Washington and Lee Law Review

Volume 30 | Issue 2 Article 7

Summer 6-1-1973

Extension of Ancillary Jurisdiction to Plaintiffs' Claims Against Nondiverse Third-Party Defendants

Millers to fulfill the dictates of the basic policy underlying diversity jurisdiction[90] and so reached a result that permitted it. However, its reasoning is strained; desire to avoid deciding a constitutional issue should not involve torturing logic to accomplish that end. While the Millers got their federal forum, it is not clear that the Fourth Circuit intended its holding to be limited to *Miller*. Rather, the language of the court indicates that a substantial change in diversity determination was intended.[91] This represents an unsatisfactory result overall; while equity was done, the repercussions will seemingly go far beyond *Miller*, since the new test for diversity in such actions flies in the face of the Supreme Court and other circuits. On the other hand, the declaration that the North Carolina statute was unconstitutional would have been a more realistic and simple way to do justice to both the Millers and the concept of diversity. By requiring that the beneficiaries be looked to for determining diversity, the Fourth Circuit, while ostensibly freeing itself from the problem of allowing diversity in a *Miller* factual situation, has left itself open to another related confrontation. What will happen when some of the beneficiaries are of the same citizenship as the defendants? The decedent might have had a right to a federal forum had he survived, but the federal forum would again be disallowed. The *Miller* decision in no way helps clarify such a situation, but only further complicates the commonly understood and applied rules of diversity jurisdiction.

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EXTENSION OF ANCILLARY JURISDICTION TO PLAINTIFFS' CLAIMS AGAINST NONDIVERSE THIRD-PARTY DEFENDANTS

The effectiveness of federal third-party practice depends largely upon the willingness of the federal courts to extend the doctrine of ancillary jurisdiction to parties and claims not originally before them.[1] The impleader procedure of Rule 14 of the Federal Rules of Civil Procedure allows a defendant to bring an additional party into an action already properly before a federal court.[2] To bring in a third party under Rule 14,

[90]The *Miller* court noted that 28 U.S.C. § 1332 (1970) did not "perfectly reflect this purpose." 456 F.2d at 67 n.9.

[91]*See* 456 F.2d at 68.

[1]*See* C. WRIGHT, LAW OF FEDERAL COURTS § 76 (2d ed. 1970) [hereinafter cited as WRIGHT].

[2]FED. R. CIV. P. 14(a) provides in part:

> At any time after commencement of the action a defending party, as a

the defendant must aver that the party is liable to him for all or part of the plaintiff's claim.[3] This procedural device would be of little practical value, however, if its application were confined within the strict limits of the jurisdictional and venue requirements of the federal courts. Consequently, the federal courts have generally been willing to give broad scope to the concept of ancillary jurisdiction as applied to Rule 14.[4] Once subject matter jurisdiction has been extended to the original cause of action, the court needs no additional jurisdictional ground to adjudicate a properly alleged third-party claim arising out of the aggregate of facts upon which the plaintiff's claim is founded.[5]

Once a third-party defendant has been impleaded, the plaintiff in the original action is entitled under Rule 14(a) to assert a separate claim against him.[6] *Kenrose Manufacturing Co. v. Fred Whitaker Co.*,[7] brought before the Fourth Circuit a situation involving such a claim which suggested an extension of federal ancillary jurisdiction beyond its generally accepted limits. In *Kenrose*, the court was asked to extend federal jurisdiction to a plaintiff's state-law claim against a third-party defendant where the plaintiff and the third party were citizens of the same state.[8] The Fourth Circuit based its refusal to sanction such an extension on a determination that the trial court was without power to take jurisdiction over this type of claim because the plaintiff and the third party were nondiverse.[9] As a result, the plaintiff was precluded from asserting a secondary claim which was closely related to the primary claim already before the federal court in a diversity action.[10]

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third-party plaintiff, may cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

[3]*Id.*

[4]WRIGHT § 76.

[5]Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). In extending the ancillary jurisdiction of the district court to embrace the defendant's impleader claim against a third party, the Second Circuit reasoned that "[t]he same aggregate or core of facts may give rise not only to rights in the plaintiff against the defendant but also to rights in the defendant against third parties." 265 F.2d at 807.

[6]FED. R. CIV. P. 14(a) where it is provided in part:

> The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.

[7]No. 72-1007 (4th Cir. Aug. 7, 1972).

[8]*Id.* at 6-7.

[9]*Id.* at 3.

[10]Diversity jurisdiction had properly been extended to the plaintiffs' class action under 28 U.S.C. § 1332 (1971). Plaintiff Kenrose Manufacturing Co., Inc., was a citizen of New

In 1970 Kenrose Manufacturing Co., Inc., a New York corporation regularly doing business in Virginia, joined by sixty of its employees, all Virginia residents, instituted an action for injunctive and monetary relief against Fred Whitaker Co., Inc., a Pennsylvania corporation also regularly doing business in Virginia. The plaintiffs brought a diversity action in district court seeking to halt the discharge of certain gaseous wastes by Whitaker's nearby textile plant as well as compensation for damages proximately resulting from such emissions. Defendant Whitaker impleaded Kilodyne, Inc., a Virginia corporation operating an industrial plant close to Kenrose's facilities.[11] Kenrose then amended its complaint, expanding its original state-law nuisance action to include a direct claim against the third-party defendant.[12] Subsequently, Kilodyne moved to dismiss on jurisdictional grounds so much of Kenrose's amended complaint as pertained to the third-party defendant. The motion was taken under advisement.[13] In the meantime, Whitaker as third-party plaintiff had moved for a voluntary dismissal without prejudice of its own third-party complaint.[14] The court, finding that Virginia law did not provide for contribution between third-party defendant Kilodyne and defendant Whitaker as required by Rule 14(a) impleader,[15] granted Whitaker's motion to dismiss its third-party complaint. With Kilodyne no longer validly before it as a third-party defendant, the court also granted Kilodyne's motion to dismiss Kenrose's amended complaint as to it.[16]

The Fourth Circuit's opinion in *Kenrose* addressed itself to the issue

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York while all of its employees who had joined it as parties plaintiff were citizens of Virginia. Original defendant Fred Whitaker Co., Inc., was a citizen of Pennsylvania.

