# NOTES

## THE PERMISSIBLE SCOPE OF STATUTORY INJUNCTIONS*

THE widespread legislative use of the injunction as a technique for enforcing regulatory statutes [1] has raised problems relating to its permissible scope.[2] These problems have been brought into focus by a recent circuit court of appeals decision in *Bowles v. Montgomery Ward & Company* [3] upholding a preliminary injunction of unusual compass which restrained the defendant corporation from "doing or omitting to do, any . . . act in violation of any regulation or price schedule heretofore or hereafter [4] issued by the Office of Price Administration." [5]

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* Bowles v. Montgomery Ward & Co., 143 F. (2d) 38 (C. C. A. 7th, 1944).

1. See the provisions of the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. § 4 (1940), the Elkins Act, 32 STAT. 848 (1903), 49 U. S. C. § 43 (1940), and equivalent provisions for the enforcement of cease and desist orders in the National Labor Relations Act, 49 STAT. 454 (1935), 29 U. S. C. § 160 (1940), the Federal Trade Commission Act, 38 STAT. 720 (1914), 15 U. S. C. § 45 (1940), and the Clayton Act, 38 STAT. 735 (1914), 15 U. S. C. § 21 (1940). The government agency praying for an injunction according to the provisions of a statute does not have to meet all the conditions surrounding the granting of an injunction without a statutory mandate. Neither inadequacy of legal remedies nor threat of irreparable injury need be proved. Brown v. Hecht Co., 49 F. Supp. 528, 532 (D. D. C. 1943). Even when the statute is silent, the Government need not show a pecuniary interest in order to invoke equity jurisdiction. *In re* Debs, 158 U. S. 564, 586 (1895). See also HANBURY, MODERN EQUITY (3d ed. 1943) 494-502.

2. The problem of scope is to be differentiated from that of specificness. Rule 65(d), FED. RULES CIV. PROC., provides that injunctions "shall be specific in terms; shall describe in reasonable detail, and not by reference to . . . [any] other document, the . . . acts sought to be restrained. . . ." It would appear that this provision does not exclude the incorporation by reference of the provisions of a statute, or administrative regulations issued in pursuance of a statute. See New York, New Haven & Hartford R. R. v. Interstate Commerce Comm., 200 U. S. 361 (1906) (by implication). *Cf.* Cudahy Packing Co. v. United States, 15 F. (2d) 133, 135 (C. C. A. 7th, 1926), for a discussion of the word "document." But *cf.* Brown v. Sacher, 53 F. Supp. 77, 79 (S. D. N. Y. 1943). For an illustration of how definiteness in orders is treated compare Arkansas Wholesale Grocers Ass'n v. Federal Trade Comm., 18 F. (2d) 866 (C. C. A. 8th, 1927), *cert. denied*, 275 U. S. 533 (1927), with Cream of Wheat Co. v. Federal Trade Comm., 14 F. (2d) 40 (C. C. A. 8th, 1926). See Note (1920) *Nebulous Injunctions*, 19 MICH. L. REV. 83.

3. 143 F. (2d) 38 (C. C. A. 7th, 1944).

4. That an injunction may include future administrative regulations seems well settled. If it were otherwise, it would be impossible to enjoin violation of tariff, price, or any other schedules which are subject to frequent change. See Bitterman v. Louisville and Nashville R. R., 207 U. S. 205 (1907) (future ticket issues); New York, New Haven & Hartford R. R. v. Interstate Commerce Comm., 200 U. S. 361 (1906) (freight rates); Calvert Distillers Corp. v. Stockman, 26 F. Supp. 73 (E. D. N. Y. 1939) (prices); Calvert

The principles governing the scope of injunctions have been discussed very little, and the few Supreme Court cases in point [6] are ad hoc decisions which provide slight guidance for determining whether a given injunction can be justified. In the famous case of *Standard Oil Company of New Jersey v. United States* [7] the Supreme Court upheld a decree enjoining the defendants "from in any way conspiring or combining to violate the [Sherman Anti-Trust] Act." [8] Injunctions almost equally broad were sustained under the Railway Labor Act of 1926 [9] where a defendant railroad recognized a company union in violation of the act,[10] and under the Sherman Act [11] where defendants attempted to coerce poultry dealers to rent coops at excessive rates.[12] On the other hand, the Supreme Court has refused to uphold act-wide injunctions

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Distilling Co. v. Brandon, 24 F. Supp. 857 (W. D. S. C. 1938) (prices). For cases enjoining violations of future OPA regulations see Bowles v. Nu Way Laundry Co., 144 F. (2d) 741 (C. C. A. 10th, 1944); Bowles v. Barclay Corp., 57 F. Supp. 159 (E. D. Pa. 1944); Brown v. Society Brand Hat Co., 16 OPA Serv. 620:206 (E. D. Mo. 1943); Brown v. Sanchez Osorio, 16 OPA Serv. 620:202 (D. Puerto Rico 1943); Henderson v. C. Thomas Stores, 48 F. Supp. 295 (D. Minn. 1942); Henderson v. Wilson & Co., 16 OPA Serv. 620:39 (N. D. Ill. 1942). But *cf.* Bowles v. May Hardwood Co., 140 F. (2d) 914 (C. C. A. 6th, 1944).

5. Bowles v. Montgomery Ward & Co., 143 F. (2d) 38, 41 (C. C. A. 7th, 1944). The injunction was issued pursuant to § 205a of the Emergency Price Control Act of 1942, 56 STAT. 23, 50 U. S. C. § 925a (Supp. 1942).

6. NLRB v. Express Publishing Co., 312 U. S. 426 (1941); Local 167 v. United States, 291 U. S. 293 (1934); Texas & New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930); Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911); New York, New Haven & Hartford R. R. v. Interstate Commerce Comm., 200 U. S. 361 (1906); Swift & Co. v. United States, 196 U. S. 375 (1905); *cf.* Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461 (1939); Warner & Co. v. Lilly, 265 U. S. 526, 532 (1924).

7. 221 U. S. 1 (1911). ". . . we construe . . . the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law." *Id.* at 81.

8. *Id.* at 79.

9. 44 STAT. 1447 (1926), as amended by 48 STAT. 1185 (1934), 45 U. S. C. § 151 (1940).

10. Texas & New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930). The decree enjoined the defendant railroad from ". . . in any way or manner interfering with, influencing, intimidating or coercing plaintiffs . . . of their free and untrammeled right of self-organization." *Id.* at 555-6, n. 1. The scope of the injunction, however, was neither an issue in the case nor discussed in the opinion.

11. 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2, 3, 4 (1940).

12. Local 167 v. United States, 291 U. S. 293 (1934). The defendants were enjoined ". . . from using any of the offices or positions in Local 167 . . . 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.'" *Id.* at 299. "The United States is entitled to effective relief. . . . [The injunction] should be broad enough to prevent evasion. . . . Having been shown guilty . . . appellants may not complain if the injunction binds generally as to related commodities. . . ." *Ibid.*

under the Sherman Act, in *Swift v. United States*,[13] where a dominant proportion of fresh meat dealers violated the act by engaging in a variety of monopolistic practices, and under the Interstate Commerce Act [14] where only one railroad contract embodying discriminatory freight rates was proved.[15]

Recently the Supreme Court has attempted to restate the doctrine of these cases in terms of two criteria.[16] Reversing an order of the National Labor

13. 196 U. S. 375 (1905) (in opinion by Holmes, J.). Besides enjoining specific monopolistic practices, the decree enjoined defendants from restraining trade ". . . by any other method or device, the purpose and effect of which is to restrain commerce. . . ." *Id.* at 393, n. 1.

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but . . . *inherent in the nature of the case.* The scheme alleged is so vast that it presents a new problem in pleading. . . . Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from the nature must be so extensive in time and space, that something of the same impossibility applies to them. . . . we are bound to enforce [the law] . . . notwithstanding these difficulties. On the other hand we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. *We cannot issue a general injunction against all possible breaches of the law.* We must steer between these opposite difficulties as best we can." *Id.* at 395-6 (emphasis supplied).

"The words quoted [*supra*] *are* a sweeping injunction to obey the law, and are open to the objection which we stated . . . that it was our duty to avoid." *Id.* at 401 (emphasis supplied).

14. 32 STAT. 847 (1903), 49 U. S. C. § 41 (1940).

15. New York, New Haven & Hartford R. R. v. Interstate Commerce Comm., 200 U. S. 361 (1906). The Attorney General argued: "It is important to know how broad injunctions issued in proceedings under this act should be, and to secure an authoritative ruling the question is here presented." *Id.* at 378. The Circuit Court of Appeals had enjoined the defendant railroads from performing one particular illegal contract only. *Id.* at 385-6. The Interstate Commerce Commission had prayed that the Chesapeake & Ohio R. R. be enjoined from "'doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a rate less than named in the tariffs published and filed by such carrier, as is required by the act . . . *and acts amendatory thereof or supplementary* thereto, or whereby any other advantage may be given or discrimination practiced.'" *Id.* at 383 (emphasis supplied). The injunction prayed for against the New Haven R. R. was equally broad. *Id.* at 383. In its assignment of error the Interstate Commerce Commission insisted that defendant Chesapeake R. R. be enjoined ". . . from giving . . . to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage. . . ." *Id.* at 403. While the Supreme Court broadened the injunction somewhat by enjoining the railroad from "taking less than the rates fixed in its published . . . rates, by means of dealing in the purchase and sale of coal . . .", *id.* at 405, it denounced the Interstate Commerce Commission's demands for an act-wide injunction as "violative of the most elementary principles of justice." *Id.* at 404.

