METHODS OF ATTACKING RECEIVERSHIPS

The equity receivership inaugurated as an extraordinary remedy for corporations unable to pay their debts as they mature has long been criticized as an effective vehicle for the machinations of dominant banker-management groups. Assisted by such carefully secured aids as a friendly court, a few obliging creditors, and puppet protective committees, these groups have succeeded in maneuvering the most complicated corporate structures through the intricacies of the modern reorganization, often with little or no concern for the interests of investors at large. Nor have the receivership courts exhibited any marked inclination to insist upon the protection of minority rights, for the very complexity of the plans commonly presented for review has militated against any thoroughgoing analysis of the issues at stake. Pressed by the exigencies of judicial business and conscious of the practical necessity of consummating some sort of reorganization, the lower courts, at least, have tended to stamp with their approval any plan which could obtain the requisite number of consents and which promised an end to tedious litigation.  


Because of this emphasis on practical considerations and because of the consequent almost universal abhorrence of the so-called "strike" or "nuisance" suit, it is not surprising that the complaints of isolated objectors have sometimes been frigidly received.² In spite of occasional outbursts by the Supreme Court against the supposedly more flagrant "collusive" receiverships, the rights of the dissenting creditor, stockholder or, in the rare case, corporation have nowhere been clearly defined. Moreover, certain procedural hazards have been interposed, which vary according to the method of attack employed, but which are well calculated to hinder the adequate enforcement of these rights.

In planning his course of attack, an interested party contesting the receivership is confronted with two broad alternatives. He may attack the proceeding in toto, contending either that it is a complete nullity or at least that it is void in its effect upon himself, or he may object to specific orders within the scope of the receivership. It will be the task of this Comment to set forth the various methods by which these two general objectives may be attained and to evaluate the advantages and disadvantages presented by each approach from the point of view, not only of the attacker, but of the corporation and of those who have acted in good faith with the dominant group.

Preliminary to any discussion of the methods by which a receivership may be wholly set aside, it is important first to note that the way is straight in those cases where it is the defendant corporation which is attacking the proceeding. Although the appointment of a receiver is generally considered an interlocutory order,⁴ it is appealable in most jurisdictions.⁵ The requirement in the federal statute that the order to be appealed from must be "upon a hearing" causes no difficulty, since it has been held not to prevent an appeal from an ex parte order except where the latter sets up merely a temporary receivership and provides for an early hearing as to its permanency.⁷ But if the case is close, the defendant may well have difficulty in getting the order reversed, since the appointment of a receiver is said to be a matter within the discretion of the lower court.⁸ Yet the remedy is quite clear.

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2. E.g., cases cited in notes 15, 19, 40 infra.
7. See id., at 250.
8. See 1 CLARK, LAW AND PRACTICE OF RECEIVERS (2d ed. 1929) § 53. The Supreme Court of Missouri, among others, has had difficulty in interpreting this con-
The appeal is of right, so that no matter how biased or unreasonable the lower court may be, the defendant can attack the receivership from the start. Generally upon the filing of a bond, a stay or supersedeas may be had, either that the receiver may be restrained from further action or even that he be required to hand back the property pending the appeal. The only procedural hazard encountered by the original defendant is undue delay in making his attack, for the courts have displayed small sympathy for objections raised for the first time after some months, when the probable outcome of the receivership had been determined to be unfavorable.

In the typical consent receivership, however, it is not the defendant corporation which is making the attack but rather groups of creditors or stockholders or both, and when one of these groups attempts to set the receivership aside in its entirety the procedural difficulties encountered are manifold. In view of the ease with which the defendant may obtain a review of the appointment of the receiver, it is apparent that the objecting creditor or stockholder could do no better than be substituted in that position. The obvious course to this end would be to intervene and be made co-defendant, but in the federal courts at the present time Equity Rule 37 requires that intervention be "in subordination to, and in recognition of, the propriety of the main proceeding." The prospective intervener is thus barred from the

cept. Compare Commonwealth Finance Corp. v. Missouri Motor Bus Co., 233 S.W. 167, 168 (Mo. 1921) ("palpable abuse of discretion" necessary for reversal), with Bushman v. Bushman, 311 Mo. 551, 560, 279 S.W. 122, 125 (1925) (appointment "should not be upheld unless . . . it appears that the court's action was for the best interests of the parties").

9. In re McKenzie, 180 U. S. 536 (1901). For the story of this case and of a dramatic example of abuse by a lower court of the receivership process, see Campbell, Brigandage by Judicial Process; an Incident in Alaskan Judicial History (1923) 17 Ill. L. Rev. 345.


very thing he is seeking to do. Clearly, if the petition in intervention reveals a purpose to attack the proceedings, by appeal from the order of appointment or otherwise, the objector has virtually no chance. Furthermore, the right to intervene for any purpose whatsoever is often discretionary with the trial court, and no appeal may thus be taken from an order denying intervention. There is, however, an exception to this latter rule. If intervention is denied where the intervener possesses a meritorious claim and has no other way of asserting it, an appeal may be taken as of right. Moreover, in a surprising number of cases appeals have been heard for less cogent reasons although these have almost uniformly been in vain.

