YALE LAW JOURNAL

Subscription price, $4.50 a year *Single copy, 80 cents*
Canadian subscription price, $5.00 a year; foreign, $5.25 a year.

YALE LAW JOURNAL COMPANY, INC., Box 401A, Yale Station, New Haven, Conn.

POWER OF FIRST MORTGAGEE TO SECURE RENTS WITHOUT FORECLOSING

IN order to protect a mortgagee in the event of a deficiency judgment it is customary to include in the mortgage contract a pledge that rents accruing after a default in the mortgage conditions may be taken by the mortgagee and applied toward the satisfaction of his debt. Such pledge creates no lien upon the rents, but only gives the mortgagee a right to establish one in an action for foreclosure.[1] Upon proper application the court will then appoint a receiver to collect the rents and apply them to any deficiency judgment that may result in favor of the mortgagee after foreclosure sale.[2] A first mortgagee

1. American Bridge Co. v. Heidelbach, 94 U. S. 798 (1876); Freedman's Savings and Trust Co. v. Shepherd, 127 U. S. 494 (1888); *In re* Israelson, 230 Fed. 1000 (S. D. N. Y. 1916). See cases collected in Note (1919) 4 A. L. R. 1410.

2., Where there is no pledge of rents a receiver may sometimes be appointed upon a showing of the insolvency of the mortgagor and the inadequacy of the value of the property to pay the debt. 1 WILTSIE, MORTGAGE FORECLOSURE (4th ed. 1927) § 558. See note 27, *infra*. A receiver will always be appointed when rents and profits have been pledged for payment of the debt. *Id.* § 557, n. 36.

who thus establishes his lien is entitled to all the rents to the exclusion of any other claimant, whether a junior mortgagee or a general creditor.[3] If the first mortgagee does not take action, however, a junior mortgagee whose mortgage contains a pledge of rents may himself foreclose, ask for a receiver, and have the rents collected for his own benefit.[4] And the right so acquired by a junior mortgagee may be defeated by the first mortgagee only if he subsequently joins in the foreclosure and has the existing receivership replaced or extended.[5] Rents meanwhile collected by the receiver belong to the junior mortgagee no matter what price the property brings at the foreclosure sale.[6]

Under present economic conditions the price for which property can be sold under foreclosure is frequently so small that even after the rents collected during the foreclosure period are applied to the first mortgage debt, a large part of it remains unpaid. Consequently, when the owner of the property is insolvent, foreclosure results in a heavy capital loss to the foreclosing mortgagee in addition to the expense of the proceedings involved.[7] Because of this risk of loss and because of the belief that better times are not far distant, the interests of the first mortgagee dictate a policy of delay, so that foreclosure may be prevented or may be concluded when prices are sufficiently high to cover the costs of the litigation as well as the debt. Meanwhile, instead of foreclosing, an attempt can be made to effect some agreement with the mortgagor whereby part of the income may be used to preserve the property and the balance may be turned over to the payment of interest on the mortgage debts. But even where such a compromise is being carried out there is the chance that a junior mortgagee may foreclose his mortgage interest in the hope that the first mortgagee will find the risk of capital loss too great to justify the similar action which would perfect for him a better right to the rents. The unfortunate effect of such a situation is a tendency to hasten mortgage foreclosures at the precise period when public policy is clearly established to the contrary,[8] to leave a large number of people burdened by personal judgments against them which they have no means of paying, and to force an expensive liquidation of indebtedness where it can hardly be afforded.

---

3. *In re* Wakey, 50 F. (2d) 869 (C. C. A. 7th, 1931); Westinghouse Electric & Manufacturing Co. v. Idaho Ry., Light & Power Co., 228 Fed. 972 (D. Idaho 1915); Metropolitan Life Insurance Co. v. Jash-Lap Realty Corp., 138 Misc. 68, 245 N. Y. Supp. 281 (Sup. Ct. 1930).

4. 3 JONES, MORTGAGES (8th ed. 1928) § 1938, n. 72.

5. Izzo v. McKay, 110 Misc. 708, 181 N. Y. Supp. 841 (Sup. Ct. 1920); *cf.* Leach v. Curtin, 123 N. C. 85, 31 S. E. 269 (1898); Schneider v. Miller, 155 Wis. 239, 144 N. W. 286 (1913).

6. Longdock Mills & Elevator Co. v. Alpen, 82 N. J. Eq. 190, 88 Atl. 623 (1913); Sullivan v. Rosson, 223 N. Y. 217, 119 N. E. 405 (1918). But see Williamson v. Gerlach, 41 Ohio St. 682 (1885).

7. A recent analysis of mortgage foreclosures in Cook County, Illinois, revealed that the cost of foreclosure and receivership, including solicitors' fees for the complainant, receivers' fees and masters' fees runs from 4.6% of the value of mortgages over $100,000 to 19.5% for mortgages under $10,000. Carey, Barbner-Smith and Lansden, *Studies in Foreclosure in Cook County* (1933) 27 ILL. L. R. 476, 508; *id.* at 623; *id.* at 757.

8. Comment (1933) 42 YALE L. J. 1236, n. 1. For recent legislation in which this attitude is crystalized into statutory restrictions see notes 46 and 47, *infra.*

A further problem must be faced in cases where a first mortgage was drawn at a time when experience had not yet made reliance upon rents and profits a usual procedure for first mortgagees. Thus, it is frequently found that of several mortgages on a given piece of property the first mortgage is an ordinary contract of grant or lien while the second or subsequent mortgages, the holders of which were more sensitive to the possibility of fluctuating economic conditions, contain pledges of rents and profits "as further security" for the mortgage debt.[9] In some instances it has been held that without such a pledge a receiver may not be secured to collect the rents for the benefit of the foreclosing mortgagee.[10] A mortgagee who does not have a pledge of rents in his mortgage may establish a lien on them by securing a subsequent pledge and bringing an action of foreclosure under which a receiver could be appointed. But where there is a dispute between two mortgagees as to the priority of their respective liens it is not clear whether the question is determined by a relation back to the date of the creation of the pledge or whether priority is given according to the rank of the mortgage to which it is incident. Whenever the issue has been presented and the lien of a senior mortgagee has been held superior to the lien previously perfected by a junior mortgagee with a similar pledge, the pledges were made at the same time as the mortgages and either rule may be deduced from the decisions.[11] It is more probable, however, that the relative position of the liens is determined by a relation back to the date of the pledge.[12] Consequently, if the first mortgage does not contain a pledge an attempt on the part of the first mortgagee to establish a superior lien upon the rents without litigation must deal with a difficulty that is not present where the problem is to form a new mortgage contract with these possibilities clearly in mind.

A first mortgagee can avoid being placed in a disadvantageous position by a junior mortgagee only if he can find some means to perfect a superior right to the rents of mortgaged property after default without the necessity of foreclosure. Prior to the creation of a junior mortgage with a pledge of rents, this may be done by an assignment of rents *in praesenti*, with a condition in the assignment that it is to become effective upon default of the mortgage terms. Such an assignment may be made either by a clause in the mortgage contract or by a separate instrument.[13] Some courts have been unwilling to give full

9. Such was the usual situation in Connecticut prior to 1930. Since then first mortgages have been changed to give a first mortgagee greater protection. The uncertainty of important steps in an attempt to perfect a superior lien upon rents and profits without recourse to foreclosure necessitates legal advice with a consequent burden of expense.

10. 1 WILTSIE, *op. cit. supra* note 2, § 569; Note (1926) 11 IOWA L. REV. 174. *Contra:* Bergin v. Robbins, 109 Conn. 329, 146 Atl. 724 (1929); Fidelity Mortgage Co. v. Mahon, 31 Ohio App. 151, 166 N. E. 207 (1929).

11. Oviatt v. Reed, 246 N. W. 779 (Iowa 1933); Sullivan v. Rosson, *supra* note 6. *Contra:* Andrew v. Haag, 245 N. W. 436 (Iowa 1932). The result of this case has since been changed by statute. Iowa Laws 1933, c. 181.

12. *Cf.* Oviatt v. Reed, *supra* note 11 (liens perfected at the same time under a chattel mortgage of profits given priority according to date). But see Metropolitan Life Insurance Co. v. Jash-Lap Realty Corp., *supra* note 3.

13. Paramount Building and Loan Association v. Sacks, 107 N. J. Eq. 328, 152 Atl. 457 (1930) (clause in mortgage); Harris v. Taylor, 35 App. Div. 462, 54 N. Y. Supp. 864 (1st Dep't 1898) (separate instrument).

effect to an assignment[14] and have seized upon differences in wording as grounds for asserting that a pledge was intended,[15] but it seems evident that when the intention of the parties is clearly expressed it will control.[16] Whereas a pledge creates no lien upon rents until the pledgee has reduced them to his possession, an assignment at the time of the mortgage or before a subsequent pledge is made gives to the assignee title to the rents upon the occurrence of the condition in the instrument[17] and even makes him responsible to account to other interested parties for all rents which he should have collected by an exercise of ordinary diligence.[18] Accordingly, there is no necessity for a first mortgagee who holds an assignment of rents prior in time to a junior mortgagee's pledge to foreclose. Even when rents have been collected by a receiver appointed for the benefit of a junior mortgagee they have been given to a first mortgagee to whom they had already been assigned at the time the junior mortgage was created.[19] It is doubtful, however, that the holder of a first mortgage contract whose assignment is of a later date than a pledge to a junior mortgagee would have the same right.[20] When such later assignment is given to a general creditor it transfers to him no more right to the rents than the mortgagor held at the time, and the right of the creditor to the rents under the assignment is subject to the lien which the mortgagee may perfect under his pledge.[21] A court might be willing to hold that an assignment to a mortgagee is different from an assignment to a general creditor, and that such later assignment in the hands of a mortgagee would be effective. But so to decide would necessitate overlooking the fact that the value of the property and the rents are two different funds and that after one has been pledged it may only be assigned subject to the pledge.[22] Where all mortgages on the property concerned contain pledges

14. For a recognition of this difference between a pledge and an assignment, see Paramount Building and Loan Association v. Sacks, *supra* note 13, at 331, 152 Atl. at 458.

15. *In re* Banner, 149 Fed. 936 (S. D. N. Y. 1907); One Hundred Forty-Eight Realty Co. v. Conrad, 125 Misc. 142, 210 N. Y. Supp. 400 (Sup. Ct. 1925); *cf.* Western Loan and Building Co. v. Mifflin, 162 Wash. 33, 297 Pac. 743 (1931).

16. Paramount Building and Loan Association v. Sacks; Harris v. Taylor, both *supra* note 13.

17. *Ibid.*

18. Sullivan v. Rosson, *supra* note 6, at 223, 119 N. E. at 407.

19. Paramount Building and Loan Association v. Sacks; Harris v. Taylor, both *supra* note 13; *cf.* Sullivan v. Rosson, *supra* note 6.

20. In Harris v. Taylor, *supra* note 13, at 866 it is stated that under an assignment to a first mortgagee the rents would go to him rather than to a subsequent mortgagee regardless of when such assignment was made. In that case, however, the assignment was made at the time of the mortgage.