16. See NLRB v. Express Publishing Co., 312 U. S. 426 (1941). In this case the National Labor Relations Board had, in the words of the Supreme Court, "ordered broadly that respondent should in effect refrain from violating the [National Labor Relations] Act [49 STAT. 452-3 (1935), 29 U. S. C. § 158 (1940)] in any manner whatsoever. . . ." upon a finding that the respondent publishing company had refused to bargain with a particular labor union. *Id.* at 430. The Supreme Court held that the Board was not justified "in

Relations Board which had directed a corporation not to violate "in any manner" [17] the duties imposed on the employer by the National Labor Relations

making a blanket order restraining the employer from committing any act in violation of the statute. . . .," *id.* at 433, and that "an appropriate order *in the circumstances of the present case* would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate." *Id.* at 438 (emphasis supplied). The Supreme Court made it clear that an act-wide cease and desist order is not objectionable in every case by distinguishing a number of cases in which equally broad orders as those in the *Express* case had been sustained. The Court contrasted "persistent attempts" to interfere with labor's right of self-organization which justify a broad order with the "isolated acts" in the *Express* case. The cases distinguished are NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939); Texas & New Orleans R. R. v. Brotherhood of Railway Clerks, 281 U. S. 548 (1930); and Virginian R. R. v. System Federation No. 40, 300 U. S. 515 (1937). Other decisions which upheld by implication act-wide orders under the National Labor Relations Act prior to the *Express* case are NLRB v. Bradford Dyeing Ass'n, 310 U. S. 318 (1940); Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938); NLRB v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938); Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453 (1938); NLRB v. Fruehauf Trailer Co., 301 U. S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U. S. 58 (1937); Associated Press v. NLRB, 301 U. S. 103 (1937).

Since the *Express* case lower courts have continued to uphold act-wide cease and desist orders when they believed that the circumstances of the particular case justified their doing so. See NLRB v. Standard Oil Co., 138 F. (2d) 885 (C. C. A. 2d, 1943) (illuminating concurring opinion by Clark, J.); Sperry Gyroscope Co. v. NLRB, 129 F. (2d) 922 (C. C. A. 2d, 1942); NLRB v. Bradley Lumber Co. of Arkansas, 128 F. (2d) 768 (C. C. A. 8th, 1942); Canyon Corporation v. NLRB, 128 F. (2d) 953 (C. C. A. 8th, 1942); NLRB v. Algoma Net Co., 124 F. (2d) 730 (C. C. A. 7th, 1941); NLRB v. Air Associates, Inc., 121 F. (2d) 586 (C. C. A. 2d, 1941); F. W. Woolworth Co. v. NLRB, 121 F. (2d) 658 (C. C. A. 2d, 1941); NLRB v. Entwistle Mfg. Co., 120 F. (2d) 532 (C. C. A. 4th, 1941); American Enka Corp. v. NLRB, 119 F. (2d) 60 (C. C. A. 4th, 1941); Oughton v. NLRB, 118 F. (2d) 486 (C. C. A. 3rd, 1941); NLRB v. Reed & Prince Mfg. Co., 118 F. (2d) 874 (C. C. A. 1st, 1941).

On the other hand, decrees have been narrowed on the authority of the *Express* case in many instances. See Commonwealth Edison Co. v. NLRB, 135 F. (2d) 891, 894 (C. C. A. 7th, 1943); NLRB v. Cleveland-Cliffs Iron Co., 133 F. (2d) 295, 302 (C. C. A. 6th, 1943); NLRB v. Botany Worsted Mills, 133 F. (2d) 876, 883 (C. C. A. 3rd, 1943); American Smelting & Refining Co. v. NLRB, 126 F. (2d) 680, 689 (C. C. A. 8th, 1942); NLRB v. Mason Mfg. Co., 126 F. (2d) 810, 814 (C. C. A. 9th, 1942); Reliance Mfg. Co. v. NLRB, 125 F. (2d) 311, 321 (C. C. A. 7th, 1941); NLRB v. Aluminum Goods Mfg. Co., 125 F. (2d) 353, 358 (C. C. A. 7th, 1942); Wilson & Co. v. NLRB, 123 F. (2d) 411, 419 (C. C. A. 8th, 1941); NLRB v. Burry Biscuit Corp., 123 F. (2d) 540, 543 (C. C. A. 7th, 1941); NLRB v. Grower-Shipper Vegetable Ass'n of Central California, 122 F. (2d) 368, 377 (C. C. A. 9th, 1941); NLRB v. Tex-O-Kan Flour Mills Co., 122 F. (2d) 433, 442 (C. C. A. 5th, 1941); Warehousemen's Union v. NLRB, 121 F. (2d) 84, 85 (App. D. C. 1941); NLRB v. Continental Oil Co., 121 F. (2d) 120, 126 (C. C. A. 10th, 1941); Singer Mfg. Co. v. NLRB, 119 F. (2d) 131, 139 (C. C. A. 7th, 1941); NLRB v. Ford Motor Co., 119 F. (2d) 326, 330 (C. C. A. 5th, 1941); NLRB v. West Texas Util. Co., 119 F. (2d) 683, 686 (C. C. A. 5th, 1941); McQuay-Norris Mfg. Co. v. NLRB, 119 F. (2d) 1009, 1010 (C. C. A. 7th, 1941).

For comment on the *Express* case see Notes (1941) 39 MICH. L. REV. 1219, (1941) 41 COL. L. REV. 911; *cf.* Comment (1940) 53 HARV. L. REV. 472.

17. NLRB v. Express Publishing Co., 312 U. S. 426, 430 (1940).

Act, the Court held that acts to be enjoined must be "*of the same type or class* as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, *may fairly be anticipated* from the defendant's conduct in the past." [18] As these criteria, *similarity* and *probability*, cannot easily, if at all, be circumscribed with precision, the Supreme Court probably intended to leave a wide area of discretion to chancellors, while preserving an equally extensive power to reverse in appellate courts. Thus the Supreme Court's doctrine has reaffirmed the traditional flexibility of the injunction as a remedial device in the modern realm of statutory injunctions.

Yet the very flexibility of the injunction has created its dangers, for only by an injunction, followed by contempt proceedings for its non-observance, can the equivalent of criminal penalties be imposed upon a defendant without the safeguards of criminal procedure.[19] Therefore the bulwarks which protect the individual against the power of the state under the common law can most easily be breached by the use of this equitable remedy. The history of labor injunctions testifies that such a breach is more than a possibility.[20] In a period in which government power is being rapidly expanded the use of sweeping injunctions to enforce administrative regulations may create added dangers. A broad injunction which was entirely justified when the government was weak, as in the *Standard Oil* case, may become an unfortunate precedent when the collectivist's impatience with the law's delay is threatening

18. *Id.* at 435 (emphasis supplied).

19. The most important of these safeguards is probably a defendant's right to a jury trial, notwithstanding the possibility that in times of stress a jury may be more easily swayed by prejudice than a chancellor. *Quaere* whether it would be advisable to amend the Emergency Price Control Act to provide for a jury trial in contempt proceedings under the Act. Such a provision in the Norris-LaGuardia Act, 38 STAT. 739 (1914), 28 U. S. C. §§ 386, 387 (1940), has been held constitutional in Michaelson v. United States, 266 U. S. 42 (1924). See Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010, 1038.

Since § 205b of the Emergency Price Control Act provides for criminal penalties in cases of willful violation, 56 STAT. 33, 50 U. S. C. § 925b (Supp. 1942), an injunction against violations of the act is an injunction against crime. It seems settled that such an injunction is permissible when the crime enjoined is also a public nuisance. Mugler v. Kansas, 123 U. S. 623 (1887); *In re* Debs, 158 U. S. 564, 593 (1895); Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146 (1868); Attorney General v. Sharp, [1931] 1 Ch. 121 (C. A.); 4 POMEROY, EQUITY JURISPRUDENCE § 1349 (5th ed. 1941). What types of crime may be enjoined and what circumstances will justify an injunction is problematical. See Caldwell, *Injunctions against Crime* (1931) 26 ILL. L. REV. 259; Rogers, *The Use of the Injunction to Prevent Crimes in Cases Involving Houses of Ill Fame, etc.* (1932) 20 KY. L. J. 329; Note (1924) 13 CALIF. L. REV. 63. "For crimes that are *mala in se* the injunction is inappropriate. . . ." HANBURY, MODERN EQUITY (3d ed. 1943) 496. "To make the infraction of a criminal statute also a contempt of court is essentially an invention to evade the safeguards of criminal procedure and to change the tribunal for determining guilt." FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1930) 107.

20. FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1930) gives the classic account. Chapter III deals with the scope of labor injunctions.

to set the tone for current intellectual trends.[21] The injunction in the *Montgomery Ward* case, which incorporates by reference not only the 16 volumes of the OPA Service already published but whatever orders and regulations the Price Administrator may add in the future, seems to furnish a timely incentive to a re-examination of the applicable principles.

A slight shift of emphasis in the choice of the criteria governing the permissible scope of injunctions may serve to underline the necessity of protecting the rights of individuals without sacrificing the virtues of flexibility inherent in the Supreme Court's doctrine. The presence of *bad faith* in a defendant's past violations may be added as a criterion to that of probability of future violations. It is true that consideration of the defendant's bad faith seems to be implicit in the Supreme Court's insistence that violations of the type to be enjoined must be such as may fairly be anticipated from the defendant's past conduct, since future offenses could hardly be expected of an inadvertent offender. Yet to make bad faith an explicit criterion would prevent manipulation of the fair anticipation test for purposes of placing a well-meaning defendant under an undue threat.[22]

Explicit insistence that the comprehensiveness of a statutory injunction bear some relation to the *magnitude of public danger* created by the possible commission of the acts to be enjoined may be suggested as an additional test in dealing with the problem of scope, on the assumption that only irresistible demands of public necessity can extenuate the jeopardizing of an individual's freedom from fear. Although the concept of public threat has not been established as a criterion in the precedents, its adoption, far from conflicting with past decisions, may serve to reconcile seemingly inconsistent holdings in a few instances. Thus the circumstances which led the Supreme Court to uphold an act-wide injunction in the *Standard Oil* case[23] were described in its opinion as "a monopolization"[24] as distinguished from "an attempt to monopolize"[25] which had been found insufficient to warrant a similar decree in the earlier *Swift* case.[26] This distinction may be translated into terms of degree of a public threat, for the danger to the public interest is less where competition still exists than where competition has already been eliminated. Likewise, a

21. For an analysis of the dangers to democracy inherent in an excessive multiplication of government controls, see HAYEK, THE ROAD TO SERFDOM (1944).

22. To a certain degree the peril of contempt proceedings is of course inevitable. Compare the language of Mr. Justice Holmes in Swift v. United States, 196 U. S. 375, 395 (1905), quoted in note 13 *supra*. "The onus thrown upon the Defendants, who have to comply with the terms of the injunction, is a necessary consequence of their own illegal act. . . ." Lord Hatherley, L. C., in Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146, 162 (1868).

23. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 80, 81 (1911).

24. *Id.* at 77.

25. *Ibid.*

26. Swift & Co. v. United States, 196 U. S. 375 (1905).

single contract embodying discriminatory freight rates [27] may reasonably be considered a threat not seriously alarming, a view which would explain the Court's reluctance to enjoin all violations of the Interstate Commerce Act because of that contract's illegality.[28]

By considering the magnitude of threat to the public in framing its decree, a court follows the traditional chancery principle of weighing the equities of contesting parties. Since a government agency in the enforcement of a statute is by definition representing the public, and since the equities on the side of the public will usually weigh stronger than the equities of an individual, it is natural for a government agency to insist that something in the nature of a blanket presumption of righteousness should be indulged in its favor, particularly when such an insistence can be fortified with Supreme Court dicta.[29] Indeed, in the case of *Hecht v. Bowles*,[30] the Price Administrator argued that the language of the Price Control Act [31] makes the issuance of an injunction mandatory upon the showing of a violation, so that "the conditions which have traditionally hedged about the granting of equitable injunctions have no application." [32] The Supreme Court, however, firmly rejected "such a drastic departure from the traditions of equity practice." [33] While it is true, as the Court emphasized in the same opinion,[34] that the public interest deserves special protection, the

27. New York, New Haven & Hartford R. R. v. Interstate Commerce Comm., 200 U. S. 361 (1905).

28. The same rationale may explain the varying scope of cease and desist orders issued under the National Labor Relations Act in the cases collected in note 16 *supra*.

29. "For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." Hecht Company v. Bowles, 321 U. S. 321, 331 (1944). "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 552 (1937). "The United States is entitled to effective relief. . . . doubts should be resolved in favor of the Government. . . ." Local 167 v. United States, 291 U. S. 293, 299 (1934).

30. 321 U. S. 321 (1944).

31. Section 205(a) of the Act provides: "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of . . . this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and *upon a showing by the Administrator that such person has engaged* or is about to engage in any such acts . . . a permanent or temporary injunction . . . shall be granted without bond." 56 STAT. 33, 50 U. S. C. § 925a (Supp. 1942) (emphasis supplied).

32. Brief for Respondent, p. 37, Hecht Company v. Bowles, 321 U. S. 321 (1944).

33. Hecht Company v. Bowles, 321 U. S. 321, 329 (1944). The Court construed § 205(a) of the Act as *a grant of jurisdiction* for the issuance of injunctions to state and federal courts. *Id.* at 329.

34. "We do not mean to imply that courts should administer § 205(a) grudgingly. . . . The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion

public interest is not necessarily represented by the government agency.[35] The circumstances of the *Hecht* case [36] which led the District Court to the conclusion that the issuance of the injunction prayed for by the Price Administrator would be unjust and *not* "in the public interest" [37] may not have been unique. Adoption of the criterion of public threat would render necessary a weighing of the equities in the light of the concrete situation at bar. Thus the supremacy of the public interest would still remain recognized but would not be thrown in the balance in the government's favor as a matter of course.

Application of the two suggested criteria of bad faith and public threat to the facts of the *Montgomery Ward* case would seem to sustain the Circuit Court of Appeals' approval of the act-wide injunction. One year before the District Court issued the decree under discussion, the defendant Montgomery Ward & Co. was enjoined from violating the provisions of the General Maximum Price Regulation [38] issued by the Price Administrator, on the basis of violations which, apparently, had not been inadvertent.[39] The ceiling prices of certain commodities were originally governed by the Regulation, the viola-

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under § 205(a) must be exercised in light of the large objectives of the Act. . . . That discretion should reflect an acute awareness of the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' . . . and that delay or indifference may be fatal." *Id.* at 330-1, quoting from SEN. REP. No. 931, 77th Cong., 2d Sess. (1942) 10.

35. In fact the courts indulge in presumptions *against* the government in certain circumstances. The most familiar example is the presumption of a defendant's innocence which the government prosecutor must overcome beyond a reasonable doubt. Likewise it seems settled that tax statutes are to be construed against the government. "In case of doubt they [tax statutes] are construed most strongly against the Government, and in favor of the citizen." Gould v. Gould, 245 U. S. 151, 153 (1917); see Benziger v. United States, 192 U. S. 38, 55 (1904); American Net & Twine Co. v. Worthington, 141 U. S. 468, 474 (1891); United States v. Isham, 17 Wall, 496, 504 (U. S. 1873).

36. The trial court had found that defendant's violations of the Act were inadvertent and innocent in character, that the defendant had made "prompt and reasonable efforts" to obey the law, and that it "consistently improved its methods . . . to . . . meet the requirements of the act and regulation and to combat the difficulties which arise from the elements of human frailty." Brown v. Hecht Co., 49 F. Supp. 528, 531 (D. D. C. 1943).

37. *Id.* at 532. "Courts of equity are not inquisitorial but remedial. . . . it was not the purpose of Congress to police industry but to seek compliance for the public good and to recognize honest and true efforts to meet the requirements of the law." *Ibid. Cf.* Brown v. Sacher, 53 F. Supp. 77, 79 (S. D. N. Y. 1943). But see Bowles v. California Scrap Iron Corp., 53 F. Supp. 40 (N. D. Cal. 1943).

38. Bowles v. Montgomery Ward & Co., 143 F. (2d) 38, 40 (C. C. A. 7th, 1944).

39. See trial record in Civil Action 4809, D. C. N. D. Ill. 1942, at p. 187, quoted in Brief for Appellee, p. 29, Bowles v. Montgomery Ward & Co., 143 F. (2d) 38 (C. C. A. 7th, 1944):

> "THE COURT. Of course this is the second time your client has been in here.
>
> "MR. BALL. The circumstances of the first case was a case of inadvertence which, I think, the court was familiar with.
>
> "THE COURT. I am thoroughly familiar with that, and there was no shadow of a defense made in the pleadings. I am thoroughly familiar with it, and there was not a shadow of a defense stated in the pleadings in the first case."

tion of which was then enjoined. Later, however, these commodities were made subject to a different category of ceiling prices, known as the "highest price line." [40] The violations which formed the basis of the broad injunction in the principal case were violations of the "highest price line" provisions, and they were committed not only before but *after* the defendant had filed a protest [41] against those provisions with the Price Administrator. It is therefore not surprising that the court found that the defendant "did not comply nor make any effort to comply" [42] with the applicable regulations. These facts would indicate that the defendant failed to obey the law, not as a result of error, but because it did not choose to do so. They contrast sharply with the facts in *Henderson v. Burd*,[43] where the defendants were acting both as selling agents for a manufacturer and as jobbers, but failed to grasp the nice distinction, "in good faith under the honest belief" [44] that they were also jobbers for the manufacturer, and as a consequence sold their goods above ceiling price. As their good faith justified the court in reversing a broad injunction, so the bad faith of the defendants in the *Montgomery Ward* case would tend to demand an injunction of a scope even broader than the one denied in the *Burd* case.