[11]No. 72-1007 at 3-4 (4th Cir. Aug. 7, 1972).

[12]*Id.* at 4.

[13]FED. R. CIV. P. 14(a), where the rule provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial."

[14]*Id.*

[15]American Zinc Co. v. H.H. Hall Constr. Co., 21 F.R.D. 190 (E.D. Ill. 1957); WRIGHT § 76, at 334. *See* General Dynamics Corp. v. Adams, 340 F.2d 271 (5th Cir. 1965); Travelers Ins. Co. v. Busy Elec. Co., 294 F.2d 139, 148 (5th Cir. 1961) (for constitutional reasons, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), prohibits the federal courts from adopting procedural rules for diversity cases which operate to alter substantive rights); Calvery v. Peak Drilling Co., 118 F. Supp. 335 (W.D. Okla. 1954); Lamport Co. v. Tepper, 3 F.R.D. 49 (D.N.J. 1953), where the District Judge asserted:

> The rule [14(a)] does not confer a substantive right where none existed before. It sets forth a method of procedure designed to prevent a multiplicity of actions where causes of action already exist.

See also Holtzoff, *Entry of Additional Parties in a Civil Action: Intervention and Third-Party Practice*, 31 F.R.D. 101, 107 (1962); W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 426 (Wright ed. 1960) [hereinafter cited as BARRON & HOLTZOFF]; J. MOORE, FEDERAL PRACTICE ¶ 14.03 [2] (2d ed. 1968) [hereinafter cited as MOORE].

[16]No. 72-1007 at 5 (4th Cir. Aug. 7, 1972).

of whether the dismissal of defendant Whitaker's third-party complaint destroyed whatever basis may have existed for the exercise of ancillary jurisdiction over Kenrose's separate complaint against Kilodyne. The court took the position that upon dismissal of the third-party complaint, Kilodyne lost its status as a third-party defendant, becoming merely a co-defendant.[18] In disposing of this issue, the court relied on the "complete diversity" mandate[19] of *Strawbridge v. Curtiss*,[20] holding that diversity would be required between Kenrose and Kilodyne for a federal court to entertain jurisdiction over the claim in question. In so far as the *Kenrose* decision rests upon the jurisdictional analysis of *Strawbridge*, its determination that the trial court lacked the power to adjudicate Kenrose's claim against the third-party defendant appears to be valid. But this holding came only as an addendum to a lengthy discussion of the isolated question of whether an independent basis of jurisdiction is required for a federal court to adjudicate a plaintiff's separate claim against a third-party defendant.[21] This question was raised as the primary issue in the appellant's brief[22] and the only issue discussed in its reply brief.[23] Yet the court's analysis in disposing of this issue fails to go directly to the issue of jurisdictional power. Rather, its analysis focuses upon certain policy considerations[24] which relate not to the existence of jurisdictional power, but to the discretion accorded the trial court in its exercise of that power.[25]

To the extent that it precludes a single adjudication of all claims

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[17]*Id.* at 13.

[18]*Id.*

[19]*See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967).

[20]7 U.S. (3 Cranch) 575 (1806). Justice Marshall's early landmark decision held that if there are two or more joint plaintiffs, and two or more joint defendants, as in the *Kenrose* situation, each of the plaintiffs must be capable of suing each of the defendants in federal court to permit extension of federal jurisdiction. The plaintiff employees of Kenrose Manufacturing Co., Inc., were citizens of Virginia as was the third-party defendant Fred Whitaker Co., Inc. Therefore the plaintiffs' separate claim against the third-party defendant was not justiciable on the basis of diversity jurisdiction.

[21]No. 72-1007 at 13-14 (4th Cir. Aug. 7, 1972).

[22]Brief for Appellant at 3-6, Kenrose Mfg. Co. v. Fred Whitaker Co., No. 72-1007 (4th Cir. Aug. 7, 1972).

[23]Reply Brief for Appellant, Kenrose Mfg. Co. v. Fred Whitaker Co., No. 72-1007 (4th Cir. Aug. 7, 1972).

[24]No. 72-1007 at 9-10 (4th Cir. Aug. 7, 1972).