21. Wiggins v. Freeman, 174 App. Div. 304, 160 N. Y. Supp. 448 (2nd Dep't 1916); *cf.* New Orleans Bank and Trust Co. v. Hart, 32 F. (2d) 721 (C. C. A. 5th, 1929), *cert. den.*, 280 U. S. 576 (1929). *Contra:* First Trust Joint Stock Land Bank of Chicago v. Stevenson, 245 N. W. 434 (Iowa 1932). For a criticism of the principle of this case see Note (1933) 18 IOWA L. REV. 251. Where the assignment to the third person precedes the mortgage in time it is effective. John McMenamy Investment and Real Estate Co. v. Dawley, 183 Mo. App. 1, 165 S. W. 829 (1914); Conley v. Fine, 181 App. Div. 675, 169 N. Y. Supp. 162 (1st Dep't 1918).

22. Wiggins v. Freeman, *supra* note 21; JONES, COLLATERAL SECURITIES (3d ed. 1912) §§ 364 *et seq.*

of the rents, a later assignment to a mortgagee might be held to perfect the lien of the pledge if such were the intention of the parties, and a receivership could thus be avoided. But where the first mortgage contract contains neither pledge nor assignment of the rent, any right to them which the first mortgagee might later establish by assignment would be effective only against the mortgagor and would not give the needed protection against a subsequent mortgagee with an intervening pledge.

The only course for a first mortgagee who has neither an assignment nor a pledge of rents prior to a pledge in a junior mortgage is to take possession of the property; for a mortgagee in possession may collect rents and apply them to his debt, and he cannot be displaced until his debt is satisfied, regardless of whether or not he has an assignment or a pledge.[23] In many jurisdictions there are statutes providing that a mortgagor shall retain possession of the premises until foreclosure and sale or even until the end of a long statutory redemption period. Some of these statutes apply only "in absence of an agreement to the contrary" [24] and a few specifically state that such agreement to the contrary may be made after the date of the mortgage and without additional consideration.[25] Most of the statutes, however, grant possession to the mortgagor "regardless of the terms of the instrument." [26] Early interpretations of the latter type of laws were to the effect that any right of a mortgagee to possession of the property, even through receivership under authority of a different statute [27] or agreement, was expressly prohibited.[28] In California this doctrine, stated in *Guy v. Ide*,[29] has subsequently been changed to such an extent that the case

23. 1 WILTSIE, *op. cit. supra* note 2, § 575.

24. IND. ANN. STAT. (Burns, 1926) § 16472; IOWA CODE (1931) § 10053; KAN. REV. STAT. ANN. (1923) c. 67, § 301; NEB. COMP. STAT. (1929) § 76-235; ORE. CODE ANN. (1930) § 5-112; S. D. COMP. LAWS (1929) § 1558.

25. ARIZ. CODE (Struckmeyer, 1928) § 2310; CAL. CIV. CODE (Deering, 1931) § 2927; N. D. COMP. LAWS ANN. (1913) § 6740; MONT. REV. CODE (Choate, 1921) § 8252.

26. COLO. CODE CIV. PROC. (1921) § 281; FLA. COMP. LAWS (1927) § 5725; GA. CODE ANN. (Michie, 1926) § 3256; IDAHO CODE ANN. (1932) § 9-104; LA. CIV. CODE ANN. (Dart, 1932) § 3290; MICH. COMP. LAWS (1929) § 14956; MINN. STAT. (Mason, 1927) § 9572; NEV. COMP. LAWS (Hillyer, 1929) § 9065; S. C. CODE (1932) § 8701; UTAH COMP. LAWS (1917) § 7253; WASH. COMP. STAT. (Remington, 1933) § 804; WIS. STAT. (1931) § 257.23.

27. In many states there are statutes that provide for the appointment at the discretion of the court in a foreclosure action where it is shown that waste is being committed or that the value of the property is insufficient to cover the debt. ARK. DIG. STAT. (Crawford & Moses, 1921) § 8612; CAL. CODE CIV. PROC. (Deering, 1931) § 564; GA. CODE ANN. (Michie, 1926) § 5475 (not limited to mortgages); IDAHO CODE ANN. (1932) § 6-601; IND. STAT. ANN. (Burns, 1926) § 1300; IOWA CODE (1931) § 12713; KAN. REV. STAT. ANN. (1923) c. 60, § 1201; NEB. COMP. STAT. (1929) § 20-1081; NEV. COMP. LAWS (Hillyer, 1929) § 8749; N. D. COMP. LAWS ANN. (1913) § 7588; OHIO GEN. CODE (Page, 1926) § 11894; OKLA. COMP. STAT. ANN. (Eagin and Eaton, 1931) § 773; ORE. CODE (1930) § 5-112; S. C. CODE (1932) § 584; S. D. COMP. LAWS (1929) § 2475; TEX. REV. CIV. CODE (Vernon, 1928) § 2293; UTAH COMP. LAWS (1917) § 6764; WASH. REV. STAT. (Remington, 1933) § 741; WIS. STAT. (1931) § 268.16; WYO. REV. STAT. ANN. (Courtright, 1931) § 89-3601.

28. Teal v. Walker, 111 U. S. 242 (1884); Guy v. Ide, 6 Cal. 99 (1856); Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74 (1880); Cullen v. Minnesota Loan and Trust Co., 60 Minn. 6, 61 N. W. 818 (1895).

29. *Supra* note 28.

may be considered obsolete.[30] The same doctrine expressed in Michigan in *Wagar v. Stone*[31] was even then subject to the implication of contemporaneous decisions which indicated that it could be circumvented by a mortgage in the form of a grant;[32] but the rule of the *Wagar* case is still followed by the Michigan courts.[33] However, the legislature has provided that in certain deed of trust mortgages a valid assignment of rents as secondary security may be made to the trustee, and in such cases the court will put a receiver in possession where it is necessary to protect the assignee.[34] The older position is still maintained in a few jurisdictions,[35] but it is more widely held that an agreement to surrender possession may be enforced, if it is for the purpose of making effective a pledge of the rents,[36] in spite of statutory provisions.

The right to take possession of the premises after default has been developed chiefly in actions of foreclosure with requests for receivers. Under these cases, when the right to have a receiver is settled, a court officer takes possession of the premises and no question has been raised as to whether or not such possession was in fact taken. But from the decisions in cases wherein a mortgagee has attempted to take possession of mortgaged property without the appointment of a receiver, and the effect of his acts has been challenged, it is apparent that possession is an elusive quality and that there is no uniform method which is certain to accomplish the desired end.[37] This practical problem must be faced by a mortgagee who wishes to avoid the expense of litigation. If a mortgagee enters an apartment of fifty tenants, giving notice of default and of the terms of the mortgage and assignment or pledge, but the tenants refuse to recognize his demand and continue to pay rent to the mortgagor, is the mortgagee nevertheless in possession of the premises? Or if some of the tenants pay rent to the mortgagee and allow him to repair and supervise their suites, but the rest do not, is he thereby a mortgagee in possession? Some positive action on the part of the mortgagee is clearly necessary,[38] but it has been held that notice to the mortgagor and tenants is not enough to establish possession and that the proper way is to

30. Fogarty v. Sawyer, 17 Cal. 589 (1861); Scott v. Hotchkiss, 115 Cal. 89, 47 Pac. 45 (1896).

31. 36 Mich. 364 (1877).

32. Jeffrey v. Hursh, 42 Mich. 563, 4 N. W. 303 (1880).

33. Straus v. Barbee, 262 Mich. 113, 247 N. W. 125 (1933). But *cf.* Michigan Trust Co. v. Lansing Lumber Co., 103 Mich. 392, 61 N. W. 668 (1894); Kelley v. Bowerman, 113 Mich. 446, 71 N. W. 836 (1897).

34. MICH. COMP. LAWS (1929) § 13498; Security Trust Co. v. Sloman, 252 Mich. 266, 233 N. W. 216 (1930).

35. Straus v. Barbee, *supra* note 33; Fidelity Philadelphia Trust Co. v. West, 178 Minn. 150, 226 N. W. 406 (1929); State *ex rel.* Gardner J. Gwinn, Inc. v. Superior Court for King County, 16 P. (2d) 831 (Wash. 1932).

36. Westinghouse Electric & Manufacturing Co. v. Idaho Ry., Light & Power Co., *supra* note 3; Moncrieff v. Hare, 38 Colo. 221, 87 Pac. 1082 (1906); Kelly v. Roberts, 17 P. (2d) 65 (Mont. 1932); Hyman v. Kelly, 1 Nev. 179 (1865); Roberts v. Southerlin, 4 Ore. 219 (1872); Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124 (1880) (no pledge).

37. *Cf.* Winnisimmet Trust Co. v. Libby, 234 Mass. 407, 125 N. E. 599 (1920); International Paper Co. v. Priscilla Co., 183 N. E. 58 (Mass. 1932); Dime Savings Bank of Brooklyn v. Fox, 147 Misc. 24, 264 N. Y. Supp. 262 (Munic. Ct. 1933); Trask v. Kelleher, 93 Vt. 371, 107 Atl. 486 (1919).

38. One Hundred Forty-Eight Realty Co. v. Conrad, *supra* note 15.

secure the appointment of a receiver.[39] According to another case, no lien was created on rents under a clause giving a right to possession because "no lien could be created until in proper form the mortgagee demands and is refused possession."[40] The mere collecting of the rents does not seem to control, for the assignee may collect the rents although the owner is still in possession.[41] Fortunately the question of possession will not in most instances be raised by the owner of the property. Where the mortgagor has pledged the rents and agreed to surrender possession, he may by refusal force the mortgagee to litigation and thus be able to keep the rents which accrue meanwhile, since the pledge does not divest him of a right to the rents until the possession becomes actual in the pledgee.[42] However, where he has assigned the rents to the first mortgagee and they belong to the assignee as soon as a default occurs,[43] there is little advantage in forcing the mortgagee to litigation and little reason to refuse to surrender possession when such refusal can be only a source of trouble. But even though an assignment of rents and an agreement to surrender the property gives a mortgagee protection against the mortgagor, if the assignment of rents is subservient to the pledges in junior mortgages,[44] foreclosure by the junior mortgagees can be prevented only by actual possession of the property. And in such case it is extremely important for him to know how such possession may be effectively secured. A clause in the contract of assignment and possession to the effect that the collection of rents by the mortgagee constitutes him at once a mortgagee in possession would be useful, for it would give the parties a definite line of conduct to follow and indicate clearly what was meant by their agreement.

In the determination of questions which will be presented to the courts as facets of the problems of first mortgagees who do not have a previous assignment of rents, there are enough points the solution of which is not at present compelled by legal doctrine to cause the end in view to play an important part in their decision. That the courts should favor the claims of a first mortgagee who wishes to avoid foreclosure and still not be deprived of the value of the rents, is apparent. For not only does it seem more appropriate that mortgagees should be able to rely upon the available funds in the order of their priority, but in periods of depression there is a great demand for a reduction of mortgage foreclosures.[45] Recent statutes prohibiting or limiting deficiency judgments[46] have such a tendency and are calculated either to make it undesirable to foreclose or to divide the losses thus incurred between debtor and creditor. Others permit substantial delay in the proceedings or stop them

39. Dime Savings Bank of Brooklyn v. Fox, *supra* note 37.

40. *In re* Banner, 149 Fed. 936 (S. D. N. Y. 1907).