In any case, the attacking intervener must overcome deep seated judicial disapproval, for even before the adoption of Rule 37 it was often held that where the defendant corporation had submitted to the jurisdiction of the court, interveners were helpless to question it, unless there was a glaring lack of federal jurisdiction. Even fraud and collusion in the receiver’s appointment were no basis for intervention as defendant. More recently there have been similar decisions denying relief to interveners without even mentioning Rule 37. The apparent effect of these decisions is to foreclose all possibility of attack through intervention except in those cases where the intervener might resort to the accepted principles of collateral attack.


Actually, however, there have been very occasional decisions which offer some hope for the objector. 

In 1922 the Circuit Court of Appeals for the Ninth Circuit held that a creditor with a meritorious claim and no other remedy had an absolute right to intervene at any time in the receivership proceedings and could appeal from its denial. The holding was perfectly conventional, but in reversing the denial of the petition to intervene the court completely ignored the fact that the relief sought included a dismissal of the original bill and the vacation of the order appointing the receiver. The case of course did not decide that the attack would be successful, but at least it assured the objector intervention and a hearing. Still more remarkable is the recent case of Lincoln Printing Co. v. Middle West Utilities Co., which involved an appeal by a stockholder, previously permitted to intervene, from the denial of a prayer that the original bill be dismissed or that the order of appointment be vacated and a new receiver appointed. On a motion to dismiss the appeal, the order was said to be appealable, and Equity Rule 37 was held not to prevent the intervener, once in the case, from challenging the present eligibility of the receiver, even though the ineligibility charged existed at the time of the appointment. The obvious implication from this remarkable acrobatic is that if the attacker can succeed in intervening on a perfectly harmless ground, he can then raise all the objections he cares to and will be able to appeal from whatever orders are ordinarily appealable. The possibility is thus suggested of manipulating the “in subordination” requirement into an extremely flexible and wellnigh meaningless phrase. But the weaknesses of the case as authority for this purpose are patent. The court expressly gave “scant consideration” to the motion to dismiss the appeal, because it wanted to consider the merits of the case and, apparently, to affirm the denial of the intervener’s petition on substantive grounds. Moreover, the intervener’s objection was less to the propriety of the receivership proceeding than to the particular receivers appointed. Similar attempts to attack once intervention has been allowed, have been made elsewhere without success, notably where the interveners were not antagonistic to the receivership until the court refused to appoint their candidate for receiver. How-

25. See note 17, supra.
ever, it is not at all inconceivable that if a court were favorably impressed with an intervener's claim, one of the techniques suggested by the above two cases might effectively avoid the barrier of Rule 37. In the vast majority of the recorded cases, the court has had no sympathy with the intervener's purpose, especially where it has been apparent that he has stayed on the sidelines until all chance to benefit by the receivership was gone.  

It is difficult to generalize as to the treatment of attacks through intervention by the state courts. A few states follow the federal rule, either under statutes resembling Rule 37, or by the use of the maxim that the intervener "takes the case as he finds it," or pursuant to the argument that by intervening he recognizes the appointment of the receiver and cannot later attack it on appeal. But the majority of states are liberal, not only in permitting interveners to come in and attack the receivership as collusive or unnecessary, but also in allowing appeal from the denial of such a privilege.

A further possibility of attack in the receivership court itself is the independent bill in equity seeking to vacate the receivership for collusion or fraud, or to enjoin further proceedings. Conceivably, an independent bill showing both the impossibility of enforcing the claim by intervention or otherwise and the danger of delay could be filed at any point in the proceed-


Where the intervener has been made a party defendant so as to raise objection to the receiver's appointment, it is to be expected that the right to appeal from the denial of his motions to vacate would be governed by the rules covering the same motions when made by the original defendant. See e.g., Carrington v. Thomas C. Basshor Co., 121 Md. 71, 75-6, 88 Atl. 52, 54 (1913).
ings. The bill would then be comparable in function to the old English bills in chancery. But the independent bill has been almost exclusively confined to attacks on the entire proceeding after the final decree, and thus assumes the nature of a bill of review. And since the bill of review cannot be used to question an interlocutory order, perhaps by dubious analogy any equitable bill brought before final judgment would also be disapproved. No hard rules can be laid down as to the substantive requirements necessary to support the bill, largely because the matter has been so seldom adjudicated. It has no doubt been felt by litigants and courts alike that where there are grounds for a bill of this kind, the more practical and sensible solution is to make the same plea in the original action, by intervening or merely appearing for the purpose. Moreover, the scarcity of attacks of this sort may be partly explained by the necessity for speed on the part of the objector. Even though it be assumed that federal jurisdiction could be obtained and other obstacles surmounted, the time involved in instituting a new suit and prosecuting an appeal would in all likelihood allow the receivership to accomplish whatever damage was feared.

