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FEDERAL INTERVENTION: II. THE PROCEDURE, STATUS, AND FEDERAL JURISDICTIONAL REQUIREMENTS

By EDWARD H. LEVI† and JAMES WM. MOORE‡

IN A previous article we have traced the source of modern intervention practice in the civil, ecclesiastical, admiralty, common law and chancery courts.¹ Intervention practice in Roman law was shown to have been rather extensive, while in England its development was slow. In equity, intervention was permitted by a device known as an examination *pro interesse suo*. At law, it was allowed as an incidental or possessory proceeding. Both at law and in equity, and also in admiralty proceedings, the determining factor seems to have been the presence of property in the hands of the court. Modern intervention practice, however, has exceeded the bounds of its sources. Despite some statements to the contrary, intervention has been allowed under state practice even in the absence of state statutes, and intervention under federal procedure in most cases is even broader than under state practice.

Federal intervention has been governed by Admiralty Rules 34 and 42,² by Equity Rule 37,³ by the Conformity Act,⁴ and by certain federal statutes.⁵ Where intervention is sought in an equity suit, the normal federal intervention case, Rule 37 will govern. If intervention is sought in a legal action in order to present a legal claim, the state law, given effect by the Conformity Act, will control. When the attempt is made to present an equitable claim in a legal action, the Law and Equity Act of 1915, which allows a defendant to set forth an equitable defense or

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1. Moore and Levi, *Federal Intervention: I. The Right to Intervene and Reorganization* (1936) 45 YALE L. J. 565.

2. See *id.*, at 570, nn. 27, 28.

3. REV. STAT. § 913 (1875), 28 U.S.C. § 723 (1934); Equity Rule 37, adopted in 1912.

4. 17 STAT. 196 (1872), 28 U.S.C. § 724 (1934); see also §§ 915, 916 REV. STAT. (1875).

5. 36 STAT. 539 (1910), 28 U.S.C. §§ 45a, 48 (1934) (Interstate Commerce Commission); 49 STAT. 793 (1935), 40 U.S.C. § 276a (2b) (Supp. 1937) (contractors for public works for United States); 42 STAT. 161 (1921) 7 U.S.C. § 193 (Packers and Stockyards Act) (1934); 38 STAT. 719 (1914), 15 U.S.C. § 45 (1934) (Federal Trade Commission); 36 STAT. 850 (1910), 48 U.S.C. §§ 401, 402 (1934) (mineral mining in Alaska); 47 STAT. 1474 (1933), 11 U.S.C. § 205(c) (13), § 207(c) (Supp. 1937) §§ 77 and 77B of the Federal Bankruptcy Act, (reorganization proceedings); Act of August 24, 1937, 75th Cong., 1st Sess., c. 724 (intervention by Attorney-General where constitutionality of congressional act is questioned).

counterclaim in a law action, becomes significant. If it is successfully contended that the Law and Equity Act is non-applicable to interveners inasmuch as the Act only applies to defendants and not to third parties, the intervener must fall back on the power of a court to treat the equitable claim as though it were a bill in equity.

It is correct to say, then, that in the usual federal case the right to intervene is governed by Equity Rule 37, which states that "any one claiming an interest in the litigation may at any time be permitted to intervene." While this rule does not appear to grant an absolute right to intervene in any case, the practice has been to allow such a right in certain instances, *e.g.*, where there is property in the custody of the court which the intervener claims as owner or upon which he claims a lien, legal or equitable,⁶ or where the intervener is already represented in an action before the court, but inadequately.⁷ The inadequacy may exist because of collusion, diverse interests, or simply non-feasance of duty on the part of the representative. In other cases the right to intervene is discretionary, and is granted for the purpose of trial convenience.⁸

The distinction between the absolute and the discretionary right to intervene has been incorporated into Rule 24 of the newly proposed rules of civil procedure.⁹ Subdivision (a) of the Rule, entitled "intervention of right," allows intervention as of right where (1) a statute of the United States confers an unconditional right to intervene; (2) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;" or (3) "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof." Subdivision (b) of the Rule is entitled "permissive intervention," and allows discretionary intervention in two cases: (1) "when a statute of the United States confers a conditional right to intervene," and (2) "when an applicant's claim or defense and the main action have a question of law or fact in common."

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6. See 45 YALE L. J. 565, at 582. For a recent state case, see *Bachellor v. Dockerman*, 291 Ill. App. 418, 10 N. E. (2d) 42 (1937).

7. See *Moore and Levi*, *supra* note 1, at 591.

8. A petitioner who is adequately represented in the proceedings only has a discretionary right to intervene, but it is a right which becomes absolute when representation becomes inadequate. And where the proceeding is *in rem*, the ordinary rules of federal jurisdictional requirements concerning discretionary intervention are not applicable. See *infra*, p. 926; see also *Wabash Rr. v. Adelbert College of the Western Reserve University*, 208 U. S. 38 (1907). For recent cases where there was no absolute right to intervene see *Acme-Evans Co. v. Smith*, 13 F. Supp. 356 (S. D. Ind. 1936); *Washburn Crosby Co. v. Nee*, 13 F. Supp. 751 (W. D. Mo. 1936) (A. A. A. cases).

9. The April, 1937, Draft, p. 61, with the addition to Subdivision (c) (p. 61, line 23) supplied in the November, 1937, DRAFT, at 16. For the earlier draft, see PRELIMINARY DRAFT, May, 1936, Rule 29, at 49.

The Rule as to discretionary intervention also states: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

In certain instances the right to intervene is governed by special statutes, for instance, the right to intervene in suits to enforce or set aside orders of the Interstate Commerce Commission,¹⁰ the right to intervene in proceedings before the Federal Trade Commission¹¹ or before the Secretary of Agriculture under the Packers and Stockyards Act,¹² and the right to intervene in suits against the contractors, or their sureties, of public works or buildings for the United States.¹³ These statutes often do not make it clear whether their intent is to give an absolute right to intervene, or merely to provide for intervention, absolute or discretionary, according to the ordinary rules of intervention.

Where a suit is brought by or against the United States to enforce or set aside an order of the Interstate Commerce Commission, the Commission and parties in interest to the hearing before the Commission may intervene "as of right." Here by statute, and by dicta in some cases, the right to intervene would seem to be absolute.¹⁴ But "communities, associations, corporations, firms, and individuals . . . may intervene." This might be construed as giving only a discretionary right to intervene, or as a grant of a general right to intervene with an application of equity practice as to whether the right is absolute or discretionary in any particular case.¹⁵

In hearings before the Federal Trade Commission, as in those before the Interstate Commerce Commission, the right to intervene appears to be governed by ordinary rules concerning intervention, although the language of the statute is entirely permissive.¹⁶ This seems

10. 36 STAT. 543 (1910), 28 U. S. C. § 45a (1934).

11. 38 STAT. 719 (1914), 15 U. S. C. § 45 (1934).

12. 42 STAT. 161 (1921), 7 U. S. C. § 193 (1934).

13. 49 STAT. 793 (1935), 40 U. S. C. § 276a(2b) (Supp. 1937).

14. "The present appellants were parties in the court below, as of right, and not by grace or favor . . ." See *Alexander Sprunt & Sons v. United States*, 281 U. S. 249, 255 (1930); *Kansas City Southern Ry. v. United States*, 282 U. S. 760, 763 (1931).

15. It is not clear whether this allows intervention by an unincorporated association which lacks capacity to sue or be sued under the law of the state in which the district court sits. There is a dictum that they may [*Moffatt Tunnel League v. United States*, 289 U. S. 113, 120 (1933)], although they were not able to come under this provision to bring an original suit to set aside an order of the Commission. *Ibid.* This latter difficulty is solved by Federal Rule 17(b) which provides that an unincorporated association or partnership having no capacity to sue or be sued by the law of the state in which the district court is held "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." DRAFT, April, 1937, at 47.

16. 38 STAT. 719 (1914), 15 U. S. C. § 45 (1934). "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

to be the case also in hearings before the Secretary of Agriculture under the Packers and Stockyards Act begun by complaint of the Secretary against a packer for violation of the Act.¹⁷ Again the statute is permissive: "Any person for good cause shown may on application be allowed by the Secretary to intervene." But a person with an absolute right under ordinary rules probably would have an absolute right here. Prior to the Act of August 24, 1935, persons furnishing labor and materials to contractors of public buildings for the United States were given the right to intervene in proceedings against the contractor or the contractors by the United States. If the United States did not bring the action, a creditor might sue in the name of the United States for the use of creditors generally. Only one action could be brought, although other creditors could file their claims in the action and be made parties.¹⁸ At the present time any creditor may sue on the bond in the name of the United States.¹⁹ While the right on the bond is no longer limited to one action, such creditors apparently still have an absolute right to intervene in an action brought by another creditor, as was formerly provided in the statute. In addition, laborers and mechanics working for the contractors are expressly given the same absolute right of intervention as is given these creditors.²⁰

In private litigation concerning the orders of the Interstate Commerce Commission, the United States "may intervene" where public interests are involved.²¹ Here the language is permissive, but it is clear that the intent was to confer an absolute right.²² The United States may intervene now as of right in any court of the United States when the constitutionality of any act of Congress affecting the public interest is questioned; the government becomes a party for the presentation of evidence

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17. 42 STAT. 161 (1921), 7 U. S. C. § 193 (1934).

18. 28 STAT. 278 (1894), 40 U. S. C. § 270 (1934).

19. 49 STAT. 794 (1935), 40 U. S. C. § 270b (Supp. 1937).

20. 49 STAT. 793 (1935), 40 U. S. C. § 276a(2b) (Supp. 1937); see *Theobald-Jansen Electric Co. v. Meyer Co.*, 77 F. (2d) 27 (C. C. A. 10th, 1935).

21. 36 STAT. 542 (1910), 28 U. S. C. § 48 (1934).

22. The inability of the federal or state government to intervene as of right in proceedings affecting the public interest finds a counterpart in other legal systems, as, for example, Germany. Deak and Rheinstein, *The Machinery of Law Administration in France and Germany* (1936) 84 U. OF PA. L. REV. 846, 868. In this country, special state statutes give the attorney general of the state the right to intervene in certain state court proceedings, such as divorce cases, [see, e.g., GA. CODE (1933) c. 30-124], but in the absence of such statutes there is no absolute right to intervene. In contrast with the limited right to intervene granted to the sovereign in this country, is the right granted in France to the public ministry. Deak and Rheinstein, *supra*, at 857. The *parquet* in France has the duty to intervene in all cases affecting public policy, and he is a party in all cases which reach the Court of Cassation, even though these cases may not involve public policy directly.

dealing with the constitutionality of the act.²³ The final draft of the Federal Rules provides that "when the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States."²⁴

The right to intervene in reorganization proceedings is governed by special provisions in the reorganization acts.²⁵ These acts, again, are obscure as to whether an absolute or discretionary right to intervene is granted, or whether ordinary intervention practice is to be applicable. Further, these acts may be thought to distinguish between a right to be heard and a right to intervene and become a party. We have discussed these provisions in detail in our previous article, and shall discuss them later in this article when we apply the rules concerning the procedure, status and federal jurisdictional requirements of interveners to the reorganization situation.²⁶

The nature of his right to intervene is of course only one problem facing the intervener. The additional problems concerning the intervener in the federal courts may be classified roughly as dealing with (1) the procedure for intervention; (2) the status of the intervener; and (3) the federal jurisdictional requirements in their relation to intervention. These problems are only partially solved by the proposed rules of civil procedure, which are somewhat specific as to the procedure for intervention, but which do not cover, save possibly by implication, the status of the intervener or the problem of jurisdictional requirements. In completing this study of federal intervention, we shall discuss these three general problems, again applying the distinctions made to the reorganization field. In so doing we shall of course rely heavily on the distinction already made between the absolute and the discretionary right to intervene. The absolute right to intervene connotes that the intervener's interest in the proceeding is so great that in justice he must be allowed to protect his interest in the case. It is to be expected that the status of such an intervener and the jurisdictional requirements which he must meet may well be different than the status of, and the jurisdictional

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23. Act of August 24, 1937, 75th Cong., 1st Sess., c. 754. See *Hinderleder v. The LaPlata River and Cherry Creek Ditch Company*, 58 Sup. Ct. 123 (1937) (memo.) where the court "invites the Attorney-General to submit his views upon the question" of whether the act was applicable. See Comment (1937) 51 HARV. L. REV. 148.

24. November, 1937, DRAFT at 16.

25. §§ 77(c) (13), 77B(c) (11), 47 STAT. 1474 (1933), 11 U. S. C. §§ 205, 207 (Supp. 1937). See also § 14d of H. R. 8046, the proposed revision of the Bankruptcy Act, which provides for the intervention of the United States district attorney in bankruptcy proceedings to oppose a discharge when requested by the court.

26. See *infra*, p. 933.

requirements for, an intervener whose right to intervene is discretionary and is granted only for the purpose of trial convenience.

I. THE PROCEDURE OF INTERVENTION

Subdivision (c) of Rule 24 of the federal rules is somewhat specific on the procedure to be followed in intervention. It states:²⁷

"A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937."

The best discussion of intervention procedure in the past is to be found in *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*²⁸ There a stockholder was allowed to intervene to file an answer in a suit against his corporation. The court, after discussing proper intervention practice, concluded, *inter alia*, that (1) a petition of intervention may be filed only by leave of court; (2) the mere filing does not make the petitioner a party to the cause; (3) after filing the petition, notice should be given and hearing had; (4) the hearing should be followed by an order denying or granting leave to the petitioner to intervene and become a party; (5) the petition must present a well pleaded defense. It has been possible in the past for the plaintiff or defendant to waive these procedural requirements as to the intervener.²⁹ But up to the present time there has been no settled uniform practice in regard to proper procedure on intervention, a result that is doubtless partially due to the haphazard manner in which the courts have often treated intervention.

The federal Rule, however, does adopt the essence of the procedure advocated in the *Atlantic Refining Company* case. There are some differences. Leave of court is not required for the filing of the petition to intervene, which is called a motion under the new Rule. The statement of the Supreme Court in *Chandler v. Brandtjen & Kluge*³⁰ that

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27. April, 1937, DRAFT at 61.

28. 280 Fed. 934 (D. Del. 1922).

29. See *Perry v. Godbe*, 82 Fed. 141 (D. Nev. 1897).

30. 296 U. S. 53 (1935); *Toler v. East Tenn. V. & G. Ry.*, 67 Fed. 163 (E. D. Tenn. 1894). See also *Lombard Investment Co. v. Seaboard Mfg. Co.*, 74 Fed. 325 (S. D. Ala. 1896), where it was said the intervener should give notice of his application for intervention. *United States v. Houde Engineering Corp.*, 9 F. Supp. (W. D. N. Y. 1935).

according to the "better practice" an applicant to intervene for a defensive purpose ought to present a proposed answer, and the recommendation of the *Atlantic Refining Company* case on this point have been extended in the Rule to all interveners, whether the proposed pleading be defensive or aggressive.

