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FEDERAL INTERVENTION
I. THE RIGHT TO INTERVENE AND REORGANIZATION*

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INTRODUCTION

INTERVENTION may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented.[1] The right to resort to this device under certain circumstances is absolute, while at other times it is dependent upon the discretion of the court.[2] Together, the theories of joinder of parties and intervention offer a rationale for determining what persons a plaintiff (and sometimes a defendant) may or must bring before a court in a particular action, the effect of a decision therein upon non-parties, and when non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense. Intervention counterbalances the many devices of joinder. Its utility lies in offering protection to non-parties, who obviously comprise a large and undefined group with varied interests, oftentimes of tremendous financial and legal importance. An example of such persons and interests, which comes most readily to mind, is that of stockholders, bondholders and unsecured creditors in corporate reorganizations. Because of the financial importance of the bulk of federal cases, the number and magnitude of federal equity receiverships and reorganiza-

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1. ". . . An intervention takes place when a third person is permitted to become a party to an action or proceedings between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant. . . ." CAL. CODE CIV. PROC. (Deering, 1931) § 387. Cf. 17 AM. & ENG. ENCYC. OF LAW (2d ed. 1900) 180; see In Rocca v. Thompson, 223 U. S. 317, 330 (1912).

2. *Infra*, p. 581.

tions under the bankruptcy law, and the jurisdictional limitations of the federal courts, an examination of federal intervention may be of utility.

The modern theory on joinder of parties has little in common with the restrictive and rigid common-law rules designed for simple litigation in an era when formalism was the vogue.[3] The present concept of joinder of parties has come to us via the chancery route. By such devices as the declaratory judgment, impleader, bill of peace with multiple parties, and interpleader, a litigant may obtain security from peril, avoid multiplicity of suits, and double liability.[4] The adoption of the liberal joinder provisions on parties in the federal equity rules of 1912[5] and recent federal legislation authorizing the declaratory judgment and extending earlier interpleader legislation illustrate the trend toward the protection needed in a modern complex society.[6] Under the liberal joinder rules and the recent legislation noted above, and no doubt under the new federal rules to be promulgated by the Supreme Court,[7] litigants are aided by flexible

3. At common law plaintiffs and defendants had to sue and be sued in the same capacity; permissive joinder was not tolerated. SHIPMAN, COMMON LAW PLEADING (1923) 393-399; Hinton, *An American Experiment with the English Rules of Court* (1926) 20 ILL. L. REV. 533, 535; Jones and Carlin, *Nonjoinder and Misjoinder of Parties in Common Law Actions* (1922) 28 W. VA. L. Q. 197, 266.

4. See BORCHARD, DECLARATORY JUDGMENTS (1934), on the place of the declaratory judgment in modern procedural and substantive law. Impleader forces a third party into a pending action. Its utility lies in affording to a defendant reasonable certainty of recovery on a claim over against the third party. For discussions see Bennett, *Bringing in Third Parties by the Defendant* (1935) 19 MINN. L. REV. 163; Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties* (1933) 33 COL. L. REV. 1147; Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action* (1933) 47 HARV. L. REV. 209; Gregory, *Tort Contribution Practice in New York* (1935) 20 CORN. L. Q. 269. For a discussion of a procedure to avoid multiplicity of suits see Chafee, *Bills of Peace with Multiple Parties* (1932) 45 HARV. L. REV. 1297; and for a thorough treatment of relief from double liability see Chafee, *Modernizing Interpleader* (1921) 30 YALE L. J. 814; *Interstate Interpleader* (1924) 33 YALE L. J. 685; *Interpleader in the United States Courts* (1932) 41 YALE L. J. 1134; (1932) 42 YALE L. J. 41. Professor Chafee's crusade for an adequate federal statute on interpleader seems at last to have attained its goal. See note 6, *infra*.

5. See Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties* (1935) 44 YALE L. J. 1291, wherein it is pointed out that these rules, with some limitations, are representative of the modern flexible procedure.

6. See 48 STAT. 955, 28 U. S. C. A. § 400 (1934), for the Federal Declaratory Judgment Act; and P. L. No. 422, 74th Cong., approved January 20, 1936, for the recent interpleader statute.

7. See 48 STAT. 1064, 28 U. S. C. A. §§ 723b, 723c (1934), for the act giving the Supreme Court the rule-making power. It is discussed in Clark and Moore, *A New Federal Civil Procedure—I. The Background* (1935) 44 YALE L. J. 387; id., loc. cit. *supra* note 6; Clark, *The Challenge of a New Federal Procedure* (1935) 20 CORN. L. Q. 443; Dobie, *Recent Developments in Federal Procedure* (1935) 21 VA. L. REV. 876; Jaffin, *Federal Procedural Revision* (1935) 21 VA. L. REV. 504; Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States* (1934) 32 MICH. L. REV. 1116; Wickes, *The New Rule-Making Power of the United States Supreme Court* (1934) 13 TEX. L. REV. 1.

provisions that afford protection and give them a wide choice in the selection of parties and issues. One about to commence an action may often avail himself of a number of concepts in determining who the parties, plaintiff or defendant, to the suit shall be. Examples of such concepts are real party in interest, capacity, class suit, permissive joinder of parties, proper, necessary and indispensable party, and joinder of actions.[8] A defendant by counterclaim, cross-claim, and particularly impleader, exercises certain control in the determination of who may or must be before the court.[9] The point to be noted is that there are a great number of devices and methods of control which plaintiffs and defendants may utilize to their advantage in getting parties and issues before the court. But what of the non-party? What protection has he if litigants in a pending action are jeopardizing his interest? In a very limited situation he may have himself substituted for a party.[10] He

8. By being assigned a claim for collection the assignee becomes the real party in interest, and his citizenship can thus be used to defeat federal jurisdiction. Oakley v. Goodnow, 118 U. S. 43 (1886) (resort can be had only to state courts for protection against such a device); Bernblum v. Travelers Ins. Co., 9 F. Supp. 34 (W. D. Mo. 1934), discussed in (1935) 35 COL. L. REV. 450. By suing a dealer for patent infringement a manufacturer may often harass a competing manufacturer, for the latter is unable to supplant the dealer as defendant since the dealer is liable as a real party in interest. See Chandler & Price Co. v. Brandtjen & Kluge, Inc., 56 Sup. Ct. 6 (1935); Demulso Corporation v. Tretolite Co., 74 F. (2d) 805 (C. C. A. 10th, 1934).

By the capacity concept a plaintiff may be able to sue an unincorporated association. This can be utilized to enforce a right, or to prevent removal, as where a partnership is defendant. See Clark and Moore, *supra* note 5, at 1315-1317. By bringing a class action a plaintiff may often force parties into an action much against their will. A good example of this is the consent receivership. See also, Supreme Tribe of Ben Hur v. Cauble, 225 U. S. 356 (1922) where particular members of the class seem to have been chosen to found federal jurisdiction. By permissive joinder of plaintiffs a plaintiff may often attain some of the advantages of a class suit; certainly when he uses the concept of permissive joinder of defendants he has a wide freedom in selecting those to be made defendant. Broad rules on joinder of actions supplement such provisions on joinder of parties. And insofar as the concepts of necessary and indispensable parties are narrowed and emphasis is placed on proper parties a real liberty is accorded the plaintiff. For discussion of the federal practice on parties see Clark and Moore, loc. cit. *supra* note 5.

9. For an excellent treatment of these subjects see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393.

10. Where the claim is for property, and not a personal claim, the owner or one bound to defend the title of the defendant, such as the landlord in ejectment, may have himself substituted for the defendant. Hardenbergh v. Ray, 151 U. S. 112 (1894). And where the wrong person has brought the action or been made defendant, or where the person suing or being sued was the right person, but, because of subsequent events, a successor in interest ought to become the plaintiff or defendant, the proper person may be substituted. See Clark and Moore, *supra* note 6, at 1317-1318. It should be noted that under substitution the third person supplants a party to the action, while under intervention he becomes an additional party. Intervention should also be distinguished from consolidation. By consolidation two distinct actions are merged into one, while under intervention a distinct right of action or defense is projected into a pending suit. The concept of an indis-

may always offer himself as an *amicus curiae*.[11] But it is to intervention that non-parties must generally resort for protection or affirmative relief in pending litigation.

Preliminary to considering federal intervention, let us briefly examine the historical material and the modern intervention practice in England and the states. We shall then turn to a detailed study of the right to intervene in the federal courts: (1) statutes and rules governing; (2) the right to intervene based on an interest in property in the control of the court; (3) the right to intervene based on inadequate representation; and (4) the application of these rights in receiverships and reorganization proceedings. In a subsequent article we propose to discuss the jurisdictional aspects of intervention, the status of an intervenor, and the procedure of intervention.

The Source of Modern Intervention Practice

The practice of allowing a stranger to intervene was first developed in the civil, the ecclesiastical, and the admiralty courts. Apparently, intervention practice in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner's interest thus be inadequately protected. The exact meaning of the statements in Corpus Juris that an appeal is given to him "who has an interest in the case"[12] or "some good reason"[13] is not apparent; but it is known that intervention was allowed in the following cases, among possible others. If the vendee was evicted from the property purchased, his vendor could appeal, and moreover he could intervene if the purchaser appeared to be in collusion with the plaintiff.[14] Furthermore, the surety of the vendor

pensable party radically expanded would lessen the need for intervention, since third persons, who now must resort to intervention, might be classed as indispensable parties. But because of venue restrictions, difficulty in obtaining jurisdiction over the person, and jurisdictional limitations as to subject-matter (particularly in the diversity cases) it is believed that a workable procedure will place less emphasis upon the concept of indispensable parties and seek to work out justice to third persons through the device of intervention. See Husting Co. v. Coca-Cola Co., 194 Wis. 311, 216 N. W. 833 (1927), which narrowly restricted the concept of indispensable party.

11. See Proceedings Before the Securities and Exchange Commission, In the Matter of Paramount-Publix Corporation (June 18, 1935) 226, for an illustrative use of "amicus curiae" in receivership proceedings. A firm of lawyers representing the bankers for the corporation, none of whom were parties to the receivership, seemed to dictate the appointment of the receiver and dominate the receivership. But compare Lee Moor v. Texas & New Orleans Railroad Company, 56 Sup. Ct. 372 (1936), where the Solicitor General had to present the government's case on the Cotton Control Act as amicus curiae.

12. 1.4 § 2 D. 49, 1.

13. 1.5 pr. D. 49, 1.

14. 1.4 § 3 D. 49, 1.

could intervene in the suit of the purchaser.[15] A creditor could intervene in a suit against his debtor, if the latter did not faithfully defend.[16] Where a "testamentary heir" had been defeated by one claiming that the will lacked necessary formalities legatees under the will and persons freed by it were allowed to intervene if they could show any collusion.[17] It was apparently not always necessary to show that one would be bound by the proceeding.[18] Nor was it always necessary that the intervenor show a legal interest; a humanitarian interest would suffice. Thus, a relative of a person sentenced to death might intervene to appeal.[19]

The passages in Corpus Juris dealing with intervention were broadly interpreted by medieval writers;[20] and the intervention practice of the Roman law has survived with some limitations in the modern civil law.[21] The ecclesiastical courts introduced the Roman practice of intervention into England. In the famous case of *Dalrymple v. Dalrymple*, a third party was said to be entitled to intervention if he "*consider* that his interest will be affected."[22] In the United States, the Roman law influenced the Louisiana practice, and through this practice, to some extent, the common law of this country.[23] Indigenous to the old common law and tending to restrict the extension of rights of intervention, was an unusual concern that the plaintiff be enabled by the courts to control his action; the modern common law theories of joinder and intervention of parties, however, bring us toward a rapprochement with the theories of the civil law.

Intervention in *in rem* proceedings in admiralty was early developed.[24]

15. 1.5 pr. D. 49, 1.

16. 1.4 § 4 D. 49, 1. This is substantially true under modern French law. French Civil Code, Art. 1166.

17. 1.5 § 1 D. 49, 1.

18. 1.5 pr. D. 49, 1. A conviction of an heir would warrant the co-heir's appeal although he would not be bound thereby.

19. 4.2 § 3 D. 49, 1. "Nor does it make any difference whether he is nearly related to the defendant or not; for I think that on the ground of humanity every person who appeals should be heard." 1.6 D. 49, 1. When a mother "induced by maternal affection appeals, it must be said that she should be heard." 5.1 § 1 D. 49, 1.

20. TANKRED, ORDO IUD. IV tit. 5 § 1; SCACCIA, DE APPELLATIONIBUS QU. 5 Nr 73; 1 WACH, CIVILPROZESS 616, note 3 (1885).

21. According to § 66 of the German Code of Civil Procedure, a legal interest in the outcome of the suit is necessary and sufficient to justify intervention at any time until the judgment is no longer subject to appeal. 1 GAUPP-STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESS ORDUNG, § 66, annotation III.

22. 2 Hagg. Con. Rep. 137 (1811) [the quotation on intervention is given only in 2 CHITTY, GENERAL PRACTICE (1834) 354 (italics supplied)].

23. CLARK, CODE PLEADING (1928) 287; see discussion in Gravenberg v. Laws, 109 Fed. 1 (C. C. A. 5th, 1900).

24. Stratton v. Jarvis and Brown, 8 Pet. 4, 9, (U. S. 1834) (Story, J. "This is very familiar"); BENEDICT ON ADMIRALTY (5th ed. 1925) 414; CONKLING, THE ADMIRALTY, LAW AND PRACTICE (2d ed. 1857) 48, 64; HENRY, ADMIRALTY JURISDICTION AND PROCEDURE (1885) 334, § 120; HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931) § 4685.

This was essential if the rights of third parties were to be protected, for, otherwise, "the greatest injustice would be done, because a decree of the court *in rem* is binding on all the world as to points which are directly in judgment before it."[25] Thus, "as a general principle it is certainly true that in admiralty process *in rem*, all persons having an interest in the thing may intervene *pro interesse suo*, file their claims and make themselves parties to the cause, to defend their own interest."[26] The historic admiralty practice is now stated in federal admiralty rules, having the force of statute, which allow intervention when the admiralty and maritime jurisdiction is *in rem*,[27] or when there is an interest in a fund in the registry of the court.[28]

But in equity and at law the practice of intervention developed slowly, and could be denied or ignored by such eminent writers as Chitty and Story. Chitty held that the practice was confined to the ecclesiastical and admiralty courts.[29] Story ignored the subject in his book on equity pleading.[30] Yet by the time of both Chitty and Story, intervention was allowed in certain equitable and legal proceedings: in equity, by a device known as an examination *pro interesse suo*; at law, by analogous but more limited practice. Although modern intervention in equity and at law has far outstripped its sources, these early developments are important, as much of the original remains.

The examination *pro interesse suo* in equity was granted to a third person who claimed an interest in property under the control of the court, in *custodia legis*.[31] The property may have come under court con-

25. The Mary Anne, 16 Fed. Cas. No. 9,195, (D. Me. 1826) p. 953, where it was held that attaching creditors might intervene in admiralty proceedings for municipal forfeiture.

26. Ibid.

27. Admiralty Rule 34: "If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* on his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer. . . ." 28 U. S. C. A. § 723.

28. Admiralty Rule 42: "Any person having an interest in any proceeds in the registry of the court shall have a right by petition and summary proceedings to intervene *pro interesse suo* for a delivery thereof to him. . . ." See 28 U. S. C. A. § 723.

Benedict takes the position that modern intervention practice in admiralty is not limited by the admiralty rules to cases where the action is *in rem* or where funds are in the registry of the court. He argues that intervention should be allowed in *in personam* actions, adopting the present practice of other federal courts. BENEDICT ON ADMIRALTY (5th ed. 1925) 414.