In the midst of war deliberate violations of a statute designed to protect the nation from inflation create a serious threat to the public welfare. The Supreme Court has stressed that "of all the consequences of war, except human slaughter, inflation is the most destructive." [45] To stem the tide of inflation, the Emergency Price Control Act of 1942 had to cover virtually all buying and selling transactions in the United States. Enforcement of such a vast scheme of control constitutes so tremendous a task that the very possibility of enforcement has been doubted. The success of the controls depends primarily on a voluntary and patriotic compliance with the law. The spectacle of a determined offender's enrichment may be enough to withdraw that foundation of public

40. The regulation violated was Maximum Price Regulation No. 330 § 1389.553, 12 OPA Serv. 45:1153. A 1944 amendment of the Act prohibits the imposition of highest price line limitations on retailers. Pub. L. No. 383, 78th Cong., 2d Sess. (June 30, 1944) § 2(k).

41. Montgomery Ward filed its protest on April 19, 1943. In the Matter of Montgomery Ward and Company, 15 OPA Serv. 600:308 (Opinion of the Price Administrator). The Administrator's denial of the protest was later sustained by the Emergency Court of Appeals in Montgomery Ward & Co. v. Bowles, 138 F. (2d) 669 (1943). The violations at issue in the principal case occurred between February 24, 1943, and September 4, 1943. Bowles v. Montgomery Ward & Co., 143 F. (2d) 38, 40-1 (C. C. A. 7th, 1944).

42. *Id.* at 42.

43. 133 F. (2d) 515 (C. C. A. 2d, 1943).

44. *Id.* at 517. In at least two instances a defendant's good faith has been deemed to justify a denial of the granting of any injunction. Brown v. Hecht Co., 49 F. Supp. 528 (D. D. C. 1943); Brown v. Standard Oil Co. of Kentucky, 52 F. Supp. 1022 (D. Ala. 1943).

45. Hecht Co. v. Bowles, 321 U. S. 321, 331 (1944) quoting from SEN. REP. No. 931, 77th Cong., 2d Sess. (1942) 2. The report continues: "This is true however we measure the effect of inflation, whether on national morale, war production, or dollar indebtedness." *Ibid.*

resolution without which the controls would collapse. In the face of that danger the administrative needs of the official who carries the burden of enforcing the Act warrant the sympathetic consideration of the courts.[46] They must be mindful that a broad injunction is the Price Administrator's only effective weapon under the circumstances of the *Montgomery Ward* case as the use of the alternative sanctions provided by the Act is beset with practical difficulties. License withdrawal[47] from so important a part of the war economy as is represented by Montgomery Ward & Company would conjure unpredictable consequences. While criminal penalties provide for both fines and imprisonment,[48] the maximum fine of five thousand dollars is not an effective deterrent to potential violators of the financial strength of Montgomery Ward, and sentences of imprisonment would seem a principally theoretical possibility, since subalterns are rarely convicted by juries and evidence beyond reasonable doubt of a director's or officer's responsibility for violations is hardly ever procurable.[49] Moreover, both the criminal sanction and the remedy of treble damage suits [50] merely provide punishment for past violations. If future violations are committed, the Price Administrator may be forced to institute new actions. Yet it is a physical impossibility to bring more than two actions, each of which must be based on an investigation, against any one defendant. By contrast, an injunction, while leaving a defendant unmolested for his past conduct, inhibits future violations

46. Compare the language of the court in Hecht Co. v. Bowles, 321 U. S. 321, 331 (1944) quoted in note 34 *supra*.

47. As provided in § 205(f)(2) of the Emergency Price Control Act. 56 STAT. 34, 50 U. S. C. § 925f (Supp. 1941-43).

48. § 205(b) of the Act. 56 STAT. 33, 50 U. S. C. § 925b (Supp. 1941-43). The maximum term of imprisonment is two years.

49. The English Prices of Goods Act provides for somewhat stiffer penalties. On the third and on subsequent violations of certain provisions of the Act an offender may be put out of business altogether (the equivalent of license withdrawal in the American act) by order of the court, and a breach of such order is punishable by penal servitude not exceeding five years. 2 & 3 GEO. VI, c. 118, § 7(2); 4 & 5 GEO. VI, c. 31, § 16(3) (1941). If a corporation is convicted of a contravention of the Act, any directors or officers of the corporation "shall be deemed guilty of that contravention, unless he proves that the contravention was committed without his consent or connivance and that he exercised all such diligence to prevent the contravention as he ought to have exercised having regard to the nature of his functions as a director of officer of that body and to all the circumstances." Prices of Goods Act, 1939, 2 & 3 GEO. VI, c. 118, § 18. This section would seem to leave little room for the presumption of innocence surrounding defendants in other criminal prosecutions. The Canadian statute provides for a maximum term of imprisonment of two years. ORDER IN COUNCIL P. C. 5109 (June 16, 1942), 3 EMERGENCY LAWS 28-12D (1942).

The Australian statute sets no maximum limit to the term of imprisonment possible upon a conviction on indictment for blackmarketing, nor is there any maximum limit on the fine for corporations. Black Marketing Act, 1942, § 4(3), EMERGENCY LEGISLATION HANDBOOK (2d ed. 1943) 129.

50. § 205(e) of the Act. 56 STAT. 34, 50 U. S. C. § 925e (Supp. 1942), as amended by § 108b of the Stabilization Extension Act of 1944, Pub. L. No. 383, 78th Cong., 2d Sess. (June 30, 1944).

by warning him that the effective sanction of a contempt proceeding [51] will follow any further breach of the law. But such a warning can be effective only where the decree is of sufficient scope to preclude an escape from its substance through the loopholes of its wording.

## RIGHT OF A STOCKHOLDER TO FILE A PETITION FOR CORPORATE REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT*

THE Chandler Act [1] does not define the intracorporate authorization necessary to the proper filing of a debtor's petition for a Chapter X reorganization, but merely states that a "corporation . . . may, if no other petition by or against such corporation is pending under this chapter, file a petition . . . ." [2] In the absence of federal statutory criteria, bankruptcy courts have determined the source of this authority to petition by applying the corporation laws of the state which chartered the debtor.[3] Typically thereunder, corporate managerial

51. Presumably the Price Administrator would institute civil contempt proceedings. The right of the United States to bring civil contempt proceedings was recognized in McCrone v. United States, 307 U. S. 61 (1939). For the distinction between civil and criminal contempt see Note (1936) 46 YALE L. J. 326.

* *In re* Western Tool & Mfg. Co., 142 F. (2d) 404 (C. C. A. 6th, 1944), *cert. granted sub nom.* Price v. Gurney, 65 Sup. Ct. 91 (U. S. 1944).

1. 52 STAT. 840 *et seq.* (1938), 11 U. S. C. § 1 *et seq.* (1940).

2. 52 STAT. 885 (1938), 11 U. S. C. § 526 (1940). A "corporation" is elsewhere defined as including "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making capital subscribed alone responsible for the debts of the association, joint-stock companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument." 52 STAT. 840 (1938), 11 U. S. C. § 1(8) (1940). This definition is expressly made applicable to Chapter X. 52 STAT. 883 (1938), 11 U. S. C. § 506(3) (1940).

3. *In re* Western Tool & Mfg. Co., 142 F. (2d) 404 (C. C. A. 6th, 1944), *cert. granted sub nom.* Price v. Gurney, 65 Sup. Ct. 91 (U. S. 1944) (right of stockholder to petition under Chapter X); see Royal Indemnity Co. v. American Bond & Mortgage Co., 289 U. S. 165, 170 (1933) (authority of directors to file voluntary petition in bankruptcy); *In re* De Camp Glass Casket Co., 272 Fed. 558 (C. C. A. 6th, 1921), *cert. denied*, 259 U. S. 703 (1921) (authority of directors to file voluntary petition in bankruptcy); Old Fort Improvement Co. v. Lea, 89 F. (2d) 286, 289 (C. C. A. 4th, 1937) (right of corporation with cancelled charter to petition under § 77B); *cf.* Mills v. Tiffany's, 198 Atl. 185, 189-90, 123 Conn. 631, 640-1 (1938) (authorization of transfer of assets to new corporation by bankrupt corporation seeking reorganization under § 77B); Home Powder Co. v. Geis, 204 Fed. 568 (C. C. A. 8th, 1913) (authority of directors to admit in writing corporate insolvency). See 10 REMINGTON, BANKRUPTCY (1939) § 4434.

The Bankruptcy Act specifically leaves some questions, such as exemptions and priority of debts, to be decided under state law. See 52 STAT. 847 (1938), 11 U. S. C. § 24 (1940); 52 STAT. 874 (1938), 11 U. S. C. § 104(a)(5) (1940).

