South Carolina Law Review

Volume 23 | Issue 2 Article 3

1971

Ancillary Jurisdiction--Rule 14--Disposition of Third Party Claim When the Primary Claim has Been Dismissed

Jeter E. Rhodes Jr.

NOTES

ANCILLARY JURISDICTION—RULE 14—DISPOSITION OF THIRD PARTY CLAIM WHEN THE PRIMARY CLAIM HAS BEEN DISMISSED

The problem considered herein involves the scope of ancillary jurisdiction as applied to Rule 14 of the Federal Rules of Civil Procedure, but more specifically it is an attempt to delineate what criteria the courts have considered when exercising discretion (where it was allowed) in determining whether it should dismiss an ancillary third party claim after the principal claim has been dismissed.

I. HISTORY AND DEVELOPMENT OF ANCILLARY JURISDICTION

Ancillary jurisdiction is a unique concept which allows federal courts to hear cases over which no jurisdiction is conferred, either by the Constitution or by statutes.[1] The concept gives the federal courts power over an entire controversy, allowing them to decide matters or claims which are incidental or ancillary to the main claim or controversy that is properly before them. No independent grounds for jurisdiction over these incidental controversies need be established.[2] Thus, in the third party practice, established by Rule 14 of the Federal Rules of Civil Procedure, as long as jurisdiction is established between the original plaintiff and defendant, no independent grounds for jurisdiction need be established between the defendant (third party plaintiff) and the third party defendant. They may have a common citizenship, and the controversy between them may involve purely a state claim and be less than the jurisdictional amount of $10,000.00.[3]

Ancillary jurisdiction grew out of cases where the federal courts had some *res* in its actual or constructive possession.[4] By necessity power was needed to dispose of the entire *res* without threatening the

1. 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 93 (Wright ed. 1960) [Hereinafter cited as BARRON & HOLTZOFF].
2. *Id.*
3. 1A BARRON & HOLTZOFF § 424, at 650.
4. 1 BARRON & HOLTZOFF § 23, at 94.

parties involved with the possibility of inconsistent results which might occur if part of the case were litigated in state courts and part in federal courts.[5] Such a problem was recognized and resolved in *Freeman v. Howe*[6] which said that any party whose interests are affected by an action in federal court in which that court has taken control of property may, in order to prevent injustice, assert his claim to the property in federal court. The Court further said that such a claim would be ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and maintained without reference to the citizenship of the parties.[7] Once federal courts had the *res* before it, a state court could not thereafter obtain jurisdiction, but any person could assert their claim thereto in federal court.[8]

Except for obscure exceptions,[9] prior to 1926 the general rule was that ancillary jurisdiction was limited to cases where the federal court had actual or constrictive possession of some property or *res*.[10] In 1926 the Supreme Court in *Moore v. New York Cotton Exchange*[11] gave ancillary jurisdiction its modern impetus and enabled the concept to become one of major importance.[12] The Court, construing old Federal Equity Rule 30, now Rule 13(a), relating to compulsory counterclaims, held that the federal court could grant relief sought by a compulsory counterclaim even though the principal claim had been dismissed on its merits and no independent grounds of jurisdiction over the counterclaim existed. No precedent was cited to support the conclusion. The rationale was that to hold otherwise would rob the compulsory counterclaim requirement of Equity Rule 30 of all its serviceable meaning, and that the principal claim and counterclaim were so closely connected that in order to do complete justice to the parties the failure of the former would establish the foundation for the latter.[13] It would be illogical to require that a counterclaim be brought and then not grant the relief sought, after the facts upon which it arose

5. Freeman v. Howe, 65 U.S. 450 (1860).
6. *Id.*, at 460.
7. *Id.*
8. *Id.*
9. C. WRIGHT, LAW OF FEDERAL COURTS § 9, at 20 (2d ed. 1970) [hereinafter cited as WRIGHT].
10. Fulton Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276, 280 (1925).
11. 270 U.S. 593 (1926).
12. WRIGHT § 9, at 20.
13. 270 U.S. at 610.

had been fully litigated and the principal claim had failed. An opposite holding would require the successful defendant to relitigate the same facts in the state court to obtain the relief sought by the compulsory counterclaim.