The remaining possible methods of overthrowing the entire receivership are those involving an attack in some other court. For instance, the contesting party may apply to a superior tribunal and seek to obtain a writ of mandamus or prohibition against the receivership court. In the federal courts and in most states, particularly in the east, the drastic nature of the remedy apparently discourages its use. It is true that in the notorious Metropolitan Railway case the petitioners applied to the Supreme Court for writs of mandamus or prohibition, but the writs were denied and the remedy neither approved nor disapproved. In a few states, notably California and Missouri, prerogative writs are in common and effective use as attacks on receiverships, and certain conclusions as to requisites may be drawn. In the first place, the relator must have an interest in the proceedings below, but he need not have been a party to the receivership nor need he have


38. In the Flershem case counsel for one of the objecting bondholders himself referred to his attack as "a bill in the nature of a bill of review." Clapier v. Flershem, 290 U. S. 504 (1934), Petitioner's Brief, p. 2.

39. See p. 763, infra.

40. Re Metropolitan Ry. Receivership, 208 U. S. 90 (1908). The same treatment was accorded the petitioner in Ex parte Relmar Holding Co., 61 F. (2d) 941 (C. C. A. 2d, 1932), cert. denied, 288 U. S. 614 (1933).


moved to vacate it\textsuperscript{43} nor have intervened for that purpose.\textsuperscript{44} But if he was in a position to appeal and did not do so, he cannot obtain the more drastic remedy\textsuperscript{45} unless he can show that an appeal would be inadequate.\textsuperscript{46} The petitioner must further have maintained a consistently antagonistic attitude towards the receivership.\textsuperscript{47} As to the grounds on which such an attack may be based, it is generally assumed that they must be “jurisdictional.” The courts seem to be uniform in saying that the petitioner is not entitled to a writ for error in the proceedings below,\textsuperscript{48} or for insufficiency of grounds for the appointment\textsuperscript{49} or failure to state a cause of action in the bill.\textsuperscript{50} But nevertheless it is clear that something more than bare jurisdiction is considered. Not only is the propriety of the receivership actually discussed in almost every opinion denying a writ,\textsuperscript{51} but the writs are often issued for what seems to be no more than serious error on the part of the lower court.\textsuperscript{52}

The rule as stated in Missouri is characteristic: that prohibition will issue where the judge has so abused discretion that his order must be treated as “extra-jurisdictional,” although the subject-matter was within his jurisdiction.\textsuperscript{53}

Closely analogous to the use of prerogative writs in that similar grounds for relief must be shown, is the so-called collateral attack upon the receivership in another court of concurrent jurisdiction. This type of attack most frequently arises in cases where a competing receivership has been set up on the theory that the original proceeding was null and void.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{43} Ibid.; cf. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121 (1890).
\item \textsuperscript{44} Ellis v. Superior Court of Riverside County, 138 Cal. App. 552, 33 P. (2d) 60 (1934) (writ of certiorari).
\item \textsuperscript{46} A. G. Col Co. v. Superior Court of Santa Clara County, 196 Cal. 604, 238 Pac. 926 (1925); see Lieberman v. Superior Court of Orange County, 72 Cal. App. 18, 27, 236 Pac. 570, 573 (1925).
\item \textsuperscript{47} Scholl v. Allen, 237 Ky. 716, 36 S.W. (2d) 353 (1931); State \textit{ex rel.} Connors v. Shelton, 238 Mo. 281, 142 S. W. 417 (1911).
\item \textsuperscript{48} See \textit{People ex rel.} Barrett v. Shurtleff, 353 Ill. 248, 259, 187 N. E. 271, 276 (1933).
\item \textsuperscript{49} See Strother v. McCord, 222 Ala. 450, 452, 132 So. 717, 718 (1931).
\item \textsuperscript{50} State \textit{ex rel.} Leake v. Harris, 334 Mo. 713, 67 S.W. (2d) 931 (1934).
\item \textsuperscript{51} \textit{E.g.}, Sunset Farms v. Superior Court of Imperial County, 9 Cal. App. (2d) 389, 50 P. (2d) 106 (1935); Gibbs v. Morgan, 9 Idaho 100, 72 Pac. 733 (1903).
\item \textsuperscript{52} Col. Co. v. Superior Court of Santa Clara County, 196 Cal. 604, 238 Pac. 926 (1925); State \textit{ex rel.} Lund & Sager v. Mulloy, 330 Mo. 333, 49 S.W. (2d) 1 (1922).
\item \textsuperscript{53} See State \textit{ex rel.} Kopke v. Mulloy, 329 Mo. 1, 11, 43 S.W. (2d) 806, 810 (1931).
\item \textsuperscript{54} Collateral attack upon receiverships has been attempted in other situations. Although logically the same principles are applicable to all, it is invariably held that
attacks are, however, rarely successful. The federal courts have been particularly strict in applying the conventional rule that only where the lack of jurisdiction affirmatively appears on the face of the record can the receivership be disturbed. It is consistently said to be immaterial whether or not the order appointing the receiver was erroneous, inequitable, ill-advised, or irregular. Although a majority of the state courts favor the strict rule as laid down by the federal courts, a few display more flexibility. Thus, even though collateral attack is based upon the supposition that the proceedings in another court are wholly null and void and hence in effect non-existent, several state courts, in not permitting the attack to succeed where the objection was not made at the proper time or in the proper manner, have relied at least in part on substantive grounds. Such decisions indicate that some courts consider collateral attack as but another method of upsetting receiverships for sufficiently good reason, and not a mere ignoring of nullity. Thus, a few successful attacks were based on the insufficiency of the original invalidity of a receiver's appointment is no defense to an action brought by him, as on a bill or note. E.g., Miller v. Hockley, 80 F. (2d) 980 (C. C. A. 4th, 1936), cert. denied, 298 U. S. 657 (1936). Collateral attack was, however, successful in defending a contempt action. Burnrite Coal Briquette Co. v. Riggs, 291 Fed. 754 (C. C. A. 3d, 1923). For circumstances of this case, see Riggs v. Burnrite Coal Briquette Co., 295 Fed. 516, 517 (D. N. J. 1924).