29. 2 CHITTY GENERAL PRACTICE (1834) 493-494

30. STORY, EQUITY PLEADING (9th ed. 1879).

31. 1 SMITH'S CHANCERY PRACTICE (1839) 449-450; Eliot, *Intervention In The Federal Courts* (1897) 31 AM. L. REV. 377, 380. The statement is made that "nothing appears clearer than that in the absence of some statute authorizing it, there can, strictly speaking, be no intervention in a suit in equity." 123 Am. St. Rep. 280, 281 (1908). But this is clearly incorrect. It is also stated, "Unless some statute has authorized it, there can be

trol by sequestration or receivership. As sequestration was always incidental to the suit, intervention in that type of situation would be in the incidental and not in the main litigation.[32] Receivership on the other hand, as a practical matter, might be either an incidental or the main objective of suit, and hence intervention in such litigation would depend upon the character of the receivership. But no matter what the character of the receivership might be, intervention would be clearly necessary if the third party was to be protected during the period of the receivership, which might be of long duration.[33] He could not successfully maintain an action against the receiver save by permission of the court, and it appears that this permission was available only if the third party presented his claim by intervention.[34]

The procedure of an examination *pro interesse suo* is described by Daniell. "The proper course . . . is to apply to the Court to direct the plaintiff to exhibit interrogatories before one of the masters in order that the party applying may be examined as to his title to the estate."[35] But if the facts were not in dispute the intervenor was not required to go before a master. Thus, when the creditors of the tenant had sequestered the leasehold, the landlord, one Sir Joseph Banks, was allowed to intervene to receive rent in arrears, and the court refused to send Sir Joseph to the master. "In a clear case the Court will not send parties into the Master's office merely that they may return with the rights as plain as when they went. The facts are not in dispute; and a question of law is more fitly discussed here than before the master."[36] The prin-

no intervention in an action at law." 123 Am. St. Rep. 280, 296 (1908). If this is taken to mean that there can be no intervention in legal proceedings incidental to the main action, it is also clearly incorrect. Foster apparently believes that the historical intervention *pro interesse suo* was allowed at common law as well as in equity. 2 FOSTER, FEDERAL PRACTICE (6th ed. 1920) § 258-h.

32. As in Dixon v. Smith, 1 Swans 457 (Ch. 1818), or in Walker v. Bell, 2 Madd. 21 (Ch. 1816) where mortgagees were allowed to intervene in the sequestration of rents and profits.

33. In re Hoare, [1892] 3 Ch. 94, 98.

34. In one case, where the receiver was given leave to defend an action brought by third parties, we are told that "the Lord Chancellor expressed doubt about it, and asked why the parties would not come desiring to be examined *pro interesse suo*." Anonymous, 6 Ves. 287 (Ch. 1801). Leave was given only after a report that this was for the benefit of all the parties.

Originally, a third party claiming an interest in specific property sequestered by court order could not institute a separate proceeding at law against the sequestrator, but was required to come into the action and be examined *pro interesse suo*. Hamlyn v. Lee, 1 Dick. 94 (Ch. 1743); James v. Dore, 2 Dick. 788 (Ch. 1744); Hunt v. Priest, 2 Dick. 540 (Ch. 1778); Empringham v. Short, 3 Hare 461 (Ch. 1844). But, without either the claimant's application or consent the court had no authority to compel the examination. Kaye v. Cunningham, 5 Madd. 406 (Ch. 1820). Cf. Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry, and Bebee Mariam Begum, 6 Moo. Ind. App. 27 (1854).

35. 1 DANIELL'S CHANCERY (1845) § 644.

36. Dixon v. Smith, 1 Swans 457 (Ch. 1818).

ciple of this old case is relevant to modern reorganization practice. Here, as will be shown later, the tendency of the courts has been to require a petitioner to present his claim before a master, even though, actually, the "facts" may be undisputed, the sole question being as to the legal interpretation of facts embodied in the phrase "fairness of the plan."

Naturally, intervention was allowed more freely in equity than at law, for, at law the action was regarded as the plaintiff's, and the prejudice against multiple parties and issues resulted in strict rules of joinder. But in a proceeding incidental to the law action, such as attachment, and in a possessory action such as replevin, intervention was commonly allowed by statute and less frequently by judicial decision.[37] An old Maryland case, relied on by many modern decisions to justify intervention in such proceedings without the aid of statute, stated: "For any apparent defect in the proceedings before the court, the attachment may be quashed upon suggestion of such defect to the court, either by the defendant himself, or a third person claiming an interest in the property attached."[38] Such intervention operated to bar some remedies otherwise available. Thus, a third person claiming property attached and sold by a sheriff was held to have no claim against the sheriff in trespass, since the third person's remedy was to have "appeared if he had thought fit, and moved the court to . . . exonerate it from the effect and operation of the attachment."[39] The fact that the intervenor could maintain an independent action for conversion has been usually held not to defeat his intervention rights.[40]

In a recent case,[41] Judge Hutcheson left open the question whether intervention might be allowed in the main proceeding in a law as distinguished from an equity suit.[42] The history of intervention recounted in the preceding paragraphs shows intervention being allowed in admiralty where a judgment would bind the world, in equity where property was in the hands of the court, and in a limited manner at law in an incidental or possessory proceeding. In all of these cases the presence of property

37. See *infra* note 56; Note (1921) 20 MICH. L. REV. 96. See CLARK, CODE PLEADING (1928) 287, § 65. There is a general discussion in notes (1909) 23 L. R. A. (N. S.) 536; 123 Am. St. Rep. 308-310 (1908).

38. Campbell v. Morris, 3 Harr. & McH. 535, 552 (Md. 1797). See Wallace v. Maroney, 6 MacKey's Rep. 221, 223 (D. C. 1887). In Clarke, Dodge, Maxwell v. Meixsell and Grafton, 29 Md. 221 (1868), intervention was allowed a lien creditor in a prior attachment suit in order to show that the court had no jurisdiction. Practical intervention was obtained by forcing the plaintiff to join the petitioner as defendant in Buckman v. Buckman, 4 N. H. 319 (1828).

39. Ranahan v. O'Neale Jr., 6 Gill & J. 298, 302 (Md. 1834).

40. This is discussed in Houston Real Estate Inv. Co. v. Hechler, 138 Pac. 1159 (Utah, 1914).

41. Burrow v. Citizens' State Bank, 74 F. (2d) 929 (C. C. A. 5th, 1935).

42. The learned judge, in pointing out that the appellants had cited a replevin case, apparently had in mind the limited nature of intervention historically allowed at law, that is, in incidental or possessory actions.

in the hands of the court seems to have been the determining factor; there is little discussion of law or equity. The appearance of a third party may be more foreign to law than to equity. On the other hand the history of intervention does not compel any distinction as to whether it is an essentially legal or equity practice. It may be doubted whether the distinction would be useful.

The history of intervention, however, does show the development of a device by the courts to keep their processes from doing injury to third persons. The development began where injury was most likely to occur. Without intervention in admiralty proceedings, a third person having an interest in property in the hands of the court would have been bound by a decree of that court without a hearing. The judgment, binding on all the world, would be *res judicata*. Without the examination *pro interesse suo* in equity, and the analogous practice at law, a third person having an interest in property in *custodia legis*, while not necessarily bound by the decree of the court unless represented in the action, would, as a practical matter, have been seriously prejudiced. Modern intervention practice, as will be seen, is an expansion of what seems to have always been the underlying principle in the development of intervention: the purpose of the courts to prevent their processes from being used to the prejudice of the rights of interested third persons.[43]

The modern English intervention practice may be said to be an outgrowth of admiralty practice *in rem* and the examination *pro interesse suo*. Although there is no express general rule, intervention is allowed as of right in the following cases: where the petitioner has or claims an interest in the subject matter of an *in rem* proceeding (admiralty actions *in rem*, receiverships, actions for the recovery of land, and probate proceedings);[44] in class actions, where the petitioner is inadequately

43. Eliot, *Intervention in the Federal Courts* (1897) 31 Am. L. Rev. 377.

44. See O. 12, r. 24, Rules of the Supreme Court; The Byzantion, 127 L. T. R. 756 (P. D. & A. 1922); The Zigurds [1932] P. 113, continuing as heretofore intervention in admiralty actions *in rem*.

Where a third person claims realty which is the subject of a receivership he may be permitted to bring an ancillary suit. Anonymous, 6 Ves. 287 (Ch. 1801); Angel v. Smith, 9 Ves. 336 (Ch. 1804); Lane v. Capsey [1891] 3 Ch. 411. But where it is more convenient to try third party claims to the subject matter in the receivership action, intervention is the permissible practice. In re Metropolitan Amalgamated Estates, Ltd., [1912] 2 Ch. 497; Kerr, Receivers (10th ed. 1935) 38. Third party claims against the receiver with respect to the conduct of his duties are properly the subject of intervention. Searle v. Choate 25 Ch. D. 723 (1884); In re Maidstone Palace of Varieties Ltd., [1909] 2 Ch. 283.

See O. 12, r. 25, Rules of the Supreme Court; Minet v. Johnson, 63 L. T. R. 507 (Ct. Opp. 1890) (intervention permitted in actions for recovery of land).

See O. 12, r. 23, Rules of the Supreme Court Crickitt v. Crickitt, [1902] P. 177 (Supreme Court rule authorizing the intervention in probate proceedings is an embodiment of earlier practice). Cf. Wytcherley v. Andrews, L. R. 2 P. & D. 327 (1871)].

represented, as, for example, a dissentient minority bondholder;[45] in execution proceedings where the petitioner is a claimant of the property levied upon;[46] in divorce proceedings, where intervention is allowed to the King's Proctor, to a co-respondent, and to a qualified extent to any member of the public.[47] And by judicial interpretation of the rule on non-joinder the court has discretion in allowing intervention to third parties.[48] In effect it may be said that the absolute and discretionary right would seem to cover the entire field where intervention is warranted.

The procedural laboratories of the many states should furnish valuable data on the utility of and the trend toward extending or delimiting the use of intervention. It has been said that intervention can be justified only when authorized by statute or court rule.[49] But intervention has been expressly allowed in the absence of such provisions on the theory that the court has inherent power to regulate its procedure in adjusting conflicting claims to property subject to its control.[50] On the whole,

45. Wilson v. Church, 9 Ch. D. 552 (1878); Fraser v. Cooper, Hall & Co., 21 Ch. D. 718 (1882); see Watson v. Cave (1), 17 Ch. D. 19 (1881). Compare the English rule on representative actions, O. 16, r. 9, Rules of the Supreme Court, which does not specifically provide for intervention of a member of the class inadequately represented, with the Indian rule, O. 1, r. 8 (1), (2), The First Schedule, which does provide for intervention.

46. O. 57, r. 12, 16, Rules of the Supreme Court.

47. *The King's Proctor:* J. A. 1925 §§ 181, 182; Roberts v. Roberts, [1916] P. 187; Bainbridge v. Bainbridge, [1934] P. 66.

The Co-respondent: Wade v. Wade, [1903] P. 16 (may recover costs if successful); cf. Darnbrough v. Darnbrough, 45 T. R. 603 (P. D. & A. 1929). But see Farrell v. Farrell, 76 L. T. R. 167 (P. D. & A. 1896); Harrop v. Harrop, [1899] P. 61; Lowe v. Lowe, [1899] P. 204, denying intervention to the co-respondent named in the husband's answer, where the relief asked by the husband was the dismissal of the wife's petition; and Grieve v. Grieve, [1893] P. 288, denying intervention to the co-respondent named by the King's Proctor.

A Member of the Public: J. A. 1925 § 183 (2); Woodhead v. Woodhead, 23 T. R. 334 (P. D. & A. 1907).

48. Re Fowler, 142 L. T. J. 94 (Ch. 1916), interpreting the rule on non-joinder, O. 16, r. 11, Rules of the Supreme Court. Where persons who in the federal courts would be "necessary" but not "indispensable" parties are not joined, because they are out of the jurisdiction (and suit in England in most instances must be instituted by personal service) or because of a sovereign's immunity from suit, they may apply to the court for admission as parties. Security for costs is usually required. Vavasseur v. Krupp, 9 Ch. D. 351 (1878); Apollinaris Co. v. Wilson, 31 Ch. D. 632 (1886); In re La Compagnie Generale, [1891] 3 Ch. 451, 458; In re La Societe Anonyme Des Verreries De L'Etoile, W. N. 119 (Ch. 1893); Maatschappij Voor Fondsenbezit v. Shell Transport & Trading Co., [1923] 2 K. B. 166.

49. See Potlatch Lumber Co. v. Runkel, 16 Idaho 192, 196, 101 Pac. 396, 397 (1909); note 123 Am. St. Rep. 280, 281 (1908).

50. Stieff v. Bailey, 27 Del. 508, 89 Atl. 366 (1913) (replevin—justified on ground of necessity); Banker's Co. v. Sanford, 138 Atl. 361 (Del. 1927) (attachment); Parson v. Eureka Powder Works, 48 N. H. 66 (1868) ("any person who can satisfy the court that he has any rights involved in the trial of a cause may be admitted to prosecute or defend the

however, the matter has been provided for in some manner. In one group of states intervention has been given to any person "who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both"; in another group, intervention is limited to a person claiming an interest in real or personal property, which is the subject of the action.[51] Obviously this latter type of statute is narrow and excludes actions for debts or for money damages, even though the petitioner claims that the right belongs to him.[52] The first type of statute is similar to Federal Equity Rule 37 on intervention, except that the statutes of this group usually do not require the intervention to be "in subordination to and in recognition of the propriety of the main proceeding."[53] Some courts have given this type of statute a narrow interpretation, holding the statute inapplicable to proceedings incidental to the main litigation, such as attachment.[54] Such constructions, however, have often been followed by statutes allowing inter-

action"); Whitman v. Willis, 51 Tex. 421 (1879) (common law); Pool v. Canford, 52 Tex. 621 (1880) ("rests on the principle that a party should be permitted to do that voluntarily which, if known, a court of equity would require to be done"); see also Armour Car Lines v. Summerour, 5 Ga. App. 619, 63 S. E. 667 (1908); Potts v. Wilson, 158 Ga. 316, 123 S. E. 294 (1924); Sims v. Goettle, 82 N. C. 268 (1880).

51. See CLARK, CODE PLEADING (1928) 287; Comment (1933) 43 YALE L. J. 127. The New York provision is: "Where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment." N. Y. CIV. PRAC. ACT (1935) § 193 (3). The decisions by the Court of Appeals seem to limit its application to actions for the recovery of specific real or personal property. Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3 (1890); Bauer v. Dewey, 166 N. Y. 402, 60 N. E. 30 (1901); cf. Wilcox v. Mutual Life Ins. Co., 235 N. Y. 590, 139 N. E. 746 (1923). For adverse criticism of the *Chapman* and *Bauer* cases see Medina, *Some Phases of the New York Civil Practice Act and Rules* (1921) 21 COL. L. REV. 113. Intervention in actions for money damages has been allowed, however, in lower court cases. Merchant's Nat. Bank of Norwich v. Hagemeyer, 4 App. Div. 52, 38 N. Y. Supp. 626 (1st Dept. 1896); Bulova v. S. S. Corporation, 194 App. Div. 418, 185 N. Y. Supp. 424 (1st Dept. 1920); Feinberg v. American Surety Co., 33 Misc. 458, 67 N. Y. Supp. 868 (Sup. Ct. 1900).

52. Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3 (1890); Bauer v. Dewey, 166 N. Y. 402, 60 N. E. 30 (1901); Brooklyn Cooperage Co. v. Sherman Lumber Co., 220 N. Y. 642, 115 N. E. 715 (1917); Marion County Lumber Corp. v. Whipple, 118 S. C. 90, 110 S. E. 70 (1921); CLARK, CODE PLEADING (1928) 288; POMEROY, CODE REMEDIES (5th ed. 1929) §§ 312, 321, 322.

53. See FLA. COMP. GEN. LAWS ANN. (Supp. 1934) § 4918 (2), and MICH. COMP. LAWS (1929) § 14019, which require intervention to be "in subordination to and in recognition of the propriety of the main proceedings, unless otherwise ordered by the court in its discretion."

54. Chase v. Washtenaw, 214 Mich. 288, 183 N. W. 63 (1921), criticized by Sunderland, Note (1921) 20 MICH. L. REV. 96; Dunker v. Jacobs, 79 Neb. 435, 112 N. W. 579 (1907); Geis v. Geis, 125 Neb. 394, 250 N. W. 252 (1933), approved in Note (1934) 12 NEB. L. BULL. 310; Consolidated Liquor Co. v. Scotello & Nizzi, 21 N. M. 485, 155 Pac. 1089 (1916) (result conceded illogical but following from precedents).

vention in the excluded area.[55] So in nearly all states, either by a general statute on intervention, specific statutes, or judicial decisions, a third person may intervene in attachment and execution proceedings and in replevin actions.[56]

A composite case picture illustrates the general trend as to what parties and interests will support intervention. It has been allowed to an owner or lienholder of property subject to court control;[57] a claimant to a fund or property in the possession of a court for purposes of administration

55. Michigan amended its statute to permit a third person claiming attached property to file a motion to release the attachment, after the decision of Chase v. Washtenaw, 214 Mich. 288, 183 N. W. 63 (1921). MICH. COMP. LAWS (1929) § 14019. New Mexico now has a statute expressly permitting intervention in attachment proceedings. N. M. STAT. ANN. (Courtright, 1929) § 105-1613.