Generally, ancillary jurisdiction now attaches in situations: (1) where the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main proceeding, or is an integral part of the main proceeding; (2) where the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) where determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) where the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.[14]

Since Rule 82 of the Federal Rules of Civil Procedure provides that the Federal Rules will not expand federal jurisdiction, *Moore v. The New York Cotton Exchange*[15] has been used by the federal courts as a foundation upon which to expand the concept of ancillary jurisdiction in order to effectuate some of the Federal Rules which permit joinder of claims and joinder of parties.[16] While ancillary jurisdiction has been expanded, the reasoning for its existence has remained basically the same, that is to prevent inconsistent results which might occur if separate trials of the same basic facts were required.[17]

---

14. Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. 1969). Only the first two situations are involved in the application of ancillary jurisdiction to Rule 14 Impleader.

15. 270 U.S. 593 (1926).

16. WRIGHT § 9, at 20; *see* Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963). It is now the general consensus that ancillary jurisdiction applies: to compulsory counterclaims under Rule 13(a) and 13(h); to cross-claims, under Rule 13(g); to impleader of a third party defendant, under Rule 14; to the joinder of federal and state claims, under Rule 18, when the two claims are so closely related as to reasonably expect both claims to be litigated in one trial; interpleader, under Rule 22; and intervention as of right, under Rule 24(a). WRIGHT § 9, at 21.

17. State of Maryland, to the Use of Wood v. Robinson, 74 F. Supp. 279 (D. Md. 1947); *see generally* Morrow v. District of Columbia, 417 F.2d 728, 738-40 (D.C. 1969); 1A BARRON & HOLTZOFF § 422, at 644; 1 BARRON & HOLTZOFF § 23, at 96.

II. RULE 14 AND ANCILLARY JURISDICTION

It is well settled that ancillary jurisdiction applies to Rule 14,[18] relating to impleader or the third party practice. Rule 14[19] is a rule of procedure[20] which is invoked principally in cases concerning indemnity, subrogation, contribution, and breach of warranty.[21] It operates when the original defendant claims that a third party is or may be liable to him for all or part of the claim asserted by the plaintiff against him. It is, however, fatal to impleader for the defendant to allege that the third party is liable solely to the original plaintiff.[22] The rule is intended to avoid a multiplicity of suits and to dispose of the entire subject matter arising from one set of facts in one suit, thus avoiding inconsistent results and the prejudice which might result thereby.[23] This rule also allows a party to be brought into the case who may have the same citizenship as either the original plaintiff or defendant.[24] An example of the application of Rule 14 follows: A sues B, a retailer, on breach of warranty when a defective product bought by A from B injures A and the proximate cause of the injury is alleged to have been the defect; A and B are citizens of different states and the amount of the claim exceeds $10,000.00. Under the rule, B is allowed to implead C from whom he bought the product, even though B and C are citizens of the same state, since C is liable to B for any damages B may have to pay A if A is successful in his suit against B.[25] Both claims involve the same set of facts to be proved, that is, that the product was defective. If both claims were not litigated in one trial, the original defendant, B, might lose the primary suit in the federal court against A and also lose the suit against C in the state court due to inconsistent findings in separate courts as to whether the product was defective. Clearly, ancillary jurisdiction should apply in such situations to confer federal

18. 1A BARRON & HOLTZOFF § 424, at 650-51, and the many cases cited in note 22 therein.

19. Rule 14 of the Federal Rules of Civil Procedure provides in part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him . . . Any party may move to strike the third-party claim, or for its severance or separate trial.

