Bringing in Third Parties by the Defendant

Dale E. Bennett
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By Dale E. Bennett*

The present trend toward a recognition of pleading rules as means toward the expeditious and economical settlement of legal controversies, rather than as ends in themselves, has manifested itself in an elasticity and liberality of joinder unknown to the common law. Following the equity practice, the more modern practice acts have sought to effectuate a procedure wherein a complete determination of all questions arising out of a common set of facts might be determined in one suit. This has been accomplished by a liberalization of rules not only as to the original joinder of parties plaintiff and defendant, but also as to the subsequent addition of new parties at later stages of the action. Under the older Code provisions, the right to bring in new parties was limited to the plaintiff, but recent practice acts extend the privilege to the defendant and even the court.¹

In spite of the general tendency to bring in more parties and allow more joinder, the right of the defendant in this regard has been exceedingly limited. Provisions for interpleader are common; but the defendant's right of recovery over in whole or in part for the claim in litigation, whether by way of contribution, indemnity or some cause of action in the nature of indemnity, is ordinarily relegated to a separate action with the attendant expense and delay. He must wait until the termination of the principal controversy, and then, if it is unfavorable, institute his suit against the party ultimately liable, with the ever present possibility that at such later date important witnesses may be unavailable and such party may have become judgment proof or have left the jurisdiction. Possibly this gap in the average Practice Act is due to the inadvertent omission of the codifiers. Again it may more plausibly be attributed to a reluctance on the part of even our more enlightened legislators to tread too far from the well beaten path of the common law and foist on the unsuspecting plaintiff an added party not of his choosing.

*Instructor in Law, Louisiana State University School of Law, Baton Rouge, La.

¹Clark, Cases on Pleading and Procedure 600, 601.
Vouching In

A partial relief from the double litigation of common issues has been effected by the common practice of "vouching in" the party liable over. Thus where the defendant may have a right of recovery against another, he may vouch such party into court by giving him notice of the pendency of the suit and an opportunity to assume the defense. Such judgment will then be conclusive in a subsequent action against the vouchee, both as to the amount and the plaintiff's right to recover.²

By means of this device the defendant has been uniformly allowed to bring in the strict indemnitor who contracted to save him harmless,³ and the co-surety against whom he asserts a right of contribution.⁴ In the primary-secondary liability set-up, as where the defendant claims a right of recovery over against the one whose negligence was the actual cause of the injury, the voucher has been limited in characteristic common law fashion. The rule generally followed in such cases is set out by Chief Justice Field of the Massachusetts court in the case of Consolidated Hand-Method Lasting Machine Co. v. Bradley:⁵


The Georgia Civil Code contains a special provision for "vouching in"—Georgia, Ann. Code (Park 1914) sec. 5234, enacted 1895, but it is merely a codification of the general practice already existing at common law. Usry v. Hines-Yelton Lumber Company, (1933) 176 Ga. 101, 168 S. E. 249, 252. See Faith v. City of Atlanta, (1887) 78 Ga. 779, 4 S. E. 3, where voucher was permitted without the aid of any special statute.


⁴Gibson v. Love, (1849) 2 Fla. 599 (co-sureties on note).

⁵(1898) 171 Mass. 127, 50 N. E. 464, 467. The machine company sued for death of its employee caused by defective electric apparatus, served notice on its lessor through whose failure to keep the lights in repair as he had contracted to do the accident had occurred. The court refused to treat the judgment in the original suit as conclusive on the lessor. Field, C. J., emphasized the fact that the machine company was under a special statutory obligation to see that the works and machinery in its plant were not defective, and so was defending against some negligence of its own in the
"If a party is obligated to defend against the act of another against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call upon him to defend it. . . . It [the right to call in the party liable over] does not, however, apply to cases where one is defending his own wrong or his own contract although another may be responsible to him."

Although the test enunciated in that decision may be characterized as mere dictum, it has been followed and its technicality amplified in other jurisdictions. In these decisions emphasis has been placed upon the requirement that the defendant must be defending solely against the wrongful act of the vouchee; and a strict-interpretation of such terms as "germane to the controversy" and "common issues" has virtually resulted in a requirement of identical causes of action and defenses.

original suit and damages were assessed according to the degree of its (not the lessor's) culpability. That the injured employer's right to recover against the machine company and the latter's right of recovery over against the lessor were for the same amounts and based on substantially (if not identically) the same set of facts was apparently considered of little consequence.

The notice to the lessor was held insufficient to bind him by the judgment, because it did not offer to surrender control of the defense. The court then hypothetically assumed a sufficient notice and formulated the rule quoted supra.

Lord and Taylor v. Yale and Towe Mfg. Company, (1920) 230 N. Y. 132, 129 N. E. 346, employer sued for injury to employee, served notice on contractor installing defective apparatus. Held, judgment against employer not res adjudicata in action over because action was based on employer's negligence in failure to inspect appliance having hard and constant use.

In Raleigh & G. R. Co. v. Western A. R. Co., (1909) 6 Ga. App. 616, 65 S. E. 586, although the decision might be justified on the ground of insufficiency of common questions of fact, it enunciated a requirement of identity of defenses (p. 589) which has been carried beyond all reason in the recent Georgia case of Usry v. Hines-Yelton Lumber Company, (1933) 176 Ga. 616, 168 S. E. 249. There a purchaser of timber rights being sued by the landowner for damages and an injunction was not allowed to vouch in his vendor who had breached a covenant to keep a lease of the timberland in force, so that the defendant became a trespasser in cutting the timber. Without any attempt to evaluate the common issues that would be determined, a requirement of identity of defenses was set up, following the Raleigh and Machine Company Cases. Compare the earlier decision in Taylor v. Allen, (1908) 131 Ga. 416, 62 S. E. 291.

A situation where "vouching in" has been pretty generally allowed is that of a municipality being held liable for an injury caused by a property owner's negligent act. Phila. v. Reading Company, (1929) 295 Pa. St. 183, 145 Atl. 65, defective sidewalk; Brookville Borough v. Arthurs, (1890) 130 Pa. St. 501, 18 Atl. 1076, same; Byne v. Mayor, etc., of Americus, (1909) 6 Ga. App. 628, 64 S. E. 284, wooden shed over sidewalk collapsed injuring boy, original suit settled question that shed defectively constructed and accident not due to negro boys pushing awning down while playing on sidewalk; Faith v. City of Atlanta, (1887) 78 Ga. 779, 4 S. E. 3, negligent
In addition to the arbitrarily imposed limitations as to the scope of application of the common law "vouching in," the device also fell far short of adequate relief, either from the defendant's viewpoint or from the broader viewpoint of trial convenience, in that it did not prevent the second suit. The defendant, even when the voucher was permitted, must turn around and bring a separate action against his vouchee for recovery over. This ordinarily involved a delay of several months, and in one case the defendant did not secure its judgment until seven years after judgment had been rendered against it.\textsuperscript{9}

Texas has only the usual statutory provision for the bringing in of necessary and proper parties.\textsuperscript{10} Yet the courts of that state, with their characteristic liberality, have developed an impleader practice affording the defendant a very complete and adequate relief. Under this procedure the defendant who has a right of recovery over against another may have him brought in as a party to the end that such third party will be bound by matters adjudicated therein, and the defendant will be enabled to secure a judgment against him in the same suit and immediately after the question of primary liability is decided. The Texas courts have experienced little difficulty in allowing the defendant to implead the party liable over, in whole or in part, whether by way of contribution,\textsuperscript{11} strict indemnity or some cause of action in the nature of excavation in public street; Bowman v. City of Greenboro, (1925) 190 N. C. 611, 130 S. E. 502, injury by falling tree limb; Littleton v. Richardson, (1856) 34 N. H. 179, obstruction on highway which frightened horse; in Guthrie v. City of Durham, (1915) 168 N. C. 573, 84 S. E. 859, it was held to be an abuse of discretion not to bring in the property owner on motion of the city (defendant).

\textsuperscript{9}Brookville Borough v. Arthurs, (1890) 130 Pa. St. 501, 18 Atl. 1076, (1893) 152 Pa. St. 334, 25 Atl. 551, lady sued city for injury sustained as result of defective sidewalk; the city vouched in Arthurs, who was under a statutory duty to keep the sidewalk in repair. Judgment against the city, May Term 1886; and city's suit for recovery over brought July 29, 1887. It was not until January 1893, several procedural hurdles later, that a final decision in favor of the city against Arthurs was secured.

\textsuperscript{10}Texas, Complete Statutes 1920, article 1848.

\textsuperscript{11}Barton v. Farmers State Bank, (Tex. Comp. App. 1925) 276 S. W. 177, impleader of co-obligors on note.

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indemnity, placing the emphasis upon the "identity of proof required" in the two controversies, rather than quibbling as to the identity of causes of action, and whether the defendant was being held on the "same theory" upon which he sought recovery over. This common sense attitude is exemplified in the leading case of Skipworth v. Hurt where sureties on the bond of a county treasurer when sued for his misappropriation of funds were allowed to implead the bank which had knowingly applied the county money to payment of a debt owed it by the defaulting treasurer. Judge Brown, in discussing the impleader, stated:

"In this case the facts are so blended and connected as to the rights of the county against these sureties and their rights against the bank that in the trial of the case, the fundamental fact of the liability of Skipworth must be established in the action of the county against the sureties, which would not bind the bank; and if another action were brought by the sureties against the bank, the same issue would be tried anew, whereas the determination of that issue in this action involves but one trial."

