1952

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JOINDER OF CLAIMS AND PARTIES UNDER MODERN PLEADING RULES

CHARLES ALAN WRIGHT*

“The King of Brogdignag gave it for his opinion that, ‘whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.’ In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before.”


In Minnesota, if the test of Chafee's set out above is apt, the title of “benefactor” should surely be applied to the Advisory Committee which drafted the new Rules of Civil Procedure, and to the Supreme Court which adopted them. These rules had two significant objectives which represent departures from prior Minnesota practice; one was to deemphasize the pleadings and look instead to the actual facts and issues as developed by discovery and the pre-trial conference; the second, no less important, was to settle as many matters as possible in one lawsuit.

I shall discuss below in detail the specifics of all of the devices for joinder which are provided by Rules 13 to 24. But I think it well to emphasize clearly from the outset what the philosophy of these rules is, for it is only by reference to their purpose and philosophy that the language of the rules can, in many cases, be meaningfully interpreted. The purpose, as has been indicated, is to make “one lawsuit grow where two grew before.” The philosophy is that joinder is not properly a pleading problem, but rather is one of trial convenience, which can be judged best only at the time of trial. Under our old practice, for example, if two persons were injured in an automobile accident by the negligence of some other driver, they were obliged to sue separately to get redress for their wounds. This result was reached because each of the injured persons was said to have a separate cause of action, and the statute required that causes of action joined “must affect all the parties to the action.” If a general rule must be laid down in advance, this

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1. 2 Pirsig's Dunnell on Minnesota Pleading §§ 1864, 1754 (3d ed. 1944) (cited hereafter as Pirsig's Dunnell). There was discretionary authority to consolidate the trials of the separate actions. See Chellico v. Martire, 227 Minn. 74, 34 N. W. 2d 155 (1948).

is probably as sound as any which could be devised, for considered in the abstract there is a natural reluctance to make a person a party to a suit if much of the litigation is going to be on issues in which he has no interest. But when one comes down from the abstract to consider specific cases, this conclusion is not nearly so inevitable as it previously seemed. In the usual collision case the principal issue, that of negligence, will be precisely the same for each of the injured persons who wish to join as plaintiffs, and every instinct toward a speedy and economical disposition of the claims arising from the accident will dictate that the injured persons be allowed to join in one action.

Suppose, then, that the statute were amended to allow joinder of parties plaintiff suing on separate causes of action. The case may then arise in which the defendant has a defense of contributory negligence against the plaintiff-driver but fears that the jury will be prejudiced against him by its sympathy for the plaintiff-passenger who suffered hideous injuries and against whom that defense is not available. Should he be required to stand trial against both of these plaintiffs at one time?

The genius of the new rules is their recognition that no rule of pleading, which necessarily must turn on identity of causes of action and similar a priori concepts, can offer a satisfying answer to all the different kinds of fact situations which may arise. The only valid way to handle the problem is to say that it is desirable to include as many claims and parties as there are in one suit, except where this may make the suit too many-sided and complicated for the jury to unravel, or where this free joinder may cause prejudice to some party or claim. And no legislature can say what the optimum size of a lawsuit is under each particular constellation of allegations in the pleadings. The new rules, therefore, allow, for practical purposes, joinder of any claim or any party, and then leave it to the trial judge to order separate trials for particular claims or issues “in furtherance of convenience or to avoid prejudice.”

With this background of free joinder at the pleading stage and wide discretion in the judge at the trial stage, it is now possible to examine the specific provisions which the new rules make, first for joinder of claims, counterclaims, and crossclaims, then joinder of parties and the special devices of party joinder, impleader, interpleader, class actions, and intervention.

JOINDER OF CLAIMS

The modern solution to the problem of joinder of claims is simplicity itself; under Rule 18.01 a party “may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party provided they do not require separate places of trial.” This supersedes the old statute, which set up six specific classes of cases, and allowed joinder only if all the causes joined fell into one of these six classes, or if they arose out of “the same transaction or transactions connected with the same subject of action.”

Criticism of the old statute as “one of the least satisfactory provisions of the Field Code” was extremely well taken, and this even though the construction Minnesota put upon it was notably more liberal than that of many states. The six specified classes were entirely arbitrary, and little used. And while the “same transaction” clause gave some relief from the rigidity of the classes, it suffered from its own vice of being so vague as to defy definition. Practically all the Supreme Court could ever say was that a particular case did or did not fall within the broad statutory language, and litigants were left at their peril. Thus where plaintiff claimed that defendant had violated an agreement as to division of the use of a mill the parties owned in common, and claimed also that defendant had diverted water from the stream which ran the mill, the court held that two causes of action had been improperly joined. Since one claim was on a contract, while the second sounded in tort, they did not fall into any one of the classes, nor did they arise from the “same transaction,” although the court failed to explain the grounds for its intuition to this effect. Surely it is senseless to require two law suits to decide the disputes between the parties about the common mill, and under Rule 18.01 such joinder would present no difficulty. In another old case, typical of the restrictiveness of the former statute, the court struck down for misjoinder a complaint which claimed damages for the withholding of one parcel of land and which also sought to recover possession of another parcel, with damages for the withholding thereof. Again the decision is neces-

5. 2 Pirsig's Dunnell §1762.
6. Courts in other states have made famous attempts at definition, but the result was a definition as vague and as useless for practical purposes as the original terms. See Stone v. Case, 34 Okl. 5, 13-22, 124 Pac. 960, 963-967 (1912); McArthur v. Moffet, 143 Wis. 564, 128 N.W. 445 (1910).
7. Gertler v. Linscott, 26 Minn. 82 (1879).
8. Holmes v. Williams, 16 Minn. 164 (1870).
JOINDER OF CLAIMS AND PARTIES

sarily devoid of any explanation why such joinder is improper. Again the joinder would be automatic under the new rules.

The weakness of the old Code statute is best illustrated by a famous New York case which seems almost a *reductio ad absurdum*. Defendant walked up to plaintiff, called him a slanderous name, and hit him. The court held that plaintiff must bring two suits, one for slander and one for assault. The claims do not fall into the same class, and they could not be joined as arising out of the “same transaction” since “assault and slander may arise at or about the same time, but in the very nature of things are separate and distinct.” Under the new rules sound and efficient judicial administration need not be hampered by metaphysical inquiries as to “the very nature of things.”

The old law required that causes of action joined had to be separately stated; the new rules require this only where “a separation facilitates the clear presentation of the matters set forth.” Of considerably more practical importance is the specific provision of the rules that a party may join inconsistent claims. The vice of the requirement of consistency of causes joined under the Code was that, even if it were liberally applied, it could mean that a party uncertain as to his legal rights would have to bring two or more actions to vindicate them, while if the requirement were strictly applied, it became an application of the doctrine of “election of remedies” in all its harshness. This is beautifully illustrated by a horrible Minnesota case, in which plaintiff was uncertain whether defendant was his tenant, or whether they had a tenancy in common. He joined counts based on both theories, and the trial court,

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10. Minn. R.C.P. 10.02. For a perceptive analysis of when such a separate statement may be necessary, see 2 Moore’s Federal Practice §10.03 (2d ed. 1948).

11. Minn. R.C.P. 8.05(2). This provision is made explicit because of some tendency to urge that the requirement of consistency be read by the courts back into codes which were merely silent on the question. See Carr, *Some Aspects of Joinder of Causes*, 5 Ford. L. Rev. 452, 456 (1936); 37 Col. L. Rev. 462, 471 (1937); 38 Col. L. Rev. 292, 316, 321 (1938); 9 Brooklyn L. Rev. 223 (1939).

12. Minn. Stat. §544.27 (1949); Vaule v. Steenerson, 63 Minn. 110, 65 N.W. 257 (1895).

13. See Clark, *Cases on Modern Pleading* 684-686 (1952). Having assisted Judge Clark in the editing of this collection of materials, I have felt free in many places, as here, to avail myself of its analysis and even, occasionally, its specific language.
finding them inconsistent, required him to elect on which theory he would go to trial. He chose the theory based on tenancy in common, and lost, but he found no sympathy in the Supreme Court. That body pontificated: "If the facts turned out to be of such a character that the plaintiff could have recovered as Lodovic's landlord, . . . it was a misfortune to have elected to proceed upon another basis, but a misfortune of which the plaintiff can hardly complain, since the election was his own." 14 Compare with this horror the decision, quite typical of those under modern rules, that plaintiff may join in his complaint allegations that defendant was liable (a) as a shareholder in a trust, (b) as a partner, and (c) as trustee, leaving it to the court to decide on which theory defendant should be held. 15

One further matter needs to be discussed, because of a misconception set forth by the Advisory Committee in their notes to the new rules. After correctly remarking that while joinder of claims is made freely available under Rule 18.01, it is not made compulsory, they go on to say:

"In view of the fact that there is authority for the proposition that a judgment is res judicata not only as to what was actually litigated, but also as to matters which might have been litigated, including separate causes of action which might have been joined, an attorney should certainly not hesitate to take advantage of the apparent permissive feature of Rule 18.01. King v. C., M. & St. P. R. R., 80 Minn. 83, 82 N. W. 1113." 16

Much can be said for the notion that joinder of related claims should be made compulsory. 17 And, as I shall show in a mo-

14. Hause v. Hause, 29 Minn. 252, 253, 13 N. W. 43 (1882). Compare 2 Pirsig's Dunell §1763 n. 97: "This is more reminiscent of the reasoning of mediaeval courts than an example to be followed in the present day administration of justice."


16. Advisory Comm. Note 6 to Rule 18.01. (The Advisory Committee notes are most conveniently available in the 1950 publication by the West Publishing Co. of the Tentative Draft of the Rules.) The same statement is made by the Revisor of Statutes at Minnesota Rules of Civil Procedure for the District Courts 159-160 (1952).

17. Clark, Cases on Modern Pleading 730 (1952): "In the view of distinguished commentators the federal system itself does not state the ultimate word as to joinder, but that for efficient dispatch of litigation there must and should be required joinder beyond any now stated. Thus see Blume, Required Joinder of Claims, 45 Mich. L. Rev. 797, 812, 1947: 'Judges have been appalled by the thought of trying in one action all claims which might arise from a major disaster. The writer is appalled by the thought of any other course.' See also Blume, The Scope of A Civil Action, 42 Mich. L. Rev. 257, 1943; Schopflocher, What Is A Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 Ore. L. Rev. 319, 1942; 37 Col. L. Rev. 462, 1937."
ment, caution may dictate that the lawyer join what seem to him to be separate claims, for fear of a later decision that he has split what was really only one claim. But however laudable the goals sought to be served by the Advisory Committee in the quoted note, their statement that a judgment is *res judicata* as to separate causes of action which might have been joined, and that therefore Rule 18.01 is only "apparently permissive," sets out a notion which has never been the law, here or elsewhere, which is not the law under any rules, new or old, and which is flatly contradicted by the case cited. The important and influential *King* case holds that where plaintiff has suffered injuries to both his person and his property he has only one cause of action, which he cannot split and litigate in two separate suits. The court decided that plaintiff's prior action for his personal injuries barred a later suit for property damage, not because the latter was a separate cause of action which might have been joined, but because both injuries were part of but one cause of action.

Now the rule against splitting a single cause of action, set out in the *King* case, did mean that the lawyer who refrained from joining what he thought were different causes, and what a court might possibly hold to be parts of a single cause, did so at his peril. And the difficulties in deciding what a cause of action is made this peril no trivial one. This peril is, if anything, increased under the new rules where the concept of "cause of action" is junked, and the "claim for relief" substituted. And thus it would seem to be good advice to the practicing lawyer to urge him to join all the demands which his client may have against defendant, lest they be determined to have been part of a single claim for relief. But if they are, indeed, separate claims for relief, the fact that they can be joined does not mean that they must be joined.

Rule 18.02 may be touched on briefly; it authorizes the joinder of claims although heretofore one of them could have been made only after the other had been prosecuted to a conclusion. The chief usefulness of this is to codify the better previous practice of allowing joinder of a claim on a debt with a claim against the debtor's transferee to set aside a fraudulent conveyance." Rule 18.02 might be construed

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18. The scholarly and judicial difficulties are carefully examined at Clark on Code Pleading 127-148 (2d ed. 1947).
19. Defined *id.* at 137-139.
20. The better prior practice was exemplified by Benton v. Collins, 118 N. C. 196, 24 S. E. 122 (1896), and had been adopted in Minnesota as a part of the Uniform Fraudulent Conveyances Act, Minn. Stat. §§513.28, 513.29 (1949), discussed at length in Lind v. O. N. Johnson Co., 204 Minn.
as allowing joinder of a claim against a tortfeasor with a claim against his liability insurer, but the decisions so far have refused to make this construction.\footnote{21}

It seems something of a pity to leave the subject of joinder of claims, about which so much hoary learning has accumulated, after a discussion in such short compass. But in truth there is nothing more which could be said. Of all the provisions of the Federal Rules and their state counterparts dealing with joinder, this rule on joinder of claims has operated most smoothly and satisfactorily. Indeed even this brief discussion might have been omitted, for it was all summed up in a nutshell by the distinguished court which said: "Where the claims are against the same defendants, certainly, there can be no misjoinder of claims in a civil action."\footnote{22}

**Joinder of Counterclaims**

The provisions dealing with joinder of counterclaims, too, should have been quite easy to understand and apply in Minnesota, as they have been in the Federal system and in the other states which have adopted modern pleading. Regrettably the Minnesota Rules here have made a departure from the Federal model which has introduced considerable confusion into the subject, and which can only be resolved by a Supreme Court decision or an amendment of the rules.