For discussion of a correlative problem, the effect of the National Bankruptcy Act upon state insolvency statutes, see Note (1940) 49 YALE L. J. 1090.

capacity is vested by a general statute or charter provision in a board of directors or trustees,[4] the powers so vested being unavailable to stockholders for direct exercise or control.[5] Since, in the absence of restrictive provisions in statute,[6] charter, or by-laws, the authorization of voluntary petitions in bankruptcy has long been held a function of corporate management[7] and hence within the sole discretion of directorates,[8] the same principle has naturally been applied to voluntary corporate reorganizations.[9]

Nevertheless, because influences adverse to the best interests of stockholders may condition the determination by directors of whether reorganization peti-

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4. See, *e.g.*, CALIF. CIVIL CODE (Deering, 1941) § 305; IDAHO CODE (1932) § 29-138; ILL. STAT. ANN. (Smith-Hurd, 1935) c. 32, § 157.33; KY. REV. STAT. (Baldwin, 1943) § 271.230; LA. GEN. STAT. (Dart, 1939) § 1114; MASS. LAWS ANN. (Michie, 1933) c. 156, § 25; MICH. STAT. ANN. (Henderson, 1937) § 21.10 (k); N. Y. GEN. CORP. LAWS (Baldwin, 1938) Art. 2, §§ 26 and 27; N. C. GEN. STAT. (Michie, Sublett, and Stedman, 1943) § 55-48; OHIO GEN. CODE (Page, 1938) § 8623-55; PA. STAT. ANN. (Purdon, 1938) tit. 15, § 2852-401; TENN. CODE ANN. (Stedman and Davis, 1942) § 3742; W. VA. CODE (Michie, Sublett, and Stedman, 1943) § 3028.

See generally 5 FLETCHER, CYCLOPEDIA OF CORPORATIONS (perm. ed. 1931, supp. 1944) § 2097 and cases there cited.

5. "Every stockholder of a corporation holds his stock subject to the execution of all the powers conferred by law upon the corporation, and he must abide by the decision of the directors or stockholders, as the case may be, upon all matters which the law commits to their determination and control." Colby v. Equitable Trust Co., 124 App. Div. 262, 271, 108 N. Y. Supp. 978, 984-5 (1st Dep't 1908). See also Fisher v. National Mortgage Loan Co., 132 Neb. 185, 271 N. W. 433 (1937). See generally 2 FLETCHER, *op. cit. supra* note 4, § 508; 5 *id.* § 2097.

6. See, *e.g.*, ORE. COMP. LAWS ANN. (1940) § 77-235. This statute (then § 5070 of the Miscellaneous Laws of Oregon) is construed in *In re* Quartz Gold Mining Co., 157 Fed. 243 (D. Ore. 1907), *aff'd sub nom.* Van Emon v. Veal, 158 Fed. 1022 (C. C. A. 9th, 1908). See also Petition of Evans, 52 F. (2d) 961 (D. Nev. 1931); Rudebeck v. Sanderson, 227 Fed. 575 (C. C. A. 9th, 1915); *cf. In re* Bates Machine Co., 91 Fed. 625 (D. Mass. 1899); *In re* C. Moench & Sons, 130 Fed. 685 (C. C. A. 2nd, 1904).

7. Royal Indemnity Co. v. American Bond & Mortgage Co., 289 U. S. 165 (1933); *In re* Kenwood Ice Co., 189 Fed. 525 (D. Minn. 1911), *aff'd sub nom.* Dodge v. Kenwood Ice Co., 204 Fed. 577 (C. C. A. 8th, 1913); *In re* Guanacevi Tunnel Co., 201 Fed. 316 (C. C. A. 2d, 1912); *In re* De Camp Glass Casket Co., 272 Fed. 558 (C. C. A. 6th, 1921), *cert. denied*, 256 U. S. 703 (1921); *In re* Lone Star Shipbuilding Co., 6 F (2d) 192 (C. C. A. 2d, 1925); *In re* Pneumatic Tube Steam Splicer Co., 60 F. (2d) 524 (D. Md. 1932); Chicago Bank of Commerce v. Carter, 61 F. (2d) 986 (C. C. A. 8th, 1932). See Comments (1921) 35 HARV. L. REV. 195, (1937) 50 HARV. L. REV. 662.

8. McClung v. Hill, 96 F. (2d) 236 (C. C. A. 5th, 1938); Shearin v. Cortez Oil Co., 92 F. (2d) 855 (C. C. A. 5th, 1937); *In re* Knox Consolidated Coal Co., 50 F. (2d) 248 (S. D. Ind. 1931); *In re* Beaver Cotton Mills, 275 Fed. 498 (N. D. Ga. 1921). See 15A FLETCHER, CYCLOPEDIA OF CORPORATIONS (repl. vol. 1938) § 7629.

9. White v. Penelas Mining Co., 105 F. (2d) 726 (C. C. A. 9th, 1939); *In re* Fidelity Assurance Ass'n, 42 F. Supp. 973 (S. D. W. Va. 1941), *rev'd on other grounds sub nom.* Sims v. Fidelity Assurance Ass'n, 129 F. (2d) 442 (C. C. A. 4th, 1942), *aff'd*, 318 U. S. 608 (1943). See 10 REMINGTON, *loc. cit. supra* note 3.

tions are to be filed,[10] this independence of judgment, if rigidly preserved, may allow dissipation of corporate assets by an inequitable or improper filing or failure to file.[11] Chapter X, in partial recognition of this possibility, expressly allows any stockholder of a solvent debtor to intervene and defend in any voluntary or involuntary reorganization proceeding.[12] Explicit provision is lacking, however, to cover instances where directors through willful inaction or other disqualification [13] fail to petition although such a course is obviously necessary to preserve the equities of stockholders. The problem arises, therefore, of ascertaining under what conditions, if any, the bankruptcy courts as courts of equity [14] will act to prevent any possible intracorporate abuse by permitting a stockholder to institute a Chapter X proceeding in the name of his debtor corporation.

Illustration is afforded by a recent case.[15] An Ohio corporation defaulted in 1923 in the payment of interest due on $90,000 worth of bonds secured by a first mortgage. A bondholders' committee was formed, and to it was transferred a majority of the outstanding stock in accordance with a voting trust agreement; the committee thereafter controlled corporate policies by electing the board of directors. After the corporation had partially defaulted on the bonds for twenty years, the committee instituted a mortgage foreclosure proceeding,[16] and the directors filed an answer consenting to the relief demanded. The equitable owners of the stock deposited under the voting trust agreement then petitioned on behalf of the corporation for a reorganization under Chapter X,[17] alleging that the corporation was insolvent

10. In JHERING, DER ZWECK IM RECHT (1877) it is stated that the position of administrator of group property is the most potentially dangerous to society of any known to the law. *Id.* at 226-7, Husik's trans. (1913) at 167-8.

11. See general discussion of the possibilities of intracorporate defection in Hornstein, *The Counsel Fee in Stockholder's Derivative Suits* (1939) 39 COL. L. REV. 784; Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder* (1940) 40 COL. L. REV. 220.

12. 52 STAT. 887 (1938), 11 U. S. C. § 537 (1940).

13. *In re* Fidelity Assurance Ass'n, 42 F. Supp. 973, 983 (S. D. W. Va. 1941), cited *supra* note 9 (quorum of directors unavailable for authorization of corporate action); *In re* Mississippi Valley Utilities Corp., 2 F. Supp. 995 (D. Del. 1933) (directors elected at stockholders' meeting without notice to all stockholders as required in by-laws); Michelsen v. Penney, 41 F. Supp. 603 (S. D. N. Y. 1941) (director not owner of corporate stock as required by statute); In the Matter of the Election of Directors of the Brooklyn Baseball Club, 75 N. J. L. 64, 66 Atl. 1051 (1907) (directors did not file report of their election with secretary of state as required by statute).

14. Continental Illinois Nat. Bank & Trust Co. of Chicago v. C., R. I. & P. R. R., 294 U. S. 648, 675 (1935); SEC v. United States Realty & Improvement Co., 310 U. S. 434, 457 (1940); *In re* E. C. Denton Stores, 5 F. Supp. 307, 310 (S. D. Ohio 1933).

15. *In re* Western Tool & Mfg. Co., 142 F. (2d) 404 (C. C. A. 6th, 1944), *cert. granted sub nom.* Price v. Gurney, 65 Sup. Ct. 91 (U. S. 1944).

16. Price v. Western Tool & Mfg. Co., Docket No. 36,421 (filed July 9, 1942), Ct. C. P., Clark County, Ohio.

17. *In re* Western Tool & Mfg. Co., Docket No. 9061 (filed Jan. 11, 1943), D. C. S. D. Ohio.

merely in the equity sense of being unable to meet maturing debts and that the stockholders' equities would be lost by the foreclosure; that the directors' conflict of interests had been resolved wholly in favor of the creditors; and that a demand made on the directors to petition for reorganization had been refused.

A motion to dismiss by the committee and by the corporation through its president and secretary in effect attacked the stockholders' standing to petition on two jurisdictional grounds: (1) that such facts of mismanagement had not been shown as would give the stockholders authority in law to maintain a derivative action,[18] and (2) that under Chapter X a corporation may

18. In Hawes v. City of Oakland, 104 U. S. 450 (1881), the leading American case on stockholders' derivative suits, Mr. Justice Miller stated that in order for a stockholder to sue on behalf of his corporation there must be:

> "Some action or threatened action of the managing board of directors, or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;
>
> "Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;
>
> "Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;
>
> "Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders and which can only be restrained by the aid of a court of equity.
>
> ". . . It is equally important that . . . the shareholder . . . show to the satisfaction of the court that he has exhausted all the means . . . to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort . . . . If time permits, or has permitted, he must show if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body. . . ." *Id.* at 460-1.

