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Third Party Impleaders in Wisconsin

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THIRD-PARTY IMPLEADER IN WISCONSIN

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Third-party impleader is a procedural device by which a defendant, upon motion, may bring into the action a person against whom the defendant will obtain a right of action if the defendant is held liable in the action.[1]

LEGISLATIVE DEVELOPMENT

The first legislative enactment on the subject of third-party impleader appears in section 6, chapter 219, Laws of 1915. The legislature in 1913 had requested the Supreme Court to suggest changes ". . . in the Code practice of the state as will simplify it, relieve it of technicalities and promote the ends of justice. . . ."[2] The Court's suggestions resulted in the following statute:

> "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. 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 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."

Except for the renumbering of the statute (from section 2610 to section 260.19), pursuant to chapter 4 of Laws of 1925, the statute remained the same from 1915 until the overhauling given it in 1935. Section 10, chapter 541, Laws of 1935, clarified the language of the first sentence and removed the second sentence. Some concern may properly arise as to the intention of the legislature in striking from the statute the mandate that "This section shall be liberally construed in order that . . . all closely related contentions may be disposed of in one action. . . ." It is arguable that the affirmative striking of a clause relating to liberal construction would evidence a legislative intention

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[1] WIS. STAT. (1949) sec. 260.19 (3).

[2] Joint Res. No. 30 (1913). See Wait vs. Pierce, 191 Wis. 202, 228, 210 N.W. 822 (1926).

to impose strict construction. The revisor's note with reference to the sentence removed is as follows:

> "(4) may be struck out . . . It could be attached to many sections or made a separate general declaration. 'Liberally construed' has little application to our statutes."[3]

The revisor of statutes, in a communication addressed to the writer, has stated:

> "One of the purposes of the revision was to rid the statute of superflous language and circumlocution and other vices of statute drafting. Personally, I am sure that there was no intention to change the rule from liberal construction to strict construction . . . I can not see how anybody could find in the revision an indication that a fundamental change was being made. Unless such a purpose appears so plainly as to be outside of judicial construction, then the revision is to be understood as not having made the change.[4]

The revisor indicated that he felt section 370.01 (49) applies to the construction of the revision. Accordingly, there is every reason to believe that the revision did not contemplate a change in the sense of the statute, so far as liberal or strict construction is concerned.

Case Law Development

The case of *Bakula vs. Schwab,*[5] indicates how little progress the doctrine of impleader had made in 1918. There, a unanimous Court ruled that a judgment in an action against two tort-feasors was not *res adjudicata* in a subsequent action betwen the tort-feasors on the question of their liability to the injured person.

Schwab's vehicle went into a ditch and injured Bakula, his passenger. Schwab claimed that he had to swerve to avoid an improper turn by Wilkinson. On Schwab's motion Wilkinson was impleaded. The trial court directed a verdict for Wilkinson, and the jury found Schwab negligent. On Schwab's appeal, the Supreme Court found that it was error to have directed a verdict relieving the impleaded defendant, Wilkinson, and then the Court addressed itself to the effect of this error. "Is the judgment rendered in this action *res adjudicata* in an action for contribution between the codefendants?"[6] In reaching its negative answer, the Court first distinguished between joint tort-feasors and joint contract debtors, saying, "In the latter case, the liability springs from a common source."[7]

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[3] Bill 50S (Wis. 1935), note to sec. 10.

[4] Ltr. from E. E. Brossard, revisor of statutes, dated February 15, 1950. Circuit Judge Arthur W. Kopp, the member of the Advisory Committee on Rules of Procedure to whom this section of the legislative bill was assigned, wrote me on February 20, 1950, that ". . . this was simply intended to clarify and make more definite the provisions of the interpleader statute."

[5] 167 Wis. 546, 168 N.W. 378 (1918).

[6] *Ibid.*, p. 553.

[7] *Ibid.*, p. 554.

The Court went on to explain that if the judgment were to be considered *res adjudicata* between Schwab and Wilkinson, it would necessarily give Schwab the right to appeal. "But what does that mean? It means that the plaintiff, who is entirely satisfied with the judgment she has secured, must be put to the burden, expense, and hardship of another trial of her action. Such a proceeding would be intolerable. It cannot be thought of. This plaintiff must not be subjected to any such burden because of a possible future controversy between the defendants upon the subject of contribution."[8]

The Court thereupon inquired into the practice of Wilkinson's having been made a party and announced: "We think that in cases such as this the court should exercise its discretion and deny the application."[9] In its closing paragraphs, the Court once again expressed its philosophy regarding the impleader of joint tort-feasors.

