MODERNIZING INTERPLEADER

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Interpleader possesses on first acquaintance an attractiveness which is not exceeded by any other remedy known to the law. "The mere "statement of the principle," declared Sir James Willes,[1] "shows its "justice." As a quick and simple way out of a complex situation, it has an intellectual fascination like the *vx* method for solving simultaneous quadratic equations. Upon further study of the cases, however, the lawyer's mental reaction changes to intense exasperation. Nowhere else, perhaps, can he encounter technicalities equal to those which hem in this admirable remedy. It is the purpose of this article to examine the most important of the restrictions on the general principle of interpleader, and consider how far they can properly be removed and how much some legislative efforts to accomplish this result have already succeeded. Here, as so often in the discussion of legal reforms, we have to discriminate between the accidental and the permanent, between limitations on judicial powers which are purely historical or arbitrary and those which are inherently desirable and cannot be discarded without causing grave injustice.[2]

The general principle of interpleader is simple and clear. Where two persons are engaged in a dispute, and that which is to be the fruit of the dispute is in the hands of a third party who occupies the position of a stakeholder and is willing to give up the stakes according to the result of the dispute, then if that stakeholder is sued or threatened with suit, he is not obliged to be at the expense and risk of defending two actions; but, on giving up the thing in dispute, he is to be relieved, and the court directs that the persons between whom the dispute really exists shall fight it out at their own expense.[3] The principle may be illustrated by some situations where it is well settled that interpleader will be granted. In these cases, and throughout the article, instead of such ambiguous terms as plaintiff and defendant, the same person

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[1] *Evans v. Wright* (1865) 13 W. R. 468.

[2] The study of equitable remedies has the advantage which Girard describes in the study of the history of Roman law: "Il n'y en a pas qui puisse plus sûrement former non pas seulement des hommes de métier aptes à interpreter correctement un texte concret, mais des hommes de science capables de remonter de ce texte à sa raison première, á même de discerner d'un oeil sûr les parties saines et les éléments morbides d'une législation, ses garanties de durée et ses chances de transformation." *Manuel élémentaire de droit romain* (6th ed. 1918) 6.

[3] Willes, J., in *Evans v. Wright, supra* note 1, somewhat expanded.

often being plaintiff in equity and defendant at law, the person asking equitable relief will be called the applicant (A), and his opponents the claimants (C_1, C_2, etc.).

First, a *res* may be claimed from an obligor both by the original obligee and by one who alleges an assignment from this obligee. Thus, a chattel in the hands of a bailee, A, is claimed by the bailor, C_1, and by a second claimant, C_2, who says he bought the chattel from C_1 after it was bailed. The bailor denies the sale or alleges it was fraudulent and brings action against the bailee for the chattel. The alleged purchaser also sues A. The bailee had nothing to do with the sale and will find it hard to defend either suit because evidence of its validity or invalidity is not readily accessible to him. Although he assumed only one obligation, he will be subjected to the serious double vexation of two litigations. Worse yet, he runs a risk of double liability. Both juries may find against him and in favor of the respective claimant, so that the bailee will have to pay for the chattel twice over.

Such an unjust situation results from two long-established rules of the common law. (1) An action at law cannot have more than two sides. Therefore, this three-sided controversy cannot be settled in a single jury trial, except where the common law has been altered by statute. (2) A judgment binds only the parties thereto and those in privity with them. Since the purchaser is not in this sense privy to the bailor, a judgment for the bailor against the bailee is not *res adjudicata* as to the purchaser. Although the bailor's jury found the alleged sale invalid, the purchaser can go ahead and sue the bailee, and can recover if *his* jury is persuaded that the sale was valid. Each jury proceeds independently of the other, and indeed will be carefully kept from knowing anything about the other trial or its outcome. Plainly, in order to protect A from certain double vexation and possible double liability, our system of law must provide him with an escape from one at least of these two rules. The second rule is permanent, the first accidental. The alleged assignee cannot justly be bound by the outcome of the two-sided proceeding between bailor and bailee; he is entitled to his day in court. The only way to bind him by that proceeding is to give him his day in court there, to make him a party to the litigation between bailor and bailee by a modification of the first rule against three-sided suits. This rule is capable of change without injustice. Three-sided suits are practicable, even where a jury trial is required, so long as it is possible to boil down the dispute into a two-sided issue for submission to the jury. This is usually the case in interpleader, which has consequently (as will be shown later) been allowed in actions at law by statute in many jurisdictions. And equity, which has no jury and is accustomed to polygonal suits, has long given the vexed bailee an adequate remedy.

The bailee files a bill of interpleader against the two claimants and puts the chattel in court. The suit is in two stages. First, the appli-

cant for relief on one side and the two claimants on the other fight out the question whether he is entitled to the relief. If he wins, the first stage ends with a decree allowing the applicant to withdraw from the case altogether and enjoining the claimants from taking any further proceedings against him in this controversy. The second stage is a two-sided fight between the bailor and the alleged purchaser about the validity of the sale, and the winner gets the chattel. This second stage can be tried if so desired by a jury, or else by a master or the equity judge himself.[4] Thus, interpleader, though in one sense a three-cornered suit, is in practice usually separated into two successive two-sided disputes, the composition of the sides changing at the end of the first stage.[5] The first stage relieves the bailee from double vexation and liability in a dispute foreign to him; in the second stage, the controversy is settled by the persons directly concerned.

In another group of cases, the original obligee is not a party, but each claimant sets up an assignment from the obligee, and the question involves the priority or validity of the two assignments.[6] Thus the applicant is a savings bank. The *res* is a deposit, and the depositor is dead. C_1 is his executor, and C_2 possesses the book under an alleged gift *causa mortis*. The bank pays the money into court and leaves the claimants to fight out the facts about the gift.

In the situation discussed thus far, we start with a definite obligee and then ask whether he has transferred his obligation and if so, to

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[4] Maclennan, *Interpleader*, 161; 2 Story, *Equity Jurisprudence* (14th ed. 1918.) sec. 1137, states a significant indication of the narrow attitude of the courts toward interpleader in his day: "It has been so rare that interpleader bills have gone to a decree, that some doubts have been entertained as to what is the proper course" (in the second stage).

[5] However, if there are more than two claimants the second stage is correspondingly triangular or polygonal, and therefore unsuited for a two-sided jury issue.

[6] *Cowtan v. Williams* (1803, Ch.) 9 Ves. 107 and 2 Ames, *Cases on Equity Jurisdiction* (1904) 2, 8, notes (this second volume of Ames' *Cases* will be cited hereafter in this article as "Ames"), support the principle of the bailee and savings bank illustrations. Recent cases interpleading the original obligee and an alleged assignee are: *Mooney v. Newton* (1920, Nev.) 187 Pac. 721; *Kenney v. Bank* (1918) 19 Ariz. 338, 170 Pac. 866; *Bathgate v. Exchange Bank* (1918) 199 Mo. App. 583, 205 S. W. 875; *Continental v. Stoltz* (1920, Calif. App.) 189 Pac. 712; *Conner v. Bank* (1920, Calif.) 190 Pac. 801. Recent cases where two persons both claiming under the original obligee were interpleaded are: *Montgomery v. Philadelphia* (1918, E. D. Pa.) 253 Fed. 473; *Fidelity Savings v. Rodgers* (1919) 180 Calif. 683, 182 Pac. 426; *Caverly v. Small* (1920, Me.) 111 Atl. 300; *Lipsitz v. Smith* (1919) 178 N. C. 98, 100 S. E. 247; *Modern Order v. Merriman* (1920, Ala.) 85 So. 473; *Haase v. First National* (1919) 203 Ala. 624, 84 So. 761; *Pittsburgh v. Ankrom* (1918, W. Va.) 97 S. E. 593; *Johnson v. Blackmon* (1918) 201 Ala. 537, 78 So. 891; *Marsh v. Mutual* (1917) 200 Ala. 438, 76 So. 370; *Schmidt v. Pittsburgh* (1917) 256 Pa. 363, 100 Atl. 959; *Iles v. Heidenreich* (1917) 202 Ill. App. 1.

whom. Another class of cases[7] exhibits a marked distinction, the great importance of which will later be made plain. Here the whole dispute turns on the question—who is the obligee? Which of the claimants owned the obligation at the very first? The Secretary of the Navy offers a vessel for sale to the highest bidder. Two persons each claim to answer the terms of the offer. Interpleader ascertains to which of them the obligation runs to convey the vessel.[8] An express company advertises a reward for the arrest and conviction of a thief. After his conviction, several claimants come forward for the reward. The company is allowed to pay the amount into court, and they settle among themselves which of them performed the act which constituted the acceptance in the unilateral contract.[9] A student has been eating at a college boarding house. He made no express agreement with any definite person, but expected to pay the standard rates. He runs up a

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[7] *Stephens v. Callanan* (1823, Exch.) 12 Price, 158 (occupier agreed to pay rent to true owner); *Livingstone v. Bank* (1893) 50 Ill. App. 162 (debt to a firm whose membership was disputed); *Morse v. Stearns* (1881) 131 Mass. 389 (two claimants to be the legatee described by the will); *Lavelle v. Bellin* (1906) 121 Mo. App. 442, 97 S. W. 200, (several claimants to lost bank-note); *Carter v. Cryer* (1904) 68 N. J. Eq. 24, 59 Atl. 233, *semble* (claimants to lost chattel); *Baber v. Houston* (1919, Tex. Civ. App.) 218 S. W. 156 (rival claimants to ownership of land interplead as to purchase price). *Trembley v. Marshall* (1907) 118 App. Div. 839, 103 N. Y. Supp. 680, (two brokers claiming commission for the same sale) overruling necessarily *McCreery v. Inge* (1900) 49 App. Div. 133, 63 N. Y. Supp. 158; same point, *Dardonville v. Smith* (1909) 133 App. Div. 234, 177 N. Y. Supp. 216; *Myers v. Batcheller* (1917) 177 App. Div. 47, 163 N. Y. Supp. 688; *Preston v. Rice* (1919) 185 App. Div. 682, 173 N. Y. Supp. 691; *Fox v. Cammeyer* (1916, Sup. Ct.) 93 Misc. 180, 156 N. Y. Supp. 1046; *Brooke v. Smith* (1893) 13 Pa. Co. Ct. 557; *Snow v. Ulrich* (1906) 126 Ill. App. 493, distinguishing *Sachsel v. Farrar* (1889) 35 Ill. App. 277; but see broker cases below, *contra*. *Mayor of N. Y. v. Flagg* (1858, N. Y. Sup. Ct.) 6 Abb. Pr. 296 (interpleader of rival claimants to public office, but merely enjoining the payment of the salary pending *quo warranto* proceedings, since the title to the office may be tried only in an action to which the state is a party); cf. *City of Buffalo v. Mackey* (1878, N. Y.) 15 Hun, 204; and see *People rel. Corscadden v. Howe* (1904) 177 N. Y. 499, 507, 69 N. E. 1114, 1117. *Dorn v. Fox* (1874) 61 N. Y. 264, and cases cited, (tax-collectors of rival towns or counties levying on the same land or personalty); *Bayerischen v. Knaus* (1909) 75 N. J. Eq. 363, 72 Atl. 952, (two women claim insurance as "wife," though these could perhaps be classed as competing assignees of the life); *Packard v. Stevens* (1899) 58 N. J. Eq. 489, 46 Atl. 250 (two contractors dispute which did the work); see also cases in notes 8, 9, 10, 35 *infra*. *Contra, Hoyt v. Gouge* (1904) 125 Iowa, 603, 101 N. W. 464; *Maxwell v. Frazier* (1908) 52 Ore. 183, 96 Pac. 548, both broker cases.