The United States Supreme Court embodied the holding of the *Hawes* case in Equity Rule 94, 104 U. S. ix (1882). To forestall stockholder claim-mongering and to prevent corporations from using the stockholder's suit to confer diversity jurisdiction on federal courts, the rule contained the additional requirements that the plaintiff be a shareholder at the time of the complained-of transaction and that he make a specific assertion under oath of the non-collusive character of the suit. With slight verbal modifications the rule was readopted as Equity Rule 27, 226 U. S. 656 (1912). Under the Federal Rules of Civil Procedure, adopted in 1938, it is Rule 23(b). See 2 MOORE, FEDERAL PRACTICE (1938, supp. 1943) § 23.05.

In some states, derivative suits are regulated by express statute. See, *e.g.*, GA. CODE ANN. (Park, Skillman, and Strozier, 1936) § 22-711. This statute (then § 2224 of the Georgia Civil Code) is construed in Bush v. Bonner, 156 Ga. 143, 118 S. E. 658 (1923); Macon Gas Co. v. Richter, 143 Ga. 397, 85 S. E. 112 (1915). See note 68 *infra*.

For treatment of the general nature of derivative suits, see Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936), *reh. denied*, 297 U. S. 728 (1936); 13 FLETCHER, CYCLOPEDIA OF CORPORATIONS (repl. vol. 1943) §§ 5939-6045; Glenn, *The Stockholder's Suit —Corporate and Individual Grievances* (1924) 33 YALE L. J. 580; McLaughlin, *Capacity of*

file a petition only through its elected directors. Without making findings of fact or drawing conclusions of law, the trial court dismissed the proceeding as not within the stockholders' derivative suit rule of *Hawes v. City of Oakland*.[19] The Circuit Court of Appeals, however, without clearly differentiating between the points of jurisdiction mentioned above, held that by Ohio law "under the facts [alleged] the equitable owners of stock of the debtor were authorized to institute these proceedings" [20] and remanded the case for disposition upon ultimate findings of fact.

In so holding, the court disregarded the traditional judicial reluctance to interfere in internal corporate affairs requiring an exercise of business judgment [21] and viewed the situation presented as following the basic pattern of recognized derivative actions.[22] Whenever directors, as *quasi*-trustees to their corporation and its stockholders,[23] have held their office subject to conflicting interests, equity has been prone to scrutinize any corporate action complained of by the stockholders [24] and to demand a showing by the directors of the utmost good faith and loyalty.[25] Directors free to exer-

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*Plaintiff-Stockholder to Terminate a Stockholder's Suit* (1937) 46 YALE L. J. 421; Note (1931) 15 MINN. L. REV. 453.

19. 104 U. S. 450 (1881). See note 18 *supra*.

20. *In re* Western Tool & Mfg. Co., 142 F. (2d) 404, 411 (1944), cited *supra* note 3.

21. Korn and Wisemiller v. Mutual Assurance Soc. Against Fire on Buildings of the State of Virginia, 6 Cranch 192 (U. S. 1810); Voeller v. Neilston Warehouse Co., 311 U. S. 531 (1941); Bill v. Western Union Telegraph Co., 16 Fed. 14 (C. C. S. D. N. Y. 1883); Altoona Warehouse Co. v. Bynum, 242 Ala. 540, 7 So. (2d) 497 (1942); Briggs v. Scripps, 13 Cal. App. (2d) 43, 56 P. (2d) 277 (1936); Mountain States Packing Co. v. Curtis, 86 Colo. 355, 281 Pac. 737 (1929); City Bank Farmers' Trust Co. v. Hewitt Realty Co., 257 N. Y. 62, 177 N. E. 309 (1931). See 13 FLETCHER, *op. cit. supra* note 18, § 5821 and cases there cited.

22. See note 18 *supra*.

23. The courts have ordinarily spoken of the relationship of directors to stockholders and corporations in terms analogous to those used in describing trusts. See, *e.g.*, Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919); Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163 (1901); Blaustein v. Pan American Petroleum & Transport Co., 263 App. Div. 97, 31 N. Y. S. (2d) 934 (1st Dep't 1941); Note (1942) 51 YALE L. J. 1034. Since directors are not, however, true trustees, Pomeroy prefers the term "quasi-trustee." 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) §§ 1088-90.

24. Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634 (1907); Smith v. Stone, 21 Wyo. 62, 128 Pac. 612 (1912); Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485 (1913); Gordon v. Santa Cruz Portland Cement Co., 130 P. (2d) 232 (Cal. D. C. App. 1943); Everett v. Phillips, 288 N. Y. 227, 236, 43 N. E. (2d) 18, 21 (1942).

25. "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and others." Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 588 (1875). The cases uniformly take this view. See, *e.g.*, Scott v. Norton Hardware Co., 54 F. (2d) 1047 (C. C. A. 4th, 1932); Sinclair Refining Co. v. Long, 139 Kan. 632, 32 P. (2d) 464 (1934). See 3 FLETCHER, *op. cit. supra* note 4, § 918 and cases there cited.

cise an unprejudiced discretion would ordinarily defend in a mortgage foreclosure suit or, in the absence of a valid defense, would seek to protect their insolvent corporate cestui que trust through reorganization. Neglect so to do would appear either actually or constructively to fall within that part of the rule of *Hawes v. City of Oakland* [26] allowing a stockholder to act on behalf of a corporation "where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or the rights of the other shareholders." [27]

The uniqueness of the principal case lies in the remedy sought. In the past the rule has been that when a court assumed jurisdiction of a stockholder's suit, it would grant any relief which the corporation could have obtained had it sued for itself.[28] The diversity of remedies has been wide: temporary [29] or pendente lite [30] receivership; specific performance; [31] money decrees; [32] removal of corporate officers [33] or directors; [34] accounting; [35] dissolution,[36] wind-

26. 104 U. S. 450 (1881). See note 18 *supra.*

27. Hawes v. City of Oakland, 104 U. S. 450, 460 (1881).

28. Collins v. Penn-Wyoming Copper Co., 203 Fed. 726 (D. Wyo. 1912); Reid v. Robinson, 64 Cal. App. 46, 220 Pac. 676 (1923); Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513 (1900); Viley v. Wall, 159 La. 627, 105 So. 794 (1925); Briggs v. Kennedy Mayonnaise Products, Inc., 209 Minn. 312, 297 N. W. 342 (1941).

29. Burnrite Coal Co. v. Riggs, 274 U. S. 208 (1927); Scholl v. Allen, 237 Ky. 716, 36 S. W. (2d) 353 (1931); Cantwell v. Columbia Lead Co., 199 Mo. 1, 97 S. W. 167 (1906).

The authority of a stockholder to seek appointment of a receiver is sometimes granted by a general statute. See, *e.g.*, TEX. CIV. STAT. (Vernon, 1938) § 2293; Fidelity Union Fire Ins. Co. v. Cain, 28 S. W. (2d) 833 (Tex. Civ. App., 1930).

Ordinarily the receivership must be ancillary to other equitable relief. Hoiles v. Watkins, 117 Ohio St. 165, 157 N. E. 557 (1927); Laumeier v. Sun-Ray Products Co., 330 Mo. 542, 50 S. W. (2d) 640 (1932). Some courts, however, admit exceptions to this requirement. Scholl v. Allen, *supra*; Specialty Furniture Co. v. Rusche, 212 Ind. 184, 6 N. E. (2d) 959 (1937).

30. Clark v. National Linseed Oil Co., 105 Fed. 787 (C. C. A. 7th, 1901); Mulvirhill v. Vicksburg R. R., Power & Mfg. Co., 88 Miss. 689, 40 So. 647 (1907); Reusens v. Mfg. & Selling Co. of America, 99 App. Div. 214, 90 N. Y. Supp. 1010 (1st Dep't 1904).

31. Presidio Mining Co. v. Overton, 270 Fed. 388 (C. C. A. 9th, 1921), *cert. denied*, 256 U. S. 694 (1921); Barr v. N. Y., L. E. & W. R. R., 96 N. Y. 444 (1884).

32. Nave-McCord Mercantile Co. v. Ranney, 29 F. (2d) 383 (C. C. A. 8th, 1928); Boulicault v. Oriel Glass Co., 283 Mo. 237, 223 S. W. 423 (1920).

33. Nathan v. Tompkins, 82 Ala. 437 (1886).

34. Andrews v. Drake, 83 F. (2d) 767 (C. C. A. 6th, 1936); Saltz v. Saltz Bros., Inc., 89 F. (2d) 860 (App. D. C. 1937).

35. Bell v. Frank Gilbert Paper Co., 117 Misc. 610, 193 N. Y. Supp. 26 (Sup. Ct. 1922), *aff'd*, 201 App. Div. 867, 193 N. Y. Supp. 925 (3rd Dep't 1922); *cf.* Fredendall v. Shrader, 45 Cal. App. 719, 188 Pac. 580 (1920).