Intervention should normally be early in the proceedings.³¹ It may be allowed after the proceedings are well under way, but this depends upon the amount of administrative inconvenience caused, and also upon whether the right to intervene is absolute or discretionary.³² The trial court may not allow intervention in the proceedings after the appeal has been argued,³³ although in an unusual case intervention may be allowed in the appellate proceedings.³⁴ The problem of the late intervener has a different aspect which affects his status,³⁵ for the late intervener normally is bound by prior orders and evidence taken and may be prevented from raising issues which more properly should have been raised at an earlier date. But it is useful to keep the status aspect separate from the problem of when an intervention petition will be granted by the court.

The proposed intervention rule states that the motion to intervene shall be "served upon all parties affected thereby,"³⁶ but does not outline the manner of service. The rule, however, should be interpreted as allowing service on the parties' attorneys under the rather liberal terms of Rule 5 concerning service and filing of pleadings and other papers unless this is negated by the court.³⁷ Where an original party is in default for failure to appear, however, it seems probable that service as to him must be made as required under Rule 4 for the service of process.³⁸

The proposed complaint or answer of the intervener must state a well pleaded claim or defense.³⁹ On the application for intervention, the well

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31. Late intervention, where intervention is of right, is usually a problem of status, but timely application is important. See *Seligman v. City of Santa Rosa*, 81 Fed. 524 (N. D. Cal. 1897); *Lamb v. Bonds & Dillard Drilling Corp.*, 107 S. W. (2d) 500 (Tex. 1935).

32. *Gaines v. Clark*, 275 Fed. 1017 (App. D. C. 1921); *Central State Trust Co. of N. Y. v. Cincinnati, H. & R. Ry.*, 169 Fed. 466 (S. D. Ohio, 1908).

33. *United States v. Radice*, 40 F. (2d) 455 (C. C. A. 2d, 1930).

34. *United States Casualty Co. v. Taylor*, 64 F. (2d) 521 (C. C. A. 4th, 1933).

35. See *infra*, p. 917.

36. Rule 24(c). April, 1937, DRAFT at 61.

37. April, 1937, DRAFT at 15. For substituted service upon the attorneys of the original party by the intervener, see *Gasquet v. Fidelity Trust & Safety Vault Co.*, 57 Fed. 80 (C. C. A. 5th, 1893), where such service was held sufficient.

38. April, 1937, DRAFT at 7. Rule 5 expressly excepts those in default for failure to appear in subdivision (a).

39. *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600 (E. D. Wis. 1912).

pleaded allegations will be taken as true.⁴⁰ Ordinary rules of procedure will control the interpretation of the pleading.⁴¹ Thus in pleading fraud it will be necessary to state facts in some detail.⁴² An intervening shareholder cannot avoid the rules requiring shareholders who desire to present a corporate defense to state that the directors have been asked to take action and have refused, or that through reason of fraud such a request would be meaningless and therefore unnecessary.⁴³ Whether a good defense is stated is, of course, a problem of substantive law. Thus in the *Equitable Trust Co.* case,⁴⁴ where stockholders desired to prove a note issue was *ultra vires* and void as to the corporation, the court pointed out that the corporation could not raise the defense while retaining the benefits of the transaction, and that therefore the stockholder would not be aided by that defense.

Interveners will be subject to the general pleading and procedure rules, *e.g.*, rules on joinder of actions and parties.⁴⁵ If intervention is denied, there is a right to appeal from the order denying intervention only if the right to intervene was absolute, unless the trial court abused its discretion in denying the discretionary right to intervene.⁴⁶ But it could seldom, if ever, be shown that the trial court abused its discretion in denying the permissive right to intervene. Once intervention has been allowed, the intervener has the right to appeal from all interlocutory and final orders which affect him and from which an appeal is given by statute, whether the right under which he intervened was originally absolute or discretionary.⁴⁷ In straight bankruptcy and in reorganizations through bankruptcy an appeal will be as of right or by permission depending upon the issue involved and whether it comes within Section 24 or Section 25 of the Bankruptcy Act.

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40. *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*, 280 Fed. 934 (D. Del. 1922); *United States v. Northern Securities Co.*, 128 Fed. 803 (S. D. Minn. 1904).

41. *Watson v. National Life and Trust Co.*, 162 Fed. 7 (C. C. A. 8th, 1908).

42. *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600 (E. D. Wis. 1912).

43. *In re Eureka Anthracite Coal Co.*, 197 Fed. 216 (W. D. Ark. 1912). See *Ashwander v. Tennessee Valley Authority*, 297 U. S. 283 (1936); *McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit* (1937) 46 YALE L. J. 421.

44. *Equitable Trust Co. of New York v. Washington-Idaho Water, Light & Power Co.*, 300 Fed. 601 (E. D. Wash. 1924).

45. Rules 18, 19, 20.

46. *Ex parte Matter of Leaf Tobacco Board of Trade of N. Y.* 222 U. S. 578 (1911); see *In re Engelhard & Sons Co.*, 231 U. S. 646 (1914); *United States v. Radice*, 40 F. (2d) 445 (C. C. A. 2d, 1930).

47. *Williams v. Morgan*, 111 U. S. 684 (1884); *Michigan Cent. R.R.*, 124 Fed. 727 (C. C. A. 6th, 1903); *Jones & Laughlins, Ltd. v. Sands*, 79 Fed. 913 (C. C. A. 2d, 1897).

An intervener must be sharply distinguished from a mere *amicus curiae* or a person who has been heard but has never intervened.⁴⁸ Thus stockholders, who file petitions of intervention which are never acted upon, or bondholders whose petition for intervention is dismissed, may not appeal from a final order entered later in the proceedings, since they were not parties to the action.⁴⁹ Since in the past an allowance of an appeal has been necessary if the court refused to grant an appeal, the remedy has been to secure mandamus from the appellate court.⁵⁰ Because of the difficulty of determining whether the right to intervene is absolute or discretionary, it has been suggested that permission to appeal should be given in every case.⁵¹ The appeal would then be dismissed if the right to intervene were only discretionary and the trial court had not abused its discretion in denying intervention.⁵² In common practice, however, upon deciding that the right to intervene was only discretionary, the appellate court has not dismissed the appeal, but rather has affirmed the order denying admission.⁵³

The same general theory will apply under the Rules. The procedure, however, has been changed. In the usual case where the appeal is to a circuit court of appeals, the applicant for intervention whose petition has been denied would file a notice of appeal, and further proceed in accordance with Rules 73, 74, 75 and 76, which deal with the perfecting of an appeal and the record thereon. If the appeal were from an order denying the discretionary right, the circuit court of appeals could dismiss the appeal unless abuse of discretion were shown. But since this will involve some examination of the record, the practice in all cases, whether the right is absolute or discretionary, will probably conform to that of the past, *i.e.*, an examination of the merits of the intervener's claim.

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48. See Moore and Levi, *supra* note 1, at 568, n. 11.

49. *Ex parte Cutting*, 94 U. S. 14 (1876); *Matter of Kenmore-Granville Hotel Co.*, 92 F. (2d) 778 (C. C. A. 7th, 1937).

50. See *Richfield Oil Co. v. Sawtelle*, 279 Fed. 851 (C. C. A. 9th, 1921); *cf. In re Engelhard & Sons Co.*, 231 U. S. 646 (1914).

51. *United States v. Philips*, 107 Fed. 824 (C. C. A. 8th, 1901). The necessity for appeal would be decreased if the order denying intervention did so without prejudice or stated that it did so because the intervener's interest was not sufficient to justify an absolute right to intervene and the court felt that trial convenience would suffer from intervention. This would remove the possibility of the denial being *res adjudicata* as to the merits of the intervener's claim. See *Trust Co. of America v. Norfolk & S. Ry.*, 174 Fed. 269 (E. D. Va. 1909).

52. *Palmer v. Bankers' Trust Co.*, 12 F. (2d) 747 (C. C. A. 8th, 1926).

53. *Farmers' & Merchants' Bank of Phoenix, Ariz. v. Ariz. Mut. Savings & Loan Ass'n*, 220 Fed. 1 (C. C. A. 9th, 1915); *Radford Iron Co., Inc. v. Appalachian Elec. Power Co.*, 62 F. (2d) 940 (C. C. A. 4th, 1933); *United States Trust Co. of New York v. Miller*, 262 U. S. 58 (1923).

Normally the appeal itself will follow the procedure for appeal of the main proceedings.⁵⁴ If this procedure were limited to appeal to the circuit court of appeals, an appeal of the intervener will be similarly limited, even though the intervener's claim is of such nature that in an independent proceeding he would be entitled to a right of appeal to the Supreme Court.⁵⁵

II. THE STATUS OF THE INTERVENER

Equity Rule 37 provided that "intervention shall be in subordination to and in recognition of, the propriety of the main proceeding."⁵⁶ This requirement was suggested by the bar committee of the Circuit Court of Appeals of the Eighth Circuit.⁵⁷ The requirement is ambiguous. Literally applied, a third person would always be precluded from intervention as a defendant to challenge the plaintiff's claim. Yet manufacturers are commonly allowed to intervene and present a defense to a patent infringement action brought against a dealer.⁵⁸ But when a person is allowed to intervene and present a defense in the same manner as an original defendant, it is a misuse of language to say that such intervention is in subordination to, and in recognition of, the propriety of the main proceeding. Trouble and confusion lurk in the ambiguities of the requirement.

*Whittaker v. Britson Manufacturing Co.*⁵⁹ is the crowning example of its danger. In this action certain creditors apparently in agreement

54. *Rouse v. Letcher*, 156 U. S. 47 (1895); *Gregory v. Van Ee*, 160 U. S. 643 (1896); *Begg v. New York City*, 262 U. S. 196 (1923); *United States v. Northwestern Development Co.*, 203 Fed. 960 (C. C. A. 9th, 1913); *Barrett v. Commercial Credit Co.*, 296 Fed. 996 (App. D. C. 1924).

55. *Cf. Whittington v. Smith*, 16 F. Supp. 448 (E. D. Tex. 1936) where in a suit before a three-judge court to restrain certain officials of Texas from enforcing its conservation law, questions between interveners and plaintiff were by agreement submitted to and were to be decided by a single judge. If this procedure is followed, the appeal in the main proceeding will be direct to the United States Supreme Court, while the appeal on the issues between the plaintiff and the interveners will be to the circuit court of appeals. The three-judge court, however, dismissed plaintiff's bill, and stated that the case between plaintiff and interveners fell with it.

56. REV. STAT. § 913 (1875), 28 U. S. C. § 723 (1934); Equity Rule 37, adopted in 1912.

57. See HOPKINS, FEDERAL EQUITY RULES (1933) 232; *Consolidated Gas Co. v. Newton*, 256 Fed. 238 (S. D. N. Y. 1919); *State of North Carolina v. Southern Ry.*, 30 F. (2d) 204, 208 (C. C. A. 4th, 1929); see also *Bancroft v. Allen*, 174 So. 749, 761 (Fla. 1937).

58. See *infra*, p. 921.

59. 43 F. (2d) 485 (C. C. A. 8th, 1930); *cf. Zeiting v. Hargardine-McKittrick Dry Goods Co.*, 244 Fed. 719 (C. C. A. 8th, 1917) where the court permitted intervention of the stockholder to contest a voluntary bankruptcy petition filed by the corporation, without any mention of Equity Rule 37.

with Bricton, the controlling figure of the manufacturing company, secured a default judgment against the company for \$51,000. Service in the action was made upon one Breed, a supposed director of the company, a 72-year old gentleman living on a farm, who had been so ill for ten months prior to service that it had been impossible for him to move from one place to another without assistance, and who was so little interested in the matter that he did not advise any officers of the company of the service upon him. He had been a director, having been given one share of stock by Bricton in 1923. In 1923 he had attended one meeting of the board of directors, but since that time had received no notice of any directors' meeting and had attended none prior to the litigation, which was in 1929. Soon after this default judgment an involuntary petition in bankruptcy was filed against the corporation, service was again made upon Breed, and adjudication had. Stockholders and creditors of the corporation sought to intervene soon thereafter in the case in which the default judgment had been entered, and in the bankruptcy proceeding, to set aside the default judgment and the adjudication of bankruptcy. The petitions were denied because of the requirement in question. Small wonder that the Eighth Circuit, which had sponsored the requirement, should deplorably observe:⁶⁰

"If we could see any legal way in which we could, without doing violence to well-established rules of equity, set aside these judgments and permit the interveners to contest the question of insolvency and the amount of the attorney's fees (the default judgment), we would do so, but in the condition of this record our hands are tied by Equity Rule 37 . . . They (interveners) do not attempt to come into the action as interveners in subordination to the main proceedings but in defiance thereto. To seek to set aside the entire proceedings in a case and to have the same held for naught on the ground that they were absolutely void cannot be in recognition of the propriety of the main suit. We are forced somewhat reluctantly to the conclusion that appellants come under the prohibition of Equity Rule 37 . . . "

Had the court realized that the rule of subordination was construed generally to effect a workable procedure it could have avoided the harsh result. The rule of subordination probably was designed to preclude an intervener from raising frivolous issues, attacking administrative orders already made, interfering with the general control of the litigation, and unduly delaying such litigation. In a great many cases the requirement has been used by courts to thwart such tactics in interveners and also as a make-weight argument in denying the merits of an intervention.

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60. 43 F. (2d) 485, 489.

The May, 1936 draft of the Rules stated that:⁶¹

"An intervener shall have the right to litigate the claim or defense for which he intervenes on the merits; and new parties may be brought in when necessary to adjudicate fully the claim of the intervener."

No comparable provision was contained in the April, 1937 draft, nor the final draft. But the intervention rule does not state, as did Equity Rule 37, that intervention must be subordinate to the main proceedings. By implication, therefore, the rule negatives the subordination requirement of old Equity Rule 37. With the subordination requirement of Equity Rule 37 omitted, it was superfluous to add that the intervener could litigate on the merits the claim or defense for which the intervention was permitted. Further, Rule 13 on Counterclaim and Cross-claim in the April, 1937 draft was expanded to include all parties to an action, and was not delimited to the defendant as was Equity Rule 30 and Rule 18 of the May, 1936 draft which dealt with Counterclaim and Cross-claim. It was, therefore, unnecessary to provide expressly that an intervener could counterclaim and bring in third parties. He may do so if the pleading which he proposes to file when he seeks intervention shows that he desires to press a counterclaim; otherwise he will be permitted to amend that proposed pleading in the sound discretion of the court to state a counterclaim. A strict interpretation of Rule 13 might limit that rule to original defendants, and thus preserve the doctrine of *Chandler & Price v. Brandtjen & Kluge, Inc.*,⁶² but such an interpretation would not do justice to the plain language of the rule.

Cases construing the subordination requirement of Equity Rule 37 will be helpful in indicating the utility and the danger of a rule which deals with subordination. Those that preclude a hearing of the intervener's claim or defense on the merits should no longer be regarded as persuasive. Those that keep intervention within bounds—by precluding the intervener from raising frivolous issues, from attacking administrative orders already made, from interfering with the general control of the litigation, and from unduly delaying such litigation—are helpful because of their inherent good sense.⁶³

Cases concerning the intervener's status which are often dealt with under the heading of subordination may be grouped into four classes:

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61. Rule 29, p. 50 of the PRELIMINARY DRAFT.