41. *Cf.* Freedman's Saving and Trust Co. v. Shepherd, 127 U. S. 494, 502 (1888); Security Trust Co. v. Sloman, 252 Mich. 266, 274, 233 N. W. 216, 219 (1930).

42. Teal v. Walker, *supra* note 28.

43. See cases cited in note 16, *supra*.

44. This would be true where the assignment is of a later date and there is no previous pledge of rents held by the assignee. See note 21, *supra*.

45. See note 8, *supra*.

46. CONN. GEN. STAT. (1930) §§ 5083, 5116; Idaho Laws 1933, c. 150; Kan. Laws 1933, c. 218, § 1; N. J. Laws 1933, § 134-48; N. C. CODE ANN. (Michie, Supp. 1931) § 2593 (d); Okla. Laws 1931, § 453; S. C. Acts 1933, No. 264; TEX. REV. CIV. CODE (Vernon, 1928) § 2218, as revised by Acts of 1933, H. B. 150.

entirely,[47] making provisional arrangements during the period of delay for preservation of the property and payment of current interest. The interests of both creditors and debtors which are thus expressed require a simple method by which mortgage foreclosures may be delayed. A more permanent need of interested parties is a means whereby the expense of effecting the rights and intention of the parties may be kept at a minimum. In drafting mortgages with these problems in mind, clear and careful expression of the rights created and of the way in which they are to be made effective should go far toward reaching the ends in view. Where this has been done, and the rights thus transferred are consistent with the rights that may be secured by resort to the courts, they should be given careful consideration and followed whenever possible.

FIXATION OF MINIMUM UTILITY RATES TO PREVENT DESTRUCTIVE COMPETITION

PUBLIC utility rate regulation began at a time when consumers, especially of railroad and warehouse services, feared exorbitant charges and discrimination by utilities which completely controlled their access to markets.[1] The economic condition of the country was characterized by deficiency in production; scarcity prices dominated, and the government was compelled to protect the consumer from exploitation.[2] Accordingly, the early attempts at public control of utilities centered around the fixing of maximum rates to prevent profiteering [3] and the fixing of uniform rates to prevent favoritism toward large or influential customers.[4] Today, however, a surplus economy exists, and in order to counteract the opposite danger of rapidly falling commodity prices it has become necessary to include in some of the industrial recovery codes a prohibition against below-cost selling. Similarly, in the public utility field, the commissions have been faced with the problem of preventing ruinous price-cutting where two or more companies are competing for the same market.

Three factors in particular are significant in the development of cut-throat competition among public utilities. In the first place, the rapid mechaniza-

47. Ark. Acts 1933, Act 21, §§ 1, 2, 3, 4; Ill. Laws 1933, H. B. 507; Ind. Acts 1931, c. 90, § 1; Iowa Laws 1933, c. 178, c. 179; Kan. Laws 1933, c. 232; N. C. CODE ANN. (Michie, Supp. 1933) § 2593(b); OHIO LAWS (Page, 1932-3) § 11588.

1. BUCK, THE GRANGER MOVEMENT (1913); FAULKNER, AMERICAN ECONOMIC HISTORY (1924) 423-6; KIRKLAND, A HISTORY OF AMERICAN ECONOMIC LIFE (1932) 613-24.

2. In each case such governmental control was of course subject to the courts being persuaded that the business was affected with a public interest.

3. Munn v. Illinois, 94 U. S. 113 (1876); Chicago, Burlington & Quincy Rr. Co. v. Iowa, 94 U. S. 155 (1876).

4. Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197 (1896); Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184 (1896). "In brief, rates or charges to be valid must not be unjust, unreasonable, unjustly discriminatory, or unduly preferential." NICHOLS, PUBLIC UTILITY SERVICE AND DISCRIMINATION (1928) 862. However, proper classification in rate-making is permissible. Interstate Commerce Commission v. Baltimore & Ohio Rr. Co., 145 U. S. 263 (1892); 1 POND, A TREATISE ON THE LAW OF PUBLIC UTILITIES (4th ed. 1932) 582, 585.

tion of production during the past half century, in which the perfection of the Diesel engine and of hydro-electric dynamos have played an important part, has resulted in the expansion of productive facilities more rapidly than consumptive demands and, consequently, in a market wherein the buyer can compel distress prices. A second factor is the ease with which some of the utilities that have become important only in recent years can expand their distributive facilities into new market areas. Railroads and street-railways, utilities formerly dominating the problems of rate regulaton, can increase their mileage only through extensive investments in road-beds, tracks and rolling stock. In the case of modern electric and natural gas utilities, however, the major investment consists in the main plant and the cost of extending new high-tension wires from an existing hydro-electric station, or of laying more pipes from a rich natural gas field, is relatively small.[5] Thus, if state legislation does not rigidly restrict the expansion of utility facilities, clashes occur between service units. Finally, where the potential expansion of output has occurred, and where the cost of widening the market is not prohibitive, the economics of overhead and decreasing costs [6] form a powerful urge for a utility to expand its sales up to the maximum of its plant capacity. And where more than one company serve the same market, the competition for additional business is at rates which aim to cover only the variable cost and not the overhead or fixed charges. This opens the door to discriminations and to price-cutting whereby rates may go below even the actual cost of production.[7] Such cut-throat competition, if continued for any length of time, leads to the bankruptcy of one or both competitors; [8] and although consumers profit by low costs during the rate war, experience has shown that the aftermath brings disrupted service and rate increases aimed at a recoupment of competitive losses.[9]

The urgent problem before public service commissions today, therefore, is to insure efficient service through the maintenance of well organized, financially sound utilities. The theoretical virtues of competition having proved abortive,

---

5. Because of the low capital investment costs in the motor bus industry, bus companies also find it easy to put additional buses in service or to expand their routes.

6. The operating costs attributable to any increase in traffic are proportionately small, since they remain relatively constant despite increases in the rate of output. See CLARK, ECONOMICS OF OVERHEAD COSTS (1923).

7. GLAESER, OUTLINES OF PUBLIC UTILITY ECONOMICS (1927) 630-32.

8. Students of public utility economics recognize that transportation, electric power, gas, and water companies are best organized as monopolies. Utility history has shown that inherent necessity forces them to grow with expanding markets, to bring competition among themselves under control, and finally to consolidate, until they have completely monopolized their respective markets. GLAESER, *op. cit. supra* note 7, at 618; JONES AND BIGHAM, PRINCIPLES OF PUBLIC UTILITIES (1931) 69, 72-7; 1 SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION (1924) 1, 31; WELCH, CASES ON PUBLIC UTILITY REGULATION (1932) 146.

9. *Re* Bowdoin Utilities Co., P. U. R. 1931B, 20 (Mont. Pub. Serv. Comm.), offers a striking example. Two competing natural gas companies engaged in a price-cutting war until one competitor disappeared through a consolidation effected by the financial backers of the ventures. The surviving company then petitioned for an increase in rates and secured one of approximately 500%.

the need has arisen to guard against its evils. Thus, in the Transportation Act of 1920, Congress went so far as to provide for the compulsory consolidation of all railroads into a few, unified systems.[10] In the field of state utility regulation, the most effective method of maintaining order is to require of new companies seeking to enter a field certificates of public convenience and necessity.[11] If competition already exists, however, and the more drastic remedy of enforced consolidation is not available, the fixing of minimum rates will at least prevent rate wars and the injury they ultimately inflict upon all concerned.

The power of a public service commission to fix minimum rates depends upon the judicial interpretation accorded the terms of the statute enumerating the powers of the commission. In a few, but decreasing number of states, the act expressly forbids the fixing of minimum rates.[12] Most statutes grant the commissions a general power to set "reasonable rates"; [13] but the definitions of that term differ widely. Some courts have held that it includes only the power to fix maximum rates and that, except to prevent discrimination among customers, the commission may not forbid a utility to charge less than the rate authorized.[14] The arguments employed on behalf of such limitation upon a commission's authority are that the public should receive the benefits of any voluntary reduction in rates [15] and that to prevent rate competition would be to condemn the utilities to slow starvation and, consequently, to deprive them of their property without due process of law.[16] The present trend, however, is toward granting the regulatory body the authority to set minimum rates on the ground that the power is necessary to prevent the economic wastes resulting

10. 41 STAT. 481 (1920), 49 U. S. C. § 5 (4) (1926). *Cf.* Emergency Railroad Act, Public Laws No. 68, 73d Cong. (1933).

11. 3 POND, *op. cit. supra* note 4, at 1845; Hall, *Certificates of Convenience and Necessity* (1929-30) 28 MICH. L. REV. 107, 276; Comment (1926) 24 MICH. L. REV. 393.

12. See, e.g., NEB. COMP. STAT. (1929) § 75-1001. See *Re* Yellow Cab & Baggage Co., P. U. R. 1932D, 121 (Neb. State Ry. Comm.).

13. WELCH, *op. cit. supra* note 8, at 363.

14. In Farmers Telephone Co. v. Wis. Telephone Co., P. U. R. 1928A, 486 (Wis. Rr. Comm.), the commission dismissed a complaint of a telephone company against a rate reduction by a competing company. It held that a utility may reduce its rates without the formality of a hearing merely by filing the new schedule with the commission, which will not interfere unless the successful operation of the utility is threatened or unjust discrimination is thereby caused. In Logan City v. Public Utilities Commission of Utah, 72 Utah 536, 271 Pac. 961 (1928), the Utah Supreme Court denied the right of the commission to fix the electric rates to be charged by a municipal plant. It declared that the commission, in seeking to avert a rate war between a municipal and private plant by fixing a minimum and a maximum rate, disregarded the public interest of giving the consumers the benefit of competition at lower rates. *Cf. Re* Georgia Power Co., P. U. R. 1931E, 449 (Ga. Pub. Serv. Comm.); *Re* Greeley Transportation Co., P. U. R. 1929C, 106 (Colo. Pub. Util. Comm.); Modesto Irrigation District v. Pacific Gas & Electric Co., P. U. R. 1932B, 203 (Cal. Rr. Comm.); *Re* Electric Light and Power Rates, P. U. R. 1917E, 721 (Ga. Rr. Comm.); Missouri Mutual Telephone Co. v. Osage County Farmers Telephone Co., P. U. R. 1919E, 689 (Mo. Pub. Serv. Comm.).