[8] *United States v. Levinson* (1920, C. C. A. 2d) 267 Fed. 692; see (1921) 34 HARV. L. REV. 556.

[9] *Webster v. Hall* (1880) 60 N. H. 7; *City Bank v. Bangs* (1831, N. Y. Ch.) 2 Paige, 570; *Fargo v. Arthur* (1872, N. Y. Sup. Ct.) 43 How. Pr. 193; *Burritt v. Press Pub. Co.* (1897) 19 App. Div. 609, 46 N. Y. Supp. 295; *contra, Collis v. Lee* (1835, C. P.) 1 Hodges, 204.

large bill. A quarrel breaks out between the cook and her husband as to which owns the establishment, and each sues the student. Interpleader enables him to pay his bill only once and prevents them from saddling him with their matrimonial infelicities.[10]

Interpleader is such a desirable remedy that in 1831 the English Interpleader Act brought it into the law courts.[11] A defendant in assumpsit, debt, detinue, or trover was allowed to move for an interpleader rule, showing that the right was claimed by a third person, who, if a proper case was established, would be brought into the suit, and the defendant would be discharged on putting the *res* into court. This statute was merely procedural, and permitted a law court to entertain an interpleader proceeding with all the incidents and limitations which we shall find surrounding the same proceeding in equity. Thus, the grounds for the remedy were not liberalized, although occasional emphasis was laid by judges on the clause allowing them to make such rules "as may appear just and reasonable."[12] Similar statutes have been passed in many states in this country, and interpreted in much the same way.[13] It will be observed that the second stage of this interpleader at law is tried by a jury.

The fundamental purpose of interpleader is simple and just. The applicant has incurred one obligation, but is subjected to two or more claims. If one claim is right, the rest must be wrong. An efficient and fair-minded system of justice ought not to subject a citizen to double vexation on a single obligation, if this can be easily and satisfactorily avoided. "The office of an interpleader suit," said Vice-Chancellor Wigram,[14] "is not to protect a party against a *double liability,* but against double vexation in respect of *one* liability." The case is all the stronger where there is a risk of double liability. And if the rigid rules of the law courts make it impossible for him to get relief there, the more reason why he should get it in equity, which is used to three-cornered litigation and abhors multiciplicity. If equity too becomes rigid, where shall he turn? The administration of justice should provide the cure for its own evils. It has a cure for this evil

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[10] *Kile v. Goodrum* (1900) 87 Ill. App. 462.

[11] 1 & 2 Wm. IV, c. 58.

[12] Maclennan, *op. cit.,* 17.

[13] Maclennan, *op. cit.,* Appendix, gives the statutes of all the states in 1901: see especially, N. Y. Code of Civil Procedure and the cases construing it. The introduction of interpleader at law is no bar to interpleader in equity, Ames, 50, note. The 1915 amendment of the United States Judicial Code, sec. 274b, possibly allows interpleader at law; but see *Sherman v. Shubert* (1916, S. D. N. Y.) 238. Fed. 225, (1917, C. C. A. 2d) 247 Fed. 246. See notes on these statutes, 1 Am. St. Rep. 800; 35 Am. Dec. 710; p. 840, note 10, *infra.*

[14] *Crawford v. Fisher* (1842, Ch.) 1 Hare, 436, 441; so also, *Livingston v. Bank* (1893) 50 Ill. App. 562, 566.

in interpleader, if it is stripped of its technicalities and granted whenever an applicant[15] is vexed by two or more mutually exclusive claims.

Two claims are mutually exclusive when they necessarily overlap. One example will make clear what is meant. If A offers a commission to any broker who effects a sale of certain land and two brokers claim the commission, only one can be entitled because there can be but one sale. The claims overlap and cannot both be right. The requisite for interpleader exists.[16] Suppose, however, A makes a contract with a broker C_1 to pay him a commission if he finds a purchaser ready, able, and willing to pay $200 an acre for the land, and makes a similar contract with C_2. If both brokers produce purchasers as described and sue for their commissions there is no mutual exclusiveness. A's obligation to one broker is in no way conditioned on the previous nonproduction of a purchaser by some other broker. A may very likely be liable to both. The two suits are based on two obligations, not one. He cannot compel the brokers to interplead, for there is no controversy between them.[17] In other words, when the two claims may both be right, and the validity of one does not depend upon the invalidity of the other, there is no reason why law or equity should unite them in one proceeding.

There must, in short, be only one obligation due from the applicant, and in addition there must be genuine double vexation with respect to this one obligation. Certain safeguards have grown up in practice to prevent an applicant from obtaining interpleader when he is not really the victim of double vexation.

(1) If one of the two claims is clearly groundless, relief will not be granted,[18] for the applicant can without hazard ascertain whether he owes the other claimant, and if he does may safely pay him. The obligor must not be allowed to prevent legal proceedings by a claimant

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[15] A claimant should also be able to initiate interpleader proceedings if a typical situation exists, as in the analogous Scotch action of multiplepoinding. This was allowed by Doe, C. J., *Webster v. Hall* (1880) 60 N. H. 7; and in Connecticut by statute, Pub. Laws, 1893, ch. 42, *Brown v. Clark* (1908) 80 Conn. 419, 68 Atl. 1001; but many cases deny relief, Ames, 2, note.

[16] See the broker cases in note 7 *supra*.

[17] *Alton v. Merritt* (1920) 145 Minn. 426, 177 N. W. 770. For other cases of double liability see Ames, 38, note; 10 L. R. A. (N. S.) 758, note; *Pratt v. Worrell* (1904) 66 N. J. Eq. 194, 57 Atl. 450; *Natl. Security v. Batt* (1913) 215 Mass. 489, 102 N. E. 691.

[18] *B. & O. Ry. v. Arthur* (1882) 90 N. Y. 244; *Modern v. Merriman* (1920, Ala.) 85 So. 473. While interpleader should properly be denied if it appears from the bill or the first stage of the suit that one claim is clearly groundless, the applicant ought not to be required to set out in his bill (or motion) a reasonably strong case for each claimant, inasmuch as he is often ignorant of the evidence and grounds upon which they rely. *Fidelity v. Rodgers* (1920, Calif.) 182 Pac. 801; dissenting opinion in *Pouch v. Prudential* (1912) 204 N. Y. 281, 97 N. E. 731. See Ann. Cas. 1913C, 1196, note.

who has some case, through trumping up a second baseless claim to the same obligation. He may not shift the burdens of litigation to a dummy. If the applicant is subject to only one danger of suit and liability, he has no more right to equitable protection that any other defendant in an action at law.

(2) The applicant must accompany his bill with an affidavit that the bill is not filed in collusion with any claimant or at his request, but that his only intent in seeking equitable relief is to avoid being sued or molested by the claimants.[19] The truth of this affidavit, if questioned, must be proved at the hearings.

(3) The *res* must be put in court or held at the disposition of the court.

One reason for these safeguards is that the plaintiff in interpleader is accorded certain traditional privileges which might easily be abused. If sued at law by the rightful claimant he would have to pay his own counsel fees and all the costs; but in interpleader he is relieved of costs from the time of filing his bill and often for the preceding process at law, besides getting his counsel fees. And from the time he puts the *res* into court, he ceases to be liable for interest,[20] which would ordinarily run until the rightful obligee was paid; if the *res* is a chattel, he is similarly relieved of subsequent damages for its detention. He is not allowed to obtain these advantages unless actually subject to double vexation, unless he comes into equity as a stakeholder to ward off a dispute in which he has no part, and not for the purpose of gaining something for himself or any particular claimant. If he is to benefit from the litigation, he ought not to be thus exempt from its burdens. At a later point I shall argue that it is better to take away a portion of these privileges than to deny interpleader when the applicant has a minor interest in the *res,* but the requirement of a substantial neutrality in the dispute between the claimants is sound.

A more fundamental reason for this neutrality and for the generally suspicious attitude of the courts toward interpleader is that it is often the means of getting a purely legal issue into equity. The second stage of the interpleader may settle disputes about ownership, etc., which are ordinarily jury questions. The only basis for the equitable jurisdiction over such matters is the double vexation, so that the court has to assure itself that this exists. Also, if C_1 has a dispute of title with C_2 about an obligation, C_1 may be very anxious to avoid the chances of a jury trial, and conceive the clever plan that instead of suing C_2 at law he will bribe the obligor to jockey the case into equity for him by interpleading. Equity will not countenance this, nor will it allow the applicant to transfer his own controversies about the *res* from law to equity. This reason has less weight, of course, in interpleader under

[19] For forms, see 3 Daniell, *Chancery Pleading and Practice* (6th Amer. ed. 1854) 2003*.

