

THE
AMERICAN LAW REGISTER.

MAY 1886.

ACTIONS BY AND AGAINST RECEIVERS.

It is the purpose of the writer, in the following pages, to discuss certain general principles of law and rules of practice in regard to actions at law and bills in equity brought by or against receivers, excluding the whole subject of their appointment, and excluding also the matter of allowance of claims against them by the court without suit. And it is to be understood that the propositions here advanced have reference equally to receivers of corporations, of judgment debtors, and of partnerships, unless a distinction is specially noted.

In an action brought by a receiver it is generally considered necessary for him, since he sues in a representative capacity and not in his individual right, to set out in his pleadings the authority by which he acts, in such manner that traverse can be taken upon it: *Bangs v. McIntosh*, 23 Barb. 591; *White v. Low*, 7 Id. 204; *Potter v. Merchants' Bank*, 28 N. Y. 641. But the defendant may be estopped by his own admissions or conduct, from denying the authority of the receiver or his right to maintain the particular action; and in such case it is not required of the receiver to prove either his appointment or his authority to bring the suit: *Scott v. Duncomb*, 49 Barb. 73. And it is to be noted that the regularity, propriety, or necessity of the receiver's appointment cannot be called in question in any proceeding instituted by or against him, at least so far as regards parties or privies to the original proceeding; for they are bound by the order of appointment, and cannot attack it collaterally: *High on Receivers*, § 203. As concerns strangers,

however, the rule is not quite so clear. It has been held in Louisiana, that where a receiver sues on a promissory note, the regularity of his appointment cannot be questioned by the defendant; it is enough for the latter to know that the receiver was in fact appointed, and as such, holds the note in controversy, and that he will be discharged of his debt by payment to the receiver: *Case v. Marchand*, 23 La. Ann. 60. And in *Thompson on Corporations*, § 542, it is said, "it has been held that to a suit by a receiver to collect an unpaid subscription, a shareholder may aver that the receiver was improperly appointed by a decree not binding on the shareholder: *Chandler v. Brown*, 77 Ill. 333. But this doctrine may perhaps be of questionable correctness, or at least application, since the shareholder could have intervened in the proceeding by which the receiver was appointed: *Schoonover v. Hinckley*, 48 Iowa 82." Probably those who were entire strangers to that proceeding should be allowed, in a collateral action where their interests are affected by the appointment, to attack the order on the ground that it was procured through fraud and collusion, and by deception practised on the court, but for no other reason. The proceeding by receivership is *quasi in rem*, so far as it involves a sequestration of the assets, but it is not wholly *in rem* so as to be binding on all the world. So strictly is the general rule adhered to, that it has been held in Illinois, that a receiver appointed by a master in chancery (who has in that state no power to make such appointment), may nevertheless defend an action of trespass in respect of the personalty committed to his charge, if the papers were regularly issued under the seal of the court: *Brush v. Blanchard*, 19 Ill. 31.

As the receiver does not occupy any higher ground than the corporation (or firm, as the case may be), his appointment does not change the contract relations of the parties nor create a right of action where none previously existed; if, therefore, the claim which he seeks to enforce was in such shape, at the time of his appointment, that the corporation could not have maintained a suit upon it, neither can the receiver do so without taking the necessary steps to complete the liability of the debtor: *Williams v. Babcock*, 25 Barb. 109. And the fact that he is an officer of the court does not confer upon him, when he becomes a suitor for the purpose of carrying out the objects of his trust, any privileges or powers not accorded to other litigants. Thus he must pursue the appropriate and existing remedies, and (for example) if the demand is one cognisable at law,

he must apply to that forum, and there is nothing in his position which authorizes him to proceed by bill in equity: *Freeman v. Winchester*, 18 Miss. 577.