[25]*See* United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-27 (1965). The Supreme Court explained that the justification for the court's power to exercise ancillary jurisdiction over secondary claims should lie in the policy considerations appropriate to the particular case at hand. Trial courts must be aware of the extent to which such policy aims as judicial economy and convenience and fairness to the litigants will be furthered by the extension of jurisdiction. If it appears that these aims will not be materially served, the court should hesitate to exercise jurisdiction over state claims even though bound to apply state law to them by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

arising from a common core of fact, the Fourth Circuit's position in *Kenrose* seems to conflict with the philosophy of contemporary third-party practice. The court's position appears to be a departure from the modern analysis which tends to take a broad view of the concept of ancillary jurisdiction.[26] This modern line of analysis views the valid extension of ancillary jurisdiction as a function of the relationship of the claims arising from a "controversy" in the constitutional sense.[27] It is this seeming inconsistency between the *Kenrose* decision and some underlying concepts of modern third-party practice which suggests that this jurisdictional problem be examined not only in relation to the circumstances out of which this case arose, but also in the light of any course of action which the reviewing court might have seen as preferable to a federal diversity action.[28]

In effect, the Fourth Circuit has replaced trial court discretion in the exercise of jurisdictional power[29] with an unqualified rule limiting the scope of ancillary jurisdiction.[30] And it is this categorical nature of *Kenrose* which seems to be at odds with the philosophy of modern third-party practice. The purpose of Rule 14 is to save time, to avoid the expense of duplicating evidence, and to obtain consistent results from identical or similar evidence.[31] Specifically, the primary purpose of subdivision (a) of Rule 14 is to avoid circuity of action by disposing of the entire subject matter arising from one set of facts.[32] The impleader procedure accomplishes this purpose by eliminating the need for separate litigation between defendants and third-party defendants on the issues of contribution and indemnification. This rationale underlying federal third-party practice seems to dictate that once a third party has been brought

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[26]*See* WRIGHT § 76.

[27]*Id.*

[28]Notes 63 through 66 *infra* and accompanying text.

[29]*See* note 24 *supra.*

[30]In laying down an "accross the board" rule outlining to some extent the outer limits of ancillary jurisdiction as applied to third-party practice, the Fourth Circuit's policy seems to differ from that of the First Circuit expressed in dicta in Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955). The First Circuit looks favorably upon the proposition that the concept of ancillarity is not amenable to precise definition. Rather the court was aware that ancillary jurisdiction arises from the equitable doctrine that a court with jurisdiction over a case may consider, in the adjudication of that case, subject matter over which it would have no independent jurisdiction whenever such matters must be considered in order to do full justice. 220 F.2d at 113-14.

[31]BARRON & HOLTZOFF § 422, at 644.

[32]Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43, 50 (4th Cir. 1962); Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942, 947 (4th Cir. 1954) (the purpose of third-party practice under Rule 14 is to "expedite litigation by bringing all phases of a controversy into one action for final determination . . . ."); Glens Falls Indem. Co. v. Atlantic Bldg. Corp., 199 F.2d 60, 63 (4th Cir. 1952); BARRON & HOLTZOFF § 422, at 644.

into an action, the court should be able to settle all claims arising from the transaction which is the basis of the main action.[33] It should be immaterial which party asserts the claim, the desirability of avoiding piecemeal litigation being as great whether the claim is asserted by a plaintiff or a defendant.[34] All parties to the controversy are before the court and the pertinent evidence is assembled. Thus, claims not contained in the original cause of action but arising from the same controversy may be decided without unduly increasing the burden on the court.[35]

The *Kenrose* opinion focuses upon the comprehensive proposition that a federal court is not constitutionally empowered to extend its ancillary jurisdiction to a claim asserted by a plaintiff against a nondiverse third-party defendant.[36] Under the *Kenrose* decision, such a claim cannot be an element of the constitutional case or controversy[37] brought within the federal jurisdictional power by the plaintiff's original claim. The result in *Kenrose* cannot be assailed directly because the trial court, arguably, was not obliged to exercise such jurisdictional power as may have existed as to an ancillary claim.[38] However, in view of the expansion of the concept of ancillary jurisdiction which has taken place in this century,[39] it seems probable that the extension of jurisdiction in issue in *Kenrose* was within the jurisdictional power of the federal district court.

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[33]Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 42 (1963).

[34]*Id. But see* Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970), where the court suggests the contrary position. In *Revere*, a third-party defendant's claim against the original plaintiff was held to be ancillary to the main proceeding so that the trial court might have adjudicated it without an independent basis of jurisdiction. However, the court, without so holding, pointedly suggested that were this position reversed, as it is in *Kenrose*, the claim would not be ancillary.

[35]Fraser, *Ancillary Jurisdiction and Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 42 (1963).

[36]The court prefaced its opinion in *Kenrose* by saying, "Notwithstanding the acknowledged relaxation of jurisdictional requirements in federal third-party practice . . . the action proposed by the plaintiff would exceed the limits of the court's power." No. 72-1007 at 3 (4th Cir. Aug. 7, 1972).

[37]Under Article III, section 2 of the Constitution, access to the federal courts is made available under certain circumstances (i.e., diversity jurisdiction), even though a federal question is not presented, by this provision:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between Citizens of different States . . . .

U.S. CONST. art. III, § 2.

[38]*See* note 67 *infra*, and accompanying text.

[39]For a general discussion of the expansion which has taken place in the concept of pendent jurisdiction see Comment, *The Expanding Role of Federal Pendent Jurisdiction*, 34 TENN. L. REV. 413 (1967).