> "Immemorially it has been the right of the plaintiff to make his own election in the matter of joining tort-feasors as defendants. It has been his privilege to institute his action against one or part or all tort-feasors responsible to him. We can see no reason why this venerable rule should be changed, nor why the plaintiff should be compelled to involuntarily litigate with parties not of his own choosing."[10]

Logically pursued, the *Bakula* decision would end impleader of tort-feasors. It is not surprising therefore that a later court expressly modified that decision. In *Wait vs. Pierce*,[11] the Court held that although a joint tort-feasor's cause of action for contribution is contingent on his paying more than his equitable share of the common liability, a judgment creating such common liability is *res adjudicata*.[12] The Court examined other problems of contribution in connection with joint tort-feasors. Thus while it was recognized that a joint tort-feasor's claim for contribution does not become complete until he has been legally compelled to satisfy more than his equitable share of a common liability, the Court, nevertheless, favored "providing for the ultimate settlement by a contingent judgment of all controversies arising out of the action."[13] Also, the Court commented on the fact that the action over may be for only a part of the total obligation. The Court said, ". . . he is certainly well within the statute because the

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[8] *Ibid.*, p. 557.
[9] *Ibid.*, p. 558.
[10] *Ibid.*, p. 559. This was quoted approvingly in State vs. United States F. & G. Co., 210 Wis. 178, 192, 246 N.W. 434 (1933).
[11] 191 Wis. 202, 230, 210 N.W. 822 (1926).
[12] See Scharine vs. Huebsch, 203 Wis. 261, 268, 234 N.W. 358 (1931). There, for the purposes of settling the liability of several tort-feasors in one action, the Court was prompted to proceed in a manner which could have resulted in two judgments in one lawsuit.
[13] 191 Wis. 202, 232, 210 N.W. 822 (1926).

whole must include an amount less than the whole. The statute would have been clearer in that respect had it said for the amount of the recovery or some part thereof."[14]

In *Fisher vs. Milwaukee E. R. & L. Co.*,[15] plaintiff was injured while a passenger on the defendant's streetcar. The streetcar company sought to implead a Dr. Rumph for his alleged negligence in treating the plaintiff after the injury. Rumph was ordered impleaded, and he later demurred to the cross-complaint. The trial court sustained the demurrer but this was reversed on appeal. The Court reasoned as follows:

> "In view of the fact that it is provided that the section shall be liberally construed in order that all closely related contentions may be disposed of in one action, even though there be two controversies, we are of the opinion that sec. 2610 confers authority upon the circuit court for Milwaukee county, in the exercise of its decretion, to make *Rumph* a party defendant in this action. We see no reason why it should not be so construed. 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 the defendant Rumph, a second jury might find against it upon that issue, and the *Light Company* therefore be compelled to pay damages, as between it and *Rumph*, not justly chargeable to it, although legally liable therefore to the plaintiff."[16]

Although the Court expressly determined that Rumph was not a joint tort-feasor, it held that the right of an action over on principles of subrogation for a part of the obligation was sufficient to warrant an overruling of the demurrer to the cross-complaint.

Both the *Fisher* and *Wait* decisions were rendered by Justice Rosenberry. In the *Wait* case, the Court found that the wife could sue her husband in tort and permitted him to be impleaded for purposes of contribution. In the *Fisher* case, the Court permitted the bringing in of a third party who had independently aggravated the plaintiff's loss. Both these cases show useful application of the technique of impleader to perform its intended functions. They represent a salutary development in the case law of third-party impleader.

Discretionary Nature of Third-Party Impleader

The authority granted by section 260.19 (3) to implead or to deny impleader is discretionary with the court.[17]

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[14] *Ibid.*, pp. 230, 231.
[15] 173 Wis. 57, 180 N.W. 269 (1920).
[16] *Ibid.*, p. 62.
[17] State vs. United States F. & G. Co., 210 Wis. 178, 191, 246 N.W. 434 (1933); Kresge vs. Maryland Casualty Co., 154 Wis. 627, 631, 143 N.W. 668 (1913); Hemenway vs. Beecher, 139 Wis. 399, 401, 402, 121 N.W. 150 (1909).