62. 296 U. S. 53 (1935), discussed *infra*, p. 924.

63. State provisions generally do not delimit the status of the intervener. See Moore and Levi, *supra* note 1, at 575-577. Two exceptions are Florida and Michigan. FLA. COMP. GEN. LAWS ANN. (Skillman, Supp. 1934) § 4918(2); MICH. COMP. LAWS (1929) § 14019. But the Michigan provision is not as sweeping as the federal equity rule: intervention is to be "in subordination to and in recognition of the propriety of the main proceeding, unless otherwise ordered by the Court in its discretion."

subordination (properly speaking), prior orders and decrees, counter-claims and the right to bring in third parties, and future orders.

SUBORDINATION

The subordination rule limits the kinds of questions which the intervener may raise in the proceeding and operates differently as to each. These questions may be roughly classified as three: (1) the real jurisdiction of the court, *i.e.*, the power of the court to pronounce a judgment good against collateral attack; (2) the assumption of jurisdiction over the proceedings, *i.e.*, whether the court in its discretion should have proceeded in the action; (3) the merits of a claim or defense. In most cases the operation of the subordination rule is dependent upon whether the intervener has an absolute right to intervene or only a discretionary right allowed for the purpose of trial convenience.

Lack of Real Jurisdiction. An intervener, no matter whether his right to intervene be discretionary or absolute, may question the court's real jurisdiction over the subject matter. A lack of real jurisdiction must be taken account of by the court itself, and no matter how the question is raised, a court will have to dismiss proceedings over which it lacks such jurisdiction. That an intervener may question the lack of real jurisdiction is indicated in *Scattergood v. American Pipe*,⁶⁴ where the debtor corporation had not objected to the improper venue and had consented to the appointment of a receiver. An intervening stockholder raised the question of the lack of jurisdiction and the propriety of the appointment of the receiver. The court states that as to the lack of jurisdiction, "either the District court or this court would be bound to take note of that fact (however the knowledge might be acquired) and to dismiss the bill of its own motion."⁶⁵ The court concluded, however, that there was real jurisdiction over the proceedings: (1) there was diversity of citizenship and the requisite amount in controversy; and (2) there was corporate property within the district. It refused to hear the intervener's claim that the property within the district was insufficient to warrant the appointment of a receiver, *i.e.*, the propriety of the court proceeding in the action. This refusal seems proper, because unless the directors of the corporation are acting fraudulently they represent adequately all stockholders on such administrative questions as to where the receivership should proceed.⁶⁶

64. 249 Fed. 23 (C. C. A. 3d, 1918); *cf. In re Veach*, 4 F. (2d) 334 (C. C. A. 8th, 1925) where it was said an intervener might not raise the question of whether an indispensable party had not been joined. But the court decided the issue on its merits, concluding that the party was not only not indispensable but improper.

65. 249 Fed. 23, 25 (C. C. A. 3d, 1918).

66. See Moore and Levi, *supra* note 1, at 591 *et seq.*

In *Cochrane v. Potts Sons & Co.*,⁶⁷ intervention was allowed state trustees of various security issues for the purpose of contesting the jurisdiction of the federal court. They denied its power to appoint a receiver over collateral underlying their issues in a proceeding begun by a plaintiff who, it was alleged, had no interest in their collateral. The Circuit Court of Appeals ordered the collateral securities in question turned over to the interveners on the theory that the federal court had no jurisdiction over that subject matter, *i.e.*, over the collateral securities in which plaintiff was not interested. To be sure, one can frequently find courts stating that the intervener may not question the jurisdiction of the court, but in these cases usually something other than real jurisdiction is meant.⁶⁸

Just as any intervener may raise the question of a lack of real jurisdiction, because the court is bound to take notice of this defect itself, intervention will not serve as a means of conferring real jurisdiction.⁶⁹ On the other hand, even though the action was improperly brought and should, and eventually will, be dismissed, the court may retain jurisdiction to adjudicate issues raised by interveners when necessary to do justice.⁷⁰

Propriety of Proceeding. In many cases the court has what we have termed real jurisdiction, but the contention is nevertheless made that the court should not proceed further with the action because of its improper assumption of jurisdiction. The largest group of cases in this category are those where a receivership was begun on an unsecured creditor's

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67. 47 F. (2d) 1027 (C. C. A. 5th, 1931).

68. The court in *In re Veach*, 4 F. (2d) 334 (C. C. A. 8th, 1925) apparently did mean that the intervener could not question its real jurisdiction, but it went on to consider the question on its merits, concluding that such jurisdiction actually was present. See also *Johnson v. Manhattan Ry. Co.*, 61 F. (2d) 934 (C. C. A. 2d, 1932) where there was a collateral attack on the decrees passed by a federal circuit judge sitting as a district judge, as being allegedly void since the appointment of the receiver by the circuit judge was in violation of the rules of the district judges. The collateral attack failed, the court stating that a direct attack could have been made through intervention despite the subordination rule. This does not seem to have involved real jurisdiction. But since the attack was on the power of the receiver, representation would be inadequate for shareholders (despite the consent of the defendants) and the right to intervene and attack discretionary jurisdiction would be absolute. Further, the order of the court stated that "the defendant or other party in interest may be heard."

69. *Cochrane v. Potts*, 47 F. (2d) 1027 (C. C. A. 5th, 1931); *cf.* *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491 (1923); *Hill v. Wilson*, 210 Fed. 200 (C. C. A. 5th, 1914); *Richards v. Chesapeake*, 20 Fed. Cas. 692 (Va. 1876); See also *Bricton Mfg. Co. v. Woodrough*, 284 Fed. 484 (C. C. A. 8th, 1922); *Board of Drainage Comm. of Pender County v. Lafayette*, 27 F. (2d) 286 (C. C. A. 4th, 1928); *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 336 (W. D. Pa. 1891); *Pianta v. H. M. Reich*, 77 F. (2d) 888 (C. C. A. 2d, 1935).

70. *Electrical Supply Co. v. Put-in-Bay Waterworks, Light and Railway Co.*, 84 Fed. 740 (N. D. Ohio, 1898); see *McKinney v. Black Panther*, 280 Fed. 486 (C. C. A. 8th, 1922).

bill without execution returned unsatisfied, or where the court assumed jurisdiction over a corporation through a receivership when the corporation's main assets or domicile were in another venue, but where the corporation had waived the venue defense. Both of these cases represent instances where, under certain conditions, it may be argued that an assumption of jurisdiction may be an abuse of discretion. Indeed, the status of a receivership begun on an unsecured creditor's bill without execution returned unsatisfied has never been satisfactorily settled, but it has been pointed out that the doubt concerns not what we have termed real jurisdiction, but rather the propriety of giving receivership relief.⁷¹ The intervener who desires to raise such a question has, of course, been met with the subordination rule. It would seem that if the intervener's right to intervene is absolute, he will be able to successfully raise this question; on the other hand, if the intervener's right is discretionary and he is permitted to intervene to facilitate the litigation of his claim or defense, he will not be permitted to argue that the court should not proceed further. The cases denying the intervener's right to raise the question of an improper assumption of jurisdiction are, with one possible exception,⁷² cases in which the intervener's right was only discretionary and in which, furthermore, the court decided the issue on its merits against the intervener.

The rule that an intervener with an absolute right to intervene may contest the discretionary jurisdiction of the court finds some support in the dictum in *Union Trust Co. of Pittsburgh v. Jones*.⁷³ There the intervener, without an absolute right to intervene, desired to question the propriety of an equity receivership begun on an unsecured creditor's bill. The court, in stating that the intervener with a discretionary right to intervene could not question this type of jurisdiction, pointed out that the intervener was neither a necessary nor a proper party in the litigation. It may be possible to construe this statement as meaning that the intervener's interest in the litigation was not sufficiently great to justify his raising this type of question. There is an implication that the intervener's interest would be sufficiently great, if he had an absolute right to intervene, for in those cases his interest in property is in grave jeopardy or he is already a party to the proceeding but inadequately represented. In *Central Trust Co. v. McGeorge*,⁷⁴ stockholders and creditors, who ap-

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71. See Sabel, *Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships* (1934) 19 IOWA L. REV. 406, 540, (1934) 20 IOWA L. REV. 83, 97.

72. Whittaker v. Bricton Manufacturing Co., 43 F. (2d) 485 (C. C. A. 8th, 1930), discussed *supra*, p. 907. And the dictum in *Johnson v. Manhattan Ry.*, 61 F. (2d) 934 (C. C. A. 2d, 1932) would allow the intervener to raise the question of an improper assumption of jurisdiction.

73. 16 F. (2d) 236 (C. C. A. 4th, 1926).

74. 151 U. S. 129 (1894).

parently had no absolute right to intervene, unsuccessfully questioned the propriety of a receivership over the corporation in a district outside the corporate domicil. The court in the *Scattergood* case,⁷⁵ in explaining the *McGeorge* case, points out that the stockholders and creditors would have been able to raise the question of a lack of real jurisdiction; they could not, however, question the discretion of the court in assuming jurisdiction where the corporation had waived its right not to be sued in a district outside its domicil. In *Primos Chemical Co. v. Fulton Steel Corporation*,⁷⁶ the court had taken jurisdiction through an equity receivership over a debtor who had only personal property in the district of the court. Judge Augustus Hand held that the court did have jurisdiction, and stated that the interveners could not raise the question of whether the court in its discretion should have taken jurisdiction where the original defendants had appeared voluntarily and submitted to the jurisdiction. The interveners in the *Primos* case had only a discretionary right to intervene.⁷⁷

Contesting the Merits of a Claim or Defense. Finally, the intervener may desire to question the merits of a claim or defense. Thus he may desire (1) to question whether the allegations of the complaint are sufficient, or (2) to contest a claimant's right to a certain amount of damages, or (3) to press a claim of his own which will have the effect of reducing the value of other claims.

There seems to be no doubt that an intervener having an absolute right to intervene can raise any one of these issues.⁷⁸ It would be meaningless to give him an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary for his own protection. Thus in *Harrison v. Nixon*,⁷⁹ the Supreme Court, in an opinion by Mr. Justice Story, allowed the claimants of a fund in the hands of the executor to intervene ten years after the death of the testator and nearly six months after the final decree and to point out successfully that the entire proceeding in the circuit court was a nullity because of a failure to allege the domicil of the testator.

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75. 249 Fed. 23, 25 (C. C. A. 3d, 1918).

76. 255 Fed. 427 (S. D. N. Y. 1918).

77. *Ibid.*

78. *McGraw v. Mott*, 179 Fed. 646 (C. C. A. 4th, 1910); *Clymore Production Co. v. Thompson*, 11 F. Supp. 791 (W. D. Tex. 1935).

79. 9 Pet. 483 (U. S. 1835). Note the vigorous dissent of Mr. Justice Baldwin. "A final decree of a circuit court, rendered in a long-pending and zealously contested cause, after the fullest consideration, has not only been reversed, but all its proceedings so completely annulled as to open the case to new parties, new bills, pleadings, issues and evidence; and to make it necessary to begin de novo, in the same manner as if the Court had never acted on any question which could arise." *Id.*, at 506. This case should be remembered in connection with the ordinary applicable rule that an intervener is bound by prior decrees. See *infra*, p. 916.

It may be suggested, also, that an intervener who has only a discretionary right to intervene should also be allowed to raise any one of these objections insofar as these claims are antagonistic to the claim or defense for which he is permitted to intervene. It is clear that these questions may unduly burden the proceedings when raised by one having only a discretionary right to intervene. The remedy, however, is to deny intervention, or at least to allow intervention only for limited purposes.⁸⁰ If the proper procedure for intervention is followed, the court may allow intervention either generally or specially upon the basis of the pleading which the intervener proposes to file. It would seem quixotic, however, to allow intervention, and then to deny the intervener the right to present his claim or defense, because in doing so, as will often be the case, he is forced to attack a claim or defense or to reduce the value of other claims.

If trial convenience will not be served by a presentation of the intervener's claim or defense, the permissive right to intervene for that purpose should be denied. Many cases denying intervention are explainable on this ground. Thus persons claiming an equitable lien on securities have been denied intervention in a suit for the return of those securities, where the court denied the equitable lien, and where the intervener sought to contest the plaintiff's right, in his capacity as statutory receiver, to sue for the securities.⁸¹ A state has been denied the right to intervene in a receivership in order to show that the purpose of the receivership is the final step in the consummation of an illegal merger or consolidation.⁸² The heir of a settlor has been denied the right to contest the present validity of a trust, when the main proceeding involved an attempt to discover whether the consolidation of Leander Clark College and Coe College was in violation of the terms of the trust fund or whether the fund should be applied *cy pres*.⁸³ Intervention has been denied to a discretionary intervener for the purpose of showing that the plaintiff

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80. Thus where a judgment creditor brought a creditor's bill against a corporation to reach its equity in property mortgaged by it, a stockholder substantially interested in the corporate defendant was not allowed to intervene to raise questions in issue in a state court proceeding between applicant and the corporation on one side and the plaintiff on the other relative to a stock and bond transaction. The issues were thought to be dissimilar, and trial convenience best served by allowing the federal and state court litigation to proceed separately. *Coffin v. Chattanooga Water & Power Co.*, 44 Fed. 533 (S. D. Tenn. 1891). See *Universal Oil Products Co. v. Standard Oil Co. of Indiana*, 6 F. Supp. 37 (W. D. Mo. 1934).

81. *Hopkins v. Lancaster*, 254 Fed. 190 (N. D. Ala. 1918). The court, while denying the right of the intervener to raise these questions, did dispose of these questions on their merits, as is often the case in intervention cases.

82. *State of North Carolina v. Southern Ry.*, 30 F. (2d) 204 (C. C. A. 4th, 1929).

83. *Schell v. Leander Clark College*, 10 F. (2d) 542 (N. D. Ia. 1926).

was not the real party in interest, even though if this had been proved the court might have lacked jurisdiction.⁸⁴

It may be suggested, however, that if the problem of the discretionary intervenor were treated as one of trial convenience, and not as a matter generally involving a problem of subordination, many cases denying intervention ostensibly on a basis of the subordination rule would have been decided differently. For instance, the Eighth Circuit has denied intervention to creditors in a foreclosure proceeding for the purpose of contesting the validity of the trust deed.⁸⁵ While the denial cannot be said to have been improper, assuming the representation of the creditors in the proceedings was adequate, the court apparently denied intervention because the interveners could not attack the validity of the trust deed since "it was the trust deed which had produced the fund in court."⁸⁶ Since the validity of the trust deed is a matter of real concern in the main litigation, there seems to be no purpose in delaying the discussion of its validity until after the decree of sale when the creditors would have an interest in a fund in court and an absolute right to intervene. Trial convenience is not served by such action.

The *Whittaker* case⁸⁷ serves to illustrate again the somewhat unique position occupied by creditors and stockholders in receivership or bankruptcy proceedings. Because they are supposedly represented already in the proceedings, their entrance may be dependent upon a showing of inadequate representation. In the *Forbes* case it was held that in a receivership of a corporation obtained at the suit of a stockholder, other stockholders might not intervene in order to file a cross bill to have the receiver's sale suspended. It had not been shown that there was "collusion or fraud" in the institution of the proceedings. Representation was supposedly adequate because the court was "satisfied that the charges of fraud and collusion made against the receiver are entirely ground-

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84. *Mueller v. Adler*, 292 Fed. 138 (C. C. A. 8th, 1923); *Adler v. Seaman*, 265 Fed. 828 (C. C. A. 8th, 1920).