Whether a suit will properly lie in the receiver's own name, on a cause of action which accrued in favor of the insolvent prior to his appointment, or whether it must be brought in the name of the party over whom he is appointed, is a matter that is usually regulated either by the statute law of the state, or the order by which he was appointed. But if he is not directly authorized to sue and be sued in his own name, either by statute or by an order of the court from which he derives his appointment, the prevalent opinion seems to be that the suit must be brought in the name of the corporation or party in whom the right of action existed before the appointment: *Manlove v. Burger*, 38 Ind. 211; *Yeager v. Wallace*, 44 Penn. St. 294; *King v. Cutts*, 24 Wis. 627; *Newell v. Fisher*, 24 Miss. 392; *Booth v. Clark*, 17 How. 331; *Graydon v. Church*, 7 Mich. 36; *Dick v. Struthers*, 20 Rep. 643. The principle upon which this rule is predicated, is, that in the absence of such provisions, the receiver can neither be regarded as an assignee of the property intrusted to him, nor as a purchaser thereof for value. True, he is a public officer, representing both the corporation and its creditors; but he does not *succeed* to the titles held by the insolvent, nor become the legal owner of its rights in action, unless the statute declares that such effect shall follow his appointment. There are therefore only two grounds on which he can base any claim to maintain a suit in respect of such rights in his own name: (1) that the law of the state constitutes him a statutory assignee of the property of the insolvent, as is the case in New York; or, (2) that the court having taken into its own charge and custody the assets and effects of the corporation, for the purpose of administering the trust, has authorized and directed its minister, the receiver, to bring actions for the recovery of those assets in his proper person. It is in the latter aspect that we must view the decisions to the effect that it is entirely competent for the chancellor to authorize the receiver to institute actions in his own name for the recovery of assets, and in that case, being substituted in the place of the real parties in interest, he is subrogated to all their rights: *Hardwick v. Hook*, 8 Ga. 354; *Leonard v. Storrs*, 31 Ala. 488.

In accordance with the rule above stated, it is held that a receiver of the property of a partnership cannot maintain an action of trover

in his own name for the conversion of the property of the firm before his appointment; for he does not become the legal owner of the property which he is required to take in charge, nor does his appointment transfer to him the legal rights of the firm in any of their choses in possession or in action: *Yeager v. Wallace*, 44 Penn. St. 294; though see *Gillet v. Fairchild*, 4 Denio 80. But if the property has already passed into the hands of the receiver, the rule is entirely different. For he is, in that case, most certainly entitled to its possession, and therefore has a right to maintain trover in his own name for a conversion transpiring after he had reduced it to possession: *Singerly v. Fox*, 75 Penn. St. 112; *Gardner v. Smith*, 29 Barb. 68; *Boyle v. Townes*, 9 Leigh 158. And so where an execution on a judgment in favor of an insolvent bank has been legally extended on real estate and seisin thereof delivered to the receivers, they may maintain an action of forcible entry and detainer in their own names against the tenant holding possession without their consent; because, as stated by WALTON, J., "The object of the suit is to obtain possession of the real estate in question for the receivers, and not for the bank. A suit in the name of the bank would not accomplish that purpose; for the execution or writ of possession, if one was obtained, would require the officer executing it to put the bank, and not the receivers into possession:" *Baker v. Cooper*, 57 Me. 388. And this modification of the rule may reasonably be extended to all cases where the cause of action accrued after the appointment, and in favor of the receiver as receiver.

But it is sometimes a question whether the receiver has a right to maintain the action at all, either in his own name or that of another. The generally accepted rule is that in the absence of an enabling statute, he cannot do so without an order of court. That is, if the statute does not authorize him to bring suits at law for the recovery of assets or for other purposes, he cannot institute proceedings of his own motion and without the direction of the court: *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41; *Green v. Winter*, 1 Johns. Ch. 60. The case of *Tillinghast v. Champlin*, 4 R. I. 173, maintains the opposite view with great ability, and claims to be in accordance with the old English practice. But this decision stands practically alone, both in this country and among the modern cases in England. But of course where a statutory enactment (as the Maryland Act of 1868, c. 471, § 195) gives to the receiver of a corporation a right to sue, no special authority

from the court which appointed him need be shown: *Hayes v. Brotzman*, 46 Md. 519. And where he is not expressly authorized to sue by the order of his appointment, he may be so authorized by a subsequent order of the same court: *Lathrop v. Knap*, 37 Wis. 307.

As the receiver owes his appointment to a pending litigation, so his proceedings must be regulated with the reference to that suit, and his authority is strictly confined to the matters in controversy therein. Thus a receiver appointed in a suit in equity to foreclose a mortgage of a railroad, cannot maintain an action to recover earnings of the road accruing before his appointment, because the mortgage not attaching to them, they are not in controversy in the suit in which he was appointed: *Noyes v. Rich*, 52 Me. 115. And "if the property is in the possession of the third person who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed:" *Parker v. Browning*, 8 Paige Ch. 388; *Davis v. Gray*, 16 Wall. 203.