Prior to the 1935 amendment, the statute explicitly stated that "the court may in its discretion make such order." Although it was amended to read "the court may so order," it is quite clear that the change in language did not contemplate an alteration of the discretionary nature of the order.[18]

In *Ertel vs. Milwaukee E.R. & L. Co.*,[19] the Court said "the statute is by its terms permissive" and determined that ". . . the application . . . was addressed to the sound discretion of the trial court and that the court properly exercised its discretion in this case." There the plaintiff was a pedestrian who was injured as the result of a collision between a streetcar and a coal wagon. The motion to implead the driver of the coal wagon was denied, although the streetcar company's answer alleged that the collision was due solely to the negligence of the coal wagon's driver.

The Court has had before it situations in which it has clearly indicated that the trial court could have properly exercised its discretion either way. Thus, in *Schmuhl vs. Milwaukee E. R. & L. Co.*,[20] the plaintiff claimed to have been assaulted by the defendant streetcar company's conductor. Regarding the denial of the streetcar company's motion to implead the conductor, the Court said:

> "We do not see how the presence of the conductor as a party defendant could prejudice the plaintiff or seriously complicate the issues to be tried, and we think it would have been a proper exercise of discretion on the part of the trial court to have ordered that he be brought in as a party. . ."[21]

However, the Court concluded that the trial court's ruling was discretionary and affirmed the decision.

That the application of section 260.19 (3) is discretionary with the court (as distinguished from the application of the rules relating to cross-complaints) was clearly brought out in the case of *Wujcik vs. Globe & Rutgers F. Ins. Co.*,[22] where the Court said:

> "Secs. 263.15 and 260.19 apply to entirely different situations. Sec. 263.15 grants a right which can be exercised without leave of court by a party defendant whenever the case comes within the terms of the statute. Sec. 260.19 does not confer a right. It grants a privilege which may be exercised only when the court in its discretion permits the exercise of such privilege. . .
> "There are undoubtedly cases where the granting of the privilege provided for by section 260.19 may work a hardship on a plaintiff who is obliged to await the determination of the issues

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[18] General Taxicab Ass'n. vs. O'Shea, 109 F. (2d) 671, 673, (App. D.C., 1940).
[19] 164 Wis. 380, 384, 385, 160 N.W. 263 (1916).
[20] 156 Wis. 585, 146 N.W. 787 (1914).
[21] *Ibid.*, p. 586
[22] 189 Wis. 36, 207 N.W. 710 (1926).

raised between the two defendants in which he may have no interest."[23]

Is The Order Appealable

Even in the absence of any rulings on the question, it would seem clear that under section 274.33, an appeal would not lie from an order granting or denying a motion for third-party impleader.[24] However, the Court has specifically held that an order on such a motion to implead is not appealable.[25] For example, the Court said in *Schroeder vs. Arcade Theatre Co.*:[26]

> ". . . inasmuch as it was discretionary with the court to have either impleaded or denied the impleading of *Edward Schroeder* individually, in refusing to permit *Schroeder* to be impleaded the court acted within its rights and exercised its discretion; and secondly, that, the court having exercised its discretionary rights, an appeal from the ruling of the court does not lie."

A similar result was reached in *Fisher vs. Milwaukee E. R. & L. Co.*[27] There a motion to implead had been granted, and the impleaded defendant demurred to the cross-complaint. The Supreme Court conceded that the trial court could have refused to grant the impleader motion but held that "The court having once exercised its discretion, a review of that order by the circuit court of Milwaukee county cannot be had by moving to dismiss the cross-complaint. . ."[28] However, in some instances the Court has to weigh the question of the proper exercise of discretion by the trial court. Thus, in *Maxcy vs. Peavy*,[29] the Court affirmed the trial court, saying: "Moreover, under the circumstances, the granting or denying of the motion was within the discretion of the court, and in our judgment the discretion was properly exercised."