85. *First Trust Co. v. Illinois Central R.R.*, 252 Fed. 965 (C. C. A. 8th, 1918), *cert. denied*, 249 U. S. 615. But see *Couch et al. v. Central Bank and Trust Corp.*, 297 Fed. 216 (C. C. A. 5th, 1924). See *Burrow v. Citizens' State Bank*, 74 F. (2d) 929 (C. C. A. 5th, 1935). Suit was brought by a bank to recover from an insurance company for losses sustained by the bank personally and as bailee. The coverage of the policies was limited, and insufficient, if the bank's own claim was as large as alleged, to cover fully the loss of the bailors. The bailors sought to intervene to contest the amount of the bailee's own claim. While the subordination rule was not mentioned, the denial of intervention seems to carry with it a trace of that rule. And see also *Baxter v. McGee*, 82 F. (2d) 695 (C. C. A. 8th, 1936).

86. 252 Fed. 965, 968 (1918).

87. 43 F. (2d) 485 (C. C. A. 8th, 1930); *cf. Zeiting v. Hargardine McKittrick Dry Goods Co.*, 244 Fed. 719 (C. C. A. 8th, 1917); *In re Beaver Cotton Mills*, 275 Fed. 498 (D. C. N. D. Ga. 1921).

less."^{87a} The difficulty could be avoided by a frank recognition that stockholders and creditors at the present time are not adequately represented in such proceedings and should therefore be granted an absolute right to intervene.

PRIOR DECREES

Closely connected with the idea of subordination, and indeed often treated as though it were a part of that principle, is the general and well settled rule, stated by Mr. Justice Brandeis to be "that intervention will not be allowed for the purpose of impeaching a decree already made."⁸⁸ Consent decrees and administrative orders are, therefore, not ordinarily subject to attack.^{88a} This general intervention rule is based upon the same policy underlying the general rule of finality of orders and judgments between original parties. And just as there are exceptions to the latter rule, so are there exceptions to the general intervention rule. Rarely, however, should administrative orders and decrees entered prior to intervention be set aside at the intervener's behest. Nor should other orders and decrees be set aside unless a clear case is made out that such prior order or decree would deprive the intervener of substantial rights which he has not been remiss in pressing. The fact that the petitioner has an absolute right to intervene will not in itself be a basis for the avoidance

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87a. 9 Fed. Cas. 408, 413 (C. C. W. D. Tex. 1872). See *In re Babcock*, 26 F. (2d) 153 (C. C. A. 7th, 1928) (where quasi parties allowed discretionary intervention, it may be specially limited). See also *Toledo, St. L. & K. C. Ry. v. Continental Trust*, 95 Fed. 497 (C. C. A. 6th, 1899).

88. *United States v. California Coop. Canneries*, 279 U. S. 553, 556 (1929). But note in *St. Louis & S. F. R.R. v. Spiller*, 274 U. S. 304 (1927) where a creditor of a corporation had failed to file his claim in the reorganization proceedings. The final decree as interpreted by the Supreme Court did not provide for his participation. Nevertheless, he was allowed to file his claim at a later date. There was "no good reason," Mr. Justice Brandeis stated, "why relief may not be had as well upon intervening petition as upon an original bill." Cf. *Wenborne-Karpen Dryer Co. v. Dort Motor Car Co.*, 14 F. (2d) 378 (C. C. A. 6th, 1926).

88a. The rule has been carried to dubious lengths in *Keller v. Wilson*, 194 Atl. 45 (Del. 1937) where intervention after a settlement but before a motion to dismiss was said to come too late. Cf. *Tretolite Co. v. Darby Petroleum Corp.*, 5 F. Supp. 445 (N. D. Okla. 1934), where the court indicated that an intervener with an absolute right would not be barred by consent decree. In *Guarantee Trust & Safe Deposit Co. v. Duluth & W. R. Co.*, 70 Fed. 803 (D. Minn. 5th, 1895) intervention was allowed stockholders after a consent decree.

Cf. *Foote v. Parsons Non-Skid Co.*, 196 Fed. 951 (C. C. A. 6th, 1912), and *United States v. Columbia River Packers Ass'n*, 11 F. Supp. 675 (D. C. Ore. 1935). In both of these cases intervention was thought discretionary and was denied on the subordination issue. In the latter case, the appellate court held intervention to be of right, and held it error to deny intervention because of the subordination rule. *United States v. Columbia River Packers Ass'n*, 81 F. (2d) 421 (C. C. A. 9th, 1936).

of this rule. It should be pointed out that the rule as to prior decrees does not regulate the right of the petitioner to intervene, but nevertheless where the right to intervene is discretionary, one factor in denying intervention will be the administrative inconvenience that intervention might cause, or the fact that intervention for the sole purpose of attacking a prior decree would be useless.⁸⁹ Where the right to intervene is absolute, however, it is particularly important that the problems be kept separate. In *Ex parte Jordan*, where bondholders desired to intervene and to object to certain prior orders and final decrees rendered prior to their admission in the proceeding, the Supreme Court in allowing intervention distinguished between the right to intervene and the possibility of contesting the prior orders and decrees. "When the case gets here the petitioners may not be allowed to go behind orders actually made by the court as to the administration of the property before they were permitted to defend."⁹⁰

The rule as to prior decrees shades off into a general rule that the late intervener who has been guilty of what might be termed laches will not be allowed to cause undue administrative inconvenience which would have been avoided but for his delay. It is well to remember, however, that the fact that intervention is sought at a late date in the proceedings does not necessarily mean that prior orders will be questioned nor that there will be administrative difficulties. Thus in the receivership of the *First Federal Trust Co. v. First National Bank of San Francisco*,⁹¹ creditors were permitted intervention to ask for immediate sale and liquidation, despite the lapse of four years, since the court felt that intervention made for no administrative difficulties. It seems particularly important that the question of laches or lateness in intervening should not be treated in the first instance as controlling the right of the intervenor to come into the proceedings, but rather should be considered at a later time when the intervenor's claim or defense is considered on the merits. Where a purchaser at a foreclosure sale sought to intervene two years later in the proceedings and reject a contract which ran with the purchase, Chief Justice Taft commented: "It may be that equity will not give it (the purchaser) relief from mistake under the circumstances. It may be that it has acquiesced and may be denied relief on that account.

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89. *Rheinberger v. Security Life Ins. Co. of America*, 72 F. (2d) 147 (C. C. A. 7th, 1934).

90. 94 U. S. 248, at 252 (1876). The interveners had been "defendants and actors" in a reference before a master, although "it is true that the petitioners were not parties to the suit until after the bill was taken as confessed.

91. 297 Fed. 353 (C. C. A. 9th, 1924). The trial court had also denied the right of trustees under a deed of trust to intervene. The trustees would seem to have had an absolute right to intervene based on an interest in property in the custody of the court, and the appellate court considered the trustees' claims on their merits. Cf. *Hutchison v. Philadelphia & G. S. S. Co.*, 216 Fed. 795 (E. D. Pa. 1914).

It may be that it has been guilty of laches. But these are questions on the merits."⁹²

Many examples can be given of the operation of the rule under consideration as a limitation upon the status of the intervener. In *Harris Trust & Savings Bank v. Chicago Rys. Co.*,⁹³ the rule as to prior decrees was one ground for denying the contention of interveners that the amount paid by the receiver of the Chicago Railways to the City of Chicago was improper. In *Lincoln Printing Co. v. Middle West Utilities Co.*,⁹⁴ it was said that the intervening owner of stock could not question the original appointment of the receiver, although he could question the present ineligibility of the receiver. Where the court has appointed a receiver on condition that certain claims be prior to the claims under the mortgage, bondholders who intervene are bound by the previous consent of the trustee to the order.⁹⁵ It has been held that interveners may not question a prior decree of sale,⁹⁶ nor may they have a receivership continued when prior to their intervention it was held to be improper.⁹⁷ One court has allowed intervention on the express provision that evi-

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92. *Cincinnati, Indianapolis & Western Railroad Co. v. Indianapolis Union Ry.*, 270 U. S. 107, 116 (1926). See *Ex parte Jordan*, 94 U. S. 248 (1876) (bondholders permitted to intervene after a *pro confesso* order); *French v. Gapen*, 105 U. S. 509 (1881) (intervention after decree of sale.) Cf. *United States v. Safe Deposit Co. of New York*, 15 F. Supp. 1080 (S. D. N. Y. 1936).

The holding in *Guaranty Trust Co. of New York v. Minneapolis & St. L. Ry.*, [52 F. (2d) 418 (C. C. A. 8th, 1931)] seems open to criticism on this point. Here intervention was denied to a bondholders' committee because the bondholders were sufficiently well represented by the trustee and also because the committee did not attempt to assert its claim of the invalidity of the pledge of bonds to the United States until six years after the receivership began and after final decree of foreclosure and sale. The court brushed aside the argument of the committee that not until the end of the six year period had it discovered the facts upon which it based its claim because "the mere failure and neglect of the committee to employ counsel until after final decree has been entered furnishes no excuse for its negligence and delay in seeking to protect its alleged rights." *Id.*, at 422. The court nevertheless recognized the rule that intervention is a matter of right "where the petitioner, not being already fairly represented, is asserting a right which could be lost or substantially affected if intervention were denied." Where the original proceeding was filed as a class action, a later petitioning intervener will not be guilty of laches if his claims have been put forward in the class action. But he may find himself barred by laches from reopening matters finally litigated. *Bankers' Trust Co. v. Virginia Ry. & Power Co.*, 273 Fed. 999 (C. C. A. 4th, 1921); cf. *Pillinger v. Beaty*, 265 Fed. 551 (C. C. A. 4th, 1920).

93. 39 F. (2d) 958 (N. D. Ill. 1929).

94. 74 F. (2d) 779 (C. C. A. 7th, 1935).

95. *Farmers' Loan & Trust Co. v. Kansas City W. & N. W. Ry.*, 53 Fed. 182 (C. C. Kan. 1892). The court vacated the order making the bondholders parties, but that seems to have been unnecessary.

96. *King v. Barr*, 262 Fed. 56 (C. C. A. 9th, 1920), *cert. denied*, 253 U. S. 484 (1919).

97. *Brittson Mfg. v. Woodrough*, 284 Fed. 484 (C. C. A. 8th, 1922).

dence already taken in the original suit insofar as it bears upon the intervenor's case should be considered as taken subject to the intervenor's right to recall and examine the witnesses.⁹⁸

The Right of the Intervenor to Counterclaim, Cross-claim, and to Bring in Third Parties. The right of an intervenor to press an affirmative claim against the plaintiff goes to the very heart of the intervenor's status. It cannot be said that the status of the intervenor in this regard has been finally settled. The problem may be more clearly stated in terms of six questions: (1) may the intervenor offer as a counterclaim a counterclaim open to the original defendant; (2) may the intervenor offer as a counterclaim one not open to the original defendant; (3) may the intervenor add new parties to the proceedings; (4) may the intervenor add to the proceedings new parties who do not have the requisite diversity of citizenship when the basis of federal jurisdiction over the main proceeding is diversity of citizenship; (5) may the plaintiff interpose the defense of improper venue to the intervenor's counterclaim, even though the plaintiff would be said to have waived that defense as against an original defendant; (6) may an original party counterclaim against the intervenor. There has been a great deal of litigation on these issues in recent years, particularly with respect to patent infringement and unfair competition, and while it is impossible to answer the questions with certainty, the trend of the cases is fairly clear.

At the outset it must be again indicated that the desire of the petitioner to present a counterclaim or to add new parties may be one reason for denying intervention for these purposes, if the right to intervene is only discretionary. The fact that the intervenor's "position is essentially aggressive," as was stated in *Coffin v. Chattanooga Water and Power Co.*,⁹⁹ has been posited as a ground for denying intervention. The addition of new issues and new parties under certain circumstances may be considered contrary to orderly procedure.¹⁰⁰ Under the procedure adopted by the new Rules the court will be able to determine before intervention is allowed, subject, of course, to its power to permit amendments, whether the intervenor proposes to counterclaim or add new parties, and it may then determine the scope of the intervention which it wishes to allow.¹⁰¹

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98. *Mathieson v. Craven*, 247 Fed. 223 (Del. 1917). "The propriety of a special order in a court of equity for the reading and consideration of such evidence in favor of subsequent intervenors as against those who have had full opportunity to examine and cross-examine witnesses and adduce or oppose the introduction of documentary evidence is well settled." *Id.*, at 228.

99. 44 Fed. 533 (S. D. Tenn. 1891).

100. See *Curan and Others v. St. Charles Car Co.*, 32 Fed. 835 (E. D. Mo. 1887); *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347 (E. D. Wis. 1913).

101. Rule 24: "The motion . . . shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." See *Chandler & Price v. Brandtjen & Kluge*, 296 U. S. 53 (1935).

If general intervention has been allowed, however, it is reasonably clear that the intervener has the same right to counterclaim or cross-claim as an original party. In the field of intervention it is to be regretted that in the past petitioners have often failed to file proposed pleadings with their petitions; if they had done so, it is probable that the rules concerning counterclaims and third parties would be less strict. The Federal Rules, as pointed out above, have clarified this problem in the direction of freedom to counterclaim and cross-claim.

Up to the present the intervener's right to counterclaim was dependent on a construction of Equity Rule 30, which provides for answers and counterclaims in general. The rule states that "The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which may be the subject of an independent suit in equity against him . . ."¹⁰² The difficulty, however, is that Equity Rule 30 previously states that "The *defendant* by his answer shall set out in short and simple terms his defense." This made it possible to argue that Rule 30 was only applicable to original defendants and not to interveners, even though the interveners came in as defendants.

Equity Rule 30 has generally been applied, however, to permit an intervener to counterclaim only when the particular counterclaim was one open to the original defendant.¹⁰³ But cases so holding were all cases in which the right to intervene was only discretionary,¹⁰⁴ and therefore it is possible to argue that if the intervener had had an absolute right to intervene, his status would not have been so limited.¹⁰⁵ Where the intervener has an absolute right, and his intervention is as a party plaintiff, as is so often the case, it would seem that he might bring in third parties, and interject claims based upon his absolute right, which are not open to any of the other parties. This might well be the case even if his intervention were as a party defendant. The right to bring

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102. Uniform Equity Rules of 1912 as amended May 4, 1925; HOPKINS, *FEDERAL EQUITY RULES* (8th ed. 1933) 209. See generally, Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393.

103. *United States Expansion Bolt Co. v. Kroncke Hardware Co.*, 234 Fed. 868 (C. C. A. 7th, 1916) did allow an intervener to counterclaim when the particular counterclaim was not one open to the original defendant, but the *United States Expansion Bolt Co.* case has been overruled to that extent. See note 118, *infra*.