The foundation for the development of the modern doctrine of ancillary jurisdiction[40] was laid in *Moore v. New York Cotton Exchange*.[41] In *Moore*, the trial court had originally entertained jurisdiction on the basis of a federal question raised by the plaintiff, there being no diversity between the parties. The trial court was held to have properly retained and decided the defendant's state-law counterclaim,[42] though it had dismissed the plaintiff's Sherman Act claim.[43] The Supreme Court reasoned that the primary claim, which provides the basis for federal jurisdiction, and the secondary claim need not be identical for ancillary jurisdiction to extend to the secondary claim. Rather, the logical relationship between the primary and secondary claims was found to be the determining factor.[44] When this requisite logical relationship exists, the constitutional and statutory requirements relating to diversity are obviated, thus empowering the court to adjudicate the entire controversy before it.[45] In *Kenrose*, the plaintiffs added a secondary state-law claim to the primary claim which was already properly before the federal court. This amendment to the original complaint came only after a substantial question of

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[40]The increasingly liberal provisions for joinder of parties and claims in federal court developed in this century posed jurisdictional problems not encompassed by traditional ancillary theory. Consequently, the courts have relaxed the principles of ancillary jurisdiction by broadening the scope of the "cases and controversies" over which they are constitutionally authorized to take jurisdiction. This constitutional line of reasoning allows the court to entertain not only the narrow question originally presented, but also such subordinate claims as can be shown to fall within the parameters of the more general concept of "controversy." *See* U.S. CONST. art. III, § 2; WRIGHT § 76, at 336; *cf.* Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 268 (1971).

[41]270 U.S. 593 (1926).

[42]*Id.* at 609. The Supreme Court's decision in *Moore* was occasioned by joinder of a state law claim pursuant to federal joinder provisions as they existed in their more limited scope prior to the advent of the Federal Rules of Civil Procedure. The provision in question was Equity R. 30, the forerunner of FED. R. CIV. P. 13. By the definition of "transaction" set out in *Moore*, the counterclaim asserted there would fit into the framework of modern joinder as a Rule 13(a) compulsory counterclaim. 270 U.S. at 610.

[43]In *Moore v. New York Cotton Exchange*, the Court held:

> A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged. . . .

270 U.S. at 608.

[44]270 U.S. at 610.

[45]On this same rationale, even entire subsequent proceedings in the same court may be held to be ancillary. Jurisdiction over the new proceeding is based upon the original cause of action regardless of the citizenship of the parties or the amount in controversy. Dugas v. American Sur. Co., 300 U.S. 414, 428 (1937); *cf.* Note, *Ancillary Jurisdiction and the Federal Courts*, 48 IOWA L. REV. 383, 384 (1963).

fact had been raised as to whether the Whitaker plant or the Kilodyne facility was responsible for the damaging emissions.[46] In view of this factual issue, the relationship between the plaintiff's two claims seems at least as significant as the relationship between the claim and counterclaim in *Moore*.[47]

With the *Moore* decision as its basis, the general concept of ancillary jurisdiction developed to allow the trial court to extend its jurisdictional power to a defendant's crossclaims and counterclaims where they were logically related to the main controversy and necessary to its complete and effective resolution.[48] Pendent jurisdiction, a significant aspect of the concept of ancillarity,[49] allows a plaintiff to attach a state-law claim to his federal claim and assert both against a nondiverse defendant. Pendent jurisdiction focuses upon convenience to the plaintiff while the main thrust of ancillary jurisdiction is directed toward avoiding prejudice to the defendant. The doctrine of ancillary jurisdiction developed to deal with the problem of multiple claims arising from a common transaction or series of occurrences.[50] The concept of pendent jurisdiction, on the other hand emerged from that doctrine[51] in response to the problem of parallel remedies available to a wronged party.[52]

It is appropriate to an examination of the jurisdictional power issue in *Kenrose* to point out that the Supreme Court's analysis of the power

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[46]No. 72-1007 at 4 (4th Cir. Aug. 7, 1972).

[47]While the primary federal question claim and the secondary state-law counterclaim in *Moore* arose from a common set of facts, the theories of relief set out in these two claims differed. Both the primary and secondary claims for damages and injunctive relief were based on an alleged violation of the Sherman Antitrust Act. The defendant's state-law counterclaim for injunctive relief, however, arose out of an allegation that the plaintiff had been purloining the defendant's cotton quotations, resulting in impairment of the defendant's property value therein. 270 U.S. at 603.

[48]For a discussion of the relationship of the general concept of ancillary jurisdiction to the more narrow theory of pendent jurisdiction *see also* Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 269 (1971).

[49]*See* BARRON & HOLTZOFF § 23, at 97 for a discussion referring to pendent jurisdiction as a distinct aspect of ancillary jurisdiction. Pendent jurisdiction is analyzed within the framework of ancillary jurisdiction in Note, *Ancillary Jurisdiction and the Federal Courts*, 48 IOWA L. REV. 383, 394 (1963).

[50]Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926).

[51]Pendent jurisdiction emerged from the doctrine of ancillary jurisdiction as a separate analytical concept in Hurn v. Oursler, 289 U.S. 238 (1933). There the Court directed its attention to the factual similarity of *Hurn* and *Moore v. New York Cotton Exchange*. It noted that in both cases the federal question claim and the state-law claim arose from the same transaction. This reference to the ancillarity of the state-law claim in *Moore* was part of the rationale justifying the extension of what was later called "pendent" jurisdiction in *Hurn*. *Cf.* Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV., 265, 269 (1971). After discussing its holding in *Moore*, the Court concluded that the questions presented by the two cases "in principle, cannot be distinguished." 289 U.S. at 242.

