May, 1932

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.

Copyright 1932, by the University of Pennsylvania.

VOL. 80

MAY, 1932

No. 7

LIABILITY IN CONDUCT OF RECEIVERSHIPS*

JOSEPH FIRST†

A receiver is appointed to conduct the business of a corporation in state X. He enters into contracts and employs agents to assist him. His activities carry him into state Y. Suppose, in thus conducting the business, he or his agent commits a tort in state X or in state Y; or suppose he commits a breach of a contract entered into for the benefit of the enterprise. What is the receiver's responsibility under these circumstances? Who shall bear the resultant loss—the receiver, the receivership fund, the defendant corporation, or the person at whose instance the receiver was appointed? And when we shall have decided this problem, we must inquire whether for the purpose of establishing such liability, suit may be instituted in a foreign tribunal or whether it is limited to the court of appointment. The present research is directed toward a solution of these problems.

Receiverships, especially corporate ones, are occupying an important part in equity litigations.¹ Modern enterprises, based on intricate financial set-ups, are of greatest value as going concerns. Not only shareholders, but creditors as well, have come to realize this *nuda veritas*. For instance, business goodwill behind padlocks and drawn blinds is valueless; and mere fixtures and stored goods, translated into currency, are scarcely comparable with the monetary returns of those fixtures and that stored goods in use. As a

* An attempt has been made to isolate the instant problem from those that arise in connection with—Suits by and against the Receiver, Place of Administration of Assets, Distribution of Assets, Jurisdiction under Creditors' and Stockholders' Bills. These problems will be treated in later articles.

† B. S., 1927, L. L. B., 1930, Gowen Fellow, 1930-31, University of Pennsylvania; Case Editor, University of Pennsylvania Law Review, 1929-30; member of the Pennsylvania Bar.

¹ While receivership law has been spoken of as administering the "incidents of a decent funeral" to a "financial last illness", the "miracle of a resurrection" is not entirely infrequent. See William H. Lloyd, Book Review (1930) 28 MICH. L. REV. 471. Municipal, railroad, insurance, and banking corporations being unable to come within the federal bankruptcy act generally fall into the equity receivership category. See 11 U. S. C. A. § 22 (1927). Railroad receiverships comprise a large part of the decisional law on receiverships.

corollary, the proper administration of the business of a corporation that has been entrusted to a receiver often, of necessity, requires continued operation. Such proceeding may be doubly warranted: it is an effective and adequate means of preserving assets and realizing the maximum for the interested parties; it is essential for the sake of public welfare when a public utility goes into receivership.

View of English Courts

Unlike the American courts, the courts of England have not been over-anxious to concede to a receiver the management of a business. Accordingly, they have based the determination of the liability of a receiver upon an analogy between a managing receiver and any other individual who, in a fiduciary capacity, carries on a business. In the latter situation, the rule has always been that the executor or trustee who, by the terms of the instrument appointing him, is directed to supervise an enterprise for the benefit of others, is *prima facie* personally liable on his contracts.²

When a receiver undertakes to manage a business, it cannot be said that he is an agent of the company, since the usual incidents of the relationship are strikingly absent. The company, on the one hand, did not appoint the receiver to whom control of the assets has been given and he, on the other hand, is not subject to its command; so, if the receiver were even to purport to contract on the company's behalf, he might be liable for breach of warranty of authority.³ Manifestly, only the court can dismiss the receiver or guide him as to the mode of conducting the business, or interfere with him in the event that he fails to discharge his role properly. The incidents of this relationship to the court are such as would, if they existed between a receiver and an ordinary person, create the status of agent and principal; yet to hold that the receiver is the agent of the court would be to render the court liable for the agent's authorized contracts—an impossible conclusion.

Consequently, the English courts draw the analogy between the executor or trustee on the one hand and the receiver on the other. In so doing, they express the desire that the receiver shall, in pursuance of his appointment, act on his own responsibility, appear to the world as to the person carrying on the business in the usual way, and look for indemnity to the assets or the persons for whose benefit ultimately the business is being conducted.⁴ However, where the receiver is bankrupt and the liability has been incurred in the proper management of the estate, the court is reluctant to place the loss on the creditor, and will therefore pay him directly out of the funds in its

² See Rigby L. J., in *Burt v. Bell* [1895] 1 Q. B. 276 at 284.

³ *DeGrelle, Houdret & Co. v. Bull, 1 Manson 118 (1894)*. See on appeal, *Gaskell v. Gosling* [1897] A. C. 575.

⁴ Lord Esher, M. R., and Rigby, L. J. in *Burt v. Bell*, *supra* note 2; GOODRICH, *CONFLICT OF LAWS* (1927) § 183.

hands.⁵ And, as in the case of the executor, when the transaction gives rise to the inference that the receiver did not pledge his personal credit, the personal liability rule will not be applied.⁶

The English rules as to the liability of a receiver in contract appear to apply also to the situation in which a tort is committed, either by the receiver or by one of his servants. There is, however, a dearth of cases on this point.⁷

The personal liability rule makes a suit against the receiver a relatively simple matter. If the receiver is as liable on contracts he makes for the receivership as he would be on any contract he makes for himself, then the *sequiturs* are obvious. In the first place, the question as to whether one would have to secure the consent of a court of appointment before a suit could be instituted would not arise, and in the second, the judgment so entered would clearly be valid in any other jurisdiction.