15. Logan City v. Public Utilities Commission of Utah, *supra* note 14.

16. Great Northern Utilities Co. v. Montana Public Service Commission, 52 F. (2d) 802 (D. Mont. 1931).

from cut-throat competition.[17] The pioneer work in this field has been done by the commissions themselves in their interpretations of their own powers, and in the past few years the state legislatures have adopted the same policy in taxicab and bus regulation statutes.[18] The United States Supreme Court passed upon the question for the first time at the end of the last term.[19] Although it sustained the power of the commission to set minimum rates, it did not discuss the economics of the problem. In reply to the utility's contention that the prevention of price-cutting constitutes a confiscation of property, the Court merely declared that the facts disclosed in the record were not sufficient to prove that the specific exertion by the commission of its power to fix minimum rates was either arbitrary or an infringement of any constitutional guarantee. An opinion of the Iowa Supreme Court offers a more

17. City of Seymour v. Texas Electric Service Co., C. C. A. 5th, August 1, 1933 (reported in U. S. News); City Cab Corp. v. Patrick, P. U. R. 1932C, 1 (D. C. Sup. Ct.); Economic Gas Co. v. City of Los Angeles, 168 Cal. 448, 143 Pac. 717 (1914); Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 Pac. 1083 (1914); Coleman Gas & Oil Co. v. Santa Anna Gas Co., 58 S. W. (2d) 540 (Tex. Civ. App. 1933); City of Farmersville v. Texas-Louisiana Power Co., 55 S. W. (2d) 195 (Tex. Civ. App. 1932); Community Natural Gas Co. v. Natural Gas & Fuel Co., 34 S. W. (2d) 900 (Tex. Civ. App. 1930); *Re* Meter Rates for Taxicab Service, P. U. R. 1931B, 258 (Conn. Pub. Util. Comm.); *Re* Street Ry. Rates, P. U. R. 1921E, 13 (D. C. Pub. Util. Comm.). In *Re* Yelloway, Inc., P. U. R. 1928A, 217 (Mo. Pub. Serv. Comm.), the commission, in granting an application for a certificate to a motor utility, announced the dictum that it would not tolerate reckless and unsound rate-cutting between motor carriers for the purpose of destroying each other at the expense of exhaustion of the utility assets for which the public must eventually suffer. In Anchor Coal Co. v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928), a three-judge court reversed an order of the Interstate Commerce Commission which established a minimum rate on coal freight in order to give a rate differential in favor of one geographical section of the coal industry; such discrimination, the court held, was invalid. However, in a dictum it declared that under the Transportation Act of 1920 the Interstate Commerce Commission may prescribe minimum rates to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected but also to competing carriers, who labor under a greater cost of doing business. Moreover, the court added, the commission is not limited in prescribing minimum rates to cases where the proposed rates are unreasonable per se, or so low as to cast a burden upon other traffic.

18. WELCH, *op. cit. supra* note 8, at 146.

19. Montana Public Service Commission v. Great Northern Utilities Co., 53 Sup. Ct. 546 (1933). The Great Northern Utilities Co. was engaged in furnishing natural gas to consumers in Shelby, Mont., under a non-exclusive franchise ordinance. In October, 1928, the Citizens Gas Co. began competitive service, charging 35c per 1000 cubic feet as compared with a 50c rate by the Great Northern. The next month the Great Northern filed with the public service commission a 20c rate schedule. Acting under a statutory provision that no advance or reduction of existing schedules is permissible without its consent [MONT. REV. CODE (Choate, 1921) § 3891], the commission rejected the proposed reduction and ordered a 35c rate. P. U. R. 1929B, 176. The Great Northern applied to the state court for an injunction against the commission on the ground that the commission was not empowered by the statute to prescribe specific rates and that the order of the commission violated the state constitution and the Fourteenth Amendment of the federal Constitution. The injunction was granted on the pleadings, but on appeal the state supreme court reversed and remanded the case. 88 Mont. 180, 293 Pac. 294 (1930). In December, 1930, the Great Northern dismissed the action in the lower state court and brought injunc-

substantial brief on behalf of minimum rate control.[20] According to that tribunal, the owner of property devoted to public use necessarily surrenders some of his rights and subjects himself to reasonable regulation, and the major right so surrendered is that of fixing his own commodity prices. Furthermore, the court argued, since a utility operates under a public franchise it has "no constitutional right of competition."

If, however, public control of minimum rates is to be substituted for competitive rate-cutting, the problem as to the level of legal minimum rates must still be solved by the commissions and the courts. Should the minimum rate be high enough to sustain all competitors in a divided market or should it be only high enough to insure a sufficient amount of service to the community? If the first basis is accepted, the primary objective of public utility regulation, securing for the consumer maximum service at minimum costs, will be defeated; for if two utility plants must be supported where one would suffice, the item of overhead or fixed charges will be approximately doubled in the rate determination. Consumers would thus be called upon to subsidize an unnecessary company. On the other hand, if the second basis is accepted, the competitors will face gradual starvation with a concomitant decline in the quality of their services. And although the Supreme Court has granted public service commissions the authority to prevent cut-throat competition, it has not declared that the legal minimum rate may be so low as to prevent either or both utilities from earning a fair return on their investments.[21] Furthermore, the rate received for public utility services depends, to a degree, upon the element of risk involved.[22] Competition not only divides the available business but also increases the uncertainty concerning the future prospects of each competitor's business.[23] Thus, on the principle of risk insurance, competing utilities could reasonably demand a minimum rate high enough to cover the risks which the state, through its duplicated franchises, has forced upon them. In support of the second basis of minimum rate fixing, however, an analogy to the rule of rate-making concerning over-built capacity may be employed. When a public utility has over-expanded its facilities, it is generally not entitled to a full return on all of its investment,[24] but is restricted to such rates only as will

---

tion proceedings against the commission in the United States district court. A three-judge court granted a temporary injunction, holding that while the statute permitting the state to fix minimum rates was valid, the order of the commission was invalid because of the circumstances under which it was issued—namely, the attempt to prevent cut-throat competition. 52 F. (2d) 802 (D. Mont. 1931). On an appeal from the interlocutory decree, the Supreme Court affirmed this holding. 285 U. S. 524 (1932). On the final hearing the injunction was made permanent. 1 F. Supp. 328 (D. Mont. 1932), and on appeal therefrom the Supreme Court reversed.

20. Mapleton v. Iowa Public Service Co., 209 Iowa 400, 223 N. W. 476 (1929); Note (1929) 14 IOWA L. REV. 494; Note (1929) 13 MINN. L. REV. 627.

21. 1 SPURR, *op. cit. supra,* note 8, at 199.

22. "The less risk, the less right to any unusual returns upon the investment." Willcox v. Consolidated Gas Co., 212 U. S. 19, 49 (1909).

23. 2 POND, *op. cit. supra,* note 4, at 1089.

24. 3 SPURR, *op. cit. supra,* note 8, at 125; *Re* Firth, P. U. R. 1921C, 348 (Cal. Rr. Comm.); *Re* Hercules Water Co., P. U. R. 1921C, 342 (Cal. Rr. Comm.); *Re* Crystal Springs Water Co., P. U. R. 1921B, 414 (Cal. Rr. Comm.); Donovan & Frisbee v. Gold-

produce sufficient revenue to meet its operating expenses, create a proper depreciation reserve, and insure a fair return upon such part of its investment as is necessary to serve its customers.[25] Moreover, rates must be fixed in the light of the value of the utility services to the consumers. The public should not be required to pay high prices merely to enable a utility corporation to realize a profit.[26] In most instances the difficulty will necessitate a compromise satisfactory to none of the parties concerned. Ultimately, the solution to the problem of duplicated utility services must be sought in the power to require of new companies certificates of public convenience and necessity and to compel the consolidation of companies already competing for the same market.

INTERPRETATION OF CONTRACTS EMPLOYED BY COOPERATIVE MARKETING ASSOCIATIONS

THE last two decades have witnessed a phenomenal development in the orderly and systematic marketing of agricultural products through cooperative associations.[1] Federal statutes [2] and favorable decisions of state courts have laid the spectre of anti-trust violation,[3] thus enabling such organizations to obtain

---

field Consolidated Water Co., P. U. R. 1916D, 419 (Nev. Pub. Serv. Comm.); Lehighton Chamber of Commerce v. Lehighton Water Supply Co., P. U. R. 1930D, 198 (Pa. Pub. Serv. Comm.).

25. Pfaff v. Adirondack Power & Light Corp., P. U. R. 1922D, 655, 662 (N. Y. Pub. Serv. Comm.); *cf.* San Diego Land & Town Co. v. Jasper, 189 U. S. 439 (1903); *Re* United Rys. & Electric Co., P. U. R. 1928C, 604, 631 (Md. Pub. Serv. Comm.), *aff'd* in part, 155 Md. 572, 142 Atl. 870 (1928).

26. 2 POND, *op. cit. supra* note 4, at 1025; Quarles v. Appleton, 45 F. (2d) 675 (C. C. A. 7th, 1930); Spring Valley Waterworks v. San Francisco, 192 Fed. 137 (C. C. N. D. Cal. 1911); Garfield Consolidated Water Co. v. Public Service Commission, 236 Fed. 979 (D. Nev. 1916); Hamilton v. Caribou Water, Light & Power Co., 121 Me. 422, 117 Atl. 582 (1922).

1. In 1910 there were 3,467 active agricultural cooperatives; in 1932 an estimated 11,900, comprising 3,200,000 members and doing an estimated business for the 1931-32 marketing season of $1,925,000,000. U. S. FED. FARM BULL. No. 9 (1932) 6, 89.

2. The Clayton Act, 38 STAT. 730 (1914), 15 U. S. C. § 17 (1926), exempts from the operation of federal anti-trust statutes agricultural associations not having capital stock. By the Capper Volstead Act, 42 STAT. 388 (1922), 7 U. S. C. § 291 (1926), the exemption is extended to cooperatives with or without capital stock. The federal government has also favored cooperatives in other ways. Agricultural cooperatives are exempted from payment of federal income taxes by the Revenue Act of 1926, 44 STAT. 40 (1926), 26 U. S. C. § 982 (1926). A division of cooperative marketing is set up in the Department of Agriculture by the Cooperative Marketing Act, 44 STAT. 802 (1927), 7 U. S. C. SUPP. VI § 451 (1932). An act "to prevent discrimination against cooperative associations," 44 STAT. 1423 (1927), 15 U. S. C. SUPP. VI § 432 (1932), forbids boards of trade to deny membership to responsible representatives of cooperatives. The Agricultural Marketing Act, 46 STAT. 11 (1929), 7 U. S. C. SUPP. VI § 521 (1932), authorizes the Farm Board to make loans to cooperative associations at low rates of interest.

3. Among the leading cases on this subject are Potter v. Dark Tobacco Growers' Cooperative Association, 201 Ky. 441, 257 S. W. 33 (1923); List v. Burley Tobacco Growers'

for themselves a secured position in the agricultural economic order; [4] and the wave of state legislation resulting in the almost uniform adoption of the so-called Standard Marketing Act,[5] has further stimulated their widespread development. Under the usual provisions of that Act, associations are authorized to make marketing contracts with their members, requiring the producers to sell to or through the association for a stated period of time. If a sale is intended, title to the produce passes to the association on delivery or at a time otherwise specified in the contract; but the contract may provide that the association is to sell or resell the products delivered by its members without taking title, simply in the capacity of agent. The resale price secured is paid over to the members after deducting all necessary selling and overhead expenditures.

In the early days of cooperative organization the agency relationship was extensively employed, the produce handled by the association being largely of a perishable nature and the problem involved merely one of routing and immediate disposal.[6] But the purchase and sale contract is now generally utilized by organizations engaged in marketing non-perishable goods which necessitate long term merchandising and financing from year to year. The reason generally advanced for the prevalence of the latter type of contract is that the association, by acquiring title to the produce, is better equipped to borrow money and accordingly to make advance payments to members.[7] The specific provisions of the purchase and sale contract vary with each cooperative, but the contract employed by the Texas Certified Cottonseed Breeders' Association may be considered representative.[8] Under it, the parties agree

---

Cooperative Association, 114 Ohio St. 361, 151 N. E. 471 (1926). And see Hamilton, *Judicial Tolerance of Farmers' Cooperatives* (1929) 38 YALE L. J. 936.

