra* and accompanying text.


77. *See* note 6 *supra* and accompanying text.

78. 44 F.R.D. 34 (S.D. Tex. 1968).

79. *Id.* at 41. The *McCann* opinion left unanswered the question of whether jurisdiction would have been denied if the claim had been brought solely for indemnity. An indemnity claim can fall within both rule 14(a) and rule 14(c). However, under rule 14(a) the impleaded claim can be within the ancillary jurisdiction of a federal court. *See* Consolidated Cork Corp. v. Jugoslavenska Linijska Plovidba, 318 F. Supp. 1209 (S.D.N.Y. 1970), where the court held that there was no admiralty jurisdiction over the plaintiff's direct claim against the third party, but admiralty jurisdiction was proper if treated as a third-party claim for indemnity. The ancillary jurisdiction concept would apply to any rule 14(a) indemnity claim. *See* note 5 *supra*.

80. The third-party claim against the doctor was based alternatively on the theory that the doctor was directly liable to the plaintiff, or was obligated to indemnify the defendant for the plaintiff's claim against him. *Id.* at 36.

81. *Id.* at 41-42.
for the Southern District of Texas stated that unification did not extend the liberal ancillary jurisdiction rules permitted under civil impleader to admiralty. To the contrary, he argued persuasively that unification specifically preserved the traditional admiralty approach to the question of ancillary jurisdiction over non-maritime third-party claims. He concluded that rule 14(c) was based on Admiralty Rule 56, which had not allowed such ancillary jurisdiction, and reasoned that the rule of construction that the "prior interpretation [of a statute] must be deemed to have received legislative approval by the reenactment of the statutory provision without material change" should apply equally to the construction of a federal rule. Thus, rule 14(c) must be read in light of the jurisdictional limitations which accompanied Admiralty Rule 56. In support of this argument it was noted that the advisory committee's note to rule 14(c) states that "[r]etention of the admiralty practice in those cases that will be counter-parts of a suit in admiralty is clearly desirable." Judge Noel further reasoned that permitting impleader of a non-maritime claim in an admiralty suit "would be an extension of the court's jurisdiction which had not been permitted under Admiralty Rule 56;" such an extension would be contrary to Federal Rule 82 which explicitly states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts." The logic of McCann is in accord with the pre-unification cases, particularly Aktieselskabet Fido. Yet, federal courts have subsequently questioned the McCann holding in certain instances. In Watz v. Zapata Off-Shore Co. Watz asserted an admiralty claim under rule 9(h) against

82. Id. at 40-41.
83. Id. at 40.
85. 44 F.R.D. at 40-41; see Notes of the Advisory Committee on the 1966 Amendment to Rule 14, supra note 20.
86. 44 F.R.D. at 41.
87. FED. R. CIV. P. 82. Judge Noel stated that "[i]f a defendant were allowed to implead a party under Rule 14(c) who might be liable to the original plaintiff but whose alleged obligation is non-maritime in character and over whom the court has no independent jurisdiction, the result would be to permit an extension of the federal court's jurisdiction contrary to the mandate of Rule 82 . . . ." 44 F.R.D. at 41.
88. 44 F.R.D. at 41.
89. See note 41 supra.
90. 44 F.R.D. at 44; see FED. R. CIV. P. 38(e).
92. See notes 66-71 supra and accompanying text.
93. 431 F.2d 100 (5th Cir. 1970).
Zapata, who impleaded third-party defendant Eaton Yale and Towne, Inc. Eaton then brought in Campbell Chain Company on a fourth-party complaint. Campbell challenged jurisdiction on the theory that the fourth-party complaint was based on negligence and breach of implied warranty arising out of a Pennsylvania sale not within the admiralty jurisdiction of the court.\textsuperscript{94} Campbell’s contention was grounded on the theory that rule 14(c) carried forward the requirement of Admiralty Rule 56 that an impleader action be maritime in nature and that ancillary jurisdiction may not be applied.\textsuperscript{95} The Fifth Circuit stated that Campbell’s liability, if proved, would be such as to arise out of the same occurrence as the original admiralty claim: the injury to Watz on board the vessel.\textsuperscript{96} The court upheld jurisdiction over the fourth-party complaint stating:

Without expressing any view on the correctness of a decision such as McCann, we note that the third-party complaint there was distinctly not maritime. . . . The same reasoning that led us to conclude that admiralty jurisdiction existed over Watz’s claim against Eaton sustains admiralty jurisdiction over Eaton’s claim against Campbell. And since the district court had admiralty jurisdiction, Campbell’s claim to a jury trial was properly denied.\textsuperscript{97}

The Watz court did not directly attack the logic of McCann, but left open the question as to how the Fifth Circuit would rule on the issue should it be squarely presented. The Watz opinion, however, can be read as indicating that the extension of ancillary jurisdiction over a non-maritime third-party claim might be accomplished by distinguishing McCann on the basis that the third-party claim there was entirely separate from the plaintiff’s admiralty claim.