As a practical matter, the result of the English rule has been conservatism on the part of receivers, and "we do not find in the English reports accounts of losses by receivers and depletion of assets under receivers' operations, as is frequently found in the American reports".⁸

View of American Courts

The American courts have almost uniformly opposed the personal liability theory. They have reasoned deductively that, if receivers could be exposed to individual responsibility, no prudent man would accept the trust, especially in cases in which a vast number of subordinates would have to be employed. No cautious person would expose himself to the hazard of the liabilities that might result. So runs the logic. In this respect, receivers are likened to public officers, who are not individually responsible for their official contracts nor for torts committed by their subordinates, but only for torts committed by themselves or for contracts in which they assume to bind themselves personally. In brief, the theory contemplates that the proceedings by which a claimant asserts his right against a receiver is analogous to an action *in rem*.⁹

The American rule regarding the liability of receivers in contract has been rationalized in numerous ways by courts and textwriters. Thus it has been said that persons dealing with a receiver intend that the receiver shall act in an official capacity because, had the intent been otherwise, a clause would have been inserted to that effect in the contract.¹⁰ For example, in a

⁵ *Batten v. Wedgewood Coal & Iron Co.*, 28 Ch. D. 317 (1885); *London United Breweries Ltd. v. Smith* [1907] 2 Ch. 511.

⁶ *In re Glasdir Copper Mines* [1906] 1 Ch. 365.

⁷ Clark, *English and American Theories of Receivers' Liabilities* (1927) 27 COL. L. REV. 679.

⁸ Clark, *supra* note 7, at 681.

⁹ *Farmers Loan & Trust Co. v. Central R. R. of Iowa*, 7 Fed. 537 (D. Iowa, 1880).

¹⁰ *Livingston v. Pettigrew*, 7 Lansing 405 (N. Y. 1872) (an assignment running in the name of "J. P. receiver" and signed "J. P. receiver", containing a covenant that the assigned claims were due and unpaid).

New York case in which a draft was drawn "To Receiver, Worcester Cycle Mfg. Co.," and was accepted "Frank Sullivan Smith, Receiver", it was held that the receiver was not liable on the draft, because all parties must have intended to give credit to the receivership alone and no personal liability could result so long as the receiver disclosed the capacity in which he assumed to act.¹¹ Frequently recourse is had to the agency principle in order to explain why a receiver, acting within the scope of his authority, as defined by the court, incurs no personal liability.¹²

Both methods of approach are subject to attack. On the one hand, whatever regard is paid to the intention of the parties is misconceived. For example, official liability results, although nothing appears as to the intention of the parties. One is impelled to the conclusion, therefore, that as a matter of law, the receiver is to be only officially liable, unless a very clear intention to be personally liable is evidenced. On the other hand, the agency theory is misleading because it presupposes a responsible principal, whereas no court has gone to the extent of holding answerable another court for the acts of a receiver. The furthest anyone has dared to go in this direction is to suggest¹³ that a practical plan for controlling a situation in which assets have been "milked" would be to surcharge both the receiver and the judge who appointed him.

The cases in which the action against the receiver is predicated upon a tort are numerous. The instances in which it is sought to charge the receiver for the negligence of an employee are particularly prevalent in railroad receiverships. There is merit in the practical consideration which takes cognizance of the fact that the receiver's relationship to the property and its operation is entirely official. He has no interest in or control over the earnings; he himself is removable at the pleasure of the court. In law and in fact the property is the court's for management and administration; the receiver is the court's officer, executing its orders and obeying its directions. It is apparent that, in the operation of a large size public utility; it would be a hardship to impose upon a receiver the hazards and responsibility which are attached to individuals acting by agents for their own convenience and profit. To these practical considerations the American courts have given ear. If the defendant receiver seeks to do by others that which he was expected and was able to do in person, it is proper that he shall be held accountable, but if the employment of agents was necessary and if, in the

¹¹ *Olpherts v. Smith*, 54 App. Div. 514, 66 N. Y. Supp. 573 (1900).

¹² *McGowan v. Ingalls*, 60 Fla. 116, 53 So. 932 (1910); *Willets v. Janecke*, 85 Wash. 654, 149 Pac. 17 (1915); *BEACH, RECEIVERS* (2d ed. 1897) § 305; and see *Vanderbilt v. Central R. R. N. J.*, 43 N. J. Eq. 669, 12 Atl. 188 (1887), *Brunner v. Central Glass Co.*, 18 Ind. App. 174, 47 N. E. 686 (1897). For a few cases apparently to the contrary, see *COOK, CORPORATIONS* (8th ed. 1923) § 878; cf. *Blumenthal v. Brainerd*, 38 Vt. 402 (1866); *Paige v. Smith*, 99 Mass. 395 (1868).