56. Intervention allowed in attachment proceedings under a general statute: Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141 (1900); Potlatch Lumber Co. v. Runkel, 16 Idaho 192, 101 Pac. 396 (1909); Lee v. Bradlee, 8 Mart. 20 (La. 1820); Houston Real Estate Investment Co. v. Hechler, 44 Utah 64, 138 Pac. 1159 (1914); Note (1911) 18 ANN. CAS. 594. Note (1910) 23 L. R. A. (N. S.) 536; Sunderland, loc. cit. *supra* note 54.

The following states have specific statutes allowing intervention in attachment, and execution proceedings, and in replevin: ALA. CODE ANN. (Michie, 1928) § 10375 (attachment and execution), § 7403 (detinue); ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4368 (attachment, execution and replevin); ARK. CIV. CODE (Crawford, 1934) § 257 (attachment), § 727 (execution), § 213 (replevin); CAL. CODE CIV. PROC. (Deering, 1931) § 549 (attachment), § 649 (execution); COLO. CODE CIV. PROC. ANN. (Mills, 1933) § 112 (attachment), § 94 (replevin); GA. CODE (1933) § 8-801 (attachment), § 39-801 (execution); ILL. REV. STAT. (Cahill & Moore, 1935) c. 11 § 29 (attachment), c. 119 § 22(1) (replevin); IOWA CODE (1931) §§ 12136 and 12137 (attachment), § 12180 (replevin); KAN. REV. STAT. ANN. (1923) § 60-421 (attachment), § 60-419 (execution); KY. CIV. CODE PRAC. (Carroll, 1927) § 29 (attachment, execution and replevin); LA. CODE PRAC. (Dart, 1932) arts. 395-403 (attachment and execution); MD. ANN. CODE (Bagby, 1924) art. 9 § 47 (attachment and execution); MISS. CODE ANN. (1930) §§ 3424-3426 (attachment and execution) §§ 3102, 3103 (replevin); MO. STAT. ANN. (Vernon, 1932) § 1325 (attachment), § 1184 (execution); N. M. STAT. ANN. (Courtright, 1929) § 105-1613 (attachment), § 105-1703 (replevin); N. C. CODE ANN. (Michie, 1935) § 829 (attachment), § 840 (claim and delivery); OKLA. STAT. ANN. (Harlow, 1931) § 162 (attachment); ORE. LAWS (1931) 244, amending Ore. Code Ann. (1930) §§ 3-301, 4-413 (attachment and execution); VA. CODE (Michie, 1930) § 6407 (attachment); §§ 5798-5800 (detinue); WASH. REV. STAT. ANN. (Remington, 1932) § 573 (attachment and execution); W. VA. CODE ANN. (Michie, 1932) § 38-7-41 (attachment).

Intervention allowed in attachment proceedings by judicial decision: Dreyfus v. Mayer, 69 Miss. 282, 12 So. 267 (1891); Sims v. Goettle, 82 N. C. 268 (1880). *Contra:* Partridge v. Marston, 127 Me. 380, 143 Atl. 599 (1928).

Replevin, being a suit for the recovery of specific personal property, falls within the embrace of both the narrow and broad intervention statutes. Rosenberg v. Salomon, 144 N. Y. 92, 38 N. E. 982 (1894) (intervention allowed under the narrow type statute).

57. Cushing v. Levi, 117 Cal. App. 94, 3 P. (2d) 958 (1931) (specific performance); Knotts v. Tuxbury, 69 Ind. App. 248, 117 N. E. 282 (1917) (quiet title); Baca v. Anaya, 14 N. M. 382, 94 Pac. 1017 (1908), 20 Ann. Cas. 82 (1911) (partition); Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842 (1889) (lienholder); Mandel v. Guardian Holding Co., 192 App. Div. 391, 182 N. Y. Supp. 686 (1st Dept. 1920) (specific performance); and cases cited, *supra* note 56.

or distribution;[58] a person inadequately represented by a party before the court who purports to represent him;[59] a person in privity with a party, as a purchaser of an interest in property *pendente lite;*[60] one who may be bound to satisfy a judgment, as a principal or surety;[61] the attorney-general in a suit involving a charitable trust;[62] a co-respondent or an officer representing the state in a divorce case;[63] a subrogee.[64] The tendency towards an extensive use of the allowance of intervention seems advantageous.[65]

STATUTES AND RULES GOVERNING FEDERAL INTERVENTION

At the present time intervention in the federal courts is governed by Admiralty Rules 34[27] and 42,[28] by Equity Rule 37,[66] and by the Con-

58. Receivership: Barnes v. Commercial Credit Co., 161 Ga. 605, 131 S. E. 476 (1926); Continental Trust Co. v. Sabine Basket Co., 165 Ga. 591, 141 S. E. 664 (1928); State v. Farmer's State Bank, 103 Neb. 194, 170 N. W. 901 (1919).

Administration of trusts and decedent's estates: Awbrey v. Estes, 216 Ala. 66, 112 So. 529 (1927); Doke v. Williams, 45 Fla. 248, 34 So. 569 (1903); Thorne v. State Bank, 193 Wis. 97, 213 N. W. 646 (1927).

Fund in court for distribution as in interpleader cases: Van Orden v. Golden West Adjustment Co., 9 P. (2d) 572 (Cal. App. 1932); Rutherford v. Union Land and Cattle Co., 47 Nev. 21, 213 Pac. 1045 (1923).

59. Stockholders: Crowe v. Hamilton National Bank, 74 Colo. 407, 222 Pac. 394 (1924); Conlee v. Clay City, 31 Ky. L. Rep. 533, 102 S. W. 862 (1907); Kerr v. Southwest Fluorite Co., 35 N. M. 232, 294 Pac. 324 (1930); Farmers' Loan & Trust Co. v. The N. Y. & Northern Ry. Co., 150 N. Y. 410, 44 N. E. 1043 (1896).

Bondholder: Walpole v. Rogers, 66 Colo. 583, 185 Pac. 346 (1919).

Taxpayer: Davis v. Warde, 155 Ga. 748, 118 S. E. 378 (1923); Greeley v. County of Lion, 40 Iowa 72 (1874); Tyree v. Road District No. 5, 199 S. W. 644 (Tex. Civ. App. 1917); Note Ann. Cas. 1913C 911.

Consumers in Public Utility Rate Cases: State v. Tidball, 35 Wyo. 496, 252 Pac. 499 (1927). *Contra:* City of Grand Rapids v. Consumers Power Co., 216 Mich. 409, 185 N. W. 852 (1921).

60. Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369 (1887); Walker v. Sanders, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276 (1908).

61. Empson v. Aetna Casualty & Surety Co., 71 Colo. 282, 206 Pac. 378 (1922); Price v. Carlton, 121 Ga. 12, 48 S. E. 721 (1904); Stratford Arms Hotel Co. v. General Casualty & Surety Co., 249 Mich. 518, 229 N. W. 506 (1930); Feinberg v. American Surety Co., 33 Misc. 458, 67 N. Y. Supp. 868 (Sup. Ct. 1900).

62. See In re McClellan's Estate, 27 S. D. 109, 129 N. W. 1037 (1911), Ann. Cas. 1913C 1035.

63. Shaw v. Shaw, 156 App. Div. 379, 141 N. Y. Supp. 425 (2d Dept. 1913); Rixa v. Rixa, 35 Misc. 227, 71 N. Y. Supp. 815 (Sup. Ct. 1901) (permitted by statute). In the absence of statute the weight of authority is against allowing intervention. Howell v. Howell, 87 Kan. 389, 124 Pac. 168 (1912), Ann Cas. 1913E 429. A third person has been allowed to intervene to secure specific performance of a land contract by one of the parties to a divorce proceeding. Gorman v. Gorman, 158 La. 274, 103 So. 766 (1925).

64. Dobson v. Southern Ry. Co., 129 N. C. 289, 40 S. E. 42 (1901); Schnick v. Morris, 24 S. W. (2d) 491 (Tex. Civ. App. 1929).

65. CLARK, CODE PLEADING (1928) 289-290.

66. U. S. REV. STAT. § 913 (1878), 28 U. S. C. A. § 723 (1926); Equity Rule, 37, adopted in 1912.

formity Act,[67] which applies the state practice to law actions. It is arguable that intervention practice was expanded by the Law and Equity Act of 1915.[68] Aside from admiralty cases, reference is usually made to Equity Rule 37 which states: "Any one claiming an interest in the litigation may at any time be permitted to intervene to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the main proceedings." The problem of intervention in the federal courts is complicated because of the existence of not one but in effect many rules. Equity Rule 37 will govern if intervention is sought in an equity suit, and the state law, given effect by the Conformity Act, should govern the allowance of intervention to present a legal claim or defense in a law action. But a court in allowing such intervention in a law action may be tempted to term the intervention an ancillary bill in equity.[69] This has resulted in some confusion and discussion as to whether intervention is legal or equitable.[70] It is to be noted that in these cases the intervenor does not intend to urge an equitable claim or defense in the law action; his claim or defense is legal; the question concerns only the nature of his right to present his legal claim or defense.

67. 17 STAT. 196 (1872), 28 U. S. C. A. § 724 (1926). Many of the intervention cases involve attachment or execution; conformity to the state practice is achieved by §§ 915 and 916 of the Revised Statutes.

68. March 3, 1915, c. 90, 38 STAT. 956, 28 U. S. C. A. § 398 (1926), § 274-b Jud. Code. This permits equitable defenses and equitable relief in actions at law. See Clark and Moore, *A New Federal Civil Procedure I, The Background,* (1935) 44 YALE L. J. 387, 424 et seq.

For discussion of federal intervention see Eliot, *Interventions in the Federal Courts* (1897) 31 AM. L. REV. 377; Hersman, *Intervention in Federal Courts* (1927) 61 AM. L. REV. 1, 161; Wham, *Intervention in Federal Equity Cases* (1931) 17 A. B. A. J. 160; Note (1931) 31 COL. L. REV. 1312; CLARK, RECEIVERS (2d ed. 1929) c. XVIII; 2 FOSTER, FEDERAL PRACTICE (6th ed. 1920) c. XVII; HUGHES, FEDERAL PRACTICE (1931) §§ 679, 696-700, 734, 1197-1201, 1218-1220, 1243, 4313-4319; SIMKINS, FEDERAL PRACTICE (1934) §§ 24, 715 et seq.; WILLIAMS, FEDERAL PRACTICE (2d ed. 1927) 408-417.

69. See the discussion in Freeman v. Howe, 65 U. S. 450, 460 (1860). The dictum in *Freeman v. Howe* was said to justify intervention in an incidental legal action in the similar case of *Gumbel v. Pitkin,* 113 U. S. 545, 547 (1885), where the claimant of a prior lien was allowed to intervene in an attachment proceeding. In *Gumbel v. Pitkin,* however, the state law would have allowed intervention.

The United States Supreme Court has recognized intervention in incidental legal proceedings where the intervenor claims a legal interest and intervention would be allowed by the applicable state practice. In addition to *Gumbel v. Pitkin,* already referred to, there is the case of New Orleans v. Louisiana Construction Co., 129 U .S. 45 (1889), where the city of New Orleans was allowed to intervene in an execution sale proceeding; Louisiana practice allowed such intervention. In Barrett v. Commercial Credit Co., 296 Fed. 996 (App. D. C. 1924), intervention in a replevin action was allowed.

70. It may be pointed out that the Supreme Court in the famous case of Krippendorf v. Hyde, 110 U. S. 276, 286 (1884), while professing to maintain a strict distinction between law and equity, allowed a bill in equity to result in what the court called "an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself". It thus allowed a bill in equity to result in intervention in an incidental legal proceeding.

Further difficulty arises when the intervenor attempts to set forth an equitable claim or defense in a law action. Although present federal practice, subsequent to the Law and Equity Act of 1915, allows a defendant to set forth an equitable defense or counterclaim in a law action,[71] no authority appears for allowing an intervenor to set forth an equitable defense or counterclaim.[72] It could be argued that once an intervenor has been allowed to become a party defendant, he should be treated as to his status in all respects like an original party and hence be held to be within the Law and Equity Act. As will be noted later, however, this argument is too broad, for an intervenor, even though he has become a party, plaintiff or defendant, has restricted rights.[73] If the intervenor cannot invoke the Law and Equity Act, he has no statute or federal rule to support his raising equitable issues in a law action.[74] It is perfectly possible, however, for the court to treat the equitable claim as though it were an ancillary bill in equity, dependent

71. *Supra* note 68.

72. See Allington v. Shevlin-Hixon Co., 2 F. (2d) 747, 749 (D. Del. 1924).

73. His rights of counterclaim are restricted. Chandler & Price Co. v. Brandtjen & Kluge, Inc., 56 Sup. Ct. 6 (1935). Apparently the issue as to venue may be different for him than for an original defendant, and the subordination rule materially cuts down defenses that he may present. The rule that a court of equity will retain jurisdiction to do justice between the parties has been said to be non-applicable to an intervenor. Bache v. Hinde, 6 F. (2d) 508 (C. C. A. 6th, 1925).

74. As a matter of fact, most of the cases cited as not allowing intervention at law are actually concerned with not allowing an intervenor to present an equitable claim in a legal action. Thus McKemy v. Supreme Lodge A. O. U. W., 180 Fed. 961, 965, 966 (C. C. A. 6th, 1910) was a case where the receiver of a grand lodge of a beneficial association brought an action at law to recover from the Supreme Lodge unpaid benefit claims out of a guaranty fund which the laws of the order required the Supreme Lodge to keep intact. Two beneficiaries holding certificates issued by the Grand Lodge were permitted to intervene on behalf of themselves and others so situated. The court sustained a demurrer to the petition on the ground that it did not state a cause of action at law inasmuch as the Supreme Lodge was in the position of a trustee of a guaranty fund and could exercise honest discretion as to whether it would pay. The claim of the intervenors under this theory was therefore an equitable claim. The court does not seem to have been very clear as to what the nature of the right to intervene was, but it was bothered by the idea of injecting an equitable claim into a law action, and it evidently jumped to the conclusion that all interventions are for that purpose. Similarly in Gravenberg v. Laws, 100 Fed. 1, 7 (C. C. A. 5th, 1900), intervention was denied in a legal action to persons claiming equitable rights, although the Louisiana statute would have allowed such intervention had this been a state court. The court dismissed the petition without prejudice and indicated that it would allow it if presented as an ancillary bill in equity. See Clarke v. Eureka County Bank, 116 Fed. 534, 537 (C. C. D. Nev. 1902) (decided on other issues). The *McKemy* and *Grevenberg* cases and the dictum in the *Clarke* case were sound under practice then prevailing previous to the Law and Equity Act of 1915. They are supportable today insofar as it is held that an intervenor cannot take advantage of the Law and Equity Act, and insofar as a court may refuse to treat these petitions as ancillary bills in equity. But these cases will be obsolete if the new procedure rules for the federal district courts unite law and equity.

upon the main action as to jurisdiction, but independent in other respects, as in appellate review.[75] This problem will become purely academic when law and equity are united under the new rules.[76]

The statutes and rules applicable to intervention in the federal courts have been applied or augmented by a great many decisions. In some cases the development has been such as would not be expected from a reading of Equity Rule 37. But the trend of the decisions is at least apparent in most instances, and it is, therefore, possible to state with some degree of certainty the federal practice on intervention.

Right to Intervene

It is convenient and theoretically sound to distinguish between the right to intervene and the rights of the intervenor, or, in other words, to distinguish the question as to when intervention is allowable from the question as to what the intervenor can do after he has intervened. The courts do not always recognize this distinction; instead they often consider the question of what the intervenor can do without deciding whether he has a right to intervene at all.[77] No particular criticism of this practice is intended. Indeed, were it not for the fact that almost inevitably when a court proceeds in this manner it decides that the intervenor has no claim,[78] the practice might be defended as an effort of the courts to consider all possible rights. In the present discussion, however, the distinction is made. We consider first, therefore, the right to intervene, and later, the status of the intervenior.