The issue was discussed in dictum by the Second Circuit in Leather’s Best, Inc. v. S.S. Mormaclynx,\textsuperscript{98} where the court took note of the pre-unification cases but stated that the effect of the merger upon the former admiralty requirement of independent admiralty jurisdiction for impleader had not yet been conclusively decided.\textsuperscript{99} Although Leather’s Best dealt with the issue of pendent jurisdiction, the Second Circuit regarded ancillary jurisdiction as relevant to the issue of pendent jurisdiction and stated that the merger of the civil and admiralty rules and the addition of rule 14(c) to the federal rules indicate that the rationale which underlies the doctrine of ancillary jurisdiction in the context of civil impleader should also be applicable in admiralty.\textsuperscript{100} In a footnote to the opinion the court stated:

\begin{itemize}
\item \textsuperscript{94} Id. at 117.
\item \textsuperscript{95} Id. at 117-18.
\item \textsuperscript{96} Id. at 117.
\item \textsuperscript{97} Id. at 118; see 7A Moore ¶ .54(3), at 396 n.13 (Supp. 1973).
\item \textsuperscript{98} 451 F.2d 800 (2d Cir. 1971).
\item \textsuperscript{99} Id. at 810 n.12.
\item \textsuperscript{100} Id. In Leather’s Best the plaintiff sued the vessel, her owner, and the terminal operator in connection with the theft of a container of leather from the shipping terminal. Admiralty jurisdiction was properly invoked against the ship and the shipowner, and the court brought the claim against the terminal operator in under a pendent jurisdiction theory. The Second Circuit argued that the constitutionally accepted doctrine of ancillary jurisdiction with respect to rule 14 was also applicable in admiralty due to the 1966 unification, and that by analogy, pendent jurisdiction could also be applied. Id.
\end{itemize}
If we were presented with the question, it would only be with the greatest reluctance that we would conclude that under the merged rules the doctrine of ancillary jurisdiction did not extend to admiralty as well as to civil impleader. . . . Certainly the practical considerations which support the doctrine of ancillary jurisdiction in the context of civil impleader are equally persuasive on the admiralty side.

In Leather's Best constitutional considerations thought to limit ancillary jurisdiction in admiralty were regarded as founded solely on the possible denial of jury trial, an issue not raised in the case.

The Second Circuit did not explain how unification made ancillary jurisdiction applicable to admiralty cases and made no attempt to deal with the logic expressed in McCann. In Leather's Best the rule 82 prohibition of expansion of jurisdiction by construction of the rules was ignored. The Second Circuit also failed to deal with the jury trial problem, and the question cannot be resolved merely by stating that the issue need not be considered. Even if it is assumed that there may be some basis in a given case for distinguishing McCann, the argument set forth therein is persuasive and must be dealt with in a straightforward manner if the traditional rule rejecting ancillary jurisdiction over non-maritime third-party claims in admiralty suits is to be abandoned. It is apparent that McCann is still the most authoritative case on the post-unification rules pertaining to ancillary jurisdiction with respect to admiralty impleader. In fact, the arguments challenging the McCann decision proved unpersuasive to Judge Noel, and, when again confronted with the issue, he reiterated his position. Further support of the McCann holding is found in Bernard v. United States Lines, Inc., where it was held that rule 14(c) "does not create admiralty jurisdiction. Rule 82 expressly negates the extension of jurisdiction by the rules."

Nevertheless, it is submitted that this result is undesirable. The policy of the federal rules is to permit impleader in any case in which the same transaction or occurrence gives rise to the claim. This policy should not be defeated merely because the claim is maritime in nature. The following problem is thus posed: Is there a way to reach an alternative result which permits the extension of ancillary jurisdiction over non-maritime third-party

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101. Leather's Best.
102. Id. at 811 n.12.
103. See notes 113, 114 infra.
104. Id., at 1136.
105. Id. at 1136.
106. 6 Wright & Miller § 1465, at 349 n.26.
claims in admiralty suits, and, at the same time, meets and overcomes the arguments to the contrary set forth in McCann?