104. This is true because most of the cases involve patent infringements, and the manufacturer has only a discretionary right to intervene in a suit for patent infringement against his vendee. *Demulso Corp. v. Tretolite Co.*, 74 F. (2d) 805 (C. C. A. 10th, 1934). See Moore and Levi, *supra* note 1, at 585.

105. See *Alexander v. Hillman*, 296 U. S. 222 (1935), discussed *infra*, p. 925; *Compton v. Jesup*, 68 Fed. 293 (C. C. A. 6th, 1895); *St. Louis-San Francisco Ry. v. Byrnes*, 24 F. (2d) 66 (C. C. A. 8th, 1928).

in third parties was, of course, limited with the right to counterclaim. Apparently an intervener with only a discretionary right could not bring in third parties with respect to his counterclaim if the original party with whom he was aligned could not have done so relative to that counterclaim.¹⁰⁶ If the intervener with a discretionary right may bring in third parties, and if the citizenship of the third parties is material, as in diversity of citizenship, it would seem the third parties may not be added to the suit when the effect would be to oust the court of jurisdiction over the counterclaim.¹⁰⁷ If those third parties are indispensable, the counterclaim may not be adjudicated. The argument could be made that an intervener with an absolute right to intervene would not have been so limited, and that, further, in adding new parties, the intervener having an absolute right would not have to show independent jurisdictional grounds.¹⁰⁸

The historical development of the above rules on counterclaims can be traced through the following cases. The earliest case on the point appears to have been *Curran v. St. Charles Car Co.*,¹⁰⁹ where the manufacturer of an apparatus which allegedly infringed the plaintiff's patent sought intervention in a suit against his customer. The petition of the manufacturer seemed to the court to be a "reasonable request," and accordingly was allowed. The manufacturer, however, then presented

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106. *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53 (1935); *Magnolia Petroleum Products Co. v. Suits*, 40 F. (2d) 161 (C. C. A. 10th, 1930); see *Hairgrove v. City of Jacksonville*, 8 N. E. (2d) 187 (Ill. 1937).

107. *Fulton Nat. Bank of Atlanta v. Hozier*, 267 U. S. 276 (1925).

108. *Compton v. Jesup*, 68 Fed. 263 (C. C. A. 6th, 1895); *St. Louis-San Francisco Ry. v. Byrnes*, 24 F. (2d) 66 (C. C. A. 8th, 1928). See *Powell v. United States*, 57 Sup. Ct. 470 (1937), where even though the right to intervene was absolute in a suit to set aside an order of the Interstate Commerce Commission, it was held that intervention might not be for the purpose of a counterclaim "that does not arise out of the transaction that is the subject of the suit and is not germane or related to it" and is not ordinarily triable by a three judge court. The original action was to set aside an order of the Commission ordering that a Tariff be "stricken from the files." The intervener claimed that the tariff should be stricken since the operation for which the tariff was filed came under Section 1(18) as to the operation of an extension of a railroad without a certificate of public convenience. The concept "transaction germane to the suit" would seem to be sufficiently broad to cover the counterclaim, although the argument based on the special nature of the main proceeding (one before a three judge court) seems more cogent. The limitation that the counterclaim be one arising out of the transaction where there is no independent federal jurisdictional ground for the counterclaim is applicable to original defendants as well as interveners. See *Moore v. N. Y. Cotton Exchange*, 270 U. S. 593 (1926); *Shulman and Jaegerman*, *supra* note 102 at 410. Where the plaintiff in the original action brings an ancillary bill against a stranger claiming an interest in the res, this suit may be brought without regard to the separate federal jurisdictional requirements for the ancillary bill. *Central Union Trust Co. of New York v. Anderson County*, 268 U. S. 93 (1925).

109. 32 Fed. 835 (E. D. Mo. 1887).

a counterclaim against the complainants asking that they be restrained from threatening other customers and from bringing other suits against licensees of vendees of the manufacturer. This counterclaim was one which was not open to the original defendant inasmuch as it was the vendee of only one machine. The court felt that it "ought not permit a third party to come in as a defendant and then file a cross-bill which the original defendant could not maintain,"¹¹⁰ and denied the counterclaim. At that date it was not clear that the intervener could counterclaim even if the counterclaim offered was one open to the original defendant. Thus in *Atlas Underwear Co. v. Cooper Underwear Co.*,¹¹¹ intervention was refused when the intervener desired to counterclaim against the plaintiff for patent infringement and to add a new party. The court was not sure that this counterclaim would not have been allowed the original defendant, but it felt that the intervener's interest was insufficient to justify burdening the proceedings with new parties. Later, in the *Allington* case,¹¹² the court was willing to concede that "the right of an intervening party defendant with respect to setting up counterclaims is, under Equity Rule 30, as broad as that of an original party defendant." Nevertheless, it felt that the right must be limited to those which the original defendant could exercise.

"To permit over the objections of the plaintiff, a person to intervene not *pro interesse suo* only, but as a party defendant, and then to permit such intervening party defendant to set up against the plaintiff a counterclaim for affirmative relief that is not available to the original defendant, and to which the original defendant is not entitled, would be conferring upon such third persons broad rights, indeed, with respect to litigation, and might be extending the rights of third persons beyond the point intended by Equity Rules 30 and 37."¹¹³

It was inevitable that cases involving the right of the intervener to counterclaim should eventually involve the problem of venue. Since most of the cases involved claims for patent infringements, Section 48 of the judicial Code was applicable.¹¹⁴ It states:

"In suits brought on the infringement of letters patent, the district court . . . shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which

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110. *Id.*, at 837.

111. 210 Fed. 347 (E. D. Wis. 1913).

112. *Allington v. Shevlon-Hixon Co.*, 2 F. (2d) 747 (D. Del. 1924) (the plaintiff had moved to dismiss.)

113. 2 F. (2d) 747, 749 (D. Del. 1924).

114. 28 U. S. C. A. § 109.

the defendant . . . shall have committed acts of infringement and have a regular and established place of business."

If the plaintiff in the original proceeding is not an inhabitant of the district and has not committed acts of infringement in the district, then the intervener will be unable to counterclaim against him for patent infringement unless it can be said that the plaintiff by bringing the proceedings has waived his rights under Section 48.¹¹⁵ If there is an absolute right to intervene, the intervener should be able to litigate the claim or defense for which he intervenes in all its ramifications, even though counterclaims or cross-claims are involved therein. This is so because the court's processes are being used to his prejudice. It would follow that no one could object to the presentation of his claim on the ground of improper venue if the presentation of his claim would have been allowed on other grounds. The *United States Expansion Bolt* case,¹¹⁶ coming at a time when it was not clear as to whether, or to what extent, the intervener could counterclaim under Equity Rule 30, and involving in addition the question of waiver of venue, was something of a landmark in the development of the status of the intervener on these points.

In the *United States Expansion Bolt* case, the Hardware Company was sued for its use of certain diamond screw anchors which were alleged to infringe the patent of the plaintiff. The Diamond Expansion Bolt Company, the manufacturer of these diamond screw anchors, intervened and proceeded to counterclaim for the infringement by the plaintiff of two other patents for an expansion shield and an expansion bolt, and in addition, it set up a claim for acts of unfair competition. The plaintiff was a citizen of New York; the suit was in Wisconsin, and the venue was incorrect for the counterclaim unless there could be said to have been a waiver. Furthermore, it was clear that the original defendant could not have counterclaimed on the two other patents. Finally, while the basis of federal jurisdiction was present for matters involving patent infringements, there was no independent jurisdiction for the claim of unfair competition, and there was no diversity between the plaintiff and the intervener. The circuit court of appeals said that the

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115. *Leman v. Krentler Arnold Hinge Last Co.*, 284 U. S. 448 (1932); cf. *Alexander v. Hillman*, 296 U. S. 222 (1935); *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430 (1932); see *First National Bank of Charlotte v. Morgan*, 132 U. S. 141 (1889).

The failure of the Supreme Court to discuss waiver of venue in *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53 (1935) when that issue had been stressed by Judge Hand in the circuit court, 75 F. (2d) 472, is some evidence that if the requirements of the Chandler case are followed, the intervener will not be given an additional hurdle as to venue. See also *United States Expansion Bolt Co. v. Kroncke Hardware Co.*, 234 Fed. 868 (C. C. A. 7th, 1910).

116. 234 Fed. 868 (C. C. A. 7th, 1916).

plaintiff's act of bringing suit in Wisconsin constituted a waiver as to counterclaims by an intervener based on patent infringements; it apparently disregarded any limitation as to the intervener's right to counterclaim based on an inability of the original defendant to counterclaim. It held that the claim of unfair competition could not be litigated because of a lack of federal jurisdiction.¹¹⁷ The *Expansion Bolt* case, then, would seem to have indicated that the intervener came under the provisions of Equity Rule 30 without limitation, that venue waived as to the defendant would be waived as to the intervener, and that, by analogy at least, if new parties were brought in by an intervener who lacked an absolute right to intervene, there would have to be some independent federal jurisdictional grounds to support the claim against them. But the circuit court was probably incorrect in the *Expansion Bolt* case in its liberal interpretation of the right of the intervener to counterclaim.¹¹⁸

Finally in 1935 in *Chandler & Price Co. v. Brandtjen & Kluge*,¹¹⁹ the Supreme Court disapproved the doctrine of the *Expansion Bolt* case insofar as it allowed the intervener to counterclaim when the defendant had no interest in that particular counterclaim.¹²⁰ The Circuit Court of Appeals for the Second Circuit had held that the intervening manufacturer might not counterclaim for patent infringement.¹²¹ Judge Learned Hand gave as the reason for this prohibition the fact that the venue was incorrect as to the plaintiff; that while the venue had been waived by the plaintiff who chose his adversary knowing "what other disputes are pending between him and the defendant, and by selecting him for attack may be charged with the risk of meeting a reprisal," the venue

117. The court was probably wrong on the federal jurisdiction point. It distinguished *Payson Mfg. Co. v. Ludwigs*, 206 Fed. 60 (C. C. A. 7th, 1913) on the aggravation point. See *Hurn v. Oursler*, 289 U. S. 238 (1933); Comment (1934) 1 U. OF CHI. L. REV. 480; (1933) 46 HARV. L. REV. 1339; 32 MICH. L. REV. 412; cf. *Geneva Furniture Co. v. Karpen*, 238 U. S. 254 (1915).

118. "The decisions of the District Court and the Circuit Court of Appeals in *United States Expansion Bolt Co. v. Kroncke Hardware Co.* . . . are disapproved to the extent, if at all, that they tend to support intervener's contention that it is entitled to set up the counterclaim." *Chandler & Price Co. v. Brandtjen and Kluge, Inc.*, 296 U. S. 53, 58 (1935). But see *Leaver v. K. & L. Box & Lumber Co.*, 6 F. (2d) 666 (N. D. Cal. 1925) where it was held that the manufacturer intervening in a patent infringement case may not counterclaim for damages against the plaintiff on the ground of the plaintiff's threats against its customer and interference with its business. The court pointed out that Equity Rule 30 which allows the defendant to counterclaim does not expressly include an intervener. It felt that the intervener's "range of activity . . . in the prosecution or defense of the interest he is there permitted to assert must necessarily be as extensive but no greater than that allowed the original parties to the suit." Cf. *Texas Co. v. Borne Scrymser Co.*, 68 F. (2d) 104 (C. C. A. 4th, 1933).

119. 296 U. S. 53 (1935).

120. See note 118, *supra*.

121. 75 F. (2d) 472 (C. C. A. 2d, 1935). The Circuit Court admitted that the intervener as an original defendant could have so counterclaimed.

was not waived as to an intervener, for "the plaintiff has not chosen him as an antagonist."¹²² The Supreme Court, on the other hand, in affirming the decision of the Circuit Court, did so, not on the grounds that the venue was incorrect, but on the grounds that "there is no suggestion that defendant has any interest in the counterclaim."¹²³ The court construed Equity Rule 30 as not applicable to an intervener. "But the context makes against construing the word 'defendant' as used in the rule to include one permitted to intervene."¹²⁴ If this statement were taken literally, it would be impossible for an intervener to counterclaim at all, except by implication under Rule 37, or under the general equitable power of a court to do complete justice. This general equitable power has since been recognized to permit an original party to counterclaim against an intervener on a claim related to the intervener's claim.¹²⁵ The intervener there may not object successfully on the grounds of improper venue.¹²⁶

The Federal Rules have, however, resolved much of the above confusion, provided Rule 13 on Counterclaim and Cross-Claim is given a fair, literal interpretation. That rule is applicable to all parties, whether original, intervening, or otherwise; it distinguished between compulsory and permissive counterclaims. A compulsory counterclaim is one which in general arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Where the counterclaim is compulsory, it must be pleaded or it will be barred.

Under subdivision (h) "when the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules." Neither the counterclaim nor the bringing in of third parties is restricted to claims which would have been allowed an original party. The intervener with an absolute right therefore seems only restricted by requirements of jurisdiction or venue in the same manner as an original party. The discretionary intervener under a liberal interpretation will also be allowed to counterclaim and to bring in third parties, although it is possible that jurisdictional and venue requirements may be more strict in his case. On the other hand, the desire of an intervener with only a discretionary right to counterclaim or bring in third parties is of importance in determining whether his intervention will unduly burden the proceedings. The requirement that the motion to intervene shall be accompanied by a

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122. *Id.*, at 473.

123. 296 U. S. 53, 57 (1935).

124. *Id.*, at 58, 59.

125. *Alexander v. Hillman*, 296 U. S. 222 (1935).

126. See *Rice v. Durham Water Co.*, 91 Fed. 433, 434 (E. D. N. C. 1899).

proposed pleading will make it possible for the court to decide at that time whether a proposed counterclaim will unduly burden the proceedings, and it may deny or restrict intervention on that account.

Future Orders. The statement has been made that once intervention has been allowed the intervener is a party for all purposes. This statement was certainly too broad under intervention practice prior to the Federal Rules, and under the Rules the court should have the power to limit intervention to certain claims or defenses. The statement is, nevertheless, applicable to orders issued in the proceeding after there has been intervention. The intervener is bound by future orders, unless the intervention has been specially limited. In that restricted case only orders pertaining to the matter for which intervention was permitted would be binding on him. The intervener will therefore have to appeal appealable orders or decrees, or be bound by them, and he cannot merely amend his petition of intervention to ask for additional relief.¹²⁷ In submitting himself to the jurisdiction of the federal court, the intervener also makes himself vulnerable to a complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party. Thus in *Rice v. Durham Water Co.*,¹²⁸ the intervener asked that the receiver of the Water Company be temporarily restrained from cutting off the water supply. The receiver then asked that a suit pending against the Water Company by the intervener in the state court be removed to and consolidated with the action in the federal court. This was granted, even though that suit did not involve any federal jurisdictional grounds.

III. FEDERAL JURISDICTIONAL REQUIREMENTS

When original federal jurisdiction is based on diversity of citizenship, there must be diversity between the parties plaintiff on one side and defendant on the other, as realigned by the court when necessary.¹²⁹ If the party lacking the requisite diversity is an indispensable party to the proceeding, the federal court will lose jurisdiction over the entire proceeding.¹³⁰ On the other hand, if the party lacking the requisite diversity is only a necessary and not an indispensable party, the suit may proceed in the federal court without the presence of that party.¹³¹ The widespread

127. *Commercial Electrical Supply Co. v. Curtis*, 288 Fed. 657 (C. C. A. 8th, 1923), *cert. denied*, 263 U. S. 709.