[52]*See* note 48 *supra*.

to extend ancillary jurisdiction has centered around the application of pendent jurisdiction.[53] *Kenrose* may be seen as a departure from the normal pendent jurisdiction situation because the primary and secondary claims are pressed against separate defending parties. However, the plaintiff's purpose in pressing the claims together is to secure a single conclusive adjudication of the rights and liabilities of the parties. To the extent that the plaintiff is justified in seeking such an adjudication and thereby avoiding the necessity of separate actions to determine substantially similar issues,[54] *Kenrose* seems to fall within the scope of the pendent aspect of ancillary theory.

In deciding a pendent jurisdiction case, *United Mine Workers of America v. Gibbs*,[55] the Supreme Court set out a comprehensive test of jurisdictional power based upon the "logical relationship" between claims. Thus in a pendent jurisdiction situation the Court adopted the basis for extension of ancillary jurisdiction originally established in *Moore*. *Gibbs* involved an action brought under section 303 of the Labor-Management Relations Act[56] to which a pendent state claim alleging malicious interference with contract rights was annexed.[57] The jury, finding for the plaintiff, awarded damages on both the state and federal claims. The trial court, however, set aside the verdict on the federal question, ruling that the proof offered on that issue could not support an action cognizable under section 303.[58] The court then sustained a remitted award on the state claim.

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[53]Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1967). The Court's discussion of jurisdictional power in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1965), a pendent case, can be characterized as establishing a "bright-line" test for the existence of such power. This test is based on a "relationship of basic facts." It is seen as a standard for identifying those cases in which the interests of judicial economy and fairness and convenience to litigants will be served by an extension of jurisdiction to a secondary nonfederal claim.

[54]*See* Sherrod v. Pink Hat Cafe, 250 F. Supp. 516 (N.D. Miss. 1965); United States v. Gen. Ins. Co. of America, 247 F. Supp. 543, 546 (N.D. Cal. 1965) (federal pendent jurisdiction is properly invoked when there is "no valid reason to have double litigation of an issue that can be settled in the case at bar."); Wolfson v. Blumberg, 229 F. Supp. 191 (S.D.N.Y. 1964). For judicial discussions of the purpose of 28 U.S.C. § 1338(b) (1970) which permits the federal courts to adjudicate pendent state claims in cases involving patents, copyrights, or trademarks, *see* Peterson System, Inc. v. Morgan, 224 F. Supp. 957 (W.D. Pa. 1963); Walters v. Shari Music Publishing Corp., 193 F. Supp. 307 (S.D.N.Y. 1961) (justifying the extension of federal jurisdiction to a pendent claim not otherwise cognizable in federal court on a policy of avoiding piecemeal litigation).

[55]383 U.S. 715 (1966).

[56]29 U.S.C. § 187 (1970).

[57]Members of a union local had forcibly prevented the opening of a mine, keeping the plaintiff from performing his duties as superintendent and from performing his hauling contract with the mine. 383 U.S. at 718.

[58]*Id.* at 735.

In finding that the trial court's pendent jurisdiction had been properly extended to the state-law claim, the Supreme Court in *Gibbs* abandoned a notable earlier test of pendency[59] which had required that "two distinct grounds in support of a single cause of action"[60] be alleged for a valid exercise of jurisdiction. Viewing this limited approach as "unnecessarily grudging,"[61] the Court replaced it with a broader test of the requisite relationship between the state and federal claims. First, the primary and secondary claims must derive from "a common nucleus of operative facts."[62] Second, the nature of the claims must be such that "the plaintiff would ordinarily be expected to try them in one proceeding."[63]

The most significant aspect of the *Gibbs* opinion is the careful distinction drawn between the *existence* of the power to exercise pendent jurisdiction and the discretionary *exercise* of that power.[64] Mr. Justice Brennan, writing for a unanimous Court,[65] discussed pendent jurisdiction "in the sense of judicial power."[66] This power is seen as a function of the substantial nature of the federal question claim and the relationship of

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[59]Hurn v. Oursler, 289 U.S. 238 (1933), involved an allegation of copyright infringement clearly establishing a federal question. The plaintiff sought further relief on the ground that the same acts which gave rise to the federal claims also constituted unfair competition under state law. In *Hurn* as in *Moore*, while the federal question was dismissed on the merits, the federal question presented was not "plainly unsubstantial" and, therefore, conferred jurisdiction over the entire case. 289 U.S. at 240.

[60]The two criteria upon which *Hurn v. Oursler* conditioned extension of the trial court's jurisdiction were: (1) the federal claim must not be plainly wanting in substance, and (2) the federal and non-federal claims must be merely different grounds supporting the same cause of action. 289 U.S. at 246. The Court explained its meaning of "cause of action" through the language of Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1926), which stated: "[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." 274 U.S. at 321.

[61]333 U.S. at 725. *Cf.* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1029 (1962). The standard of *Hurn v. Oursler* for extension of pendent jurisdiction posed certain problems in the lower courts. Determination had to be made as to the degree of "identity" which must exist between the state and federal claims to warrant such an extension. Many courts applied *Hurn* with varying degrees of literalism, requiring that the claims rest on the same or substantially similar facts. *Compare* Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y. 1961) and Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667 (N.D. Tex. 1957), *with* Kleinman v. Betty Dain Creations, Inc., 189 F.2d 546 (2d Cir. 1951) and Musher Foundation, Inc. v. Alba Trading Co., 127 F.2d 9 (2d Cir.), *cert. denied*, 317 U.S. 641 (1942).

[62]383 U.S. at 725.

[63]*Id.*

[64]Note 52 *supra.*

[65]The decision as to the validity of the trial court's extension of pendent jurisdiction represented the unanimous opinion of the Court. Mr. Justice Harlan wrote a concurring opinion, in which he was joined by Mr. Justice Clark, expressing misgivings as to the broad interpretation given the statute in question by the majority. 383 U.S. at 742.