4. The American system of cooperatives is generally presumed to owe much of its inspiration to the Rochdale consumer movement in England, begun in 1844. Traces of cooperative organization existed as early as 1810 in the United States, and later received a material stimulus from the Granger movement. See generally, STEEN, COOPERATIVE MARKETING (1923) 1-10; MEARS AND TOBRINER, PRINCIPLES AND PRACTICES OF COOPERATIVE MARKETING (1926) 15-18; NOURSE, LEGAL STATUS OF AGRICULTURAL COOPERATION (1927) 25-50; BULLARD, AGRICULTURAL COOPERATIVE MARKETING LAW (1931) 1-4; HANNA, LAW OF COOPERATIVE MARKETING ASSOCIATIONS (1931) 3-27.

5. The Standard Marketing Act has been adopted with minor variations in every state except Delaware. BULLARD, *op. cit. supra* note 4, at 331; see statistical comparison of state statutes in FEDERAL TRADE COMMISSION, REPORT TO SENATE ON COOPERATIVE MARKETING (1928) 397-406. The most common statutory form in use is patterned after the Bingham Marketing Act of Kentucky. KY. STAT. (Carroll, 1930) § 883f.

6. NOURSE, *op. cit. supra* note 4, at 183, 187. The author sets forth an agency contract employed by the Pachappa Orange Growers' Association in 1893, by which members bound themselves to deliver all their crops, agreed to pay a proportionate share of the expenses, and to receive a pro rata share of the net proceeds.

7. MEARS AND TOBRINER, *op. cit. supra* note 4, at 118; U. S. DEP'T OF AGRICULTURE BULL. No. 1106 (1929) 48-50. No reason is apparent, however, why the authority to borrow with produce as security could not be conferred by contractual agreement even in the agency relationship, the producer as owner granting such authority to the cooperative.

8. Contract in use in 1931. Usually the agreement will specify that in the event that the grower sells to third parties, he must pay a stipulated sum as liquidated damages; the grower also agrees to pay any court costs incurred by the association in enforcing

that title to all seed produced by the breeder for ten years [9] shall pass to the association on delivery of warehouse receipts; [10] that the association will resell at its own discretion and pay over to the breeders the net amount received, less freight, insurance and interest, and after deducting the cost of maintaining the association; that the association may, in its discretion, establish pools on a daily, monthly or seasonal basis with respect to the varieties of seed delivered, the proceeds from such sale to be divided ratably in proportion to the amount delivered by each breeder; [11] that the association may borrow in its own name on any seed in its possession; and that the association shall distribute the money so borrowed as advances or partial payments equitably among the breeders.[12]

An examination of the agency and purchase and sale contracts authorized by the Standard Marketing Act would suggest that both are sufficiently explicit in terms to compel different results in cases involving their construction. The consequences of a well drawn agency contract are generally perfectly apparent. But no formula has yet been fashioned to define with any degree of exactitude the operative effect of a purchase and sale contract. The difficulty with its interpretation is that even where the words of the contract expressly provide for a sale, specify the time at which title to the goods under contract shall pass, and indicate that the intention of the parties is to pass title, the association still retains the character of an agent; for cooperatives are non-profit enterprises,[13] and their sole function is to aid in the marketing of goods. In order to achieve a desired result, therefore, the courts have not infrequently given to a sales contract the effect of an agency relationship,[14]

---

the contract against him. *Cf.* the marketing agreement of Burley Tobacco Growers' Cooperative Association in use in 1921.

9. It is to be noted in this connection that the grower is not obligated to produce the seed; but if he does produce, the contract requires sale and delivery to the association.

10. Title may pass although the price is not fixed at the time of sale. Certainty of price is not necessary. Brown v. Georgia Cotton Growers' Cooperative Association, 139 S. E. 417 (Ga. 1927); Louisiana Farm Bureau Cotton Growers' Association v. Clark, 160 La. 294, 107 So. 115 (1926).

11. The purposes of such a pool are to equalize marketing risks among members, to reduce expenses of handling and financing, and to leave the sales manager free to make sales at any time and in any market. By pro-rating all returns, less association expenses and agreed reserves, no favoritism is shown to any individual grower. All share equally. U. S. DEP'T OF AGRICULTURE MISC. PUB. No. 14 (1929) 1-11; U. S. FED. FARM BULL. No. 10 (1932) 6-7; STEEN, *op. cit. supra* note 4, at 320.

12. Whether the contract be construed as one of sale or agency, it is clear that the cooperative may recover sums paid in advance which prove to be in excess of the amount eventually realized from liquidation of the pool. Arkansas Cotton Growers' Cooperative Association v. Brown, 179 Ark. 338, 16 S. W. (2d) 177 (1929); California Raisin Growers' Association v. Abbott, 160 Cal. 601, 117 Pac. 767 (1911); California Bean Growers' Association v. Williams, 255 Pac. 751 (Cal. App. 1927); Farmers' Association of Natoma v. Schultze, 212 Pac. 670 (Kan. 1923); *In re* Murphy's Estate, 214 Pa. 258, 63 Atl. 745 (1906).

13. Rarely is the cooperative organized for profit. A provision for liquidated damages for failure to deliver to one such profit-making enterprise has been held illegal as a restraint on trade. Reeves v. Decorah Farmers' Cooperative Society, 160 Iowa 194, 140 N. W. 844 (1913).

14. Johnson v. Staple Cotton Association, 142 Miss. 312, 107 So. 2 (1926); Texas Certi-

despite the express language employed. The construction adopted depends upon the requirements of the particular situation. Dialetically such a situation is unsatisfactory; practically it has resulted in a greater degree of judicial solicitude for the cooperative. The problem is presented in a variety of situations.

As against the claims of creditors seeking to attach the assets of producers subject to the marketing contract, there is an apparent tendency to prefer the rights of the cooperative and to give to the contract of sale its literal interpretation. In contracts purporting to pass title before delivery, for example, there is no dispute as to the rights of the association. Thus, an action for conversion was sustained in California [15] against a sheriff seizing raisins under attachment process while the produce was still on the grower's land. The court held that the contract in question, which passed a present title to all crops to be grown on the producer's land in the ensuing fourteen years, clearly gave the association title. In a Texas case [16] an attachment was likewise denied to a creditor bank seeking to levy on hay after it had been stored, the court finding that title was in the association under a contract of sale which provided that title should pass when the hay was stored.

Similarly, when the problem is to determine who can compel delivery of mortgaged property, a question which becomes particularly important when the association has obligated itself to dispose of the produce to third parties, a literal interpretation of the sales contract, favorable to the cooperative, is adopted. Many of the marketing contracts employed specifically permit the grower to place crop mortgages on his produce. When the grower effects such a mortgage it has been held that the association may still take delivery of the crop and dispose of it, if the mortgagee has notice that the crop is under

---

fied Cottonseed Breeders' Association v. Aldridge, 61 S. W. (2d) 79 (Tex. 1933). *Cf.* Brown v. Staple Cotton Association, 132 Miss. 859, 96 So. 849 (1923); Oregon Growers' Association v. Lentz, 212 Pac. 811 (Ore 1923). Elsewhere the relationship has been described as that of a trust. Dairymen's League Association v. Holmes, 207 App. Div. 429, 202 N. Y. Supp. 663 (4th Dep't 1924); Rhodes v. Little Falls Dairy Co., 230 App. Div. 571, 245 N. Y. Supp. 432 (4th Dep't 1930); Mountain States Beet Growers' Marketing Association v. Monroe, 269 Pac. 886 (Colo. 1928); Henderson, *Cooperative Marketing Associations* (1923) 23 COL. L. REV. 91. *Cf.* Ballantine, *Cooperative Marketing Associations* (1923) 8 MINN. L. REV. 1, criticizing the trust analysis and intimating that the contract is what it purports to be, one of sale.

15. Sun Maid Raisin Growers' Association v. Jones, 96 Cal. App. 650, 274 Pac. 557 (1929) (hearing denied by Cal. Sup. Ct., April 1, 1929); *cf.* Beardlsey v. Beardsley, 138 U. S. 262, 266 (1891). Although legal title is in the association, the producer still retains a mortgageable interest in the proceeds from the sale of the crop. Merriman v. Martin, 298 Pac. 95 (Cal. App. 1931) (hearing denied by Cal. Sup. Ct., May 28, 1931). It has been held that title may pass if agreed even though the subject-matter of the contract has only a potential existence. Hogue-Kellogg Co. v. Baker, 47 Cal. App. 247, 190 Pac. 493 (1920); Turner, Kuhn and Fraser v. Jones, 61 Cal. App. 732, 215 Pac. 1033 (1923) (hearing denied by Cal. Sup. Ct., June 21, 1923). The sale is perfect when made, vesting property in the purchaser the moment the subject-matter comes into existence. Black v. Solano Co., 299 Pac. 843 (Cal. App. 1931); *cf.* Western Oil and Refining Co. v. Venango Oil Co., 16 P. (2d) 190 (Cal. App. 1932).

16. Texas Hay Association v. Angleton State Bank, 291 S. W. 846 (Tex. Com. App. 1927).

a marketing contract.[17] But if the mortgagee takes without notice of the association's claims, the mortgagee has been allowed a prior claim to the produce and the association has been denied delivery.[18] The association's remedy then lies in the recovery of damages for such produce as is foreclosed and sold.[19] In Indiana the issue is clearly settled by the state Marketing Act, which provides that producers may place crop mortgages after signing marketing agreements, but that such mortgages and other liens are subordinate to the right of the association to take delivery.[20] In states where the mortgage itself passes title to a mortgagee who is an innocent party, it has been indicated that the mortgagee may enforce his rights against a cooperative that has taken delivery by maintaining an action of replevin.[21]

Where the question is the taxability of produce subject to the marketing contract, however, the contract is more likely to be construed as one of agency. For if the association is held to be merely an agent, produce in its possession may be relieved of taxation under certain statutory provisions, and liability for a tax, if any, attaches only to the producer as owner; while if the purchase were considered outright after delivery, such produce would be subject to a tax levied against the association. A decision by the Kentucky Supreme Court [22] presents a striking example. The association agreed by the terms of the marketing contract to purchase, and the producer to sell certain crops, title to pass on delivery. Despite the fact that the tobacco had been delivered, the court, disregarding the express words of the parties, construed the contract as one of agency, and thereby brought the association within the terms

17. Kansas Wheat Growers' Association v. Floyd, 116 Kan. 522, 227 Pac. 336 (1924); Kansas Wheat Growers' Association v. Ast, 118 Kan. 247, 234 Pac. 963 (1925); Redford v. Burley Tobacco Growers' Cooperative Association, 205 Ky. 515, 266 S. W. 24 (1924); Dark Tobacco Growers' Cooperative Association v. Dunn, 150 Tenn. 614, 266 S. W. 308 (1924).