Under the Code counterclaims could be pleaded in only two situations: where the original claim was on a contract, defendant could plead as a counterclaim a claim in his favor on another contract—this corresponded roughly to the common law right of "set-off"; and defendant in any action could plead as a counterclaim a cause of action "arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected

\footnotesize{\begin{itemize}
  \item 30, 282 N.W. 661 (1938). Practice under the new rule is discussed in Wynne v. Boone, 191 F. 2d 220 (D.C. Cir. 1951).
  \item 21. 3 Moore's Federal Practice §18.08, p. 1828 (2d ed. 1948). These decisions are, however, all from the Federal courts, where the brooding omnipresence of *Erie v. Tompkins* poses its special problems. It is quite possible that a state court would feel freer to hold that Rule 18.02 accelerates determination of the liability of the insurer, Proceedings of Cleveland Institute on Federal Rules 329 (A.B.A., 1938), just as the "may be liable" provision of Rule 14.01 allows defendant to implead his insurer. See pp. 614-621 below. Joinder of the insurer has worked without difficulty in those jurisdictions which have been bold enough to give it a try. See Note, *Permissive Joinder as a Substitute for Excluding Evidence That Defendant is Insured*, 59 Yale L. J. 1160 (1950).
\end{itemize}}
with the subject of the action”—the analogy here was to the common-law right of “recoupment.” All this is gone under Rule 13 which allows the defendant to plead as a counterclaim any claim whatsoever which he may have against the plaintiff.

But the new rule goes even further than this. Not only now you plead as a counterclaim any claim which you have, it says, but certain claims which defendants will have against plaintiffs must be pleaded as counterclaims, on pain of being barred from later asserting them in another suit. This then is the notorious “compulsory counterclaim,” which has caused, as we shall see in tedious detail, more confusion than any other provision of the Minnesota reform—it is merely a system to insure that when defendant’s claim against plaintiff is closely related to plaintiff’s claim against him, both claims will be decided and disposed of in one law suit.

There is nothing new about making certain counterclaims compulsory: California as long ago as 1872 required the assertion of counterclaims which arose out of the transaction pleaded in the complaint, and a number of other states followed its example. Other states took a middle course by providing that if the defendant did not plead a counterclaim when he could have, he was barred from recovering costs in a later action on the claim. In the Federal system compulsory counterclaims were provided for in 1912 in equitable actions, and were an important feature of the Federal Rules of Civil Procedure. The impetus of the Federal reform on state procedures carried the compulsory counterclaim with it to another large group of states, and it proved so successful that it was even adopted by a few states which did not adopt the Federal Rules generally.

This, then, is the background: the compulsory counterclaim has been tested in practice in 13 states, two territories, and all the Federal courts. If one can form a judgment from the decided cases, from the law review commentaries, and from the reactions of lawyers in these legal systems—and I am at a loss to know what other

23. Minn. Stat. §544.05 (1949).
27. Federal Equity Rule 30 (1912).
28. Alaska, Arizona, Colorado, Delaware, New Mexico, Puerto Rico, and Utah. Of the states which have adopted the Federal Rules only New Jersey has made no provision for compulsory counterclaims.
29. Florida, Iowa, Missouri, and Texas.
basis there can be for judgment—it has worked with complete smoothness and satisfaction in those systems no matter what kind of case was involved.

Of course even without a rule or a statute there is considerable pressure on the defendant to plead his claim as a counterclaim in those kinds of cases where the claims are closely related and where the compulsory counterclaim rule operates: if the issue is the same on both the plaintiff's claim and the defendant's claim, res judicata—or perhaps more accurately, "estoppel by verdict"—would bar a later action by the defendant.\(^{30}\) Further, while res judicata is so difficult, confusing, and serious as to be a trap for the unwary, it can only operate to the disadvantage of the defendant who prefers to play dog in the manger and save his claim for a later suit. In a collision case, for example, a judgment for the plaintiff establishes his lack of negligence and will bar a subsequent action for negligence by the defendant, but a judgment for the defendant does not establish plaintiff's negligence and defendant will still have to go to the trouble and expense of proving the same facts all over again in his later action.\(^{31}\)

It was, undoubtedly, with these persuasive arguments for the compulsory counterclaim in mind that the Minnesota Advisory Committee in its original draft of the new rules followed precisely the Federal model. Rules 13.01 and 13.02 in the Tentative Draft of 1950 were identical with Federal Rules 13(a) and 13(b) and provided, with limitations not here relevant, that if defendant's claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" it had to be pleaded as a compulsory counterclaim, while any claim "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim" was a permissive counterclaim. So far, so good.

By September, 1950, however, the Committee had taken a step backward. For they then changed their rules so that compulsory counterclaims were those arising out of the "contract or transaction" involved in plaintiff's claim, rather than the "transaction or occur-


rence" as before, and permissive counterclaims were those "not arising out of the contract, transaction, or occurrence" involved in plaintiff's claim. These nice distinctions among such generalities as "contract," "transaction," and "occurrence" were explained by the Committee on the basis of fears:

"...that compulsory counterclaims in personal injury and other tort actions may work a hardship in cases where, for instance, the defendant's injury is presently unknown or where he is not represented by an attorney who appears primarily for him..."

Now this change can be criticized from a number of angles: perhaps most obvious is that, as a matter of draftsmanship, it led to a patent absurdity. Reading the language used in the light of the Committee's explanation, they must have regarded "contract or transaction" as excluding torts, while "contract, transaction, or occurrence" included torts. But then, because 13.01 is phrased affirmatively, while 13.02 is phrased negatively, it amounted to this: if the claim arose from a contract (or transaction) it was compulsory, while permissive counterclaims were those not arising from either contracts or torts. Thus there was no authority given to use a tort claim even as a permissive counterclaim, a result which the Committee surely did not intend.

A much more important criticism runs to the merits of the change. Is it undesirable to make counterclaims compulsory in personal injury and other tort cases? Certainly as a matter of judicial administration it is extremely desirable to settle all the claims arising from one accident in a single suit, for there are more personal injury actions than any other kind in our courts. If the reform is not to be applied in this area, it becomes comparatively unimportant. Certainly, too, all experience elsewhere teaches that the compulsory counterclaim presents no difficulties in personal injury actions. And the specific problems adverted to by the Committee seem to be imaginary horribles. It is unrealistic to suppose that tort actions will be disposed of so quickly by our courts that the case will be over before defendant knows he has been hurt; Rule 13.05 explicitly authorizes defendant to set up his counterclaim by supplemental pleading if it matures only after he has filed

32. 7 Bench and Bar of Minnesota, Sept. 1950, p. 18.
his original answer. Rule 13.06 expands on this by allowing defendant, with leave of court, to amend his answer to set up a counterclaim omitted through "oversight, inadvertence, or excusable neglect." And the argument that the attorney representing defendant is really interested in protecting the insurance company which pays his salary hardly carries any weight. The lawyer in this position who fails to advise defendant of the necessity of setting up his own claim would surely be in trouble with the Canons of Legal Ethics; this differs only in degree, however, from his responsibility to advise defendant, under the existing law, of the perils of res judicata.

Procedural reform, like politics, is the art of the possible, and in this concession on compulsory counterclaims was necessary to win support for the rest of the rules from members of the bar who customarily act for insured defendants, then the Committee was doubtless well advised to make the concession. On principle, however, it seems impossible to justify.

We cannot end this melancholy history so soon. Apparently the Committee realized the difficulties which its choice of language would cause, for less than four weeks before the rules were to be effective the Court ex parte amended 13.01 and 13.02 again. The confusing word "contract" which the Committee had resurrected

34. In the delightful case of Safeway Trails, Inc. v. Allentown & Reading Transit Co., 185 F. 2d 918 (4th Cir. 1950), defendant carrier was allowed to amend its answer to plead a counterclaim which had been omitted only because its counsel had never read the Federal Rules in the 12 years they had then been in effect.

35. Cf. Opinion 231, A. B. A. Comm. on Prof. Ethics and Grievances (1941). Quaere: wouldn't the lawyer also be liable to defendant for malpractice?

36. This becomes a dangerous principle if carried too far. In procedural reform half a loaf may confuse the Bar, and may be inherently unsatisfactory, and yet it will exhaust the forces which are working for thoroughgoing change; in this way it is probably much worse than none. See Clark, Dissatisfaction with Piecemeal Reform, 24 J. Am. Jud. Soc'y 121 (1940); Clark, The Texas and the Federal Rules of Civil Procedure, 20 Tex. L. Rev. 4 (1941). But of course all this is relative, and I do not feel that the concessions which the Minnesota reformers were forced to make have impaired the essential integrity of the new rules. Indeed, much credit is due to Chairman Youngquist and his able colleagues on the Advisory Committee for having made so few concessions and having gotten the rules adopted over opposition that I had feared might make up in vociferousness what it lacked in reasoned arguments.

37. 233 Minn. vii (Dec. 6, 1951). Apparently even the Revisor of Statutes has been baffled by this latest change, for in his recent official publication, Minnesota Rules of Civil Procedure for the District Courts 122-125 (1952), he states correctly the text of Rule 13.01 as it now stands, but uses indiscriminately Notes addressed to each of the forms which the language of the rule has taken, and he annotates the rule with a selection of Federal cases, without indicating that they turn on different language.
from the former Code statute was buried once more, and everything was made to turn on the concept "transaction." If the claim arises out of the "transaction that is the subject matter of the opposing party's claim" it is a compulsory counterclaim; if it does not arise from the "transaction" it is a permissive counterclaim. Our inquiry now must be, what is the meaning of "transaction." The literature and the case law on this word are voluminous. The United States Supreme Court has called it "a word of flexible meaning." Certainly cases can be found which say that "transaction" refers only to business negotiations, and therefore does not include torts within its orbit. The trouble is that even more authorities can be found which are precisely contrary, and, most important for our purpose, Minnesota falls in this latter class. Our court declared itself unequivocally in a leading case in which it was called on to construe the word where it appeared in our old statute for joinder of causes:

"That causes of action in tort are included within the meaning of this statute is quite obvious. The word 'transaction,' as there used, embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrences be in the nature of tort or otherwise."

This does not mean that the Court will necessarily construe 13.01 as it now stands as including tort claims. Indeed this whole history has been so tenuous that litigation over the matter seems sure. But until the Court has ruled otherwise, the lawyer who ignores this clear expression by our own Court as to the meaning of the key term, and who thus holds back a claim which defendant has arising from an accident, is playing dangerously fast and loose with his client's interests.

The other questions which the new counterclaim provisions present are, by comparison, quite simple. A counterclaim is permissive only, rather than compulsory, if it did not exist at the time of serv-

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38. It is cited and discussed at Clark on Code Pleading 653-660 (2d ed. 1947). And see 36 Yale L. J. 148 (1926); 21 Col. L. Rev. 196 (1921).
41. "The term 'transaction' is not legal and technical; it is common and colloquial; it is therefore to be construed according to the context and to approved usage; ... as so construed it is broader than 'contract' and broader than 'tort', although it may include either or both. ..." Pomeroy, Code Remedies §650 *774 (5th ed. 1929).
42. Minn. Stat. §544.27 (1949).
ing of defendant's answer, if it requires for its adjudication the presence of third parties over which the court cannot get jurisdiction, or if, at the commencement of the suit, it was the subject of another pending action. Just as under the old law, additional parties can be brought in if they are necessary to grant complete relief on a counterclaim, and thus defendant can counterclaim against plaintiff and a third party. The requirement under the Code that the counterclaim be against all the plaintiffs and in favor of all the defendants is dropped. Where the counterclaim comes from the same transaction as does plaintiff's claim—and thus is a compulsory counterclaim—defendant may assert it to defeat plaintiff's claim even though otherwise it would be barred by the statute of limitations. A counterclaim is allowed in the reply; while an argument can be made that this is limited to compulsory counterclaims, the question seems academic, for the better practice in any event is for plaintiff to amend his complaint to join the new claim.

Can a counterclaim be used by or against a party in a different capacity from that in which he was sued? Under the old law, for example, in an action brought by a partnership, defendant could not counterclaim against one of the partners individually. Such a counterclaim will, however, be allowed under the new rules. And where an insurance company brings a tort action as subrogee to recover for damage caused its insured, and for which the insured has collected from the company, a counterclaim may be asserted against the insurer for loss allegedly caused defendant by the insured. Where a true representative capacity is involved, there is support for a different result: it has been held that in a suit by trust-

44. Minn. R. C. P. 13.01. These limitations are discussed at 3 Moore's Federal Practice §13.14 (2d ed. 1948).
45. Minn. R. C. P. 13.08; 3 Moore's Federal Practice §13.39 (2d ed. 1948). The old law was Minn. Stat. §540.16 (1949) see 2 Pirsig's Dunnell §1776.
47. 3 Moore's Federal Practice §13.11 (2d ed. 1948); Comm., Effect of Statute of Limitations on Right to Assert Counterclaim, 3 Fed. Rules Serv. 688 (1940). The old Minnesota law was to the same effect. 2 Pirsig's Dunnell §1809.
48. See Minn. R. C. P. 18.01. Under the Code a counterclaim in the reply could only be used defensively. 2 Pirsig's Dunnell §1588.
49. 3 Moore's Federal Practice §13.08 (2d ed. 1948); Advisory Comm. Note 4 to Rule 13.02.
50. Maurin v. Lyon, 69 Minn. 257, 72 N.W. 72 (1897).
tees a counterclaim will not lie against them individually, and that in a suit against the administrator of an estate he need not assert a claim, otherwise compulsory, for wrongful death, since he is sued as administrator for the benefit of creditors and distributees, while the wrongful death claim is for the benefit of the persons designated by the statute. Nonetheless, as at least one defendant has found to his sorrow, the rule is not clear even in this area. This defendant was sued for having caused the death of a truckdriver, the action being brought by the driver’s employer, as assignee of the widow’s death claim. Subsequently defendant sought to sue the employer for damages caused defendant by the negligence of the deceased driver acting in the scope of the employer’s business. The court held, under the Florida compulsory counterclaim statute, that this second action was barred, since the claim should have been asserted as a counterclaim in the first suit. The court rests its decision on the ground that the different capacities of the employer on the claim and on the counterclaim would have caused little difficulty, while allowing two actions is contrary to the legislative purpose to dispose of all claims from a single accident in one suit. I think this is an example of the thesis I advanced early in this article, that the philosophy of the joinder rules often provides answers where the rules themselves do not. The philosophy would dictate here, as elsewhere, that related claims be joined, and that the court order separate trials if confusion will otherwise result. I think this philosophy offers a sure guide to the otherwise difficult problem of varying capacities.