[66]*Id.* at 725.

that claim and the state-law claim to a common nucleus of operative fact.[67] The element of discretion enters into the jurisdictional analysis only after the fact, that is, after the existence of the jurisdictional power has been determined. This is not to say, however, that this discretionary phase of the analysis cannot be dispositive of the question.[68] The task of weighing the various discretionary factors and determining, upon the facts of each case, the advisability of extending jurisdiction clearly devolves upon the trial court.

When applied to the jurisdictional problem in *Kenrose,* the jurisdictional power analysis developed in *Moore v. New York Cotton Exchange,* through *Hurn v. Oursler,*[69] and articulated in *United Mine Workers of America v. Gibbs,* raises a significant question concerning the nature of the primary claims in these cases. In *Moore, Hurn,* and *Gibbs,* the trial court had originally taken jurisdiction over a federal question[70] while *Kenrose* came into federal court as a diversity action. This fundamental difference seems to pose the question of whether the exercise of ancillary jurisdiction might be valid where the primary claim presents a federal question, but of questionable validity where the primary claim is presented in a diversity case. In other words, in determining constitutional jurisdictional power on the basis of the relationship between the primary and secondary claims,[71] does the court implicitly consider the nature of the federal interest embodied in the primary claim? While there is some indication that the court is more likely to entertain a secondary claim if it is closely tied to questions of federal policy,[72] the courts which have dealt with the plaintiff versus third-party defendant situation have not

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[67]*Id.* The Court recognized the existence of pendent jurisdiction

> whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. CONST., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."

See Vanderboom v. Sexton, 422 F.2d 1233, 1242 (8th Cir. 1970); Lewis v. Pennington, 400 F.2d 806, 815 (6th Cir. 1968).

[68]*See* 383 U.S. at 728; Ritchie v. United Mine Workers of America, 410 F.2d 827, 831 (6th Cir. 1969); Shannon v. United States, 417 F.2d 256, 263 (5th Cir. 1969); Particle Data Laboratories, Inc. v. Coulter Electronics, Inc., 420 F.2d 1174, 1178 (7th Cir. 1969).

[69]289 U.S. 238 (1933).

[70]United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) (Labor Management Relations Act, 29 U.S.C. § 187 (1964)); Hurn v. Oursler, 289 U.S. 238 (1933) (violation of copyright law); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890)).

[71]383 U.S. at 725.

[72]*See* Tirino v. Local 164, Bartenders and Hotel & Restaurant Employees Union, 282 F. Supp. 809, 818 (E.D.N.Y. 1968); United States *ex rel.* Mandel Bros. Contracting Corp. v. P.J. Carlin Const. Co., 254 F. Supp. 637 (E.D.N.Y. 1966); WRIGHT § 20, at 65.

considered this discrepancy.[73] By disposing of the question on policy grounds rather than upon an analysis of jurisdictional power, these courts have not confronted the problem. A constitutional analysis of jurisdictional power over an ancillary claim was not applied in a Rule 14(a) impleader situation until *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*[74] in 1970. In *Revere,* however, the Fifth Circuit found the relationship between a third-party defendant's state-law counterclaim against a nondiverse plaintiff and the primary claim in a diversity action sufficient to empower the court to entertain that counterclaim.[75]

Revere involved an action on a surety bond in which the plaintiff sued a contractor's surety for breach of a construction contract. When impleaded by the surety, the contractor admitted the operational facts alleged in the plaintiff's complaint but asserted a counterclaim against the plaintiff, charging breach of warranty. The plaintiff appealed the trial court's refusal to dismiss the counterclaim on the ground that there was no diversity between it and the third party. The court discussed the jurisdictional question in terms of the logical relationship test of *Moore v. New York Cotton Exchange.*[76] Interpreting *Moore*, the court found that for purposes of jurisdictional analysis, a secondary claim bears the requisite relationship to the primary claim if it arises out of the same aggregate of operative fact in two ways. First, the same aggregate of operative facts must serve as the basis for both claims. Second, this common aggregate of fact must activate additional rights in the party asserting the secondary claim.[77] The *Kenrose* court found the *Revere* rationale inapplicable on the

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[73]*See* note 77 *infra.* In the decisions and rulings which are characterized as the majority position among the circuits on the jurisdictional requirements pertaining to a plaintiff's claim against a nondiverse third-party defendant, the courts have not addressed themselves to questions presented by the nature of the primary claim. In Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965) and Friend v. Middle Atlantic Transp. Co., 513 F.2d 778 (2d Cir.), *cert. denied,* 328 U.S. 865 (1946), the primary claim stated a cause of action under state law while in McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960), Patton v. Baltimore & O. R.R., 197 F.2d 732 (3d Cir. 1952), United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952), Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969), and Palumbo v. Western Maryland Ry., 271 F. Supp. 361 (D. Md. 1967), the primary claim presented a federal question.

Four lower court decisions have favored the minority position, only the earliest of which, Sklar v. Hays, 1 F.R.D. 594 (E.D. Pa. 1941), made the nature of the primary claim (a state-law claim in this instance) clear. In the three later rulings, Buresch v. American La France, 290 F. Supp. 265 (W.D. Pa. 1968), Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965), Meyer v. Lyford, 2 F.R.D. 507 (M.D. Pa. 1942), the courts spoke directly to the jurisdictional issue without alluding to the nature of the primary claim involved.