III. A PROPOSED SOLUTION TO THE MCCANN DILEMMA

It cannot be doubted that unification of admiralty and civil procedure and the addition of rule 14(c) to the federal rules in and of themselves create no new concept of ancillary jurisdiction with respect to third-party practice in admiralty.110 It is equally true that Federal Rule 14(c) evolved from Admiralty Rule 56111 which disallowed the impleading of a non-maritime third-party claim.112 However, these facts must not necessarily be construed in such a manner as to bar the extension of ancillary jurisdiction to admiralty impleader.

A. Construction

As to the initial argument in McCann that rule 14(c) must be deemed to have emulated the denial of ancillary jurisdiction which was characteristic of Admiralty Rule 56, the advisory committee stated that unification was intended to "abolish the distinction between civil actions and suits in admiralty."113 There is no indication that there was any intention to retain the Admiralty Rule 56 prohibition against hearing a non-maritime third-party claim in an admiralty suit. In fact, the 1966 note of the advisory committee on rule 18 suggests a contrary policy: "[F]ree joinder of claims and remedies is one of the basic purposes of the unification of admiralty and civil procedures."114 It would follow as a policy argument that ancillary jurisdiction would be an entirely appropriate tool in the promotion of such "free joinder of claims and remedies." This is given further support when considered in light of the general policy behind the unification: that is the extension of modern procedural advantages to actions in admiralty.115 Thus, it seems clear that the addition of rule 14(c), while certainly no basis for the adoption of ancillary jurisdiction in admiralty, cannot be read as impliedly denying its use.

The conclusion in McCann that the rule 82 prohibition against expansion of jurisdiction by construction of the rules compels a federal court to follow the accepted rules of jurisdiction is questionable.116 It ignores the fact that ancillary jurisdiction has been extended in civil actions involving impleader since the 1938 adoption of the Federal Rules of Civil Procedure, in spite of rule 82.117 In this context the argument in favor of the extension of ancillary jurisdiction to admiralty impleader proceeds on two theories.

110. See generally Landers, note 12 supra; 6 WRIGHT & MILLER § 1465, at 349.
111. See note 10 supra.
112. See note 6 supra.
114. Id., Rule 18, at 7757-58.
115. See Colby, note 9 supra, at 1258-59. See also Note of the Advisory Committee on the 1966 Amendment to Rule 1, supra note 113.
Application of ancillary jurisdiction to admiralty impleader in spite of rule 82 is analogous to the extension of ancillary jurisdiction with respect to civil impleader. One theory on which the expansion of ancillary jurisdiction was based in civil impleader actions is the concept that rule 14 does not actually extend jurisdiction, but merely sanctions impleader as a procedure resting on the concept that a “claim” consists of a core of facts “giving rise to rights flowing both to and from a defendant.”\textsuperscript{118} It would seem, given the policy of impleader to “avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action,”\textsuperscript{119} that a federal court sitting in admiralty would be free to follow the reasoning used in civil impleader for the adoption of ancillary jurisdiction.

The objection to this line of reasoning is that civil courts initially avoided rule 82 by finding pre-1938 authority sanctioning ancillary jurisdiction in civil impleader actions,\textsuperscript{120} while no such pre-1938 authority exists with respect to admiralty impleader.\textsuperscript{121} However, in the analysis set forth above, the justification for avoiding rule 82 in civil actions was not based solely on pre-1938 case law, but rather rested primarily on the theory that the concept of a “claim” sanctions the exercise of ancillary jurisdiction over third-party actions growing out of the same transaction or occurrence. Moreover, prior to unification in 1966 it had been held that there may be jurisdiction over a maritime suit based on the pendent relationship between the maritime claim and the civil action properly before the court.\textsuperscript{122} Given the relationship between pendent and ancillary jurisdiction,\textsuperscript{123} this would seem to support the policy argument for extension of ancillary jurisdiction over non-maritime third-party claims in an admiralty suit. Of course, in all cases under rule 14(c) the third-party claim must necessarily arise from the same transaction or occurrence or series of transactions or occurrences as the original claim.\textsuperscript{124}