20. WRIGHT § 76, at 332.

21. *Id.*, at 333-34.

22. *Id.*, at 335-36.

23. *Id.*, at 333.

24. *Id.*, at 336.

25. UNIFORM COMMERCIAL CODE § 2-715(2)(b).

jurisdiction over the third party claim against C. But, suppose A and B settle their controversy and the primary suit is dismissed. What should be the disposition of the third party suit which has no independent grounds of federal jurisdiction?

III. POWER TO AJUDICATE

The general rule is that jurisdiction over an ancillary claim is not lost when the principal claim has been settled or dismissed on its merits.[26] *Dery v. Wyer*,[27] a leading case for this proposition, reasoned that sufficiency of federal jurisdiction should be determined at the commencement of the action and if found to be present then it should continue until final disposition of all claims.[28] The court, persuaded by policy considerations, felt that a contrary holding in many cases would: result in a serious waste of effort by both the judge and the litigants; discourage settlements during the course of litigation; discourage ajudications on motions and settlements in advance of trial; create confusion as to when ancillary jurisdiction is lost; prejudice the ancillary claimant whose claim may then be time-barred; and seriously impair the utility of many of the Federal Rules and generate many sterile jurisdictional disputes.[29] The holding was limited solely to the power to ajudicate and not discretion to ajudicate, discussed *infra*, but the existence and utility of ajudicatory discretion were acknowledged.[30] Clearly this was jurisdiction conferred for the sake of convenience, as was *Moore*,[31] and the dissent recognized it as such.[32]

The *Dery* case is supported by the recent Supreme Court case of *United Mine Workers of America v. Gibbs*,[33] a case involving pendent

26. 1A BARRON & HOLTZOFF § 424, at 658; WRIGHT § 76, at 338.

27. 265 F.2d 804 (2d Cir. 1959). This appeal was only on the merits of the third party claim, but the court of appeals directed the parties to submit supplemental briefs addressed to the question of whether the trial court had jurisdictional *power* to ajudicate the third party claim after the primary claim had been dismissed on its merits.

28. *Id.*, at 809.

29. *Id.*, at 809-10.

30. *Id.*, at 810. Since the question of power to ajudicate the third party claim was not raised until the case reached the court of appeals, the trial court had no opportunity to exercise any discretion. The *Dery* court pointed out that its decision was not contradictory to cases allowing *discretion* to ajudicate the third party claim under such circumstances since those cases must presuppose *power* to ajudicate the third party claim. 265 F.2d at 809.

31. 270 U.S. 593 (1926); *see* WRIGHT § 9, at 20.

32. 265 F.2d, at 811.

33. 383 U.S. 715 (1966).

jurisdiction, a special branch of ancillary jurisdiction.[34] *Gibbs* held that where a substantial federal (principal) claim was presented, the federal court had *power* to ajudicate related state (pendent) claims, even if the federal claim was later dismissed, if they derived from a common nucleus of operative facts so as to reasonably expect both the federal and state claims to be tried in one judicial proceeding.

IV. DISCRETION TO AJUDICATE

Although the federal courts have power to ajudicate the ancillary third party claim after the principal claim has been dismissed, in the exercise of discretion they have the power to dismiss the ancillary claim.[35] In *Duke v. Reconstruction Finance Corp.*[36] the court, in recognizing a basic policy consideration stated that:

> [t]he federal courts were not intended for the trial of cases involving no federal question, between citizens of the same State, which the State courts are fully competent to try. And we should discourage attempts by litigants to ride into federal courts on the coattails of a distantly related, but quite dissimilar, original civil action.[37]

Another policy to be considered is that ancillary jurisdiction rests only upon the need to avoid the substantial likelihood of prejudice to a litigant in federal court which might result from his being compelled to relitigate facts in a state court which have been litigated in federal court. When this substantial likelihood of prejudice is lacking, the ancillary claim should ordinarily be dismissed.[38]