Some Practice Points

Under this heading, I propose to mention some miscellaneous (and disconnected) aspects of Wisconsin practice relating to impleader. In the first place, it has been held that impleader applies to all actions, whether at law or in equity.[30] The State may properly be brought in

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[23] *Ibid.*, pp. 371, 372. See State ex rel. Wis. Power & Light Co. vs. Zimmermann, 194 Wis. 193, 196, 215 N.W. 887 (1927). There the Court declined to determine whether the application was discretionary or mandatory on the ground that the application was too long delayed.

[24] Klitzke vs. Herm, 242 Wis. 456, 8 N.W. (2d) 400, (1943).

[25] Schmuhl vs. Milwaukee E. R. & L. Co., 156 Wis. 585, 586, 146 N.W. 787 (1914); Wechselberg vs. Michelson, 105 Wis. 452, 455, 81 N.W. 657 (1900); Cook vs. City of Menasha, 95 Wis. 215, 216, 70 N.W. 289 (1897).

[26] 175 Wis. 79, 123, 184, N.W. 542 (1921).

[27] 173 Wis. 57, 180 N.W. 269 (1920).

[28] *Ibid.*, pp. 62, 63.

[29] 177 Wis. 140, 148, 187 N.W. 1020 (1922).

[30] Patitucci vs. Gerhardt, 206 Wis. 358, 362, 240 N.W. 385 (1932).

as a party.[31] However, impleader may not be had against an estate where there is no executor or other person designated upon whom service may be had.[32] An order of impleader is given by the court as opposed to an order by the judge.[33] It logically follows that a court commissioner does not have the power to issue an order of impleader.[34] Under section 260.19 the application must be "to the court."

Does the civil court of Milwaukee County, or a justice court, have authority to grant an impleader motion? If the action is in the civil court of Milwaukee County and relates to a matter involving over $200.00, it is clear that impleader practice is appropriate since circuit court practice governs such cases.[35] The section of the Wisconsin statutes which deals with the rules of pleadings and procedure in justice court permits pleadings to be amended ". . . when such amendment will promote justice."[36] It is arguable that one such amendment contemplated in the statute is an amendment to bring in new parties. Section 300.04 provides: "Where no special provision is otherwise made, justices are vested with all necesary powers which are possessed by courts of record; and all laws of a general nature apply to justice courts so far as applicable." The Advisory Committee on Rules of Procedure has stated that this section ". . . is a practice rule and is intended to make circuit court practice apply to justice court actions in circumstances and situations where Title XXVIII fails to prescribe the procedure."[37] A perusal of Title XXVIII and of the Civil Court act fails to reveal any pronouncement upon the topic of impleader. Accordingly, it would seem that circuit court practice governs and that impleader motions are appropriate in justice courts and also in the civil court of Milwaukee County.

Should the court deny a motion for third-party impleader where the plaintiff has failed to give notice within the limitation period to a joint tort-feasor whose impleader is sought? In *Ainsworth vs. Berg,*[38] the Court held that contribution was not barred under such circumstances. The Court said:

> "We are satisfied that the right of one joint tort-feasor against the other to recover contribution is in no wise impaired by the statutory duty placed upon the plaintiff to serve prompt notice of his injuries."[39]

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[31] Breese vs. Wagner, 187 Wis. 109, 115, 203 N.W. 764 (1925).
[32] Mills vs. Morris, 150 Wis. 277, 136 N.W. 556 (1912).
[33] Day vs. Buckingham, 87 Wis. 215, 219, 58 N.W. 254 (1894).
[34] State ex rel. Nelson vs. Grimm, 219 Wis. 630, 638, 263 N.W. 583 (1935).
[35] Civil Court Act, sec. 14.2; Laws of 1909, ch. 549.
[36] WIS. STAT. (1949) sec. 301.35 (11).
[37] See Anno. to WIS. STAT. (1947) sec. 300.04.
[38] 253 Wis. 438, 34 N.W. (2d) 790 (1948).
[39] *Ibid.*, p. 445a. See Smith, *Auto Accidents—Contribution and Covenants Not to Sue.* 1950 WIS. L. REV. 684.