[74]426 F.2d 709 (5th Cir. 1970).

[75]*Id.* at 715-16.

[76]*Id.* at 715.

[77]*Id.*

basis of dicta limiting that decision to the facts before the court.[78] However, although the *Revere* court expressly differentiated between the third-party defendant versus plaintiff situation before it and the type of claim asserted in *Kenrose,* it did so purely on policy grounds rather than on the basis of the relationship between the primary and secondary claims.[79]

More recently in *United States v. Davis,*[80] the power-discretion analysis developed in *Gibbs* was applied to a jurisdictional problem involving a plaintiff versus third-party defendant situation. In *Davis,* the district court allowed the plaintiff to assert a state-law claim against nondiverse third-party defendants in a case factually similar to *Kenrose,* but in which the primary claim stated a cause of action under the Federal Tort Claims Act. The plaintiff in *Davis,* as administratrix of the decedent's estate, sued the United States Government for failure to properly supervise the pilot of a plane which crashed, causing the decedent's death. The Government impleaded the owner of the plane and the pilot, both of whom were defendants in another suit resulting from the crash brought by the same plaintiff in state court. Whereas the Fifth Circuit in *Revere* had based its extension of ancillary jurisdiction on *Moore,*[81] the lower court in *Davis* relied upon *Gibbs,* entertaining the plaintiff's state-law claim against the third-party defendant under the doctrine of pendent jurisdiction. However, in finding the claims before it to be so intertwined that the doctrine of pendent jurisdiction properly applied, the *Davis* court failed to mention what impact, if any, the federal nature of the primary claim may have had upon its ruling.

Instead of applying this power-discretion analysis in its *Kenrose* opinion, however, the court disposed of the jurisdictional problem summarily. The Fourth Circuit relied upon what it considered to be the majority position among the federal courts concerning the specific prob-

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[78]In *Revere* the plaintiff argued that since there must be an independent jurisdictional basis for a plaintiff's claim against a third-party defendant, that requirement must also be met by a third-party defendant asserting a counterclaim against the original plaintiff. The court, however, was unpersuaded by this argument and found that the two situations were only superficially the converse of each other and that there were differences between them that militated against identical treatment. 426 F.2d at 716.

[79]*Id.* The opinion of the court that ancillary jurisdiction should not be extended to a *plaintiff v. third-party defendant* situation is based on what would seem to be discretionary factors under *Gibbs.* The court objected to an extension of ancillary jurisdiction which would allow a plaintiff to assert indirectly a claim which he would not be able to assert directly in federal court. Similarly, it expressed concern over the possibility of collusion between the original plaintiff and the defendant to allow the plaintiff to assert an independent claim against a nondiverse party in federal court.

[80]41 U.S.L.W. 2260 (E.D. Mich. Oct. 26, 1972).

[81]426 F.2d at 713.

lem presented.[82] This majority consists of five appellate decisions, from four circuits, and two lower court rulings. Significantly, the more authoritative appellate decisions all predate *Gibbs* and the power-discretion analysis articulated there.[83] Thus, it would seem that the subsequent decision of *Gibbs* and *Revere* might have had a stronger impact upon the Fourth Circuit than it did. Although the *Kenrose* court did cite two lower court cases of more recent vintage, those authorities simply mirrored the older position.[84]

An important feature of the situation in *Kenrose* is that it demonstrates a real need for a single judicial determination of responsibility for the damaging emissions which are the subject of the action. The pretrial proceedings in *Kenrose* presented substantial questions of fact concerning the extent to which Whitaker, Kilodyne, or both were responsible for such damaging emissions as may be found to exist.[85] While use of the impleader device to obtain a comprehensive determination of these questions in the district court would have required extension of the doctrine of ancillary jurisdiction beyond its generally recognized bounds,[86] such a determination was readily and conveniently available in the state courts of Virginia.[87] Considering the factual situation in *Kenrose,* the Fourth Circuit's decision might be seen as the result of judicial reluctance to expand the concept of ancillarity beyond its present limits in a case which does not urgently require such an expansion, rather than as an unqualified denial of the trial court's discretion concerning a particular aspect of ancillary jurisdiction.

In establishing the power-discretion dichotomy as an instrument of ancillary analysis, *Gibbs* made it clear that a determination of the exist-

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[82]The Fourth Circuit in its decision in *Kenrose* adopted this position, citing what it termed the "impressive consistency of the overwhelming majority" of the federal courts: Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Patton v. Baltimore & O. R.R., 197 F.2d 732 (3d Cir. 1952); United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952); Friend v. Middle Atlantic Transp. Co., 153 F.2d 778 (2d Cir.), *cert. denied,* 328 U.S. 865 (1946); Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969); Palumbo v. Western Maryland Ry., 271 F. Supp. 361 (D. Md. 1967).

[83]While *Gibbs* was decided in 1966, the line of authority from circuit court decisions relied upon in *Kenrose* runs from 1946 through 1965. *See* note 77 *supra.*

[84]*See* Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969); Palumbo v. Western Maryland Ry., 271 F. Supp. 361 (D. Md. 1967).

[85]Whitaker had impleaded Kilodyne upon an allegation that the pollution had emanated from Kilodyne's plant rather than from its own. Brief for Appellants, Kenrose Mfg. Co. v. Fred Whitaker Co., No. 72-1007 (4th Cir. Aug. 7, 1972). The third-party complaint was phrased in the language of Rule 14 indicating that Kilodyne might be liable to Whitaker "for all or part" of Kenrose's original claim for damages.