Here and there, in other jurisdictions, decisions are to be found where the court has been exceedingly liberal, but unfortunately


13 (1901) 94 Tex. 322, 60 S. W. 423; followed in Nat'l Surety Co., v. Atacosa Ice, Water & Light Co., (Tex. Com. App. 1925) 273 S. W. 821, 824, in suit by depositor for deposits wrongfully taken by cashier, the defendant bank was allowed to make the surety company on the cashier's bond a party and recover a judgment over against it. Powell, P. J., points out the fact that the loss of the light company "was due solely and only to the payment by the bank of these checks issued fraudulently by Witt [cashier] in the company's name. Clearly if the bank owed the company any money under the pleadings and proof of this case, it was the very amount which Witt had wrongfully withdrawn by the process lie adopted. . . . The very same proof which showed a given amount due the light company [plaintiff depositor] necessarily authorized recovery from the surety company by the bank." He concludes, after quoting at length from Skipworth v. Hurt, that in the case at bar . . . "it seems to us that because of Witt's connection with all the parties to the action, it was better to have every issue between them all settled in one suit. In that way they would confront each other and promptly pursue any questions which might arise."

14 Miller & Barnhardt v. Gulf & Atlantic Ins. Company, (1925) 132 S. C. 78, 129 S. E. 131, held abuse of discretion not to make sheriff a party in action on his bond for mismanagement of attached property (motion of surety [defendant] and application of sheriff to intervene). That the sheriff was not merely to be "vouched in" is evidenced by the emphasis placed by the court on the factors that there could be no detriment to the plaintiff to have a judgment against two rather than one, and it would be a serious detriment to the surety company to have to pay the judgment and then bring a separate action for indemnity. Peurifoy v. Mauldin, (1927) 142 S. C. 7,
the Texas judicially developed impleader practice stands signally alone. It is to special legislative enactments that we must turn for relief from the cumbersome technicality of the common law.

**THE ENGLISH THIRD PARTY PRACTICE**

The earliest conscious attempt to essay a solution to this problem is found in the English third party practice, originally set out in Order XVI of the Supreme Court of Judicature.19 Rule 48 of that order provided:

"Where a defendant claims to be entitled to *contribution* or *indemnity* over against any person not a party to the action, he may, by leave of the court or a judge issue a notice (hereinafter called the third party notice) to that effect..."

The person thus brought into the controversy was allowed to take such part in the trial as should appear just and proper to the court, to the end that he should be bound by the judgment. In case the original defendant suffered an adverse verdict, he could secure a judgment over in the same suit against the im-

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140 S. E. 253, surety of defaulting bank president allowed to bring in receiver of misappropriated securities. Woods v. Lavitt, (1930) 110 Conn. 668, 149 Atl. 392, on defendant’s motion, plaintiff ordered to make vendor of property alleged to have been converted a party. McMillan v. Spencer, (1926) 162 Ga. 659, 134 S. E. 921, payee of note executed without consideration, added in suit against maker (emphasis placed on code sections purporting to bring about a blending of law and equity). Hoskins v. Hotel Randolph Company, (1926) 203 Iowa 1152, 211 N. W. 423, passenger sued hotel company for injury in elevator and the latter vouched in the manufacturer. The elevator company, having assumed full charge of the defense, was held to be bound by the findings as to the defective condition of the elevator and the plaintiff’s rights to recover; it was further held to have barred itself from denying the hotel company’s rights to indemnity. The decision is clearly out of line in requiring the voucher to admit the defendant’s right to recovery over as a condition of assuming the defense, but is possibly justified under the facts of the case, the elevator company having conducted the defense throughout in a very prejudicial manner, seeking to absolve itself and throw the blame on the hotel company. Judgment was for the plaintiff against the elevator company and hotel company, declaring the liability to be primarily that of the elevator company.

But see J. Hogan v. Miller, (1931) 156 Va. 166, 157 S. E. 540; Johnson v. Cullinan, (1923) 94 Okla. 246, 211 Pac. 732; Enid Oil and Pipe Line Company v. Champlin, (1925) 113 Okla. 170, 240 Pac. 649; Owens v. State, (1928) 133 Okla. 183, 271 Pac. 938, 945, where under statutes (as found in several states) merely providing for bringing in parties where there was a non-joinder and not purporting to adopt the equitable procedure, the courts laid down a strict requirement that the party brought in must be a necessary party.

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15The Annual Practice, 1924, Order XVI, rules 48-55, pp. 281 et seq. This procedure was founded on Judicature Act. (1873) sec. 24, ss. 3. pt. V. div. I.
pleaded party, on proof of his right to indemnity or contribution, as the case might be.16

The true purpose of these rules, "to enable all questions between the parties interested to be tried in one action without the necessity of instituting a second suit," was recognized by the English Courts,17 but considerable difficulty was encountered as to the proper interpretation of rule 48. The words "entitled to contribution or indemnity" had originally been followed by the phrase "or other remedy or relief" which was subsequently omitted.18 In view of that omission, it was held in a number of decisions that impleader should be limited to cases of contribution and indemnity within the narrow meaning of the old rule, namely "where a third person has contracted to indemnify the defendant."19 Usually, however, the courts took the liberal view that

16Rule 48 also sets out details as to filing and service of notice. Rule 49 provides third party must enter appearance in 8 days, and effect of failure to do so. Rules 50 and 51 allow judgment for defendant against third party who defaults. Rule 52 governs appearance of third party and application for directions as to trial of question of third party's liability to make contribution or indemnify. Rule 53 provides: "The court or a judge upon the application mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just and generally order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the court, or judge, shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action."

Rule 54 gives the court discretion as to the awarding costs. Rule 54a provides for the third party to issue third party notice to one liable over to him, etc. Rule 55 makes third party procedure available against a co-defendant.

17The Annual Practice, 1924 p. 281, Editor's note.

18Speller v. Bristol Steam Nav. Co., (1884) 13 Q. B. D. 96, 101, 53 L. J. Q. B. 322, defendant sued for damage to goods caused by vessel being unseaworthy, not permitted to serve third party notice on persons from whom vessel was hired with a warranty of seaworthiness. Pontifex v. Foord, (1884) 12 Q. B. D. 152, 53 L. J. Q. B. 321, lessee sued for breach of a covenant to repair not allowed to bring in sub-lessee with precisely similar covenant; Nelson v. Empress Assurance Corp. Ltd., [1905] 2 K. B. 281, 74 L. J. K. B. 699, in action on insurance policy, the defendant was not permitted to bring in the underwriter of a policy of re-insurance covering the same subject-matter, the court holding that the contract of re-insurance was not one of "indemnity" within the meaning of Order XVI, rule 48; Gowar v. Hales, [1928] 1 K. B. 191, 96 L. J. K. B. 1088, motorist sued for damages refused permission to bring in insurance company as third party. The court followed the rule that in an action against a motorist the jury should not be informed that he was insured; Clover, Clayton & Co. v. Hessler, [1925] 1 K. B. 1, 94 L. J. K. B. 42, defendant shipowners not allowed to bring in underwriters who had superintended repairs that plaintiff's cause of action was based on.
"the object of the rule was to enable the court to try once and for all an issue of fact in which all parties are alike interested," and allowed the impleader without more ado if substantial questions of fact were common to the original controversy and the defendant's cause of action for recovery over.\(^{20}\) Again it might work out an implied obligation to indemnify.\(^{21}\)

In order to escape from its apparent limitations and the resulting conflict as to its application, rule 48 was altered in 1929 and couched in much broader and less ambiguous language. Its substitute, rule 1 of Order XVIa of the Supreme Court of Judicature (the new code of Third Party Procedure),\(^{22}\) provides:

"Where in any action a defendant claims as against any person not already a party to the action (in this Order called the 3rd party),

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and sub-

\(^{20}\)Carshore v. N. E. Ry. Company, (1885) 29 Ch. D. 344, 347, 54 L. J. Ch. 760, action against railway company for transfer of plaintiff's stock on forged indorsement; the railway obtained leave to serve transferee with claim for indemnity. Fry, L. J., concludes in this very practical two paragraph opinion: "Here all are interested in whether the transfer was a forgery, and I think it best to try it once in the presence of all parties;" Benecke v. Frost, (1876) 1 Q. B. D. 419, 45 L. J. Q. B. 693, action for refusal to take shellac ordered; defendants allowed to bring in parties for whom they had bought the shellac and who had likewise refused to accept it as being of inferior quality (clause as to quality same in contracts between plaintiff and defendants on one hand, and defendants and third parties on the other). Blackburn, J., states: "The very object of the Judicature Acts seems to be that a question of this sort, which is one question whether certain shellac did or did not satisfy a certain description, should be determined once for all. There was a great scandal in the possibility of different juries giving different answers to such a question, and that was what the Act sought to put an end to." Accord: Byrne v. Brown, (1889) 22 Q. B. D. 657, 58 L. J. Q. B. 410, 37 W. R. 592, lessee sued for covenant to repair; Eden v. Weardale Iron and Coal Company, (1887) 34 Ch. D. 223, 56 L. J. Ch. 178, 400, defendant sued for damages in respect to coal taken from lands, served notice as indemnitor on third party who had purported to own the coal and allowed defendant to work it; Norris v. Beazley, (1877) 46 L. J. Q. B. 515, 31 L. T. 409, trustee impleaded company primarily liable.