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75. In McDermott v. Hayes, 197 Fed. 129 (C. C. A. 1st, 1912), the court treated intervention in a law suit to present an equitable claim as an ancillary equitable proceeding. But the court in Austin Machinery Co. of Va. v. Consolidation Coal Co., 67 F. (2d) 775, 776 (C. C. A. 6th, 1933) refused to do this, because this "would have permitted a stranger to convert a law cause into an entirely new suit in equity, wherein the petition would have lost the feature of intervention altogether and would have served as an original bill in equity." But the case arose in Tennessee which had no statute allowing intervention at law.

Ordinarily the appeal will follow the procedure set for the main suit. Rouse v. Letcher, 156 U. S. 47 (1895); Bogg v. New York City, 262 U. S. 196 (1923).

76. 48 Stat. 1064, 28 U. S. C. A. §§ 723-b, 723-c (1934).

77. In Jameson v. Guaranty Trust Co. of New York, 20 F. (2d) 808 (C. C. A. 7th, 1927); cert. denied, 275 U. S. 569 (1927). Palmer v. Bankers' Trust Co., 12 F. (2d) 747 (C. C. A. 8th, 1926); Guaranty Trust Co. of New York v. Minneapolis & St. L. Ry. Co., 52 F. (2d) 418 (C. C. A. 8th, 1931); Clark v. Young, 31 F. (2d) 227 (C. C. A. 5th, 1929). It is sometimes impossible for the appellate court to determine whether the trial court granted or denied intervention. This was the case in First Federal Trust Co. v. First National Bank of San Francisco, 297 Fed. 353 (C. C. A. 9th, 1924), where the appellate court allowed creditors to intervene in a receivership, but was unable to determine whether the trial court had already allowed them to intervene.

78. As, for instance, in Lincoln Printing Co. v. Middle West Utilities Co., 74 F. (2d) 779 (C. C. A. 7th, 1935).

The right to intervene seems to be of two types: absolute, and discretionary.[79] The absolute right exists when the petitioner claims an interest in property in the hands of the court,[80] or when the petitioner is inadequately represented in an action controlled by the court and in which a decision will be binding upon the petitioner.[81] The discretionary right to intervene exists when the petitioner has an interest in a question of law and fact common to the pending litigation.[82] The discretionary right is a matter of trial convenience.[83] The absolute right is given as a protection to the petitioner. Equity Rule 37 makes no such distinction. It speaks in the language of permission for all intervenors. "Any one claiming an interest in the litigation *may* at any time be permitted to intervene." But the courts do make the distinction, although they are more apt to talk in terms of abuse of discretion than in terms of absolute right.[84] In referring to that large class of cases in which permission to intervene must be granted and where denial thereof is always an abuse of discretion, it seems artificial to talk in terms of discretion, the right being, rather, absolute.

The main practical difference between absolute and discretionary rights of intervention is that only in the absolute type, will an appeal lie from the order refusing intervention,[85] and there need be no independent ground

79. Whatever objection there may be to classifying rights into absolute or discretionary when substantive law is dealt with, it would seem that for procedural purposes the classification is justifiable.

80. Credits Commutation Co. v. United States, 177 U. S. 311, 315 (1900). See the discussion in Minot v. Mastin, 95 Fed. 734, 739 (C. C. A. 8th, 1899); Clarke v. Eureka County Bank, 116 Fed. 534, 536 (C. C. D. Nev. 1902); Demulso Corporation v. Tretolite Co., 74 F. (2d) 805, 807 (C. C. A. 10th, 1934). But the absolute right to intervene is sometimes so phrased as to make it appear that no absolute right will be given if any other avenue of redress is open to the attempted intervenor. United States Trust Co. of New York v. Chicago Terminal Transfer Ry. Co., 188 Fed. 292 (C. C. A. 7th, 1911).

81. Central Trust Co. of New York v. Chicago R. I. & P. Rr. Co., 218 Fed. 336, 339 (C. C. A. 2d, 1914).

82. It is usually stated that a petitioner for intervention must have some legal interest in the subject matter of the suit. Glass v. Woodman, 223 Fed. 621 (C. C. A. 8th, 1915). "The general rule is that a person not a party to a suit cannot appear in it, and be admitted to defend against it, except on the ground that he has an interest in the results of the litigation of a direct and immediate character." Lombard Investment Co. v. Seabord Manufacturing Co., 74 Fed. 325, 326 (C. C. S. D. Ala. 1896).

83. Intervention as a discretionary matter is allowed on the theory that the intervenor would be a proper party. See Brinckerhoff v. Holland Trust Co., 159 Fed. 191 (C. C. S. D. N. Y. 1908).

84. Palmer v. Bankers Trust Co., 12 F. (2d) 747, 752 (C. C. A. 8th, 1926); cf. United States Casualty Co. v. Taylor, 64 F. (2d) 521, 526 (C. C. A. 4th, 1933); State of North Carolina v. Southern Ry. Co., 30 F. (2d) 204, 209 (C. C. A. 4th, 1929).

85. United States v. Philips, Judge, 107 Fed. 824 (C. C. A. 8th, 1901); United States Trust Co. of New York v. Chicago Terminal Transfer Rr. Co., 188 Fed. 292 (C. C. A. 7th, 1911); Burrow v. Citizens' State Bank, 74 F. (2d) 929 (C. C. A. 5th, 1935).

In United States v. Philips, Judge, 107 Fed. 824, 825 (C. C. A. 8th, 1901) the suggestion

of federal jurisdiction.[86] A holding by a court that the petitioner has a right to appeal such an order is always a holding that the petitioner's right of intervention is absolute.[87] Further, although there is a conflict on the point, one line of cases holds that an independent ground of federal jurisdiction must exist where the right to intervene is discretionary. Thus, where federal jurisdiction is based on diversity of citizenship, a petitioner who lacks the requisite diversity will be allowed to intervene only if he has an absolute right to do so.[88] And as we shall later suggest, the nature of the petitioner's right to intervene may affect his status after he has intervened.

I. The Absolute Right to Intervene

A. Based on Property in the Control of the Courts

The historic intervention practice of examination *pro interesse suo* with which we have dealt is the foundation for the absolute right to intervene, either in the main or incidental proceedings, where the intervenor claims an interest in property subject to the control of a court. Intervention may here be justified even though the court's jurisdiction over the property be not truly *in rem*, its action being incapable of cutting off the rights of one not a party, and even though remedies other than intervention may be available.[89] It is important to stress the latter because some courts tend to regard the absolute right to intervene as dependent upon the non-existence of other means of redress. But since a third person's rights are apt to be seriously jeopardized in all these cases, and may be cut off in some, the remedy of intervention is clearly necessary to prevent the court's processes from injuring his rights.

The Interest of the Petitioner

What kind of an interest must a petitioner have in property subject to the control of a court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the

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is made that the trial court should allow an appeal to all would-be intervenors as a matter of course, for "if a mistake is made by the lower court as to the character of the intervention, and the chancellor refuses an appeal, the intervenor is entirely without a remedy."

86. Krippendorf v. Hyde, 110 U. S. 276 (1884); Lackner v. McKechney, 252 Fed. 403 (C. C. A. 7th, 1918). The subject will be further discussed later in these articles.

87. The reasoning here is circular. But reasoning is always circular when a right is identified by its necessary incidents.

88. Fulton Bank v. Hozier, 267 U. S. 276 (1925); Cochrane v. W. F. Potts Son & Co., 47 F. (2d) 1026 (C. C. A. 5th, 1931). But see Drumright v. Texas Sugarland Co., 16 F. (2d) 657 (C. C. A. 5th, 1927) cert. denied, 274 U. S. 749 (1929). The subject will be further discussed in these articles.

89. Rhinehart v. Victor Talking Machine Co., 261 Fed. 646, 651 (D. N. J. 1917).

type to be denominated a lien, equitable or legal.[90] It is "not always easy to draw the line"[91] as to when an interest is sufficient to give a lien for this purpose; but the tendency of the cases is apparently towards a liberal definition of ownership and lien.

An absolute right to intervene runs to a claimant of attached property, or the proceeds thereof,[92] to the part owner of mortgaged personal property being foreclosed,[93] to the purchaser of land from the defendant in a foreclosure action,[94] to the mortgagee of a leasehold interest sought to be forfeited.[95] On the other hand it has been held that one claiming as owner of land upon which execution has issued and levy and sale been had, has no absolute right to intervene, his remedy being by a bill to quiet title, or by defending in an action for possession based upon the execution sale.[96] But in view of the development noted above, where the absolute right of intervention is given despite the presence of other possible remedies, the latter result seems questionable.

In the above cases the claim is that of the owner, the part owner, the lessee, or the mortgagee, and constitutes a fairly well defined claim, arising from transactions commonly used to create property interests.

90. The Supreme Court has indicated that an "inchoate lien" would be sufficient. In a suit for accounting of property received in settlement of certain mining suits, the petitioner was allowed to intervene to prove his claim to the "fund" on the basis of a contingent fee. Barnes v. Alexander, 232 U. S. 117, 123 (1914). Where intervention is discretionary there need be no lien; the possibility of direct gain or loss in a legal interest is sufficient. United States Casualty Co. v. Taylor, 64 F. (2d) 521 (C. C. A. 4th, 1933).

91. United States v. Radice, 40 F. (2d) 445 (C. C. A. 2nd, 1930), where a mortgagee of a leasehold interest was said to have an absolute right to intervene in a cross-suit by the owner of property to forfeit the lease. Judge Swan pointed out that intervention could be allowed as an absolute right here if the district court had the required jurisdiction, even though other remedies might be available to the petitioner.

92. Krippendorf v. Hyde, 110 U. S. 276 (1884). Although the court did not seem to be sure what form the intervention should take, it was sure that the petitioner could claim the right of intervention because he had an interest in property controlled by the court.

93. Osborne & Co. v. Barge, 30 Fed. 805 (C. C. N. D. Iowa, 1887).

94. Gaines v. Clark, 275 Fed. 1017, 1019 (App. D. C. 1921).

95. United States v. Radice, 40 F. (2d) 445 (C. C. A. 2d, 1930). The United States brought an action to abate a nuisance against the owner and tenant. The owner filed a cross-bill to forfeit the lessee's leasehold. The court ordered the lease forfeited and the lessee appealed. After the forfeiture decree, the mortgagee of the leasehold interest petitioned for leave to intervene. The trial court denied the petition after the appeal to the appellate court had been perfected. The appellate court held that, although in the instant case the district court was without jurisdiction to pass on the petition for intervention, the appeal having already been argued at the time the petition was filed, nevertheless, in cases where it had jurisdiction, the intervention would have to be allowed.

96. Ex parte Mensing, 55 Fed. 17 (C. C. D. S. C. 1893). There was no privity between the petitioner and the defendant in the execution, and there was an action at law pending between the purchaser at the sale under execution and the petitioner. The lack of privity would seem immaterial. The pending suit might be a reason for denying intervention in a given case. See Connor v. Peugh's Lessee, 18 How. 394 (U. S. 1855).

But in another class of cases the petitioner's interest arises from an atypical transaction, and the lien, if any, depends upon equitable considerations. Thus, Indiana in building the Wabash & Erie Canal incurred certain indebtedness to Robertson for the performance of work on the canal, and to Johns for the destruction of his water right. It was agreed that an amount of money should be payable to Robertson out of rent received through the operation of the canal, and that Johns should be furnished a certain amount of water, rent free. Later, the state, to meet the expense of building the canal, issued certificates of indebtedness. The holders of these certificates having brought a bill in equity which resulted in a sale of the canal, it was held that persons in the position of Robertson and Johns had an absolute right to intervene in the equity proceedings.[97] The lessor of a non-assignable lease, who alleged that he was owed a sizable amount for maintenance of the leased railroad, was held to have an absolute right to intervene in receivership proceedings, because the receiver had sold the lease and, furthermore, had made no provision for preferring the debt incurred by maintenance.[98] A petitioner claiming a contingent fee was said to have a like right of intervention in an accounting suit upon the theory of a lien on the fund in court.[99] In a suit by creditors to obtain payment from a trust fund, other creditors claiming an interest in this same fund, insufficient to pay all creditors fully, had an absolute right to intervene.[100]

A more complete picture of the interest required for this type of intervention is given by a consideration of those cases where the interest was held to be insufficient to sustain an absolute right of intervention. A lessor does not have a sufficient interest in the property of his lessee to sustain an absolute right to intervene in the general receivership of the lessee. On the other hand, the New York City Railway Company was allowed to intervene in the receivership of its lessee and, in fact, have the receivership extended to it, but on the theory that it was "within the *discretion* of the [trial] court."[101] The same theory was approved in *Board of Commissioners of Sweetwater County, Wyo. v. Bernardin*,[102] but with a difference in result. The lease here being sub-

97. French v. Gapen, 105 U. S. 509 (1881). No exception was taken by any of the parties to the plea for intervention.

98. Vicksburg, S. & P. Ry. Co. v. Schaff, 5 F. (2d) 610, 611 (C. C. A. 5th, 1925): "Intervener might establish his claim to damages by a suit at law and in some other court, but it is not probable there would be any personal liability of the receiver, and in the last analysis recovery would have to be out of the assets of the receivership."

99. Barnes v. Alexander, 232 U. S. 117 (1914). The problem before the court was whether it was proper for the trial court to have allowed intervention; but the Supreme Court talked in terms of an absolute right.

100. Carter v. City of New Orleans, 19 Fed. 659 (C. C. E. D. La. 1884).

101. In re Metropolitan Ry. Receivership, 208 U. S. 90, 111 (1908).

102. 74 F. (2d) 809 (C. C. A. 10th, 1934), cert. denied, 55 Sup. Ct. 845 (1935).

ject to forfeiture if taxes were unpaid, the lessors contended that they had an absolute right to intervene on the question of the priority of tax payments, in order to safeguard their interests. This contention was rejected, and the right, if any, of the petitioner held discretionary; so that the order of the trial court refusing intervention was non-reviewable. If the lessor has an insufficient interest in the property of his lessee to justify the absolute right to intervene in a receivership of the lessee, we may expect that a simple creditor of a party to a legal proceeding will not be given that absolute right unless more can be shown. Thus, the creditor of foreclosing bondholders had no absolute right to intervene in a foreclosure suit brought by the bondholders, when the creditor's claim appeared to have no relation to the suit.[103]

Patent infringement cases present an interesting phase of the intervention problem. In most instances the manufacturer has probably agreed to protect his buyer from patent suits; and in all events, the outcome of the litigation is likely to affect the economic interest of the manufacturer more than the buyer. The buyer is apt to conclude that it will be cheaper for him to agree to buy the product from the plaintiff in the future in return for a consent decree letting him off with no liability and less bother in the present case. Yet it is difficult to see how the manufacturer can be said to have any interest approximating a lien on property in the hands of the court in such a case. Accordingly, in *Demulso Corp. v. Tretolite Co.*,[104] where the trial court denied the manufacturer the right to intervene in a patent infringement suit against the dealer, the appellate court held that no appeal would lie from the order inasmuch as the petitioner had only an "indirect" interest in the *res* in the hands of the court. Realizing, however, the dilemma in which the decision would place the manufacturer, the court suggested that if another such patent suit were brought against any of his dealers the trial court in its discretion might allow intervention. Similarly, one court,[105] while denying the absolute right, made the suggestion that where the suing patentee knows that the manufacturer is paying for the defense of the suit, the manufacturer ought to be considered a party. Apparently the court premised this suggestion not on a theory of intervention but on the theory that the manufacturer was the real party in interest. The difficulty with that theory is that the manufacturer's liability is separate from and in addition to the liability of the dealer,

103. Glass v. Woodman, 223 Fed. 621 (C. C. A. 8th, 1915). The appellate court affirmed the order denying intervention. Actually it would seem that since there was no absolute right to intervention, and no appeal lay, the appeal should have been dismissed.

104. 74 F. (2d) 805, 808 (C. C. A. 10th, 1934). The day after the petition for intervention was filed a consent decree was entered.

105. Foote v. Parsons Non-Skid Co., 196 Fed. 951 (C. C. A. 6th, 1912). There was a consent decree in the main action.

and the court's concept of the real party in interest has been recently repudiated by the Supreme Court.[106] On the other hand, no logical or practical reason appears for basing the intervenor's absolute right on the plaintiff's knowledge as to the person bearing the expenses of the defense.