[20] *Conner v. Bank* (1920, Calif.) 190 Pac. 801; Ann. Cas. 1912B, 1005, note.

the Codes, which retain the jury trial and allow the defendant in the original action at law to substitute a claimant in his stead. Even here, however, the court will not let the obligor avoid his responsibility of defending unless he really has no part in the dispute. And, in general, interpleader will not be granted by equity if the law courts provide an adequate remedy through some other type of proceeding, such as garnishment or a statutory trial of title.[21]

On the whole, these requirements of a reasonable apprehension of double vexation, absence of collusion, and the deposit of the *res* in court, are sound and grow out of the inherent nature of the remedy of interpleader. Some other requirements meet with no serious objection if sensibly interpreted. (4) The stakeholder must not have been placed in his precarious position through his own fault, and must be free from slothfulness.[22] Otherwise, he cannot fairly ask the claimants to pay his costs and counsel fees and relieve him of further worries of litigation. (5) Equity must have the power to enjoin the claimants from prosecuting their claims against the applicant outside of the interpleader proceedings, for otherwise it could not close the controversy. If actions against the applicant are already pending in courts of another sovereign, or if some claimants cannot be brought within the jurisdiction of the court which is asked to compel them to interplead, serious difficulties arise, which need only be mentioned here.[23] Apart from these difficulties of conflict of laws, which no remedy can wholly escape, it would be an easy matter for courts to apply the general principle of interpleader, so highly praised by Sir James Willes, if the five requirements already named were the only limitations on that principle.

We must now consider whether any further requirements ought to exist. Four additional limitations are imposed by a multitude of decisions, and change interpleader from a simple and expeditious remedy into a difficult and technical problem, so that we may well echo the despairing words of the greatest American jurist:[24]

"The doctrine on this whole subject is not well defined. And I cannot but regret that it is not in my power to give a more full and clear exposition of it."

The classic and oft-quoted statement of these four limitations is by Pomeroy:[25]

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[21] *McLay v. Montowese* (1919, Conn.) 108 Atl. 664; *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 4 Sup. Ct. 232.

[22] Ames, 16, 50, notes; *Horner v. Willcocks* (1846, Q. B.) 1 Ir. Jur. (o. s.) 136; the courts have been unduly harsh in applying this limitation.

[23] *Smith v. Reed* (1908) 74 N. J. Eq. 776, 70 Atl. 961; *N. Y. Life Ins. Co. v. Dunlevy* (1916) 241 U. S. 518, 36 Sup. Ct. 613; see (1916) 30 HARV. L. REV. 86.

[24] 2 Story, *op cit.* note 4, at sec. 1127, n. 2.

[25] 4 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 1322. See also 35 Am. Dec. 695, note; 91 Am. St. Rep. 593, note.

"1. The same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded; 2. All their adverse titles or claims must be dependent, or be derived from a common source; 3. The person asking the relief must not have or claim any interest in the subject-matter; 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder."

The most important is the second, often summed up as privity. An investigation of these limitations will show that they are partly historical incidents of interpleader unnecessary to its rational purpose and partly over-rigid attempts to state the tests of mutual exclusiveness and double vexation. Judges have taken great trouble to hem in the remedy of interpleader by these limitations with somewhat the same intellectual pleasure that a solitaire player exhibits in devising new rules which will make it harder for him to win the game. The business of courts is justice, and in the twentieth century we should bestir ourselves to scrape away antiquarian and metaphysical incrustations from any remedy that is as admirably fitted as interpleader to attain justice.

Interpleader, however, has never wholly escaped from the limitations of the Middle Ages. Some discussion of the historical origin of the remedy is essential to a comprehension of the four requirements just named. It is not an invention of the Chancellor, but is borrowed from the old common-law writ of interpleader, which, like other peculiar writs, gradually disappeared after the introduction of the jury; although this new trier of facts supplied a more rational mode of procedure, it demanded a narrow issue and was unsuited to such old practices as interpleader and prohibition.[26] Interpleader at common law may be roughly divided into four situations.[27] (1) If two persons jointly bailed a chattel, usually charters, to a bailee with instructions to re-deliver it to one or the other bailor according to the outcome of a specified contingency, a dispute frequently arose between the bailors, and both brought actions of detinue against the bailee. He was allowed to interplead the joint bailors. (2) If one bailor delivered a chattel to the bailee for re-delivery to another person on the happening of a certain event, a similar dispute might arise. Interpleader was allowed if the bailor and the third person both brought detinue. (3) The finder of a chattel was given the same remedy against detinue by several claimants to its ownership. (4) Interpleader was also allowed to a person subjected to double vexation from various obsolete actions.

[26] Hazeltine, *The Early History of English Equity*, in *Essays in Legal History* (Vinogradoff's ed. 1913) 261.

[27] The source of all other discussions of this topic is 2 Reeves, *History of English Law*, (Finlason's ed. 1869) 635-640. The Year Books and other primary sources ought to be investigated afresh, since many points might be discovered which escaped Reeves' attention.

For example, if a bishop was asked by two different persons to appoint two respective clergymen to a single church, the advowson being claimed by each of the contestants, interpleader furnished an excellent refuge to the bishop from two actions of *quare impedit* and from a situation which seems thoroughly vicious to us with our congregational traditions.

It will be observed that there is a marked distinction between the first two types of common-law interpleader and the last two, the same distinction which we have already pointed out in the modern cases. In the two bailment situations, we start with a definite obligation and a relation between the claimants. In the finder and bishop cases, the ownership of the obligation is uncertain from the start, and there is no relation between the two claimants. It is therefore significant that only in the bailment cases do we find the common-law writers speaking of a requirement of privity.

The Chancellor found it easier to take over and remodel this common-law remedy, because he was already used to handling cases of double vexation when trustees sought the advice of equity as to which of two competing beneficiaries was rightfully entitled to the *res*.[28] Here, of course, equity had independent jurisdiction on account of the trust, but it was only a short step for the Chancellor to deal with instances of double vexation where there was no other ground of equitable jurisdiction, on the analogy of the common-law interpleader. Spence gives an instance of relief in equity in 1559, and the first reported case, *Hackett v. Webb*,[29] was in 1676. At first the Chancellors considered it dangerous to allow "new inventions"[30] in bills of interpleader outside the general scope of the common-law remedy, although they never restricted it to relief against detinue. Much of this reluctance survived.[31] Interpleader still suffers from its infantile repressions.

We are now in a position to examine Pomeroy's four rules, one by one, although it will be possible to keep them wholly separate.

THE SAME THING, DEBT, OR DUTY

This requirement of identity partly arises from the primitive simplicity of common-law interpleader, where each claim was directed to precisely the same object without the possibilities of variation which are presented by modern life, and partly is only an unsuccessful

[28] 1 Spence, *Equity Jurisdiction* (1846) 390, 659.

[29] (1676, Ch.) Cas. temp. Finch, 257.

[30] Hardwicke, C., *Metcalf v. Hervey* (1749, Ch.) 1 Ves. Sr. 248, 249.

[31] See Brougham, C., in *Pearson v. Cardon* (1831, Ch.) 2 Russ. & M. 606, 613: "You can have no interpleader here, if upon principle you could not have it at law;" and the adverse comment in 2 Story, *op. cit.*, sec. 1116, n. 3; 35 Am. Dec. 696, note; 91 Am. St. Rep. 597, note.

attempt to phrase the principle of mutual exclusiveness. The difference between that principle and the identity test as commonly applied will soon be plain. A typical statement of this test in its narrowest form was made by Vice-Chancellor Shadwell in 1840:[32]

"A case of interpleader then arises where the same subject, whether debt, duty, or thing, is claimed. Now, when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to the identity of matter. But, where the subject in dispute is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they can never be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient, of itself, to determine the identity; for the amount may be the same, and the debt may be different."

This is obviously much narrower than the test advocated in this article, that interpleader should be granted whenever there is multiple vexation but *in substance* only one obligation. The obligor ought not to be subjected to needless worry and expense just because this single obligation is given a different technical form or a different amount by the various claimants. The identity test may have been appropriate to common-law interpleader, but modern courts should reject as too formal a test which refuses relief unless the claims coincide at every point like two superimposed triangles in plane geometry.

1. Consider first Shadwell's logical denial of interpleader under this test if the claims differ in amount. This recalls Aristotle's belief that if an action was brought to recover a debt of 20 minae, it would be dangerous to give the tribunal discretion to allow the plaintiff to prove and recover only 18 minae. Even the cautious Pomeroy declares Shadwell's statement "alike opposed to principle and to authority."[33] It would be absurd to refuse relief in the boarding-house case because the wife put the bill at $60 and the husband at $59. A recent Alabama decision[34] granting interpleader although some claimants wanted the whole *res* and others only a part is typical of the current of judicial opinion, and expressly repudiates Shadwell's view.

2. Peculiar difficulties arise in cases where the same property is assessed for taxes in two different cities or towns. For example, a tax-payer who spends the winter in the city and the summer in a rural part of the same state may have his domicil disputed and be in real danger of having to pay two taxes on his stocks and bonds (if subject to direct tax) and on tangible personalty like automobiles. The amounts claimed by the two jurisdictions are rarely the same, but in

[32] *Glyn v. Duesbury* (1840, Ch.) 11 Sim. 139, 148.

[33] 4 Pomeroy, *op. cit.*, sec. 1466, and cases cited.

[34] *Enterprise v. Dothan* (1913) 181 Ala. 388, 61 So. 930; see also *School Dist. v. Weston* (1875) 31 Mich. 85.

justice he is liable only once. It is also contended that the duty is not identical in the two claims, since each jurisdiction acts independently of the other in levying the assessment under which the duty to pay arises. No such difficulty would arise under the mutual exclusiveness test, and even the identity test seems to be satisfied, because the citizen owes one duty to the state to pay taxes on his personalty. The duty is not primarily to the locality of his domicil, but to the state, which has by statute selected some local government as its agent to enforce this duty and fix its pecuniary extent. The question is, which locality is its agent in this particular case? There are not two duties claimed by two different places, but only one duty whose ownership they dispute, and about whose size in dollars they differ. The situation is analogous to the finder's position at common law. A further objection is, that the applicant in interested to have his domicil fixed in the place which levies the smaller tax, but Pomeroy's third requirement seems to be sufficiently satisfied if he pays the larger amount into court and withdraws without further participation in the controversy. Neutrality in thought is not demanded, only neutrality in deed.