**JOINDER OF CROSS-CLAIMS**

Under the Code Minnesota courts were authorized to determine the ultimate rights of the parties on each side as between themselves “when justice so requires,” and in practice this was interpreted as meaning that the court should determine the claims among the parties on the same side where these claims were “arising out of, or having reference to, the subject of the original action.” The new rule on cross-claims, Rule 13.07, has formalized this procedure, and has made the assertion of a cross-claim a right of the

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56. Minn. Stat. §548.02 (1949).
party, rather than leaving it in the discretion of the court, but the crucial test remains much the same as before. Cross-claims may now be raised when they arise out of the "transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein" or if the claim is one "relating to any property that is the subject matter of the original claim." This last clause is something rather new: it will allow, for example, a second mortgagee who is named as a party defendant in a foreclosure action to cross-claim against the mortgagor to get a personal judgment for his debt, even though this debt does not arise from the same transaction as the first mortgage.65 But other than this provision there is little about this rule which should be new to a Minnesota lawyer.

Where a cross-claim is made it is subject to the same rules as any other pleading. Since the defendant on the cross-claim now becomes an opposing party to the cross-claimant, the usual rules on counterclaims will apply: the defendant must counterclaim against the cross-claimant on any claim arising out of the transaction which is the subject matter of the cross-claim, and he may plead as a counterclaim any other claim which he has.

The cross-claim, like any other pleading, must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Consider the various possibilities which may arise in a tort action against two defendants: if the parties are jointly liable, one of them may cross-claim against the other for contribution66—the rule specifically provides that a cross-claim will lie if the party against whom it is asserted "is or may be liable to the cross-claimant for all or part" of the original plaintiff's claim. If one of the parties is only secondarily liable, he may cross-claim against the primarily liable defendant for indemnity against any amount he may have to pay—the demand for indemnification is a "claim for relief."67 But finally there is the situation, quite frequently encountered now that joinder in the alternative is permissible, where one defendant wishes to assert that he is blameless and that his co-defendant is solely liable. In this circumstance a cross-claim will not be permissible, since it asks for no relief from the party against whom it is asserted.68 Facts which show that the would-be cross-

59. Minn. R. C. P. 8.01.
The availability of the cross-claim to litigate claims against a fellow defendant puts to rest procedural questions which had been raised by two decisions of the Minnesota Supreme Court emphasizing the rule that the judgments for or against each of the defendants in their contest with the original plaintiff may be binding upon them in a subsequent suit among themselves for contribution or indemnity. A defendant may now guard against the possibility that his fellow defendant will win in the original action, and thus be immune from a later suit for contribution or indemnity, because of failure of the plaintiff to prosecute his claim with sufficient vigor, by cross-claiming and presenting his own evidence to show that the other defendant is primarily liable or that there is common liability. Indeed while Rule 13.07 is permissive in terms the possibility that a verdict for the co-defendant will become the law of the case, or show an absence of common liability, will probably be enough to compel a defendant, for his own protection, to file a cross-claim where he has any notion of later seeking contribution or indemnity.

63. The decisions, American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 5 N. W. 2d 397 (1942), and Fidelity & Casualty Co. v. Minneapolis Brewing Co., 214 Minn. 436, 8 N. W. 2d 471 (1943), were sharply criticized when they were handed down. See Note, 27 Minn. L. Rev. 519 (1943); 2 Pirsig's Dunnell §1979. The criticism was partly because the decisions seemed to rest on a notion of res judicata more broad than that applied elsewhere, and partly because they held that parties were bound on issues which, because of the absence of appropriate procedural machinery, they could not possibly have litigated among themselves in the original suit. Rule 13.07 meets the second objection by providing the procedural machinery for the parties to litigate their claims for contribution or indemnity in the same action in which they are being sued, and our Court, in an extremely recent decision, Bunge v. Yager, 52 N. W. 2d 466 (Minn. Sup. Ct. March 21, 1952), has met the first objection by explaining that the cases in question didn’t turn on res judicata after all. The court explains the Vigen case, where a favorable verdict for the co-defendant in the original action was held to bar a later suit for contribution, by saying that the first action establishes the co-defendant’s non-liability to plaintiff, and thus the common liability necessary for contribution is gone. The charge of the trial court in the Fidelity case, to the effect that both defendants were involved in active negligence and thus joint tortfeasors, is now said to have established the “law of the case,” and on this basis, rather than res judicata, it bars a later contention by one of the parties that he was only secondarily liable and therefore should have indemnity. In its latest pronouncement the court also tells us that it “need not now determine” whether the earlier decisions “are sound.” While it thus leaves open possibilities of further confusion in the contribution and indemnity situations, it has at least made it clear that res judicata exercises no effect between co-parties in other situations.

64. Note, 27 Minn. L. Rev. 519 (1943), argues that even if there were procedural machinery for litigating claims between co-parties, the result in the Vigen and Fidelity cases, discussed note 63 supra, cannot be correct, because “cross-claims are uniformly optional and not compulsory.” Id. at
The phrase "is or may be liable" in Rule 13.07 has other important consequences. As will be discussed more fully in connection with the impleader rule, it allows an acceleration of the determination of liability. Suppose that an insurance company brings suit for a declaratory judgment of non-liability against its insured and a person whom he has injured. The injured person may cross-claim against the plaintiff insurer and the defendant insured to recover for his injuries, so long as the injury itself and the insurer's claim of non-liability arise from the same "transaction or occurrence." The "no action" clause in the insurance policy is no bar to the cross-claim: in part because the "may be liable" clause of Rule 13.07 is intended to accelerate the determination of liability; in part because a court will not "administer justice piecemeal, by extending its facilities to one party to an action and denying them to another." Not even great insurance companies can eat their cake and have it too.

Although Rule 13.07 allows a cross-claim only against "a co-party," additional parties may be ordered in if necessary to give complete relief on the cross-claim. And the former right of the court in its discretion not to allow a cross-claim where the litigation between the co-defendants might delay, and thereby prejudice, the original plaintiff, is substantially preserved by the authority to act.

528. I suggest that this begs the question. The substantive doctrines of law of the case, and of common liability as a prerequisite for contribution, do not turn on the form of procedural rules. I would favor making cross-claims compulsory, in order to prevent multiplicity of suits in the situations where the substantive doctrines do not provide the needed measure of compulsion, but the failure of procedural draftsmen to go this far cannot be used as an argument for encouraging multiplicity where hitherto it would have been barred by the substantive law.

65. See pp. 614-621 above.

66. Thus if the company claims it is not liable because its insured was acting outside the scope of the policy when he inflicted the injury, the cross-claim clearly comes from the same "transaction or occurrence." But if the company's action is to cancel the policy because of fraud in its procurement, the injury comes from a separate transaction, and the cross-claim will not lie. Hoosier Casualty Co. of Indianapolis v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).

67. 3 Moore's Federal Practice §§13.34, 14.08 (2d ed. 1948).

68. United States Fidelity & Guaranty Co. v. Janich, 3 F. R. D. 16, 18 (S.D. Calif. 1943). This dicta in the Hoosier Casualty case, note 66 supra, is not inconsistent with this. For there the Federal court was obliged to apply Iowa law, and the Iowa Rule which otherwise corresponds to Minn. R. C. P. 18.02—see p. 585 above—has the added provision: "But there shall be no joinder of an action against an indemnitor or insurer with one against the indemnified party, unless a statute so provides."

69. Minn. R. C. P. 13.08.

order separate trials and give separate judgments “in furtherance of convenience or to avoid prejudice.”

JOINDER OF CLAIMS AND PARTIES

Make no mistake about it, joinder of parties can be tough. Although the new rules offer solutions more effective and simple than anything which had gone before, even they leave some difficult problems unsolved. It’s not surprising that this should be the case: where joinder of claims is involved you have, usually, only one party on each side, and there are no good arguments against bringing in at that time as many matters as they have in dispute. But when you turn to joinder of parties two new factors enter in. On the one hand, it is undesirable to bring a party into a lawsuit in which he has absolutely no interest; this demands that there be some limit on permissive joinder. On the other hand, it is undesirable to decide matters which will affect a person unless he is a party to the lawsuit; this demands that in some situations joinder be made compulsory.

Compulsory Joinder

To understand what parties must be joined we must examine the distinctions between “indispensable,” “necessary,” and “proper” parties. These distinctions are well known to the Minnesota Court, although, as has usually been the case in state courts, there has been some confusion in terminology. It will be most useful for our purpose to define these labels in terms of the results which follow when they are applied; the labels have meaning only in terms of the procedural results to which they give rise, and to seek to define them without reference to these results would lead to a barren conceptualism. “Indispensable parties” are those who must be joined or the action will be dismissed. “Necessary parties” are those who must be joined if they are within the jurisdiction of the court; if they are without the jurisdiction of the court, the action can proceed despite their nonjoinder. “Proper parties” are those who may permissibly be joined, but who need not be joined even though they are within the jurisdiction of the court.

We can now proceed to decide which label to apply to a particular party. If a person has “a joint interest which is not also a several interest” he is either an indispensable or a necessary

71. Minn. R. C. P. 42.02, 13.09.
72. See 2 Pirsig’s Dunnell §1883; 29 Calif. L. Rev. 731 (1941).
73. Minn. R. C. P. 19.02.
74. Minn. R. C. P. 19.01.
party; if he is united with the existing parties only by a several interest, or by common question of law or of fact, he is a proper party. Or to put it in another, and less technical way, "persons having an interest in the controversy, and who ought to be made parties, in order that the court may . . . decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights in it" are either indispensable or necessary parties. Some specific examples may make this clearer: joint obligors are proper parties, for a statute provides that their liability is both joint and several.76 Similarly joint tortfeasors are merely proper parties, since their liability is several.77 By way of comparison, in an action to reform a contract or to cancel a deed all the parties to the contract or deed are necessary or indispensable, since they are jointly interested in the outcome of the litigation and since a decree in the suit will affect them. The distinction, then, between proper parties on the one hand and necessary or indispensable parties on the other is not too difficult: is the party so closely connected with the matters in question that, for his own protection, we should require him to be joined, if possible?

The distinction between necessary and indispensable parties is quite another matter. And necessarily so, for here neither the nature of the interest nor the niceties of common law history furnish the guide. The United States Supreme Court has defined indispensable parties this way:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and in good conscience."80

"Good conscience" is hardly a term of art, and while the quoted definition is useful for explaining the decision in a particular case it is of little help in reaching the decision. And the criteria offered in a later Federal case, though they give an illusion of greater certainty, are probably in practice little more helpful:

"(1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render

77. Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764 (1920); Mason v. Dullaghan, 82 Fed. 169 (7th Cir. 1897); Prosser on Torts 1096-1102 (1941).
80. Shields v. Barrow, 17 How. 130, 139 (1854).
justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

“If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party’s interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.”

Still one returns to such concepts as “justice,” “equity,” and “good conscience.” And this is inevitable. For what is really involved here is the desire of the courts, on the one hand, to avoid a multiplicity of suits and to give parties their day in court before making decisions that affect their interest, while on the other hand is the courts’ desire to make some judgment, if it is at all possible, rather than leaving the parties without a remedy because, in some Utopia where all the parties could be ordered in, a better decision might be reached. All one can do in a specific case is balance these conflicting desires. Perhaps one example will give a suggestion as to how this balance is made. The beneficiaries of a trust are necessary, but not indispensable, in an action to remove the trustee for misconduct, as are the heirs under a will in an action to construe the will, or in an action to impose a constructive trust on the various legacies. On the other hand, in a suit by a remainderman under a trust to establish his interest in stock dividends the life tenant is an indispensable party, and all the beneficiaries under a will are indispensable parties in an action to set aside the will.

Consideration of the varying results in these five somewhat similar cases will give some insight into how the courts balance the interests in determining whether a party is necessary or indispensable.