As a general rule the receiver is not allowed to employ the attorney of either of the parties to the original proceeding to advise or assist him in discharging the obligations of his trust. The attorney's first duty is to his client, and on his behalf, he is already bound to scrutinize all the proceedings of the receiver, and to see that the latter is faithful in accomplishing the objects of his appointment. The undertaking to act as solicitor or counsel for the receiver, would therefore, in many instances, involve the attorney in conflicting and inconsistent duties: *Ryckman v. Parkins*, 5 Paige Ch. 543; *In re Ainsley*, 1 Edw. Ch. 576. This rule, however, is only intended to protect the rights of the parties to the suit, and if they make no objection, the receiver is not absolutely forbidden to employ the solicitor of either of them; and certainly a mere stranger has no right to raise that objection when the receiver employs such solicitor to sue the stranger: *Warren v. Sprague*, 11 Paige Ch. 200.

Where an action is pending at the time of the receiver's appointment, in which the corporation is plaintiff, the proper practice is to continue the suit in the name of the receiver, by order of court on a summary application: *Talmage v. Pell*, 9 Paige Ch. 410. And

so where the corporation is party defendant to a suit properly commenced in the Court of Chancery, such action is neither barred nor abated by the subsequent appointment of a receiver over the corporation; at most, such appointment will render the suit defective, so as to make it irregular for the complainant to proceed until the receiver is brought before court by a supplemental bill in the nature of a bill of revivor: *Wilson v. Wilson* 1 Barb. Ch. 592. Nor will the appointment be sufficient ground for dissolving an attachment previously issued against the corporation; the plaintiff should have the receiver substituted and then proceed with his action: *Pickersgill v. Myers*, 99 Penn. St. 602. However, it must be remembered that the receiver is a stranger to all proceedings which he finds in progress at the time of his appointment, until he is regularly brought before the court. Hence, he cannot interfere in a pending suit against the corporation, as by giving notice of a motion or conducting an appeal in his own name, unless he has been made a party to the action by order of court: *Tracey v. Bank*, 37 N. Y. 523. In this connection we may cite an interesting case recently decided by the Supreme Court of Pennsylvania. The facts were as follows: a creditor of a mutual insurance company had reduced his claim to judgment, and issued process against a garnishee who was indebted to the company on his premium note for his proportion of losses sustained, but to an amount not yet ascertained; pending this proceeding the company was dissolved by a decree of the court and a receiver appointed, who thereupon levied an assessment on all the premium notes, thereby liquidating the indebtedness of the garnishee; it was held that the dissolution of the corporation did not abate the garnishment proceedings, nor did the appointment of the receiver prevent the creditor from continuing the same, and he was therefore entitled to recover from the garnishee the amount of his claim to the extent of the indebtedness fixed upon the latter by the action of the receiver; because the attachment created a charge upon the garnishee's debt *subject to which* it passed into the receiver's hands as assets, and his action in making the assessment simply ascertained the amount of the debt upon which the creditor had levied: *Hays v. Lycoming Fire Ins. Co.*, 99 Penn. St. 621.

Upon the appointment of a receiver of a corporation, the right of action against the shareholders for their unpaid subscriptions to the capital stock vests in him, and a judgment-creditor of the corporation will be restrained from prosecuting a suit against an individual

stockholder in respect of such subscription : *Rankine v. Elliott*, 16 N. Y. 377 ; *Mann v. Currie*, 2 Barb. 294. But if the receiver fraudulently combining with the stockholders, neglects or refuses to call in unpaid stock, for the discharge of debts, the proceeding may be maintained directly by the creditor in his own name against the stockholders, making the receiver a party defendant : *Hightower v. Thornton*, 8 Ga. 486. In an action of this kind, against a delinquent subscriber, the receiver is not restricted in his recovery to the amount of the debt due to the creditor of the corporation who procured his appointment, for he acts for all the creditors and stockholders : *Mann v. Pentz*, 2 Sandf. Ch. 257.