55. An objecting creditor may, however, force the debtor into bankruptcy or move for a 77B reorganization. Cf. In re Penny, 10 F. Supp. 638 (M. D. N. C. 1935); In re Greyling Realty Corp., 74 F. (2d) 734 (C. C. A. 2d, 1935), cert. denied, 294 U. S. 725 (1935). See BANKRUPTCY ACT § 77B(i), 48 STAT. 920, 11 U.S. C. § 207(i) (1934). Bankruptcy must be instituted within four months of the receivership. Neely v. McGehee, 2 F. (2d) 853 (C. C. A. 5th, 1924). Although similar in effect to the typical collateral attack, both of these methods entail a superseding of the receivership rather than an upsetting of it, and the problems raised in any conflict between trustee and receiver are not relevant here. Hence these alternatives will receive no further attention in this Comment.


59. See VANFLEET, LAW OF COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS (1892) 14.


61. This attitude may explain the similarity between the results of simple collateral attack and of the more specialized form represented by the prerogative writ. See notes 48-52, supra.
creditor's bill, as where it did not allege insolvency, wasting of assets, or fraud on the part of the corporate officers. These allegations become "jurisdictional facts," along with the existence of the corporation for which the receiver was appointed and the lack of an adequate remedy at law for the original plaintiff. A further divergence from accepted concepts of jurisdictional facts may possibly be found in those states where the court's power to appoint a receiver is said not to be inherent, but strictly limited and defined by statute, for in such states many questions may be deemed "jurisdictional" that are elsewhere considered as affecting only the propriety of the court's action. Similar differences arise as to the effectiveness of consent on the part of the defendant debtor in waiving jurisdictional defects. Regardless of the rule in particular jurisdictions, however, neither the prerogative writ nor collateral attack can ever be regarded as anything but insecure remedies, no matter how meritorious the attacker's case.

From this examination of the various devices whereby a receivership may be set aside in its entirety it is apparent that although the possibilities are varied, the actual utility of these methods to the prospective attacker is of negligible value. Whether the objector intervenes in the proceeding or brings a bill of review or files a petition in some other court, he can never be sure that even a meritorious claim will necessarily support his attack. Whichever way he turns he is met with a procedural obstacle of one sort or another, to say nothing of the practical difficulty of showing the lack of equity in the proceeding. Under the existing law, dissentors are thus without a single


63. See Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 Atl. 895 (Ch. 1911) semble.


66. Although the courts have not been articulate in making this exception, the results of the decided cases seem to support the statement in the text. Compare the states represented in the cases cited in note 65 with those in note 62, supra. See generally, State ex rel. Yohe v. District Court, 33 Wyo. 281, 296, 238 Pac. 545, 550 (1925); 1 FREEMAN, LAW OF JUDGMENTS (5th ed. 1925) 735.


Although it is arguable that collusive receiverships could be attacked collaterally, especially in the federal courts, as lacking the elements of a "case" or "controversy," this argument has not been made.

68. The procedural hazards interposed by the courts have commonly been justified on the theory that they are necessary adjuncts to a workable reorganization process
remedy which affords any substantial assurance that they can set a receivership aside even for cause shown.

The unhappy position of such dissenting groups has given rise to considerable agitation to liberalize the intervention provisions, for the "in subordination" requirement of Rule 37 has hitherto been an almost impassable obstacle facing the attacker of an equity proceeding. One of the first indications that this agitation has not been in vain may be found in the provision of the Bankruptcy Act relating to attack upon reorganizations under Section 77B. Subsection (a) provides in effect that specified classes of creditors and stockholders shall have an absolute right to appear and controvert the allegations made in the petition together with any jurisdictional facts necessary to the maintenance of the proceeding. The express purpose of the provision is to permit a questioning of the existing necessity and good faith of the proposed reorganization. It seems, however, that the appearance authorized under this section must be within thirty days of the original petition. And since the problems encountered by a 77B court are substantially identical with those raised by a receivership, Subsection (a) is highly illustrative of current notions respecting minority rights.