In *United Mine Workers of America v. Gibbs*,[39] the Court said that:

> [i]t has consistently been recognized that pendent jurisdiction is a

34. 1 BARRON & HOLTZOFF § 23, at 97. Pendent jurisdiction arises when the principal claim raises a federal question and thus is within the jurisdiction of the federal court, while other purely state claims, joined by the plaintiff and arising from the same nucleus of operative facts, lack any independent jurisdictional grounds. The concept of pendent jurisdiction gives the federal courts power to ajudicate these purely state claims along with the federal claim. The considerations supporting its existence are the same as for ancillary jurisdiction.

35. Duke v. Reconstruction Finance Corp., 209 F.2d 204 (4th Cir. 1954), *cert. denied*, 347 U.S. 966 (1954); *see* 1A BARRON & HOLTZOFF § 424, at 658; WRIGHT § 76, at 338.

36. 209 F.2d 204 (4th Cir. 1954), *cert. denied*, 347 U.S. 966 (1954).

37. *Id.*, at 209.

38. Dery v. Wyer, 265 F.2d 804, 812 (2d Cir. 1959) (dissenting opinion).

39. 383 U.S. 715 (1966); *see* note 34 *supra*.

> doctrine of discretion, not of . . . right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . .[40]

While many cases do not specifically mention these considerations, it is evident that they were the basis for disposing of the ancillary claim. An analysis of the cases will be helpful in determining what criteria were involved when the courts exercised discretion in disposing of the ancillary claim after the primary claim had been dismissed and there were no independent grounds of jurisdiction to support the ancillary claim.

V. DISMISSAL OF THE PRIMARY CLAIM BEFORE TRIAL

A. Ancillary Claim Dismissed

When the primary claim has been dismissed before trial, the general rule is to also dismiss the ancillary third party claim.[41] The reason for this rule is that impleader is allowed only because of economy of time and costs in trying all issues in one trial and the avoidance of proving the same set of facts in two separate suits. The ancillary third party suit should be dismissed when these considerations cease to exist.[42] Another reason has been that to ajudicate the third party suit in such a situation would be an extension of federal jurisdiction in violation of Rule 82.[43]

It is interesting to note that the policy considerations supporting the *Dery*[44] holding would probably dictate the trial court's discretionary dismissal of the ancillary claim if the facts of that case

40. *Id.*, at 726.

41. E.K. Carey Drilling Co. v. Murphy, 113 F. Supp. 226 (D. Colo. 1953); Thomas Worcester, Inc. v. Clover Stores Corp., 11 F.R.D. 334 (N.D.N.Y. 1951); State of Maryland to Use of Wood v. Robinson, 74 F. Supp. 279 (D. Md. 1947). This rule is supported by *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) which stated that "[i]f the federal [principal] claims are dismissed before trial . . . the state [pendent or ancillary] claims should be dismissed as well." *Id.* at 726.

42. Thomas Worcester, Inc. v. Clover Stores Corp., 11 F.R.D. 334 (N.D.N.Y. 1951); State of Maryland to Use of Wood v. Robinson, 74 F. Supp. 279 (D. Md. 1947).

43. E.K. Carey Drilling Co. v. Murphy, 113 F. Supp. 226 (D. Colo. 1953); Thomas Worcester, Inc. v. Clover Stores Corp., F.R.D. 334 (N.D.N.Y. 1951). Rule 82 of the Federal Rules of Civil Procedure provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

44. 265 F.2d 804 (2d Cir. 1959).

arose today.[45] For example, little if any judicial energy has been spent, since the principal claim has been settled in the pleading stage shortly after the ancillary third party claim had been filed;[46] the ancillary claimant had not been prejudiced since his claim was not time-barred;[47] all the parties apparently knew when the principal claim had been settled so there could have been no confusion as to when the ancillary claim was required to stand on its own;[48] and the utility of Rule 14 would not have been impaired since there was no danger of inconsistent results by two separate courts.[49]