82. “There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party.” Niles-Bement-Pond Co. v. Iron Moulders’ Union, 254 U. S. 77, 80 (1920). And see 2 Pirsig’s Dunnell §1885: “... the questions raised by joinder of parties must be determined with respect to the facts of the individual case.”
83. Wesson v. Crain, 165 F. 2d 6 (8th Cir. 1948).
85. Bank of California Nat. Ass’n v. Superior Court, 16 Cal. 2d 516, 106 P. 2d 879 (1940), an unusually scholarly and helpful opinion.
87. Young v. Meyers, 124 Ohio St. 448, 179 N. E. 358 (1931).
88. Beyond such a general insight the only source for more specific
If a party is necessary only, and he is not within reach of the court, the plaintiff must set forth the missing party's name in the complaint, and explain why he hasn't been joined.\textsuperscript{90} If a party who should join as plaintiff refuses to do so, and service of process can be had on him, he must be joined as a defendant.\textsuperscript{90} If a necessary or indispensable party has not been joined the existing parties may point out the defect by motion or in the responsive pleading\textsuperscript{91} and the court shall order them summoned into the action.\textsuperscript{92} If the missing party is not within reach of the court's process, and he is indispensable, the action must be dismissed,\textsuperscript{93} whereas in this situation if he is only a necessary party, the court has discretion to proceed without him.\textsuperscript{94} Failure to join a necessary party is waived unless one of the existing parties points out the defect,\textsuperscript{95} whereas lack of an indispensable party runs to the very power of the court to decide the case; it is, therefore, not waived\textsuperscript{96} and may even be raised by an appellate court on its own motion if it has not been previously considered.\textsuperscript{97}

\textit{Permissive Joinder}

There are few developments in all of the law, and certainly none in the limited field of procedural reform, as instructive and as grotesque as the struggle to achieve sensible and workable provisions for permissive joinder of parties. In New York, a particularly horrible example, it took four successive statutory reforms to reach a goal which had been clear 100 years before when David Dudley Field and his associates first went to work. All this effort was required, furthermore, despite experience in England which pointed out the exact pitfalls to be avoided.

I do not feel justified in taking the space to describe this comedy of errors in detail\textsuperscript{98} because the mistakes which other states have answers is the voluminous and perceptive analysis of many kinds of cases at 3 Moore's Federal Practice §§19.07-19.14, 19.18 (2d ed. 1948). Note, \textit{Indispensable Parties in the Federal Courts}, 65 Harv. L. Rev. 1050 (1952).

89. Minn. R. C. P. 19.03.
90. Minn. R. C. P. 19.01.
91. Minn. R. C. P. 12.02.
92. Minn. R. C. P. 19.02.
93. 3 Moore's Federal Practice §19.05(2) (2d ed. 1948).
94. Minn. R. C. P. 19.02.
95. Minn. R. C. P. 12.08; Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc., 140 F. 2d 268 (2d Cir. 1944).
96. Minn. R. C. P. 12.08. See 3 Moore's Federal Practice §§19.05(2), 12.23 (2d ed. 1948).
98. The sordid story is told in Clark and Wright, \textit{The Judicial Council}
made have been avoided in Minnesota. They were avoided by an enviably simple technique; Minnesota did not accept the Code provisions for permissive joinder or parties, and made no attempt to improve on the restrictive rules of the common law until 1952. Then the Federal Rule on the subject, which had been carefully drafted to avoid the mistakes made elsewhere, and which had shown in 13 years of use that it was successful in this attempt, was incorporated into the state practice as Rule 20.01.

The distinctions made in the preceding section of this article between "proper" parties and "necessary" and "indispensable" parties are still relevant. When we come to permissive joinder we are interested only in "proper" parties; thus, as suggested before, joinder is permissive only as to those whose interests are joint and several, or several only. But this is not the limit of the class of "proper" parties, for the rule provides that persons may be joined even though they have no common interests, in the technical sense, provided that there is asserted either for or against them any right to relief "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of fact or law common to all of them will arise in the action." Thus joinder of the two persons injured in the same collision, discussed at the beginning of this article, is clearly proper, although they have no common interest. Their respective rights to relief from the same transaction or occurrence—the collision—and there is a question of law or fact common to both of them, namely "Was defendant negligent?" And the absurd Minnesota rule that tortfeasors could be joined if their acts caused a single injury, but not where they had acted independently and each had caused some damage to which the other did not contribute, is gone. Under this rule a plaintiff, whose lungs had been damaged by poisonous fumes in the plant where he worked, was not allowed to join the two persons who had owned the premises and employed him during


99. 2 Pirsig’s Dunnell §1861.
100. See pp. 597-598 above.
101. Minn. R. C. P. 20.01.
102. Joinder was allowed in this situation in Thomson v. United Glazing Co., 36 F. Supp. 527 (W.D. N.Y. 1941). Indeed I don’t believe that there could be any question about the propriety of such joinder under the new rules.
103. 2 Pirsig’s Dunnell §1870.
different parts of the period in question.\textsuperscript{104} Today, under Rule 20.01, a court would approach the problem this way: employment in one plant by successive owners is surely a "series of transactions or occurrences" if, indeed, it is not a single transaction. Thus the first test of 20.01 is met. And there is a question of fact, "did the fumes in the plant cause the damage to plaintiff's lungs," common to both defendants. Thus the joinder would be allowed and plaintiff could get a judgment for the full amount of damage to him, letting the defendants fight between themselves as to the proportion of the damage which each of them caused. This result is not merely a procedural improvement, by allowing one suit to do the job for which two might formerly have been required. It is a distinct substantive advantage to plaintiff to proceed against both employers at one time. Under the former practice where he was forced to bring separate suits each defendant would doubtless argue to the jury—and might well convince it—that the real damage was caused during the employment by the other owner.\textsuperscript{105}

\textsuperscript{104} McGannon v. Chicago \& N. W. Ry. Co., 160 Minn. 143, 199 N. W. 894 (1924). See also Johnson v. Fairmont, 188 Minn. 451, 247 N. W. 572 (1933), where joinder was denied of two factories, each of which deposited substances in a stream which combined to give the stream an offensive odor when it passed plaintiff's land.

\textsuperscript{105} A pat example of this is presented by Way v. Waterloo, C. F. \& N. R. R., 239 Iowa 244, 29 N. W. 2d 867 (1947), 27 Neb. L. Rev. 590 (1948), decided under rules, so far as here relevant, identical to the new Minnesota rules. A railroad employee had been killed in a collision between a train and a truck of the Foley Trucking Co. His executrix joined the railroad and Foley in her wrongful death action, and the trial court, pursuant to the Iowa equivalent of Minn. R. C. P. 42.02, ordered separate trials as to each defendant. In the action against the trucker, the jury found for the defendant. On appeal, the Court held that it was an abuse of discretion to have ordered separate trials, saying, at 257-258, 29 N. W. 2d at 874:

"We are not unmindful of the fact that the railroad will possibly be at some disadvantage in the joint trial. ... We suspect the chief disadvantage will be the inability in a joint trial to shift the entire responsibility upon the other co-defendant. ... The record here shows that the defendant Foley took full advantage of the situation presented by the severance. It was brought out that the plaintiff had a suit pending against the railroad for $50,000 damages for the death of Mr. Beckner in this accident. The argument to the jury by Foley's counsel is set forth in the record. ... Counsel's remarks were well within the rules of legitimate inference drawn from testimony in the case. But the argument does illustrate the terrific disadvantage in which plaintiff was placed by the severance. Counsel's argument in defense of Foley consisted in the main of a scathing denunciation of the railroad and a charge of negligence on the part of the railroad that was the sole cause of the accident. The plaintiff, who admittedly had a suit for $50,000 pending against the railroad for the death of Mr. Beckner, was forced to defend the railroad to some extent or at least argue that its negligence was not the sole cause of the accident. ... Plaintiff should not, in a forced separation, be put to the hazard of two juries, each believing the absent tort-feasor the wrongdoer."
Minnesota long ago reached the conclusion, on the express
ground of "the orderly administration of justice," that a master
and servant might be joined in a tort action although the liability
of the master was statutory while that of the servant rose from
the common law.\textsuperscript{106} Such joinder, of course, is still proper under
the new rules,\textsuperscript{107} which are not concerned with such perplexities
as the nature or source of defendants' duties. Similarly in juris-
dictions which require common carriers to carry liability insurance\textsuperscript{108} the injured person has been allowed to join the insurer
and the carrier as defendant, whether the liability of the insurer
be considered a statutory tort liability\textsuperscript{109} or a contract liability.\textsuperscript{110}

Among the most important changes which Rule 20.01 makes
in Minnesota practice is its specific permission for joinder of either
plaintiffs or defendants in the alternative. Our court has refused
to allow joinder of two defendants where plaintiff claims that one
of them converted his goods but he doesn't know which one did it.\textsuperscript{111} Nor, where plaintiff was uncertain whether an agent had
been acting within the scope of his agency in executing a note,
was he allowed to claim alternatively against the agent and the
principal.\textsuperscript{112} The proposition that a complaint "that one or the other
of the defendants is liable, but plaintiff does not know which one
... states no cause of action against either defendant"\textsuperscript{113} may be
impressive rhetoric but it is ridiculous law. In the converse situa-
tion, where a person holds a sum of money but is uncertain to
whom he should pay it, it has long been commonplace to allow
interpleader and make the various claimants fight among them-

\textsuperscript{106} Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79, 110 N. W.
356 (1907).

\textsuperscript{107} Johnson v. Rudolph, 3 Fed. Rules Serv. 20a.12, case 1 (D. D.C.
1940) (citing the Mayberry case, note 106 supra); Drake v. Hodges, 114
Colo. 10, 161 P. 2d 338 (1945) (applying Colo. R. C. P. 20a, which is prac-
tically identical with Minn. R. C. P. 20.01).

\textsuperscript{108} As does Minnesota, Minn. Stat. §221.10 (1949). Whether the
language of this statute is such as to allow any action against the insurer
until judgment has been had against the carrier seems not to have been
decided.

\textsuperscript{109} Fitzgerald v. Thompson, 167 Kan. 87, 204 P. 2d 756 (1949).

\textsuperscript{110} Grier v. Ferrant, 62 Cal. App. 2d 306, 144 P. 2d 631 (1944), 32
Calif. L. Rev. 202, 39 Ill. L. Rev. 81; Hudson v. Ketchum, 156 Kan. 332, 133
Kans. 171 (1943) (perhaps qualified by the Fitzgerald case, note 109 supra);
James v. Young, 43 N. W. 2d 692 (N.D. 1950).

\textsuperscript{111} Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144
N. W. 450 (1913).

\textsuperscript{112} Pilney v. Funk, 212 Minn. 398, 3 N. W. 2d 792 (1942).

\textsuperscript{113} Id. at 402, 3 N. W. 2d at 795.
in and make them fight the issue, in which plaintiff has no interest, as to which is liable? That there is no good answer to such a question is indicated by Rule 20.01, which allows just such a procedure.

Indeed, perhaps the classic case to illustrate modern permissive joinder of parties turns on joinder in the alternative. An office supply company had contracted to sell to a particular customer time cards meeting special specifications. It then contracted with a manufacturer to purchase such time cards from it. When the cards were shipped, the customer refused to pay for them, claiming that they failed to meet the required specifications. The supply company then sued the customer and the manufacturer, demanding the price from the customer, or in the alternative, damages for breach of contract in not meeting the specifications from the manufacturer. This case presents one common question: "Did the goods furnished by the manufacturer conform to the specifications?" If they did, then the customer must pay the price. If they did not, then the manufacturer has breached his contract. No matter how many other questions may appear in the case this common question is fundamental, and the court properly allowed the joinder.

Multiple Claims and Multiple Parties

More complicated problems arise when it is sought to join both multiple parties and multiple claims. The new rules present only two clues to the solution of such problems. By express provision they negate the code requirement that all the causes of action—or claims—joined must affect all the parties. And Rule 18.01, which allows unlimited joinder of claims where one plaintiff is suing one defendant, provides:

"There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied."

The most important decision construing these rules was the early case of Federal Housing Administrator v. Christianson," decided by one of the ablest judges on the Federal bench. In that case plaintiff held two promissory notes, both of which had been made and endorsed to him the same day. Three persons, whom he joined as defendants, were liable to him on one of the notes, while

115. Minn. R. C. P. 20.01.
117. 26 F. Supp. 419 (D. Conn. 1939).
two of the same three people were liable on the other note. The court found that under Rules 18 and 20 this was misjoinder, saying:

“Clearly there is no common question of fact involved here. For each note necessarily involves a separate question of fact. Nor, I hold, is there here involved a common question of law. For under the first count the only questions of law relate to the liability of the three defendants upon the first note and under the second count the only questions of law relate to the liability of the two defendants upon the second note. Whether the same general principles of law are applicable is no part of the prescribed test. To rule otherwise would in effect permit a creditor, such as a bank, to bring a single action against all debtors whose obligations arose out of promissory notes, upon the theory that a common question of law was involved.”

Although this decision enjoys the weighty approval of Professor Moore, and, as will be seen, has support in the case law, I suggest, with deference, that it is unsound both in its reasoning and in its result.

The reasoning of Christianson is subject to criticism on two different levels. First, while we are greatly handicapped by the decision’s failure to state fully the facts, it seems likely that the case did present common questions of law or fact. So far as questions of law go, Judge Hincks seems to suppose that the only question on each note is, “Are the defendants liable on this note?” This is far too narrow a view. The “common question of law” test of Rule 20.01 must relate to those very “general principles of law” which the judge refuses to consider. Otherwise there could never be a common question of law except where a joint right or liability is involved, since on Hinck’s view the only question of law would be: “Is defendant liable to plaintiff A?” and “Is defendant liable to plaintiff B?” or “Is defendant X liable?” and “Is defendant

118. Ibid.

119. 3 Moore’s Federal Practice §18.04(3) (2d ed. 1948). The view as to when joinder of multiple claims and multiple parties is permissible which the Christianson case exemplifies, and which is criticized in the succeeding text, is shared also, though without any reasoned discussion, by Blume and Reed, Pleading and Joinder 380, 425 (1952). The learned Messrs. Barron & Holtzoff have no very clear idea of what they think on this issue. They quote from the Christianson case as representing the law on joinder of plaintiffs (sic), 2 Barron & Holtzoff, Federal Practice and Procedure §532 p. 104 (1950), though a page before they have stated that the questions of law or fact must be common to the parties, not to the claims joined. This is the correct view, I think, but it is exactly opposite to what Christianson says. And at §533 they manage to sit on the fence with a beautiful zig-zag sentence which says in its opening clause that the right to relief against each party must relate to the same transaction, etc., but which says in its concluding clause, in effect, that there are cases the other way.
Thus suppose that a number of persons who have been individually induced, by means of a fraudulent prospectus, to invest their money in a sham corporation wish to join in one action against the promoters of the corporation for fraud. Judge Hincks would rule that as to each of these plaintiffs there is a different question of law, namely: "Are defendants liable to this plaintiff for fraud?" Yet such a construction would negate the remedial purpose of the rule, and in fact when that very case arose, a distinguished court, in an opinion which makes a discriminating analysis of the meaning of the phrase "any common question of law or fact," held the joinder proper.\(^2\) One must keep in mind the purpose of Rule 20.01. It is intended to abandon the technical legal tests which the common law and the Code made so important, and to put an end to the wasteful practice of litigating similar issues over and over again in different law suits. Suppose that under a particular set of circumstances it is doubtful whether a person is a holder in due course, and that both of the notes indorsed over to plaintiff in the Christianson case were taken by him in such circumstances. In that case it would seem to me clear that there is a question of law common to both claims: "Is a person who takes under these circumstances a holder in due course?"