\(^{22}\)The Annual Practice, 1932. p. 287, Order XVIa, rule 1. (1). Aside from this distinct change, the remainder of Order XVIa, rules 2-12, corresponds very closely, both in substance and phraseology, to the old provisions in Order XVI, rules 49-55. Rules 7 and 8 of the new order are of interest in that they tend to emphasize, by slight alterations, the wide discretionary powers already given (rule 53 of old order) the trial court in determining what part the added party is to play in the principal action and how far he is to be bound by the adjudication therein.
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stantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, the court or judge may give leave to the defendant to issue and serve a 'third party notice'."

The interpretation of rule 12 of the new Order (providing for issuance of third party notice on co-defendants) in the recent case of In re Burford indicates that the new rule will undoubtedly broaden the third party procedure so that leave to implead the party liable over will now be given in cases sometimes considered outside the former provision. In the Burford Case an administrator had given checks signed in blank to solicitors who filled them out and then lost the funds through the insolvency of a brokerage firm to which they were given for investment. The beneficiaries sued the administrator and the solicitors to recover the money, and the administrator moved to serve third party notice on the solicitors asserting a claim to recovery over. The lower court refused the motion on the ground that the relief claimed was not "substantially the same." In reversing that holding the Court of Appeal interpreted the rule as requiring substantial similarity of facts rather than identical remedy or relief. "The words 'substantially the same,'" states Lord Justice Lawrence,

"should, I think, be interpreted as 'the same in substance though not in form,' because it is impossible that the issues between the defendant's inter se should ever be the same in form as those between the plaintiffs and defendants. The claim by a defendant against his co-defendant must necessarily be a different claim from that of the plaintiff against the defendants."

The most delightful feature of the decision is the court's refusal to attempt the formulation of any definite rule purporting to govern future decisions. Order XVIa is treated simply as a

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23[1932] 2 Ch. 122, 101 L. J. Ch. 321.
24 The Annual Practice 1932, Editor's notes pp. 287-292, discussion of the effect of the new rule on cases where impleader was formerly refused.
26 Lawrence, L. J., succinctly states, p. 140, "without attempting to lay down any general rule as to what claims do or do not come within the scope of rule 12, sub. r. 1, of Order XVIa, in my judgment the present claim is essentially one which comes within that scope."
procedural device to facilitate the defendant's recovery over, rather than as a rule of substance to be litigated and relitigated in a hollow effort at precision and definition as to its scope.

Although the English third party provisions contain a considerable amount of administrative detail, it is significant that the all-important procedural questions of what part the added party is to play in the principal controversy and how far he shall be bound by the judgment rendered therein are clearly and distinctly left to the trial court's discretion,27 guided by those vague yet workable considerations of trial convenience and practical justice which play so important a part in the English practice.28 This discretion vested in the courts has been wisely and understandingly exercised with a conscious effort to balance properly the conflicting interests in the individual case rather than to work out a "rule of thumb" to be indiscriminately applied. Although the third party has been uniformly permitted to attend the trial and assist the defendant,29 he has not been given a free rein to set up independent issues at will and take full part in the principal controversy unless such direct personal defense was necessary for an adequate protection of his interests. Thus where the defendant had already raised all reasonable defenses so that the added party's interests were fully protected, the latter was not allowed to harass and delay the plaintiff by additional defenses and interrogatories.30 On the other hand, he was given leave to defend as to points not raised or properly handled by the defendant;31 and where the de-

27See notes 16 and 22, supra.


30Barton v. London and N. W. Railway Company, (1888) 38 Ch. D. 144, 150, 57 L. J. Ch. 676, in affirming an order denying a full defense to the added party, Lord Justice Cotton declared that if the defendants had not already properly raised all defenses and points, the court would no doubt have given the third party leave to raise them, but "where all material grounds of defense are fairly raised by the defendant, a plaintiff ought not, in my opinion, to be embarrassed by a third party coming in and saying, 'I wish to deliver a defense; I wish to administer interrogatories; I wish to take the same course as if I were a defendant.'" He further pointed out that where a defendant, as in the case at bar, was making a bona fide defense he would always be glad to avail himself of any evidence or defenses called to his attention by third parties.

31Witham v. Vane, (1880) 49 L. J. Ch. 242, 41 L. T. 729; Eastern Shipping Company v. Quah Beng Kee, [1924] A. C. 177, 93 L. J. P. C. 72, usual order obtained to effect that the third party should be at liberty to defend and appear at the trial, and should be bound by the judgment, and might raise points of defense not raised by the defendant company.

The decision in Byrne v. Brown, (1889) 22 Q. B. D. 637, 38 L. J. Q. B.
defense was entirely neglected, he was allowed to take full charge.\textsuperscript{32} As an added precaution, for the protection of the plaintiff from unnecessary delay, the question of liability over, which is only of importance to the defendant and the added party, was kept separate and distinct—being tried subsequent to the principal controversy.\textsuperscript{33} The flexibility of the English decisions and their freedom from fine-spun common law disquisitions is further illustrated by the case of \textit{Eden v. Weardale Iron & Coal Company}\textsuperscript{34}, where the court experienced little difficulty in holding the impleaded party, an "opposite party" or a "defendant" for certain purposes\textsuperscript{35} in giving full effect to the impleader practice, and yet not a defendant within the general meaning of the word.\textsuperscript{36}

**Third Party Provision's in American States**

A relatively small number of our states, recognizing the patent inadequacy of the common law device of "vouching in," have enacted provisions, patterned either directly or indirectly after the English third party practice.\textsuperscript{37} An examination of these statutes 410, 37 W. R. 592, where the third party was baldly denied leave to defend, in face of its claim that the original defendant had failed to raise all feasible defenses, was possibly unduly strict. For a more liberal view on similar facts, see Benecke v. Frost, (1876) 1 Q. B. D. 419, 45 L. J. Q. B. 693, where the third party was given leave to appear by counsel and defend the action "as they may be advised" on the common question as to the quality of shellac furnished, but upon no other question. Under the order in this case it appears that the added defendant's part in the trial would depend on the adequacy of the defense by the original defendant.

\textsuperscript{33}Callender v. Wallingford, (1884) 53 L. J. Q. B. 569, Lord Coleridge, C. J., states: "Rule 53 puts it beyond doubt that the Court or a Judge, if it shall appear desirable, may give the third party liberty to defend the action—that is, in fact, may put him in the place of the defendant. It is obvious that there may be cases where even without collusion, and a fortiori with collusion, it may not suit the defendant to defend, and in such cases I think the third party should be allowed to take his place. In this case, therefore, I think the third party should have general leave to defend."

\textsuperscript{34}(1887) 34 Ch. D. 223, 56 L. J. Ch. 178, 400.

\textsuperscript{35}Coles v. Civil Service Supply Ass'n, (1884) 26 Ch. D. 529, 53 L. J. Ch. 638; Eden v. Weardale Iron and Coal Company, (1887) 34 Ch. D. 223, 56 L. J. Ch. 178, 400.

\textsuperscript{36}Cotton, L. J., pointing out that the third parties were not defendants within the general meaning since the plaintiff could not get judgment against them. Accord, Edison and Swan Electric Company v. Holland, (1889) 41 Ch. D. 28, 58 L. J. Ch. 524.

\textsuperscript{37}In addition to third party provisions in New York, Wisconsin and
and the decisions interpreting them as to their operation and scope raises a substantial query as to their success.

**New York**

In New York, sec 193 (2) of the Civil Practice Act, generally conceded to have been at least suggested by the English rules,\(^3\) was introduced in 1922.\(^3\) The new provision was originally construed in a very narrow manner due largely, so it was stated,\(^4\) to the interpretation of the word "must" in the statute as making the impleader a matter of right rather than exercise of judicial discretion. Fearful lest by their liberality in a particular instance they might establish a precedent which would prove burdensome to plaintiffs in later cases, the courts limited the *right* of impleader to cases of liability over by way of contribution or indemnity in the strictest sense of the word.\(^4\)

Pennsylvania, which will be discussed, infra., such enactments are also found in Louisiana, Code of Practice (Dart 1932), art. 378-388; Iowa, Code 1933, sec. 11, 155; Maine, Rev. Stat. 1930, sec. 54, p. 1339. For a discussion of impleader practice in federal admiralty jurisdiction, and English dominions having statutory authorization, see Cohen, Impleader Practice, (1933) 33 Col. L. Rev. 1147, 1169, 1182.