128. 91 Fed. 433 (E. D. N. C. 1899); see also *Boston Acme Mines Corp. v. Salina Canyon Coal Co.*, 3 F. (2d) 729 (C. C. A. 8th, 1925) (intervention in state court proceedings, later federal court proceedings should be stayed).

129. *Strawbridge v. Curtis, et al.*, 3 Cranch (U. S.) 267 (1806); *Blake v. McKim*, 103 U. S. 336 (1880); see FOSTER, *FEDERAL PRACTICE* (1920) § 41.

130. *Patterson v. Delaware & Hudson Co.*, 251 Fed. 255 (C. C. A. 3d, 1918).

131. *Beebe v. Louisville, N. O. & T. Ry.*, 39 Fed. 481 (N. D., Miss. 1889); *Barnes & Co. v. Berry*, 156 Fed. 72 (S. D. Ohio, 1907). See *Sioux City T. R. & W. Co.*

practice of allowing intervention in federal proceedings, however, tends to modify these rules in practice where the foundation of jurisdiction is diversity of citizenship. A single case may serve to illustrate the difficulty. In *Drumright v. Texas Sugarland Co.*,¹³² both the mortgagee and the former equitable owner sued the purchasers of the property for foreclosure of the mortgage declaration and enforcement of an equitable lien, or rescission. Since the federal jurisdiction was founded on diversity, it was necessary that there be complete diversity between the equity owner and mortgagee on the one hand and the purchasers of the property on the other. The former equity owner, however, had the same citizenship as one of the defendants, and the action, as brought, could not be maintained. Inasmuch as the equity owner was not an indispensable party, he was dismissed from the suit as a party plaintiff, and the bill was maintained without him. Up to this point the ordinary rules of federal jurisdiction had been followed. The equity owner, however, then proceeded to file a petition of intervention, and this was allowed. Thus through the roundabout method of intervention, a necessary party, lacking the requisite diversity, was allowed to become a party to a proceeding from which he had been dismissed.

The Federal Rules of Civil Procedure do not deal with the question of what federal jurisdictional requirements are necessary for an intervenor. But on the basis of the distinction already applied in other instances between the absolute and discretionary rights to intervene, it is possible to state a rule which is in accordance with most of the cases. That rule, as above indicated, is that intervention under an absolute right or under a discretionary right in an *in rem* proceeding, need not be supported by grounds of jurisdiction independent of those supporting the original action. Intervention in an *in personam* action under a discretionary right must be supported by independent grounds of jurisdiction.

The above rule protects the intervenor (1) who has an unconditional, federal statutory right to intervene, or (2) whose interest is so affected by inadequate representation, or by distribution or other disposition of property subject to court control, that he has an absolute right to intervene. It is flexible enough so that a court may, in its discretion, permit intervention when a federal statute confers only a conditional right, or when convenience warrants the court to adjudicate claims or defenses of the intervenor relative to property in the custody of the court, although the intervenor cannot show that he has an absolute right. In those cases no independent federal grounds of jurisdiction are necessary, and the rule is in accordance with the general theory that in such situations

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v. Trust Co., 82 Fed. 124 (C. C. A. 8th, 1897), which is similar to *Drumright v. Texas Sugarland Co.*, 16 F. (2d) 657 (C. C. A. 5th, 1927).

132. *Drumright v. Texas Sugarland Co.*, 16 F. (2d) 657 (C. C. A. 5th, 1927).

intervention is ancillary to the main proceeding. On the other hand, by requiring a showing that there would have been federal jurisdiction had he been joined as an original plaintiff or defendant, it protects the jurisdiction of the federal courts from undue expansion in the case where the intervener is admitted solely because he had a claim or defense that presents a question of law or fact common to the pending litigation.

Thus if it is assumed in the *Drumright* case that the equity owner had an absolute right of intervention, the case was handled correctly.¹³³ If, on the other hand, he was allowed to intervene merely because his claim presented a question of law or fact common to the main litigation the case is subject to criticism. It would not seem justifiable to allow discretionary intervention to do indirectly what cannot be done directly by original joinder in an *in personam* action.

There are cases which seem contrary to the rule stated above. The case of *Cochrane v. Potts*¹³⁴ may be thought to hold that even where the right to intervene is absolute, there must be independent jurisdictional grounds to support the intervention. Here original proceedings had been begun by the holder of securities of only one of six separate bond issues, and a receiver asked for. One Kegerries, a holder of one of the other issues, intervened. The federal court appointed a receiver for securities of all the issues despite the lack of any interest of the original plaintiff in the collateral of the other issues, other than the interest of a general creditor. A trustee appointed by the state court to take charge of collateral underlying issues not held by the original petitioner intervened to demand such collateral. On appeal, Judge Hutcheson declared the jurisdiction of the federal court over the collateral, which did not underlie the issue held by the original petitioner, to be void, and, as to the intervention of Kegerries, held that inasmuch as there was not the requisite diversity between Kegerries and the defendants, there was likewise no jurisdiction over the collateral of the issue held by Kegerries. If it be assumed that the court had jurisdiction over the res, which in this case would be the collateral underlying the Kegerries' issue, then the refusal to sustain jurisdiction over the claim of Kegerries would be a holding that independent jurisdictional grounds, such as diversity, would be required from an intervener having an absolute right to intervene. The case, however, is distinguishable. Judge Hutcheson's decision was

133. Under the broad construction given to the requirement that there be a lien or ownership as to property in order that the right to intervene be absolute in some cases, the intervener in the *Drumright* case might well have had an absolute right to intervene. See in particular, *Aetna Casualty and Surety Co. v. American Surety Co. of New York*, 64 F. (2d) 577 (C. C. A. 4th, 1933); *Tift v. Southern Ry.*, 159 Fed. 555 (S. D. Ga. 1908). Cf. *Bickford v. Federal Reserve Bank of New York*, 5 F. Supp. 875 (S. D. N. Y. 1933). The theory of this case that a common question of law or fact does not warrant intervention is, of course, no longer sound under Rule 24(b).

134. *Cochrane v. Potts Son & Co.*, 47 F. (2d) 1027 (C. C. A. 5th, 1931).

rather based on the holding that the court lacked jurisdiction of the res (collateral underlying issues not held by the original plaintiff) prior to the entrance of Kegerries into the suit. In this respect the decision may be criticized, for the interest of a general creditor, such as the plaintiff who was both a lien and general creditor, might well suffice to give the court jurisdiction over all collateral. But if it is assumed there was no jurisdiction over the collateral in question, the entrance of Kegerries would not confer it. The case merely holds that an intervener cannot confer jurisdiction upon the court.

Some cases seem to hold that a creditor having only a discretionary right to intervene need not show any independent jurisdictional grounds. These cases also may be distinguished. In *Wichita R.R. v. Public Utility Commission*,¹³⁵ a utility company, having only a discretionary right, intervened in a suit by its purchaser to restrain the public service commission from raising rates. Chief Justice Taft held that this intervention did not defeat the jurisdiction of the federal court, even though the basis of jurisdiction was diversity and though there was no diversity between the intervener and the purchaser. But the intervening utility was not an indispensable party, and therefore there would be no reason for the court to lose jurisdiction over the entire proceedings. The Chief Justice did not hold that there was jurisdiction over the intervener's answer to the bill.¹³⁶ The Sixth Circuit in *Vogue Co. v. Vogue Hat Co.*¹³⁷ held that a decree of the court as to unfair competition would be binding on an intervening defendant in a patent infringement case, although there was no diversity between the intervener and plaintiff. But the claim for patent infringement and unfair competition constituted but one cause of action, and hence federal jurisdiction based on the claim for patent infringement supported the claim for unfair competition. The most troublesome case is *In re Metropolitan Ry. Receivership*.¹³⁸ There the lessor of the railway was allowed to intervene and have the receivership extended to it. Diversity was lacking between the intervener and the railway, but not between the complainant and the intervener. If it is assumed that the lessor intervened as a party defendant, the case raises no special problem. If the lessor intervened as a party plaintiff, then it is necessary to assume, unless the case is contrary to our rule, that the lessor had an absolute right to intervene — which was apparently not the theory of the case.¹³⁹

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135. 260 U. S. 48 (1922).

136. The contention was made that the original "bill should have been, and must be now, dismissed for want of jurisdiction and *without any inquiry into the other issues of law and fact.*" *Id.*, at 53.

137. *The Vogue Co. v. Vogue Hat Co.*, 12 F. (2d) 991 (C. C. A. 6th, 1926).

138. 208 U. S. 90 (1908).

139. See Moore and Levi, *supra* note 1, at 584. An argument which would justify intervention in this situation without independent grounds of jurisdiction to support it

While it may be admitted then that there are some cases which might seem contrary to the rule as we have stated it—although we believe these cases on closer examination are reconcilable with that rule, most cases affirm the doctrine that an intervener with an absolute right need not show independent jurisdictional grounds, and that an intervener with only a discretionary right must do so. The doctrine that an intervener with an absolute right need not show independent jurisdictional grounds finds early recognition in the cases. In *Freeman v. Howe*,¹⁴⁰ mortgagees, who had unsuccessfully attempted to replevy goods in the custody of the federal court by a state court writ, claimed that they were left without a remedy, since the federal court had custody through an attachment suit and the mortgagees had the same citizenship as the defendant in that suit. To that contention the court responded:

"those familiar with the practice of the federal courts have found no difficulty in applying a remedy, and one much more effectual than the replevin, and more consistent with the order and harmony of judicial proceedings. The principle is, that the bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."¹⁴¹

Krippendorf v. Hyde,¹⁴² one of the earliest cases to establish clearly the absolute right to intervene when there was an interest in a fund in court, involved intervention by a petitioner who did not show that there was any independent jurisdictional ground for his claim. The court found this to be no defect. "The question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the strangers to the action in his own interest, as what Mr. Justice Story calls . . . a dependent bill."¹⁴³ Then in 1886, in *Phelps v. Oaks*,¹⁴⁴ the Supreme Court held that the intervention of a

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is that the federal court already has jurisdiction of one action, and intervention avoids the necessity of another action. But this argument would seem to overlook the distinction between cases cognizable in the federal courts, and those cognizable only in the state courts.

140. 65 U. S. 450 (1860).

141. *Id.*, at 460. Intervention cases should be distinguished from substitution cases. See *Monmouth Inv. Co. v. Means*, 151 Fed. 159 (C. C. A. 8th, 1906); *Cauffiel v. Lawrence*, 256 Fed. 714 (M. D. Tenn. 1919); *Chester v. Life Ass'n of America*, 4 Fed. 487 (W. D. Tenn. 1880).

142. 110 U. S. 276 (1884).

143. *Id.*, at 283, 284.

144. 117 U. S. 236 (1886).

landlord as a defendant in a possessory proceeding against his tenant was within the jurisdiction of the federal court even though the intervenor and the plaintiff had the same citizenship. And one year later, in *Osborne v. Barge*,¹⁴⁵ which was a foreclosure suit, the federal circuit court for the northern district of Iowa permitted the owner of a part of the mortgage being foreclosed and the assignees of the mortgagor to intervene. The interveners had the same citizenship as the original complainant who was made defendant in the interveners' cross action.

Phelps v. Oaks and *Osborne v. Barge* have been followed in numerous cases. Creditors have been permitted to intervene in the dissolution proceedings of a partnership,¹⁴⁶ even though they lacked the requisite diversity. The holder of a deed of trust on partnership real property has been held to have a right to intervene in an accounting suit brought by the wife of a partner against the co-partner, despite a lack of diversity as to the creditor.¹⁴⁷ The lessor of rails has been permitted to intervene in a receivership proceeding for recovery of the leased rails, although there was a lack of diversity between the intervenor and his adversary.¹⁴⁸ In addition, the interveners were permitted to bring in new parties, some of whom did not have requisite diversity as to the interveners.¹⁴⁹ Junior bondholders also may intervene in a receivership notwithstanding a lack of diversity, and they may also bring in new parties.¹⁵⁰ The

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145. 30 Fed. 805 (N. D. Ia. 1887). In *United Electric Securities Co. v. Louisiana Electric L. Co.*, 68 Fed. 673 (E. D. La. 1895), the suit was by a stockholder asking for the appointment of a receiver in order to take the management and the property out of the hands of the board of directors. An intervening petition was filed by the New Orleans Traction Company, which had the same citizenship as the defendant. The court allowed the intervention on the basis that jurisdiction over the intervenor was dependent "upon the controversy between the securities company and the light company; and, unless there is such a controversy, and one, too, that draws to the court the possession and control of the property of the light company, the case or controversy of the traction company with the electric light company must be left out of consideration."

146. *Lackner v. McKechney*, 252 Fed. 403 (C. C. A. 7th, 1918).

147. *Minot v. Mastin*, 95 Fed. 734, 738 (C. C. A. 8th, 1899). ". . . The proceeding which was inaugurated by filing that complaint was of a dependent or ancillary character, since the power of the court to entertain it was derived, not from diversity of citizenship as between the parties thereto, or the existence of a federal question, but solely from the jurisdiction which it had already acquired in the pending case . . ."

148. *St. Louis-San Francisco Ry. v. Byrnes*, 24 F. (2d) 66 (C. C. A. 8th, 1923); and see *Wabash R.R. v. Adelbert College of the Western Reserve University*, 203 U. S. 39 (1908).

149. *Id.*, at 6.

150. *Compton v. Jessup*, 68 Fed. 263, (C. C. A. 6th, 1895), 167 U. S. 1 (1897). An intervenor into a class action need not have independent federal jurisdictional grounds. *Stewart v. Dunham*, 115 U. S. 61 (1885); cf. *Clauss v. Palmer Union Die Co.*, 222 Fed. 870 (C. C. A. 9th, 1915). There may be an obligation on the intervenor

retention of jurisdiction in foreclosure proceedings has resulted in the purchaser being allowed, without independent jurisdictional grounds, to intervene after the sale in order to rid itself of a contract which it had failed to reject properly.¹⁵¹ The class of cases where independent jurisdictional grounds is unnecessary broadens, of course, as the concept of a lien on property in the custody of the court widens.¹⁵²

A great deal of authority may be found in the cases also for the proposition that where the right to intervene is only discretionary, independent federal jurisdictional grounds must be shown by the intervener. Thus interveners claiming merely a right to payment for oil taken from wells in the possession of a receiver were denied litigation of their claim when they failed to show independent jurisdictional grounds, because the circuit court of appeals, differing from the trial court, failed to find an interest in a fund in the possession of the court.¹⁵³ In a bondholder's suit against a city to collect on the bond, taxpayers could not intervene to enjoin payment of the allegedly void bonds without showing some independent jurisdictional grounds to support their intervention.¹⁵⁴ The drawer of a check could not intervene in the receivership of his payee without showing diversity or some other ground of jurisdiction when the proceeds of the check, which the drawer claimed, had already been

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to pay the rateable share of expense. *Bowker v. Haight*, 140 Fed. 794 (S. D. N. Y. 1905). See *Illinois Steel Co. v. Ramsey*, 176 Fed. 853 (C. C. A. 8th, 1910).