In the next place the inquiry presents itself whether the receiver is estopped to set up the fraudulent acts of the corporation, committed prior to his appointment in a suit brought by or against him. In order to determine this question we must first answer the further query, what parties does the receiver represent ? Cases may sometimes arise where the receiver can properly be considered as representing only the corporation : and accordingly it was held in an early New York case that where a corporation has done acts in fraud of its creditors, and a receiver is afterwards appointed, the remedy cannot be pursued in his name, but must be sought directly by the person defrauded : for such fraudulent transactions would, in most cases be binding on the corporation, and therefore, also upon its representative : *Hyde v. Lynde*, 4 N. Y. 387. But in the great majority of instances it is either essential to the maintenance of the action, or a necessary deduction from the circumstances of the case, that the receiver should be held to represent not only the corporation over which he is appointed, but also the creditors and all parties in interest. Hence it is held that an action to vacate and set aside a judgment against the corporation, on the ground that it was obtained without consideration by collusion with the officers of the corporation, and in fraud of creditors, will lie in the name of the receiver ; for it is his duty, as the representative of the creditors, to resist the enforcement of the judgment ; this he could not do in the original action, because he was a stranger to that proceeding, and therefore it is open to him to proceed by direct action : *Whittlesey v. Delaney*, 73 N. Y. 571 ; *Porter v. Williams*, 9 Id. 142. So where a debt due the corporation has been fraudulently discharged, by collusion with the officers, a bill to obtain satisfaction of the debt against the original debtor, is properly brought in the name of the

receiver, for he represents the creditors: *Nathan v. Whitlock*, 9 Paige Ch. 152. But conversely, when the receiver sues on a contract made before his appointment, and it appears that the defendant was induced to make the agreement by the fraudulent misrepresentations of the agents of the corporation as to its solvency, that defence may be urged as well against the receiver as against the corporation: *Litchfield Bank v. Peck*, 29 Conn. 384.

The right of a defendant, in a suit by the receiver, to set off a claim which he holds against a corporation, is involved in considerable doubt. This, also, must depend upon the receiver's representative capacity. If he represents only the corporation, justice obviously demands that the debtor should have the same equitable right of set-off against him which he would have against the corporation itself. But, as we have already seen, he must be regarded in most instances, as the representative both of the corporation and its creditors. In the latter case, therefore, the true rule seems to be, that if the debtor holds a claim, such that it is capable of being made the basis of an independent action, it cannot be allowed as a set-off to the receiver's suit. Because, if the debtor has such an independent claim, he is, to that extent, a creditor of the corporation; as such, he is entitled to all the rights and remedies of the other creditors, if he can and does affiliate with them in the main proceedings, but to no more. Now to allow his set-off would practically amount to giving him a short cut to the very point which the other creditors are striving to reach by the indirect process of the receivership, viz.: the recovery of their debts. In other words, it would give him a manifest and unjust preference over other creditors. And further, since the receiver is the representative of the creditors in suing to recover the assets of the estate, the action, though brought in his name, is in reality a proceeding in the interest and behalf of the creditor. Now a demand against the corporation is obviously no claim against its creditors; and therefore the debtor ought not to be allowed to offer as a set-off any claim which would not be good against the creditors, were they the *nominal* plaintiffs instead of the *cestuis que trust*. This latter view is the one which controlled the decision in the well-reasoned case of *Osgood v. Ogden*, 4 Keyes (N. Y.) 70. And in support of the former position, see *Clark v. Brockway*, 3 Id. 13. The case of *Receivers v. Patterson Gaslight Co.*, 3 Zab. 283, appears at first sight to maintain a contrary doctrine, but the decision was governed by a local statute.

And a very recent case from the same court entirely supports the first position taken above: *Williams v. Traphagen*, 38 N. J. Eq. 57. On the other hand where one indebted to an estate which is in a receiver's hands is employed to render necessary services for the benefit and protection of the estate, the value of his services may be allowed as a set-off to an action by the receiver to recover the debt: *Davis v. Stover*, 58 N. Y. 473; for this, of course would be a good claim against the creditors themselves if they were suing as plaintiffs, in respect to the trust estate, instead of their representative, the receiver. A Massachusetts decision holds that in an action by the receiver of a bank, upon a debt contracted before his appointment, the defendant may set off debts held by him before the proceedings in which the receiver was appointed, but not debts purchased since that time: *Colt v. Brown*, 12 Gray 233.