18. Bishop v. Alabama Farm Bureau Cotton Association, 110 So. 711 (Ala. 1926); Kansas Wheat Growers' Association v. Loehr, 118 Kan. 248, 234 Pac. 962 (1925); Louisiana Farm Bureau Cotton Growers' Association v. Clark, *supra* note 10, at 296, 107 So. at 121 (taking with notice of association contract held immaterial); Tobacco Growers' Association v. Harvey, 189 N. C. 494, 127 S. E. 545 (1925); see Wilson, *Legal Status of Cooperative Marketing Movement* (1928) 14 A. B. A. J. 575 *et seq.*

19. Kansas Wheat Growers' Association v. Loehr, *supra* note 18, at 250, 234 Pac. at 963; Kansas Wheat Growers' Association v. Ast, *supra* note 17, at 250, 234 Pac. at 964; North Carolina Cotton Grower's Cooperative Association v. Bullock, 191 N. C. 464, 132 S. E. 154 (1926).

20. IND. ANN. STAT. (Burns, 1926) 3677(b); *cf.* Maine Cooperative Lien Law, which makes filing of marketing agreements with county register of deeds notice to all future lien holders. The association may thus secure delivery and any liens attach to members' claims against the association. ME. REV. STAT. (1930) c. 59, §§ 30-32. Similar provisions appear in ARIZ. CODE (Struckmeyer, 1928) § 569; N. M. STAT. ANN. (Courtright, 1929) §§ 31-203, 204; ORE. CODE ANN. (1930) §25-803; S. C. CIV. CODE (1932) § 8890; VA. CODE ANN. (Michie, 1930) § 1265 (35); WIS. STAT. (1931) § 185.08 (5).

21. Kansas Wheat Growers' Association v. Loehr, *supra* note 18, at 250, 234 Pac. at 963.

22. City of Owensboro v. Dark Tobacco Growers' Association, 300 S. W. 350 (Ky. 1927); *cf.* State v. Tuscaloosa Cotton Seed Oil Co., 95 So. 52 (Ala. 1923) (holding a similar statutory tax exemption applicable to dealers and brokers acquiring articles for exchange or resale); Penick and Ford v. Ehret, 166 La. 1, 116 So. 572 (1928).

of a statutory provision exempting from local taxation unmanufactured agricultural products in the hands of a producer or his agent.[23] A closely analogous determination was made in Kansas.[24] A state statute[25] required every merchant to file a personal property schedule, and defined a merchant as any person or company holding personal property which he intends to sell at an advanced price or profit, or which might have been consigned to him for the purpose of being so sold. The court interpreted the marketing contract, much less succinct than that in the Kentucky case, but providing for a purchase and sale, as not constituting the association a merchant, since it realized no profit through its dealings. The producers were held to be the owners of the wheat in the cooperative's possession, and a tax assessment could be levied only against them. The significance of such decisions is obvious when the volume of business conducted by cooperatives and their potential liability to taxation are considered.

The problem of determining the operative effect of the purchase and sale contract is also important in apportioning possible loss between the cooperative and its members, for the generally accepted principle is that the risk of loss is on him who has title.[26] The cases do not clearly indicate whether or not the courts will favor the cooperatives in such situations. A decision of the Supreme Court of Maine[27] suggests the issues involved. Fruit subject to what was clearly an agency contract was frozen while still in possession of the producer. In an action against the association, it was decided that the risk of loss was on the producer as having title, and that the evidence showed no sale to the association. Ordinarily the cooperative protects itself against certain types of loss by insurance, and where the insurance policy covers the loss actually suffered it is considered merely an asset of the cooperative to be pooled along with any income realized through sale. Thus, in a recent Texas case,[28] where no specific contractual provision had been made as to the disposition of insurance between members and the association, insurance collected after the destruction by fire of seed delivered by a particular member was directed to be pooled and distributed among all the members. In what apparently was dictum the court indicated that the contract in question, although it provided that title should pass on delivery of warehouse receipts, was one of agency rather than of sale. The warehouse receipts, moreover, had actually been turned over to the association. Precisely why the court should have been moved to call the contract one of agency is not clear, for if the contract were

23. KY. STAT. (Carroll, 1930) § 4019a-10.

24. Kansas Wheat Growers' Association v. Board of Commissioners, 119 Kan. 877, 241 Pac. 466 (1925).

25. KAN. REV. STAT. ANN. (1923) c. 79, § 1001.

26. Chapman v. Nitrate Agencies Co., 225 Ala. 650, 144 So. 810 (1932); McKinney v. Sargent, 13 P. (2d) 373 (Cal. 1932); see The Fred E. Hasler, 55 F. (2d) 389, 391 (S. D. N. Y. 1932). Section 22 of the Uniform Sales Act provides that unless otherwise agreed goods remain at the risk of the seller until the property is transferred to the buyer.

27. Haarparinne v. Butter Hill Fruit Growers' Association, 122 Me. 138, 119 Atl. 116 (1922).

28. Texas Certified Cottonseed Breeders' Association v. Aldridge, *supra* note 14, at 82. A similar holding appears in Johnson v. Staple Cotton Association, *supra* note 14, at 334, 107 So. at 6.

construed as one of sale it would follow even more directly that the proceeds of the insurance belonged to the association. Conceivably the court might have been influenced by a desire to protect the cooperative in the event of loss sustained through some medium not covered by insurance. Such a decision would find support in the determination of one court that an association cannot, in the absence of contractual provision for pooling of losses, impose upon its members a community sharing of loss.[29] However, it might be contended that any uninsured loss should be pro-rated among all members of the association, on the ground that the association, as a cooperative venture employing a pooling device by which all share in common profits, creates by necessary implication a common protection in favor of any individual member whose produce is destroyed. Certainly a well drawn marketing contract could, and should, expressly allocate the risk of loss independently of possession of title.[30]

What the judicial reaction will be where creditors of the association attempt to attach produce in its hands is entirely problematical. It is said that a creditor may attach any assets of the cooperative,[31] but the cases in which successful efforts have been made to levy on association property have involved only attachments of stock and reserve funds. Produce in the cooperative's possession does not seem to have fallen into the limbo of attachable assets. Should the courts, in the event of the association's insolvency, wish to protect the individual producers and entitle them to a return of their crops, contracts of purchase and sale would have to be construed as creating mere agencies.[32] In that event the property of members of an incorporated cooperative could not be used to satisfy the debts of the association.[33] If, on the other hand, the contracts were interpreted as contracts of outright sale, and the cooperative thereby given title, the members probably would be classed as ordinary creditors and would be compelled to take their chances on returns from liquidation.

Whether the marketing agreement is construed as one of sale or agency is seldom important when questions arise as to the enforcement of the contract against members of the association.[34] No matter how the contract is interpreted, the courts have provided ample protection to the cooperative. To guard against delinquencies on the part of its members the association has been given the remedies of specific performance and injunction, the grant of such

29. Steelman v. Oregon Dairymen's League, 97 Ore. 535, 192 Pac. 791 (1920).

30. That such an allocation of risk is possible, see 1 WILLISTON, SALES (2d ed. 1924) § 302; The Fred E. Hasler, *supra* note 26, at 392.

31. Leyden v. Calhoun Cooperative Creamery Co., 135 So. 317 (Ala. 1931); Associated Fruit Co. v. Idaho-Oregon Fruit Growers' Association, 256 Pac. 99 (Idaho 1927); Texas Farm Bureau Cotton Association v. Lennox, 297 S. W. 743 (Tex. 1927).

32. McKenzie v. Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S. E. 981 (1911); see U. S. DEP'T OF AGRICULTURE BULL. No. 1106, *supra* note 7, at 50.

33. Mandell v. Cole, 244 N. Y. 221, 155 N. E. 106 (1926). The holding is otherwise where the association is unincorporated; all members are then jointly liable. Mandell v. Moses, 239 N. Y. 555, 147 N. E. 192 (1924), *aff'g* 209 App. Div. 531, 205 N. Y. Supp. 254 (3d Dep't 1924).

34. One British Columbia case, apparently without American counterpart, holds that an agency contract can not be specifically enforced, but that a sale contract may be. Kelowna Growers' Exchange v. De Caqueray, 70 D. L. R. 865 (1922).

relief being authorized by statute,[35] or determined by contractual agreement,[36] or by the equities of the situation.[37] But even when equitable relief is provided by statute, it is not always held to be mandatory and it may be defeated by the circumstances of the particular situation.[38] Where the contract passes title before delivery,[39] any attempts by a dissatisfied producer to dispose of produce would probably support an action of replevin. Nevertheless, if an association is unreasonable in marketing produce an aggrieved member may be released from continuing delivery.[40] Under an agency interpretation of the contract, it is probable that he could compel the return of goods already delivered, but if a sale construction were adopted and title were held to have passed, he might be compelled to seek his remedy only in an action for breach of contract. In suits against tenants, whose lessors had signed marketing contracts, the lessee also has been held bound to deliver where he had actual or constructive notice of the contract's existence.[41] Whether the contract here be construed as one of sale or agency is again immaterial.

When, however, an action is brought against third parties seeking to purchase from members goods under contract, or otherwise to interfere with the association's rights, it is extremely important to the cooperative that the marketing agreement be interpreted to constitute a sale. In such cases, consequently, even contracts of exclusive agency have been given constructions

---

35. The Bingham Act, *supra* note 5, is representative as to this provision: "In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof."

36. Dark Tobacco Growers' Association v. Dunn, 150 Tenn. 614, 266 S. W. 308 (1924); *cf.* Dark Tobacco Growers' Association v. Daniels, 215 Ky. 67, 284 S. W. 399 (1926). But see Oregon Growers' Association v. Lentz, *supra* note 14.

37. The usual equitable grounds advanced are that damage would result from reducing the quantity of produce to be handled, and that the existence of the association and its continued prestige depend upon fulfillment of contracts by members. Phez Co. v. Salem Fruit Union, 103 Ore. 514, 201 Pac. 222 (1921); Washington Cranberry Growers' Association v. Moore, 117 Wash. 430, 201 Pac. 773 (1921); *cf.* Annaheim Citrus Fruit Association v. Yeoman, 197 Pac. 959, 961 (Cal. App. 1921); Oregon Growers' Association v. Lentz, *supra* note 14, at 817.

38. Brown v. Georgia Cotton Growers' Cooperative Association, 139 S. E. 417 (Ga. 1927) (failure to enforce contract against all members grounds for refusing specific performance); Staple Cotton Cooperative Association v. Borodofsky, 108 So. 802 (Miss. 1926) (release by association to a few members releases all); *cf.* California Bean Growers' Association v. Rindge Land Co., 248 Pac. 658, 664 (Cal. 1926). But see Kansas Wheat Growers' Association v. Schulte, 113 Kan. 672, 680, 216 Pac. 311, 317 (1923); Nebraska Wheat Growers' Association v. Smith, 115 Neb. 177, 212 N. W. 39 (1927) (mismanagement by association held no defense in suit for specific performance).

39. See cases cited notes 15 and 16, *supra*.

40. Mountain States Beet Growers' Association v. Monroe, *supra* note 14, at 886; *cf.* Guglielmelli v. Walla Walla Gardeners' Association, 288 Pac. 251 (Wash. 1930) (association not bound to take delivery where marketing costs make loss inevitable).