¹³ *Nelles, Examination of Receivership Precedent for Labor Injunction* (1931) 40 YALE L. J. 507, 550.

performance of his duty, the receiver acted prudently and selected only competent agents, he has discharged his full duty and will not be held responsible for the acts of agents employed.¹⁴

Logically, there is no escape from the conclusion that the liability of a receiver ought to be personal, reserving to the receiver the right of indemnity out of the funds in his hands according to the general principle applied to trustees, executors and the like. Justice Holmes, in *Archambeau v. Platt*,¹⁵ accurately analyzes the situation: "The universal practice of the American courts, bold as it may seem in origin, appears to be too well established to be departed therefrom."

The official liability theory so firmly established by decision has not only been applied by the courts of the state of appointment, but also by foreign courts. In *Sager Mfg. Co. v. Smith*¹⁶ an effort was made to place personal responsibility upon a receiver appointed by the federal court of Massachusetts who contracted for goods in the state of New York, but the court saw no distinction in the cases and no reason for departing from the usual rule.

Several corollaries may be stated to the propositions already considered. The corporation itself, having no control over the receiver or his servants, is not, in the absence of an absolute liability imposed by statute, responsible for the negligence or torts of the employees of the receiver and no suit against it for damages occasioned thereby can be maintained.¹⁷ Similarly, the party at whose instance the receiver was appointed is not ordinarily chargeable with the obligations of the receiver.¹⁸

Maladministration and Duty to Account

Whatever justification there may be for the doctrine that has grown up in this country as to official liability, it has no place in a discussion of mal-

¹⁴ *Cardot v. Barney*, 63 N. Y. 28 (1875). An analogy has been drawn between the receiver's status and that of a class of quasi corporations which are authorized to conduct legal proceedings in the name of their officers. *Murphy v. Holbrook*, 20 Ohio St. 137, 148 (1870). "For torts committed by his [the receiver's] servants while operating the railroad under his management he is responsible upon the principle of respondeat superior. The liability, however, is not a personal liability, but a liability in his official capacity only . . . These rules of law are well settled and have been held in many adjudicated cases and are laid down in the text-books", *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, *aff'd* 141 U. S. 327, 12 Sup. Ct. 11 (1891). Concerning the liability of receivers as common carriers when operating railroads, see Note (1900) 63 L. R. A. 231. As to costs of receivership see *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406 (1907).

¹⁵ 173 Mass. 249 at 250, 53 N. E. 816 at 817 (1899). The increase in recent years of the use of insurance as a means of "spreading risk" in the conduct of business enterprises raises the question whether the practical considerations on which the American courts have based their view of non-liability of receivers is sound today. Thus the question arises whether the receiver would not be adequately protected by carrying a sufficient amount of insurance, the cost of which could be defrayed as a receivership expense.

¹⁶ 45 App. Div. 358, 60 N. Y. Supp. 849 (1899).

¹⁷ *McNulta v. Lockridge*, *supra* note 14; *Hicks v. International*, 62 Tex. 381 (1884); *Ohio v. Davis*, 23 Ind. 553 (1864); *Bell v. Indianapolis*, 53 Ind. 57 (1876); *Metz v. Buffalo*, 58 N. Y. 61 (1874). A distinction is made if the receiver and the corporation run the road jointly. *Railroad Co. v. Brown*, 17 Wall. 445 (U. S. 1873).

¹⁸ *Cf. Atlantic Trust Co. v. Chapman*, *supra* note 14; *Boehm v. Goodall* [1911] 1 Ch. 155.

administration by the receiver. The safety of those whose property is necessarily placed in the hands of receivers makes it the imperative duty of the court to restrain and discourage such breaches of trust. This can best be accomplished by holding a receiver personally liable for the improvident investment of receivership funds,¹⁹ or the wrongful commingling of such money,²⁰ or gross neglect in giving no attention to the duties of the office.²¹ Once such argument is accepted, we are then met by the problem: To which court may such receiver be called to account? In the case of executors and administrators it has been said that a "logical application of the principle that the administration of the estate in each State is an independent matter",²² compels the result that the responsibility for an accounting shall be to the court of appointment. While complete independence is ordinarily not an end sought after in the administration of receivership assets, it would appear inadvisable to call the receiver away from the court which appointed him, which exacted his official bond, and to which by the terms of that bond he must account.²³ To allow him to be called to account in another court for his wrongful conduct in the administration of the assets or for his failure to make a final accounting would be to lose an effective concentration of the control over the receiver by the court best informed for this purpose.

Personal Torts

There are a number of cases and much *dicta* to the general effect that for his own tortious acts, as distinguished from those committed by his agents, the receiver is personally liable.²⁴ As in the maladministration cases, there is no reason for an official liability rule. Thus, where there has been failure to file a claim against the estate,²⁵ or a conversion of non-receivership property,²⁶ the plaintiff may hold the receiver personally answerable. It does not follow, however, that the plaintiff may not, in some situations, find it extremely advantageous to be allowed to charge the receivership funds where the personal estate of the receiver is insolvent. On the other hand, at least

¹⁹ *Collins v. Gooch*, 97 N. C. 186, 1 S. E. 653 (1887) (the duty was of a positive obligation imposed by statute which in turn was merely a recognition of a safe rule for the preservation of the property).

²⁰ *United Ins. Co. v. Lynch*, 11 Paige 520 (N. Y. 1845).