Like all other representatives whose authority depends upon the action of a court, the receiver has no power, merely by virtue of his appointment in one state, to go into a foreign jurisdiction and there sue for the recovery of assets, or upon any other cause of action. As stated by Mr. Justice WAYNE, "He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment-creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." *Booth v. Clark*, 17 How. 322; *Killmer v. Hobart*, 58 How. Pr. 452. The suit must therefore be brought, if at all, in the name of the corporation: *Hope Mut. Life Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278. But where receivers appointed in another state have power, by the laws of that state, to sell, assign, or convey the assets of the insolvent, they may assign a debt due from a citizen of a foreign state, and such assignment will give the purchaser an equitable right of action, in the courts of the latter state, at least as against the debtor, though its effect as against creditors and *bona fide* purchasers is not determined in this case: *Hoyt v. Thompson*, 5 N. Y. 320. And so, where a citizen of the state has attached a fund in the hands of one indebted to a foreign corporation, and it appears that receivers have been appointed over that corporation in the state of its domicile, such receivers cannot come into the courts here and claim the funds attached, as assets

of the corporation, because they have no extra-territorial authority. *Warren v. Union National Bank*, 7 Phila. 156. A similar case was decided in Massachusetts upon grounds somewhat different, but equally conclusive of the question, viz. : that the proceeding by appointment of receivers is in effect an involuntary assignment for the benefit of the creditors—it matters not whether the trustee be called assignee or receiver—and it is well settled that insolvency proceedings taken under the laws of a given state can have no effect, as against non-resident creditors, upon any remedies which the latter may have against property within their own state. *Taylor v. Columbian Ins. Co.*, 14 Allen 353. But this power to sue in the courts of a foreign jurisdiction, though never to be claimed by the receiver as a matter of right, may sometimes be accorded to him as a privilege, on the principles of comity which prevail between the states of the Union. But this privilege rests in the discretion of the court, and will not be granted in derogation of the rights of resident creditors. Thus it is said: “Upon principles of comity, often recognised and always acted on, except when they come in conflict with paramount rights of suitors in our courts, they [the foreign receivers] might be admitted here to protect the interests and enforce the claims of the corporation, of whose affairs they are the legal guardians there. But comity does not require us to permit the exercise of such privileges to the detriment of our own citizens who are pursuing appropriate legal remedies in this court.” *Hunt v. Columbian Ins. Co.*, 55 Me. 290; *Runk v. St. John*, 29 Barb. 585. In the case of *Graydon v. Church*, 7 Mich. 36, it was held that where a receiver was appointed on a creditors’ bill in the Court of Chancery of New York, and the debtor made a general assignment to the receiver of all his property, and the assignment was made in such form that it would be effectual to transfer an interest in lands under the statutes of Michigan, the receiver might file his bill in the courts of Michigan to foreclose a mortgage interest, or to enforce a right of redemption in real property in the latter state held by the debtor at the time of the appointment; for in such case the receiver sues, not strictly in his official character as receiver, but as an assignee, holding the legal interest in the property by virtue of the assignment by the debtor. Finally, where receivers appointed in one state bring a suit there in the name of the estate, and also sue the same defendant upon the same cause of action, but in their own names, in another state,

and obtain judgment in the latter action, such recovery will forbid any further prosecution of the suit in the former state; because the actions must be regarded as substantially between the same parties, and therefore the principle applies that a judgment in one state will bar any further suit upon the same demand in any other state: *Bank of North America v. Wheeler*, 28 Conn. 433.

It is held that where a receiver is prosecuting an unjust and vexatious suit at law, in the name of a third person, without his consent, the court which appointed him has jurisdiction to interfere and restrain him, although the application for such relief is made by persons not parties to the suit in which the receiver was appointed: *In re Merritt*, 5 Paige Ch. 125.

To turn now to the second branch of our subject—actions in which the receiver is a party defendant—it is universally held that he is an officer of the court which appointed him, that the possession of the receiver is the possession of the court, and that therefore permission of the court to sue the receiver, must be obtained before proceedings can be legally instituted against him: *DeGroot v. Jay*, 30 Barb. 483; *Angel v. Smith*, 9 Ves. 335; *Barton v. Barbour*, 104 U. S. 126. And to bring such an action without leave of the court appointing the receiver, whether before the same or another tribunal, is a contempt of that court: *Thompson v. Scott*, 4 Dill. 508; *DeGroot v. Jay*, 30 Barb. 483. And where an action is commenced without leave against a receiver appointed by a Court of Chancery, that court will generally issue an injunction to restrain all proceedings until further order: *Evelyn v. Lewis*, 3 Hare 472; *Tink v. Rundle*, 10 Beav. 318; or the proceedings may be stayed or set aside on motion or petition: *DeGroot v. Jay*, 30 Barb. 483. Nor is this rule limited to cases where the object of the suit is to recover specific property out of the receiver's possession, but applies equally to actions for a mere money demand; because, if the creditor has a right to prosecute his suit to judgment without leave, he has also a right to enforce satisfaction of it; now the judgment would be against the receiver in his official capacity, and satisfaction could only be obtained out of the trust estate in his hands; hence the result would be to take the property of the trust out of the receiver's possession, and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property; "we think, therefore, that it is immaterial whether the suit is brought against him to