41. Monte Vista Potato Growers' Association v. Bond, 80 Colo. 516, 252 Pac. 813 (1927); Kansas Wheat Growers' Association v. Ast, *supra* note 17; Dark Tobacco Growers' Association v. Daniels, *supra* note 36; Feagain v. Dark Tobacco Growers' Association, 202 Ky. 801, 261 S. W. 607 (1924).

equivalent to a vesting of title, the decisions describing the agency as irrevocable by the producers and compelling delivery.[42] A Wisconsin statute further protects the association's rights by declaring that whether the contract be one of sale or of agency, if it is recorded the association secures an interest in the title to all property agreed to be sold, and that in case of subsequent purchase by third parties no title passes to such other purchaser.[43] It is in these situations only that expediency has required a contract of agency to be given the effect of an outright sale, but the very uniqueness of the result lends strength to the assertion that the marketing agreement, regardless of its express wording, is whatever the courts wish it to be in the light of the particular circumstances.

THE PRIVILEGE OF INTERVENTION

THE frequency with which litigation either benefits or prejudices persons who are not parties to a suit has led to rapid development of the equitable device of intervention. It is by means of this device that persons who may acquire rights against or become liable to the original litigants as a result of the judgment, and also persons who assert claims against property which is the subject-matter of the action, gain the privilege of participating in pending proceedings.[1] Yet because the injection of new parties and new issues into a suit frequently occasions delay and uncertainty, the privilege of intervening is granted only when the advantages to be gained appear to outweigh the disadvantages. Appellate courts have often reiterated the rule that an intervenor must have "an interest in the matter in litigation," and in most of the thirty-one states[2] in which statutes supplement equity's power to grant intervention

42. Phez Co. v. Salem Fruit Union, *supra* note 37, at 515, 201 Pac. at 229; Spencer Co-operative Live Stock Shipping Association v. Schultz, 245 N. W. 99 (Wis. 1932).

43. WIS. STAT. (1931) § 185.08 (5).

1. "An intervention takes place when a third person is permitted to become a party to an action between other persons, either in 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 defendant." COLO. CODE CIV. PROC. (1921) § 22.

2. ALA. CODE (Michie, 1928) § 9485; ARIZ. REV. CODE (Struckmeyer, 1928) § 3793; ARK. DIG. STAT. (Crawford & Moses, 1921) § 1102; CAL. CODE CIV. PROC. (Deering, 1931) § 387; COLO. CODE CIV. PROC. (1921) § 22; CONN. GEN. STAT. (1930) § 5521 (persons having an "interest or title which the judgment will affect" may intervene); IDAHO CODE ANN. (1932) §§ 5-322, 5-324; IND. ANN. STAT. (Burns, 1926) § 279; IOWA CODE (1931) § 11174; KAN. REV. STAT. (1923) § 60-417; KY. CIV. CODE PRAC. (Carroll, 1927) § 29; LA. CODE PRAC. ANN. (Dart, 1932) arts. 389-94; MICH. COMP. LAWS (1929) § 14019; MINN. STAT. (Mason, 1927) § 9263; MONT. REV. CODE (Choate, 1921) § 9088; NEB. COMP. STAT. (1929) § 20-328; NEV. COMP. LAWS (Hillyer, 1929) § 8563; N. M. STAT. ANN. (Courtright, 1929) § 105-1501; N. Y. CIV. PRAC. ACT (1928) § 193 (3); N. C. CODE (1931) § 460; N. D. COMP. LAWS (1913) § 7413; OHIO GEN. CODE (Page, 1926) § 11263; OKLA. STAT. (1931) § 158; ORE. CODE ANN. (1930) § 1-315; S. C. CODE (1932) § 409; S. D. COMP. LAWS (1929) § 2322; TENN. CODE (1932) § 8623; UTAH COMP. LAWS (1917) § 6518; WASH. REV. STAT. (Remington, 1932) § 202; WIS. STAT. (1931) § 260.19 (1); WYO. REV. STAT. (1931) § 89-522; *cf.* Federal Equity Rule 37, 198 Fed. xxviii. The foregoing list

the same test has been adopted. But since persons lacking an "interest in the matter in litigation" do not in practice desire to intervene, this rule is not helpful in disposing of petitions. Nor does the Supreme Court's attempted clarification, that the interests must be "direct" and that petitioner must "obtain immediate gain or suffer loss by the judgment," [3] effectively vitalize the expression. Unhappily, however, courts have sometimes regarded their power to grant interventions as limited by the terms of statutes and have therefore denied petitions through difficulty in bringing them within the purported statutory definitions.

When the original plaintiff in a controversy has assigned his claim against the defendant, the assignee may acquire a presently enforceable right by a judgment favorable to plaintiff. The intervention of the assignee can hardly be open to objection if the validity of the assignment is not contested. In such a case no new issue is brought into the controversy; the need for a separate action upon the assignment is avoided; and the assignee is assured of adequate presentation of the claim. Even when the validity of the assignment is disputed, the intervention should ordinarily be permitted. The addition of the single new issue, one which in most cases may be quickly disposed of, should not unduly complicate or delay the determination of the principal controversy. In accord with these considerations, courts have uniformly allowed the interventions of assignees,[4] and also of subrogees.[5]

Even stronger reasons favor admission of intervenors who, having assumed a secondary obligation, may become liable to one of the parties to an action as a result of the judgment therein. Yet the courts' treatment of such petitioners has not been consistent. When a surety intervenes in an action against his principal, he not only protects himself from laxity in the defence of the case but also avoids the necessity of an independent action against him, since by his petition he admits his contingent liability. Nor can such an intervention create new issues in the case, for neither of the original parties will care to dispute his liability. If, on the other hand, he is not allowed to intervene in the action, he may be held upon a judgment which he will have had no opportunity to contest except collaterally. These considerations have led the courts in most cases to permit interventions not only by sureties in actions against their principals but also by principals when judgment is sought against their sureties.[6] But in disposition of the essentially similar situation where a warrantor seeks to be made a party to a suit against his warrantee, an uncertain attitude is shown. Some courts grant the application; [7] others deny it

is only of the general statutes. Most states also have various specific acts, providing for intervention in certain particular situations. See notes 27 and 32, *infra*.

3. See Smith v. Gale, 144 U. S. 509, 518 (1892).

4. Milliken v. Anderson, 294 S. W. 921 (Tex. Civ. App. 1927); Mountain Timber Co. v. Lumber Insurance Co. of New York, 99 Wash. 243, 169 Pac. 591 (1917).

5. Schnick v. Morris, 24 S. W. (2d) 491 (Tex. Civ. App. 1929); *cf.* The Halo, 52 F. (2d) 136 (C. C. A. 2d, 1931).

6. Empson v. Aetna Casualty and 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).

7. Bodcaw Lumber Co. v. The Pardee Co., 3 La. App. 162 (1925); Hoffman v. Bigham, 324 Mo. 516, 24 S. W. (2d) 125 (1930).

on the ground that petitioner's "interest" is not sufficient,[8] or on the flat assertion that plaintiff has a right to sue whomever he chooses.[9] It is also asserted that permission to intervene will not benefit petitioner,[10] a contention which would seem sufficiently answered by his willingness to take the risk. In similar fashion applications of persons who have assumed defendants' obligations outright by contract are rejected,[11] even when they allege that defendant is incapable of making adequate defence.[12] A joint tortfeasor, moreover, is not permitted to come in as a party over plaintiff's objection,[13] although he may be liable to defendant for contribution in the event of an adverse judgment. The refusal to accord to these other persons secondarily liable the privilege of intervention which is granted to sureties and principals seems unjustified.

When, however, the anticipated effect of the judgment on petitioner will not be to raise a legal right or an enforceable liability but will merely result in a benefit or detriment to an organization in which he has some interest, it is more difficult to justify his intervention. Most frequent of such applications are those of consumers in public utility rate cases, taxpayers in their cities' and stockholders in their corporations' suits. The financial interest of these applicants consists in the effect the decision may have upon the taxes or rates they must pay or upon the value of their stocks or amount of their dividends. Denial of the interventions will not result in additional litigation, since the petitioners' interest will not ordinarily be an enforceable right. Furthermore, such applicants will in most cases be adequately represented by the state's rate commission, or by counsel for the city or corporation. It would seem, therefore, that in the absence of allegations of fraud and collusion these petitions should be denied. Courts have generally held that consumers' interests are sufficiently protected by representation.[14] Stockholders' petitions, on the other hand, generally contain allegations of fraud and collusion on the part of the principal parties and thus reinforced are granted.[15] Although it has been said that taxpayers have an interest in suits involving municipal policy,[16] their intervention petitions have not always been granted.[17]

8. Smith v. Gale, *supra* note 3; Charles F. Garrigues Co. v. Casualty Co. of America, 220 N. Y. 588, 115 N. E. 1036 (1917).

9. See Municipal Service Real Estate Co. v. D. B. & M. Holding Corp., 257 N. Y. 423, 428, 178 N. E. 745, 746 (1931).

10. See Tanner v. American National Bank, 145 Ga. 512, 514, 89 S. E. 515, 516 (1916).

11. Beall v. Helm, 50 S. W. (2d) 460 (Tex. Civ. App. 1932); *cf.* Tanner v. American National Bank, *supra* note 10.

12. Beall v. Helm, *supra* note 11.

13. Hagins v. Wilson, 262 S. W. 770 (Tex. Civ. App. 1924).

14. O'Connell v. Pacific Gas & Electric Co., 19 F. (2d) 460 (C. C. A. 9th, 1927); City of Grand Rapids v. Consumers' Power Co., 216 Mich. 409, 185 N. W. 852 (1921); see *In re* Engelhard, 231 U. S. 646, 650 (1914). *Contra:* State v. Tidball, 35 Wyo. 496, 252 Pac. 499 (1927).

15. Crowe v. Hamilton National Bank, 74 Colo. 407, 222 Pac. 394 (1924); Bourree v. Trust Francais des Actions de la Franco-Wyoming Oil Co., 14 Del. Ch. 332, 127 Atl. 56 (1924); Kerr v. Southwest Fluorite Co., 35 N. M. 232, 294 Pac. 324 (1930). *Contra:* Gunderson v. Illinois Trust & Savings Bank, 199 Ill. 422, 65 N. E. 326 (1902).

16. See Davis v. Warde, 155 Ga. 748, 768, 118 S. E. 378, 387 (1923).

17. *Intervention allowed:* Davis v. Warde, *supra* note 16; Tyree v. Road District No.

In contrast to interventions in which petitioners thus merely adopt the cases of the original litigants, is the more complex problem presented by a third person's assertion of a claim against property which is the subject of a proceeding. Such a claim will frequently be in derogation of the rights of the original parties, and will always inject a new issue into the case.