²¹ *Commonwealth v. Eagle Fire Ins. Co.*, 96 Mass. 344 (1867) (where one of two receivers misappropriated the fund).

²² *Goodrich*, *op. cit. supra* note 4, § 187.

²³ *Conkling v. Butler*, 4 Biss. 22 (C. C. Ind. 1865) ("the mere statement of the case thus made by the bill is enough to show the impossibility of sustaining it"). Cf. *Hinckley v. Railroad Co.*, 100 U. S. 153 (1879).

²⁴ *Farmers Loan & Trust Co. v. Central R. R. of Iowa*, *supra* note 9; *Cardot v. Ashbel*, 63 N. Y. 281, 287 (1875); *Archambeau v. Platt*, *supra* note 15, at 250, 53 N. E. at 817 (1899).

²⁵ *Keene v. Gackle*, 56 Md. 343 (1881).

²⁶ *Kirk v. Kane*, 87 Mo. App. 274 (1900) (comparison made to a sheriff who takes property of one not a defendant).

one court has accepted the doctrine that the receiver may have recourse to his fund when he has been required to pay a judgment against himself.²⁷

The criterion in the personal tort cases is this: If the tort is such as cannot, in fairness, be considered one arising out of the business, the court will not only hold that the liability of the receiver is personal but it will not even allow the claimant to resort to the receivership assets if the receiver is execution-proof. On the other hand, if the wrong is reasonably connected with the operation of the business, the mere fact that the receiver is personally liable does not compel the conclusion that the claimant must look solely to him for payment. Thus, when a receiver has caused injury by wrongfully securing an injunction, the court might very well allow the receivership property to be used to meet the claim.²⁸ The rule is definitely established that where the negligence is an act of a servant, the assets are to be charged. It would appear, therefore, that where, for example, the receiver is execution-proof, the mere fact that it may no longer be improper to render a personal judgment ought not, of itself, to place the claimant in a worse position, even though the receiver himself and not his agent has committed the wrong.

Acts in Excess of Authority or Pursuant to Void Orders

Many instances arise in which a receiver either assumes to contract without authority to do so, or in which the particular tort committed by the receiver's servants occurred during the performance of an operation in excess of the receiver's authority. Such want of authority often arises merely because of the omission from the order or decree of the court of language suitable to confer the power.

In *Ryan v. Rand*,²⁹ the plaintiff, who was a stenographer, had been employed by the attorney for the receiver. She was permitted to bring suit against the receiver personally to recover for services rendered, because the court was of the opinion that the defendant had possessed no authority to make the demand a charge upon the estate. The court intimated, however, that after the receiver had paid the judgment, he might charge it in his accounts and have it sanctioned in this fashion. To similar effect is the case of *Sayles v. Jordan*,³⁰ wherein a personal action against the receiver of a railroad was held to lie for merchandise furnished to a hotel which he had assumed to run in connection with the railroad. In like manner a receiver who executed a note signed "Hickey, Receiver", and who had no authority to bind the assets by such a note, was personally liable, even though the

²⁷ *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303 (1888) (this is a matter to be settled by the court that appointed him).

²⁸ *Cox v. Stone*, 146 La. 81, 83 So. 385 (1919). Cf. 1 CLARK, RECEIVERS (2d ed., 1929) § 392 b. To the argument that shareholders and creditors will suffer it has been said that if the act is *ultra vires* they could have resort to the surety's bond).

²⁹ 20 Abb. N. C. 313 (N. Y. 1887).

³⁰ 2 N. Y. Supp. 827 (1888); *aff'd* 121 N. Y. 685, 24 N. E. 1008 (1890) ("there is no evidence that the defendant was running this hotel as receiver by direction of the court").

payee took the note knowing it to have been executed in the receiver's representative capacity, and mistakenly believing that the receiver had authority to execute the note in such capacity.³¹ It seems proper that where the receiver has acted in excess of his authority, the liability should be personal. This has been held true, even though the expenses incurred were necessary for the preservation of the property. A receiver may not, of his own motion, contract debts chargeable upon the fund. And while a court may allow expenses incurred by a receiver for the preservation of the property, it is nevertheless the order of the court and not the act of the receiver which creates the charge and determines its validity.³²

The act of the receiver, as has been indicated, may be in excess of his authority, such want of authority existing because of an omission in the appointing order. A more complicated problem is presented when the want of authority is predicated not upon the omission in the order, but upon the lack of jurisdiction in the court to confer the authority.

Several cases within this class are deserving of some study. In *Kain v. Smith*³³ the defendant had been appointed receiver of the Vermont Central Railroad by the court of chancery of the state of Vermont. By the decree of such court he was authorized to lease and operate the Ogdensburg and Lake Champlain Railroad which was wholly within the state of New York. The defendant made the lease and assumed to operate such railroad as receiver. An accident occurred in which an employee upon the leased line was injured, and an action was brought against the defendant receiver personally to recover damages for the injury. The defendant was held personally liable.