But that whole issue is made academic by a more fundamental error in the Christianson reasoning, and it is here, particularly, that I take issue with Professor Moore. That learned author says that in the Christianson situation:

\[\text{\ldots joinder of the different claims would be proper if the claims arose out of the same transaction, occurrence, or series of transactions or occurrences, and if there was a question of law or fact which knit them together.} \] [Italics added.]\(^1\)

Since Judge Hincks saw fit to examine whether there was a question common to both claims, patently he was construing the interrelationship of Rules 18 and 20 in the same way that Moore does. But I suggest that the language of the rules indicates quite clearly that this construction is erroneous. Rule 18, it will be recalled, says that the same complete freedom on joinder which exists in the one plaintiff-one defendant situation may be had where there are multiple parties if the requirements of the rules on joinder of parties are met. The test of joinder of parties here relevant is that which allows joinder of the parties "if any question

\(^{120}\) Akely v. Kinnicutt, 238 N. Y. 466, 144 N. E. 682 (1924).

\(^{121}\) 3 Moore's Federal Practice §18.04(3), p. 1811 (2d ed. 1948)
of fact or law common to all of them will arise in the action." The word "them" here does not refer to claims sought to be joined, since the rule is drafted principally with regard to suits in which only one claim is involved. Instead it refers to the parties who are to be joined. What Judge Hincks and Professor Moore have done is to read the "common question" test as if it referred to the claims, and thus, in effect, to put a restriction on joinder of claims which Rule 18.01 does not contain. All that the rules require is any question common to all the parties; plainly whatever questions are involved in the note on which all three of the Christianson defendants were sued are common to all of them, and thus this test of joinder was met here.

Much the same objection may be made to the contention of Moore—not discussed in the Christianson case—that the claims must have arisen out of the same transaction or occurrence. Rule 18 makes no such requirement as to joinder of claims. The "same transaction" test comes from Rule 20.01, which allows parties to be joined if there is asserted for or against them "any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences. . . ." Even by itself this is a far cry from saying that all claims for relief must arise from the same transaction. And this must be read in connection with the later sentence in the same rule providing: "A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded." Now in Christianson there was a right to relief asserted against all the defendants growing out of the first note. This should be enough to satisfy the test, and it is then immaterial whether the second note is a part of the same series of transactions.

The result in Christianson can now be re-evaluated. All three defendants were properly joined in the claim on the first note, since the right to relief asserted against them came from one transaction and presented questions of law and fact common to all of them. A second claim is then made against two of these three defendants; can

122. Minn. R. C. P. 20.01. Federal Rule 20(a), under which the Christianson case was decided, is identical save that "fact" and "law" are transposed.

123. "If multiple parties are involved and their joinder is authorized by the rules governing joinder of parties, the road to joinder is clear, as there is no obstacle of any kind in the rule which governs joinder of claims," Blume, Free Joinder of Parties, Claims and Counterclaims, Jud. Admin. Monographs, Series A, No. 11, p. 13 (A.B.A., 1941). The same conclusion is reached in the closely reasoned Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 Fed. Rules Serv. 822 (1942).

124. Again the differences between the Minnesota rule and F. R. C. P. 20(a) are merely in the order of words.
it be litigated in the same suit or must it be severed and proceeded on separately? The specific provision which makes it unimportant that the third defendant is not interested in defending against the relief asked on the second note seems to me a complete answer to the question. This provision is also a complete answer if the problem is approached another way. Suppose that plaintiff had chosen to proceed on both notes against only the two defendants who were liable on both. Everyone agrees that in this case he could join his claims on the two notes, no matter how unrelated they were, just as in a suit against a single defendant a multitude of unrelated claims may be joined. Does this perfectly proper joiner of claims become improper when the third defendant is brought in to answer to the one claim in which he was interested? The construction that it does flies squarely in the face of the language and the purpose of Rule 20.01.

I conceded at the outset of this discussion that the Christianson holding has support in the case law, and it is now time to examine the extent of that support. One point should be made immediately: the cases on this proposition, both those which support Christianson and those which are more favorable to my view, are uniformly devoid of any reasoned discussion of this joinder issue. Commonly they quote a phrase from Rule 20, state the result which they have reached in the particular case, and let it go at that.

To begin with, I have found no case which presents a clear holding supporting my view. Such a case would be one in which the joinder is allowed where there is a question of law or fact common to all the parties, and some right of relief urged for or against all the parties arising from the same transaction or occurrence, but in which the claims do not arise from the same transaction and present a common question. There is one case in which the first of these tests is met, and I would think the joinder proper, but in which the absence of any indication as to the nature of the claims makes it impossible to tell whether Judge Hincks and Professor


126. Callinan v. Federal Cash Register Co., 3 F. R. D. 177 (W.D. Mo. 1942) (joinder allowed of claim against 3 defendants for fraud and a claim against 2 of the 3 for money had and received).
Moore would not also allow the joinder. 127 Also favorable to my view, but not conclusive, are the cases in which courts have allowed joinder for stated reasons I think sound, but in which, while the court doesn't mention it, the claims do arise from the same transaction and involve a common question, so that the Hincks-Moore test also would be satisfied. 128 No help one way or the other can be drawn from the cases in which joinder was denied where it would be improper either by the Hincks-Moore test or by my test; 129 that is, where there is no question common either to all the parties or all the claims, or there is no right to relief urged for or against all the parties arising from the same transaction.

Next come a group of cases which have the force of dicta against my theory and in favor of the Hincks-Moore test; 130 these are the

127. Indeed 3 Moore's Federal Practice §18.04(3) n. 19 (2d ed. 1948) cites the Callinan case, note 126 supra, in support of its position, but there is nothing said in the case which justifies such citation of it. And the statement at Clark, Cases on Modern Pleading 910 (1952) that "... it appears that in this case the test suggested ... [in the Christianson case] ... of a common question involved in all the claims would be satisfied" now seems to me to have been ill-advised.

128. Hopper v. Lennen & Mitchell, Inc., 52 F. Supp. 319 (S.D. Cal. 1943) (joinder allowed of two claims against both defendants with one claim each against the separate individuals); Thomas v. Moore, [1918] 1 K. B. 555 (C.A. 1917) (joinder allowed of separate claims against each of the defendants for different slanders with a claim against all defendants for conspiracy to slander); Teeter v. Los Angeles, 209 Cal. 689, 290 Pac. 11 (1930) (joinder allowed of claim against the city to rescind an easement for street construction given it by plaintiff, with a claim against the city and its contractor for an injunction against building the street). Although in all of these the Hincks-Moore test could have been met, in the Thomas and Teeter cases the courts rested their decisions on the rule that all defendants need not be interested in all the relief demanded, which seems to me the proper ground for decision.

129. Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939) (joinder not allowed, though questions of law and fact common to all defendants, because there is no claim—nor claims arising from the same transaction—on which all defendants are joined); Rohlfing v. Cat's Paw Rubber Co., 99 F. Supp. 886 (N.D. Ill. 1951) (a number of plaintiffs could not join individual claims under the anti-trust laws, since there is no right to relief in favor of all arising from the same series of transactions); Kainz v. Anheuser-Busch, Inc., CCH Trade Reg. Rep. (9th ed.) ¶62,928 (N.D. Ill. 1951) (to the same effect as the Rohlfing case). In the Rohlfing case the court states the rule as to when joinder should be allowed correctly, as I think, although I have some feeling that in both the Rohlfing and Kainz cases the court viewed the matter too narrowly, and should have regarded the sale of one product to different retailers in the same metropolitan area as one series of transactions. On this last matter my position is supported by the case note at 65 Harv. L. Rev. 890 (1952), as well as by such cases as Benton v. Deininger, 21 F. 2d 657 (W.D. N.Y. 1927); Brown v. Kinnicut, 2 F. 2d 263 (S.D. N.Y. 1924); and Akely v. Kinnicut, 238 N. Y. 465, 144 N. E. 682 (1924). The Kainz case has just been reversed for the reason suggested here, 16 Fed. Rules Serv. 23a-33, case 4 (7th Cir. 1952).

130. Hynd v. McGraw, 11 F. R. D. 82 (S.D. N.Y. 1950) (joinder allowed of claim against four defendants with a second claim against two of
cases in which joinder would be proper by either test, but in which the court states that it is allowing joinder because the claims present a common question of law or fact and arise from the same transaction. And last are the cases which seem to me to be square holdings in favor of the Hincks-Moore point of view, cases in which joinder is not allowed because the Hincks-Moore test is not met, although by the test I suggest joinder should have been allowed. Inevitably, too, there are a couple cases in which joinder was denied though it was proper by either test.

...
On the basis of this analysis of the cases I think it fair to conclude that precedent is on the side of the view expressed in the Christianson case, but that there is no such weight of precedent that way to demand that a court which is willing to study the problem closely need feel bound by the handful of unreasoned opinions contrary to my view.

I have considered this problem of multiple claims and multiple parties at such great length for three reasons. First, I think it perhaps the most complicated problem which the new rules on joinder present. Second, in view of the reputation for scholarship which Judge Hincks and Professor Moore enjoy, it would be an impertinence to call their view wrong without presenting a detailed exposition of why it is wrong. Finally, I began my consideration of permissive joinder by referring to the long struggles which ensued and the errors which were made before satisfactory rules on this subject were devised. There is no more sorry chapter in that story than the judicial decisions holding that bold new provisions for joinder of parties were limited by earlier and more restrictive rules on joinder of causes. It would seem to me particularly tragic if history were to repeat itself and if the unlimited joinder of claims provided by Rule 18 should be held to be limited by the provisions for joinder of parties in Rule 20, when such a reading would do violence not only to the purpose of the rules but also to their language as I understand it.

**IMPLEADER**

The broad provisions of Rule 14.01 allowing a defendant to implead a third party “who is or may be liable to him for all or part of the plaintiff’s claim against him” are responsive to a suggestion from the Minnesota Supreme Court that impleader provisions would be desirable and codify a practice which had been found immensely useful in England, New York, Pennsylvania, Wisconsin, and the admiralty courts as well as under the Federal Rules and state systems modelled thereon.

Where the defendant wishes to exercise his privilege to implead

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134. See Kemerer v. State Farm Mutual Auto. Ins. Co., 201 Minn. 239, 245-247, 276 N. W. 228, 231-232 (1937). Although Minn. Stat. §§540.16 and 548.20 (1949) may have allowed impleader, they were not frequently used for that purpose.

a third party meeting the test of the rule, he must make a motion\textsuperscript{136} for leave to file a summons and complaint on the third party. In theory the court has discretion whether to grant the motion\textsuperscript{137} but where the motion is promptly made\textsuperscript{138} I think that there should be few, if any, cases in which the court ought to deny the motion. Of course bringing the third party in may complicate the litigation\textsuperscript{139} but the power to order separate trials of separate issues, granted by Rule 42.02, should be sufficient safeguard against harm from that source.\textsuperscript{140} The fact that plaintiff’s action may be delayed by the impleader is hardly a sufficient objection, since the loss of time is compensated for by the elimination of a possible second action between defendant and the third party on the same transaction.\textsuperscript{141} In any event it is silly for a judge to purport to exercise his discretion at the time of the defendant’s motion; a much better procedure would be for him to allow service of the third-party complaint, reserving a final decision on its propriety until the third-party defendant has answered, or has raised his own objections to being brought into the suit. At that time the judge will know what issues really arise between defendant and the third party, and can decide on that basis, rather than in a vacuum, whether their controversy might better be fought out in a second suit.

Rule 14.01 is explicit that a third-party complaint may be served only “upon a person not a party to the action.” It is clear from this that where the person liable over is a co-defendant the correct procedure is to file a cross-claim, under Rule 13.07, rather than a third-party claim,\textsuperscript{142} and if the claim is against a co-defendant and a third party, a cross-claim, combined with a motion under 13.08 to

\textsuperscript{136} Before service of his answer defendant may move \textit{ex parte}; thereafter the motion must be with notice to the plaintiff. Minn. R. C. P. 14.01. The form of the motion is set out as Official Form 17, Minn. R. C. P.

\textsuperscript{137} General Taxicab Ass’n v. O’Shea, 109 F. 2d 671 (D.C. Cir. 1940); 3 Moore’s Federal Practice §14.05 (2d ed. 1948); Comm., \textit{Discretion of Court on Motion to Implead}, 2 Fed. Rules Serv. 648 (1940).


\textsuperscript{139} The reason given for denial of the motion in, \textit{e.g.}, Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb. 1950).