A comparable problem is whether the court should decline to implead where the plaintiff has given a covenant not to sue the proposed impleaded defendant. The right to contribution would seem to be undisturbed by the contractual agreement between the injured person and one of the joint tort-feasors. While there is no express holding by our Supreme Court, there is authority for the conclusion that the impleader will lie since the right to contribution survives. Thus, Williston states,

> "Certainly, if the creditor by his covenant or release expressly reserves his right against the other co-debtors, the agreement must then necessarily be interpreted as binding the creditor to refrain only from direct proceedings against the debtor who receives the covenant or release, but not to hold that debtor harmless from such liability as may come to him indirectly after the debt has been enforced against his co-debtors."[40]

What form should the application for impleader take? Section 260.20 suggests that the impleader application may "appear by . . . affidavit or answer, duly verified." Prior to its amendment in 1935, the statute expressly required an affidavit to establish the right to implead for the purpose of avoiding an action over. In one case, the Court was helped in affirming the trial court's denial of impleader because ". . . no affidavit was made in conformity with the statute."[41] Since the amendment of section 260.19 (3) in 1935, an affidavit is not now expressly required. Often, an attorney will present both an affidavit and a proposed cross-complaint with his motion of impleader.[42] The omission of the proposed cross-complaint at this stage of the impleader is not a fatal defect; in this respect the practice is unlike that which applies to a motion to vacate a default judgment where our Court has held that the proposed answer must be served with the moving papers.[43] By filing a proposed cross-complaint as well as an affidavit with his action, the applicant permits the trial judge to have the best possible opportunity to determine the merits of the application, and it is a practice to be encouraged. The Court has commented adversely on the practice of seeking to bring in an additional party by a mere prayer to a counterclaim.[44]

The mechanics of serving the order of impleader and the amended summons and complaint upon the impleaded party are touched upon

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[40] WILLISTON, CONTRACTS, sec. 342 (Rev. Ed. 1936). See also Blauvelt vs. Village of Nyack, 141 Misc. 730, 252 N.Y.S. 746 (1931).

[41] Maxcy vs. Peavey, 177 Wis. 140, 148, 187 N.W. 1020 (1922).

[42] See VOLZ AND OTHERS, WISCONSIN PRACTICE METHODS (1949), sec. 1654.

[43] Velte vs. Zeh, 188 Wis. 401, 403, 206 N.W. 197 (1925).

[44] N.Y. Continental Jewell Filtration Co. vs. City of Kenosha, 167 Wis. 371, 377, 167 N.W. 451 (1918).

in section 260.20.[45] This section has been criticized from time to time, but it still remains intact. In 1878 the revisor of statutes stated:

> "This chapter was first enacted in 1861 and repealed in 1863. Being re-enacted in 1864, it has since remained in force. It seems to add little or nothing to the provisions of the preceding section, not fairly inferable from that, but as it points out a specific mode of practice, it is retained as amended."[46]

The revisor's note in 1935 was even more derogatory and abrupt: "260.20 should be repealed."[47] This statute leaves open the questions of who is to prepare the amended pleadings and who is to serve them. If the motion to implead is made by a defendant, it would seem fair that the preparation and service be performed by such defendant. In one case, the court directed the plaintiff, at the defendant's expense, to deliver to the defendant an amended summons; the order further directed the defendant to serve the amended summons and the cross-complaint upon the impleaded defendant.[48]

Guides to the Exercise of Discretion

We have now seen that the granting or denying of a motion to bring in a third party is discretionary. What then are the guides to its proper application?

Justice Owen, in his decision in *Bakula vs. Schwab*,[49] expressed particular concern over the burden to a plaintiff when impleader is granted. A few years thereafter in his concurring opinion in *Fisher vs. Milwaukee E. R. & L. Co.*,[50] the same justice reiterated this concern, observing that whether the impleader statute will:

> ". . . prove a blessing or a nuisance will depend very much upon the wisdom exercised in its administration. In order to accomplish the beneficent purposes intended by its enactment, its scope was necessarily made quite broad, and the question of whether, in a given case, the power conferred should be exercised was committed to the discretion of the trial court. The purpose of the enactment was to facilitate and expedite the dispatch of litigation and provide for the settling of all closely related questions in one action. It is obvious that this often may

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[45] This statute reads as follows: "Whenever any party shall cause it to appear by his affidavit or answer, duly verified, that additional parties ought to be brought in according to section 260.19 the court shall make an order that the summons and complaint be amended as shall be necessary, and that the same, with a copy of such order, shall, if such additional parties be defendants, be served on them within a prescribed time according to law; and the action shall be continued as may be necessary and further proceedings had therein as if such additional parties had been originally proceeded against."