The theory underlying the decision was that the Vermont court had no jurisdiction over the Ogdensburg and Lake Champlain Railroad, or over its property rights or franchises. It had no power to clothe its agent with such authority. It could not invest him with any official status in the operation of the leased railroad in a foreign state cognizable by the courts of that state. The power of the Vermont court was, therefore, exhausted when it granted to its receiver the permission to lease the railroad, and such permission could only become useful upon the accounting of the receiver in the court which appointed him. Any other rule, the court thought, would unwisely allow the

³¹ *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276, 81 N. W. 473 (1900) ("defendant may charge the funds for the amount recovered against him if the contracts were of benefit to the estate or funds in his hands . . . as he had no authority to bind any person but himself, the notes are his, and he cannot have them reformed"). Cf. § 20 of the NEGOTIABLE INSTRUMENTS LAW. Consider *Livingston v. Pettigrew*, *supra* note 10, wherein it is said that even considering a covenant that the assigned claim would be paid as void because the receiver exceeded his powers and that it did not bind the estate, he was not personally liable, for under the circumstances it would not be construed as a personal covenant. Notice how the court fails to realize that the logic of the situation would always require us to find personal liability.

³² *Rogers v. Wendell*, 61 N. Y. 540 (1889). See BEACH, RECEIVERS § 305. Cf. *Stanton v. Alabama*, 2 Woods 506 (U. S. 1875) (the case involved exceptions to a report of a master as to settling accounts).

³³ 80 N. Y. 458 (1880).

receiver to operate, control and manage an entire railroad and its property outside the state of his appointment with no liability except such as the appointing state approved.

*Lyman v. Central Vermont Railway*³⁴ involved facts similar to those of the preceding case, except that in the latter case the property was entirely within the territorial jurisdiction of the court appointing the receiver. Justice Powers remarked that the order of the court sanctioning the receiver's engagement in outside business entirely foreign to the administration of the property in the hands of the court was available to him in the settlement of his accounts, but not in the determination of his responsibility to third persons. These decisions are consistent with the proposition that, if the acts of the receiver are pursuant to an order of the court which is void because beyond the power of the court, such *ultra vires* acts may subject him to personal liability which may extend to cover liability arising from the negligence of his employees over whom he exercises control and supervision.

The query, of course, must be answered: Were these acts in fact void and beyond the jurisdiction of the courts to authorize? What shall be the test? An order of a court obviously ought not to be considered void merely because it contemplates the doing of an act outside the state. Thus, in *Guarantee Trust & Safe Deposit Co. v. Phila. R. & N. E. R. Co.*,³⁵ the court said:

"If the receiver in operating the road finds it necessary to send his employees into another State he may do so; and the fact that he does so does not affect the jurisdiction of the court to direct him as to their wages. . . . It is true that no court can enforce its decree beyond the territorial limits of its jurisdiction; but it is also true that by a rule of comity³⁶ based in part on paramount necessity, the authority of receivers appointed in one State will be recognized in many ways by the courts of another State within whose jurisdiction it may be exercised."³⁷

Such an attitude is fundamentally sound, founded as it is upon a recognition that state lines cannot delimit fields of commercial activity. For exam-

³⁴ 89 Vt. 167, 10 Atl. 346 (1887).

³⁵ 69 Conn. 709 at 717, 38 Atl. 792 at 794 (1897).

³⁶ While the courts speak of comity the proper viewpoint is that "conflict of laws is based upon prevalent notions of convenience, like all other law; and not on 'comity' as is generally stated." Francis, *Domicile of a Corporation* (1929) 38 YALE L. J. 335, 339; YOUNG, FOREIGN CORPORATIONS AND OTHER CORPORATIONS (1912) 15, 19, and works there cited; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1926) § 6. Cf. STORY, CONFLICT OF LAWS (8th ed. 1883) §§ 3-7; WHARTON, CONFLICT OF LAWS (3d ed. 1922) 10; Note (1927) 36 YALE L. J. 694.

³⁷ Compare suits by a foreign receiver. The state courts have from the outset usually refused to recognize suits by a foreign receiver as a matter of right, but have generally permitted such suits as a matter of privilege when local creditors were not involved. The early English cases recognized the title of a foreign assignee vested with title pursuant to involuntary proceedings and as a corollary, allowed a suit by such receiver as a matter of right. See 3 PIGGOTT, FOREIGN JUDGMENTS AND JURISDICTION (1910) 98; *Ex parte Blake*, 1 Cox Eq. 398 (Eng. 1787); *Selkrig v. Davies*, L. R. 15 Eq. 383 (1873); *Grimshaw v. Galbraith* [1910] 1 K. B. 339; *In re MacFadyen* [1908] 1 K. B. 675.

ple, it is not at all unusual for the receiver to purchase supplies outside of the state of appointment. This specific situation arose in a New York case.³⁸ The problem was whether in making purchases for a bicycle manufacturing concern the receiver appointed by the United States Circuit Court for the district of Massachusetts was confined to the State of Massachusetts, or whether, if he purchased from dealers in New York, it was at the risk or certainty of being personally liable. The court, in refusing to find personal liability, distinguished *Kain v. Smith* on its facts in this fashion:

"If the defendant had assumed as receiver to lease and operate a factory of the plaintiff and had purchased supplies for its operation from other parties for which recovery was sought, the case would be analogous to *Kain v. Smith*, . . ." ³⁹

The fact that territorial limitations *per se* cannot be considered as furnishing a criterion for the voidness of the court order is well illustrated by *Rosso v. Freeman*.⁴⁰ In that case a Connecticut receiver of a Connecticut corporation operated a bus line between Hartford in the state of Connecticut, and Springfield, in the commonwealth of Massachusetts. The court felt unprepared to say that if the receiver's employee subjected the defendant to liability by acts of negligence, the liability would be personal if committed in Massachusetts and official if committed in Connecticut. "I see no rational ground," said the court, "for thinking that the defendant thus stepped out of his official character at the state line."