\textsuperscript{140} As it was held to be in Miskell v. W. T. Cown, Inc., 10 F. R. D. 617 (E.D. Pa. 1950).


bring in the third party to answer to the cross-claim, would still be the appropriate procedure. Similarly where the claim is against a third party and the original plaintiff, the correct move is to counterclaim under 13.01 or 13.02 and have the third party brought in by virtue of 13.08. In the situations thus far, however, it seems to me unimportant if defendant mistakenly chooses to file a third-party complaint rather than following what I think is the proper procedure. But there is a situation where the provision of the rule now being considered becomes more serious. Suppose that a driver of a car and his passenger join in a suit against the other driver for personal injuries. The defendant wishes to claim that the plaintiff-driver was negligent, and that defendant has a right to contribution or indemnity against him for sums defendant may have to pay to the passenger. By what procedure can defendant raise this claim? Both Rule 13.07, on cross-claims, and Rule 14.01, on impleader, speak in terms of “is or may be liable” and thus may be used for a contingent claim to contribution or indemnity. But the former rule may only be used against a co-party, while the plaintiff-driver here is an adversary party, and the latter rule can only be used against persons not already party to the action. There is nothing in 13.02, the permissive counterclaim rule, which prevents defendant from filing his claim against plaintiff-driver by this means, but it seems to be thought that since this rule does not specifically authorize the pleading of contingent claims, it may not be used. The answer which has been worked out by the courts which have considered the problem is to use the broad power of severance given by the final sentence of Rule 21, and to sever the claim of the passenger from the claim of the plaintiff-driver. Then, since the latter is no longer a party to the passenger’s claim, he meets the test of Rule 14.01 and may be impleaded. To add a final fillip, the leading opinion on all this suggests that after the severance and impleader has taken place, it will be permissible to consolidate the two actions again for purposes of trial so that the advantage of clearing up

143. 3 Moore’s Federal Practice §14.14 (2d ed. 1948). In Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc., 25 F. Supp. 1021 (E.D. N.Y. 1939), defendant was allowed to file a third-party complaint against the third party and the original plaintiff. A famous comment of Judge Learned Hand—regrettably not printable in this family magazine—would describe my feelings about this decision.

144. 3 Moore’s Federal Practice §14.14 (2d ed. 1948).


related matters in one suit won't be lost. I suppose all this legerdemain is fine if you have a taste for that sort of thing; had I been the judge I would have taken the bull by the horns and allowed the impleader originally without getting too worried about the literal language of Rule 14.01.147

The use of impleader to present contingent claims is best illustrated by the well-known decision of Judge Nordbye in Jeub v. B/G Foods, Inc.148 Plaintiff sued a restaurant, claiming that he had been served unwholesome and deleterious food, in violation of the Minnesota statutes, and had been damaged thereby. Defendant filed a third-party complaint against Swift & Co., claiming that he had obtained the food from that company in a sealed can, that if it was unwholesome it was Swift's fault, and demanding on common-law principles that Swift indemnify him for any sums he might have to pay plaintiff. Swift moved to vacate the third-party complaint, arguing that under Minnesota law no right to indemnity would exist unless and until the restaurant had to pay a judgment to the plaintiff. But Judge Nordbye held that the purpose of the impleader rule is to accelerate the determination of liability, and to avoid circuity of action.

"The fact that an independent action for money recovery could not be brought at this time does not militate against B/G Foods' right to invoke a procedure which will determine rights of the parties concurrently with that of the basic proceeding, and if and when any loss has been sustained as to which Swift and Company is liable over, the laws of this State in regard thereto may be made effective... Rule 14 is not restricted to the rights of indemnity or contribution which are presently enforceable...."149

Judge Nordbye went on to point out how the judgment could be shaped to preserve the substantive rights of the parties, by providing that the judgment for indemnity could be stayed until the judgment in favor of the original plaintiff had been paid. And the Minnesota Supreme Court has already indicated that Rule 14.01

147. I suggest this bold course on the ground that there is nothing a complaining party could do about it. An order allowing impleader is neither appealable nor subject to review by writ of certiorari. Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438 (1950). And since the same end result can be reached by the mumbo-jumbo of severance, impleader, and consolidation, the point would surely be "harmless error," within the meaning of Minn. R. C. P. 61, if the complaining party sought to raise it in his appeal after final judgment. Besides I should hope that the Bar of Minnesota is more considerate of the time of its busy judges than to require them to enact the little morality play which the literal language of 14.01 seems to demand.

148. 2 F. R. D. 238 (D. Minn. 1942).

149. Id. at 240. See 3 Moore's Federal Practice §14.08 (2d ed. 1948).
may be used for the same purpose in the state practice as it was in
the *Jeub* case.\(^{150}\)

As soon as the notion of using Rule 14.01 to accelerate the deter-
mination of rights has been grasped, the question of impleader
of a liability insurer comes immediately to mind. If the "is or may
be liable" clause in Rule 14.01 allows impleader of a joint tort-
feaso for contribution, even though absent the rule he could not
be sued until after the original defendant had paid a judgment,
doesn't it also mean that an insurer can be brought in, although the
"no action" clause of the the usual insurance policy prohibits suit
against the company until the insured has paid a judgment? Of
course it does. I should say that this is so clear that not only
may a court in its discretion allow such impleader, but that it would
be a gross abuse of discretion to deny the impleader.

Of course this whole question is of more theoretical interest than
practical importance, for there is only a very limited situation in
which such impleader would be attempted. In the usual tort case the
insurance company will conduct the defense. It is hardly likely that
it will seek to implead itself. And even if the defendant is aware
of the possibilities Rule 14.01 offers, an attempt on his part to
implead the insurer when the insurer is already defending for him
would undoubtedly be a breach of the policy clause requiring the
insured to "cooperate" in the defense.\(^ {151}\) Thus we are limited to the
case in which the insurer has disclaimed liability and refused to
conduct the defense. There the "no action" clause can be no bar,
because the express purpose of 14.01 is to accelerate the determina-
tion of liability.\(^ {152}\) And an experienced Federal judge has found still
further grounds for refusing to allow the "no action" clause to bar
impleader:

\(^{150}\) Gustafson v. Johnson, 51 N. W. 2d 108, 113-116 (Minn. 1952),
36 Minn. L. Rev. 543.

\(^{151}\) See the interesting discussion at Proceedings of Cleveland Insti-

\(^{152}\) 3 Moore's Federal Practice §14.12 (2d ed. 1943); Comm., Im-
pleading of Insurer as Third-Party Defendant, 2 Fed. Rules Serv. 650, 651
(1940). This is why the New York cases denying impleader of the insurer
are not apposite, for the New York impleader statute reads "is or will be liable"
and the court rested its decision on a refusal to read this as equivalent to
138 (2d Dep't 1925). Since the recent change in language of the New York
statute, impleader of the insurer has uniformly been allowed. E.g., Brooklyn
Yarn Dye Co. v. Empire State Warehouses Corp., 276 App. Div. 611, 96
N. Y. S. 2d 738 (2d Dep't 1950); Adelman Mfg. Corp. v. New York Wood
Finisher's Supply Co., 277 App. Div. 1117, 100 N. Y. S. 2d 867 (2d Dep't
808, 93 N. Y. S. 2d 113 (3d Dep't 1949). See Bisselle, *Impleader of Casualty
"The 'no-action' clause is directly opposed to Rule 14. It poses a question as to whether the court should permit litigants to circumvent rules of court by contractual arrangements. Rule 14 was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. The no-action provision of the policy is neither helpful to the third-party defendant, to the courts, nor generally is it in the interest of the public welfare. Its object is to put weights on the already too slow feet of justice. Moreover, such provision, if permitted to become effective, should not operate in this case for the reason that the third-party defendant is alleged to have breached its contract. According to the third-party complaint, it has declined to perform the obligation of its undertaking in any way. It has refused to defend the defendants or third-party plaintiffs and has declined to meet the expenses contemplated by its contract. Under such circumstances it should not be permitted to interpose contractual provisions of a contract it has repudiated."

So far as I can discover, every case which has been decided under an impleader rule identical with our Rule 14.01 has allowed impleader of insurers in these circumstances.

It seems to be supposed that where impleader of the insurer is allowed that the court must forthwith order separate trials,

154. Jordan v. Stephens, note 153 supra; A B & C Motor Transportation Co., Inc. v. Moger, 10 F. R. D. 613 (E.D. N.Y. 1950); Petersen v. Falzarano, 6 N. J. 447, 79 A. 2d 50 (1951); and cases cited note 152 supra; see Tullgren v. Jasper, 27 F. Supp. 413, 416 (D. Md. 1939); Crawford, Third-Party Practice Under the Missouri Code, 19 U. of Kan. City L. Rev. 16, 33-34 (1951); 36 Minn. L. Rev. 421, 422 n. 3, 861 (1949). In King v. Shepherd, 26 F. Supp. 357 (W.D. Ark. 1938), the third-party complaint against the insurer was dismissed for improper venue. In Moreland v. Pennsylvania R. Co., 3 Fed. Rules Serv. 14a.221, case 1 (S.D. Ohio 1945), defendant railroad company was not allowed to implead the insurer of the owner of the car in which plaintiff was driving at the time of the injury; but since the owner was not a party, and there was no theory on which her insurer would be liable, no other result could have been expected. The cases of Pucheu v. National Surety Corp., 87 F. Supp. 558 (W.D. La. 1949) (impleader allowed) and Combs v. Continental Casualty Co., 54 F. Supp. 507 (N.D. Ala. 1944) (impleader denied) are cases in which the insurer is the main defendant and seeks to implead other insurers for contribution. They turn on whether the state in which they arise recognizes a right to contribution, and have nothing to do with our problem.

For the reasons stated in the text, I think that the dicta suggesting that there should be a different result in personal injury cases than in other insurance cases—see DeLong v. Allen, 105 N. Y. S. 2d 635, 637 (Sup. Ct. 1951); J. A. Ewing & McDonald, Inc. v. Municipal Warehouse Co., 193 Misc. 173, 81 N. Y. S. 2d 559 (City Ct. N.Y. 1948)—are quite indefensible.
Rule 42.02, in order to avoid prejudice. I think that this proposition deserves more critical thought than it seems to have had thus far. Who will be prejudiced? Surely not the plaintiff—one gathers that a plaintiff’s lawyer’s idea of the hereafter is a lawsuit in which the jury knows defendant is insured. Surely not the defendant—if he had any fear of prejudice he would hardly invite the insurance company to become a third-party defendant. And the company won’t be prejudiced on the substantial issue of liability vel non; under the older procedure by which defendant, after paying the judgment, sued the company to collect from it, the jury was well aware in considering the question of liability that the insurer was involved. The only conceivable prejudice which might arise is that the jury, having decided that the insurance company was liable, might award a larger sum in damages to the plaintiff. Even if this bogeyman is not, as I think, entirely unrealistic it can arise only where both issues are to be tried to the jury; if defendant waives his right to a jury on the issue of the company’s liability the jury will have no means of knowing whether the verdict it finds is to be paid by the defendant or by the company. I suggest that this is an improvement over the present situation where juries take it for granted that the damages they award will come out of the deep pocket of some liability insurer.

At the short course on the new rules offered by the University of Minnesota Law School last December the following question was posed to me: if the insurer because of bad faith or negligence rejects an offer of settlement within the policy limits and the insured is subsequently sued for an amount greater than his insurance coverage, may he implead the insurer on his claim of injury by the in—


156. “The argument in the reply brief that to import the insurance company into the case may react unfavorably... before a jury, is less than convincing. In this day and generation there may possibly remain a vestige of ingenuousness in the minds of jurors concerning insurance coverage of the operators of most motor vehicles, but I venture to doubt it. The current facts of life, concerning the ultimate financial responsibility involved, are pretty generally known by personal experience or the reading of newspaper and magazine advertising, on the part of those of sufficient intelligence to qualify as jurors in this court. Indeed, the size of verdicts may not be unrelated to that awareness.” A B & C Motor Transportation Co., Inc. v. Moger, 10 F. R. D. 613, 615 (E.D. N.Y. 1950). See Tullgren v. Jasper, loc. cit. note 154 supra.
surer’s refusal to settle. 157 Despite indications at the time from Judge Charles E. Clark that I was wrong, I argued that impleader would not be permissible under such circumstances. I have now decided that I must recant. On mature consideration it seems to me that the rule allows such impleader, that the company is a person who “is or may be liable” to defendant for all or part of plaintiff’s claim against defendant, and that a third-party complaint which alleged that the insurer negligently—or in bad faith—refused the settlement offer and had damaged defendant to the extent of any judgment which plaintiff may get in excess of the policy limits states a “claim showing that the pleader is entitled to relief” sufficient against a motion to dismiss. But what is to be gained by such impleader? Separate trials on the original complaint and the third-party complaint would have to be ordered as a matter of course; not only would the refused settlement offer be inadmissible before the jury which was considering plaintiff’s claim, 158 but since the proof of the pudding is in the eating, it would be impossible to tell whether the company’s refusal to settle was wise or unwise until plaintiff’s claim had been litigated. And although I am not advised in the premises, I should think that there might at least be question whether the duty of the insured to cooperate with the insurer would allow him to file such a third-party complaint. I suspect that it is for practical reasons of this sort that there is, so far as I can find, no reported case in which a defendant has tried to implead his insurer for this purpose.