36. The general rule is that equity has no jurisdiction to dissolve a corporation independently of statute. Pearce v. Sutherland, 164 Fed. 609 (C. C. A. 9th, 1908); Taylor v. Decatur Mineral & Land Co., 112 Fed. 449 (D. Ala. 1901). In exceptional circumstances, however, even in the absence of statute, the remedy has been granted. Edison v. Fleckenstein Pump Co., 249 Mich. 234, 228 N. W. 705 (1930) (impossible to attain corporate

ing up,[37] or reinstatement of corporation;[38] rescission or cancellation of contract[39] or other written instrument;[40] mandamus;[41] declaration of trust in corporate assets wrongfully diverted to third parties with notice.[42] Since reorganization is a form of relief equally available to a corporation, it would seem to follow that a stockholder's right to petition is thereby established unless Chapter X by mandatory terms prohibits its assertion.

While it is true that Chapter X nowhere specifies the power of a stockholder to petition for his corporation, neither does it negative the possibility. In granting to "corporations" the authority to take advantage of the chapter's provisions,[43] Congress apparently anticipated that they would file petitions only according to normal usage through their duly elected directors.[44] Nevertheless, the statement of the Supreme Court that "an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part"[45] gives basis for argument. Since "corporations" in numerous instances have been forced to act through their stockholders in matters usually within the scope of managerial authority, it seems reasonable to assert that this means of self-protection is not precluded under Chapter X without express provision. Moreover, an assumption that the meaning of "corporation" in Chapter X[46] restricts "corporate action" to that

purposes); Abbott v. Loring, 303 Ill. 154, 135 N. E. 442 (1922) (fraud or breach of trust in incorporation and organization); Red Bud Realty Co. v. South, 153 Ark. 339, 241 S. W. 21 (1922) (fraud or breach of trust in management of corporation).

37. In some jurisdictions, the courts draw a distinction between the dissolution and winding up of a corporation, decreeing the latter without statute, but not the former. Tower Hill-Connellsville Coke Co. of W. Va. v. Piedmont Coal Co., 64 F. (2d) 817, 829 (C. C. A. 4th, 1933), *cert. denied*, 290 U. S. 675 (1933); Bowen v. Bowen-Romer Flour Mills Corp., 114 Kan. 95, 217 Pac. 301 (1923); Benedict v. Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485 (Ch. 1892); Nashville Packet Co. v. Neville, 144 Tenn. 693, 235 S. W. 64 (1921). See Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder* (1940) 40 COL. L. REV. 220, 221-5.

38. Southern Land Co. v. McKenna, 100 Cal. App. 152, 280 Pac. 144 (1929). See Comment (1939) 48 YALE L. J. 650, 663.

39. Morris v. Elyton Land Co., 125 Ala. 263, 28 So. 513 (1900); Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465 (1903).

40. Howard v. National Telephone Co., 182 Fed. 215 (C. C. N. D. W. Va. 1910); Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138 (1912).

41. Walsh v. State, 199 Ala. 123, 74 So. 45 (1917); People v. Cummings, 72 N. Y. 433 (1878).

42. Meagher v. Harrington, 78 Mont. 457, 254 Pac. 432 (1927); Drucklieb v. Harris, 84 Misc. 291, 147 N. Y. Supp. 298 (Sup. Ct. 1914).

43. 52 STAT. 885 (1938), 11 U. S. C. § 526 (1940). See *supra* p. 151.

44. See H. R. REP. No. 1409, 75th Cong., 1st Sess. (1937) 39-41; *Hearings Before the Committee on the Judiciary of the House of Representatives on H. R. 8046*, 75th Cong., 1st Sess. (1937) 293, 335-47; *Hearings Before a Subcommittee of the Committee on the Judiciary of the United States Senate on H. R. 8046*, 75th Cong., 2nd Sess. (1938) 48, 91.

45. SEC v. United States Realty & Improvement Co., 310 U. S. 434, 457 (1940).

46. 52 STAT. 885 (1938), 11 U. S. C. § 526 (1940).

authorized by directors creates the anomaly that stockholders may intervene to prevent managerial fraud in *filing*,[47] but may not themselves petition to prevent managerial fraud in *not* filing. In view of the basic purpose of Chapter X to afford adequate relief to distressed corporations,[48] it appears likely that the courts will not support such a construction, but will follow the principal case, defining with particularity, as the need arises, the conditions of their sanction of a stockholder's petition.

These conditions seemingly must include the traditional derivative suit requirements [49] modified to the field of reorganization. In addition to alleging and proving actual or virtual directorial fraud and refusal of redress, it would appear a *sine qua non* that the corporation be insolvent in the equity sense alone, for if bankrutpcy insolvency exists, under the *Boyd* case doctrine [50] the stockholder would have no pecuniary interest in the reorganization, the maxim then applying that equity will not aid a volunteer. Like all petitioners, he must show that the petition was filed in good faith as defined by Chapter X.[51]

47. "Prior to the first date set for the hearing provided in section 161 of this Act, an answer controverting the allegations of a petition by or against a debtor may be filed . . ., if the debtor is not insolvent, by any stockholder of the debtor." 52 STAT. 887 (1938), 11 U. S. C. § 537 (1940).

48. Campbell v. Alleghany Corp., 75 F. (2d) 947, 950 (C. C. A. 4th, 1935) (construing former § 77B).

49. See note 18 *supra*.

50. Northern Pac. Ry. v. Boyd, 228 U. S. 482 (1913), reiterated in Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106 (1939). The doctrine of the *Boyd* case, while interpreted variously, is usually stated as preventing junior economic interests from participating, under ordinary circumstances, in a reorganization unless senior claims are fully satisfied.

The law reviews have feasted well and often on the *Boyd* and *Los Angeles Company* cases. See Dean, *Corporate Reorganization* (1941) 26 CORN. L. Q. 537; Dodd, *The Los Angeles Lumber Products Company Case and Its Implications* (1943) 53 HARV. L. REV. 713; Fennell, *Some Reflections on the Los Angeles Lumber Company Case* (1940) 29 GEO. L. J. 36; Foster, *Conflicting Ideals for Reorganization* (1935) 44 YALE L. J. 923; Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 VA. L. REV. 541; Gerdes, *A Fair and Equitable Plan of Corporate Reorganization Under Section 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. REV. 1; Graham, *Fair Reorganization Plans Under Chapter X of the Chandler Act* (1938) 8 BROOKLYN L. REV. 137; Rosenberg, *Reorganization—The Next Step* (1922) 22 COL. L. REV. 14; Spaeth and Winks, *The Boyd Case and Section 77* (1938) 32 ILL. L. REV. 769; Swaine, *Reorganization—The Next Step: A Reply to Mr. James N. Rosenberg* (1922) 22 COL. L. REV. 121; Comments (1940) 25 IOWA L. REV. 793, (1940) 49 YALE L. J. 841; Notes (1940) 49 YALE L. J. 1099, (1940) 49 YALE L. J. 1297. See also SEC REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. VIII (1940) 142-61.

51. If the judge is not satisfied the petition has been filed in good faith, he is to dismiss it. 52 STAT. 887 (1938), 11 U. S. C. § 541 (1940). Good faith is not present if (1) the petitioning *creditors* have acquired their claims for the purpose of filing the petition; or (2) adequate relief may be obtained by the debtor under Chapter XI; or (3) it is unreasonable to expect that a plan of reorganization may be effected; or (4) a prior proceed-

Judicial policy against claim-mongering would require that the petitioner not have purchased his stock for the purposes of instituting the reorganization.[52] The smallness of his holdings [53] or the fact that he is not an owner of record,[54] however, should not interfere.

It has been argued that a judicial determination of whether a board of directors has in fact breached its fiduciary relationship involves disputes so far afield from reorganization that bankruptcy courts are without jurisdiction to entertain petitions until such matters have been litigated in a plenary equity proceeding.[55] This objection, however, seems specious, for courts always

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ing pending in any court would better subserve the interests of creditors and stockholders. 52 STAT. 887 (1938), 11 U. S. C. § 546 (1940). See Marine Harbor Properties v. Manufacturers Trust Co., 317 U. S. 78 (1942).

It is probable that petitioning stockholders would have the most difficulty with establishing under (3) above that a plan of reorganization may reasonably be expected to succeed, for it is necessary that two-thirds of each class of creditors consent to a proposed plan. 52 STAT. 892 (1938), 11 U. S. C. § 2579 (1940); 52 Stat. 895 (1938), 11 U. S. C. § 616(7) (1940). And it may appear that well over one-third of the creditors indicate in advance that they will not consent to any conceivable plan. See Brief for Appellees, pp. 28-9, *In re* Western Tool & Mfg. Co., 142 F. (2d) 404 (1944), cited *supra* note 3. It was pointed out, however, in *In re* Castle Beach Apartments, Inc., 113 F. (2d) 762 (C. C. A. 2d, 1940), that without the consent of the court any indication of creditor approval or disapproval is nugatory under the Bankruptcy Act, 52 STAT. 891 (1938), 11 U. S. C. § 576 (1940), and should be judicially ignored for the purposes of entertaining or dismissing the petition. *In re* Castle Beach Apartments, Inc., *supra* at 764. See also *In re* Blinrig Realty Corp., 114 F. (2d) 100 (C. C. A. 2d, 1940). It is interesting to note that despite an initial indication of unwillingness to consent by 75% of the creditors in the Castle Beach reorganization, a plan was eventually accepted by the requisite two-thirds of each class and consummated. *In re* Castle Beach Apartments Co., Docket No. 75,839 (1940), D. C. S. D. N. Y.