Therefore, interpleader will be granted to the tax-payer[35] except in jurisdictions where public policy is held to forbid the injunction of tax-officials, on the ground that the state should not be forced to wait for its money until the validity of a tax is decided. Instead, the citizen is forced to pay under protest and wait for *his* money until the tax is declared illegal in an action of quasi-contract. In these states, if two towns assess the same property, he cannot pay the larger tax assessed into court and compel the two officials to fight out his domicil between themselves, while they are enjoined from proceeding further against him. He must pay the two taxes to the two towns, and then bring two separate actions of quasi-contract to get his money back. Inasmuch as both juries will normally prefer him to be taxed in their own neighborhood, it is by no means improbable that the verdicts in both suits will go against him. He will be doubly taxed, because the law refuses to provide machinery to ascertain which tax is illegal, though it is plain that one must be illegal. At least he should be enabled to bring a single quasi-contract action against the two towns as defendants in the alternative.[36] One defendant must be liable, but the jury would decide which. This is a sort of interpleader turned inside out.

[35] 4 Pomeroy, *op. cit.*, sec. 1467; Ames, 17, note; (1911) 25 HARV. L. REV. 174.

[36] Such an action seems permitted by Conn. Practice Book, 1908, 238, General Rules, sec. 120: "Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other." Among other states with similar provisions, usually statutory, are Minnesota, New Jersey, New York, and Rhode Island. See note by Austin W. Scott (1920) 33 HARV. L. REV. 244; (1918) 31 *id.* 1034; G. R. Alston, *Joinder of Claims under Alternative Ambiguities* (1898) 12 *id.* 45.

It would not violate the alleged policy against tax-injunctions, would avoid double taxation, and also obviates the slight possibility that two independent juries might both find in favor of the tax-payer and allow him to escape from his double vexation with no taxation at all. However, it would be much better to grant interpleader and discard the policy altogether wherever an injunction is asked against a tax which shows strong signs of illegality. I submit that the so-called policy against tax-injunctions is only bad policy. It is better for the state and its subsidiary taxing units to lose a little interest now and then than to force a citizen to pay a tax twice over when one payment is concededly illegal, or even to pay once in cases of doubtful legality and wait for his money through a tedious litigation at law. The creditor who forcibly seizes twice as much money as his debtor owes him offends all standards of common honesty. Whether the state is merely a glorified public service company, as Leon Duguit contends, or, in the loftier conceptions of public opinion and T. H. Green, is an ethical culture society to lead its citizens onward and upward, on neither view has it any business to finance its work by plainly dishonest methods.[37]

The loyalty and energetic devotion of citizens would also be encouraged if interpleader were available when the same property is taxed in two or more states, each claiming to be the *situs*. Since it can not be in two places at once, the claims are mutually exclusive, but they are surely not identical, unlike the case of two towns in the same state. There is no superstate law which imposes a duty to pay taxes in the state of one's domicil. Each state claims under the alleged legal duty created by itself, so that there is no duty common to both states. This brings out the narrowness of the "same debt, duty, "or thing" test, but even if we can substitute mutual exclusiveness, other and fatal obstacles make it impossible to interplead the tax officials of the two contending states. (1) Relief cannot be obtained in the courts of one state, for they have no jurisdiction over the officials of the other state. (2) Relief cannot be obtained in the United States courts, because they will not enjoin state tax officials; because the requisite diversity of citizenship is probably lacking[38] and

[37] For ancient examples of the "dishonesty of sovereignties," see Zimmern, *Greek Commonwealth* (2d ed. 1915) 304, on the periodical debasing of the coinage as a means of revenue. For modern examples, see the repudiation of state debts; and the refusal of Anglo-Saxon governments to admit legal liability for torts, discussed by John M. Maguire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20, and H. J. Laski, *The Responsibility of the State in England* (1919) 32 *id.* 447.

[38] There is much disagreement as to what diversity of citizenship is necessary for interpleader in the United States Courts. (1) Possibly A, C_1, and C_2, must be residents respectively of three different states. *Mutual Life v. Allen* (1883) 134 Mass. 389; *Republic v. Keogh* (1881, N. Y. Sup. Ct.) 23 Hun, 644; *George v. Pilcher* (1877, Va.) 28 Gratt. 299. This requires diversity in both the first and the second stage. (2) *Sherman v. Shubert* (1917, C. C. A. 2d) 247

no federal question is raised by absence of due process of law or otherwise; and because of the Eleventh Amendment to the United States Constitution. Since the tax official of one state is admittedly within his powers (but of which state is uncertain), proceedings against that official are really against his state, and this is prohibited by the Amendment. Seven cities claimed Homer dead, and as many American states may seek to levy inheritance taxes on the estate of a deceased millionaire, but the much needed means of joining them all in one action is forbidden by our constitutional system of sovereign states.

3. Another logical result of the identity test would be the denial of interpleader when the claimants select different forms of action. Fortunately few decisions have been thus wooden. Interpleader was granted in 1676 in *Hackett v. Webb*,[39] although C_1 sued in covenant on a bond and C_2 brought an action of money had and received. In *Morgan v. Marsack*[40] one claim was at law and the other in equity. The courts are apt to ignore other differences in forms of action in the same liberal spirit. It was well enough for the common-law courts in Year Book days to refuse interpleader unless both actions were in detinue, or *quare impedit;* modern equity looks at the substance. Thus a recent Alabama case[41] holds it immaterial that one claim is on a negotiable check and the other on a mere debt. Occasionally a narrow case occurs. In a North Dakota decision,[42] a warehouseman was denied interpleader against the receiver of his bailor who asked for the bailed grain or the proceeds thereof, and an alleged mortgagee of the bailor who sued for damages for conversion of the grain. Apparently the mortgage was subsequent to the bailment, and if so there was privity and abundant authority for relief.[43] The court said that the claimants were not claiming the same property or debt, since any judgment the mortgage obtained must be satisfied in money, whereas the receiver, although suing for damages in the alternative, might be satisfied by the delivery of grain in accordance with the storage receipts. As to him the applicant was a bailee, as to the mortgagee a tortfeasor. Yet there was clearly mutual exclusiveness, and all the claims arose from the only substantial obligation, the duty of the bailee

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Fed. 256, gave interpleader, although the claimants were co-citizens, on the ground that the relief was ancillary to the pending action at law of C_1 against A, who were not co-citizens; but see (1917) 30 HARV. L. REV. 520. There is then no diversity of citizenship in the adjudication of ownership in the second stage. (3) The federal Insurance Interpleader Act, Feb. 22, 1917 (39 Stat. at L. 929), requires only that the claimants be of different states. Diversity will then be lacking in the first stage. *Quaere* as to constitutionality, *Penn. Mutual v. Henderson* (1917, N. D. Fla.) 244 Fed. 877.

[39] *Supra* note 29.

[40] (1816, Ch.) 2 Mer. 106; Ames, 6, note 5.

[41] *Marsh v. Mutual* (1917) 200 Ala. 438, 76 So. 370.

[42] *More v. Western Grain Co.* (1915) 31 N. D. 369, 153 N. W. 976.

[43] See note 6.

under the bailment. The fact that the mortgagee elected to sue in tort should not cheat the stakeholder out of just relief.[44] The case has been deservedly condemned.[45]

4. The difficulty is greater when the two claimants do not both ask for money damages, but one of them insists on specific relief. Thus in England, despite the broad attitude taken by the courts since the Judicature Act of 1873—of which more hereafter—interpleader was denied to an insurance company against joint policy-holders, one of whom insisted on having the house rebuilt in pursuance of an old statute, while the other demanded the insurance money.[46] Yet only one claim can be sound, and there is the same duty in substance on which both claimants rely, the lawful obligation of the insurer as imposed by law and the policy. The same principle would apply in the North Dakota case if one claimant sued for the grain itself in replevin and the other for its money value.

PRIVITY

The superiority of the simple test of mutual exclusiveness over the four requirements stated by Pomeroy appears even more strongly in the second requirement of privity, which has caused endless discussion and perplexity in the cases. Interpleader is refused unless the claims are "dependent, or derived from a common source." Pomeroy's statement may be supplemented by others. Story says[47] in a passage which is quoted in many American decisions:

"The true doctrine supported by the authorities would seem to be that in cases of adverse independent titles the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader."

Notice that this requires privity among all three parties, including the applicant, and not merely between the claimants; the latter is usually the test applied. Lord Cottenham states that the adverse claim must

[44] The decision also turns upon the wording of the North Dakota statute, and proves the need of careful drafting in statutory regulation of interpleader. The statute allows interpleader at law to "a defendant against whom an action is pending upon a contract, or for specific real or personal property." It was held that an action to recover damages for conversion is not an action for specific personal property. Thus a shrewd claimant can defeat interpleader by choosing trover instead of replevin. Of course, it should make no difference, either, that A is treated as a tortfeasor by this claimant; his hands are clean despite a possible technical conversion.

[45] (1916) 2 IOWA L. BULL. 97.

[46] *Sun Insurance Office v. Galinsky* [1914, C. A.] 2 K. B. 545.

[47] 2 Story, *op. cit.*, sec. 1135.

be "under a derivative, and not under a paramount title."[48] Maclennan gives a somewhat different phrasing:[49]

"It is a prime rule in equity, that the titles of the adverse claimants must be connected, by reason of one being derived from the other, or by both being derived from a common source. There must be privity of some sort between all the parties, such as privity of estate, title or contract."

It is plain that this kind of privity is entirely distinct from privity to a judgment. For example, in the situation first considered in this article, where the bailee interpleads his bailor and an alleged assignee, there is privity between the claimants, but not in the sense that if the bailor gets a judgment against the bailee, this will be *res adjudicata* as to the assignee. He can bring a second suit against the bailee, and may, as we have seen, force him to pay a second time.

The text-writers quoted agree in condemning this requirement. Pomeroy declares:[50]

"It is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands."

Maclennan says much the same.[51] Story in 1843 added to the passage quoted above the following sentences:"[52]

"Whether it might not have been more wise, and more consistent with the principles of equity, originally to have held, that in all cases whatsoever, where the bailee was innocent, and without any fault, he should have a right to a bill of interpleader is a point, into which it is now too late to inquire."

This doctrine, which Story unwillingly clung to because of its age, had then a venerable antiquity of fourteen years. Indeed, though privity was first mentioned in equity by Leach, M. R., in 1829,[53] and by a dictum of Lord Brougham in 1831[54], there was no decision by a Chancellor to support the doctrine until 1837,[55] barely six years before

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[48] *Crawshay v. Thornton* (1837, Ch.) 2 Myl. & C. 1, 23.