More pertinent to the issue at hand, however, is the proposed revision of Rule 37, which goes even further in the direction of encouraging promiscuous attack. Rule 24 of the new Federal Rules, now before Congress,

—an argument which the courts frequently employ to bar "outsider" interference. Compare the "rule of convenience to facilitate the conduct of the suit," "an exception to the general principle that all interested should join in the controversy." See note 115, infra.

69. The hardship might be minimized if a technique employed and recommended by District Judge Woolsey of New York should become a general practice. On application for the appointment of a receiver, he appointed a temporary one to examine the financial condition of the defendant corporation, and, having received the latter's report, he then dismissed the action. Municipal Financial Corp. v. Bankus Corp., 45 F. (2d) 902 (S. D. N. Y. 1930). It is to be regretted that this eminently sensible lead has not been followed.


72. The only persons who can maintain an attack under this section are "three or more creditors who have provable claims which amount in the aggregate in excess of the value of securities held by them, if any, to $1,000 or over," and "stockholders holding 5 per centum in number of all shares of stock of any class of the debtor outstanding." Section 77B(c), however, provides that any stockholder or creditor may intervene for the purpose of attacking particular orders handed down by the reorganization court. See note 121, infra.

73. An appearance under 77B(a) must be made "prior to the hearing provided for in subdivision (c), clause (1) . . ." Under the latter provision a hearing is required within thirty days of the approval of the petition.

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provides that intervention shall be of right " . . . (1) when a statute of the United States confers an unconditional right to intervene; or (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 . . . ." Within these limits the right to intervene and attack the proceeding immediately upon intervention is apparently absolute; no mention is made of the "in subordination" requirement of Rule 37.

Preliminary to any analysis of Rule 24, it is important to distinguish between intervention for the purpose of attacking particular orders handed down by the receivership court and intervention for the purpose of knocking out the proceeding as a whole. To the extent that this provision assures dissenters the right to be heard on questions arising within the scope of a reorganization, no criticism can be made of the liberality of the new Rule. But Section 77B(a) of the Bankruptcy Act and Section 24 of the New Federal Rules do not limit intervention to those situations where an objector wishes to attack a particular order made by a reorganization court. As pointed out above, they permit an attack upon the entire proceeding on jurisdictional grounds, and in this respect the advisability of relaxing equity restrictions is open to serious doubt. Although it may be true that Equity Rule 37 occasions harsh results in those cases where a receivership is fraudulently conceived, the practical consequences of invalidating the proceeding preclude the possibility of any abstract disposition of the problem based upon philosophical analysis of creditor's rights. In the first place, attacks upon receiverships are not always prompted by a bona fide desire to set the proceeding aside. To the extent that these contests represent a genuine threat to the reorganization, their nuisance value is patent. Hoping to be bought off at an advantageous price, dissenters may press suits where there is no possibility of other material gain. The greater the ease with

75. Under the Act of June, 1934, authorizing rules uniting law and equity, the new rules apparently will take effect at the close of the present session, if Congress takes no further action. 48 Stat. 1064, 28 U. S. C. § 723(c) (1934); see Clark, Power of the Supreme Court to Make Rules of Appellate Procedure (1936) 49 Harv. L. Rev. 1303, 1309.

76. Rule 24 also provides for intervention under other circumstances at the discretion of the court.

77. Existing possibilities for intervention to object to specific orders within the receivership are discussed at pp. 762-766, infra.

78. In this respect, Rule 24 represents a substantial improvement over the existing law relating to intervention. See p. 765, infra.

79. There seems to be no reason why any creditor or stockholder may not qualify under Subsection (3) of the new rule, as one "so situated as to be adversely affected" by the result.

which they can tie up proceedings, the greater will be the nuisance value of these suits, and consequently the greater the temptation to creditors in general to adopt the same tactics—thus threatening any sort of efficient administration of receiverships. Nor will judicial condemnation of nuisance suits and refusal to grant stays alone suffice to remedy the evils of un-restrained attack, for even when the receivership is shown to be fraudulent and is consequently set aside, the position of the contesting creditors is not materially improved. The immediate effect is usually a free-for-all race of diligence, no one creditor being in any better position than another. Since the fact of receivership will usually result in insolvency even if that condition was not originally present, the chance of full realization on claims is at best dubious. With all opportunity gone for the debtor to work through to a fresh start, liquidation becomes inevitable, and not only are the claims of majority creditors jeopardized but employees and others dependent on the existence of the corporation are deprived of their opportunity for livelihood.