But these objections carry little weight when the property against which petitioner asserts his claim is a fund in the possession of the court for purposes of administration and distribution. Such proceedings are not private controversies between two original parties but are instituted for the determination of all claims to the fund before the court. In general receiverships,[18] interpleader proceedings[19] and administration of decedents' estates,[20] therefore, intervention is freely allowed. And since in most receiverships allowance of additional claims will reduce the other creditors' dividends, petitioners are not limited to assertion of their claims but may intervene to deny rights in others.[21] They will not, however, be permitted to come in to assert the invalidity of the principal suit.[22]

Although actions for the determination of ownership of real or personal property are private controversies between the original parties, the new issue of a petitioner's claim against the same property will not so delay the litigation as to justify denial of the intervention. If the petition were denied, the party ultimately successful might be forced to relitigate his right in the property in a subsequent action against the petitioner. Such multiplicity of suits is unwarranted. Courts have, therefore, granted intervention applications in actions of ejectment,[23] proceedings to quiet title,[24] foreclosure suits,[25] bills for specific performance of contracts of sale,[26] and replevin.[27]. Moreover,

---

5, 199 S. W. 644 (Tex. Civ. App. 1917); *cf.* Inskeep v. State, 198 Ind. 224, 153 N. E. 411 (1926). *Intervention denied:* Ebersbach Construction Co. v. Charles Ringling Co., 100 Fla. 1270, 131 So. 148 (1930); Bush v. Quick, 90 Miss. 32, 43 So. 70 (1907); *cf.* Caldwell v. Guardian Trust Co., 26 F. (2d) 218 (C. C. A. 8th, 1928).

18. Barnes v. Commercial Credit Co., 161 Ga. 605, 131 S. E. 476 (1926); State v. Farmers' State Bank, 103 Neb. 194, 170 N. W. 901 (1919).

19. Van Orden v. Golden West Credit and Adjustment Co., 9 P. (2d) 572 (Cal. App. 1932); Rutherford v. Union Land & Cattle Co., 47 Nev. 21, 213 Pac. 1045 (1923).

20. Awbrey v. Estes, 216 Ala. 66, 112 So. 529 (1927); Thorne v. State Bank of Platteville, 193 Wis. 97, 213 N. W. 646 (1927).

21. Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545 (C. C. A. 8th, 1915); Continental Trust Co. v. Sabine Basket Co., 165 Ga. 591, 141 S. E. 664 (1928). *Contra:* Wagner v. Freeny, 123 Md. 24, 90 Atl. 774 (1914).

22. King v. Barr, 262 Fed. 56 (C. C. A. 9th, 1920); Livingston v. Southern Surety Co. of New York, 262 Mich. 438, 247 N. W. 712 (1933). These cases were decided under statutes providing that the intervention be made "in recognition of the propriety of the main proceedings."

23. Craddock v. Barnett, 186 Ky. 791, 218 S. W. 252 (1920).

24. Knotts v. Tuxbury, 69 Ind. App. 248, 117 N. E. 282 (1917); State v. District Court, 17 P. (2d) 57 (Mont. 1932).

25. French v. Gapen, 105 U. S. 509 (1881); Moon v. First National Bank, 163 Ga. 489, 136 S. E. 433 (1927); Webb v. Patterson, 114 Neb. 346, 207 N. W. 522 (1926).

26. Cushing v. Levi, 117 Cal. App. 94, 3 P. (2d) 958 (1931); Mandel v. Guardian Holding Co., 192 App. Div. 390, 182 N. Y. Supp. 686 (1st Dep't 1920).

27. Lowenstein v. Reikes, 140 Misc. 645, 251 N. Y. Supp. 618 (1931); *cf.* Capitol

legislatures in thirteen states have expressly provided for intervention "in actions for the recovery of real or personal property." [28] Under these statutes, however, intervention has sometimes been denied when the prayer for relief, in actions concerning the parties' rights in property, has been for a money judgment.[29] These decisions are defended on the ground that the wording of the statutes impliedly excludes such actions from its scope. Since the prayer for relief does not alter the nature of the action [30] and therefore can have no bearing upon the merits of an intervention petition, and since in any event these statutes do not purport to limit the courts' power to allow intervention in other cases, such a restriction appears unnecessary.

When a plaintiff in an action for a money judgment attaches property of the defendant, claimants of prior interests in the property frequently seek to intervene. If the attachment is in fact wrongful, it will, until dissolved, deprive the petitioner of his recourse to the property. Moreover, the property may be sold in satisfaction of a judgment without regard for the petitioner's rights. If, therefore, the intervention is denied, the petitioner will be forced to bring a separate action to establish his claim. Consequently most courts have permitted intervenors to contest the validity of attachments,[31] and such permission is authorized by statute in a few states.[32] Courts reaching a contrary conclusion have argued that an attachment proceeding is merely ancillary to a principal suit, and hence that petitioner has no interest in "the matter in litigation." [33] There seems no basis for thus refusing to recognize the separability of the ancillary proceedings.

Intervention in an action is occasionally based upon ownership of land which not only is not in the possession of the court but which is not even the subject-matter of the proceedings. Such a situation may be presented by

---

Motor Corp. v. Lasker, 138 Va. 630, 123 S. E. 376 (1924) (detinue); ILL. REV. STAT. (Smith-Hurd, 1933) c. 119, § 22a; IOWA CODE (1931) § 12180; N. M. STAT. ANN. (Courtright, 1929) § 105-1703.

28. See statutes for Arkansas, Idaho, Indiana, Kansas, Kentucky, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Wisconsin, and Wyoming, *supra* note 2.

29. Brooklyn Cooperage Co. v. A. Sherman Lumber Co., 220 N. Y. 642, 115 N. E. 715 (1917); see Caldwell v. Guardian Trust Co., *supra* note 17, at 222; CLARK, CODE PLEADING (1928) 288. In the New York case cited, lessor of defendant in an action for damages for trespass on realty was denied permission to intervene. This decision would probably not be generally followed. Robinson v. Crescent City Co., 93 Cal. 316, 28 Pac. 950 (1892); Marion County Lumber Corp. v. Whipple, 118 S. C. 90, 110 S. E. 70 (1921).

30. CLARK, *op. cit. supra* note 29, at 184.

31. Seib v. Cooper, 170 La. 105, 127 So. 380 (1930); McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928); see authorities collected by Professor Sunderland in Note (1921) 20 MICH. L. REV. 96.

32. IOWA CODE (1931) § 12136; KY. CIV. CODE PRAC. (Carroll, 1927) § 29; MISS. CODE ANN. (1930) § 169; N. M. STAT. ANN. (Courtright, 1929) § 105-1613; W. VA. CODE (1931) c. 38, art. 7, § 41.

33. Partridge v. Marston, 127 Me. 380, 143 Atl. 599 (1928); Consolidated Liquor Co. v. Scotello & Nizzi, 21 N. M. 485, 155 Pac. 1089 (1916); Dent v. Ross, 35 Pa. 337 (1860). In the Scotello case, the New Mexico court conceded that the result was illogical and contrary to the weight of authority outside the state, but considered itself bound by its own precedents. 21 N. M. at 495, 155 Pac. at 1093.

enforcement of a zoning ordinance[34] or of restrictive covenants,[35] or by a controversy over a proposed building program which will physically affect petitioner's premises.[36] Allowing intervention in these cases may be justified on the ground that multiplicity of suits is thereby avoided. The few courts passing upon this question have reached conflicting decisions.[37]

A judgment adverse to the defendant in an action against him will necessarily have the effect of diminishing the assets out of which his creditors hope to be paid. This circumstance has led to frequent intervention petitions by creditors, who claim an "interest in the matter in litigation." The wisdom of granting their applications, however, is doubtful. Unquestionably the numerous diverse issues resulting from consideration of their unrelated claims would seriously handicap the conduct of the principal controversy. Furthermore, unless the debtor is insolvent, it is difficult to see wherein denial of intervention prejudices the creditor, since his claim can still be satisfied in full. And if intervention gives him priority over other creditors, there is the danger of a race of diligence which would wholly subvert the purpose of the original action. These considerations have led to the general rule that unsecured creditors as such will not ordinarily be allowed to intervene,[38] the courts' rationale being that their interest is not sufficiently direct. Exception is frequently made where the defendant is insolvent; [39] in such a case, it is said, present intervention is the creditor's only remedy. Some cases also suggest that judgment creditors are entitled to intervene on the ground that they have an equitable lien on the defendant's assets.[40]

The determination of whether or not to permit intervention is ordinarily a question of procedural efficiency rather than of substantive right. Instead of discussing the problem in terms of administrative convenience, however, the courts have dealt with it in vague and unrealistic concepts. But the very

---

34. Rosenberg v. Mehl, 37 Ohio App. 95, 174 N. E. 152 (1930) (intervention allowed).

35. Abernathy v. Adoue, 49 S. W. (2d) 476 (Tex. Civ. App. 1932) (intervention allowed).

36. State v. Northern Pacific Ry. Co., 88 Mont. 529, 295 Pac. 257 (1930) (intervention allowed); Latham v. Chicago, Burlington & Quincy Rr. Co., 100 Neb. 173, 158 N. W. 923 (1916) (intervention denied).

37. Receiver of Central Rr. & Banking Co. v. Macon, Dublin & Savannah Rr. Co., 115 Fed. 926 (C. C. S. D. Ga. 1902) (intervention allowed); Chicago & Western Indiana Rr. Co. v. Chicago, 294 Ill. 257, 128 N. E. 462 (1920) (intervention denied); Tyree v. Road District No. 5, *supra* note 17 (intervention allowed); see also cases cited *supra* notes 34, 35 and 36.

38. Glass v. Woodman, 223 Fed. 621 (C. C. A. 8th, 1915); Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502 (1905); State v. Superior Court, 91 Wash. 40, 157 Pac. 28 (1916).

39. Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852 (C. C. A. 9th, 1922); Reard v. Freiden, 184 Iowa 823, 169 N. W. 245 (1918); *cf.* Bell v. Miller, 11 Ohio Dec. 163 (1891). *Contra:* Glass v. Woodman, *supra* note 38. Such allowance is especially frequent in actions to set aside conveyances alleged to be in fraud of creditors. Dwight v. First National Bank, 159 Ga. 188, 125 S. E. 62 (1924); Gage v. Cameron, 212 Ill. 146, 72 N. E. 204 (1904).

40. Horn v. Volcano Water Co., 13 Cal. 62 (1859); Cleavenger v. Felton, 46 W. Va. 249, 33 S. E. 117 (1899).

looseness of such expressions as "interest in the matter in litigation" and "discretion of the trial court" [41] leaves the courts free to decide the cases upon more realistic grounds. And in fact, while the full potentialities of intervention as a procedural means of hastening the end of litigation have not been realized, the actual decisions have shown more regard for practical considerations than has been customary in judicial treatment of other procedural reforms under the codes.[42]

41. It is usually said that whether or not an intervention should be allowed will, in any particular case, rest in the broad discretion of the trial court. Nelson v. Tropical Land Co., 93 Fla. 203, 111 So. 512 (1927). It is said, however, that this discretion is judicial only, and is not to be exercised arbitrarily. See Tonkonogy v. Levin, 162 Atl. 315, 316 (Pa. Super. Ct. 1932). These two balanced concepts are used by appellate courts as arguments for affirmance or reversal, according to their conclusions in the particular case. Check v. Kaplan, 182 N. E. 305 (Mass. 1932), is an example of such juggling of concepts.

42. Particular reference is had to the fate of the New York Civil Practice Act provisions as to joinder of parties. See comment by Dean Clark at (1925) 35 YALE L. J. 85.