[49] Maclennan, *op. cit.*, 122.

[50] 4 Pomeroy, *op. cit.*, sec. 1468.

[51] *Op. cit.*, 122.

[52] This first appears in the 3d ed. 1843, sec. 820; 14th ed. 1918, sec. 1135.

[53] *Cooper v. De Tastet* (1829, Ch.) Taml. 177; see also *Lowe v. Richardson* (1818, Ch.) 3 Madd. 277, Shadwell, V. C.; but see *Morley v. Thompson,* (1819, Ch.) *id.* 564.

[54] *Pearson v. Cardon* (1831, Ch.) 2 Russ. & Myl. 606, 608, granting interpleader.

[55] *Crawshay v. Thornton, supra;* the decision of Shadwell, V. C., below, rests entirely on independent liability (1835, Ch.) 7 Sim. 391.

Story, on the strength of a few recent English cases without any American approval of the doctrine, said it was "too late" to consider the requirement. I submit that equity, with its well-established power to alter, improve, and invent,[56] ought in the twentieth century to repudiate forever a doctrine which rests on such a slight foundation, and has been stigmatized by the best writers on interpleader and by many judges as unjust and inconsistent with the admirable purpose of this remedy.

This technical doctrine of privity got into equity by accident. Mutual exclusiveness requires no connection between the claims except that the validity of one shall necessitate the invalidity of the other. As late as 1814 Lord Eldon granted interpleader in a case where privity was by no means certain.[57] Two factors explain the appearance of the conception in Brougham's opinion of 1831.

First, inspired probably by Reeves' *History of English Law,* he took an unfortunate interest in the obsolete action of interpleader at common law,[58] and instead of treating it merely as an antiquarian source for more liberal remedies in equity, he insisted on limiting his powers as a nineteenth century Chancellor by rules laid down by common-law judges in the Wars of the Roses.

"You can have no interpleader here, if upon principle you could not have it at law."[59]

Just because in the common-law bailment cases the claimants were naturally associated with each other in a relation involving privity of contract, Brougham demanded that privity should always accompany interpleader. He might just as sensibly have announced that common-law interpleader was given only for actions of detinue, and denied it in equity for assumpsit or covenant. Chancellors had long demolished such limits.[60] And Brougham entirely overlooked the fact that even the Year Books did not require any connection between the claimants in the finding and advowson cases. The accidental linking of privity with interpleader in some of the very few situations where this remedy lay at common law was assumed to indicate a basic principle which had to be rigidly maintained, just as a child who has jam on his bread once always insists on bread and jam.

Secondly, just as privity between the claimants was accidentally present in some of the Year Book cases where interpleader was granted, although it was not a requisite even then for all interpleader, so also it was accidentally absent from some equity cases which denied interpleader for other reasons. Nineteenth century authorities, ignoring the total silence of Chancellors from 1676[61] to 1831 with regard to this

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[56] Jessel, M. R., *In re Hallett's Estate* (1886) L. R. 13 Ch. Div. 696, 710.
[57] *Stevenson v. Anderson* (1814, Ch.) 2 Ves. & Beames 407.
[58] See note 27, *supra.*
[59] *Peason v. Cardon* (1831, Ch.) 2 Russ. & Myl. 606, 613. See note 31.
[60] In *Hackett v. Webb, supra* note 29, the actions were covenant and assumpsit.
[61] See note 29.

sweeping doctrine of privity, have assumed that these old equity decisions rested on such a doctrine. These decisions must now be examined briefly to show that they furnish it no support.

A tenant could not call on his landlord to interplead with a third party who claimed under a title paramount to the landlord.[62] Such cases say nothing about a general doctrine of privity in interpleader, but rest expressly on special circumstances in the relation of landlord and tenant. The best reasons[63] for denying interpleader in this situation are the reluctance of equity to try title to land, which has now largely disappeared in other equitable remedies with the substitution of testimony in open court for written interrogatories; and the absence of any risk of double liability and any practical danger of double vexation. Suppose that a stranger to the landlord's title insists that he owns the premises. The tenant would have real cause for apprehension if in addition to the landlord's claim for rent this stranger could bring an action for use and occupation against the tenant, on the ground that he was under "a promise implied in law" to turn over the fruits of his unjust enrichment to the true owner. The law, however, gives the stranger no such claim. For historical reasons, a disseisor of land cannot be sued for use and occupation.[64] Consequently, the only possible liability of the tenant to the stranger is in an action of ejectment, followed by trespass for mesne profits. Here we come to the vital point—the tenant's position in ejectment is so favorable that interpleader is practically unnecessary. First, there is no danger of double liability through two juries deciding different ways, as in the ordinary interpleader situation,[65] because there is privity of estate between landlord and tenant, and a judgment between the stranger and the tenant that the former has title will be *res adjudicata* against the landlord, and prevent any further claim on his part against the

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[62] *Dungey v. Angove* (1794, Ch.) 2 Ves. Jr. 304; *Johnson v. Atkinson* (1797, Exch.) 3 Ans. 798; see Ames, 11, note; 10 L. R. A. (N. S.) 751, note.

[63] Other reasons given are (a) the things demanded are different, rent and unliquidated damages, but this is no obstacle in cases where privity exists; (b) an outsider would stir up the tenant to interplead, so that the landlord might be compelled to disclose his title in the second stage of the interpleader, whereas if sued by the outsider in ejectment the landlord could rest on his possession as prima facie title, but this reason is also unsound, for the burden of proof could be made the same in interpleader as in ejectment and possession allowed to be a prima facie case until the stranger maintained his burden by showing an apparently good title in himself. So with chattels, *Davis v. Levey* (1861) 11 U. C. C. P. 292; *Ireland v. Ireland* (1886, N. Y. Sup. Ct.) 42 Hun, 212.

[64] Ames, *Assumpsit for Use and Occupation* (1889) 2 HARV. L. REV. 377; Keener, *Quasi-Contracts* (1893) 191, 192; 2 Tiffany, *Real Property* (2d ed. 1920) 1515. Some of the old cases assume that the action lay. *Johnson v. Atkinson, supra; Stephens v. Callanan, supra* note 7. For a neat illustration of the difference between land and chattels in this action, see *Stockett v. Watkins* (1830, Md.) 2 G. & J. 326, allowing assumpsit for use of slaves on the land but not for use of the land.

[65] See p. 815, *supra.*

tenant.[66] Secondly, there is no practical danger even of double vexation, because just as soon as the tenant is sued in ejectment he gets all the benefits of interpleader in the ejectment action itself by vouching his landlord to come in and substitute himself as a defendant to uphold the title, while the tenant withdraws the same as in interpleader. As Lord Loughborough states the relief:[67]

"The law has taken such anxious care to settle their rights arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place."

This is for all practical purposes interpleader in the law court, analogous to the relief under the Interpleader Act of 1831 and the American codes and statutes.[68]

It is theoretically possible that the landlord might not come in, but instead would be shabby enough to sue the tenant for rent, so that he would be subject to double vexation, although double liability would be avoided, because such a refusal would be an eviction and would render the landlord liable for whatever mesne profits the tenant had to pay the stranger.[69] This possibility did not necessitate interpleader, because it was only theoretical. In view of the close relations between landlord and tenants in England, the social odium attaching to a landowner who failed to defend his tenant's possession against an outsider would have been so great that it is safe to assume that the danger of any such eventuality was not worth considering. Therefore, the landlord and tenant cases should have been of no authority whatever for denying interpleader in other situations.

Nevertheless, they are constantly cited as analogous in cases where the applicant is under an entirely different sort of relation to one of the claimants. For example, a buyer is not allowed to interplead his vendor and an adverse claimant to the chattel for want of privity.[70] Yet he cannot vouch in the vendor to defend the title, and furthermore, whereas the tenant must pay rent to a landlord with a bad title up to the time of eviction, a buyer is not obliged to take or keep a chattel which the seller does not own. The seller impliedly warrants his title, and it is absurd for the law to throw the burden of defending it upon the buyer.

The privity doctrine appears at its worst in the case of the bailee, where it was first laid down by Brougham and Cottenham. No person was more frequently subjected to double vexation through disputes of

[66] The landlord might make a claim for rent before the eviction, but the tenant could set-off whatever mesne profits he had to pay the stranger for the same period. See note 69.

[67] *Dungey v. Angove* (1794, Ch.) 2 Ves. Jr. 303, 310.

[68] See notes 11, 13 *supra.*

[69] *Dungey v. Angove, supra.*

[70] *Slaney v. Sidney* (1845, Exch.) 14 M. & W. 800; Ames, 12, note.

title, except possibly the sheriff, and it is significant that Parliament allowed the sheriff to have interpleader in the very year, 1831,[71] that the Chancellor first denied it to the bailee. It is also significant that the law courts had already declared that the bailee was entitled to interpleader in equity, and that text-books on Bailments have gone on declaring this, following Kent, not wisely but too well, in oblivion of the cases decided since he wrote.[72] What they say is justice, though it is not the law. Warehousemen are not in the business of guaranteeing title to the goods deposited with them and have no facilities for making investigation into the ownership of a bailor. They take the goods without inquiry in the speed of daily business, and then learn afterwards of a dispute between the bailor and some third person. We have already seen that the bailee may have interpleader if the dispute arose out of an alleged assignment by the bailor.[73] Privity exists there, since one claim is derived from the other, but not if the other claimant alleges that the bailor stole the chattel before bailing it. The distinction, whether the dispute of title arose before or after the bailment, is immaterial under the test of mutual exclusiveness. Whichever claimant is owner ought to have the chattel from the bailee, and he ought not to be liable to the other. Unlike the tenant, he is not estopped to deny the title of the person with whom he contracted.[74] And there is no unfairness in forcing the bailor to fight out his title himself in the second stage of the interpleader, whether the other claim is derivative or paramount. The bailor may rest on his possession as prima facie title, just as if the outsider were suing at law.[75] On the privity test, however, the distinction between a derivative and a paramount claim becomes all-important, although the bailee is equally free from fault, equally unconcerned in the dispute, and as frequently troubled by a paramount claimant as by an alleged assignee. The result of *Crawshay v. Thornton* [76] was nicely devised to prevent interpleader in the very situation where it was most needed.