It is conceivable that the more unfortunate effects of a successful attack upon a receivership could be alleviated to some extent by imposing a time limitation on the period during which such an attack could be brought. For instance, Rule 24 might be amended to conform with the requirement of Section 77B(a), that any attack based on jurisdictional grounds must be commenced within thirty days of the filing of the petition. Such an amendment would be particularly opportune in those cases where the objection made to the receivership is that the corporation was at all times ready and willing to meet its debts as they matured, for, if the fraudulent character of the proceeding is immediately exposed, an originally solvent corporation might conceivably survive the customary aftermath of a successful attack. And even where solvency is not in issue there can be no question as to the desirability of limiting jurisdictional attack to the early stages of the receivership, i.e., before assenting groups have acted in reliance on its validity. The customary creditors' race might be avoided by a blanket injunction pro-

81. The race of diligence may be avoided if the corporation goes into voluntary bankruptcy or under Section 77B. Cf. note 55, supra.

82. It is noteworthy that even in the Flershem case, where the appointment of the receiver was held to have been collusive, largely because insolvency was not then imminent, the corporation actually became insolvent before the entry of the order of sale. 290 U. S. 504, 517, 519 (1934).

83. The unhappy results flowing from the overthrow of a debtor relief proceeding have long been judicially recognized. See Pinneo v. Hart, 30 Mo. 561, 569 (1860); cf. Re Metropolitan Ry. Receivership, 208 U. S. 90, 112 (1908).

84. For Congress to change the rules, it will apparently be necessary to enact legislation "of like dignity" to the Act of 1934. See Clark, loc. cit. supra, note 75. However, under the Act the Supreme Court's power to issue rules is made continuing, so that presumably they could be amended at any time. 48 Stat. 1064, 28 U. S. C. § 723(b) (1934).
hibiting creditors from levying execution upon the property of the debtor immediately following the dissolution of the proceeding.

Advocation of the "in subordination" requirement does not imply that dissenters should be deprived of all remedy against a receivership fraudulently procured. Actually, several other methods exist whereby the objector may obtain full satisfaction for whatever loss he has suffered as a result of the receivership without at the same time disrupting the entire proceeding. A possible solution to this end is an attack which does not purport to overthrow the receivership as a whole but only to avoid its effect upon the parties contesting it. Such an attack is well typified by the "special appearance" method, so-called for want of a better term. Procedurally this type of attack cannot be classified. It seems to involve merely an appearance before the court, an argument made, and either a motion to be appealed from, or simply an appeal taken from an order of the court in the main proceeding. This procedure was early foreshadowed in the Metropolitan Railway case. In that case, the objecting claimants merely made "application" to the trial court praying the dismissal of the original bill in equity for fraud, etc. Their petition was later amended to include a prayer to be allowed to intervene in behalf of other creditors, and was then in all respects denied; but at least it was heard, and appears to have put the objectors in a position, if not to appeal, at least to lay the foundation for their original applications to the Supreme Court.

Twenty-five years later in another landmark case in receivership law, First National Bank of Cincinnati v. Flershem, almost the same thing was done, this time with eminent success. Two of the non-assenting debenture holders "appeared specially" at the hearing on the confirmation of the sale ten months after the receiver's appointment and objected to the whole proceeding. From the decree affirming the sale they appealed, apparently without protest, and reached the Supreme Court by certiorari. It is difficult to avoid the conclusion that the objectors were lucky. In the first place, it is at best doubtful if their procedure could have withstood objection, particularly at the point of initial appearance. Secondly, it seems clear that if the Supreme Court had not felt strongly on the subject of the collusive receivership, it would have found fatal fault with the objectors for waiting so long, presumably "to see which way the cat would jump," before attacking the original bill as to jurisdiction and general equity. Nevertheless, the significance of the case

85. This result has been sought, and in one case, at least, has apparently been reached by means of collateral attack. Texas & P. Ry. v. Gay, 86 Tex. 571, 26 S. W. 599 (1894) (death action against railroad in receivership where law prohibited such actions against receivers). Cf. cases cited in notes 58 and 63, supra. The probability is, however, that a receivership once declared a nullity in any proceeding would not long survive.

86. Re Metropolitan Ry. Receivership, 208 U. S. 90, 97-98 (1908).

87. 290 U. S. 504, 513 (1934).
procedurally can easily be underestimated, since the method of attack followed is not wholly unknown in some Circuit Courts of Appeals.88

Closely related to the "special appearance" method is the procedure followed in Shapiro v. Wilgus.89 There, after the appointment of a receiver, and the injunction against attachments and executions (but not suits) unless permitted by the court, the objecting creditor filed suit and recovered a judgment in a state court. He thereupon "made application in due form" before the district court for permission to levy execution on the debtor's property in the hands of the receivers. Upon appeal from denial and certiorari, he was declared to be entitled to payment in full by the receivers or leave to issue execution. The court appeared to limit the availability of the method to cases where there was no "substantial doubt that the conveyance and the receivership were voidable obstructions," speaking almost entirely in fraudulent conveyance terms, and once again the question was undecided as to whether the hearing of the application and the appeal from its denial were of right.90 Notwithstanding these uncertainties, where the original decree takes a similar form,91 the procedure is less amorphous and enjoys greater formality than the special appearance method, and it brings the same reward if successful. It is noteworthy that a similar procedure has been employed with comparative frequency by receivers seeking to obtain possession from a competing receiver in another court.92 But since a court officer is no doubt entitled to greater attention and respect in an informal proceeding than the typical objecting creditor, this practice can afford only a dubious precedent for the methods outlined above. Possibly because the