[46] Explanatory Notes of Revisors, Title 25, p. 185 (1878).

[47] Bill 50S (Wis. 1935) note to sec. 11.

[48] Fisher vs. Milwaukee E. R. & L. Co., 173 Wis. 57, 59, 180 N.W. 269 (1920).

[49] 167 Wis. 546, 168 N.W. 378 (1918).

[50] 173 Wis. 57, 63, 64, 180 N.W. 269 (1920).

> be done without imposing additional burden, hardship, or delay upon the original parties to the action, and that under such circumstances the administration of justice is greatly facilitated."

Justice Owen thereupon stated the case against impleader from the plaintiff's standpoint:

> "The plaintiff is not at all interested in the issue raised by the cross-complaint, and it would not be surprising if its trial should consume much more time than the trial of the main issue between the plaintiff and the streetcar company. During all the time, however, the plaintiff must be present with her witnesses and she must pay her attorneys for being in attendance, while the issue in which she is not at all interested is being tried out, which may in the end result in a mere moot question."[51]

Justice Owen's concluding remarks on this subject well express his viewpoint on the limited desideratum of impleader:

> "Trial courts should appreciate the responsibility which the statute lays upon them. Whether additional parties shall be brought in is always a matter for the exercise of wise discretion under the circumstances. The power was conferred so that by its exercise the administration of justice may be facilitated and expedited, and whether in a given case the bringing in of new parties will have this effect calls for the serious consideration of the court. Where it will delay, hamper, or burden the plaintiff, it should appear pretty plainly that, in the end, benefits in the nature of general results will outweigh the inconvenience, annoyance, and expense which the bringing in of new parties will impose upon the plaintiff, or the application should be denied."[52]

Another approach to the question of impleader and a strikingly different viewpoint is expressed by Chief Justice Winslow in *Hemenway vs. Beecher,*[53] wherein the Chief Justice referred to the statutes of impleader and cross-complaints and observed that they:

> ". . . are very broad in their terms and were intended to give courts plenary powers not only to call in new parties, but to mould the pleadings and dispose of all branches of a controversy in one action after having obtained jurisdiction of the necessary parties. 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 circuity of action and multiplicity of suits. This purpose should be encouraged rather than discouraged by the courts. It is in line with the idea that courts are formed to decide controversies without unnecessary delay and without undue refinement as to

[51] *Ibid.*, p. 64.
[52] *Ibid.*, p. 65.
[53] 139 Wis. 399, 401, 402, 121 N.W. 150 (1909).

> pleading or procedure so long as the parties are before the court and the issues understood."

The Federal Courts under the provisions of Rule 14 (a) of the Federal Rules of Civil Procedure permit much flexibility in the types of actions which are amenable to impleader.[54]

There can be no doubt that circumstances will exist which will render unsound the granting of impleader. For example, in *Zutter vs. O'Connell,*[55] a child was injured while a passenger in an automobile driven by his father. The father was impleaded by the driver of the other vehicle, but the latter's cross-complaint for contribution was dismissed on the ground that the father could have no liability to his minor child.[56] Had the driver of the other vehicle sought recovery of damages for his own injuries from the collision as opposed to contribution for liability to the child, impleader would have seemed fitting. A similar problem is presented by the case of *Hromek vs. Freie Gemeinde,*[57] where the impleaded defendant, a labor union, was found not subject to liability for contribution, and thus the cross-complaint was dismissed. It would appear from the two foregoing cases that the proposed cross-complaint must state a cause of action; that is to say, if the cross-complaint is demurrable it will ordinarily be appropriate to deny impleader.[58]

It is undoubtedly true that the presence of a third party might delay and burden the plaintiff, but are not the benefits of ultimate justice to all related parties, economy of litigation and avoidance of successive trials on the same issues sufficiently more desirable to outweigh the plaintiff's tribulations? No litigant in a civil action has an indefeasible right to have an exclusive trial of his individual claim. It has been said that:

> "It is a common-law tradition that the plaintiff is 'lord of his action' and may manipulate its progress, within the rules of the game, as he sees fit. . . . But our courts and legislatures are beginning to realize that a lawsuit is not a game but is a serious attempt to administer justice. Furthermore, they figure that the general convenience of all concerned is worth a good deal more than merely the plaintiff's advantage. Hence they are tending to ignore the plaintiff's objections to this practice."[59]