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[71] 1 & 2 Wm. IV, c. 58, sec. 6. Similar statutes are common in this country.

[72] *Wilson v. Anderton* (1830, K. B.) 1 B. & Ad. 450, 456, per Tenterden, C. J.; 2 Parsons, *Contracts* (8th ed. 1893) 216; Schouler, *Bailments* (3d ed. 1897) sec. 118; Van Zile, *Bailments* (2d ed. 1908) sec. 53; see 2 Kent, *Commentaries*, *566, before *Crawshay v. Thornton.*

[73] Note 6, *supra.*

[74] The bailee, if sued by the bailor, may set up the *jus tertii* by authority of the outside claimant. *Biddle v. Bond* (1865, Q. B.) 6 B. & S. 225; *Ogle v. Atkinson* (1814, Exch. Ch.) 5 Taunt. 759. This protects the bailee even in the case of no privity, but only if the claimant is willing to come in and become the real defendant. His failure to come in is not attended with penalties, like that of the landlord. He may bring trover against the bailee (*Wilson v. Anderton, supra*) who is thus liable to double vexation and perhaps a double recovery.

[75] Note 63, last sentence; Maclennan, *op. cit.*, 176, 177, citing other cases.

[76] *Supra;* for other bailee cases, usually denying relief in the absence of privity, *First National Bank v. Bininger* (1875) 26 N. J. Eq. 345; Ames, 27, note; 10 L. R. A. (N. S.) 756, note.

It is therefore very important to abolish the privity test altogether. And where it is not abolished, it is necessary to define it accurately to prevent its being used for indiscriminate denial of interpleader. Such a definition would have permitted relief in *Crawshay v. Thornton* itself and in many other cases where it has been denied.

An examination of the definitions of privity already given shows the need of more precision in order to make the conception cover all the cases. First, if the courts say that one claim must be derived from the other, this covers the assignee situation, but not that where the claimants are two assignees, each alleging a superior right.[77] Hence, the definition must be widened at least to recognize, as Pomeroy and Maclennan do,[78] that interpleader will be granted when both claims are derived "from a common source," even though one is not derived from the other, but is wholly antagonistic to it. What do they mean by "common source"? In the case of the two assignees, both derive from a common person, but that is not a decisive factor. Most adverse claimants in cases where interpleader is denied would trace title to the same individual if they went far enough back. For example, if the specific legatee of a chattel bails it, the bailee cannot interplead the bailor and the next-of-kin who contests the will, though both derive title from a common person, the decedent. The trouble is that neither the decedent nor the next-of-kin had anything to do with the bailment. Again, if one claimant sells a chattel to the other and then wrongfully bails it, the bailee cannot interplead although the buyer plainly derives title from the seller, because the buyer does not claim through the bailment. In such situations, privity means that the common person must have been the owner of the obligation to which the applicant is subject and whose ownership is in dispute. "Common source" involves, not so much common person, as *common obligation.*[79]

This interpretation of Pomeroy's second requirement becomes still more solidly established when we try to fit into it that important group of interpleader cases so constantly emphasized in this article, the finder and advowson cases at common law, the boarding-house case, the tax cases of bailees, etc. is this: Are both claims against the applicant his dilemma.[80] Here the claimants have no connection with each other. They do not derive title from one another or from any common person. The only test which will apply both to these cases and to the relational cases of bailees, etc. is this; Are both claims against the applicant derived from the same obligation?

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[77] See note 6, *supra.*

[78] See notes 25 and 49 *supra;* 91 Am. St. Rep. 600, note.

[79] This interpretation of privity accords with Story (note 47, *supra*) and with the early cases, which do not emphasize connection between the claims, but the existence of an obligation from the applicant to C_1, to which C_2 must not be a stranger. *Dungey v. Angove* and *Crawshay v. Thornton* are examples.

[80] See notes 7, 8, 9, 10, 35, *supra.*

To put the same point in another form. Two sharply marked types of interpleader have been obvious from the days of the Year Books. (1) Cases based on the finder analogy, where the applicant is liable on an obligation without knowing who is at the other end of it, and he brings interpleader to find out the obligee. Each claimant professes to be that obligee. Here all talk of connection or derivation among the claims is meaningless. Privity was not mentioned at common law. Either we should say that privity has no place in these cases, or better yet, that the real meaning of privity must be wide enough to cover them. Certainly Pomeroy's second requirement must be made that wide, and the only common source permissible here is that both claims should be derived from substantially the same obligation. (2) Cases based on the bailment analogy, in which the applicant started with an obligation to a definite person, and wants to know whether that person still owns it or whether he has passed it along to some one else. Here, too, the broad test applies, but in this type every one who claims through this same original obligation must derive his title from the original owner of the obligation, and a connection between the claimants results which did not exist in the other type. This connection is, however, an incidental matter; the vital question under Pomeroy's second requirement, so long as we are unwilling to abolish it, is the same in both types of interpleader. And it would be well if privity could be thus defined to mean merely derivation from a substantially common obligation.[81] It seems feasible to obtain thus much from the courts in view of the authorities. Eventually, they may throw privity overboard and adopt the test of mutual exclusiveness.

The most conspicuous example of the beneficial effects of an accurate definition of privity is *Crawshay v. Thornton*[82] itself, where Lord Cottenham denied interpleader to a warehouseman with whom iron had been deposited by Raikes. The claimants were a pledgee under Raikes, and Daniloff, who alleged that Raikes was only an agent and he was the true owner as undisclosed principal. The Chancellor held that there was no privity. Yet both claimants got their rights against the bailee through the same person, Raikes, and through the same obligation, the bailment, which originally ran to Raikes as obligee. Indeed both offered to pay the warehousemen's charges. Even if Raikes was only an agent, his principal had to recognize the bailment as a valid transaction and not as a wrongful act outside the agent's powers. He had to deposit the iron somewhere. He could not carry it around in his pockets. Consequently the bailee should have had interpleader, just as if the claimants were two assignees from Raikes.

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[81] This will reach the same result as Pomeroy's first test if the *res* is a debt or duty, but not necessarily if it is the same thing, since the applicant may owe different obligations with respect to that to the two claimants. See the discussion of *First National Bank v. Bininger, infra.*

[82] *Supra.*

The existence of privity in that case will become more clear by contrast with *First National Bank v. Bininger.*[83] The depositary of bonds under a suretyship transaction was denied interpleader against a creditor of the bailor and the bailor's wife, who alleged that the bonds belonged to her and were taken and deposited without her consent. Here only the mutual exclusiveness test would permit relief, for there was no privity under any definition. The wife did not claim through the bailment, but asserted it was a wrong to her and that her husband was wholly unauthorized to deposit the bonds in this transaction. This case shows that the same obligation test of privity does not always concide with Pomeroy's first requirement of same thing, debt, or duty, though it usually would. Here the parties claim the same bonds, but through different obligations.

The advantage of the broad interpretation of Pomeroy's second test is clearly shown in recent cases. In *Fogg v. Goode* [84] the maker of a note for the price of goods wished to interplead the executor of his obligee and the surviving partner, who claimed that the debt belonged to the firm. Here there was privity in the broad sense, because both claimed through the obligation, the executor as legal owner and the partner as equitable owner, of the note. Yet relief was denied, on the narrow view of what the Florida court admits to be a "highly technical require-"ment"; privity is said to be absent because the partner claims adversely to the executrix. Fortunately other courts have been more liberal, and several recent cases have granted interpleader where any insistence on connection between the claimants might easily have led to a similar refusal of relief. Thus a bank which had collected a note from the indorser interpleaded the owner of the note and the indorser, who tried to get the money back on the ground that it had been paid under mistake.[85] Here is it difficult to find privity even in the broad sense, but the claims are mutually exclusive. A corporation after the death of a stockholder interpleaded the legatee of the stock and the purchaser at a sale conducted on behalf of the guardian of the decedent to pay the guardianship expenses.[86] A bank interpleaded the depositor, an American citizen, and the Alien Property Custodian, who contended that the beneficial ownership of the deposit was in an alien enemy.[87] The last two cases have privity in the broad sense, since both parties claim through the same obligation, that of the corporation to the dead shareholder or of the bank to the nominal depositor. Similarly relief ought to be granted in the numerous cases where an

[83] *Supra* note 76.

[84] (1919, Fla.) 82 So. 614. *Contra, Beebe v. Mead, infra* p. 840, note 10.

[85] *Roberts v. U. S. Trust Co.* (1919) 234 Mass. 224, 125 N. E. 185.

[86] *Thomas Key Woolen Mill Co. v. Sprague* (1919, D. Ore.) 259 Fed. 338.

[87] *American National Exchange Bank v. Palmer* (1919, S. D. N. Y.) 256 Fed. 680; but see *American National Exchange Bank v. Garvan* (April 7, 1921, C. C. A. 2d) not yet reported; cf. *Kahn v. Garvan* (1920, S. D. N. Y.) 263 Fed. 909.

instrument payable to X is deposited with a bank for collection and the proceeds are claimed by two persons, one asserting that X was owner and the other that X was his agent. Though the claims are adverse to each other, both are through X and through the deposit for collection, which must be recognized as rightful, since an agent can and ought to collect an instrument when it matures.[88] Other recent liberal cases on the bailment analogy are given below.[89]

A very interesting case on the finder analogy is *Packard v. Stevens*.[90] A contractor made separate agreements with two sub-contractors to fill in an island to a uniform level at so much per cubic yard. When the work was finished the total of the estimates of sub-contractors exceeded by a large number of cubic yards the actual volume filled in. They had begun work on opposite sides of the island and the difficulty arose when they met, each insisting that material pumped in by him had overflowed to the other side of the dividing line. Assume that the total filling was a million cubic yards, the price ten cents a yard, and each claimant estimated his work as six hundred thousand yards. Thus, the applicant owed only $100,000, and was subject to claims aggregating $120,000. Interpleader was properly granted, for the partial overlapping of the claims constituted mutual exclusiveness, although somewhat different from the usual case. Ordinarily, the two claims completely overlap, so that if one is right, the other must be wholly wrong. Here neither claim was wholly wrong, but both could not be wholly right. Each claim was sound up to $40,000. Thus, $80,000 of the applicant's liability was undisputed, but the remaining $20,000 might rightfully belong all to one claimant, or partly to each. The claims were mutually exclusive to this extent. Or else it can be said that interpleader was necessary to relieve the applicant from the excess of $120,000 over $100,000, since this excess was admittedly not due. In other words, it is not essential that any claim or claims shall be wholly wrong, so long as a part of the aggregate claims must be wrong. Some overlapping is essential. The same need for interpleader exists when a municipality empowered to issue bonds to a certain amount issues a larger amount, so that some bonds must be invalid, but no one knows which;[91] or when sub-contractors claim mechanics' liens aggregating more than the amount of the main contract.[92]

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[88] *Platte Valley Bank v. National Live Stock Bank* (1895) 155 Ill. 250, 40 N. E. 621; *contra, Third National Bank v. Skillings Lumber Co.* (1882) 132 Mass. 410. See the cases collected in 10 L. R. A. (N. S.) 756, note.