The cases seem to indicate that if a court orders the receiver to do acts outside of the state,⁴¹ such order may give rise to official liability if the act for which recovery is sought relates to property within the jurisdiction of the court under the receivership decree. It would appear also that the order should be considered of effect in determining liability if the act has to do with property of the defendant corporation in another state, so long as no ancillary receiver has been appointed. But if, in pursuance of the order, the receiver carries on a business too far removed from the primary one, or enters into transactions not reasonably related to the business of the defendant corporation, the court will be regarded as having exceeded its authority, at least to the extent that its receiver, not having the protection of a valid official status, may be held personally liable in a foreign state.

³⁸ *Sager Mfg. Co. v. Smith*, *supra* note 16. The court stated its conclusion thus—"Where a receiver of a corporation is duly appointed by a court of a sister state and given authority to continue the business of such corporation and to make purchases for that purpose, such receiver may make such purchases in the state in which he was appointed, or any other state, provided only that he discloses the character in which he assumes to act and the source of such authority." At 368, 60 N. Y. Supp. at 856.

³⁹ *Ibid.* at 367, 60 N. Y. Supp. at 855.

⁴⁰ 30 F. (2d) 826 (D. Mass. 1929).

⁴¹ In *Sager Mfg. Co. v. Smith*, *supra* note 16, the receiver was a federal receiver who ordinarily is strictly limited to his territorial limits—but the question was not raised.

Underlying the doctrine of the cases in this section is the recognition that as a matter of logic a receiver's liability should be personal, but that as a matter of business convenience a contrary result should obtain. Therefore, when business convenience no longer necessitates freedom from personal liability, a receiver is to be treated no differently from any other individual. This is also the case in criminal prosecutions against a receiver. Thus no difficulty is found in holding a receiver for embezzlement⁴² or for committing a nuisance,⁴³ although in accordance with criminal law a strict interpretation of penal statutes sometimes necessitates the conclusion that a receiver was not within the purview of the particular statute.⁴⁴

Leave of Court to Sue

There has been a marked difference of opinion as to whether leave of the court appointing the receiver is necessary before suit may be brought against the receiver and as to whether a failure to allege the granting of such leave affects the jurisdiction of the court entertaining the suit. Not a little of the confusion has been occasioned by failing to inquire whether a different rule might not be applicable to pre-receivership claims as distinguished from claims arising out of transactions within the scope of this article.⁴⁵ Also it is not uncommon to find that jurisdiction, in the sense of power over the person and subject matter has been confused with jurisdiction in the sense of advisability of exercising such power.

Most of the cases descend from either one or the other of the opinions in the case of *Barton v. Barbour*,⁴⁶ which has been assumed to lay down a general rule on the subject. The majority opinion by Justice Woods proceeded upon the basis⁴⁷ that if the plaintiff had the right to prosecute his case to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment he could, unless restrained by injunction, seize upon the receivership property or attach its credits. Thus, if the judgment were recovered outside the ter-

⁴² *Fields v. United States*, 27 App. D. C. 433 (1906).

⁴³ *State v. Railroad*, 152 N. C. 785, 67 S. E. 42 (1910)—the case directly involved the liability of the corporation itself and on this the ruling was that the railway company could not be indicted, for no man nor corporation should be made criminally responsible for acts which he had no power to prevent. BISHOP, CRIMINAL LAW §§ 421, 422.

⁴⁴ *People v. Blair*, 183 Mich. 130, 149 N. W. 1039 (1914); *United States v. Harris*, 177 U. S. 305, 20 Sup. Ct. 609 (1900); cf. *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 34 Sup. Ct. 829 (1913).

⁴⁵ See Nelles, *Legal Consequences of a Strike* (1931) 40 YALE L. J. 547, 551.

⁴⁶ 104 U. S. 126 (1881).

⁴⁷ The reason for the rule has been said to be found in the necessity of protecting receivers against unnecessary and oppressive litigation, as well as in the desirability of compelling all claimants against the fund or property in the receiver's hand to assert their demand by motion, or otherwise, in the proceeding in which he was appointed, thus administering complete justice to all claimants in one and the same proceeding. See the observation of the court in *DeGroot v. Jay*, 30 Barb. 483 (N. Y. 1859). The rule is attacked as illogical and unsupported by legal reasoning by Hugh, *Right of Action against Receiver of Other Courts* (1876) 2 So. L. Q. (N. S.) 576.

ritorial jurisdiction of the court which appointed the receiver, the plaintiff could seize the property outside such state, while the court which appointed the receiver and was administering the assets was impotent to restrain him. The effect of any attempt to enforce satisfaction of the judgment would be precisely the same as if suit had been brought for the purpose of taking property from the possession of the receiver.⁴⁸

The objection to a procedure which contemplates and accepts such absolute control in the court of appointment may not be so serious when the purposes of the receivership are to wind up the affairs of the corporation, to discharge its debts, and to distribute the remaining assets, if any, among the shareholders. But where the receiver is to continue the business it seems unreasonable to say that all parties deal with him on the implied understanding that they must resort to the court of appointment for relief. This is the tenor of the argument of Justice Miller in the dissenting opinion in *Barton v. Barbour*, where it was pointed out that the majority opinion was not in accord with the practice of the court of chancery in England, in which, if it was thought that the plaintiff in any action was interfering with the functions of a receiver, the court could punish him for contempt.