\(^{3}\) Lewis H. May Company v. Mott Avenue Corporation, (1923) 121 Misc. Rep. 398, 201 N. Y. S. 189. Cropsey, J., states, "Although the notes do not give credit to the English practice rules, as the origin of this amendment, it seems quite obvious that they at least furnish the suggestion;" also see Neuss Hesslein & Company v. National Aniline & Chemical Company, (1923) 120 Misc. Rep. 164, 197 N. Y. S. 808.

\(^{4}\) Laws 1922, ch. 624.

\(^{3}\) May Company v. Mott Avenue Corporation, (1923) 121 Misc. Rep. 398, 201 N. Y. S. 189, Cropsey, J., in limiting impleader to case of strict indemnity or contribution, says "I cannot believe it was intended to permit a third party to be brought in upon the application of the defendant merely because the defendant has a claim against him the determination of which involves some of the same facts involved in the plaintiff's claim. And this construction, it would seem, should not be given unless absolutely required because by the terms of the amendment the court 'must' direct the third person to be brought in."

\(^{4}\) May Company v. Mott Avenue Corporation, (1923) 121 Misc. Rep. 398, 201 N. Y. S. 189, vendor of real estate sued for commissions not allowed to bring in purchaser who would be liable over because of his representation that there was no broker in the transaction; New Netherland Bank of New York v. Goodman, (Sup. Ct. Spec. Term N. Y. County 1923) 201 N. Y. S. 188, suit for failure to return skins delivered to be dressed and dyed, defendant's motion to bring in party to whom he claims to have delivered them denied. Neuss Hesslein & Company v. National Aniline & Chemical Company, (1923) 120 Misc. Rep. 164, 197 N. Y. S. 808. Action for damages caused by impurities in beer coloring sold by defendant. On ground that claims were "largely unrelated," the defendant's motion to bring in party who sold it the coloring so as to assert a claim against such party was denied.

But see Fedden v. Brooklyn, (1923) 204 App. Div. 741, 199 N. Y. S. 9,
To escape the limitations of the early decisions, Section 193 (2) was amended in 1923, the word "must" being changed to "may," so as to make the matter clearly discretionary with the court. With the decision of the Irwin Case immediately following this change, it appeared that the New York judiciary were likely to defeat the legislative purpose by self-imposed restraints in the exercise of their newly acquired discretion. In that case a defendant who was sued for damages resulting from his chauffeur's negligence sought to implead the chauffeur, an ideal situation for the application of section 193 (2). The motion was denied on the ground that there was no showing of merit in the application.

In subsequent opinions, however, the courts have appeared to sense the real significance of the change and, with a wholesome emphasis on the purely discretionary nature of their power, have sought to apply the equitable principles intended by the codifiers. Judge Taylor of the appellate division declared in Ilczu v. New York Central Railway Company:

"Not only the promotion of expedition and the curtailing of expenses in litigation, but the trend of authority speak for a liberal construction of this statute, that it be given a scope as wide as is consonant with due regard for the rights of plaintiffs to proceed promptly."

The court cited the broad construction of similar provisions by master being sued for his servant's negligent act allowed to bring in the servant.

Sec. 193 (2) N. Y. Civil Practice Act, as amended by New York, laws 1923, ch. 250, provides:

"Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court, on application of such party, may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such judgment as may be proper."

In Irwin v. N. Y. Telephone Company, (1923) 121 Misc. Rep. 642, 202 N. Y. S. 81, Judge Hazarthy says, in speaking of the change of the word "must" to "may," that the change "is of vital importance" and that "the legislature did mean to invest the court with discretion, and that discretion was meant to be exercised in each particular case."


the Wisconsin and English courts and the statement by Clark in his treatise on Code Pleading that, "It would seem that the rule [here under consideration] should be more broadly applied without such meticulous spelling out of the supposed statutory requirements." This practical attitude is evidenced in decisions permitting the impleader of prior indorsers on a forged check paid by defendant bank, parties assuming the obligations of notes sued on, an undisclosed principal, a prior grantor whose deed had contained warranties similar to those made by the defendant, an employee of the defendant whose negligence in procuring insurance caused the plaintiff's loss, the railway responsible at least in part for loss due to delay in forwarding goods, and an independent contractor whose negligent act created the dangerous condition of the premises. In Day v. 5th Avenue and 43rd Street Building Corporation the trial court's refusal to allow an application to bring in the party primarily liable was reversed by the appellate division as an abuse of discretion. It is interesting to note that the plaintiff was not objecting to the defendant's motion, indicating that it was not for his protection or convenience that the impleader had been refused.

On the other hand, in several of the more difficult cases, the courts have resorted to technicalities to justify decisions which, if justifiable at all, could best be explained in terms of judicial discretion. In Krombach v. Killian, the owner of certain prem-

45At p. 286.
cellation, sued to recover a deposit for faithful performance, the defendant (original lessee) was allowed to bring in the lessor who had cancelled the lease and with whom he had posted a like sum as security.
53(1930) 231 App. Div. 89, 246 N. Y. S. 380, owner of building, being sued for death of workman in its construction, applied to bring in two of contractors engaged in erection of the building, who, if anyone, were liable for the alleged negligence. Contractors had also agreed to indemnify the owner from such claims.
is, on being sued by a guest who had slipped on a stairway, sought to bring in an insurance company liable to him under a policy covering such risks (the insurance company had disputed sufficiency of the notice to it). The reversal of the lower court’s order bringing in the insurance company might easily have been justified on the basis of resulting prejudice to the insurance company by the disclosure of its interest in the case to the jury. This consideration the court merely alluded to, choosing to “go technical” and limit the benefits of section 193(2) to cases where there is an absolute or present liability over, a rule which if uniformly applied would virtually emasculate the New York provision.

The finishing touches on the judicial strait-jacket for section 193(2) were applied by the New York court of appeals in Nichols v. Clark, MacMullen and Riley. An action had been brought against certain consulting engineers for defective plans and work in the reconstruction of a heating system, resulting in a fire which had destroyed the plaintiff’s house and its contents. The engineers were charged with negligence in recommending the use of celotex as a non-inflammable covering and insulation for hot air pipes, when it was in fact inflammable. They sought to bring in the celotex manufacturer as a defendant, alleging that it had recommended and advertised its product as insulating material for covering hot and cold air ducts and would be liable over if they were mulcted in damages for using celotex. The refusal to allow the joinder of the Celotex Company might have been explained on the sole ground that no prima facie case of liability over had been established by the defendant’s allegations, but

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55"The provisions of the section," states Kelby, J., "are limited to a person who 'is or will be liable.' 'Will be' cannot arbitrarily be changed to 'may be.' The Insurance Company is not presently liable. It may hereafter be liable; but such liability will not accrue, unless and until a judgment shall have been obtained against the owners, and the owners shall have fully satisfied such judgment by a payment 'in money.' And even after the payment of such judgment by the owners, there would still remain for determination the disputed question of the service of due notice." Similarly in Hotel Antlers v. Standard Oil of N. Y., (1923) 144 Misc. Rep. 781, 259 N. Y. S. 351, the court refused joinder of a party alleged to be solely liable for the negligent act as an independent contractor or liable over to the defendant if the court found him to be a servant and the doctrine of "respondeat superior" applicable so as to enable plaintiff to recover against the defendant. The court appeared bothered by the allegation of liability over in the alternative.

56(1933) 261 N. Y. 118, 184 N. E. 729.

57The court discussed the insufficiency of the defendant’s allegations of liability over, but it is evident from other parts of the opinion that had the
such a practical disposal of the matter did not satisfy the court's penchant for definite interpretation. Judge Crane sought additional reasons to justify the decision, and held that the cause of action against the Celotex Company was not identical with the one against the defendant, which contained allegations of negligence in designing the heating system as well as in the use of Celotex as an insulating material. He declared:

"All these allegations are contained in one cause of action. Upon the trial the proof may go in under any of the allegations, for some of which the 'Celotex' might be responsible and for some of which the engineers solely responsible. A judgment against these defendant's engineers, upon such allegations would not be binding upon the Celotex Company or, to state it more accurately, the Celotex Company would not be liable over to the engineers on a judgment recovered against them based upon such proof. . . . The object is to prevent a circuity of action. The determination of the facts to be tried will settle both claims. The causes of action must, therefore, be the same or, at least, based upon the same grounds, although arising, of course, out of different relationships."

While it is true that the decision against the engineers might be predicated entirely on negligence in designing the heating plant, partly on such negligent designing and partly on the use of celotex, or wholly on the use of celotex, the jury determining the primary question of their liability is best fitted to determine the related question as to the ultimate basis of such liability. Otherwise, although the original jury's finding of negligence be based entirely on the use of celotex, another jury in a separate suit for recovery over might take an opposite slant on the facts and refuse to allow recovery over against the Celotex Company on the theory that the fire was due entirely to negligence in designing the heating unit. Such an anomalous result is clearly possible, to say nothing of the fact that two trials, two juries and two examinations of witnesses are required where one would clearly have sufficed.