[89] *Sherman v. Shubert supra* note 38; *Caverly v. Small, supra* note 6, *semble; Schmidt v. Pittsburgh, supra* note 6; *Bathgate v. Exchange* (1918) 199 Mo. App. 583, 205 S. W. 875; *Baber v. Houston, supra* note 7; *Repetto v. Raggio* (1919) 201 Mo. App. 628, 213 S. W. 525.

[90] (1899, Ch.) 58 N. J. Eq. 489, 46 Atl. 250.

[91] *Saratoga v. Deyoe* (1879) 77 N. Y. 219 (as bill of peace).

[92] *School District v. Weston* (1875) 31 Mich. 85.

It would have been easy for the court which decided the Bininger Case[93] to deny relief in *Packard v. Stevens*[94] on the ground that privity in the narrow sense was lacking, because there was no connection between the claimants. The same objection would exist to the finder case at common law. It is also questionable whether privity exists in any sense[95] or whether Pomeroy's test of "same debt, duty, or thing" is satisfied, since the claims arise from distinct contracts. In substance, however, there is only one obligation, to pay each man for the work he has done. The same difficulty arises in the broker cases, where each claims a commission under a distinct contract.[96] All these cases show the advantage of avoiding this extremely technical discussion by discarding the requirements of identity and privity altogether.

Is this judicial abolition of privity possible? Or ought the courts to adopt the attitude of Vice-Chancellor Van Fleet in the Bininger Case?[97]

"If this was a case of first impression, no difficulty would be found in declaring it fell clearly within the purposes designed to be accomplished in the establishment of a court of equity. But the rule . . . is too firmly established to be changed by anything short of legislative power. I cannot break through a rule so firmly established as to be, in the judgment of Judge Story,[98] no longer open to discussion, even if it was clear a better could be invented. Stability in legal rules is more important than that they should accomplish complete justice in every case."

The doctrine of *stare decisis* applies to judicial principles on which men rely in acquiring property or conducting their affairs.[99] If a court has held municipal bonds to be valid, and purchases have been made accordingly, a decision that they are void will be highly unjust.[1] If a certain course of dealing has been held not to be tortious or criminal, men who subsequently so act, supposing their conduct to be innocent, ought not to be rendered wrongdoers by an overruling of the

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[93] Note 76, *supra*.

[94] Note 90, *supra*.

[95] Privity is said not to exist in these cases by notes in (1904) 17 HARV. L. REV. 489, and (1909) 9 COL. L. REV. 252. The latter note is an able exposition of the division of interpleader cases into two types, which was worked out independently by the writer of this article.

[96] See note 7, *supra* (the broker cases denying relief).

[97] (1875) 26 N. J. Eq. 345, 349.

[98] See note 52, *supra* and my comment in the text.

[99] "I am a strong believer in applying the doctrine of *stare decisis* whenever prior decisions, in any degree, either affect property rights or lay down principles which have become accepted rules of property; but here no such rights or principles are involved." Moschzisker, J., dissenting in *Luzerne v. Morgan* (1919) 263 Pa. 458, 107 Atl. 17, 19.

[1] *Gelpcke v. Dubuque* (1864, U. S.) 1 Wall. 175.

established cases. But if interpleader is given in a situation where it used to be denied for lack of privity, who suffers? It cannot be seriously contended that the claimants in the Bininger Case acted and acquired rights in reliance on the rule of *Crawshay v. Thornton.* The fact that it was impossible on existing authorities to interplead them (if they thought of it at all) would not have the slightest influence on their conduct. And the abolition of the doctrine of privity is not like a change in the law of property or negligence. It does not add to the real rights of the parties or subtract from them. It merely moulds the machinery by which rights are to be enforced so as to lessen expense, delay, and the possibility of an unjust double recovery. Consequently, it is to be hoped that many judges in their treatment of the traditional limitations on interpleader will imitate, not the caution of Van Fleet, but the courage of Christiancy[2] and Doe.[3] *Stare decisis* is out of place in procedural reform.

There are many signs that the process of liberalization is already well under way. Many cases get around Pomeroy's four requirements by showing great readiness to find an independent ground of equitable jurisdiction on which to base a bill in the nature of interpleader, which is free from technical limitations.[4] Often this ground is not stated, and it is hard to discover any except multiplicity, which is not far removed from double vexation and nothing more.[5] A skilful pleader can usually work out some ground. Other cases tacitly or even expressly discard privity.[6]

Meanwhile, much has been accomplished by legislation. Privity has been wholly abolished in England,[7] Canada,[8] California, and the other states following its Code (Idaho, Montana, Utah).[9] Many other states have statutes regulating interpleader, especially in law suits, which do not say anything about privity one way or the other. There is some judicial tendency to regard privity as abolished by these statutes, while other decisions treat them as merely procedural like the English

[2] See note 92, *supra*, and the end of this article.

[3] See note 15, *supra.*

[4] Ames, 46, note; *Guaranteed State Bank v. D'Yarmett* (1917, Okla.) 169 Pac. 639 (cancellation); *Sherman v. Shubert, supra* note 13 (account).

[5] *Aleck v. Jackson* (1892, Ch.) 49 N. J. Eq. 507, 23 Atl. 760; *Carter v. Cryer* (1904, Ch.) 68 N. J. Eq. 24, 59 Atl. 233.

[6] *Baber v. Houston, supra* note 7, at p. 161: "The rule has been frequently relaxed;" *Sewanee v. Leonard* (1917) 139 Tenn. 648, 651, 202 S. W. 928, *semble:* "Waiving the old rule of privity . . . which is now said to be somewhat relaxed." For tacit relaxing, see cases in notes 85-89, *supra.*

[7] *In re Mersey Docks* [1899, C. A.] 1 Q. B. 546; Maclennan, 350.

[8] See Maclennan, Appendix, for the various provinces..

[9] Calif. Code Civ. Pro. sec. 386; 4 Pomeroy, 3470, note, objects to the abolition of identity, but mutual exclusiveness would doubtless still be required. At some future time I hope to review the decisions construing American interpleader statutes.

Act of 1831.[10] Privity has frequently been abolished in the situations where it caused the worst injustice. Thus the sheriff has been given relief in several jurisdictions.[11] Massachusetts and New York have allowed apparently unlimited interpleader to some banks.[12] And the kinds of bailees who most need interpleader now have it under the Uniform Warehouse Receipts Act[13] and Uniform Bills of Lading Act.[14] It is to be hoped that judges in the many states which have adopted these two statutes will come to regard them as enunciations of a broad commercial principle that bailees should have relief regardless of privity, and will extend this statutory principle, by analogy, to bailees and other persons not within the Acts, just as they would extend a principle laid down by a judge in a decision to other situations not before that judge. In this instance everyone agrees that the legislative principle of broad relief is far better than the judicial principle of privity, and far more suitable to apply to new sets of facts.[15]

INTEREST

The two remaining requirements of Pomeroy require only brief mention. The objections to relief for a person who is subject to real double vexation, but has some interest in the controversy, are threefold. (1) If he is interested, he ought not to withdraw, but should contest the various claims. This is sound if he has an interest which is of as much importance in the controversy as the obligation out of which the double vexation arises. For example, if he denies the claims

[10] See notes 11-13, *supra,* and Maclennan for the statutes in 1901. Conn. Gen. St. 1918, sec. 6055 apparently abolishes privity; *Union Trust Co. v. Stamford Trust Co.* (1899) 72 Conn. 86, 43 Atl. 555. Mass. Gen. Laws, 1902, ch. 173, sec. 37, is said not to abolish any requirements, by *Gonia v. O'Brion* (1916) 223 Mass. 177, 178, 111 N. E. 787, but liberal results are reached by *Underwood v. Coolidge* (1919) 232 Mass. 124, 122 N. E. 270, and see note 85, *supra.* The construction of N. Y. Code Civ. Proc. sec. 820 is uncertain. It is said not to be recognized by the statute in *Crane v. McDonald* (1890) 118 N. Y. 648, 23 N. E. 991; but the statute is said merely to carry over equitable interpleader into the law courts in *Pouch v. Prudential Ins. Co.* (1912) 204 N. Y. 281, 284, 97 N. E. 731. In *Beebe v. Mead* (1905) 101 App. Div. 30, 92 N. Y. Supp. 51, a bailee was relieved without privity.

[11] See Maclennan.

[12] Mass. Acts 1908, ch. 590, sec. 50 (savings banks); *Phillips v. Suffolk* (1914) 219 Mass. 597, 107 N. E. 401; N. Y. Banking Laws, sec. 199 (trust companies); *Evans v. Guaranty Trust Co.* (1919) 187 App. Div. 30, 175 N. Y. Supp. 118.

[13] Sec. 17. This act is adopted in 39 states. *N. J. Title Co. v. Rector* (1910) 76 N. J. Eq. 587, 75 Atl. 931, reversing (1909, Ch.) 75 N. J. Eq. 423, 72 Atl. 968; *Manhattan v. Benguiat* (1913) 155 App. Div. 196, 139 N. Y. Supp. 1073; *Rosenberg v. Viane* (1919, Sup. Ct.) 105 Misc. 215, 179 N. Y. Supp. 447.

[14] Sec. 20. This act is adopted in 20 states.