The weight of authority⁴⁹ to the effect that failure to obtain permission to sue a receiver does not affect the jurisdiction of the court in which suit is brought descends from this dissent by Justice Miller. He saw the problem⁵⁰ as one of whether equity would here exercise its own acknowledged jurisdiction of restraining suits at law and itself dispose of the matter involved. A plaintiff in such case desiring to prosecute a legal claim for damages against a receiver might very properly obtain leave to prosecute⁵¹ in order to relieve himself from the possibility of having his proceedings arrested by an equity court (assuming the law court could secure personal jurisdiction).

The federal courts⁵² by the practice of embodying in the decree a general leave to sue reached the result desired by Justice Miller. Still later, the *Judicial Code*⁵³ specifically provided that "Every receiver or manager of any court of the United States may be sued in respect of any *act or transaction*

⁴⁸ To the same effect—Black, *Actions by and against Receivers* (1886) 34 AM. L. REG. 289, 299. Many cases allow waiver by receiver: *Hubbel v. Dana*, 9 How. Pr. 424 (N. Y. 1854); Black doubts that the privilege is personal. The result foreseen in *Barton v. Barbour* is not a complete *sequitur* as the cases under "Effect of Judgment" *infra* indicate. See also *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 1010 (1893).

⁴⁹ *Rosso v. Freeman*, *supra* note 40, disagrees as to the weight of authority.

⁵⁰ Justice Miller recognized that *Kinney v. Crocker*, 18 Wis. 74 (1864), so saw the problem.

⁵¹ If the suit is brought outside the state and the plaintiff was not in the state at the time of the decree appointing the receiver, no equitable interference would be possible, it would seem. No contempt would appear to be involved since the possession of the receiver is not interfered with. See on the contempt question *Nelles*, *Legal Consequences of a Strike*, *supra* note 45, at 542, 547.

⁵² The practice was started by Judge Caldwell. Caldwell, *Receiverships in Federal Courts* (1896) 30 AM. L. REV. 161.

⁵³ § 66, 28 U. S. C. A. 125 (1928).

of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed."⁵⁴

Where the liability of the receiver with respect to management of the business is personal, there is substantial agreement that no permission to sue the receiver need be sought.⁵⁵ No court feels that the receiver must be protected when he is traveling beyond the line marked out for him by the court.⁵⁶

As a conclusion, it might be stated that "while the better considered authorities formerly supported the proposition that leave to sue the receiver was jurisdictional in its nature, the great weight of authority as the result of the later decisions sustains the opposite view and it is accordingly held that the failure to obtain leave is not jurisdictional and that its omission is not fatal to the action."⁵⁷

Effect of Judgment Against Receiver Officially

The reasoning in *Barton v. Barbour* is much influenced by what the court thought would be the result of a judgment rendered against a receiver officially. When a plaintiff sues a receiver in a foreign court for breach of a contract made by the latter in his representative capacity, is the plaintiff attempting to control the official acts of the defendant receiver? Can it be said that he is seeking to reach property in the receiver's hands which, if it is in another state, is subject to control and disposition by that state? Or is the plaintiff simply endeavoring to have his claim against the defendant adjudicated and established in a foreign state?

The cases⁵⁸ clearly indicate that the judgment in substance and fact is not against the receiver, but is against the funds and property in his hands

⁵⁴ The interpretation of "subject to general equity jurisdiction" is given *infra* under "Effect of Judgment."

⁵⁵ *Kirk v. Kane*, *supra* note 26, BEACH, RECEIVERS (Alderson's ed. 1899) 663; SMITH, RECEIVERS (2d ed. 1900) 189; HIGH, RECEIVERS (4th ed.) 257; *cf.* 1 CLARK, RECEIVERS (2d ed. 1929) 549, also see 549 (c).

⁵⁶ Accordingly it is held that if the receiver takes possession of property not embraced in the receivership, the protection of the court will not be accorded to him. As to such he may be sued without leave. *Brooke v. Kettler*, 166 Ala. 76, 51 So. 940 (1910); *Hills v. Parker*, 111 Mass. 508 (1873) (replevin for locomotive used on railroad but not property of defendant corporation); *Gutsch v. McIlhargey*, *supra* note 27; *Kenney v. Ranney*, 96 Mich. 617, 55 N. W. 982 (1893).