52. This would be analogous to the requirement in Federal Rule 23(b) that the plaintiff be a stockholder at the time of the complained-of transaction, FED. RULES CIV. PROC. 23(b), and to the good-faith requirement that petitioning creditors shall not have acquired their claims for the purpose of filing the petition. 52 STAT. 887 (1938), 11 U. S. C. § 546 (1940).

53. This is an established stockholder's suit principle and may properly be reapplied, since the petitioning stockholders' interest in the reorganization is real, and the benefits accrue to all stockholders. See Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 318 (1936), *reh. denied*, 297 U. S. 728 (1936); General Inv. Co. v. Lake Shore & M. S. Ry., 250 Fed. 160, 173 (C. C. A. 6th, 1918). But *cf.* Aldrich v. Union Bag & Paper Co., 81 N. J. Eq. 244, 87 Atl. 65 (1913).

54. Since reorganization proceedings are in equity, equitable rights should be protected as well as legal. Hall v. M. B. O'Reilly Realty & Investment Co., 305 Mo. 182, 267 S. W. 407 (1924); Fisher v. Patton, 134 Mo. 32, 33 S. W. 451 (1895); Litwin v. Allen, 168 Misc. 205, 4 N. Y. S. (2d) 55 (Sup. Ct. 1938); Great Western Ry. v. Rushout, 5 De G. & S. 290 (1852). See note 14 *supra*.

55. See Judge Hicks, dissenting in *In re* Western Tool & Mfg. Co., 142 F. (2d) 404, cited *supra* note 3, at 411.

have power to pass upon matters germane to their jurisdiction,[56] including in a stockholder's suit whatever relates to the alleged directorial defections. Directly analogous are reorganization proceedings instituted on creditors' petitions,[57] in which extrinsic questions pertaining to the jurisdictional allegations [58] are constantly raised by litigants and passed upon by the bankruptcy courts.[59]

In granting to the complaining stockholders a standing as petitioners for corporate reorganization, the Sixth Circuit has set a seemingly valuable precedent, for extension of the stockholders' suit principle to the field of reorganization augments present judicial safeguards against intracorporate misconduct. While it is possible that instances of nuisance and "strike" suits or speculative lawyer's fee litigation may appear, the low fees generally allowed lawyers for petitioners [60] and the speedy hearings usually held on petitions,[61]

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56. Stoll v. Gottlieb, 305 U. S. 165 (1938); Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940).

57. 52 STAT. 885 (1935), 11 U. S. C. § 526 (1940). Three or more creditors having liquidated claims amounting in the aggregate to $5,000 or over against the corporation or its property may file. *Ibid.*

Stockholders as such may not petition on the theory that their holdings of stock constitute them corporate creditors. Bryan v. Welch, 74 F. (2d) 964 (C. C. A. 10th, 1935), *cert. denied*, 295 U. S. 748 (1935); *In re* Picadilly Realty Co., 78 F. (2d) 257 (C. C. A. 7th, 1935); *In re* Pittsburgh Terminal Corp., 30 F. Supp. 106 (W. D. Pa. 1939), *aff'd on opinion of lower court*, 109 F. (2d) 1020 (C. C. A. 3rd, 1940).

58. All petitions must contain certain allegations. 52 STAT. 886 (1938), 11 U. S. C. § 530 (1940). Creditors' and indenture trustees' petitions must contain others in addition. 52 STAT. 886 (1938), 11 U. S. C. § 531 (1940).

59. *In re* Utilities Power & Light Corp., 19 F. Supp. 204 (N. D. Ill. 1937) (construing former § 77B); *In re* West Virginia Printing Co., 11 F. Supp. 211 (D. W. Va. 1935) (construing former § 77B); *cf. In re* Cheney Bros., 12 F. Supp. 609 (D. Conn. 1935) (construing former §77B).

60. The judge is given discretion to allow reasonable compensation for services. 52 STAT. 900 (1938), 11 U. S. C. §§ 641-2 (1940).

"A very broad discretion is lodged in the chancellor in the allowance and fixing of fees and he must ever be alert lest a reorganization inure to the benefit, not of the distressed debtor and its creditors, but only to those engaged in saving it. . . . The statute defines the groups that *may* be compensated, but this is in no sense to be construed as meaning *shall* be compensated." Pennish v. Herz Inc., 81 F. (2d) 511, 512, 513 (C. C. A. 7th, 1936) (construing former § 77B); Teasdale v. Sefton Nat. Fibre Can Co., 85 F. (2d) 379 (C. C. A. 8th, 1936) (construing former § 77B); *In re* Paramount Publix Corp., 85 F. (2d) 588 (C. C. A. 2d, 1936) (construing former § 77B). See generally 3 GERDES, CORPORATE REORGANIZATIONS (1936) § 1170; 10 REMINGTON, BANKRUPTCY (1939) § 4645.

61. Through summary proceedings the bankruptcy courts generally dispose of matters before them more quickly than do other courts in plenary suits. In addition, unlike the majority of derivative suits, hearings on petitions do not necessitate the submission of evidence on damages, thereby reducing the time needed to prepare for trial. See Central Republic Bank & Trust Co. v. Caldwell, 58 F. (2d) 721, 731 (C. C. A. 8th, 1932); Bien v. Robinson, 208 U. S. 423 (1908). See generally FINLETTER, BANKRUPTCY REORGANIZATION (1939) 156-67; 2 GERDES, *op. cit. supra* note 60, §§ 848-9, 851.

in contradistinction to the practice in other forms of derivative actions,[62] should discourage such abuse. The danger is further minimized by the provisions of Chapter X, which permit the bankruptcy courts to dismiss petitions only after a hearing with notice to creditors and stockholders [63] and which subject all allowances upon dismissal [64] to a hearing with notice to the same parties.[65] If experience proves otherwise, appropriate controls may be found in strict requirements for specification of facts in petitions; [66] in extensive use of the summary judgment, judgment on the pleadings, and motion to dismiss; [67] or, if necessary, in requiring security for costs, perhaps including the counsel fees of defense.[68]

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62. "It has become the common practice on a recovery or court-approved settlement of a stockholder's action, to allow plaintiff's counsel fees out of the recovery in amounts ranging from twenty to forty percent of the total, with apparent distinction between trials and settlements and little regard to the usual principle of scaling percentages down as the amounts increase." WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (Chamber of Commerce of the State of New York, 1944) 11. In twelve recent derivative actions, counsel fees allowed for the stockholders' attorneys ranged from $40,000 to $135,000. *Id.* at 8. A number of the suits in New York courts have taken more than a month to try, and "in two instances they occupied the time of one part of the Supreme Court for more than a year (*Donovan v. Atlas Corp.*, N. Y. Co. 34032-1934; *Weiss v. General Investment Corp.*, N. Y. Co. 31607-1937)." *Ibid.*

Calendar congestion of civil suits in the federal courts has been commented upon: "The median time for each circuit and for the District of Columbia was as follows: First Circuit, 15.8 months; Second Circuit, 18 months; Third Circuit, 13.8 months; Fourth Circuit, 5.6 months; Fifth Circuit, 6.3 months; Sixth Circuit, 13.7 months; Seventh Circuit, 11 months; Eighth Circuit, 8.1 months; Ninth Circuit, 11.5 months; Tenth Circuit, 8.3 months; District of Columbia, 12.2 months." SECOND ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1941) 26. See Moore, *The Supreme Court: 1940, 1943 Terms—The Supreme Court and Judicial Administration* (1942) 28 VA. L. REV. 861, 886-7.

63. 52 STAT. 899 (1938), 11 U. S. C. § 636(2) (1940).

64. 52 STAT. 901 (1938), 11 U. S. C. § 646 (1940).

65. 52 STAT. 901 (1938), 11 U. S. C. § 647 (1940).

66. See, *e.g.*, Gerdes v. Reynolds, 281 N. Y. 180 (1939).

67. General Order in Bankruptcy 37 renders the Federal Rules of Civil Procedure applicable to the Bankruptcy Act. General Order 37, 305 U. S. 698 (1939), following 30 STAT. 554 (1898), 11 U. S. C. § 53 (1940).

68. See WOOD, *op. cit. supra* note 62, at 21 *et seq.* Section 61 of the New York General Corporation Law was recently amended, N. Y. Laws 1944, c. 698, empowering corporations in whose right derivative actions are brought to require plaintiff-shareholders with less than 5% of the outstanding shares (unless the shares have a market value in excess of $50,000) to give "security for reasonable expenses, including attorney's fees." *Ibid.* For discussion and criticism, see Carson, *Further Phases of Derivative Actions Against Directors* (1944) 29 CORN. L. Q. 431, 452-60; Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York* (1944) 32 CALIF. L. REV. 123.