recover specific property or to obtain judgment for a money demand. In either case, leave should be first obtained:" *Barton v. Barbour*, 104 U. S. 126. It has been held that the permission of the court to sue the receiver, is waived by him if he appears by counsel to the action, and want of such leave cannot be made ground for dismissing the suit after such appearance: *Hubbell v. Dana*, 9 How. Pr. 424. But it is difficult to see how this exemption from liability to suit without leave can be considered a privilege so personal to the receiver that he may waive it. In reality, it is the barrier which the court itself interposes against unwarranted interference with its own officers and against depredations upon the estate which is in its own charge and custody. The receiver, however, is protected by the court, only as respects the property of which he is directed or authorized to take possession by the order of his appointment. If he assumes to interfere with property not embraced in the decree, and to which the estate never had title, he is not acting as an officer of the court, but is a mere trespasser, and the owner of the property need not obtain permission of the court to sue the receiver for its possession: *Hills v. Parker*, 111 Mass. 508. Leave to sue will in general be given to any plaintiff who makes out a *prima facie* case against the receiver, or discloses the foundation of a valid claim: *Hills v. Parker, supra*; *Jordan v. Wells*, 3 Woods 527.

Since the possession of the receiver is the possession of the court the whole trust estate in his hands is regarded as *in custodia legis*, and therefore cannot be taken upon any process of attachment or execution issued after the receiver was appointed: *Adams v. Haskell*, 6 Cal. 113; *Hooper v. Winston*, 24 Ill. 353. Hence one who has a judgment-lien on land of his debtor which is in the possession of a receiver cannot proceed to levy his execution, if he have notice of the fact that the estate is in the custody of the law; he must apply to the Court of Chancery, which will take care to protect his interests in making a sale or distributing the proceeds: *Wiswall v. Sampson*, 18 How. 52. Or, if he believes that there is any valid reason why the land should not have passed into the receiver's hands, his proper course is to apply to the court which appointed the receiver, to ask its discharge out of custody, in order that he may proceed against it: *Robinson v. Atlantic, &c., Rd.*, 66 Penn. St. 160. But when property which has been held by a receiver is, by a decree of the court, vested in one of the parties to the suit, his title to it is thereupon perfected, and it is liable to be

taken in execution for his debts, notwithstanding the receiver has not yet been discharged by formal order of court: *Very v. Watkins*, 23 How. 469. Property in the possession of a receiver appointed by a federal court is in the possession of that court, and cannot be taken therefrom on process subsequently issued from a state court; application should be made to the federal court for leave to sue the receiver, or for an order upon the receiver to pay the claim: *Ohio, &c., Rd. v. Fitch*, 20 Ind. 498. And any attempt to disturb the possession of such receiver, on the part of a suitor in a state court, without leave of the federal court first obtained, is a contempt of the latter court; *De Visser v. Blackstone*, 6 Blatchf. 235.

In regard to the liability of a receiver for torts committed by his own employees, or those of the corporation, during his receivership, there has been a considerable diversity of opinion. But recent decisions have gone far to clarify judicial opinion on this point, and to settle the law on broad and just principles. The first of these cases which we shall notice is that of *Little v. Dusenberry*, decided by the Court of Errors and Appeals of New Jersey, in November 1884, and to be found in 46 N. J. Law. 614. This was an action against the receiver of a railway corporation to recover damages for the death of plaintiff's intestate, caused by the negligence of the company's employees, the accident occurring during the receivership. In New Jersey, by statute, the receiver is authorized to "operate said railroad for the use of the public." The court (SCUDDER, J.), said: "The first error assigned on the bill of exceptions returned with this writ is, that the receiver was not liable in this action, because that under his statutory appointment he is not a common carrier, but a public officer. An examination of the cases where this immunity has been given, will show that it is limited to those that are strictly public officers, who are parts of the governmental agency of the state, entirely distinct from individual gain or profit, such as state, county, municipal, and township boards and officers discharging duties imposed on them by law, with none behind them but the public, whom they represent, and no funds to answer except those that must be taken from the public treasury. * * * There was no error in the charge to the jury that the receiver, in his representative capacity, was liable for injuries resulting from the transaction of the business of the corporation under his supervision as such receiver, the same as the corporation which he represented." And the same rule is held in *Meara v. Holbrook*, 20 Ohio St. 137,