By his attempt to define and apply that elusive term "cause of action" as a purely technical concept, Judge Crane places an unfortunate interpretation on section 193 (2), limiting its benefits to that narrow line of cases where the impleaded party will be liable on the judgment rendered against the original defendant. Under the modern conception of "factual" rather than "label" pleading, it appears unnecessary to talk in terms of "causes of liability over, in case the use of celotex caused the fire, been clearly established, the impleader would still have been refused."
BRINGING IN THIRD PARTIES BY DEFENDANT

action;” but if such terminology must be employed, a much happier result may be reached by the application of Clark's pragmatic and common sense treatment of the cause of action as “an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts.”

In matters of procedure, once the third party is brought in, the New York Courts have prevented any real serving of trial convenience by their reluctance to abandon the ancient legal idea of a two party action—an action exclusively between plaintiff and defendant. Following the lead of Judge Lehman's lengthy opinion in Municipal Service Company v. D. B. & M. Holding Corporation, they have uniformly held that unless the original defendant turns over the defense (presumably by going through the old process of "vouching in") the impleaded party has no right to take any part in the proceedings between the plaintiff and defendant, but must confine his activities to listening carefully and answering the supplemental pleadings of the defendant.

Consequently, the facts decided in the main controversy are not final as to him, but must be relitigated in the action for recovery over—the only effect of the impleader being to provide for the joint trial of the two controversies.

Nor does the fact that the defendant may still bind the impleaded party by turning over the entire defense to him adequately meet the situation. For example, in the Nichols Case, while there are important common questions of fact which make the impleader advisable, there are also questions solely between the plaintiff and defendant with which the added party is in no way concerned.

59(1931) 257 N. Y. 423, 178 N. E. 745.
60Municipal Service Company opinion quoted at length and followed in: Marsh v. Standard Acc. Ins. Co., (1931) 141 Misc. Rep. 484, 252 N. Y. S. 206, third party's counter-claim against plaintiff's complaint stricken out on ground that his pleadings in defense must be directed solely against the supplemental pleadings of the original defendant; Fenner v. Kahn (1933) 146 Misc. Rep. 210, 261 N. Y. S. 528, 533, dictum that added defendant cannot counter-claim against the plaintiff. See also, Travlos v Commercial Union of America, (1930) 135 Misc. Rep. 895, 238 N. Y. S 692, holding impleaded party could not answer or otherwise plead in respect to the plaintiff's complaint.
61In the Municipal Service Company Case, (1931) 257 N. Y. 423, 178 N. E. 745, the court points out that where the indemnitor is not offered the opportunity to defend the original suit, the judgment therein is not binding on him and thus he is not prejudiced by the original defendant's feeble defense.
The true solution, afforded by the English practice, is to give the added party control of those issues upon which his liability over depends, provided the original defendant is not making an adequate defense. In case of a strict indemnitor it might mean a complete assumption of the defense. In the Nichols Case set-up—only on the question as to whether the fire was caused by the use of Celotex. This is not a matter to be governed by any categorically stated set of rules. It is a matter to be pragmatically worked out with reference to the peculiar facts of the individual case.

New York—Section 211A

Inseparably connected with section 193 (2) of the New York Civil Practice Act is section 211a. Prior to its enactment in 1928, the New York courts had followed the unsatisfactory though generally accepted rule that there was no right of contribution among joint tort-feasors in pari delicto, and consequently refused to allow the impleader of such parties, unless the plaintiff acquiesced in the motion. The new section purported to alter the harsh common rule and enable the defendant to secure contribution from his co-tort-feasors. It provided for contribution

"where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants. . . ."

The purpose of the legislators to give the joint tort-feasor a substantial right of contribution was fully grasped by Judge Crouch of the appellate division in Haines v. Bero Engineering Corporation. In that case, a corporation being sued for an injury caused by the alleged negligence of one of its truck drivers was permitted to bring in, for the purpose of securing contribution, the driver of the car in which the plaintiff was riding when the collision took place; Judge Crouch summarily dismissed all technical objections arising from a strict construction of the unfortunate wording of section 211a, and pointed out that unless impleader was permitted under section 193 (2) the joint tort-feasor's right

62Added by Laws 1928, ch. 714, in effect September 1, 1928.
64Fisher v. Bullock, (1923) 204 App. Div. 523, 198 N. Y. S. 538, aff'd (1923) 237 N. Y. 542, 143 N. E. 735, treating the defendant's motion, in effect, as if the plaintiff were applying to bring in the third party.
of contribution would not be a substantive right, but merely a will-o’-the-wisp depending solely on the election of the plaintiff to sue jointly. This liberal and common sense decision, interpreting sections 193 (2) and 211a together, apparently settled the matter in the appellate division, and a very liberal practice was evolved.\(^66\)

Then came the case of *Fox v. Western New York Motor Lines*. The trial court had allowed a defendant bus company to implead the driver and owner of a truck in which plaintiff was riding when the injuries complained of were sustained. The bus company alleged such third party was at least jointly at fault in causing the collision. The plaintiff made no objection to the impleader, but the added defendant moved to vacate the order bringing him in. The appellate division, following its previous decision in the *Haines Case*, upheld the order adding the truck driver as a defendant.\(^67\) Judge Sears emphasized the fact that the plaintiff’s rights were unaffected by bringing in the joint tort-feasor, and declared in reference to the right of contribution under section 211a: “We deem the right a substantial one, not merely of a phantom nature existent or not at the whim of a plaintiff, but one which the courts may enforce even against the will of the plaintiff, unless the plaintiff’s own rights are thereby put in jeopardy.” The court of ap-

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\(^66\)Haines Case followed in: Schenck v. Bradshaw, (1931) 233 App. Div. 171, 251 N. Y. S. 316, allowance of defendant’s motion to bring in driver of other car upheld, overruling plaintiff’s objection of prejudice and delay; Davis v. Hauck and Schmidt, (1931) 232 App. Div. 556, 250 N. Y. S. 537, as to procedure after the joint tort-feasor is brought in, the court held that the plaintiff might adopt the averments of the defendant’s answer as to the added party, amend his complaint setting forth his theory as to the negligence of all parties, or stand on his original complaint. As to possible verdicts, the jury might defeat the plaintiff, or find against or in favor of one or more of the defendants on the basis of all the evidence, and after judgment rendered and payment, the respective liabilities of the defendants, one to another, could be determined by motion without the necessity of an independent suit with a rehearing of the evidence; La Lone v. Carlin, (1931) 139 Misc. Rep. 553, 247 N. Y. S. 665, holding that the plaintiff’s covenant not to sue the driver of the car he was in did not defeat the defendant’s right to bring in such party. (Decision favorably commented on in (1931) 16 Corn. L. Q. 598 on the ground that otherwise plaintiffs could circumvent sec. 211a by covenanting not to sue those persons whom they did not want held).

Contra: Rowe v. Denler, (1929) 135 Misc. Rep. 286, 238 N. Y. S. 9, auto collision, 211a held only applicable where plaintiff has sued defendants jointly (noted (1930) 39 Yale, L. J. 909); in Troshow v. Altman & Company, (1931) 140 Misc. Rep. 420, 250 N. Y. S. 599, Rowe v. Denler was followed and the Haines Case overruled, but that decision was reversed without opinion and the defendant’s motion to bring in the joint tort-feasor granted by the appellate division, (1931) 234 App. Div. 664, 851, 252 N. Y. S. 945.

peals, however, reversed the appellate division on the ground that section 193 (2) does not apply "unless there is a liability over, either through indemnity or contribution or otherwise, existing at the time of application." Judge Crane expressly overruled the Haines Case line of decisions, interpreting sections 211a and 193 (2) together, and limited the newly created right of contribution to the case where a plaintiff has originally sued joint tort-feasors and recovered a money judgment jointly against them.

Looking at the Fox v. New York Motor Lines decision in the abstract and from a purely technical standpoint, it is unimpeachable. If we view it from the common sense standpoint of whether it carries out the true purpose of the Legislature, it is, to say the least, unfortunate. Thus section 211a becomes delusive, holding out a promise of contribution to the ear, only to disappoint the hope. That opinion, however, has been uniformly followed in subsequent cases and has apparently settled the scope of New York's contribution statute.

Compare with it the decision of the Texas commission of appeals in Lottman v. Cuilla, involving a similar contribution provision. In sustaining the impleader of an alleged joint tortfeasor, Commissioner Speer set out the Texas statute and stated, "This clearly recognizes the principle of enforced contribution among joint tort-feasors, thus changing the common law rule upon that subject. It is true literally the statute applies to judgments

68(1931) 257 N. Y. 305, 178 N. E. 289.
69Rothman v. Byron, (1931) 141 Misc. Rep. 770, 253 N. Y. S. 812, in refusing to bring in operator of automobile in which plaintiff was riding, the court held that section 211a did not confer a substantive right of contribution existent prior to the entry of a money judgment and concluded, "I am constrained to hold that the plaintiff in the case at bar, when he elected not to sue the driver of the car in which he was riding—who was presumably his friend—was exercising a privilege well within his legal rights." The Fox Case was followed in Booth v. Carleton Inc., (1932) 236 App. Div. 296, 258 N. Y. S. 159; and Morbito v. Rupp, (1932) 143 Misc. Rep. 385, 256 N. Y. S. 605, 607.
70(Tex. Civ. App. 1926) 288 S. W. 123. The Texas contribution statute contains the same joint money judgment requirement which has proved so troublesome in section 211a.
71(Tex. Civ. App. 1926) 288 S. W. 123, 126. The liberal statutory construction in Lottman v. Cuilla was approved by Chief Justice McClendon in Ferguson v. Johnson, (Tex. Civ. App. 1933) 57 S. W. (2d) 372, 377. After stating the general rule of statutory construction, that the court is not permitted to look beyond the language employed, he declares, "But even this rule is not an altogether inflexible one; and where the literal, grammatical, or dictionary interpretation of the language would defeat or substantially impair effectuation of the legislative objective, the wording in which the legislature has clothed its mandate will not be given controlling effect."
rendered against two or more wrongdoers. But the evident purpose of the act was to relieve the rigor of the common law, so as to place the burden, as amongst themselves, equally upon all solvent tort-feasors. There is no reason to hold the legislature meant to exclude from the benefits of the statute those cases where, as here, the plaintiff did not elect to sue all the tort-feasors; but every consideration impels us to hold that the defendant sued, may, and should be allowed to, bring in other wrongdoers, provided he does so in such way as not to delay or otherwise prejudice the plaintiff's case."