On the theory of the patent cases, the insurer has no absolute right to intervene when claimants of workmen's compensation sue to restrain a commissioner from enforcing his order denying recovery on insurance policies. For, the insurer can show no lien, and although it bears the financial risk, it is unable to claim that it is the real party in interest,[107] since the right asserted by the workman is against the commissioner. But a trial court, exercising sound discretion, may allow intervention on grounds of administrative convenience.[108]

On the theory that the receiver is merely the custodian of property and does not represent the parties, he has no absolute right to intervene in a suit to establish a lien or claim against that property. Thus, the receiver of a drainage district could not intervene in a suit against the district on bonds which it had issued.[109] The court in its discretion, however, often will allow intervention.[110] The position of the receiver in these cases should be contrasted with his position in cases where stockholders wish to intervene in a receivership and the right is denied them on the grounds that they are sufficiently represented by the receiver.[111]

106. Chandler & Price Co. v. Brandtjen & Kluge, Inc., 56 Sup. Ct. 6 (1935).

107. United States Casualty Co. v. Taylor, 64 F. (2d) 521 (C. C. A. 4th, 1933), cert. denied, 290 U. S. 639 (1933). Intervention was allowed here after the final decree.

108. In United States Casualty Co. v. Taylor, 64 F. (2d) 521 (C. C. A. 4th, 1933), the insurance company had been a party in the hearing before the commissioner. But it would seem that the fact that the petitioner had been a party to a prior administrative hearing with the plaintiff will not of itself give the petitioner an absolute right of intervention in the present proceeding. In Kansas City Southern Ry. Co. v. United States, 282 U. S. 760, 763 (1931), the Kansas City Southern Ry. Company brought the suit to set aside two orders of the Interstate Commerce Commission. The right to bring the suit was attacked on the basis that the Louisville & Nashville Rr. Co. was also attacking the orders of the Commission in an earlier suit, and that inasmuch as both of the railways had been parties to the hearings of the Commission at which the orders were made, the Kansas Railway had an absolute right to intervene in the suit by the Louisville Co. and should be required to do so rather than to bring a separate suit of its own. The court nevertheless allowed the separate suit, but stated ". . . the appellants, upon proper application could have been allowed to intervene in the earlier suit brought for the same purpose." But it would seem that the right to intervene in such a case would be discretionary rather than absolute.

109. Board of Drainage Commissioners of Pender County Drainage District No. 4 v. La Fayette Southside Bank of St. Louis, 27 F. (2d) 286 (C. C. A. 4th, 1928).

110. In Perry v. Godbe, 82 Fed. 141 (C. C. D. Nev. 1897), the receiver of the corporation's property was allowed to intervene in order to contest plaintiff's efforts to establish an equitable lien on that property. The parties to the suit were said to have waived their right to object to intervention by not making any objections when the petition for intervention was filed, but, instead, filing a replication to it. See First Trust Co. v. Illinois Central Rr. Co., 252 Fed. 965 (C. C. A. 8th, 1918), cert. denied, 249 U. S. 615 (1919).

111. See *infra* note 189.

It should be contrasted also with the position of a trustee in bankruptcy who has an absolute right to intervene in state court proceedings instituted by lien creditors more than four months before the bankruptcy.[112] There seems to be no adequate reason for any differentiation and the theory underlying the stockholder-bankruptcy cases seems the sounder.

When a creditor brings an individual action against a debtor, another creditor will not have an absolute right to intervene.[113] To hold otherwise would be to abandon completely the general notion that a plaintiff may control his action and that an unrepresented petitioner must show a lien interest to support an absolute right of intervention. Even if the suit brought by the creditor is a class action, a third person without showing more than that he is a creditor may be denied the right to intervene as a *general party* unless he agrees to pay a ratable portion of the expenses and to be represented by the plaintiff's attorney.[114] Similarly a mere stockholder has no absolute right to intervene in an individual stockholder's action,[115] nor in a stockholder's class suit, save on such terms as may reasonably be set by the court.[116]

Up to now we have been dealing with cases which have attempted to define "lien" for purposes of intervention. Where a legal interest in property is lacking, there can be no lien, and hence no absolute right to intervene. Moreover, in some cases, there would seem to be no basis even for a discretionary right to intervene, there being no question of law or fact common to petitioner's claim and the pending litigation. Thus, in a suit by a power company to review an order of the Federal Power Commission denying permission to build a dam, an iron company had no right to intervene merely because it transported material on the river where the dam was to be constructed.[117] The court in denying intervention stated: "It is well settled that the only interest which will

112. Straton v. New, 283 U. S. 318 (1931).

113. Rhoades v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 93 Fed. 533 (C. C. E. D. Pa. 1899). The plaintiff's claim was adjusted before intervention was attempted.

114. Myers v. Fenn, 5 Wall. 205, 207 (U. S. 1866). Judgment creditors joined with the plaintiff without any order of court in a creditors' bill charging fraudulent transfer of property. "The practice of permitting judgment creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation is well settled." See Bowker v. Haight and Freese Co., 140 Fed. 794 (C. C. S. D. N. Y. 1905), where, although intervention was allowed, the court evidently did not regard it as a case of absolute right.

115. Jackson Co. v. Gardiner Inv. Co., 200 Fed. 113, 117 (C. C. A. 1st, 1912).

116. Elder v. Western Mining Co., 280 Fed. 569 (C. C. A. 8th, 1922). The court disregarded, however, the question as to whether stockholders were adequately represented by directors and officers.

117. Radford Iron Co. v. Appalachian Electric Power Co., 62 F. (2d) 940 (C. C. A. 4th, 1933), cert. denied, 289 U. S. 748 (1933). The appeal was not dismissed, but the order denying intervention was affirmed. The iron company owned no property on the river.

entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights."[118] The City of New York was likewise unable to intervene in a suit by the Gas Company against the Attorney General of New York, the District Attorney of the County of New York and the Public Service Commissioner in order to have the 90-cent gas law declared unconstitutional.[119] The city was not legally affected in its corporate capacity because it got its gas at 75 cents per cubic foot under another section of the law not under attack, and, because of the character of the parties defendant, there was no need for it to intervene to protect the interests of its residents. And it is not sufficient justification for an absolute right of intervention in a proceeding brought to dissolve a tobacco combination, found to have violated the anti-trust laws, that the would-be intervenor is a combination of concerns selling leaf tobacco and is vitally interested in the dissolution to be effected.[120]

Court Control of Property

How have the courts developed the dual concept of control and property so that ownership of or a lien interest in property in the control of the court affords the basis for an absolute right to intervene? In some cases the emphasis is upon what constitutes control; in others it is upon the determination of property; but in all cases control and property are inextricably linked together. The dual concept is developed in receivership cases, suits to establish or impress a trust, fund cases, possessory actions, and incidental proceedings such as sequestration and attachment. A distinction between an interest in property and an interest in the proceeds of that property has crept in, a distinction, of course, well known in other fields of the law, but possibly of doubtful utility in intervention practice.

The element of court control is depicted by a non-typical case.[121] A corporate officer had been a witness but not a party in a case brought by his corporation for patent infringement. The exhibits in the suit were impounded in the custody of the clerk of the court. The United States Attorney subsequently applied for leave of court to use these

118. Id. at 942.

119. City of New York v. Consolidated Gas Co. of New York, 253 U. S. 219 (1920).

120. In the Matter of Leaf Tobacco Board of Trade of the City of New York, 222 U. S. 578 (1911), a writ of mandamus to compel the circuit court to allow intervention was denied. Cf. Coca Cola Bottling Co. v. Coca Cola Co., 269 Fed. 796 (D. Del. 1920).

121. Perlman v. United States, 247 U. S. 7 (1918) (decided against the petitioner on the merits). In Potter v. Beal, 50 Fed. 860 (C. C. A. 1st, 1892), the district attorney was not allowed to intervene in a suit against the receiver of a bank in order to obtain possession of private papers for the purpose of a criminal prosecution.

impounded exhibits in the prosecution of the officer for perjury, and the officer petitioned to intervene for the purpose of opposing the application and to have the documents returned to the corporation. The trial court denied intervention, but on appeal, the petitioner was held to have an absolute right to intervene based on his interest in the impounded exhibits.

The more typical cases involve receiverships where both control and property interest are apparent. Thus, where a receiver was appointed on the petition of lien creditors and a sale held, other creditors claiming liens had an absolute right to come in to establish their claims.[122] In another receivership, the trial court had denied the trustee under the mortgage a right to intervene, and the Circuit Court of Appeals, without bothering to reverse the order of the trial court, proceeded to treat the trustee as a party and to consider his claim on the merits.[123] Where a receiver had been appointed to manage the production of oil and gas, a petitioner claiming a portion of the production was held to have an absolute right to intervene.[124] Even in a partnership accounting suit, where a receiver had been appointed, it was held that petitioners who claimed the partnership property as mortgage security would have an absolute right to intervene.[125]

Although it is less easy to find control over property *in custodia legis* in the trust cases, here too, the right to intervene is absolute by an expansion of the concept developed in the receivership cases. Thus, in a suit to establish a trust in certain securities, the elements of court control and property interest were said to be sufficient to compel the court to grant intervention to a third person claiming a trust in the same securities.[126] If a trust cannot be shown, a favorite device to support intervention is the fund theory. Here the emphasis shifts to a determination of whether the court is in possession of property, or

122. Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852 (C. C. A. 9th, 1922). The same result was reached in Richfield Oil Co. v. Sawtelle, 279 Fed. 851 (C. C. A. 9th, 1921), which is also interesting from a procedural angle in that the Circuit Court of Appeals felt the trial court should have allowed intervention, but felt unable to do it itself. It chose, instead to mandamus the district court to allow an appeal from the order denying the petition for leave to intervene. There seems to be no good reason why intervention cannot be allowed at the appellate stage, however.

123. First Federal Trust Co. v. First National Bank of San Francisco, 297 Fed. 353 (C. C. A. 9th, 1924). The same court which had felt that it could not allow intervention directly in Richfield Oil Co. v. Sawtelle, 279 Fed. 851 (C. C. A. 9th, 1921), *supra* note 122, here in effect reversed its position.

124. Swift v. Black Panther Oil and Gas Co., 244 Fed. 20 (C. C. A. 8th, 1917). The court distinguished between the absolute right and the discretionary right, although it evidently assumed that in order to have an absolute right, no other remedy must be open to the petitioner.

125. Minot v. Mastin, 95 Fed. 734 (C. C. A. 8th, 1899). No diversity existed between the intervenors and their defendants.

126. Leary v. United States, 224 U. S. 567 (1912).

something less than property. The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action. Where a surety sues as assignee of monies due its principal, a petitioner who claims to have an assignment of a portion of the same monies has been said to have an absolute right to intervene because of an interest in a "fund" in court.[127] Where shippers succeed in enjoining the enforcement of excessive rates, other shippers, charged the excessive rate, have an absolute right to intervene because of their interest in the "fund."[128] Where is the fund? "In contemplation of equity, . . . it is the sum total of the excessive rates on lumber, unlawfully exacted from the shippers by the combined defendant companies. . . ."[129]

On the other hand, there are cases taking a more restricted view. A suit for the construction of the terms of a trust, for instance, has been held—and it would seem correctly—not to put any property in the hands of a court so as to give creditors of the beneficiary an absolute right to intervene.[130] Or a court may decide that while there is a *res*, the petitioner's interest lies elsewhere. Thus where the plaintiff sues to impress a trust on certain funds, the petitioner gains no absolute right by showing that he has a similar trust claim, but on other funds of the defendant.[131]

In some cases, the interest of the petitioner may be said to be not in the property before the court, but rather in the proceeds of that property. One claiming an interest in notes impounded in court had no absolute right to intervene in a suit to gain possession of the notes, because it was said that his interest would be in the fund realized when the notes were paid, and not in the notes themselves.[132] In a similar case, a creditor

127. Aetna Casualty and Surety Co. v. American Surety Co. of New York, 64 F. (2d) 577 (C. C. A. 4th, 1933).

128. Tift v. Southern Ry. Co., 159 Fed. 555 (C. C. S. D. Ga. 1908). The court analogized the right of the shippers to the historic right to intervene in admiralty practice.

129. 159 Fed. 555, 558 (C. C. S. D. Ga. 1908).

130. Hoffman v. McClelland, 264 U. S. 552 (1924). The question at issue was whether this was a spendthrift trust. There was no diversity between the creditors and the beneficiary, so that, at least on one theory, a discretionary right of intervention could not be allowed. Although the creditors urged that the court had taken possession of the trust *res*, the court held that it might look at its own records to determine whether it had taken such possession, and found no indication thereof in its records.

131. Bickford's, Inc. v. Federal Reserve Bank of New York, 5 F. Supp. 875 (S. D. N. Y. 1933). The plaintiff had deposited checks for collection with the Bank of the United States to be credited to the plaintiff's account. The checks were sent to the Federal Reserve to be collected. The latter kept the proceeds when the Bank of the United States closed and applied the sum to a debt owed to the Federal Reserve by the Bank. Plaintiff sued to enforce a trust on the proceeds. Although the petitioner alleged identical facts, the court said the "fund" in which the latter claimed an interest was different, so that, while there was an interest in the litigation, it was not in the same subject matter.

132. Gregory v. Pike, 67 Fed. 837 (C. C. A. 1st, 1895). An improper cross-bill was

sought to intervene in a possessory action because he had attached property as a creditor of one of the litigants. His debtor, the plaintiff, offered no objection to the attempted intervention, but the court denied intervention on the theory that the property interest of the petitioner was in the proceeds which "will result from this suit."[133] It is hard to see how it would have been prejudicial to the parties to have granted intervention in such a case.[134]

Instead of saying that the petitioner's interest is solely in the proceeds, the court may deny the absolute right to intervene on the theory that the petitioner's interest is one step removed, that is, the petitioner's interest is in an interest in the property. The validity of such a distinction and its utility seems doubtful. Yet, where a creditor had attached the equity of redemption—and the assumption, apparently, was that the equity could be validly attached—it was held that the creditor could not intervene in the foreclosure proceeding because his interest was not in the property foreclosed, but solely in the equity of redemption. Yet the equity of redemption, it would seem, constitutes a sufficient interest to give to the holder an absolute right to intervene.[135]

B. The Absolute Right to Intervene Based on Inadequate Representation

So far we have been considering the absolute right to intervene based on an interest in property subject to court control. To deny intervention in these cases would be injurious to a petitioner, but the judgment would not be *res judicata* as to him, unless he were represented in the action or in privity with a party. On the other hand, where a petitioner is represented in a proceeding, he will be bound by a decree of the court, whether he can show an interest in property or not. It, therefore, becomes even more important that the right to intervene be absolute if the representation is shown to be inadequate.

Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative

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treated as an unauthorized intervention. The case takes a more limited view of intervention than would possibly be taken today.

133. Harrington Bros. v. City of New York, 35 F. (2d) 1009 (S. D. N. Y. 1929).

134. Cases dealing with what constitutes a power coupled with an interest indicate how confusing a distinction between an interest in a thing and an interest in its proceeds is. It seems unnecessary to open the door to that confusion here.

135. Lombard Investment Co. v. Seaboard Mfg. Co., 74 Fed. 325 (C. C. S. D. Ala. 1896). The court apparently went on the theory that the petitioner's interest was protected by the debtor's protection of his equity of redemption. On this theory then the right to intervene should have been absolute because the representation would be inadequate. Realistically, one might just as well speak of the debtor as representing the plaintiff-creditor as to say he represents the petitioner-attaching creditor.

has or represents some interest adverse to that of the petitioner, or fails because of non-feasance in his duty of representation. The petitioners in these cases are usually unsecured creditors, stockholders, or bondholders, and, in a somewhat different class of cases, taxpayers or rate-payers. The theory is that stockholders are represented by the directors and officers,[136] bondholders by the trustees,[137] and all creditors by the receiver.[138] Some courts have gone so far as to term stockholders and bondholders quasi-parties.[139] A more remote relationship exists in the taxpayer and rate-payer cases. Although the would-be intervenors in these cases are often said to be adequately represented by a local political unit, the real reason for denying a right of intervention seems to be the inadequacy of the petitioners' interest.[140]

A stockholder cannot intervene unless he shows that he has asked the directors and officers to present the claim or defense which he wishes to offer, and has been refused by them, or shows facts indicating that the request would be futile.[141] This rule is derived by analogy from Equity Rule 27, which limits the stockholder's right to bring a corporate action to similar circumstances.[142] The rule seems justifiable where the right of action accrues out of the usual corporate business.[143] Although the stockholders' control of directors and officers is often negligible due both to control devices, such as all forms of non-voting stock, and to the natural weakness of a large and widely separate group,[144] it never-

136. See the discussion in Atlantic Refining Co. v. Port Lobos Petroleum Corporation, 280 Fed. 934 (D. Del. 1922).

137. See Guaranty Trust Co. of New York v. Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434, 440 (N. D. Ill. 1926).