and *Newell v. Smith*, 49 Vt. 255. So it is maintained by the United States Supreme Court, that the earnings of a railroad in the hands of a receiver, are chargeable with the value of goods lost in transportation, and with damages done to property during his management: *Cowderly v. Galveston, &c., Rd.*, 93 U. S. 352. And in Massachusetts, that receivers who are running a railroad under appointment by the Court of Chancery in another state, who act as common carriers, and are there held liable as such, to actions at law, may be sued as common carriers in this commonwealth: *Paige v. Smith*, 99 Mass. 395. A contrary view appears to obtain in Tennessee, where it was held (*Hopkins v. Connel*, 2 Tenn. Ch. 323), that the receiver of a delinquent railroad, appointed by the governor of the state under Tenn. Laws 1852, 151, 5, is a public agent, and as such, not liable for the wrongs or negligence of his employees, but only for his own tortious acts or delinquencies. But a late case (1883) from the same court seems to lean strongly to the generally accepted rule, although the point actually determined was merely that the receiver could not, in any event, be made a party defendant without leave of the court appointing him: *Rogers v. Mobile, &c., Rd.*, 16 Rep. 536. The case of *Cardot v. Barney*, 63 N. Y. 281, holds that the receiver is not liable for the negligence of his subordinates, where he does not hold himself out as a carrier of passengers, other than as an officer of the court, and is guilty of no personal neglect, the decision resting upon the general principle that a public officer, where he has no individual interest in the profits of the business intrusted to him, should not be held liable for injuries not imputable to his personal tort. But it is submitted that an examination of this case will show it to be an authority only upon the point that an *individual* responsibility cannot be fastened upon the receiver; and this view is not at all inconsistent with the rule allowing a recovery against him in his representative capacity, and to be enforced against the trust funds in his hands. We are therefore justified, by the weight of authority, in accepting the doctrine that a receiver who is operating the road, either by statutory authority or by the order of his appointment, is liable in his representative capacity for damages arising from the wrongful acts or negligence of his employees committed under his management.

In the next place it is established beyond contradiction, that where a railroad corporation is sued in damages for injuries occasioned by the negligence of employees on the road, it is a complete and perfect

defence, that at the time of the injuries complained of, the road was in the hands and under the control of a receiver, who was operating the road as a common carrier, being thereto empowered by statute or order of court. In other words, where the receiver is liable, the corporation itself is *not*; any such claim is a liability of the receivership, to be enforced against the trust fund: *Hicks v. International, &c., Rd.*, 62 Tex. 382; *Rogers v. Mobile, &c., Rd.*, 16 Reporter 536; *Bell v. Indianapolis, &c., Rd.*, 53 Ind. 57; *Metz v. Buffalo, &c., Rd.*, 58 N. Y. 61; *Ohio, &c., Rd. v. Davis*, 23 Ind. 553; though see, as a case under a local statute, *Louisville, &c., Rd. v. Cauble*, 46 Ind. 277. But an important distinction is formulated in the case of *Railroad Co. v. Brown*, 17 Wall. 445, as follows: where a railroad was being run on the joint account of a receiver of a part of it and the lessees of the remaining part, it was held that an action would properly lie against the corporation itself for injuries sustained by a passenger at the hands of servants employed by the parties jointly operating the road; because the rule that the corporation is not liable in damages when the receiver is so liable, is never to be applied, unless the possession of the receiver is exclusive, and the employees of the road are wholly controlled by him; in this case, the receiver and the lessees would be jointly liable, and if so, the original company would also be responsible, for the servants, under such an employment, are as much the servants of the corporation as of the receiver and lessees.

It seems that specific performance of a contract made with the corporation before the appointment of the receiver, cannot be exacted of the latter. In a recent case before the Supreme Federal tribunal, the facts were as follows: a railroad company and an express company made a contract, whereby, in consideration of a loan of money, the railroad agreed to grant to the express company the necessary privileges and facilities for the transaction of all the express business over its road; the road having passed into the hands of a receiver, the express company brought a bill in equity against him, upon leave, for specific performance; but SWAYNE, J., said: "There is another objection to the appellant's case, which is no less conclusive. The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road.