Instead of setting up the contribution statute in vacuo and then strictly and narrowly defining its terms, the Texas courts have sought to ascertain and effectuate the real legislative purpose.

**WISCONSIN**

The liberality intended in the Wisconsin third party practice is evident both from its context and its origin. The legislature, in 1913, requested the supreme court to suggest such changes in the court practice, "as will simplify it, relieve it of its technicalities and promote the ends of justice, and to report their suggestions to the legislature which convenes in 1915." The suggestions made by the court pursuant to this request were embodied in chapter 219 of the laws of 1915, and included a specific provision for the bringing in of parties against whom the defendant will have a right of recovery over.

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Prior to the enactment of a special impleader statute, we find a limited application of the practice under a general provision for the bringing in of adverse or necessary parties by the court (Wisconsin, Stat. 1931, sec. 260.11). See Town of Washburn v. Lee, (1906) 128 Wis. 312, 107 N. W. 649, sureties on town treasurer's bond allowed to implead parties knowingly receiving the illegal payments. In Schmull v. Mil. E. & R. L. Co., (1914) 156 Wis. 585, 146 N. W. 787, though Barnes, J., felt that the lower court had made a mistake in denying the street railway company's motion to implead the conductor for whose negligence it was being sued, he held that the matter was purely discretionary and therefore not appealable.

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Joint Resolution No. 30, 1913.


(1) gives court power to bring in necessary parties.

(2) interpleader provision.

(3) "A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order.

(4) "This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the
The Wisconsin provision has been held to be discretionary in the largest sense of the word. Thus, the supreme court refused to intervene in *Ertel v. Mil. Elec. Ry. & Light Company* although the trial court had clearly abused its discretion and defeated the very purpose of the act. In that case a pedestrian, injured when a street car collided with and threw a coal wagon against him, sued both the street car company and the coal company for his injuries. The trial court denied the coal company's motion to make its driver, for whose alleged negligent act it was being held, a party defendant. In affirming that ruling, Judge Rosenberry declared "that the court properly exercised its discretion." Fortunately, other trial courts have been more liberal than the one in the *Ertel Case*, and have usually allowed the defendant's application, provided it was seasonably made. Thus a surety has been allowed to implead the party knowingly receiving funds misappropriated by its principal; a defendant bank to bring in indorsers on forged checks it had cashed; and a mortgagor to implead an insurance company so that the latter might be ordered to pay the amount due for a contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship.

Section 260.20, pertaining to the proceedings after new parties are brought in, adds little that should not be easily inferable from section 260.19.


Bell Lumber Company v. Northern Nat'l Bank, (1920) 171 Wis. 374, 177 N. W. 616.
fire loss on the mortgaged premises into court, to be applied directly to the mortgage debt.\textsuperscript{51}

In negligence cases where the defendant seeks to bring in a joint or concurrent tort-feasor for the purpose of enforcing his right of contribution,\textsuperscript{52} the Wisconsin courts have encountered considerably more difficulty, taking the attitude in early cases that when the added defendant was brought in a big free-for-all fight would ensue, in the course of which the plaintiff would be delayed and might suffer reversal due to error by the court in the interdefendant controversy. This attitude was forcibly illustrated in the case of \textit{Bakula v. Schwab}.\textsuperscript{53} In that case the driver of an automobile was sued for injuries to the plaintiff when he ran his car into a ditch in passing a buggy. He moved to bring in the driver of the buggy which was alleged to have swerved in front of him. The motion was granted, but at the close of the testimony the trial court directed a verdict in favor of the added defendant. The original defendant, after an adverse jury verdict, sought a reversal on the ground that the court had erred in directing a verdict against the added defendant. The original defendant, after an adverse jury verdict, sought a reversal on the ground that the court had erred in directing a verdict against the added defendant. This, he argued, would amount to an affirmation of such party's non-liability and thus prevent recovery in any subsequent action for contribution. The supreme court, partially influenced by the broad wording of the Wisconsin provision, could not conceive of the third party in any other light than as a full-fledged defendant in the controversy between the original parties,\textsuperscript{54}

\textsuperscript{51}Lumberman's Nat'l Bank v. Corrigan, (1918) 167 Wis. 82, 166 N. W. 650. Winslow, C. J. (a member of the 1913 Supreme Court Committee suggesting the 1915 provisions) stated, "We regard this as a typical case where justice demands the settling in one action of a number of conflicting claims, all very closely connected." After setting out facts, he continues, "That these parties should be compelled to settle their rights and liabilities in several separate actions, thus duplicating expense and dragging out the controversy through a series of years, is not and never has been the idea of our code of procedure but rather the contrary. . . . The idea in both sections is to enable the court to grasp all the issues germane to the main controversy, whether arising between the plaintiff and the defendant, or between defendants, or between a defendant and an outside party and dispose of them in one and the same action and thus avoid a multiplicity of suits."

\textsuperscript{52}Ellis v. Chi. & N. W. Ry. Co., (1918) 167 Wis. 392, 167 N. W. 1048, recognizes the right to contribute between joint tort-feasors, subject to certain limitations.

\textsuperscript{53}(1918) 167 Wis. 546, 168 N. W. 378.

\textsuperscript{54}Sec. 260.19 (3) provides that defendant may in proper case apply for an order "making such third person a party defendant"—(see note 74 supra, for entire section).

Compare with Judge Owen's technical conception of the Wisconsin provision the common sense and practical interpretation of the English third party provisions, supra.
any error in respect to him justifying a reversal of the plaintiff's judgment. After pointing out the "intolerable" burden, expense and hardship on the plaintiff of another trial, Judge Owen sought to escape the logic of his own reasoning by holding that the issues in the principal case were not res adjudicata in a subsequent controversy between the two drivers. He treated the verdict appealed from as though the driver of the buggy had never been made a party and expressed the opinion that the trial court should have exercised its discretion and denied the application.85

With a fuller realization of the proper interrelation of parties in the impleader set-up, the difficulties confronting the court in Bakula v. Schwab appear more imaginary than real. Judge Rosenberry in two subsequent decisions86 has done much to clarify the practice.

In Wait v. Pierce,87 the most important of these decisions, the

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85 Judge Owen points out, by way of dictum (p. 382), there is no purpose or object in bringing in the concurrent tort-feasor who may also be liable and whose presence only adds confusion, and declares, "We see no reason why this venerable rule [that a plaintiff may choose whom he will sue] should be changed, nor why the plaintiff should be compelled to involuntarily litigate with parties not of his own choosing." Accord: Town of Humboldt v. Schoen, (1919) 168 Wis. 414, 170 N. W. 250, town officers sued for the unlawful expenditure of funds were not allowed to bring in other officers participating therein. Siebecker, J., states, "The plaintiff is not to be subjected to having such rights between defendants tried out in its action." Bakula v. Schwab cited, and no mention made of code provision for bringing in parties liable over.

86 The first of these decisions was Fisher v. Mil. E. R. & Lt. Co., (1920) 173 Wis. 57, 180 N. W. 269. There a light company, being sued for negligent injury to a person thrown from its car, was allowed to bring in the doctor whose negligence was alleged to have aggravated the injury, and against whom a claim for recovery over was asserted for such damages as were due to lack of care in treating the plaintiff. The doctor objected on the grounds: (1) that there could be no right of recovery over until the judgment was paid, and (2) that the light company's cause of action over was not for the full amount of the plaintiff's recovery, the light company admitting liability for part of the injuries. Judge Rosenberry overruled these highly technical objections. He emphasized the fact that the impleader provision should be liberally construed in order to dispose of all closely related matters in one action, and concluded, "The contentions relate to the same general subject, and it is conceivable that although the plaintiff recover against the light company for damages due to the negligence of defendant Rumph [the doctor], a second jury might find against it upon the issue, and the light company therefore be compelled to pay damages, as between it and Rumph, not justly chargeable to it, although legally liable therefor to the plaintiff."

But see opinion of Owen, J., concurring on the ground that the trial court's ruling was not reviewable, but emphatically decrying the giving of the order (adhering to his former view in Bakula v. Schwab).