The court in *United States v. Houff*,[50] after disposing of the principal claim by summary judgment, invited a motion for dismissal of the ancillary claim since proof of different sets of facts would have been required to dispose of the principal and ancillary claims. It implied that impleader had been improvidently granted initially and indicated that if no motion to dismiss was made, it would consider dismissal anyway.[51] This was the only case found where the court considered dismissing the ancillary claim on its own motion. It could be argued in such situations as *Houff* that ancillary jurisdiction never really attached because a trial of the same set of facts could not dispose of both the primary and ancillary claims.[52]

B. Ancillary Claim Not Dismissed

The mere fact that the principal claim was settled prior to trial has not been determinative in all situations. In *Oakes v. Graham Towing Co.*[53] the principal case had been settled before trial, but the ancillary third party claim was then tried, resulting in a verdict for the third party plaintiff. The third party defendant then attacked the court's jurisdiction to hear the ancillary claim since no independent grounds

45. *Id.*, at 809-10. The policy considerations which supported the court's holding as to the power to ajudicate the third party claim are also relevant when exercising the discretion to ajudicate. Since no discretion was actually exercised in this case, obviously the policy considerations could not have been utilized by the trial court.

46. *Id.*, at 806.

47. *Id.*, at 810.

48. *Id.*, at 806.

49. *Id.*, at 812 (dissenting opinion).

50. 202 F. Supp. 471 (W. D. Va. 1962), *aff'd*, 312 F.2d 6 (4th Cir. 1962).

51. *Id.*, at 480. The question whether the trial court could dismiss the ancillary claim on its own motion was not raised on appeal. It seems obvious that the third party claim was dismissed, but it is uncertain whether it was dismissed on motion by one of the parties or by the court on its own motion.

52. *See* text accompanying note 17 *supra*.

53. 135 F. Supp. 485 (E.D. Pa. 1955).

for jurisdiction had existed. Holding that jurisdiction existed, the trial court held that jurisdiction was discretionary, to be exercised to simplify procedure in accordance with Rule 14, and to avoid unnecessary duplication and roundabout methods of disposing of controversies. Significant to the decision was the fact that the ancillary claim had been tried before any mention of jurisdiction was made. The same result under similar circumstances occurred in *Murphy v. Kodz*[54] which held that the trial court did not lose its power to ajudicate the ancillary claim and could do so in its discretion; and where no discretion had been actually exercised in the case, ajudication of the non-federal claim would not be grounds for reversal when the appellants failed to bring such discretionary matters to the court's attention. The *Murphy* court did not base its holding on any considerations of judicial economy, but based it on estoppel of the appellants to assert abuse of discretion since they never gave the court cognizance of such discretionary powers before the ancillary claim had been tried. To hold otherwise would encourage litigants to make two attempts for victory by refusing to assert the issue of discretion until their case had been lost on the merits. It seems that the *Murphy* court would have required dismissal of the ancillary claim had the appellants raised the issue before it had been tried.[55] Thus, the mere fact that the primary claim is settled before trial is not determinative of the dismissal of the third party claim if there is an unreasonable delay in the motion to dismiss it. The motion to dismiss should be made immediately after the primary claim has been dismissed. Waiting until after the ancillary claim has been fully litigated before raising the issue is asking the trial court to stretch its discretion to, if not beyond, its limits. However, it does seem that the ancillary claim may be dismissed by the trial court on its own motion.[56] In fact, where considerations of judicial economy arise, the trial court should not hesitate in dismissing the ancillary claim.

Where the statute of limitations would bar recovery on the ancillary claim if required to be asserted in a new action in the state courts, the court in *Southern Milling Co. v. United States*[57] held that

54. 351 F.2d 163 (9th Cir. 1965).