88. Kingsport Press v. Brief English Systems, 54 F. (2d) 497 (C.C.A. 2d, 1931), cert. denied, 286 U. S. 545 (1932); Seneca Sec. Corp. v. Medinah Athletic Club, 74 F. (2d) 108 (C.C.A. 7th, 1934); cf. New York Trust Co. v. Watts-Ritter & Co., 57 F. (2d) 1012 (C.C.A. 4th, 1932) (mortgage trustee filed special appearance to contest court's jurisdiction over it and to obtain leave to foreclose mortgage in a separate suit). These attacks were all unsuccessful, but the procedure was tolerated.

The possibility of filing briefs as amici curiae on appeal from any order of the receivership court and arguing for dismissal of the original bill has been recognized. People's-Pittsburgh Trust Co. v. Hirsch, 65 F. (2d) 972 (C.C.A. 3d, 1933).

89. 287 U. S. 348, 351-352 (1932).

90. Other precedent is equally unsatisfactory in that the attacks failed on substantive grounds and no procedural questions were raised. Ketchum v. McDonald 85 F. (2d) 436 (C.C.A. 3d, 1936), cert. denied, 299 U. S. 595 (1936); Patterson v. Patterson, 184 Fed. 547 (C. C. S. D. N. Y. 1910); First National Bank of Medford, Ore. v. Stewart Fruit Co., 17 F. (2d) 621 (N. D. Cal. 1927). In the last case cited, the creditor ordered the sheriff to levy execution, and appeared in the receivership court to make his attack when that court issued a restraining order against the sheriff.

91. Even an injunction against the bringing of any action might not prove fatal to the use of this method if an appearance were first made to attack the injunction. Seneca Sec. Corp. v. Medinah Athletic Club, 74 F. (2d) 108 (C.C.A. 7th, 1934).

state courts are not as strict in their limitations on attack through intervention, these methods have not been favored outside of the federal courts, although a variety of attempts to use them have been made. It is true that there have been a few instances when attorneys have simply informed the judge of circumstances making his appointment of a receiver wholly improvident and that he has vacated the order of appointment on his own behalf, but in these cases personal factors rather than procedural problems were involved.

Although the "special appearance" and the method of attack suggested in Shapiro v. Wilgus are both remedies of doubtful certainty, there can be no doubt as to their value to the objecting creditor in those cases where they prove successful. By making a special appearance, the creditor may obtain a judicial declaration that the receivership proceedings are entirely void as to him. He may then levy execution and collect 100% of his claim. The same result may be reached when the creditor obtains leave to levy execution as was done in the Shapiro case. There is no necessity for a race of diligence, for in neither of these cases is the receivership vacated as to all concerned. An attempt by other creditors to ride the coattails of the venture-some attacker and reap the same benefits was made in proceedings following the Flershem case, but without success. Even from the point of view of the corporation as a whole, it is arguable that the "special appearance" is preferable to a more general attack through intervention. Although objectors may become entitled to payment in full, satisfaction of their claims will permit the receivership to continue an uninterrupted course which may lead to eventual rehabilitation of the company.

But despite the advantages which may follow from the "special appearance" method of attack, there are countervailing objections which render its extensive use as undesirable as a general overthrow of the proceeding. First, the attacking creditor must be paid the entire amount of his claim even though total available assets may be far from sufficient to meet all obligations of the debtor corporation. Such a preference can hardly be


justified in terms of the equitable policy of pro rata administration of debtor's estates. Its effect upon participating small creditors seems particularly unfair, since full satisfaction of the attacker's claims will proportionately diminish the amount of assets to be distributed among those who have relied in good faith upon the validity of the proceeding. But even though it be assumed that the preference accorded to those who are successful in their attack is warranted as against assenting creditors, recurring judicial declarations upholding this method of attack would place so high a premium on dissent that the essential work of securing creditor's cooperation and assent to a reorganization would become virtually impossible.

Whatever objections may be raised to attacks upon the validity of a receivership either as a whole or in part, none of these defects needs apply to the second general course of action open to the dissenter, that of attacking particular orders within the scope of the proceeding. Certainly the effect of a successful attack upon a single order is in no way as disastrous as an overthrow of the entire proceeding. Instead of a race of diligence and probable liquidation of the debtor corporation, the reviewing court can merely direct an amendment of the erroneous order, or, if the case requires, insist upon a re-evaluation of the property and adjustment of the upset price. Nor is there any unjustifiable preference in favor of the contesting party since all the creditors will benefit by a successful attack.