87 (1926) 191 Wis. 202, 209 N. W. 475 (containing facts of the case), 210 N. W. 822 (opinion as to bringing in added parties). Accord: Mitchell v. Raymond, (1923) 181 Wis. 591, 195 N. W. 855, driver of other car
defendants impleaded the plaintiff’s husband who was alleged to be jointly liable with them and from whom they claimed a right to recover half of any damages awarded to the plaintiff. The husband’s technical objection that the claim against him was not for the full amount of the plaintiff’s recovery was practically considered and overruled, the court stating,

“While it is true that one joint tort-feasor will not have a right of action over against his co-tort-feasor for the amount of recovery, but only for one-half of the amount in the event that there are two, he is certainly well within the statute, because the whole must include an amount less than the whole.”

After setting forth the facts and opinion in Bakula v. Schwab, Mr. Justice Rosenberry says,

“Language is used in the opinion rather broader than the issues of the case warrant. . . . To hold under such circumstances that a judgment which establishes the common liability is not res adjudicata upon that question is to ignore the principle upon which the right to contribution rests. In the Bakula Case, supra, there was no cross complaint, and no issue was made between the co-defendants. It was therefore held that the defendant Schwab was not concluded by the judgment in Wilkinson’s favor. So far as the Bakula Case holds that, where one joint tort-feasor discharges more than his equitable share of a liability resting upon him and another joint tort-feasor by a single judgment, the question of liability of the other joint tort-feasor to the plaintiff is not res adjudicata, it must be and is modified.”

A logical solution to the Bakula v. Schwab problem was arrived at by Judge Fowler in Scharine v. Huebsch.85 Here again the original defendant appealed from a judgment awarding a recovery to the plaintiff, but dismissing the former’s cross complaint against the impleaded concurrent tort-feasor. Again the court was confronted with the task of adjusting rights which had appeared irreconcilable to Judge Owen. On the one hand, “the plaintiff, having recovered a judgment satisfactory to her, ought not to be subjected to the expense and jeopardy of a new trial, merely to enable the defendants to try out issues between themselves.” On the other, if the impleader was to be given its purported effect, the determination of the questions of fact common to the plaintiff’s cause of action and the defendant’s right of recov-

85 (1931) 203 Wis. 261, 234 N. W. 358, followed in Brown v. Haertel, (1933) 210 Wis. 354, 246 N. W. 691.
cry over must be res adjudicata on the added party. The supreme court affirmed the judgment in so far as it awarded recovery to the plaintiff against the original defendant, and reversed its denial of the latter's claim for contribution. Noting the fact that this decision would "require entry of two judgments in a law action, which is unusual, perhaps without precedent," Mr. Justice Fowler states:

"But we see nothing in reason as distinguished from precedent to prevent this. . . . The two issues, that between the plaintiff and the defendant first sued, and that between the latter and the impleaded defendant, really constitute two separate actions which we permit to be litigated together in order to settle the whole controversy by one trial."

He then points out that the inter-defendant issue should be litigated subsequent to and without interfering with the finality of the determination of the principal controversy.

By safeguarding the plaintiff from unnecessary delay, expense and hardship, these recent supreme court decisions have eliminated the only serious practical objection to the impleader of additional parties, and have done much to insure an increasing liberality in the trial courts.

**Pennsylvania**

Probably the clearest and most far-reaching impleader provision is the *Pennsylvania Scire Facias Act*, enacted in 1929.89 This

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89 Pennsylvania, Act of Apr. 10, 1929 (P.L. 479) as amended June 22, 1931, (P.L. 663, No. 236). "An Act to regulate procedure where a defendant desires to have joined, as additional defendants, persons whom he alleges are (alone liable or) liable over to him, or jointly or severally liable with him, for the cause of action declared on, (and providing for entry of judgments against such additional defendants).

"Be it enacted, Etc., That any defendant named in any action, may sue out, as of course, a writ of scire facias to bring upon the record, as an additional defendant, any other person alleged to be (alone liable or) liable over to him for the cause of action declared on, or jointly or severally liable therefor with him, with the same force and effect as if such other had been originally sued; and (such original defendant shall have the same rights in securing service of said writ as the plaintiff in the proceedings had for service of process in said cause. Where it shall appear that an added defendant is liable to the plaintiff, either alone or jointly with any other defendant, the plaintiff may have verdict and judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summoned by the plaintiff and the statement of claim had been amended to include such defendant, and as if he had replied thereto denying all liability.)

"(Upon the joinder of additional defendants under the terms of this act), such suit shall continue, both before and after judgment, according to equitable principles, although at common law or under existing statutes, the plaintiff could not properly have joined all such parties as defendants."

Note—parts added by 1931 amendment in parenthesis.
act was drafted and suggested by a special committee of the state bar association,90 for the express purpose of enlarging the old common law device of “vouching in” to include all cases of liability over, either by way of indemnity or contribution, and to prevent the necessity of a separate suit for recovery over. “The wording of the suggested statute has been made broad,” reads the 1928 Report of the Pennsylvania Bar Association,91 “in order to eliminate all questions of technical procedural rules of joinder. The provision that the action shall proceed according to equitable principles will permit the respective liabilities to be worked out and an appropriate judgment or judgments to be entered, covering the whole situation, without the bringing of separate suits.”

The effectuation of this intended liberality is largely due to the friendly and clear-sighted attitude of the Pennsylvania judiciary. The lower courts were dubious at first as to the implication of the new act,92 but with the Vinnacombe decision,93 the supreme court effectually cleared away the haze surrounding it. Judge Simpson, in that case, conceived the purpose of the statute as two-fold:

1. “to avoid a multiplicity of suits; to compel every interested person to appear and defend the action by plaintiff; and to save the original defendant from possible harm resulting from loss of evidence, as might result if compelled to await the end of the suit before proceeding against those who were primarily liable in whole or in part;”

and to leave the plaintiff’s rights unaffected—

2. “As to them the action proceeds against the original defendant only, exactly as it would have done if the additional defendants had not been named.”

Again in First National Bank of Pittsburgh v. Baird94 Judge Simpson reiterated his holding in the Vinnacombe decision, that

91Pennsylvania, Bar Association 34th Annual Report (1928) pp. 42-44, the report sets out examples of cases coming within the benefits of the proposed statute.

The report also recommended (pp. 44-47) a rule clearly establishing the right of contribution between all joint tort-feasors, which, unfortunatey, was not adopted.

92Cole v. National Casket Company, (1930) 101 Pa. Super. 207, after added party in by scire facias, the trial judge, being evidently somewhat at sea as to the procedure under the Scire Facias Act, held “a side bar conference” with the counsel of all the parties where it was agreed to try the suit as if the plaintiff had originally sued the defendants jointly.

93Vinnacombe v. Phil., (1929) 297 Pa. St. 564, 147 Atl. 826. City sued for injuries due to defect in pavement, allowed to bring in tenant and owner liable over to it for failure to make repairs.

94(1930) 300 Pa. St. 92, 150 Atl. 165.
the adding of defendants by scire facias does not affect the rights existing between the plaintiff and the original defendant. In that case an accommodation maker was sued on a promissory note and caused a scire facias to be issued against the one alleged to be primarily liable. Pending the scire facias and the motion to quash it, the court gave a judgment for the plaintiff against the maker who had filed no affidavit of defense. The defendant appealed from this judgment as prematurely entered, arguing that the pendency of the scire facias proceedings prevented the plaintiff's moving against the added party defendant. Mr. Justice Simpson pointed out the patent absurdity of such a contention, in that the defendant admittedly had no defense as against the plaintiff, and had already been allowed 91 days instead of the customary 15 for filing his affidavit. He declared that the plaintiff need not and could not move for judgment against the added party—the third party controversy being a strictly inter-defendant affair, concluding, "appellant's whole contention on this point is built on the word 'defendants' in the clause 'additional defendants.' The legislature might just as well have used the words 'third parties,' in which event this supposed argument could not have been made. What was intended is clear beyond cavil, and the use of the word 'defendants' does not make it less so. ... The act was not passed to hinder or delay a plaintiff, or to compel him to do impossible or useless things, but only to give the defendant an immediate remedy as against any other person alleged to be liable over for the cause of action declared on, or jointly or severally liable therefor with them."

Guided by Justice Simpson's keystone opinions, the lower Pennsylvania courts have disposed of the various technical questions raised in connection with the new act in a clear and logical manner, striking a very happy balance between the plaintiff's right to a speedy and unencumbered trial and the interest of the defendant, witnesses and court in the prevention of unnecessary litigation or the double adjudication of common facts.\textsuperscript{96} Contrast with

\textsuperscript{95}Note the 1931 amendment to the Scire Facias Act (note 93 supra) provides "Where it shall appear that an added defendant is liable to the plaintiff, either alone or jointly with any other defendant, the plaintiff may have verdict and judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summoned by the plaintiff and . . ." The effect to be given the new clause has not been determined as yet. It is submitted that the result in cases like the Baird Case should not be changed, especially since the plaintiff was asking for no judgment against the added party.