[15] On the extension of statutory principles by analogy, see Roscoe Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383; Donald E. Dunbar, *Statutory Principles in the Common Law* (1917) 30 *id.* 742; Chafee, *Cases on Negotiable Instruments* (1920) 33, note.

altogether, this dispute is as serious as that between the claimants, and he cannot very well put the *res* into court and retire.[16] Even so, the alternative of two suits at law may mean a double recovery. The appropriate solution is a three-cornered suit in equity, not interpleader because the obligor stays in, but an analogy in the form of a bill of peace.[17] On the other hand, if the obligor disputes a small part of one or both claims or has a lien or set-off, his interest is small in comparison with the double vexation, and he should be allowed to put the full amount claimed in court and retire. (2) Here we must deal with a second objection, that there is no way to adjudicate his small claim in either stage of the interpleader suit. This is true enough if the historical form of the proceeding is rigidly maintained, but it is entirely practicable to adapt it to deal with the applicant's claim. For example, if A claims a bailee's lien, which is recognized by C_1 but not by C_2, the first stage can allow interpleader and direct A to put the chattel in court; the second stage will determine which claimant is entitled to it, and if C_1 wins, A's claim will be voluntarily discharged; but if C_2 wins, the proceeding can easily be extended into a third stage, in which he and A can contest the validity of the alleged lien. There is no reason in the nature of things why interpleader should be limited to two stages. Another solution is to allow the applicant to participate in the second stage, and fight out his claim in a three-cornered suit. It is not absolutely essential that he withdraw at the end of the first stage,[18] and equity is used to multi-sided suits. It has merely an historical prejudice against them in the special case of interpleader, which ought to be overcome. Indeed, where there are more than two claimants, the second stage is always triangular or polygonal. There is no fatal objection to considering the applicant as one of three claimants to the *res*. In a recent bill in the nature of interpleader, where the ownership of a bank deposit was disputed between several persons and the bank itself claimed an interest for the repayment of loans made by it, the bank was allowed to put the deposit into court, and then participate in the polygonal contest as to its distribution.[19] Here there was an independent ground of equitable jurisdiction, in addition to multiple vexation to the bank, but the machinery thus used is equally applicable and equally needed without that ground, inasmuch as the remedy at law is clearly inadequate. In another bill in the nature of interpleader, where the applicant disputed the amount of his obligation,

[16] *Galpin v. Chicago* (1915) 269 Ill. 27, 109 N. E. 713; *Maxim v. Shotwell* (1920, Mich.) 176 N. W. 414; *Goggin v. Mutual* (1919, Mo. App.) 213 S. W. 522.

[17] *McHenry v. Hazard* (1871) 45 N. Y. 580.

[18] In *George v. Pilcher* (1877, Va.) 28 Gratt. 299, 305, a tenant interpleading rival heirs of his lessor was allowed to pay accrued rents into court, but was retained in the suit subject to the order to pay subsequent instalments of rent in as they became due.

[19] *Sherman v. Shubert* (1917, S. D. N. Y.) 238 Fed. 225. The independent ground was here said to be account.

this dispute was allowed to be determined in a preliminary stage of the proceedings; the amount thus fixed was then paid into court by the applicant, who withdrew and left the claimants to fight out its ownership.[20] Why should the existence of some independent ground be a prerequisite to such a just solution? (3) It will be objected that an interested applicant ought not to be given interpleader with its traditional benefits in the form of costs, counsel fees, remission of interest, etc.,[21] if he participates in the claims to the *res*. The answer is, give him interpleader without those benefits. Equity has no hard and fast rules as to costs in other suits; it can adjust them according to the merits of the parties and other facts. Why should it not have the same flexibility in interpleader?[22]

Consequently, the existence of some interest in the applicant should not deprive equity of jurisdiction to grant interpleader, but should merely go to the exercise of jurisdiction, and should not bar relief in cases where there is genuine double vexation with no adequate remedy at law.

INDEPENDENT LIABILITY

In several cases where the applicant was under an obligation to C_1 and C_2 did not claim through it, the courts have denied relief both for want of privity and because A was said to be under an independent liability to C_1, which would not be settled by the second stage of interpleader. In fact, no such independent liability arose out of the obligation, except in the landlord and tenant cases, for if C_2 was justly entitled to the *res* the obligation to C_1 would be discharged. However, such additional liability might conceivably be created by estoppel or some other ground, but this would be unusual.[23] In *Crawshay v. Thornton*[24] Cottenham was much too eager in finding that estoppel existed. Assume there is a true possibility of independent liability of a bailee to C_1, the pledgee under the bailor, because of estoppel, in addition to the bailee's liability to deliver the disputed chattel to the rightful owner. It is said that relief ought to be denied because an adjudication of ownership in C_2 will not conclude the controversy, and because the applicant does not stand indifferent

[20] *Aleck v. Jackson* (1892, Ch.) 49 N. J. Eq. 507, 23 Atl. 760. The independent ground was cloud on title.

[21] The applicant was ordered to pay part of the costs because of his interest, in *Jacobson v. Blackhurst* (1862, Md.) 2 Johns & H. 486; *Christian v. Ins. Co.* (1895) 62 Mo. App. 35.

[22] For cases giving relief despite interest, see Ames, 13, note, 2d par.; 15, note.

[23] In *Lindsey v. Barron* (1848) 6 C. B. 291, a bailee of chattels had pledged them to C_1; they were also claimed by the bailor. Interpleader was denied, because even though in the second stage C_2 might win for want of power in A to pledge, A might still be under an independent liability to the pledgee on an implied warranty of his authority to pledge.

[24] (1837, Ch.) 2 Myl. & C. 1; the bailee did not represent that the pledgee was owner, but merely that he had whatever rights the bailor, Raikes, possessed; the pledgee did not act in reliance upon any representation, since the money had already been advanced.

between the claimants. It is true that a two-stage proceeding will not determine that the bailee is entirely free from liability to either claimant, but here again as in the interest cases, equity need not limit the proceeding to two stages. At the end of the first stage, the bailee can put the chattel into court and withdraw; in the second stage the ownership of the chattel will be settled between the claimants. If C_1 wins, everything is over; for C_1 cannot also pursue the bailee on an independent liability. On the other hand, if C_2 wins, the independent liability of A to C_1 can be fought out between them in a third stage, and complete justice will be done. The applicant will thus be relieved from a real danger of double vexation and double liability with respect to the ownership of the chattel, and in many cases the independent claim will never need to be litigated. Costs can be partly thrown on A in view of his special situation. The arguments against this method are (1) the hardship to C_1 of two contests, first with C_2 in the second stage, secondly with A in the third stage, whereas if he were allowed to sue A at law, both of A's liabilities would be determined in one contest; but this must be set-off against the hardship to A of two actions at law and a possible double recovery and weighed by the court in the balance of convenience, so that jurisdiction will be exercised or not according to circumstances; (2) the analogy of common-law interpleader, where the applicant dropped out entirely after the first stage; but modern courts should refuse to be so rigidly limited where justice is at stake. The court should have discretion. Just because interpleader would sometimes be unfair to the claimant who alleges the independent liability, this does not make it always unfair, and when it is not so, relief should be given to the applicant who is none the less doubly vexed on the common claim, although there is a possible independent claim.

The wisdom of this flexible method is shown by the instances where it has been used under modern statutes. In England under the Judicature Act a warehouseman was allowed this relief despite a possible liability to one claimant through estoppel,[25] although the statute and rules of court said nothing one way or the other about the old bar of independent liability. The same result has been reached in New York under the Warehouse Receipts Act,[26] which is also silent on Pomeroy's fourth requirement, and Alabama under its Code gave relief to an insurance company which had gone so far as to give a check to one claimant to insurance money, and would therefore have been denied relief in a strict court.[27] Consequently, all courts should find it possible to dispense with this limitation without legislation.

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[25] *In re Mersey Docks,* [1899, C. A.] 1 Q. B. 546. The terms of the English court order furnish a valuable model for American interpleader legislation. However, these provisions are still narrowly interpreted with respect to the tests of same debt, duty, or thing. See note 46, *supra.*

[26] *Rosenberg v. Viane, supra* p. 840, note 13.

[27] *Marsh v. Mutual* (1917) 200 Ala. 438, 76 So. 370. Cf. *National Security Bank v. Batt* (1913) 215 Mass. 489, 102 N. E. 691; (1904) 17 HARV. L. REV. 489.

Our discussion of Pomeroy's four requirements results, therefore, in the following conclusions. The first and second requirements should be abolished and the test of mutual exclusiveness substituted. The third and fourth requirements should remain only as considerations affecting the exercise of equitable jurisdiction and no longer bar the jurisdiction.

Undoubtedly, these changes will make interpleader in many cases very different from the smooth-sliding rigid common-law remedy, with its automatic disposal of the applicant. It will be no longer a distinctive branch of equity, but really only one species of a bill of peace, if we extend that name to all suits where relief is asked from a multiplicity of actions at law without adequate possibility of justice in the law courts. If the benefits of settling the matter by one proceeding in equity outweigh the difficulties of combining numerous parties and claims, then equity should act. Questions of fact can be referred to a jury if the Constitution so requires. The whole problem of interpleader thus boils down to a question of multifariousness.[28]

The history of interpleader exhibits one great leap forward when the Chancellor threw overboard the limitations of the common-law action and did not require that the claim should be in detinue or *quare impedit,* but granted relief in many situations wholly uncontemplated by the common law. Early in the nineteenth century. this progress was suddenly checked. The Court, which had changed a rigid mediaeval remedy into a flexible instrument of justice, set about devising new limitations of its own. The time has now arrived for a second leap forward. Equity judges can solve many of the perplexing tangles growing out of our complex modern commercial life if they will only adopt toward interpleader the same broad attitude which they have used toward other equitable remedies, and take to heart the warning given by an able judge in a liberal interpleader decision fifty years ago:[29]

"There have been, occasionally, upon the bench, as well as at the bar, minds of that peculiar cast, which always see more importance in arbitrary signs, than in the thing signified; in the form and detail of the mere scaffolding, than in the building it was intended to aid in erecting; minds which take it for granted that the whole law has been exhausted in its application to the particular enumerated facts found in the cases which have already arisen and been decided, and that no remedy can be given in cases which may happen to lack some of the facts enumerated in past cases, or to present new ones; thus mistaking what in their nature were but instances of the application of the principle, for a restrictive definition of the entire principle itself."

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[28] *School District v. Weston* (1875) 31 Mich. 85, 96.

[29] *School District v. Weston,* at p. 95, per Christiancy, J.