Secondly, rule 82 does not say that new concepts of jurisdiction may not be developed by federal courts, but merely states that the “rules shall not be construed to extend . . . jurisdiction.”\textsuperscript{125} There is nothing in the federal rules which prohibits admiralty as a body of law, or the federal courts generally, from adopting new concepts in order to keep pace with the ever-changing needs which judicial procedure must serve.\textsuperscript{126} Thus, federal courts

\textsuperscript{118} Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959).
\textsuperscript{119} Wright § 76, at 333.
\textsuperscript{120} See Brandt v. Olson, 179 F. Supp. 363 (N.D. Iowa 1959); Landers, note 12 supra.
\textsuperscript{121} See note 6 supra.
\textsuperscript{122} Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). This case arose on the law side and the admiralty claim was pendent to the legal claim. However, the underlying policy reasons should be equally applicable to the reverse situation in which the main cause lies in admiralty.
\textsuperscript{123} United Mine Workers v. Gibbs, 383 U.S. 15 (1966); see notes 49, 100 supra.
\textsuperscript{124} Fed. R. Civ. P. 14(c).
\textsuperscript{125} Fed. R. Civ. P. 82 (emphasis added).
\textsuperscript{126} The original adoption of impleader in admiralty was the result of judicial decision. See The Hudson, 15 F. 162 (S.D.N.Y. 1883). It was based on the same policy grounds later used in support of civil impleader under the Federal Rules. See Wright § 76, at 332-38. As The Hudson demonstrates, there is precedent for expansion of legal theories in admiralty. Given that the original policies behind civil impleader are the same as those behind admiralty impleader, it follows that if ancillary jurisdiction helps carry out these policies in the context of civil impleader, the same would be true for actions in admiralty.
should be free to develop concepts of ancillary jurisdiction with respect to third-party practice in admiralty as long as the rationale for the development is not dependent on construction of the federal rules. Under the foregoing analysis, when the original claim is properly designated as one in admiralty under rule 9(h) and the case is cognizable in admiralty, a defendant should be permitted to implead a third party under rule 14(c) if the third-party claim arises out of the same transaction or occurrence as the original claim, without regard for the maritime nature of the third-party claim.

B. The Jury Trial Problem

Once over this initial hurdle, the additional problem of the possible denial of the third-party defendant's right of jury trial still exists. This impediment is not as serious as some have perceived it to be. It is true that there is no right of jury trial in admiralty, and that rule 38(e) states that "these rules shall not be construed to create a right to trial by jury of the issues in a maritime claim within the meaning of Rule 9(h)." In McCann this was construed to mean that if a third party is impleaded under rule 14(c), the third party has no right to a jury trial "either on the issues raised in the third-party complaint [or] on those he raises by way of his answer." Such a construction poses serious constitutional questions as to the permissibility of ancillary jurisdiction in admiralty impleader cases; and constructions of the rules which raise constitutional questions should be avoided if possible. The reasoning of the McCann court seems to be in conflict with the policy stated by the Supreme Court in Beacon Theatres, Inc. v. Westover. In Beacon Theatres the Court held that the legal issues raised by a counterclaim must be tried before a jury in order to preserve the defendant's right of jury trial even though the original suit was for equitable relief. Under this rationale, an admiralty court could not deprive a third-party defendant of his right of jury trial merely because the original suit was in admiralty. In McCann there was no reason why a jury could not have been empaneled to hear the legal issues raised by the third-party complaint. The McCann construction of rule 38(e) seems unreasonable in light of the fact that a right to a jury trial in an action containing both maritime and non-maritime claims had been held to exist prior to the 1966 unification. In Fitzgerald v. United States Lines Co. the Court held that neither the sev-

127. See notes 41-48 supra, and accompanying text.
129. See note 41 supra and accompanying text.
131. See note 91 supra.
133. Further support for this view is found in the fact that jury trials have been allowed under statutory authority in maritime cases arising on the Great Lakes since 1845. See 28 U.S.C. § 1873 (1974). This practice has been held to be constitutional. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). See also note 46 supra.
134. 374 U.S. 16 (1963). This was a case where admiralty and nonadmiralty claims were pendent together. A seaman was permitted to bring a civil action under the Jones Act for negligence, an action at law, and attach to that his admiralty claims for
enth amendment nor any other constitutional provision forbids jury trials in admiralty cases.