\textsuperscript{96}Connor v. Bank and Trust Company, (1930) 14 D. & C. (Pa.) 581,
the Bakula v. Schwab decision that of the Pennsylvania superior court in Moorhead Knitting Company v. Hartman.97 There an original defendant sought to have the plaintiff’s judgment set aside because of the trial court’s error in refusing to have the jury in the principal action sworn to try the issues between the original defendant and a subcontractor brought in by scire facias. In rejecting the defendant’s technical claim for reversal, Judge Gawthrop stated that the admitted error of the lower court had nothing to do with the plaintiff’s judgment, which was entirely separate and distinct from the ancillary controversy, as to liability over, between the two classes of defendants. Further, the judgment in the principal controversy establishing the negligent handling of plaintiff’s goods was held to be binding on the impounded subcontractor who had had an opportunity to appear and join in the defense.

Under the 1929 scire facias act the Pennsylvania courts uniformly refused to allow the impleader of one alleged to be solely liable, holding that such allegation, if true, would constitute a complete defense for the original defendant, and no liability over or joint and several liability could possibly exist.98 But a confession


98Folcroft Borough v. Lenhart, (1930) 15 D. & C. (Pa.) 535, 538, writ of scire facias held to depend on primary liability of the original defendant, plus existence of right of contribution or indemnity; King v. Equitable Gas Company, (1932) 307 Pa. St. 287, 161 Atl. 65; Shaw v. Megargee, (1932) 307 Pa. St. 447, 161 Atl. 546, automobile collision case. Held, scire facias should be quashed where basis was sole liability of other driver defendant sought to bring in; Yellow Cab Company v. Graham,
of primary liability was not a prerequisite, the writ being alter-
native in nature, and amendment was possible where the error
was merely one of pleading. In 1931, the act was amended to
allow issuance of the writ on one alleged to be “alone liable.”
This was in line with the general plan to bring in all interested
parties and thresh out all matters in one suit. Yet it may be sub-
ject to criticism, in that it permits the defendant to bring in parties
against whom only the plaintiff has any claim should his (the orig-
inal defendant’s) assertion of sole liability be well-founded. Might
not this privilege be more judiciously vested in the plaintiff alone?

CONCLUSION

Isadore H. Cohen concludes that the success of the English
third party practice as contrasted with that of New York “is
obviously the result of the careful attention to detail reflected in
rules of interlocutory practice.” The detail referred to, however,
relates solely to such formal and incidental matters as: form and
issuance of the third party notice, the time given the added party
to answer, procedure on and effect of default by the third
party, etc.

That all-important and much litigated question of what part
the impleaded party is to play and how far he is to be bound by
the adjudication in the principal controversy is very wisely placed
entirely and frankly in the discretion of the trial court, to be deter-
mimed by the particular facts of each individual case. Granting

(C.C.A. 3rd Cir. 1932) 61 F. (2d) 666; Gable v. Golder, (1930) 15 D.
& C. (Pa.) 55.


101See note 89 supra—parts added in parenthesis. In Yellow Cab Co.
v. Rodgers, (C.C.A. 3rd Cir. 1932) 61 F. (2d) 729, 730, on allegation of
“sole liability” of the impleaded party, the defendant was not permitted to
prove “joint and several liability or liability over.” The advisable pro-
cedure, in case of doubt, is to allege both sole liability and liability over in
bringing in an added party.

102Cohen, Impleader: Enforcement of Defendant’s Rights Against
Third Parties, (1933) 33 Col. L. Rev. 1147, 1181.

103Order XVIa, rule 8, provides: “The court or Judge, upon the hear-
ing of the application for directions [provided for by rule 7] may, if it
shall appear desirable to do so, give the third party liberty to defend the
action, either alone or jointly with the original defendant, upon such terms
as may appear just, or to appear at the trial and take such part therein as
may be just, and generally may order such proceedings to be taken, plead-
ings or documents to be delivered, or amendments to be made, and give
such directions as to the court or judge shall appear proper for having the
question of rights and liabilities of the parties most conveniently determined
that the New York rules might be clarified considerably along other lines suggested by Mr. Cohen, it is submitted that their brevity is probably the one factor that has prevented their being more completely enveloped in the fog of obtuse judicial technicality.

A comparison of the New York and English decisions indicates that the success of the English third party practice has been due, not so much to the happier phraseology of their rules, as to the understanding application of those rules by the courts. Again, in Pennsylvania, the guiding opinions of Mr. Justice Simpson have served to achieve and crystallize the true purpose of the scire facias.104

The seeming penchant of the New York judiciary for definition and classification of procedural rules is founded on a mistaken conception of their function. Such rules were not formulated for use as a sort of “I-Q block fitting test” to be applied to trial lawyers by the courts—the attorney under inspection being forced to summarily determine which one of the pegs furnished exactly fits his particular case. They were enacted as guides to “be operated flexibly by wise administrators exercising wide discretion.”

Viewing procedure as a tool, rather than as the finished product, what end of justice can be said to have been subserved in the Nichols Case and in the Fox v. Western New York Motor Lines decision?

Turning more specifically to the problem at hand, certain changes may be necessary in order to sweep away the maze of technical distinctions with which the New York courts have surrounded their impleader provisions. Again in those states which

and enforced and as to the mode and extent in or to which the third party shall be bound or made liable by the decision or judgment in the action.”

This rule is undoubtedly an improvement over the New York, Wisconsin and Pennsylvania provisions, in that it clearly declares that trial convenience and expediency in the particular case, and not any purportedly definite rules, are to serve as guides to the trial judge.

104 Justice Simpson declares in First Nat'l Bank v. Baird, (1930) 300 Pa. St. 92, 100, 150 Atl. 165, that in interpreting any change in legal procedure, “the courts must accept the legislation as it is written, and apply what it says despite the suggested difficulties, which, after all, are generally found to be more imaginary than real. The conservative bar frequently prefers to perpetuate the prior procedure though it destroys the statute; the courts, however, must give full effect to the statute, and must alter that procedure to fit the new situation, created by the statute, when they cannot co-exist.” He concludes, p. 102 of opinion, “under friendly interpretation, the statute [the scire facias act] may be made a beneficent means of reaching justice speedily, and at a minimum of cost to litigants and to the state.”

may enact such statutes in the future, certain safeguards as to phraseology may help prevent their misinterpretation. To that end the writer offers the following suggestions:

(1) It should be clearly shown that identity of all issues, liability over by way of strict indemnity, a claim against the added party for the entire claim in litigation, and maturity of the defendant's claim through judgment and payment are not prerequisites to impleader; but rather that it includes any case where a defendant claims an ultimate right of recovery over, either in whole or in part, which is dependent on substantial questions of fact to be litigated in the original controversy.

(2) It should be directly stated that the new impleader practice carries with it the effect formerly acquired by "vouching in"—that the decision in the principal controversy is res adjudicata on the impleaded party as to facts common to both controversies; but that in other respects the principal controversy (between the plaintiff and original defendant) and the action for recovery over (between the two classes of defendants) shall be kept separate and distinct, the latter being litigated immediately subsequent to and having no effect on the plaintiff's rights established in the former.

(3) The part the added party is to take in defending against the plaintiff's claim should be frankly and completely left up to the sound discretion of the trial court, guided by considerations of expediency and trial convenience.

(4) If a provision like New York's 211a be enacted, purporting to secure a right of contribution between joint and concurrent tort-feasors, "it should expressly state that the required common obligation is not joint judgment liability."

Assuming the correctness of the above legislative suggestions, they are offered with a full realization of the fact that no set of rules can insure an effective third party practice. The final success of any pleading reform depends upon its friendly interpretation by a liberal judiciary. Trial court discretion, understandingly exercised with a view to the promotion of administrative convenience, must supplant the fine spun disquisitions of the common law.

Nowhere is this more imperative than in determining what part the added party is to play in the principal controversy. Here the court must take cognizance of the two necessarily conflicting interests: (1) The trial should be conducted with the least possible

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106 Charles O. Gregory, in a very comprehensive article, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action, (1933) 47 Harv. L. Rev. 209, 243, sets out a model act based on a thorough study of the problems involved, and comprehensive beyond the fondest possible dreams of Mr. Cohen. The proposed act is admirably phrased and plugs up several of the loopholes found in section 211a, the only objectionable feature being its completeness of procedural detail, which might afford a "happy hunting ground" for technically minded attorneys and judges.
BRINGING IN THIRD PARTIES BY DEFENDANT

prejudice to the plaintiff—his action should not be unnecessarily impeded or delayed. (2) The third party should be allowed a sufficient opportunity to protect his interests in regard to the question of primary liability, to the end that he will be bound by the facts adjudicated. Usually these two can be adjusted without any severe hardship on either the plaintiff or the impleaded party. Any slight inconvenience to them is clearly outweighed by the saving in time and expense to the original defendant, witnesses and the court. If, however, it is evident that either the plaintiff or the third party will be seriously prejudiced, the impleader may be very properly denied in the exercise of judicial discretion. These are questions which can best be determined pragmatically with regard to the particular facts of each case, not by rigid predetermined rules involving the precise definition of such necessarily broad and indefinite terms as "the cause of action," "added defendant," "liability over by way of indemnity."