Another neat problem which impleader presents is whether a defendant may implead a third party liable over to him for plaintiff’s claim when the plaintiff is under some disability which would bar him from suing the third party directly. Now it has been held that a defendant may implead plaintiff’s employer, even though plaintiff could not himself sue the employer because his sole remedy is under a compensation act. 159 The third party may be impleaded although the statute of limitations would bar a suit against

157. The duty of the insurer in these circumstances is discussed at 34 Minn. L. Rev. 150 (1950).
him directly by plaintiff. And probably a covenant by plaintiff not to sue the third party will be ineffective against impleader of the third party.

The situation in which controversy arises is where the third party defendant sought to be brought in is the husband or wife of the original plaintiff. Most of the cases involving this situation are cases in which the attempted impleader was to get contribution; an immediate distinction in terms of the substantive right to contribution recognized in the particular state must be made in analyzing these seemingly-procedural cases. In some states a joint judgment is necessary as a basis for contribution; if plaintiff chooses not to sue all the tortfeasors, the ones that he does sue are stuck, and cannot have contribution from their more fortunate fellows. In states which follow this rule defendant can never implead a joint tortfeasor to seek contribution, even where there is no such special disability as the husband-wife relation involved. Thus it should hardly surprise us that these states refuse to allow defendant to implead plaintiff's spouse for purposes of contribution. But in other states all that is necessary for contribution is a common liability, and the tortfeasor who is sued can implead his fellows to have his right to contribution litigated concurrently with the main action. In states where there is no bar on suit between spouses, and which allow impleader for contribution, the spouse of course can be brought in for this purpose. Thus trouble can come only in a state which meets three requirements: suit between husband and wife is not allowed; the right to contribution turns on a common liability rather than a joint judgment; and the procedural rules provide for broad impleader. In two of the three jurisdictions which meet these requirements and had passed on the question, defendant has been allowed to implead plaintiff's spouse for contribution, even though plaintiff could not have joined the spouse originally as a defendant. But a recent case from an


161. 3 Moore’s Federal Practice §14.10 (2d ed. 1948); see Buttorff v. Sun Oil Co., 2 F. R. D. 508, 509 (M.D. Pa. 1942); Uniform Contribution Among Tortfeasors Act §5, in 9 U. L. A.


important court has rejected this result, saying that where the spouse cannot be sued directly he or she is not liable and, therefore, that common liability necessary for contribution is not present.105

It is difficult to predict how Minnesota will go on this question, which seems certain to be litigated in this state. Rule 14.01 is the most modern sort of impleader rule, and will be usable in this state to get contribution from tortfeasors, even though they were not originally joined by plaintiff.106 On the other hand we follow the usual rule prohibiting tort actions between spouses,107 and since we put much emphasis on a "common liability" as the basis for contribution,108 our court might well hold that no contribution can be had from plaintiff's spouse. But this conclusion is not inevitable. Our court has quoted with approval language indicating that the prohibition on suits between spouses is merely the denial of a remedy, and that, in Cardozo's phrase, "unlawful the act remains, however shorn of a remedy."109 On a verbal level I concede that a "liability" from which one is immune sounds suspiciously like a contradiction in terms, but the desirability of allowing contribution is so clear on grounds of policy170 that it can be hoped the court will overlook the verbal incongruity involved. Some support for this hope may be found in the fact that our Court in a different situation has allowed an action against the husband where the proceeds will be for the sole benefit of the wife so long as formally it is not directly a suit between the two.171

the hands of her husband while acting within the scope of his agency, and this even though the principal, being only secondarily liable, will have an action over against the husband. Where, as there, the substantive right is clear, there can be no question but that Rule 14 may be used to avoid circuity of action in enforcing the substantive rights.

Rule 14.01 is quite clear that once the third party has been impleaded, he may assert any defenses he may have against the plaintiff in the main action, and the plaintiff and the third party may assert against each other any claims which they may have arising out of the transaction or occurrence involved in the main action, although they are not required to do so. The usual rules as to compulsory and permissive counterclaims apply, not only to the claim which the original defendant makes against the third party, but also as to any claims which the plaintiff and the third party may have asserted against each other. Thus suppose that the plaintiff and the third party have claims against each other arising out of the transaction or occurrence involved in the main action, but that one or both wish, as a matter of strategy, to save these claims for a later suit. As long as both follow this course all is well, since there is no compulsion on them to assert claims against each other. But as soon as one does assert his claims the other must present his as a compulsory counterclaim thereto, as he will be barred from any later action.

**INTERPLEADER**

Not much need be said about interpleader, for while Rule 22 makes important advances over the prior Minnesota practice, they are of a sort that are easily described and understood. Interpleader comes to us originally from equity, and the chancellors regarded four conditions as essential to its maintenance: (1) the same thing, debt, or duty must be claimed by both or all of the parties against whom the relief is demanded; (2) all their adverse titles or claims must be dependent, or be derived from a common source—this is the well known requirement of "privity"; (3) the person asking the relief must not have or claim any interest in the subject matter; and (4) he must have incurred no independent liability to either of the

174. 3 Moore's Federal Practice §14.16 (2d ed. 1948).
175. 3 Moore's Federal Practice §14.17 (2d ed. 1948).
claimants, but must be an indifferent stakeholder. So far as one can tell, these same limitations were applied in actions under the Minnesota statutes which provided relief in the nature of interpleader.

All four of the old limitations on interpleader are abolished by the explicit language of the next to last sentence of Rule 22. The stakeholder need not be indifferent, but may vigorously contest his liability to one or both parties, the claimants need not be in privity with each other, and they need not be claiming the same "thing, debt, or duty." It now should be possible to use the interpleader device in any case in which a party fears that he may be vexed by multiple litigation.

A recent Federal case presents a nice example of the kind of complicated situation which can be readily unraveled by interpleader, and of the procedure to be used. The named beneficiary

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179. Only as to the last mentioned contention has controversy arisen. In John A. Moore & Co., Inc. v. McConkey, 240 Mo. App. 198, 203 S. W. 2d 512 (1947), the court said that the Missouri statute—identical so far as is here relevant with Minn. R. C. P. 22—had abolished the second of the once-essential conditions for interpleader, and had liberalized the remedy with regard to the third and fourth conditions; but it made no mention of that statute having any effect on the first condition, that "the same thing, debt, or duty must be claimed" by all the claimants. And there is support in the Federal cases for the view that the first condition remains as before: United States for use of Eaton v. Olson, 5 F. R. D. 513 (N.D. Cal. 1946); Buxton v. Acadian Production Corp., 3 Fed. Rules Serv. 22.12, case 1 (W.D. La. 1940); Standard Surety & Cas. Co. v. Baker, 26 F. Supp. 956 (W.D. 1939), rev'd on other grounds, 105 F. 2d 578 (8th Cir. 1939). This view turns, however, on what I think is an unnecessary and unwise restriction of the language of Rule 22, where it requires merely the possibility that plaintiff "may be exposed to multiple liability" and says the claims need not be "identical." In Girard Trust Co. v. Vance, 4 F. R. D. 255 (E.D. Pa. 1945), three different brokers claimed to have found the buyer for a block of stock, and to be entitled to the commission on its sale. When plaintiff sought to make them interplead, they urged that as each had had a separate contract providing for a commission if it found a buyer, they were not claiming on the same debt and that interpleader would not lie. The court overruled the objection, and allowed the interpleader. I should think this quite sound in view of the language of the rule, and in refreshing contrast to the opposite Minnesota decision on almost identical facts. Alton & Peters v. Merritt, 145 Minn. 426, 177 N. W. 770 (1920). My view on this matter—that the first of the "essential conditions" for interpleader is abolished by the rule—is shared by the outstanding authorities respectively on interpleader and on the rules. Chafee, Federal Interpleader since the Act of 1936, 49 Yale L. J. 377, 408 (1940); 3 Moore's Federal Practice §22.04(1) (2d ed. 1948).
under a $30,000 life insurance policy claimed the proceeds, which, after deducting policy loans, amounted to about $21,000. Another person claimed to be the legal owner of the policy, and, arguing that the policy loans were improper, demanded the full face amount of the policy. The insurer admitted its liability of $21,000 but denied being liable for the excess, and it was indifferent as to which of the claimants got the $21,000. Further, there was a right to a jury trial as to whether the policy loans were proper, but no such right on the question of which claimant should have the proceeds. The company brought an action of interpleader. The court ordered the company to deposit the full amount of the policy, $30,000, in court, and then allowed it to stand aloof while the claimants contested between themselves, in a trial to the court, their right to the proceeds. If the named beneficiary was successful at this stage, the balance of $9,000 would be returned to the insurer, and the action would be at an end. But if the other claimant was successful in the first stage he would forthwith be paid $21,000, and then a jury could be impanelled to determine his right to the other $9,000.

Interpleader under Rule 22 is not restricted to plaintiffs. Where a person has been sued already, and fears that others may later present claims against him in the same matter, he may require the plaintiff and the other claimants to interplead, by filing a counterclaim for interpleader. But this is not all, for the rule also preserves the former Minnesota practice by which if the defendant admits liability and deposits the amount claimed in court, he may be discharged from the action and have the potential adverse claimants substituted as defendants in his stead. Of course where the stakeholder wishes to dispute his liability in whole or part, or where the amount of his liability may differ according to which claimant is successful, this procedure is not open to him, and he must counterclaim for interpleader.

In essence Rule 22 furnishes a useful corollary to Rule 20.01, which allows joinder of parties in the alternative. The latter rule permits joinder of defendants where it is uncertain which of them is liable, and allows plaintiffs to join where they are not sure which of them has the right to prevail. Interpleader makes available the same free joinder to the person against whom the claim might otherwise be pressed.

The class action device has never been of much importance in Minnesota, although, in common with the other Code states, there was provision in the statutes for one or more persons to sue or defend in behalf of an entire class where the question was of common interest to many parties, and there were so many persons who might be made parties that it would be impracticable to bring them all into court. But Rule 23.01 is broader in scope and more helpfully drafted than the old statute, and its adoption may presage much more frequent use of the class action in Minnesota, as was the case in the Federal system when the similar rule was adopted there.

Rule 23.01 sets out two basic requirements for a class action: the members of the class must be so numerous as to make it impracticable to bring them all into court, and the persons who are suing or being sued on behalf of all must be such as to assure adequate representation to the entire class. The rule then goes on to set out three situations in which, the basic requirements being met, a class action is permissible. These three situations, which are distinguished from each other in practical effect largely by the different rules of res judicata applicable, are popularly known as the "true", the "hybrid", and the "spurious" class suit.

The true class action is one in which, but for the class action device, joinder of all interested persons would be required, and thus it is that subsection 1 of Rule 23.01, which describes the true class suit, speaks in language reminiscent of Rule 19.01, the compulsory joinder of parties rule. The two kinds of class suits which have been most common in Minnesota, the stockholders' suit to

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182. Minn. Stat. §540.02 (1949). The statute phrased the requirements of a common interest and of numerous parties in the alternative, but our court always read the statute as if both elements were required. Advisory Comm. Note 5 to Rule 23.01.

183. This phenomenon is amusingly described by Chafee, Some Problems of Equity 199-200 (1950), concluding with the lament: "The situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity."

184. See 3 Moore's Federal Practice §23.05 (2d ed. 1948).


186. "It may be admitted that the terminology shocks the aesthetic sense and the succession of adjectives before the noun shows the poverty of imagination in choice of terms characteristic of the legal profession. But back of the unedifying nomenclature there is substance." Goodrich, C. J., in Pentland v. Dravo Corp., 152 F. 2d 851, 852 (3d Cir. 1945).

187. 3 Moore's Federal Practice §23.08 (2d ed. 1948).
enforce a corporate right and the taxpayers' suit, are both true class suits within the purview of the new rule.

The hybrid class action is one in which the rights of the members of the class are several, and there would be no necessity for joining all of them, but in which there is also involved property which may be affected by the claims.

Finally there is the spurious class suit, in which the rights of the members of the class are several, and they are joined only because of a common question of law or fact affecting their rights, and a common relief which is sought. The spurious class suit is really only another permissive joinder device, and one which is principally useful for avoiding the restrictive jurisdictional requirements of the Federal courts. Indeed serious question has been raised as to whether it is necessary for a state system to include the spurious class suit within its rules. In any case in which a spurious class suit would be possible in Minnesota, the members of the class could also be joined by virtue of Rule 20.01, and it is hard to see what advantage the class action offers.

The effect of a judgment in each of these kinds of class suits can be simply stated: the judgment in a true class suit is conclusive on all members of the class, whether or not they took part in the litigation; the judgment in a hybrid class suit is conclusive as to disposition of the property on all members of the class, but on other issues is binding only on those persons who entered into the litigation; and the judgment in a spurious class suit binds only those actually parties to the proceeding. Of course due process of law requires that the absent class members be adequately repre-

188. 2 Pirsig's Dunnell §1858.
189. 3 Moore's Federal Practice §23.09 (2d ed. 1948).
190. 3 Moore's Federal Practice §23.10 (2d ed. 1948).
191. Judge Clark has called it "unnecessary under state procedures," California Apparel Creators v. Wieder of California, Inc., 162 F. 2d 893, 897 (2d Cir. 1947), and the Minnesota Judicial Council had proposed that subsection 3 of Rule 23.01, which embodies the spurious class suit, be omitted. See Advisory Comm. Note 1 to Rule 23.01. Professor Moore says "there may be some utility in the spurious class suit even when there are no jurisdictional difficulties," 3 Moore's Federal Practice §23.10(1) (2d ed. 1948), but he gives no example, and he criticises—for reasons with which I agree—the one case which purports to set out advantages from such use of the spurious class suit. Weeks v. Bareco Oil Co., 125 F. 2d 84 (7th Cir. 1941), criticised 3 Moore's Federal Practice §23.10(1) n. 10 (2d ed. 1948).
192. This would be my answer to the suggestion at Advisory Comm. Note 8(3) to Rule 23.01 that the spurious class action might be used in such a situation as that presented in Thorn v. George A. Hormel & Co., 206 Minn. 589, 289 N. W. 516 (1940). In that case the claim of each member of the class was so small that individual actions would have been impracticable. But now all of those claimants could join as plaintiffs, and the only added cost which a class action would avoid is the inclusion of the names of
sented if they are to be bound in any of these situations. All this, as I noted, is simply stated. Its application, however, has caused confusion and its wisdom has aroused scholarly debate. To attempt to resolve that confusion, or to weigh the merits of the opposing arguments, would require a lengthy article of its own. Perhaps someday I shall write such an article, but for now I must be content with referring readers to the principal spokesmen of each camp.