151. *Cincinnati, Indianapolis and West Ry. v. Indianapolis Union Ry.*, 270 U. S. 107 (1926); cf. *Minnesota Co. v. St. Paul Co.*, 69 U. S. 609 (1864). See *Local Loan Co. v. Hunt*, 292 U. S. 234 (1934), where the bankruptcy court has granted a discharge, the bankrupt may petition the bankruptcy court, without separate federal jurisdictional requirements, to enjoin a creditor from prosecuting in the city municipal court a claim based on a wage assignment. And see *St. Louis & San Francisco R.R. v. Spiller*, 274 U. S. 304 (1927).

152. In *Tift v. Southern Ry.*, 159 Fed. 555 (S. D. Ga. 1908), where the court found a fund in the amount of unlawful rates charged by various common carriers, intervention was permitted various shippers having claims to the "fund". In *Brinkerhoff v. Holland Trust Co.*, 146 Fed. 203 (S. D. N. Y. 1906) intervention was allowed without discussion of jurisdiction, where the intervener would have an interest in the res if subrogation were granted. In *Carter v. City of New Orleans*, 19 Fed. 659 (E. D. La. 1884) creditors, over whom priority was claimed in a creditor's suit to secure payment from an alleged trust fund, were allowed to intervene without any discussion of jurisdictional grounds. "At the hearing, if their rights would be lost by a decree, the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected." See *City of Shidler v. H. C. Speer & Sons Co.*, 62 F. (2d) 544 (C. C. A. 10th, 1932), where bondholders could intervene in a suit on municipal waterworks bonds. Note also *Rice v. Durham Water Co.*, 91 Fed. 433 (E. D. N. C. 1899): where intervention in a receivership is permitted, the federal court may order the removal from a state court of a connected cause of action by the intervener against the original defendant, despite lack of diversity.

153. *Forest Oil Co. v. Crawford*, 101 Fed. 849 (C. C. A. 3d, 1900).

154. *Seligman v. City of Santa Rosa*, 81 Fed. 524 (N. D. Cal. 1897).

taken by the bank pursuant to its right of set-off against the payee.¹⁵⁵ The intervener had a claim to a fund, but that fund was already "in the bank's possession and beyond the receiver's reach."¹⁵⁶ Similarly, creditors of the beneficiary of a spend-thrift trust could not, without showing independent jurisdictional grounds, intervene in a proceeding for the construction of a will when the court had only reserved jurisdiction over the trustee in order to determine the right of the beneficiary to obtain part of the corpus of the estate.¹⁵⁷ In the view of the Supreme Court the trial court did not have custody or control of property which would give the intervener an absolute right to intervene.

IV. INTERVENTION AND REORGANIZATION PROCEEDINGS

In the previous article, we applied the rules on intervention to receiverships and reorganizations.¹⁵⁸ We showed that in an equity receivership operating under the fiction of a judicial sale, it was important that creditors and stockholders be given an opportunity early in the proceedings to be heard on the reorganization plan. We pointed out that the interests of creditors and stockholders had not been sufficiently protected because of the notion that they were adequately represented. The secured creditors were often said to be represented by a trustee under an indenture,¹⁵⁹ the creditors in general were told they were represented by the receiver,¹⁶⁰ and the stockholders were supposedly represented by the directors.¹⁶¹ Unless some fraud or collusion on the part of the representative could be shown, the creditors and stockholders were thereafter denied an absolute right to intervene. We suggested that in most cases it was

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155. *Fulton National Bank v. Hozier*, 267 U. S. 276 (1925).

156. *Id.*, at 281.

157. *Hoffman v. McClelland*, 264 U. S. 552 (1924). The Supreme Court recognized that if there had been control of the property by the court intervention would have been allowed without independent jurisdictional grounds. "Where in the progress of a suit in a federal court property has been drawn into the court's custody or control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting, and enforcing their claims—although the court could not consider or adjudicate their claims if it had not acquired the property." *Id.*, at 558. Cf. *Julian v. Central Trust Co.*, 193 U. S. 93 (1904).

158. *Moore and Levi*, *supra* note 1, at 595. See Comment (1938) 47 YALE L. J. 746.

159. *Palmer v. Bankers' Trust Co.*, 12 F. (2d) 747 (C. C. A. 8th, 1926); *Guaranty Trust Co. of New York v. Minneapolis & St. L. Ry.*, 52 F. (2d) 418 (C. C. A. 8th, 1931).

160. *Hartford-Connecticut Trust Co. v. Doherty*, 286 Fed. 926 (C. C. A. 6th, 1923); see *Conley v. International Pump Co.*, 237 Fed. 286, 287 (S. D. N. Y. 1915).

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

extremely unrealistic to assert that the trustee under an indenture adequately represented the creditors under the indenture.¹⁶² The so-called corporate trustee has most often been distinguished by its inactivity, which, whether it is justifiable inactivity or not, should not stand as a barrier against the admittance of the secured creditors into the proceedings.¹⁶³ The receiver has usually been more interested in conserving and operating the property than in representing the claims of creditors on a plan of reorganization. The directors are elected by stockholders to conduct a going business, and not to preserve the interest of a particular class in a reorganization looking forward to a new company.¹⁶⁴

We suggested, therefore, that a distinction should be made between the formal institution of the reorganization proceeding, whatever form that might take, the administration of the estate, and the reorganization process.¹⁶⁵ We felt that in the absence of a showing of fraud or collusion on the part of the representative, creditors and stockholders might well be held to be represented adequately in the formal bringing of the proceedings and in the administration of the estate. Even at that point, a showing of fraud or collusion on the part of the representatives would make the right to intervene absolute. On matters close to the reorganization process itself, we felt that creditors and stockholders ought to have an absolute right to intervene. In applying these distinctions, then, we suggested that as to the initiation of proceedings, the administration of the estate under the receiver or trustee, even in the issuance of ordinary receiver's or trustee's certificates, creditors and stockholders only have a discretionary right of intervention.¹⁶⁶ But as to the working out of the reorganization plan, including the early stages of the plan, the formation of committees, the solicitation of deposits, and anything involving the status of a class, together with matters concerning the provisions of deposit agreements, there should be an absolute right to intervene for creditors and stockholders, because with reference to these matters they are not adequately represented by the trustee, receiver, and directors.

The corporate reorganization provisions have not essentially changed the problem of intervention. Neither Section 77 nor Section 77B are

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162. Moore and Levi, *supra* note 1, at 603; see *Hazzard v. Chase Nat. Bank of City of New York*, 287 N. Y. Supp. 541 (1936).

163. See SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES; Pt. VI, TRUSTEES UNDER INDENTURES (1936) 48, 65.

164. See *In re National Lock Co.*, 9 F. Supp. 432 (N. D. Ill. 1934).

165. Moore and Levi, *supra* note 1, at 606.

166. The discretionary right would become an absolute right if representation were inadequate. Even when the right is only discretionary, no independent federal jurisdictional grounds are necessary to support intervention since it is ancillary to the *in rem* proceeding.

clear as to intervention; Section 77 is apparently more liberal, but neither is satisfactory. Both sections distinguish in some measure between the right to be heard and the right to intervene. Section 77B grants the debtor a right to be heard on all questions in the proceedings.¹⁶⁷ No provision is made for hearing either committees or the trustee under the mortgage indenture. Any creditor or stockholder has the right to be heard on the permanent appointment of the trustee and on the proposed confirmation of the reorganization plan. In addition, any creditor or stockholder may be heard, upon filing a petition for leave to intervene, "on such other questions" as the judge shall determine. This provision is extremely unsatisfactory. It is open to the interpretation that intervention may not be permitted on those matters where an absolute right to be heard is granted by the statute, *i.e.*, that the absolute right to be heard is, in fact, intervention. If this is so, it is possible to argue that there can be no right to be heard under Section 77B without an allowance of intervention. This would mean that there is an absolute right to intervene in the case where the right to be heard is absolute, and, presumably, that the right to intervene in all other cases may be only discretionary. If Section 77B is interpreted in this manner, it is less liberal on the whole than Equity Rule 37. Furthermore, since the right to be heard is only given to creditors and stockholders, and not to the indenture trustee and committees, it is again possible to deny intervention to the trustee or committee on the theory that the Section means to exclude them.¹⁶⁸ This also seems unfortunate. The most reasonable interpretation of the Section seems to be that it gives an absolute right to be heard, and that there is also a right to intervene, the nature of which is not stated, and therefore ordinary rules as to intervention are applicable.

The distinction between the right to be heard and the right to intervene is much clearer under Section 77.¹⁶⁹ The debtor, any creditor or stockholder, the duly authorized committee, or the attorney or agent of the trustee under an indenture have the right to be heard on all questions arising in the proceedings. In addition, such persons or any other "interested party" may be permitted to intervene. The difficulty with this provision, however, is the danger of the possible interpretation that inter-

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167. Section 77B(c) (11).

168. See *Bitkser v. Hotel Duluth Company*, 83 F. (2d) 721 (C. C. A. 8th, 1936) where it was said that the trustee under the indenture might not attack the reorganization plan. The problem of whether the trustee may file claims for non-depositing security holders or cast votes for non-depositors in the plan is not an intervention problem. See *In re Allied Owners Corp.*, 74 F. (2d) 201 (C. C. A. 2d, 1934).

In the reorganization of the Utilities' Power and Light Corporation, the S.E.C. was allowed to "intercede" to request the appointment of an independent trustee. See *New York Times*, Oct. 27, 1937, p. 49.

169. Section 77(c) (13).

vention, as opposed to the right to be heard, is always discretionary. This is probably not the case. The "may be permitted to intervene" or permissive language of the statute is similar to the permissive language of Equity Rule 37 which, as we have seen, has been construed to provide for both an absolute and a discretionary right of intervention.¹⁷⁰ Therefore, the ordinary rules concerning the absolute right to intervene should apply. Since the ordinary rules as applied by the courts, however, were unrealistic in the determination that creditors and stockholders were ordinarily sufficiently well represented in the proceedings, some more definite declaration of policy would be helpful. The need for a right to intervene is not satisfied by a right to be heard, for, as will be shown, they are not the same, and the right to be heard is in many cases an insufficient substitute.

Since our first article, there has been a great deal of discussion concerning corporate reorganization; the reports of the Securities and Exchange Commission and various other bodies investigating under congressional authority have appeared.¹⁷¹ Although intervention is generally recognized as one of the problems of reorganization that has not been solved satisfactorily,¹⁷² we do not believe that it may be dealt with as a separate problem. The question has two aspects. The first is that security holders and stockholders must be adequately represented or be allowed — and indeed encouraged — to represent themselves. Intervention is one way of meeting this problem. It is not completely satisfactory because security holders and stockholders are not entirely capable of protecting their own interests. A compromise solution would seem to allow intervention to committees if these committees are adequately policed.¹⁷³ Perhaps a still better solution would be to supplement committee representation with a government official as a protagonistic representative for each of the various classes if the size of the reorganization warrants the expense. But this latter solution does not seem capable of realization at the present time. The other aspect of the problem of intervention is that it is not desirable to allow strikers to hold up the proceedings by an undue amount of intervention and resulting appeals.¹⁷⁴

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170. Moore and Levi, *supra* note 1, at 581.

171. The SECURITIES AND EXCHANGE COMMISSION, REPORTS, *supra* note 163. Note, in particular, Pts. I, III, and VI.

172. See *Report of the Counsel to the Special Committee*, 74th Cong., 2d Sess., Sen. Doc. No. 268 (1936) (McAdoo Committee) 27: "The obvious result of discouraging intervention and of shifting objection is to weld the circle of collusion that surrounds the judge." REPORT, Pt. VI, *op. cit. supra* note 171, at 48.

173. As would be the case under the Lea Bill [H. R. 6868, 75th Cong., 1st Sess. (1937)]; see also the Barkley Bill [S. 2344, 75th Cong., 1st Sess. (1937)].

174. See Friendly, *The 1935 Amendment of the Railroad Reorganization Act* (1936) 36 COL. L. REV. 27. See generally, Comment (1938) 47 YALE L. J. 746.

But again this portion of the problem cannot be adequately dealt with so long as everyone who opposes the house of issue is considered a striker. Until a better procedure for reorganization has been developed, we believe that the interests of stockholders and creditors warrant the application of liberal intervention rules. Chapter X of the proposed revision of the Bankruptcy Act, the Chandler Bill, adopts in general the broader rules of Section 77, with the addition that it gives the Securities and Exchange Commission unusual intervening powers.¹⁷⁵ While it makes no distinction between an absolute and discretionary right to intervene relative to others, it may be assumed that such a distinction will be applied.

When intervention is requested in reorganization proceedings, it is necessary that the intervener state his interest in the proceeding. If he is a creditor, he must state what kind of a creditor he is.¹⁷⁶ It is to be hoped also that better practice will be followed and that the intervener will be required to indicate the points which he wishes to raise in the proceedings.¹⁷⁷ If intervention is discretionary, the court may then find it feasible to deny intervention altogether or to limit its scope.¹⁷⁸ Thus a contractor who merely fears that his contract will be rejected need not be admitted as an intervener prior to any attempt on the part of the trustee to reject the contract.¹⁷⁹ When sufficient facts are alleged in the petition, together with a statement of the points the intervener wishes to raise, the court may be able to conclude that the intervention is not in good faith, and reject intervention on that ground.¹⁸⁰ Even where the

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175. H. R. 8046 (75th Cong., 1st Sess., 1937), § 206: "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter." § 207: "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter . . ." § 208: "The Securities and Exchange Commission shall, upon the filing of a notice of its appearance in a proceeding under this chapter, be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been filed with and allowed by the judge." See also §§ 210, 213, 247, 249, 265.

176. *Bryan v. Welch*, 74 F. (2d) 964 (C. C. A. 10th, 1935).

177. See discussion *supra*, p. 904.

178. See *In re Denver & R. G. Western Ry.*, 13 F. Supp. 821 (D. C. Colo. 1936). The court quoted Judge Faris in an unreported oral opinion in the Matter of Pacific R.R.: "Heretofore, ex gratia we have allowed general interventions by persons and aggregations, who were at most entitled to come in specially. This action has had the effect to induce numerous others to seek the privilege of general intervention; so that the case has become unconscionably complicated, and if this grace is broadened, it will ultimately become so unwieldy as to preclude orderly administration."

179. *Globe Grain and Milling Co. v. American Marine Products Co.*, 91 F. (2d) 380 (C. C. A. 9th, 1937).