55. *See* Wham-O-Mfg. Co. v. Paradise Mfg. Co., 327 F.2d 748, 752-54 (9th Cir. 1964) which was cited by Murphy v. Kodz, 351 F.2d 163, 168 (9th Cir. 1965).

56. United States v. Houff, 202 F. Supp. 471 (D. Va. 1962), *aff'd*, 312 F.2d 6 (4th Cir. 1962).

57. 270 F.2d 80 (5th Cir. 1959).

dismissal of the ancillary claim was an abuse of discretion even though the principal claim had been decided by summary judgment before trial. Certainly, if discretion is to be exercised, this result must follow to prevent a third party plaintiff from having to bring two suits at the same time, concerning the same set of facts, in both the federal and state courts in order to protect himself from being without a remedy should the suit against him in federal court be settled or dismissed after the statute of limitations has run on his claim against the third party defendant. Fairness to the litigants dictates the *Southern Milling Co.* result.

Where extensive interrogatories have been filed and answered and other pre-trial motions have taken place after the principal claim has been settled and dismissed, but before the motion to dismiss the ancillary calim has been made, it has been held that the ancillary claim should not be dismissed.[58] Considerations of judicial economy probably controlled this result, but it would seem that such a result should occur only in those states where the state courts will not recognize the discovery methods of the federal courts. Only then will any extensive efforts on anyone's part be wasted.[59]

VI. DISMISSAL OF THE PRINCIPAL CLAIM AFTER TRIAL HAS BEGUN

Ordinarily, the ancillary claim should not be dismissed if the principal claim has been dismissed after trial has begun. Considerations of judicial economy weigh heavily in such situations. But there still may be some situations where it would be better to dismiss the ancillary claim. In *Gibbs* the Court said:

> [t]he issue whether pendent [ancillary] jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in

58. Pennsylvania R.R. Co. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Day v. Pennsylvania R.R. Co., 172 F. Supp. 506 (E.D. Pa. 1959).

59. *Eg.*, South Carolina Circuit Court Rule 87 provides:

> When an action in any court of the United States or any state has been dismissed and another action involving the same subject matter is afterward brought by the same parties . . ., all depositions lawfully taken and filed in the former action may be used in the latter as if originally taken therefor.

> this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited.[60]

In *Gibbs* the principal claim was not dismissed until after the trial on its merits when the trial judge granted a judgment *n.o.v.* No abuse of discretion was found in then ajudicating the ancillary claim.

It was held in *Duke v. Reconstruction Finance Corp.*[61] that the trial court had not abused its discretion in dismissing a third party claim after the merits of the principal claim had been decided. The same set of facts did not exist in the ancillary claim that existed in the primary claim, indicating that impleader had been improvidently granted initially. All that was left to be litigated was a separate and distinct controversy between parties having a common citizenship.[62] Although the entire controversy did stem from the same subject matter, a construction contract, the main suit related to a contract of guaranty and the ancillary claim related to an alleged fraudulent breach of a subcontract. Therefore, all criteria dictated dismissal of the third party claim. The court implied that had the same factual proofs been common to both the principal and ancillary claims, dismissal of the ancillary claim, after deciding the principal one, would have been an abuse of discretion.[63]

In *Paliaga v. Luckenbach Steamship Co.*[64] it was held that the trial court had abused its discretion in dismissing the ancillary claim after the principal claim had been settled. There had been a trial lasting eight days where evidence involving the ancillary claim had been heard; two and a half years had elapsed since the filing of the ancillary claim and its dismissal; the possibility of a plea of *res judicata* existed on certain issues; and no other judge at the outset would be as familiar with the facts of the case and the issues involved. This is a good example of the proper discretionary application of ancillary jurisdiction. Considerations of judicial economy, convenience, and fairness to the litigants all played an important part in the decision reached.

---

60. 383 U.S. 715, at 727 (1966).
61. 209 F.2d 204 (4th Cir. 1954), *cert. denied*, 347 U.S. 966 (1954).
62. *Id.*, at 208.
63. *Id.*
64. 301 F.2d 403 (2d Cir. 1962).