A counterclaim in a real sense is an "inconvenience, annoyance and expense to the plaintiff", but no serious challenge can be made to its

[54] Kletecka, *Impleader—A Comparison Between the Wisconsin and the Federal Practice,* 27 MARQ. L. REV. 208 (1943). See also General Taxicab Ass'n. vs. O'Shea, 109 F. (2d) 671 (App. D.C., 1940) and U. S. vs. Yellow Cab Co. 340 U.S. 543, 71 S. Ct. 399 (1951).
[55] 200 Wis. 601, 607, 229 N.W. 74 (1930).
[56] Wick vs. Wick, 192 Wis. 260, 212 N.W. 787 (1927).
[57] 238 Wis. 204, 209, 298 N.W. 587 (1941).
[58] See Wait vs. Pierce, 191 Wis. 202, 226, 210 N.W. 822 (1926).
[59] Gregory, *Contribution among Tort-feasors,* 1938 WIS. L. REW. 365, 384.

usage. So, too, consolidation of related litigation is usually an intrusion on the plaintiff's case, but the usefulness of consolidation may overwhelm any objection thereto. Indeed, the legislature has evidenced a desire to permit all related actions to be tried together by even permitting the circuit court to order certified to such court actions pending in other courts of the same county for purposes of consolidation.[60]

Where an issue has been raised on the propriety of consolidation as contrasted with the inconvenience to the plaintiff, our Supreme Court has readily dismissed the objection and favored the consolidation. In *Newburg vs. United States F. & G. Co.*,[61] the Court said:

> ". . . the court ordered the consolidation thereof for the purpose of trial, notwithstanding the objection of appellant that the actions involved different parties; that it would give to the parties who were adverse to appellant the right of cross-examination of witnesses, which they would otherwise have to call as their own witnesses; and that such consolidation would be prejudicial to appellant. Such an order for consolidation is commendable unless substantial rights of the litigants are prejudiced thereby."

Certainly the trial court must weigh the conveniences of the parties against the likelihood of multiple actions. A persuasive element to be weighed is the chance of contradictory results in separate lawsuits. In the absence of some special circumstance, it would seem that the plaintiff should not have such a vested grasp on the litigation so as to bar reasonably related facets of the controversy. It would be impossible, of course, to delineate the multitudinous situations in which impleader should or should not be granted. To attempt such a cataloging would create a problem not unlike that which was before the Vermont justice of the peace of whom Justice Holmes wrote. A suit was brought before this justice of the peace by one farmer against another for breaking a churn. The justice of the peace took time to consider ". . . and then said that he had gone through the statutes and could find nothing about churns, and gave judgment for the defendant."[62]

The unlikelihood of more definite statutory instructions coupled with the absence of more explicit judicial guideposts leaves the problem of impleader in the discretion of the trial judge—*les non exacte definit, sed arbitrio boni viri permittit.*[63] Or, as Justice Cardozo put it:

> "A few hints, a few suggestions, the rest must be trusted to the feeling of the artist."[64]

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[60] WIS. STAT. (1949) sec. 269.59.
[61] 207 Wis. 344, 352, 241 N.W. 372 (1932).
[62] HOLMES, THE PATH OF THE LAW, COLLECTED LEGAL PAPERS (1920), 196.
[63] The law does not define exactly, but trusts in the judgment of a good man.
[64] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), 36.

CONCLUSION

The designation of pleadings and parties is somewhat cumbersome after the granting of a motion for impleader. The impleaded defendant is frequently referred to as simply a "defendant" and the pleading against him is denominated a cross-complaint. Particularly with a jury is there the danger of confusion. The Federal Rules of Civil Procedure, in Rule 14 (a) expressly declare that the person brought in be "hereinafter called the third-party defendant." Form 22, approved by the U.S. Supreme Court, contains a pleading labelled a 'third-party complaint." I believe that we could adopt these changes from the Federal forms with substantial benefit to our procedure. Not only would the possibility of confusion in nomenclature be diminished but the procedural steps under section 260.20 would be more clearly resolved.

While the law involving third-party impleader has had some bumpy travelling, it has generally moved forward on a sound course. It is now one of our more enlightened procedural techniques designed to improve the administration of justice.