The objection to the use of such a split-trial device is that a part-jury trial may be unduly cumbersome. It may be argued, theoretically, that liberal rules of joinder and impleader in conjunction with expanded provisions allowing ancillary jurisdiction may work in many cases to complicate the litigation unduly, while refusal to hear all the peripheral claims may lead to a quicker and "better" decision in the main action. An extension of this view is that denial of ancillary jurisdiction may further work to promote settlement of potential claims which could conceivably have been included in the lawsuit.138

Nevertheless, the objections to the split-trial device are somewhat speculative. It is submitted that it would be proper to extend the doctrine of ancillary jurisdiction to admiralty impleader, thus giving a federal court the power to hear all the issues arising out of the same transaction or occurrence. The general thrust of the federal rules has been towards avoiding a multiplicity of suits based on the same facts,137 and frustration of these policy considerations need not be compelled by either the reasoning in McCann or the fear of overly cumbersome litigation. There are several ways by which a federal court may avoid unnecessarily complicating the main action. A federal court has the power under rule 14(a) to strike or sever a third-party claim for separate trial.138 Separate trials may also be ordered under rule 42(b) "when separate trials will be conducive to expedition and economy" or to avoid any prejudice which may result from hearing the entire action in one suit.139 The extension of ancillary jurisdiction to admiralty impleader in conjunction with the option to sever gives a federal court (1) the ability to hear all claims which should, in the interest of judicial economy and fairness, be heard in one action, and (2) the flexibility to order separate trials when impleader would not serve economy and fairness.

IV. CONCLUSION

Ancillary jurisdiction over non-maritime third-party claims in admiralty was not allowed prior to the 1966 procedural unification.140 The merger of admiralty and civil procedure cannot be read as automatically extending the civil concept of ancillary jurisdiction into admiralty impleader. Yet, the unification seems to indicate that the policies which underlie the Federal Rules of Civil Procedure should be equally applicable to both maritime and non-maintenance and cure, and unseaworthiness, and have all issues decided by a jury. See notes 41, 46 supra and accompanying text.

136. For a related discussion see 1B MOORE ¶ .412[1], at 1809-12 (1974), where it is asserted that the abandonment of the doctrine of mutuality of estoppel might actually work to increase litigation without justification.

137. See generally WRIGHT § 76, at 333; 6 WRIGHT & MILLER § 1014.

138. FED. R. CIV. P. 14(a); see Williams v. United States, 42 F.R.D. 609 (S.D.N.Y. 1967).


140. See note 6 supra.
maritime cases. Thus, given the policy goals, there is no reason why admiralty law should not be free to develop the concept of ancillary jurisdiction with respect to third-party practice just as the civil courts have done. The proscription against expansion of jurisdiction contained in rule 82 can be avoided by following reasoning analogous to that used by the civil courts, or by simply not relying on construction of the rules as the basis for the expansion. The general policy of judicial economy which underlies impleader could be enough to set aside the anachronistic rule that a third-party claim in admiralty must have an independent basis of maritime jurisdiction.

The third-party defendant's right of jury trial can be preserved because there is no constitutional right to a non-jury trial in admiralty. Legal issues raised by way of a third-party claim can be tried to a jury. Undue complication of lawsuits, and abuse of impleader can be avoided by the use of such devices as severance and separate trials. It therefore seems reasonable that a federal court could properly conclude that a non-maritime third-party claim arising out of the same transaction or occurrence or series of transactions or occurrences as the original admiralty claim could be within the ancillary jurisdiction of the court.

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141. See note 126 supra and accompanying text.
142. See notes 118, 119 supra and accompanying text.
143. The advent of admiralty impleader was based on the same grounds as those which eventually led to civil impleader. See The Hudson, 15 F. 162 (S.D.N.Y. 1883). These policy grounds caused one early court to extend the doctrine of ancillary jurisdiction to third-party practice in admiralty. See Evans v. New York & Pac. S.S. Co., 163 F. 405 (S.D.N.Y. 1906). See also notes 21, 62, 126 supra.
144. See note 41 supra.
145. See notes 138, 139 supra and accompanying text. It is submitted that it is preferable to give a federal court the power to exercise ancillary jurisdiction over non-maritime third-party claims, along with the flexibility of the severance option, rather than to deny ancillary jurisdiction altogether. This would give a federal court sitting in admiralty the ability to hear all claims arising out of the same transaction or occurrence which should, in the interest of judicial efficiency and fairness, be heard in one action. At the same time, the severance option provides the court with a means of avoiding overly complex litigation which would not serve judicial economy.