[86]*See* note 77 *supra,* for the authority which the Fourth Circuit found to be the majority position on this question among the federal courts.

[87]VA. CODE ANN. § 8-368 (Repl. vol. 1957).

ence of jurisdictional power over a secondary claim will not compel exercise of that power.[88] Indeed, the Supreme Court went so far as to describe hypothetical situations in which the trial court would be well advised to withhold the exercise of its ancillary jurisdiction.[89] This discretionary factor furnishes a more viable explanation of the Fourth Circuit's decision in *Kenrose* than can be offered by an unqualified ruling that the trial court lacked power to extend its jurisdiction. In view of the complete remedy available in the state courts, *Kenrose* can be interpreted as judicial approval of the lower court's discretionary refusal to extend federal ancillary jurisdiction in a controversy so clearly amenable to state court adjudication.

Within four years of the Supreme Court's decision in *Gibbs*, the power-discretion analysis established there had been expressly adopted by Judge Sobeloff, who wrote the *Kenrose* opinion, as applied to joinder of parties under Rule 20.[90] In *Stone v. Stone*,[91] the Fourth Circuit was confronted with jurisdictional questions pertaining to amount in controversy and the ancillary nature of the joinder provisions of Rule 20. The court cited *Gibbs* as authority for the proposition that jurisdiction need not necessarily be exercised.[92] It went on to reverse the trial court's dismissal of the claims before it, holding that "sound discretion dictates that all of the plaintiff's claims be heard in a single suit."[93]

Viewing *Kenrose* as approval of the trial court's discretionary refusal to exercise its jurisdiction, it is helpful to look to some policies by which the federal courts have traditionally tempered jurisdictional application with a well considered regard for areas in which the state courts are thought to be especially competent. Such an area in which the wisdom of extending federal jurisdiction is called into question is the regulation of internal corporate affairs.[94] The question of whether a diversity action

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[88]United Mine Workers of America v. Gibbs, 383 U.S. 715, 716 (1965).

[89]*Id.*; *see* note 24 *supra*.

[90]FED. R. CIV. P. 20 provides for permissive joinder of plaintiffs and defendants in appropriate actions.

[91]405 F.2d 94 (4th Cir. 1968).

[92]*Id.* at 98.

[93]*Id.* at 99.

[94]Pennsylvania v. Williams, 294 U.S. 176 (1935). The Court stated:

> It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state.

Id. at 185. Schreiber v. Jacobs, 121 F. Supp. 610 (E.D. Mich. 1953), following *Pennsylvania v. Williams*, held that the district court properly stayed action in a stockholder's derivative suit pending resolution of matters pertaining to the corporation's internal affairs in state court.

in federal court is an attempt to interfere with the internal affairs of a foreign corporation has been seen as not relating to jurisdiction in a strict sense but rather to a policy within the sound discretion of the trial court.[95] Similarly, the federal courts have long observed a doctrine of abstention[96] from jurisdiction in certain areas which present problems of state-federal comity. The appellate courts have historically abstained in cases where state appellate review could moot an underlying federal constitutional question[97] or where remedies available in state courts are adequate or have not been exhausted.[98] Federal courts have also favored a policy of discretionary refusal to exercise jurisdiction over a controversy involving possessory rights in a res under the control of a state court.[99]

While the Fourth Circuit's refusal to expand the application of ancillary jurisdiction in a diversity situation where adequate remedies are available in the state courts can be justified by analogy to other federal jurisdictional policies, it is also in accord with the position taken by the American Law Institute in its Study of the Division of Jurisdiction Between State and Federal Courts.[100] The proposals of the Institute for a reallocation of jurisdiction between the state and federal judicial systems would compel Kenrose to bring its state-law nuisance action in state court.[101] These provisions realistically consider that although both Kenrose and Whitaker are foreign corporations, both are so substantially established in Virginia as to effectively eliminate any real risk of prejudice against strangers in the Virginia courts.[102] On this assumption, the provisions establish the premise that in such a situation no foreign corporation so established in a state should be allowed to remove when sued in state court.[103] Not only is the possibility of prejudice in the state forum minimal, but also, since local law must be applied, the state court would

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[95]Contractors Ass'n of America v. Contractors Ass'n, 342 F.2d 393, 398 (9th Cir. 1965).

[96]Baggett v. Bullitt, 377 U.S. 360, 375 (1964). The doctrine of abstention involves a discretionary exercise of the court's equity powers. Its application is made on a case by case basis upon ascertaining whether the requisite "special circumstances" exist.

[97]Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960).

[98]Fay v. Noia, 372 U.S. 391 (1963); McLarty v. Borough of Ramsey, 270 F.2d 232 (3d Cir. 1959); Metropolitan Fin. Corp. v. Wood, 175 F.2d 209 (9th Cir. 1949); Detroit Edison Co. v. East China Township School Dist. No. 3, 247 F. Supp. 296 (E.D. Mich. 1965); Sherwood v. Bradford, 246 F. Supp. 550 (S.D. Cal. 1965).

[99]Apodaca v. Carraher, 327 F.2d 713 (10th Cir. 1964).

[100]American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Official Draft 1969.

[101]*Id.*, Ch. 84 §§ 1301, 1302. *See* Field, *Jurisdiction of Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969).

[102]WRIGHT § 23, at 75.

[103]*Id.* at 76. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 195 (1969).