180. *In re Associated Gas & Electric Co.*, C. C. H. Bankr. Serv. ¶3850 (N. D. N. Y. 1936).

intervener has an admitted interest in the proceeding, such as the trustee for the security holders, it may be useful to allow intervention on specific issues, rather than generally, although this seems doubtful when a petitioner with so broad an interest is involved.¹⁸¹ Where indenture trustees and the representative of holders of some of the securities issued under the indentures each sought intervention, the former's petition has been granted and the latter's denied.¹⁸² The reason was that the former party was the more general representative, and the latter could be admitted later on for the purpose of raising specific issues. If sufficient facts are stated to indicate that the petitioner is not really adequately represented by a committee that has already intervened, the court may allow the petitioner to intervene.¹⁸³ Of course, if the intervener can show clearly an absolute right to intervene, intervention will have to be allowed. And even when the right to intervene is not absolute, it may be suggested that the court should not be entirely captious in denying intervention, because, for instance, the attorney for the intervener had presented the same objections in prior chancery proceedings.¹⁸⁴

It must be remembered that the right to be heard is not the same as intervention. This has been recognized by the Seventh Circuit, which has pointed out that the statute expressly gives only an absolute right to a hearing, not to intervention. "The record discloses that his petition to intervene was denied, but he was given every opportunity to be heard on every pertinent question."¹⁸⁵ A denial of intervention, then, is not a denial of the right to be heard. One who is only given a right to be heard, and has not intervened, has no right of appeal. Thus in *In re Trust No. 2988 of the Foreman Trust and Savings Bank*,¹⁸⁶ it was held that a bondholder who had appeared in the District court only upon exceptions to the master's report and had challenged the jurisdiction of the court and the fairness of the plan, could not appeal from a final decree approving the final account of the trustee and the report of the reorganization consummation. "Appellant at no stage of the proceedings petitioned the court for leave to intervene; nor was any order ever entered granting him such a right."¹⁸⁷ And in *Public Service Commission*

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181. *In re Missouri Pacific R.R.*, C. C. H. Bankr. Serv. ¶1871.11 (E. D. Mo. 1934).

182. *In re Denver & R. G. Western Ry.*, 13 F. Supp. 821 (Colo. 1936).

183. *In re United Telephone & Electric Co.*, C. C. H. Bankr. Serv. ¶4217 (1936).

184. *In re General Theatres Equipment Co.*, 12 F. Supp. 785 (Del. 1935).

185. *In re 333 North Michigan Ave. Bldg. Corp.*, 84 F. (2d) 936 (C. C. A. 7th, 1936).

186. *In re Trust No. 2988 of the Foreman Trust and Savings Bank*, C. C. H. Bankr. Serv. ¶4216 (C. C. A. 7th, 1936).

187. *Ibid.*

v. Philadelphia Rapid Transit Co.,¹⁸⁸ it was held on rehearing that the city controller could not appeal from an order allowing certain payments to be made, because while the controller was allowed to be heard in the proceeding, he was not a formal party, not having been allowed to intervene. In this respect intervention finds its chief distinguishing feature from the practice of allowing a party to appear as an *amicus curiae*.¹⁸⁹ "If the court below wanted to hear him as adviser, controller, or representative, it could do so, but this privilege did not give him the right to appeal as a party from the decree of the court."¹⁹⁰

On the other hand, once intervention has been allowed, the intervener has the status of a party for purposes of appeal. This is subject to the qualification that where intervention is limited in scope, the intervener can not be affected by many orders and decrees, and may not appeal from them. The rule that an intervener has the status of a party for purposes of appeal is, of course, the ordinary rule in regard to intervention, and it has been expressly recognized by the Second Circuit as applicable to cases arising under Section 77B.¹⁹¹ The argument against allowing the intervener to appeal is that such procedure opens the door to an unnecessary number of appeals, but, as the Second Circuit has pointed out, the safeguard against too frequent appeals is to deny intervention.¹⁹²

The intervener, however, is given no more than the right to appeal possessed by original parties. In the ordinary bankruptcy case, the original parties are not allowed to appeal the allowance of claims of other creditors unless the trustee has unreasonably refused to appeal the allowance or is disqualified.¹⁹³ It may be, therefore, that an intervener, who has been allowed to intervene generally in reorganization proceedings

188. 82 F. (2d) 481 (C. C. A. 3d, 1935). In *In re Garment Center Capitol, Inc.*, C. C. H. Bankr. Serv. ¶3472 (S. D. N. Y. 1935) the court in denying the right of an individual creditor to intervene in 77B proceedings stated: "The petitioner, without intervention, is entitled to notice of hearing on any proposed plan of reorganization." See also *In re Kenmore-Granville Hotel Co.*, C. C. H. Bankr. Serv. ¶4842 (C. C. A. 7th, 1937).

189. Cf. *Moor v. Texas & N. O. R.R.*, 297 U. S. 101 (1936) (The Solicitor General appeared as *amicus curiae* to present the government's position on the Cotton Control Act).

190. 82 F. (2d) 481, 487 (C. C. A. 3d, 1935).

191. *In re N. Y. Investors*, 79 F. (2d) 179 (C. C. A. 2d, 1935).

192. *Id.*, at 182. Cf. Comment (1938) 47 YALE L. J. 746, at 766.

193. See *Chatfield v. O'Dwyer*, 101 Fed. 797 (C. C. A. 8th, 1900); *Amick v. Mortgage Security Corp.*, 30 F. (2d) 359 (C. C. A. 8th, 1929). But *contra* is *In re Roche*, 101 Fed. 956 (C. C. A. 5th, 1900), which is sometimes distinguished because the creditor claimed "a special lien in the sum in the hands of the trustee." But this is analogous to the absolute right to intervene. And see also *Pennsylvania Co. for Ins. on Lives, etc. v. Philadelphia Co.*, 266 Fed. 1 (C. C. A. 3d, 1920); *West v. Radio-Keith-Orpheum Corp.*, 70 F. (2d) 621 (C. C. A. 2d, 1934).

will not be allowed to appeal the allowance of another creditor's claim without showing that the trustee has unreasonably refused to do so or is disqualified. The Eighth Circuit, impressed with the number of appeals as to claim allowances which would be made if their ruling were otherwise, has so held.¹⁹⁴ It was felt that "in the matter of taking an appeal from orders allowing claims to other creditors," the intervener "was in no better position than any creditor."¹⁹⁵ But intervention is allowed in reorganization proceedings because the creditor or stockholder is not adequately represented. Where there is adequacy of representation, intervention—if it does not suit the convenience of the court—should be denied. If general intervention signifies that the intervener is not adequately represented for all purposes, a general intervener should not be required to rely for representation on the trustee. If representation is adequate on the matter of contesting the claims of other creditors, the remedy is to deny intervention on this point, not to allow intervention and then dismiss the appeal.

The ordinary rule that the appeal of an intervener follows the course of appeal in the main proceeding seems inapplicable under the reorganization statutes, because in these proceedings different kinds of appeal are expressly provided for the various kinds of orders that may be appealed from. At the present time it is not always clear whether Section 24 or 25 of the Bankruptcy Act is the applicable section to particular orders and decrees in reorganization proceedings, but intervention presents no special problem.¹⁹⁶

The status of interveners in reorganization proceedings is, to an extent, dependent upon the nature of their right to intervene. Creditors and stockholders, we have said, should be considered as having the absolute right to intervene on matters involving the reorganization plan. They will not then be allowed to object to prior decrees, except in unusual circumstances, but they will be permitted to question the jurisdiction of the court, the propriety of further proceeding in the action, and the claims and defenses of other parties. But if their representation is considered adequate, the right to intervene is only discretionary. Again, they may question the jurisdiction of the court and the claims of other parties. They may not usually avoid prior decrees nor raise the question that the court should not proceed.

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194. *Jonas v. Bellerive*, 90 F. (2d) 688 (C. C. A. 8th, 1937). The court cited *Christian v. Hoe & Co.*, 79 F. (2d) 541 (C. C. A. 2d, 1935) as taking a similar view, but in that case appeal was erroneously attempted under Section 25 rather than Section 24.

195. *Jonas v. Bellerive Inv. Co., et al.*, 90 F. (2d) 688, 699 (1937).

196. See *Meyer v. Kenmore-Granville Hotel Co.*, 297 U. S. 160 (1936), (1936) 31 ILL. L. REV. 58.

Some courts have placed an additional restriction on intervening creditor committees. Section 77B states that three or more creditors with provable claims in excess of the value of the securities held by them, if any, to \$1,000 or over, or stockholders holding 5 per centum in number of all shares of stock of any class of the debtor outstanding, may appear under certain circumstances and controvert the facts alleged in the petition or answer as the case may be.¹⁹⁷ Section 77 has a similar provision allowing creditors generally to controvert the facts alleged in the petition, but it does not mention stockholders.¹⁹⁸ From the provision in 77B, it has been argued that no other creditors or stockholders may be allowed to intervene to controvert the facts alleged in the petition, for such permission would be contrary to the rule that intervention must be in subordination to the main proceedings. Thus in *In re 1030 North Dearborn Bldg. Corp.*,¹⁹⁹ the court denied intervention to the claimant of the property of the debtor, the trustee under the indenture for bondholders, and a bondholders committee which desired to defeat the petition of three creditors. The court stated:

"I am of the opinion that the applicants for intervention may not properly be admitted for the purpose of contesting the jurisdiction of the court or for the purpose of defeating the petition, but they may be admitted upon proper petitions for intervention in subordination to and in recognition of the original proceedings . . . "

The court took the same position in *In re Prairie Ave. Bldg. Corp.*²⁰⁰ where intervention had already been allowed. The Circuit Court of Appeals for the Seventh Circuit has held that a bondholders' committee and the trustee under the indenture could not question the good faith of a petition under Section 77B because "there is no provision for intervention upon this issue by bondholders' committee or trustee."²⁰¹

It may be argued that a bondholders' committee with only a discretionary right to intervene at the preliminary stage need not be allowed to intervene to controvert the allegations of the petition. A trustee for the bondholders, however, has an absolute right because of his interest in the res in the possession of the court. If either the trustee or a committee has been allowed to intervene, either ought to be allowed to controvert, not the fact that a sufficient petition for the court to assume jurisdiction with propriety has been filed—only one with an absolute right to intervene, such as the trustee, could do that—but that the petition was filed in good faith. This is true because the court must find that the

197. Section 77B(a). See also H. R. Rep. No. 1409, 75th Cong., 1st Sess. (1937) 39.

198. Section 77(a), prior to the hearing provided for in § 77(c)(1).

199. *In re 1030 North Dearborn St. Bldg. Corp.*, 7 F. Supp. 896 (E. D. Ill. 1934).

200. *In re Prairie Ave. Bldg. Corp.*, 11 F. Supp. 125 (E. D. Ill. 1935).

201. *In re Loeb Apartments*, 89 F. (2d) 461, 464 (C. C. A. 7th, 1937).

petition was filed in good faith; it is something which the creditor must show before he can justify his demand for reorganization of the corporation.²⁰² The statute, of course, may be read as denying this ordinary rule of intervention, but it does not seem wise or necessary to do so. Since the good faith of the petition is somewhat dependent on the creditor's showing that reorganization is possible, which in a given case may mean the presentation of a tentative reorganization plan, or a showing that the bankruptcy proceeding will be more advantageous than a pending equity receivership, it would seem to be important that all interveners be heard on this matter. We might even give an absolute right to be heard on these matters to all interveners presenting claims in the reorganization. Inasmuch as 77 and 77B are not clear in their intervention provisions, an interpretation which construes them as denying intervention on this important matter seems unnecessary. Accordingly many courts have permitted intervention.²⁰³ The Chandler Bill, indeed, expressly allows "an answer controverting the allegations of a petition by or against a debtor" to be "filed by any creditor or indenture trustee, or, if the debtor is not insolvent, by any stockholder of the debtor."²⁰⁴

Reasonable restrictions, of course, may be placed on intervening creditors and stockholders. The situation is somewhat similar to intervention in class actions where the intervener is often required to pay his share of the expenses.²⁰⁵ Failure of the intervener to "offer to contribute its fair share of the costs and expenses" may be one reason for refusing intervention.²⁰⁶ It is not necessary that an intervener who has not proved himself a creditor be considered as subsumed under the term "party in interest", as that term is used in Sections 47 and 49 of the Bankruptcy Act; he is not entitled to disclosure of the accountant's report.²⁰⁷ On the other hand, the restrictions must be reasonable. The court cannot require a surety bond before the intervener will be heard with reference to the removal of temporary trustees.²⁰⁸

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202. *Provident Mut. Life Ins. Co. of Phil. v. University Evangelical Lutheran Church of Seattle*, 90 F. (2d) 992 (C. C. A. 9th, 1937); cf. *In re Utilities Power & Light Corp.*, 19 F. Supp. 204 (N. D. Ill. 1937).

203. *Provident Mutual Life Ins. Co. of Phil. v. University Evangelical Lutheran Church of Seattle*, 90 F. (2d) 992 (C. C. A. 9th, 1937); *In re South Coast Co.*, 8 F. Supp. 43 (Del. 1934); see *In re Surf Bldg. Corp.*, 11 F. Supp. 295 (E. D. Ill. 1934); *In re Island Park Associates*, 77 F. (2d) 334 (C. C. A. 2d, 1935); *In re Grigsby-Grunow Co.*, 77 F. (2d) 200 (C. C. A. 7th, 1935). Cf. *In re Peyton Realty Co.*, 18 F. Supp. 822 (E. D. Pa. 1936).

204. Section 137.

205. *Forbes v. The Memphis, El Paso & Pac. R.R.*, 2 Woods 323 (C. C. W. D. Tex. 1872).

206. *Jenkins Petroleum Process Co. v. Credit Alliance Corp.*, 83 F. (2d) 532 (C. C. A. 10th, 1936).

207. *In re Annin & Co.* (U. S. Dist. Ct. S. D. N. Y. April 30, 1936, C. C. H. 3995).

208. *In re Simon Manges & Son, Inc.*, 77 F. (2d) 493 (C. C. A. 2d, 1935).

There is no doubt that the intervener may protest against the confirmation of a plan; the reorganization statutes give all creditors and stockholders the right to be heard on this issue, and the intervener clearly should have a right of appeal. As one court stated, even though no one objected, the court would still have to consider whether the plan was fair and equitable, and any intervener would seem qualified to raise the objection.²⁰⁹ Interveners have also been allowed to question the constitutionality of the statute,²¹⁰ to object to fees,²¹¹ and to controvert the right of the court to appoint an investigator under the reorganization statutes.²¹² Somewhat anomalously one court has held that an intervening committee might not question the right of another committee to represent certain security holders.²¹³ This decision on any consideration of status seems indefensible.

The courts have not been lenient in granting fees to interveners.²¹⁴ To the extent that intervention is necessary to protect the small security holders, a denial of fees to their attorneys, while it will prevent strike suits, does not seem entirely satisfactory. We may repeat our earlier observation on this point.²¹⁵

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

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209. *In re Peyton Realty Co.*, 18 F. Supp. 822 (E. D. Pa. 1936).

210. *In re New York, New Haven & Hartford R.R.*, 16 F. Supp. 504 (D. C. Conn. 1936).

211. *In re Pine Block Bldg. Corp.*, 90 F. (2d) 238 (C. C. A. 7th, 1937).

212. *In re Utilities Power & Light Corp.*, 90 F. (2d) 798 (C. C. A. 7th, 1937).

213. *In re Follansbee Bros. Co.*, 19 F. Supp. 27 (W. D. Pa. 1937).

214. See *In re New York Investors*, 79 F. (2d) 182 (C. C. A. 2d, 1935).

215. *Moore and Levi*, *supra* note 1, at 607.