VII. SEPARATION OF PRINCIPAL AND ANCILLARY CLAIMS

When the principal and ancillary claims have been completely separated for trial, ordinarily the ancillary claim should be dismissed. Authority for dismissal in such a situation can be found in *Gibbs* where it was stated that jurisdiction of the pendent (ancillary) claim should be refused when, due to the likelihood of jury confusion in treating divergent legal theories of relief, the state (ancillary) and federal (principal) claims are separated for trial pursuant to Rule 42(b).[65] While Rule 14 specifically allows for separation of issues for separate trials under Rule 42(b), it would seem that this would apply only when issues common to both the principal and ancillary claims are separated from other common issues and not when the two claims themselves are separated. For example, if both breach of contract and negligence are issues in the principal and third party claims, requiring proof of separate sets of facts to establish each claim, the trial judge might separate the issues for purposes of trial. Issues common to the primary and third party claim are therefore separated and the third party must not be dismissed. But if the primary claim is based solely on negligence and the third party claim solely on contract, each claim requiring proof of separate sets of facts, separation of the issues for trial would completely separate the principal claim from the third party claim. The third party claim should, therefore, be dismissed unless independent grounds of jurisdiction exist. Any other applicatin of Rule 42(b) in third party actions would frustrate the end that Rule 14 was intended to accomplish.[66] Dismissal of the ancillary claim in such cases would not be contradictory to the basic purpose of Rule 14 and ancillary jurisdiction which is to prevent inconsistent results by separate trials of the same set of facts.[67]

This was not the result which was reached in *McDonald v. Blue Jeans Corp.*[68] where the principal claim was separated from the

65. 383 U.S. at 727; 1A BARRON & HOLTZOFF § 422, at 645; *But see* WRIGHT § 76, at 333. Rule 42(b) of the Federal Rules of Civil Procedure provides:

> The court, in furtherance of convenience to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . third-party claim, or of any separate issue or of any number of . . . third-party claims, or issues, always preserving inviolate the right of trial by jury . . . .

66. 1A BARRON & HOLTZOFF § 422, at 644; *see* WRIGHT § 76, at 333.

67. *Id.*

68. 183 F. Supp. 149 (S.D.N.Y. 1960).

ancillary claim and settled during the separate trial. The court not only refused to grant the motion to dismiss the ancillary claim but allowed the third party plaintiff to assert a new claim against some of the ancillary third party defendants. All the parties in the separate ancillary trial were corporations and citizens of the same state. The court reasoned that in order to effectuate the purpose of Rule 14, such result was required so that complete relief may be given to all parties involved. This case seems clearly wrong. The other purposes of Rule 14 and ancillary jurisdiction are overlooked[69] when such a result occurs. When the main claim was separated from the ancillary one, two separate and distinct controversies existed, the latter of which was nothing more than a suit between litigants of the same state; no prejudice from inconsistent ajudications on the same set of facts could possibly have resulted in this case; and since separate trials were required, judicial economy would have been better served by dismissal of the third party claim. The court may have had the power to continue to ajudicate the ancillary claim, but to do so was certainly an abuse of its discretion.

VIII. DISMISSAL OF PRINCIPAL CLAIM ON JURISDICTIONAL GROUNDS

While discretionary adjudicatory power over the ancillary claim exists in the trial court after the principal claim has been dismissed on its merits, such is not the rule when the principal claim has been dismissed on jurisdictional grounds. Every case which dealt with the issue held that the federal court had no power to ajudicate the ancillary claim if it did not have power to ajudicate the primary claim.[70] No case has been found where such a rule was applied to third party actions. Since Rule 82 provides that the Federal Rules cannot extend federal jurisdiction, Rule 14, unable by its own provisions to confer jurisdiction over the third party claim, must be controlled by the rule of law set out in these other cases involving ancillary jurisdiction. One Rule 14 case, through dicta, did recognize that if the principal claim has been dismissed on jurisdictional grounds, dismissal of the ancillary claim would be required.[71]

---

69. *See* text accompanying notes 36-40 *supra*; 1A BARRON & HOLTZOFF § 422, at 644.