Rule 23.02 provides that in a stockholders' suit plaintiff must set out with great particularity his efforts to get the corporation to take the action he desires, and the reasons why his efforts were unsuccessful. The substantive principle involved, that the stockholder must try to make the corporation act before bringing suit, has always been the law in Minnesota. The requirement of "particularity" in the complaint must be observed with care, for in the Federal courts the similar rule has been interpreted with a strictness that has bordered on harshness. The Minnesota rule omits the requirement of its Federal counterpart that the plaintiff must aver that he was a stockholder at the time of the transaction of all of the members of the class in the caption of the complaint.

The holding in the Thorn case that a class suit can only be used in actions "equitable" in nature—of very dubious soundness even under the Code—is surely not the law under the new rules. See Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2d Cir. 1944); Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi. L. Rev. 684, 685 (1941).


This case for the rule is made, and its possible complexities illuminated, at 3 Moore's Federal Practice §§23.02-23.12 (2d ed. 1948). The case against the rule is presented by Chafee, Some Problems of Equity 243-295 (1950), and his discussion of the background of the class suit device, id. at 198-242, is also helpful, although there is little at the latter place with which I think Moore would disagree. These two works provide ample references to other literature on the problem. The notes of the Minnesota Advisory Committee to Rule 23.01, and their counterparts in the official edition of the Rules, Minnesota Rules of Civil Procedure in the District Courts 186-187 (1952) are mere paraphrases of Moore—although in the latter case there is not even the grace to cite to his treatise—but I doubt very much whether they represent any judgment by the Committee on the kind of issues mooted between Moore and his critics.


which he complains; no explanation for this deletion has been made.  

Rule 23.03 prohibits dismissal or settlement of a class suit without permission of the court, and requires that notice of the proposed dismissal must be given to all members of the class in a true class action, and that this may be required by the court in hybrid or spurious class suits.

**Intervention**

Thus far all of the joinder devices which I have considered have been means by which persons in a law suit, or about to start one, can bring in, practically without limitation, other persons or claims. Rule 24, which provides for intervention, does the opposite job. It lets the person who has been left out of the suit come into it, even though his presence may not be wanted by those already there. In doing this it outlines the circumstances in which the outsider has an absolute right to come in, and also other circumstances in which it is left up to the judge to decide whether the third party's presence will be desirable.

Rule 24.01 authorizes intervention as of right "when the applicant has such an interest in the matter in litigation that he may either gain or lose by the direct legal effect of the judgment therein whether or not he were a party to the action." The great bulk of this phrase is taken from the former Minnesota intervention statute and presumably will allow intervention under the same circumstances as heretofore. Thus the principal debtor will be allowed to intervene in an action against his surety, a third party claiming the goods may intervene in an action of replevin, a principal may intervene in a suit against his agent on a contract, and a mortgagee may intervene in a suit by his

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198. The Advisory Committee merely says that Rule 23.02 is "substantially the same" as the equivalent Federal rule. Advisory Comm. Note 1 to Rule 23.02. Worse yet, the Revisor of Statutes, not noticing that there is this important change in language between the Minnesota and the Federal rule, annotates Minn. R. C. P. 23.02 with four Federal cases cited for the proposition that: "A petitioner must have been a stockholder at the time of the transaction of which he complains in order to bring a derivative action or his shares must have devolved on him by operation of law." Minnesota Rules of Civil Procedure for the District Courts 195 (1952).


200. 2 Pirsig's Dunnell §§1916-1925 is very helpful in its discussion of the prior law.

201. Becker v. Northway, 44 Minn. 61, 46 N. W. 210 (1890).


mortgagor for the destruction of property securing the mortgage
debt.204

All, then, would be well, and life could go on as before, were it
not for the final words tacked on to the rule, "whether or not he
were a party to the action." These words were added at a late
date205 in order, as the Advisory Committee tells us, to express the
rule of Faricy v. St. Paul Investment & Savings Society.206 That
rather confusing case needs some consideration. Plaintiff was suing
defendant for a money judgment on bonds of defendant which he
held. A third party claimed that he was the true owner of the
bonds, that the plaintiff had obtained them by fraud, and that he
should be allowed to intervene and have judgment on the bonds.
Defendant didn't want the intervenor to be allowed in the law suit,
and argued that since the judgment in the action between plaintiff
and defendant would not bind the intervenor in any way that there
was not the necessary gain or loss "by the direct legal effect of the
judgment" which the statute then, and the rule now, makes a
condition of intervention. The court managed to muddy the waters
right from the start by saying:

"The immediate question is whether that provision of the
statute is to be interpreted as meaning that such person may
gain or lose by the direct legal effect of the judgment (1) by
becoming a party to the action or (2) without becoming a party
to the action. If the former construction be adopted, defendant
must prevail; if the latter, the intervenor."207

Here the court has things just reversed. It is the defendant who
is arguing for the latter contention, that a third party must be
affected by the judgment though he is not a party to it before he
may intervene, and the intervenor who is taking the position that
it is enough that he will gain or lose if he is a party to the judgment.
The court got itself straightened out, though it didn't correct
its unfortunate earlier language, when it allowed the intervention,
and said:

"To the extent involved in the particular facts it involves,
we subscribe to the proposition that a party is entitled to inter-
vene when he would necessarily gain or lose by the direct legal
effect of the judgment therein if he became a party to the action,
and to this extent only, and do not restrict the right to inter-
vention to cases in which the intervener would gain or lose by

204. Wohlwend v. J. I. Case Threshing Machine Co., 42 Minn. 500, 44
N. W. 517 (1890).
205. 7 Bench and Bar of Minnesota, Sept. 1950, p. 19.
206. 110 Minn. 311, 125 N. W. 676 (1910).
207. Id. at 314, 125 N. W. at 677.
the direct effect of the judgment if he were not made a party."

This is a correct statement of the holding of the case, and it has been so understood by a leading commentator\textsuperscript{208} and by the Advisory Committee itself.\textsuperscript{210} Patently it is desirable that such an important liberalization in interpretation of the statutory language should be codified in a rule which borrows that same language. Thus if the Committee had achieved its desirable goal of expressing the \textit{Faricy} gloss in Rule 24.01, we would know that all continues as it has been, and that it is enough that the intervenor will gain or lose if he is allowed in. I suggest, however, that the language chosen for this purpose, far from codifying the \textit{Faricy} gloss, has the opposite and entirely unexpected effect of codifying the restrictive reading which the court rejected in the \textit{Faricy} case. Consider again the language used: the intervenor may come in when he has such an interest that he will gain or lose by the judgment "whether or not he were a party to the action." My understanding of the phrase "whether or not" is that it means "even if he is not," just as in the small boys' game of "Hide and Seek" the familiar cry, "ready or not, here I come," means "even if you are not ready, I am coming." If this understanding is correct, and I can think of no contrary usage of the phrase, what the rule says in effect is that intervention will be allowed where the third party would gain or lose by the judgment "even if he were not a party to the action." The good work which the Supreme Court did in the \textit{Faricy} case is thus undone by this slip which the Court made in promulgating the rules.

My comments in this regard are more in the nature of a plea to the Court and its Advisory Committee to amend the rule than advice to members of the bar or district judges. If I were a lawyer and had a case like \textit{Faricy} I wouldn't hesitate about moving to intervene, and if I were a judge I would be just as quick to allow the intervention. After all, even if the case no longer comes within the literal language of the intervention-as-of-right rule, it can surely be brought in under Rule 24.02, allowing permissive intervention at the discretion of the court. And I should think that this sort of slip in draftsmanship is just the sort of situation in which the trial judge would unquestionably exercise his discretion favorably to the intervenor.

Clauses 2 and 3 of Rule 24.01 also allow intervention as of

\begin{footnotes}
\item[208] Id. at 319, 125 N. W. at 679-680.
\item[209] 2 Pirsig's Dunnell §1922.
\item[210] Advisory Comm. Note 4 to Rule 24.01.
\end{footnotes}
right where the representation of the applicant's interest by the existing parties may be inadequate, and where the applicant may be adversely affected by the distribution of property in custody of the court. We can forget about these clauses, for in every situation which they cover the intervention would also be proper under clause 1, the "gain or lose by the effect of the judgment" clause. What has happened here is that clauses 2 and 3 are taken directly from the equivalent Federal rule; they are necessary there, because in the Federal system clause 1 is quite different and much narrower than is its counterpart in our rule.

Permissive intervention may be allowed "when an applicant's claim or defense and the main action have a question of law or fact in common," and in exercising its discretion the court is told to consider whether the intervention will delay or prejudice the original parties. The United States Supreme Court has told us that the identical language of the Federal rule "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." Indeed the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit. What this means is that of the two requirements for permissive joinder of parties, a common question of law or fact, and some right to relief arising from the same transaction, only the first test need be met for intervention.

Permissive intervention may be allowed where the intervenor has an economic interest in the outcome of the suit, although not a direct or a legal interest. It is on this basis that the neighbors are allowed to come into an action to set aside a zoning order, and that in an action in which the Brotherhood of Locomotive Engineers sought a declaratory judgment that their agreement with the railroad allowed them to work more miles and days than they were working, the firemen's union, arguing that the more days engineers work the fewer days firemen work, was allowed to intervene. Indeed intervention may be allowed when the intervenor

has little more interest than the avoiding of a precedent which may someday come back to haunt him.\textsuperscript{217} In an old Minnesota case it had been held that a railroad could not intervene in an action to reduce the rates of a competitor, even though, as a practical matter, it would have to lower its rates to meet the competition.\textsuperscript{218} I should expect a different result if the action were decided under the new rules.

The procedure for intervention presents no particular problems: in every case the third party serves a motion to intervene, accompanied by his proposed pleading, on all the parties who will be affected.\textsuperscript{219} If the intervention is of right, the court will automatically grant the motion, while it will exercise its discretion if the intervention is permissive. Despite some confusion in the cases\textsuperscript{220} it is clear on principle that an intervenor has all the rights of an original party, including the right to counterclaim.\textsuperscript{221} The old rule that the intervention had to be in "subordination" to the main action, and that the intervenor could not introduce new and foreign issues to the action\textsuperscript{222} is gone.\textsuperscript{223} Of course where the intervention is permissive the trial judge will have the intervenor's proposed pleading in front of him when he decides whether to allow the intervention, and the fact that a proposed counterclaim would introduce new issues and delay the main action could properly be given weight in the judge's exercise of his discretion. I would suppose that in any case the original parties have the right to counterclaim against

\textsuperscript{217} Cf. Brotherhood of Locomotive Firemen and Enginemen v. United States \textit{ex rel} Deavers, 183 F. 2d 65 (5th Cir. 1950); Fishgold v. Sullivan Drydock \& Repair Corp., 328 U. S. 275 (1946), decided over Justice Black's dissenting observation that "this case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents." \textit{Id.} at 292. But cf. Jewell Ridge Coal Corp. v. Local No. 6167, U. M. W., 3 F. R. D. 251 (W.D. Va. 1943), where the court decided intervention to make a precedent was improper, but allowed the applicant to participate in the trial, present argument, and file briefs as an \textit{amicus curiae}.

\textsuperscript{218} Steenerson v. Great Northern Ry. Co., 60 Minn. 461, 62 N. W. 826 (1895).


\textsuperscript{222} Twin Cities Milk Producers Ass'n v. Oase, 199 Minn. 124, 271 N. W. 253 (1937).

\textsuperscript{223} Clark on Code Pleading 424-425 (2d ed. 1947); Park \& Tilford, Inc. v. Schulte, 160 F. 2d 984, 989 n. 1 (2d Cir. 1947).
the intervenor if he is allowed in, and further, that the compulsory
counterclaim rule224 would apply to claims between the intervenor
and the original parties.

CONCLUSION

At this law school's short course on the new rules last Decem-
ber, Dean Maynard E. Pirsig introduced me by saying that the
topic I was to cover—the same topic I have discussed in this paper
—was "important and difficult." I began my remarks by noting
that in my view joinder is neither important nor difficult, and I
concluded by telling my audience I hoped I had demonstrated that
my view was correct and the Dean's not. The same conclusion is
appropriate at this point. Of course joinder is important in the
sense that it will be immensely helpful in the cases in which it is
appropriate, but there are not really a great number of such cases.225
As to the more pressing matter, is it difficult, I hope that the fore-
going discussion has made it clear that it is not. Indeed I could
almost have stopped my discussion thirty pages earlier, at the
conclusion of my presentation of the philosophy of the joinder
rules, were it not for the need to demonstrate by chapter and verse
that the old restrictions, and the worries and concerns which stu-
dents and judges have built up around them, are now one with
Nineveh and Tyre. I think my final advice to the bar can be put
very simply: if there is any reason why bringing in another party
or another claim might get matters settled faster, or cheaper, or
more justly, then join them. Somewhere in the rules there is surely
authority for the joinder.

224. Minn. R. C. P. 13.01, discussed pp. 587-592 above.