138. Jones & Laughlins, Ltd. v. Sands, 79 Fed. 913, 914 (C. C. A. 2d, 1897). The court spoke of them as "parties to the cause, being represented by the receivers." The absolute right of creditors to present their claims in a receivership was recognized; an appeal would be allowed on rejection of the claim. Acme White Lead & Color Works v. Republic Motor Truck Co., 285 Fed. 88 (E. D. Mich. 1922). Where creditors are adequately represented and can show no interest in funds in the hands of the court, they have no absolute right to intervene. Aronstam v. James, 273 Fed. 545 (E. D. N. Y. 1921).

139. Atlantic Refining Co. v. Port Lobos Petroleum Corp., 280 Fed. 934 (D. Del. 1922). Some courts distinguish in this regard between bondholders and stockholders, as in Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600, 611 (E. D. Wis. 1912); see Jones & Laughlins, Ltd. v. Sands, 79 Fed. 913 (C. C. A. 2d, 1897).

140. See *infra*, p. 594.

141. Acme White Lead & Color Works v. Republic Motor Truck Co., 284 Fed. 580, 581 (E. D. Mich. 1922).

142. Rev. Stat. § 913 (1789), 28 U. S. C. A. § 723 (1926).

143. A distinction between ordinary corporation business and matters which are extraordinary is inherent in most corporation acts; by means of the distinction directors and officers are allowed less freedom in selling all the corporate assets or in changing the corporate structure, intrinsic elements in reorganization, and it seems peculiar that the same distinction is not carried over into the receivership field as a matter of course.

144. We refer here to voting trusts, proxies, powers coupled with an interest, which in

theless remains true that in ordinary affairs the directors and officers act for the corporation. The stockholder wishing to alter the normal rule must show that the directors or officers have refused to act in the alleged corporate interest, and that their refusal is not based on a lawful discretion.[145] Thus, where directors have admitted insolvency in a suit by creditors for the appointment of a receiver, a stockholder has no absolute right to intervene to prove solvency, unless he can show that the directors acted in bad faith.[146] Nor can he intervene to show that the court should have refused jurisdiction of receivership proceedings, when the directors, acting in good faith, caused the corporation to submit to the jurisdiction of the court.[147] And a mere showing that the officers and directors of his corporation are in effect appointed by the directors of an opposing corporation, where there is a law suit pending between the two, will not justify an absolute right to intervene.[148] Where, how-

a way are less important than the inertia and the uninformed character of stockholder groups.

145. In ex parte Cutting, 94 U. S. 14 (1876), stockholders were refused permission to intervene in the foreclosure suit of third mortgage bondholders. The stockholders charged fraud in the issuance of the bonds. Intervention had been allowed to one stockholder but he had withdrawn. A petition for mandamus to the Supreme Court was denied.

The rule that fraud must be shown combined with the rule that in equity intervention must be in subordination to the main proceedings, puts the stockholder in a difficult position. The best example of this is Whittaker v. Brictson Mfg. Co., 43 F. (2d) 485 (C. C. A. 8th, 1930) where an involuntary petition in bankruptcy was filed and notice served on a director who was entirely inactive and did not advise anyone of the service. No defense was made, and an order of adjudication entered. Stockholders then sought to intervene, but this was refused on the basis that to contest the bankruptcy order would not be in subordination to the main proceeding. It would not be necessary for a court in bankruptcy, however, to apply the equity rule, although the tendency is in that direction. See In re 1030 North Building Corp., 7 F. Supp. 896 (E. D. Ill. 1934).

The rights of a stockholder to intervene are often said to be limited to a presentation of those claims which the corporation could present. Big Creek Gap Coal and Iron Co. v. American Loan & Trust Co., 127 Fed. 625 (C. C. A. 6th, 1904); Equitable Trust Co. of New York v. Washington-Idaho Water, Light & Power Co., 300 Fed. 601 (E. D. Wash. 1924). This would seem to be inapplicable to reorganizations.

146. In In re Eureka Anthracite Coal Co., 197 Fed. 216 (W. D. Ark. 1912), and in Guarantee Trust & Safe-Deposit Co. v. Duluth & W. Rr. Co., 70 Fed. 803 (C. C. D. Minn. 1935), stockholders sought to intervene in foreclosure suit after a decree *pro confesso* had been signed, but not entered. The stockholders alleged that the directors refused to defend and were sacrificing the interests of the stockholders, and the court, not wishing to settle the matter of fraud in a hearing upon affidavits, allowed intervention. See Cole v. Seaman, 266 Fed. 846 (C. C. A. 8th, 1920). But see Couch v. Central Bank & Trust Corporation, 297 Fed. 216 (C. C. A. 5th, 1924).

147. Scattergood v. American Pipe & Construction Co., 249 Fed. 23, 27 (C. C. A. 3d, 1918). In Central Trust Co. v. McGeorge, 151 U. S. 129 (1894), the defendant corporation voluntarily submitted itself to the jurisdiction of the court and receivers were appointed. The venue was improper. Held, intervening creditors and stockholders could not raise the objection of improper venue. Cf. McGraw v. Mott, 179 Fed. 646 (C. C. A. 4th, 1910).

148. This was the case in Atlantic Refining Co. v. Port Lobos Petroleum Corp., 280

ever, the stockholder showed that the purpose of a voluntary bankruptcy proceeding was to continue fraudulent directors in control, the fraud being indicated by a state court suit based on fraudulent mismanagement which terminated in an order for an accounting and the appointment of a receiver, the right to intervention was held absolute.[149]

Since representation of all creditors by the receiver and of bondholders by the trustee is peculiarly a reorganization problem in most cases, we will defer discussion of these cases, and of additional problems having to do with the representation of stockholders, until we come to the broader subject of intervention by these classes in reorganization.[150]

Taxpayers and rate-payers have not fared very well in their efforts to secure an absolute right of intervention. Representation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part. A taxpayer could not intervene in a bondholders' action brought to have the money paid by the bondholders impounded pending a decision of the state supreme court on the legality of the bond issue.[151] A subscriber of a telephone company had no absolute right to intervene in a suit by the utility against the city to enjoin the enforcement of rates alleged to be confiscatory, even though the subscriber expressed the apprehension that the city "may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company."[152] Similarly, when a telephone company sued the Public Service Commission to enjoin the enforcement of alleged confiscatory rates, the City of New York had no absolute right to intervene, as the commission adequately represented the city.[153] And in a suit by a utility company against a municipality, the intervention petition of a taxpayer, based on the theory that he had paid in excess of the amount the company was allowed to charge and that

Fed. 934, 939 (D. Del. 1922). The court stated that "corporations controlled and managed by the same officers and stockholders have a right to deal with each other." But that is no argument for refusing intervention.

149. Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719 (C. C. A. 8th, 1917), cert. denied, 245 U. S. 667 (1917). The district court had denied the petition on the ground that no defense could be made to the voluntary petition in bankruptcy. The appellate court allowed the intervening petition and dismissed the voluntary petition in bankruptcy. Accord: In re Beaver Cotton Mills, 275 Fed. 498 (N. D. Ga. 1921) (a minority stockholder permitted to intervene to contest bankruptcy proceedings, but application denied on the merits).

150. See *infra*, p. 596 et seq.

151. Farmers' State Bank of New Washington, Ohio, v. Board of Commissioners of Jensen Bridge District, 295 Fed. 755 (S. D. Fla. 1920).

152. In re Englehard & Sons Co., 231 U. S. 646, 650 (1914). The attempt was made to intervene as the representative of all the subscribers and this was denied. The trial court in its discretion had allowed intervention as an individual matter. The city was said to be the proper party to make defendant in the suit as representative of all interested.

153. City of New York v. New York Telephone Company, 261 U. S. 312 (1923).

the city was about to compromise so that approximately only one-half of the taxpayer's excess payment would be returned to him, was denied.[154]

A recent case illustrates the close relation of the problem of inadequacy of representation to the more general problem of whether the petitioner has an adequate interest in any event. It also illustrates what has been stressed above, that in many cases where intervention might be denied as an absolute right, it would seem desirable that the trial court exercise its discretion and allow intervention. In a suit by the Government to restrain alleged violations of the then code of fair competition by the defendant's refusal to deal with representatives of its employees, the status of the local American Federation of Labor affiliate was in issue. An employee sought to intervene to urge the unconstitutionality of the code section, and the unrepresentative character of the union. The court denied intervention: "The district attorney represents the people in the proceeding. . . . The interest of the defendant (the company) is the interest of the petitioner. . . . The employee of the defendant has no better right to intervene than has an individual of the general public in a multitude of litigated matters." In a case which involves the question of the relationship between employer and employee, a contest between company union and regular union, and the whole problem of the constitutionality of Governmental regulation, it would seem that intervention, whether the right is absolute or not, would have been a useful device both for enlightening the court and protecting the parties for whose benefit the code was enacted.[155]

The Right to Intervene in Receiverships and Reorganization Proceedings

Probably in no field of the law is intervention more important than in the field of reorganization, whether reorganization be accomplished through an equity receivership or bankruptcy proceedings. In no field of the law, too, is a clarification of the problems of intervention more necessary. The same rules applicable in other intervention cases should be applied to reorganization proceedings. The petitioner, therefore, should have an absolute right to intervene if he can show an interest in the property in the hands of the court,[156] or that he is inadequately represented.[157] In any given case, of course, the petitioner may have an absolute right to intervene at one stage when he would not have

154. O'Connell v. Pacific Gas and Electric Co., 19 F. (2d) 460 (C. C. A. 9th, 1927); cf. McKinney v. Black Panther Oil and Gas Co., 280 Fed. 486 (C. C. A. 8th, 1922).

155. United States v. Houde Engineering Corp., 9 F. Supp. 836 (W. D. N. Y. 1935). The background of the litigation is discussed in Comment (1935) 48 Harv. L. Rev. 630; (1934) 34 Col. L. Rev. 1362.

156. See *supra* p. 582. 157. See *supra* p. 591.

at another,[158] or an absolute right to intervene for some purposes and not for others. And intervention for one purpose or at one stage will not constitute an intervention for other purposes or for all stages of the proceeding. Further, the same petitioner may have at one time or for one purpose an absolute right to intervene based on property in the hands of the court; at another time or for another purpose an absolute right to intervene based on inadequate representation; and, further, have in other matters no absolute, but at most a discretionary right to intervene. Thus, in reorganization proceedings, the petitioner most likely can show an interest in property under the court's control, such as a creditor's claim against the company, entitling him to intervene to establish and protect that interest. Further, for other matters the petitioner may have an absolute right to intervene based on inadequate representation. And for still other matters the petitioner will probably have no right to intervene at all, such as matters of administration involved in running the company during the reorganization.

In most reorganization proceedings, three principal classes of persons seek intervention: stockholders, bondholders, and creditors other than bondholders. In most reorganization proceedings, too, there are different classes of stockholders and of bondholders.[159] The reorganization process is designed somehow to adjust these conflicting interests by a "fair" plan. The usual legal device employed in the past has been the simple foreclosure, receivership, and sale; and the fiction underlying the device dominated the picture of reorganization,[160] and affected the character of the right to intervene.

The legal fiction was that bondholders and creditors had the right to have the property sold to pay their debts; that the court would see that the sale was fair, and would distribute the proceeds to the bondholders and the creditors. In strict theory they had no interest in the property in the hands of the court until after the sale, and then only in the proceeds.[161] They had an absolute right to intervene to file their claims to the proceeds with a master;[162] the procedure was similar to

158. See Commerce Trust Co. v. Woodbury, 77 F. (2d) 478 (C. C. A. 8th, 1935).

159. Friendly points out that in the reorganization of the Missouri Pacific there were 72 different classes of security holders. Friendly, *Amendment of the Railroad Reorganization Act* (1936) 36 COL. L. REV. 27, 29.

160. Farmers' Loan and Trust Co. v. Toledo, Ann Arbor and North Michigan Ry. Co., 67 Fed. 49, 55 (C. C. N. D. Ohio 1895). Where the fiction of foreclosure and sale was not employed, it was easier for the court apparently to pass upon the plan, and to hear dissenters. Graselli Chemical Co. v. Aetna Explosives Co., 252 Fed. 456 (C. C. A. 2d, 1918), is such a case where it was a stockholder reorganization. Wallace v. Motor Products Corp., 25 F. (2d) 655 (C. C. A. 6th, 1928); Eagleson v. Pac. Timber Co., 270 Fed. 1008 (D. Del. 1920); Willson v. Waltham Watch Co., 293 Fed. 811 (D. Mass. 1923); see also Wicher v. Del. Mines Corp., 15 P. (2d) 610 (Idaho, 1932).

161. After the sale and before confirmation of the sale.

162. Acme White Lead & Color Works v. Republic Motor Truck Co., 285 Fed. 89 (E. D. Mich. 1922).

that followed in the historic intervention for an examination *pro interesse suo*, except that even when the "facts" were clear, the court would not hear the claimant until the master had disallowed a claim or reduced it by allowing the claim of another. But the theory that bondholders, other creditors, and stockholders only had a claim to the proceeds ignored the fact that these same groups in some combination would be the buyers at the judicial sale.[163] Originally the court took the view that the rivalry that went on between bondholder groups, different classes of creditors, and stockholders, or between majority and minority members of the same group, and the inadequate representation of a class,[164] was out of the court's province.[165] But partial protection was later provided[166] by the device of a constructive trust placed on the property of the old corporation in the hands of the new,[167] by a consideration of the plan

163. This has been discussed from many angles. CRAVATH, REORGANIZATION OF CORPORATIONS, SOME LEGAL PHRASES OF CORPORATE FINANCING—REORGANIZATION AND REGULATION (1917) 153; Swaine, *Reorganization of Corporations: Certain Developments of the Past Decade* (1927) 27 COL. L. REV. 901; Rodgers, *Rights and Duties of the Committee in Bondholders' Reorganizations* (1929) 42 HARV. L. REV. 899; Frank, *Some Aspects of Corporate Reorganization* (1933) 19 VA. L. REV. 698; Foster, *Conflicting Ideals for Reorganization* (1935) 44 YALE L. J. 923; Dodd, *Reorganization Through Bankruptcy: A Remedy for What?* (1935) 48 HARV. L. REV. 1100; Rohrlich, *The New Deal in Corporation Law* (1935) 35 COL. L. REV. 1167.

164. For instance, the original debenture holders' committee in the reorganization of Paramount Publix. With the exception of Mr. Frank Vanderlip, who acquired debentures after he became chairman, the committee "was from beginning to end a committee composed of people other than debenture holders." Proceedings before Securities and Exchange Commission, Matter of Paramount Reorganization (1935) 357.

165. Bowling Green Trust Co. v. Va. P. and P. Cox, 164 Fed. 753, 755 (C. C. Va. 1903). Bondholders were allowed to file a plan of reorganization to be considered on the question of whether an early sale should be ordered. But "with the fairness and equity of the plan we have nothing to do." The trustee and individual bondholders filed plans.

166. For an explanation of the reasons for this change in judicial attitude, see Louisville Trust Company v. Louisville, New Albany and Chicago Railway Company, 174 U. S. 674, 682 (1899); see Canada So. Rr. Co. v. Gebhard, 109 U. S. 527 (1883).