70. Kelleam v. Maryland Cas. Co., 312 U.S. 377 (1941); Mitchell v. Maurer, 293 U.S. 237 (1934); 3 J. MOORE, FEDERAL PRACTICE § 14.26, at 708 (2d ed. 1968).

71. Pennsylvania R.R. Co. v. Erie Ave. Warehouse Co., 302 F.2d 843, at 845 (3d Cir. 1962).

The problem is recognizing when the court has power as compared to discretion to ajudicate the ancillary claim. In *Gibbs* the Court said that the question of jurisdictional power will ordinarily be resolved on the pleadings.[72] In that case the Court was considering federal question jurisdiction, where the allegations in the pleadings are all that is examined to determine if a substantial federal question has been presented.[73] Therefore, a determination after the pleading stage that the principal claim does not present a substantial federal question does not divest the court of its power to ajudicate the ancillary claim, but is only a determination on the merits of the principal claim.

The rule is different in cases where jurisdiction of the principal claim is based on diversity of citizenship. When the jurisdictional amount is questioned, the plaintiff will be required to offer additional proofs to establish to a legal certainty that the jurisdictional amount is in controversy.[74] This could occur in the discovery stage when certain facts are discovered which indicate that the amount in controversy is less than the jurisdictional amount. The court loses jurisdiction of the principal claim when this legal certainty is not proved,[77] and jurisdiction of the ancillary claim is also lost. If diversity of citizenship is discovered not to have existed between the original parties when the action was commenced, the court will lack power to ajudicate the principal claim[76] regardless of what stage of the suit the discovery was made. The court will therefore lack power to ajudicate the ancillary claim. It is apparent that a federal court may lose its power to ajudicate at a later stage in a diversity case than it would in a federal question case.

When the court loses its jurisdiction over the principal claim due to mootness, a different rule applies, and the court in its discretion can ajudicate the ancillary claim.[77] The reason is that mootness is frequently a matter beyond the control of either party and may not occur until after substantial time and energy have been expended in litigating the principal claim.[78] It is significant that neither party has control over that which causes the court to lose jurisdiction.

72. 383 U.S. at 727 (1966).
73. *See* WRIGHT § 18.
74. 1 BARRON & HOLTZOFF § 24, at 106-107; WRIGHT § 33, at 111.
75. *Id.*
76. WRIGHT § 28.
77. Rosado v. Wyman, 90 S. Ct. 1207 (1970).
78. *Id.*, at 1214.

IX. SUMMARY

When a federal court has jurisdiction over a controversy between the original plaintiff and defendant, it also has jurisdiction over the third party claim even though no independent grounds of jurisdiction exist. Although the principal claim may be dismissed on its merits, the court still has power to adjudicate the third party claim. However, in its discretion it may dismiss the ancillary claim due to considerations of judicial economy, convenience, and fairness to parties. Ordinarily the ancillary claim should be dismissed when the principal claim has been settled before trial, when the ancillary and primary claims cannot be disposed of in one trial, and when the ancillary and primary claims have been completely separated for trial pursuant to Rule 42(b). The ancillary claim should not be dismissed when it has since become time-barred, extensive discovery proceedings have taken place which cannot be used in the state courts, the trial has already begun, and when the discretionary power to dismiss has not been brought to the court's attention until after the trial of the ancillary claim. No discretion exists to dispose of the ancillary claim if the principal claim is dismissed for lack of federal jurisdiction, and the ancillary claim must fall unless there is independent jurisdiction to support it.

JETER E. RHODES, JR.