When the dissenter phrases his attack in terms of a particular order handed down by the receivership court, the procedural path is comparatively clear. Whether the creditor or stockholder wishes to attack the particular receiver appointed or the judge presiding, the fairness of the reorganization plan, or the adequacy of the upset price, in the vast majority of cases he will seek to intervene for the purpose. True, it has been suggested on occasion that a creditor who is dissatisfied with the activities of his representative in the receivership should bring an independent suit, but such suits, although they have been attempted, have not been encouraged, apparently on the ground that the plea might more properly have been made in the original proceeding. Moreover, objectors have some-

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98. See Reed v. McIntyre, 98 U. S. 507, 512 (1878).
times appeared in receivership proceedings without having previously intervened, but it may be surmised that in most of these cases the dissenters were served with notice of the hearing and were fully expected to come in and make their objections. In spite of these more or less isolated cases intervention in subordination is the standard method of attack, especially when there is opposition to the protest.

Although intervention is admittedly the most desirable of these procedures, the intervening party is presented with a difficult problem in determining when he should make his attack. Where the objection is raised at the hearing preliminary to the final confirmation of the sale, the objector will almost always be permitted to intervene and to appeal from that decree. And even though the attack is not made until after the final decree, the Boyd case indicates that, if the creditor is not guilty of laches, there is virtually no limit upon the assertion of his rights. There are, however, certain practical disadvantages in delaying the attack until this time, or even until the approval of the plan. Among these must be included the inertia of the courts in overturning what has already been accomplished. The consummation of the sale and probable unwillingness of court and parties alike to repeat the whole weary process are factors difficult to evaluate but which must nevertheless be taken into consideration by any objector who hopes to maintain a successful attack. Moreover, the damage to the creditor may have taken place at or shortly after the time of original appointment, and in such cases it may be ruinous to wait until the receivership court has finally approved a plan. For instance, the objecting creditor may wish to contest the particular receiver directly after his appointment, or the reorganization plan and upset price immediately upon their promulgation.


111. It seems clear that a court may take jurisdiction over and approve a proposed plan of reorganization before the sale [Eastern States Pub. Serv. Corp. v. Atlantic
In such cases, the logical move would seem to be to intervene and appeal from the order objected to. Although a few federal courts have been lenient in this respect, the majority rule appears to be that intervention for this purpose is not of right and hence not appealable. Various explanations have been advanced to support this rule, among them being the argument that the objector is already adequately represented. This contention, however, seems patently fallacious, the very fact of intervention militating against its truth. Certainly no creditor will intervene unless he feels that his interests are in conflict with the majority group. It is further said that intervention at such a time is premature, that it will be time enough for objections to be heard before confirmation of the sale. But the creditor may believe, and with reason, that it will then be too late. The almost universal refusal to permit intervention during the early stages of a receivership is merely another indication of current judicial concessions to the controlling majority elements of large scale reorganizations.


117. See Moore & Levi, supra note 17, at 599.

118. Mr. Robert T. Swaine believes it "to be established by the decisions . . . that the determination of the fairness of a plan should properly be had upon the application for confirmation of a sale . . ." Swaine, Reorganization of Corporations;
It has no doubt been felt that efficient conduct of receiverships would be considerably disturbed by constant interventions and appeals. But if carried to its logical extreme this argument becomes patently absurd. Concededly, the smoothest and least troublesome method of effectuating a reorganization would be to permit the management group to dictate the plan and conduct the entire proceeding. The mere statement of the proposition, however, does violence to accepted concepts underlying the administration of a corporate debtor's estates. The essence of reorganization procedure to date has been a bargaining process which presupposes that all classes of stockholders and creditors are either present or represented in the proceeding and can hence partake in the negotiations antecedent to the drafting of a plan. To provide all opposing interests with a fair opportunity to exercise whatever bargaining power each may possess, it seems that easy intervention at the outset of the proceeding is a prerequisite.

Nor is there any practical justification for the existing rule. By permitting stays only under high bond and by punishing frivolous appeals the nuisance value of these suits can be effectively curtailed.

Although it is too early to prophesy with any assurance of accuracy, it seems that the adoption of the new Federal Rules will obviate the necessity of delaying intervention in receiverships until the reorganization plan has become to all intents and purposes a fait accompli. Although the wisdom of the abolition of the "in subordination" clause of Equity Rule 37 may be questioned, Rule 24 represents a substantial improvement over current equity practice in two respects. It clarifies the rights of dissenters by setting out definite standards as to who may intervene and it places no limit on the time within which such intervention must take place. Of course it is possible that if and when these Rules go into effect, reactionary interpretation by the courts may strip such provisions of their clearly intended liberality. For instance, the provision of subdivision (3) that intervention shall be of right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of the property in the custody of the court" might be interpreted to mean that the dissenter would have no right to intervene until he had been actually "affected," as, e.g., by a sale of the property. But this interpretation would clearly violate the obvious purpose of the Rules.

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121. If interpreted so as to carry out this purpose, Rule 24 should provide more adequate protection to the intervener even than that afforded in 77B reorganization. Section 77B(c) provides that only objections to the permanent appointment of the trustee or the confirmation of the plan may be made as of right, and offers no opportunity for policing the formulation of the plan.