167. James v. Railroad Co., 73 U. S. 752 (1867); Railroad Co. v. Howard, 74 U. S. 392 (1868); Louisville Trust Co. v. Louisville New Albany and Chicago Railway Co., 174 U. S. 674 (1899); Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482 (1913); Kansas City Ry. v. Guardian Trust Co., 240 U. S. 166 (1916); Hibernia Ins. Co. v. St. Louis and New Orleans Trans. Co., 13 Fed. 516 (C. C. E. D. Mo. 1882); Blair v. St. Louis, H. & K. Co., 25 Fed. 2 (C. C. E. D. Mo. 1885) (despite the fact that the petitioners' intervention pleas were denied); Central Trust Co. of New York v. Cincinnati, J. & M. Ry. Co., 58 Fed. 500 (C. C. N. D. Ohio 1892); Chattanooga R. & C. Ry. Co. v. Evans, 66 Fed. 809 (C. C. A. 6th, 1895); Central of Georgia Ry. Co. v. Paul, 93 Fed. 878 (C. C. A. 5th, 1899); St. Louis Trust Co. v. Des Moines, N. & W. Ry. Co., 101 Fed. 632 (C. C. S. D. Iowa 1900); Western Union Telegraph Co. v. United States and Mexican Trust Co., 221 Fed. 545 (C. C. A. 8th, 1915); Okmulgee Window Glass v. Frink, 260 Fed. 159 (C. C. A. 8th, 1918); Mountain States Power Co. v. A. L. Jordan Lumber Co., 293 Fed. 502 (C. C. A. 9th, 1923); Wabash Railway Co. v. Marshall, 224 Mich. 593, 195 N. W. 134 (1923); Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428 (1890); Hurd v. New York and Commercial Steam Laundry Co.,

on a hearing for confirmation of the sale,[168] and by the setting of an upset price.[169] The state courts sometimes added the device of trustee-purchase, whereby if the majority committee which was about to buy in at the sale did not offer what the court thought to be a fair plan, the court would order the trustee to buy in the property for all the bondholders.[170] The courts were shaking themselves loose from the theory that this was merely a foreclosure or receivership and sale.

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167 N. Y. 89, 60 N. E. 327 (1901). There was a slight possibility of holding members of the reorganization committee liable if the dissenter were a depositor. Industrial and General Trust Ltd. v. Tod., 180 N. Y. 215, 73 N. E. 7 (1905); Ginty v. Ocean Shore Rr. Co., 172 Cal. 31, 155 Pac. 77 (1916). The type of unfairness recognizable in the omission of a class is somewhat different, however, than the type of unfairness concerning a minority member of one class.

168. Previous to the sale the courts often felt themselves unable to consider the plan. Guaranty Trust Co. of New York v. Chicago, M. and St. P. Ry. Co., 15 F. (2d) 434, 440 (D. C. N. D. Ill. 1926). The St. Paul reorganization is described in LOWENTHAL, THE INVESTOR PAYS (1933). Simon v. New Orleans T. and M. Rr. Co., 242 Fed. 62 (C. C. A. 5th, 1917). Petition to intervene and oppose the order of sale on the basis of unfairness was denied. But, while intervention was denied, a hearing on the merits was had at the confirmation of the sale. See Merchants' Loan and Trust Co. v. Chicago Ry. Co., 158 Fed. 923 (C. C. A. 7th, 1907). Occasionally a hearing was had on the plan insofar as it affected the order of sale or the time for the sale. Guaranty Trust Co. of New York v. Missouri Pac. Ry. Co., 238 Fed. 812 (E. D. Mo. 1916). Bondholders of a subsidiary line were also creditors of the general line which assumed the mortgage. They were allowed to intervene in the foreclosure suit and object to the plan before the sale. In Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co. Inc., 296 Fed. 875 (C. C. A. 2d, 1924), the plan was considered upon application for an order of sale by the reorganization committee, although there evidently had been no formal intervention by that committee. The appellate court approved this procedure of looking at the plan. The older view is illustrated in First National Bank v. Shedd, 121 U. S. 74 (1887).

For the theory that the court has no jurisdiction over the plan, see First Nat. Bank v. Flershem, 290 U. S. 504 (1934). In Rospigliosi v. New Orleans, M. I. C. R. Co., 237 Fed. 341 (C. C. A. 5th, 1916), the petitioner wished to intervene to have the confirmation of the sale set aside on the theory of inadequacy of the bid and unfairness of the plan. The court, in denying leave, said it had nothing to do with the plan. See Blanks v. Farmers' Loan and Trust Co., 122 Fed. 849 (C. C. A. 5th, 1903); Moore v. Splitdorf Electrical Co., 114 N. J. Eq. 358, 168 Atl. 74 (1933). Only rarely did the plan get an early hearing; even then the viewpoint of the court was that it was only to see if there was patent unfairness. Gates v. Boston and New York Air Line Railroad Co., 53 Conn. 33, 5 Atl. 695 (1885); see Sullivan v. St. Louis-San Francisco Rr. Co., 147 Misc. 485, 263 N. Y. Supp. 396 (Sup. Ct. 1933).

169. Central Trust Co. of New York v. Washington County Rr. Co., Co., 124 Fed. 813 (C. C. D. Me. 1903). The court treated stockholders and bondholders as parties allowed to intervene in order to hear their exceptions to the master's report. An upset price was fixed, but it is moot whether it was fixed with the idea of protecting the minorities or of forcing them into the plan. Equitable Trust Co. of New York v. Western Pacific Ry. Co., 233 Fed. 335 (N. D. Cal. 1916). This was not always done. Provident Life and Trust Co. of Philadelphia v. Camden, 177 Fed. 854 (C. C. A. 3d, 1910); Weiner, *Conflicting Functions of the Upset Price* (1927) 27 COL. L. REV. 132. Occasionally in the absence of an upset price it was held the price bid must not be inadequate. Ballentyne v. Smith, 205 U. S. 285 (1907). But usually something more than that had to be shown.

170. First National Bank in Wichita v. Neil, 137 Kan. 436, 20 P. (2d) 528 (1933).

But considering the plan at the time of confirmation of the sale, and with the emphasis on the sale, was likely to be too late, and therefore inadequate to protect minority groups.[171] The latter found themselves attacking what was apparently the work of years, the result of compromise and study; they found themselves asking the court to upset what apparently had the support of the majority.[172] They found it difficult to urge economic arguments, not easily understood at best, against a finished product.[173] Various types of legislation were proposed; longing glances were cast at the English Joint Stock Companies Arrangement Act.[174] The result was reached in sections 77[175] and 77B[176] of the Bankruptcy Act which require the court to consider the fairness of the plan before confirming.[177] But the argument as to when the court should consider the fairness of the plan still goes on. And in equity receiverships, although it does not seem as though any court would refuse to consider the fairness of the plan, in view of the persuasive effect of sections 77 and 77B, the problem still remains: at what time will it do so?[178] If the plan is only going to be considered at the end of the proceedings, little actual protection will be afforded minority groups.[179]

But see Chicago Title & Trust Co. v. Robin, 361 Ill. 261, 198 N. E. 4 (1935); note (1936) 49 HARV. L. REV. 487. And in the federal courts also if the indenture provided for it. Sage v. Central Rr. Co., 99 U. S. 334 (1878); Werner, Harris and Buck v. Equitable Trust Co., 35 F. (2d) 513 (C. C. A. 10th, 1929) (minority bondholders had the sale, and an order allowing the trustee to bid in, set aside).

171. Undoubtedly the threat of a refusal by the court to confirm the sale because of unfairness of the plan may have given greater bargaining power to minority groups. But the number of plans actually upset is small. The courts constantly reiterate that they are not the makers of the plans, and unless some unfairness can be shown they will not refuse to confirm because the plan might be better.

172. In Duncan v. Mobile, 8 Fed. Cas. No. 4139 (C. C. S. D. Ala. 1879), p. 25, where the court considered the plan on foreclosure before the decree of sale, the court said: "We have examined this scheme and if not perfectly equitable, we are unable to point out any want of fairness in it." The court then decreed that the minority must be allowed to participate on the same basis as the majority in this inequitable but fair plan.

173. Jameson v. Guaranty Trust Co. of New York, 20 F. (2d) 808 (C. C. A. 7th, 1927).

174. COMPANIES ACT OF 1929, 19 & 20 GEO. V., c. 23, § 153 (1929). Rosenberg, *A New Scheme of Reorganization* (1917) 17 COL. L. REV. 523; Rosenberg, *Reorganization—The Next Step* (1922) 22 COL. L. REV. 14; Fraser, *Reorganization of Companies in Canada* (1927) 27 COL. L. REV. 932.

175. 49 STAT. 911, 11 U. S. C. A. § 205 (1935).

176. 49 STAT. 965, 11 U. S. C. A. § 207 (1935).

177. Friendly, *Some Comments on the Corporate Reorganization Act* (1934) 48 HARV. L. REV. 39; Hanna, *Corporate Reorganization under the Bankruptcy Act* (1935) 21 A. B. A. J. 73, 76.

178. As long as the orthodox theory is that the court is not to supervise reorganization, nor require a "best" plan, it is important that unfairness be detected at the initial stages. For the orthodox theory, see Swaine, *Reorganization of Corporations: Certain Developments of the Past Decade* (1927) 27 COL. L. REV. 901.

179. Fearon v. Bankers' Trust Co., 238 Fed. 83 (C. C. A. 3d, 1916), where first mortgage

What were the stockholders, creditors and bondholders doing while this process was going on? What rights did they have? All had the right to file their claims before the master, and to contest his allowance of other claims which might diminish theirs. But what other rights did they have to come into these proceedings which were being conducted for their benefit?

If the stockholders attempted to intervene they were usually told that they were adequately represented by their directors and officers,[180] unless they could show that the directors and officers were practicing fraud or collusion,[181] or that the interests of the directors and officers were sufficiently opposed to that of the stockholders.[182] Thus, if the directors had purposely brought the company into bankruptcy in order to allow themselves in another capacity as bondholders to gain complete ownership of the corporation, the stockholders were permitted to intervene.[183]

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bondholders were refused leave to intervene, illustrates the futility of a late hearing on the plan, and the superficial manner in which a court is compelled to consider the plan at that time.

180. Guaranty Trust Co. of New York v. Chicago, M. and St. P. Ry. Co., 15 F. (2d) 434 (W. D. Ill. 1926) (virtual ownership of the corporation would not change this); Coffin v. Chattanooga Water & Power Co., 44 Fed. 533 (C. C. S. D. Tenn. 1891). This refers to the right absolute. Sometimes when the stockholder had no absolute right to intervention, intervention was allowed in the discretion of the court. Such was the case in Lincoln Printing Co. v. Middle West Utilities Co., 74 F. (2d) 779, 784 (C. C. A. 7th, 1935). There remained the absolute right to file claims and contest the claims of others before the master. This was recognized even in Forbes v. Memphis, E. P. & P. R. Rr. Co., 9 Fed. Cas. No. 4,926 (C. C. W. D. Tex. 1872), p. 408, which doubted whether intervention would be allowed stockholders on a suggestion of fraud on the part of corporate officers. See Seaman v. Adler, 266 Fed. 846 (C. C. A. 8th, 1920); Guaranty Trust Co. v. International Pump, 231 Fed. 594 (C. C. A. 2d, 1916); Daly v. Opelousas Ins. Agency, 181 La. 89, 158 So. 631 (1935).

181. On the other hand it was once doubted whether "in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit and seek to defend or control the proceedings." Forbes v. Memphis, E. P. & P. R. Co., 9 Fed. Cas. No. 4,926, p. 408. But the charge of fraud apparently was directed at the receiver; moreover the charge was regarded as groundless by the court.

Intervention may be denied despite a charge of fraud, otherwise substantively sufficient, against directors and officers, if it appears that the stockholder is having a judicial hearing of his claim which will be unimpaired by the present case. Lewis v. Baltimore & L. Rr. Co., 62 Fed. 218 (C. C. A. 4th, 1894). In this case intervention was sought in the cross bill for foreclosure filed by the first mortgage trustee, and denied.

182. Or that the directors and officers were so negligent as to be indicative of fraud. Guarantee Trust & Safe-Deposit Co. v. Duluth & W. Rr. Co., 70 Fed. 803 (C. C. D. Minn. 1895). See Atlantic Refining Co. v. Port Lobos Petroleum Corp., 280 Fed. 934 (D. Del. 1922).

183. United States Trust Co. of New York v. Chicago Terminal Transfer R. Co., 188 Fed. 292 (C. C. A. 7th, 1911); cf. Geddes v. Anaconda Mining Co., 254 U. S. 590 (1921); American Seating Co. v. Bullard, 290 Fed. 896 (C. C. A. 6th, 1923).

Or if there were two classes of stockholders, and the would-be intervenors could show that one class, opposed to them, had control of the directors, intervention was permitted.[184]

But to say that stockholders are represented by their directors in a reorganization is to forget that in reorganization "the corporate structure or entity . . . becomes diaphanous, and the stockholders emerge as the real parties in interest."[185] It is no longer a matter of corporate business. It is a question of class against class, and a group struggle within a class. The directors were not elected to conduct such business. Thus, one court, reasoning along similar lines, allowed the stockholders to intervene when they were in form certificate holders, the ownership of the legal interest in the stock being in voting trustees whom the stockholders had not appointed. It was the theory of the court that the stockholders' control over the directors elected by the voting trustees was not sufficient to justify a holding that they were adequately represented.[186] But practically it would seem that stockholders are often inadequately represented by directors and officers who may be bondholders, or associated with bondholders, or desire to be continued in office by the new stockholders. One example should illustrate this clearly. Under section 77B of the Bankruptcy Act the stockholders are given a great deal of power if insolvency is not found, or if the judge has not found that they will be unaffected by the plan.[187] Would any one urge that the proper representatives in such a case should be the directors who may honestly believe the corporation to be insolvent, and possibly not being more than nominal stockholders themselves, might have no further interest in protecting the rights of the stockholders?[188]

The creditors were told that they were represented by the receiver or by the trustee appointed by the court.[189] Before they could intervene

184. Hamlin v. Toledo, St. L. & K. C. Rr. Co., 78 Fed. 664 (C. C. A. 6th, 1897). The stockholders of one class will be required to join if they intervene. Toledo, St. L. & K. C. Rr. Co. v. Continental Trust Co., 95 Fed. 497 (C. C. A. 6th, 1899), cert. denied, 176 U. S. 219 (1900). If there were a divergence of interest within the class, however, intervention should be allowed without joining. The Farmers' Loan and Trust Co. v. The New York and Northern Railway Co., 150 N. Y. 410, 44 N. E. 1043 (1896) (the absolute right given to minority shareholders where the majority stockholders and bondholders were bringing the foreclosure suit pursuant to a plan to gain complete ownership of the corporation).

185. In re National Lock Co., 9 F. Supp. 432 (N. D. Ill. 1934). The actual case involved reorganization under section 77B of the bankruptcy act. But see In re O'Gara Coal Co., 260 Fed. 742 (C. C. A. 7th, 1919).

186. In re Babcock, 26 F. (2d) 153 (C. C. A. 7th, 1928).

187. Cf. Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., 5 F. (2d) 39 (C. C. A. 2d, 1925).

188. It is not entirely clear that stockholders may not have some added right under section 77B even if insolvency is shown. In re Reading Hotel Corp., 10 F. Supp. 470, 471 (E. D. Pa. 1935); see Sabel, *Recent Economic Developments in Corporate Reorganization* (1936) 20 MINN. L. REV. 117, 137.

189. Thus in Hartford-Connecticut Trust Co. v. Doherty, 286 Fed. 926 (C. C. A. 6th,

they had to show that such representation was inadequate.[190] Thus, in one case where it was a question of the receiver's being allowed his fee from the court, the creditors could intervene to contest the amount.[191] Or if they could show that the property had been in receivership for an inordinate length of time (here, over four years) and that no progress had been made under the receiver either towards sale or rehabilitation, they were allowed to intervene on the question of setting a date for the sale.[192] If they could go further and show that the bondholders and the stockholders had combined in a plan to eliminate creditors other than bondholders; and were in the process of doing so, the court would allow the creditors to intervene to be heard on the plan.[193] No mention is made of the position of the receiver in such cases. Supposedly the theory would be that, in allowing the combination, he had proved himself inadequate. But, actually, the receiver is put in to conserve the property; he has very little to do with creditors in working out a plan of reorganization. There would seem to be no reason, therefore, why he should be held to represent them.

The bondholders were told that they were represented by the trustee.[194]

1923), lienholders were denied the absolute right to intervene in a receivership when they desired to file a cross-bill for the collection of stock subscriptions, when the receiver had not refused to take such action.

For reorganization matters, the receiver has sometimes been considered their representative. Conley v. International Pump Co., 237 Fed. 286, 287 (S. D. N. Y. 1915) (Intervention was denied stockholders who charged unfairness of the plan and collusion between bondholders and officers. The court felt that it had little to do with the fairness of the plan, and that the receiver would defend adequately for the stockholders.).

190. Jones & Laughlins, Ltd. v. Sands, 79 Fed. 913 (C. C. A. 2d, 1897); Aronstam v. James, 273 Fed. 545 (E. D. N. Y. 1921). Where the right to intervene is not absolute because of representation by the receiver, the court may still allow intervention, and refuse to grant leave to sue the receiver in any other manner. Field v. Kansas City Refining Co., 296 Fed. 800 (C. C. A. 8th, 1924), cert. denied, 266 U. S. 618 (1924). This is said not to be contrary to Adler v. Seaman, 266 Fed. 828 (C. C. A. 8th, 1920), since there is said to be no coercion. As to coercion, compare United States v. Butler, 56 Sup. Ct. 312 (1935).

191. King v. Hiawatha Silk Mills, Inc., 296 Fed. 907 (C. C. A. 2d, 1924).

192. First Federal Trust Co. v. First National Bank of San Francisco, 297 Fed. 353 (C. C. A. 9th, 1924). The appellate court was unable to find out whether the trial court had permitted or denied intervention.

In Haines v. Buckeye Wheel Co., 224 Fed. 289 (C. C. A. 6th, 1915), it was proper for the court to allow creditors to intervene in a receivership proceeding when the creditors claimed that the receiver was violating his authority.

193. This is clearly so after there has been a sale. Louisville Trust Co. v. Louisville, New Albany and Chicago Railway Company, 174 U. S. 674 (1899). It was apparently successfully urged previous to the sale in Western Union Telegraph Co. v. United States and Mexican Trust Co., 221 Fed. 545 (C. C. A. 8th, 1915).

194. Palmer v. Bankers' Trust Co., 12 F. (2d) 747 (C. C. A. 8th, 1926); Guaranty Trust Co. of New York v. Minneapolis & St. L. Rr. Co., 52 F. (2d) 418 (C. C. A. 8th, 1931). A different problem is presented where the question is the right of senior mortgage bondholders to intervene in the foreclosure suit of junior bondholders. The right is

The outstanding quality of the modern corporate trustee is apt to be its inactivity. The indenture is drawn so as to save the trustee harmless from everything except gross negligence. The trustee may have neglected to have notified the bondholders of the default.[195] He may be connected with the house of issue. He very probably has some affiliation with the members of the majority bondholders' committee.[196] Yet in most cases he is said to be the adequate representative of the bondholders, with the result that they are denied an absolute right to intervene.[197] Even a showing that the trustee is the trustee of two bond issues and must therefore represent conflicting interests has been held an insufficient indication of inadequacy,[198] although it seems clear that the modern

absolute, apart from any question of trustee representation. Compton v. Jesup, 68 Fed. 263 (C. C. A. 6th, 1895), questions certified and answered in 167 U. S. 1 (1897). When the trustee represents both senior and junior mortgagor, the junior bondholders have been given an absolute right to intervene. Northampton Trust Co., Trustee, v. Northampton Traction Co., 270 Pa. 199, 112 Atl. 871 (1921); cf. Carpenter v. Catlin, 44 Barb. 75 (N. Y. 1865); see Chase National Bank of City of New York v. 10 East 40th Street Corp., 238 App. Div. 370, 264 N. Y. Supp. 882 (1st Dep't 1933) (minority bondholders' committee was allowed to intervene in foreclosure suit for the purpose of attacking it; however, the trustee did not oppose their intervening).

195. Cf. Richards v. Chesapeake & O. Rr. Co., 20 Fed. Cas. No. 11,771 (C. C. E. D. Va. 1876) p. 692. As a business practice this is a frequent occurrence. See Posner, *Liability of the Corporate Trustee* (1928) 42 HARV. L. REV. 198. Arguments in justification concern the state of the market, the welfare of the country, and the discretion of the trustee.

196. In Shaw v. Railroad Co., 100 U. S. 605 (1879), where intervention was denied bondholders on the theory that they were represented by trustees, two of the trustees were creditors whose debts were provided for in the plan of reorganization. In Trust Company of America v. Norfolk & S. Ry. Co., 174 Fed. 269 (C. C. E. D. Va. 1909), the bondholder alleged that the trustee was acting with the majority bondholders' committee and was causing the indebtedness of the corporation to be augmented in excess of the real indebtedness. Intervention was denied on the theory that the right to go against the proceeds of the sale was sufficient protection. See Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600, 607, 612 (E. D. Wis. 1912). In Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co., 169 Fed. 486 (C. C. S. D. Ohio, 1908) a court refused intervention to bondholders despite the fact that the trustees represented conflicting interests, which is exceedingly probable where the trustee is a bank or trust company. It was said that the bondholder was sufficiently protected by his ability to appear before the master to file and contest claims. Cf. Brown v. Denver Omnibus & Cab Co., 254 Fed. 560 (C. C. A. 8th, 1918).

197. Guaranty Trust Co. of New York v. Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434, 440 (N. D. Ill. 1926). Where the trustee's own personal interest is involved, as against that of the bondholders, intervention should be allowed as an absolute right. Thus where the trustee's compensation is in dispute, the bondholders can intervene. Williams v. Morgan, 111 U. S. 684 (1884). The trustee had also acted as receiver and this involved compensation in that capacity.

In some cases intervention by bondholders is allowed as a discretionary matter, when the absolute right may be questioned. Ex parte Jordan, 94 U. S. 248 (1876).

198. Clyde v. Richmond & D. Rr. Co., 55 Fed. 445 (C. C. E. D. Va. 1893). The committee of bondholders which desired intervention, however, itself represented conflicting groups.

view would allow intervention here. Furthermore, in any contested reorganization, there will be conflicting groups in one class of bondholders.[199] How can the trustee represent them all? To deny intervention is at variance with the idea that intervention will be permitted by a court in order to see that its processes will not be used to prejudice the rights of interested third persons.

The problem of allowing stockholders, creditors and bondholders to intervene is an extrinsic part of the larger problem of the court's consideration of the plan. It will do no good to have the court consider the plan, if only the proponents thereof are before the court.[200] The persons who are interested must be before the court before any advance in reorganization practice will have been made. The further question of when the court should consider the plan still remains and is also bound up with the question of intervention. For it will do little good to allow intervention at the final stages of a proceeding when the claim of the petitioners will appear as a minority attempt to defeat the work of many months, many minds, much labor and much cost.[201]

The reorganization statutes, liberally interpreted, indicate a trend towards allowing greater rights of intervention. Section 77B states that "any creditor or stockholder shall have the right to be heard on the question of the appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon filing a petition for leave to intervene, on such other questions arising in the proceeding as the judge shall determine."[202] The provisions of the act expressly giving an absolute right to intervene can easily be overemphasized. The appointment of a trustee and confirmation of a plan, important as they are, do not go to the essence of the reorganization problem, which is the consideration of the plan in its formative stage with all the conflicting interests before the court, and with the court cognizant of its duty to aid in the formulation of a plan when necessary.

199. Galveston Railroad Co. v. Coudrey, 11 Wall. 459 (U. S. 1870); Farmers' Loan and Trust Co. v. Northern Pac. Rr. Co., 66 Fed. 169 (C. C. S. D. Wis. 1895); Farmers' Loan & Trust Co. v. Northern Pac. Rr. Co., 70 Fed. 423 (C. C. S. D. N. Y. 1895); Central Trust Company of New York v. Chicago, R. I. & P. Rr. Co., 218 Fed. 336 (C. C. A. 2d, 1914); JONES, CORPORATE BONDS AND MORTGAGES (3d ed. 1907) § 398a.

200. Notice the development portrayed in Cary v. Houston and T. C. Ry. Co., 45 Fed. 438 (C. D. E. D. Tex. 1891), and Southern Pacific Co. v. Bogart, 250 U. S. 483 (1919); see Temmer v. Denver Tramway Co., 18 F. (2d) 226 (C. C. A. 8th, 1927).

201. Palmer v. Bankers' Trust Co., 12 F. (2d) 747 (C. C. A. 8th, 1926). Intervention was denied to bondholders but their arguments were heard in court as to the unfairness of the plan. The court stressed the fact that 84% of the refunding bonds and 98% of the adjustment bonds were in favor of it, and that the Interstate Commerce Commission had approved of it. See Guaranty Trust Co. of New York v. Chicago, M. & St. P. Ry. Co., 15 F. (2d) 434 (N. D. Ill. 1926).

202. 77B (c) (10).

Under the terms of the act, intervention relative to all other matters save the filing of claims and appointment of trustees, and confirmation of the plan might be said to be discretionary, because of the contrast in language: an express absolute grant of the right to be heard relative to the appointment of a trustee and to the confirmation of a plan on the one hand, and a vague grant of the right to file a petition for leave to intervene on other matters. This interpretation, however, would be most unfortunate since, unless unusual protection is given minorities, Section 77B may be an effective weapon for destroying their rights.[203] It is suggested, therefore, that the theory of intervention heretofore advanced should be applicable to reorganizations under Section 77B, recognizing that under this section reorganization is no longer a mere foreclosure sale and that the real parties are creditors, bondholders, and stockholders.[204] This theory is supplemented by the rationale of the statute giving the court power to disregard the provisions of deposit agreements,[205] and thus avoid one kind of representation of creditors, which in many ways was no less inadequate[206] than that furnished bondholders by their trustees, creditors by the receiver or trustee, and stockholders by their directors.[206] Similar considerations and criticisms apply to Section 77 of the Bankruptcy Act.[207]

203. Bondholders denied the right to intervene in 77B proceedings. In re General Theatre Equipment Inc., 12 F. Supp. 785 (D. Del. 1935). The necessity to file an intervening petition still remains. In re Milwaukee and Sawyer Bldg. Corp., 79 F. (2d) 478 (C. C. A. 7th, 1935). By disregarding ordinary intervention rules, that is, that the owner of property in the custody of the court may intervene, the petitioner claiming to be the owner of property under 77B proceedings, was denied intervention. In re 1030 North Dearborn Bldg. Corp., 7 F. Supp. 896 (E. D. Ill. 1934). See In re St. Louis-San Francisco Ry. Co., U. S. Dist. Ct. (E. D. Mo. Nov. 4, 1933), unreported (deals with Section 77 prior to its amendments).

204. In line with this theory is the holding that the trustee may not vote on the proposed plan as the representative of bondholders in the absence of an express provision in the indenture. In re Allied Owners Corp., 74 F. (2d) 201 (C. C. A. 2d, 1934); note (1935) 2 U. OF CHI. L. REV. 644. It may be suggested that a provision in the indenture giving the power may well be disregarded by the court.

205. 77B (b) (10). See In re South Coast Co., 8 F. Supp. 43 (D. Del. 1934).

206. The ability of creditors and stockholders to present plans under the Act also leads to this interpretation. As an example of intervention under the act, see In re Hotel Gibson Co., 11 F. Supp. 30 (S. D. Ohio 1935). On committees intervening prior to 77B see Pennsylvania Steel Co. v. New York City Ry. Co., 160 Fed. 222 (C. C. S. D. N. Y. 1903); Penn Steel Co. v. New York City Railway Co., 181 Fed. 285 (S. D. N. Y. 1910).

207. Section 77, despite amendments, partly because of them, is unclear as to the nature of the right to intervene which it purports to give. It is stated that any creditor or stockholder "shall have the right to be heard on all questions arising in the proceedings, and upon petition thereof and cause shown any such person or any other interested party *may* be permitted to intervene." This section may be said to give only the discretionary right to intervene, unless other broad principles of intervention practice are introduced. The unusual powers granted a court under section 77, broader than those given under section 77B, make it extremely important not only that creditors and stockholders be heard, but where they are in

A distinction should be made between the formal bringing of the reorganization proceeding, whatever form that may take, the administration of the estate and the reorganizing process. Any representative, unless more is shown, is competent to initiate the reorganization proceeding.[208] Unless the danger of a fraudulent dismissal is indicated, there is no need to allow intervention for that matter and at that stage. In the administration of the estate under the receiver or trustee, even to the issuance of ordinary receiver's or trustee's certificates, it seems unnecessary to allow intervention as an absolute right unless fraud, adverse interest, or non-feasance on the part of the receiver or trustee can be shown. But in the working out of a reorganization plan which would include the formation of committees, the solicitation of deposits, the substance of deposit agreements, and anything involving the status of a class, it is to be hoped that the plan will be considered in its formative stages, and that creditors of all types and stockholders will have the absolute right to intervene. The compromise of claims by the receiver would also seem to be a step sufficiently connected with any reorganization to categorize it as a part of the reorganizing process. Furthermore, if the creditors or stockholders give proxies to committees to represent them, the court should be able, even without a statute, to peruse this agreement to see whether representation is in reality adequate.[209] The cry that if this were so the court would be overwhelmed with parties to the action seems unconvincing. Actually, in reorganization proceedings, the court has often heard dissenters. The appellate courts, seemingly not sure whether intervention should be allowed or not, have discussed the merits of the dissenters' petition on appeal. Allowing intervention in the manner suggested will serve, not only to clarify the situation, but also to facilitate the intervention of dissenters previous to any confirmation of the sale, and the hearing of their arguments at a time when the court may see the plan grow before it.

If intervention is to be freely allowed as suggested, court supervision

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fact inadequately represented, that they have the right to appeal. But see Friendly, *The 1935 Amendment of the Railroad Reorganization Act* (1936) 36 COL. L. REV. 27. See Comment (1935) 3 U. OF CHI. L. REV. 63.

208. It has been held that bondholders' committees have no absolute right to intervene on the question of the good faith of the filing of the petition, in 77B proceedings. In re Prairie Ave. Bldg. Corp., 11 F. Supp. 125 (E. D. Ill. 1935).

209. The courts without the aid of statute have disregarded the provisions of trust indentures, limiting the right of a bondholder to insist on foreclosures unless a certain percentage of bondholders request the trustee to foreclose. Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. Co., 53 Fed. 182 (C. C. D. Kan. 1892); First Nat. Fire Ins. Co. v. Stephen Salisbury, 130 Mass. 303 (1881); cf. Rodman v. Richfield Oil Co. of Cal., 66 F. (2d) 244 (C. C. A. 9th, 1933); Lowenthal, *The Stock Exchange and Protective Committee Securities* (1933) 33 COL. L. REV. 1293; see Douglas, *Protective Committee in Railroad Reorganization* (1934) 47 HARV. L. REV. 565.

of the allowance of committee fees is a necessary corollary. The disallowance or the allowance of inadequate fees may only result in mulcting the depositors, or the stockholders of the new corporation. It should be possible for a court, with the aid of the Interstate Commerce Commission in cases arising under Section 77, and with the aid of masters in other cases, to anticipate the amount of fees to be allowed in a particular reorganization. The fact that intervention is often sought solely to gain the allowance of fees by the court could be taken care of by such a procedure.[210]

It is believed that the absolute right to intervene as heretofore outlined is essential in protecting the interests of third persons, whether the litigation be simple, or complex as in reorganization. If this view is sound; the discretionary right to intervene becomes less important. But as pointed out in several instances, the grant of intervention in many of the discretionary cases facilitates the disposal in one action of claims involving common questions of law or fact, and thus avoids both court congestion and undue delay and expense to all parties. The discretionary right to intervene is a corollary of the permissive joinder, class suit, bill of peace with multiple parties, joint hearing and consolidation statutes and rules predicated upon the theory that when claims or defenses have a question of law or fact common to each other a sound administrative scheme of procedure should encourage one action or hearing rather than a multiplicity of actions or hearings.

210. In Greenbaum v. Lehrenkrauss Corp., 9 F. Supp. 425 (E. D. N. Y. 1935), preferred stockholders were denied leave to intervene in equity reorganization proceedings when the court thought the chief reason for requesting intervention was to give the stockholders' committee standing for an allowance. Cf. Bethlehem Steel Co. v. International C. E. Corp., 66 Fed. (2d) 409 (C. C. A. 2d, 1933) (where there was supervision over the underwriting fee); In re Republic Gas Corp., U. S. District Court (S. D. N. Y. Nov. 21, 1935); In re Paramount Publix Corporations, 12 F. Supp. 823 (S. D. N. Y. 1935); In re Kentucky Electric Power Corp., 11 F. Supp. 528 (W. D. Ky. 1935). The result reached in In re Diversy Bldg. Corp., U. S. Dist. Ct. (W. D. Ill. May 17, 1935), may be questioned. See In re Mortgage Security Corp. (S. D. N. Y. 1935) unreported; In re Milady's Footwear Corp. (S. D. N. Y. 1935), unreported; Medill, *Fees and Expenses in a Corporate Reorganization Under Section 77B* (1936) 34 MICH. L. REV. 331.