⁵⁷ HIGH, RECEIVERS § 254 (a). BEACH, *op. cit.* *supra* note 12, 724. *Baker v. Denver Tramway Co.*, [and cases cited] 72 Colo. 233, 210 Pac. 845 (1922). A writer in (1876) 3 CENT. L. J. 427 argues that unless consent is secured the court appointing the receiver would have the right, and might in many cases deem it proper to require a reexamination, on its merits, of the controversy, before permitting satisfaction of the execution.

⁵⁸ See *Murphy v. Holbrook*, 20 Ohio St. 137, 148 (1870); *Davis v. Duncan*, 19 Fed. 477 (C. C. S. D. Miss. 1884); *Farmers Loan & Trust Co. v. Central R. R. of Iowa*, *supra* note 15; *McNulta v. Lockridge*, *supra* note 14. "Actions against the receivers are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." *Cf.* *Morris v. Hiler*, 57 How. Pr. 322 (N. Y. 1879) wherein a fund in the hands of the receiver could not be distributed, for provision had not been made for payment of a judgment of plaintiff recovered in an action of false imprisonment for certain proceedings of the receiver's attorney.

qua receiver, "in other words, against the matter of the receivership, which a court of chancery authoritatively organized in a certain cause of equity pending therein . . . The judgment is, as it were in the nature of a judgment in *rem* and the *res* is the matter of the receivership, . . . the administration in the chancery court of the trust, and the fund and property which are the subjects of the trust."⁵⁹

Under the official liability theory the receiver is sued as such and merely because he is, for the time being, the tangible representative of the property of the receivership. The plaintiff in the event of his success in establishing his claim must necessarily enforce any judgment which he may recover in accordance with the laws of the state of administration.⁶⁰ If there are assets of the defendant corporation under control of the defendant receiver within the jurisdiction rendering the judgment, there is no legal objection to requiring satisfaction out of such fund in the course of local administration, but in the absence of such administration the judgment serves as proof of the claim wherever the assets are to be distributed.

When the liability of the receiver is official, therefore, it would be legal error to award a judgment against the receiver personally and to issue execution therefor.⁶¹ The judgment would have to be entered against him as receiver and specifically or by reasonable inference made payable out of funds held by him in that capacity in the due course of administration.⁶² But manifestly after the court that appointed the receiver has discharged him and withdrawn him from all control or right to control the property, it cannot be said that the representative character continues. A judgment against the

⁵⁹ *McNulta v. Lockridge*, *supra* note 14, at 280, 27 N. E. at 453.

⁶⁰ *LeFevre v. Mathews*, 39 App. Div. 232, 57 N. Y. Supp. 128 (1887).

⁶¹ The problem as to whether execution may be issued against property in hands of receiver for judgments secured against the defendant corporation will be dealt with in a later article. See *Noe v. Gibson*, 7 Paige 513 (N. Y. 1839); *Robinson v. Atlantic & Great West. Ry.*, 66 Pa. 166 (1870); *Wiswall v. Simpson*, 14 How. 52 (U. S. 1852) (method to be followed by persons claiming prior legal or equitable rights); *Attorney General v. Supreme Council*, 196 Mass. 151, 81 N. E. 966 (1907) (effect of judgment secured against defendant corporation after appointment of receiver). See also *Riehl v. Margolies*, 279 U. S. 218, 226 n. 1, 49 Sup. Ct. 310, 313 n. 1 (1929). An able article by Beach, *Effect of Judgment Claims in Receivership Proceedings* (1920) 30 YALE L. J. 674, considers judgments against defendant corporations secured (a) before receivership (b) after receivership in actions in which the receiver has intervened (c) those rendered after receivership in which receiver took no part.

⁶² *Camp v. Barney*, 11 N. Y. 373 (1875) (receiver appointed by District Court of United States for Northern District of New York); *Commonwealth v. Runk*, 26 Pa. 235 (1856) (suit against receivers for taxes, including those that became due after they assumed office); *Sloan v. Central Iowa Ry.*, 62 Iowa 728 (1883); *Schmidt v. Garyner*, 59 Minn. 303, 62 N. W. 265 (1894); *Pfeffer v. Kling*, 58 App. Div. 179, 68 N. Y. Supp. 641 (1900); *Vasela v. Grant Street Elec. Ry.*, 16 Wash. 602, 48 Pac. 249 (1897); also to effect that it must be made clear that the receiver is sued *qua* receiver, *Smith v. Jones Lumber & Mercantile Co.*, 200 Fed. 647 (W. D. Wis. 1912); *Lyons v. Simpsell*, 168 Ill. App. 542 (1912); *Mallott v. Mapes*, 111 Ill. App. 340 (1903) (neglect of statutory duty to keep fence repaired); *Betts v. Bisher*, 213 Fed. 581 (C. C. A. 9th, 1914) "while actions against receivers may be brought in the state courts, they may also be brought in the court in which the receiver was appointed, and that, notwithstanding that no federal question was involved, and there is no diversity of citizenship, those courts have jurisdiction upon the ground that the actions are ancillary to the original suit, and that the judgments recoverable therein are payable from the property or funds in the course of administration."

discharged receiver, who is no longer the representative of the property in any respect, would not bind the property, and one so rendered would be fruitless.⁶³ A corollary would necessarily provide that a successor may be sued officially for the prior acts of his predecessor. Although one receiver has passed out of the picture, the identity of the *res*—the property of the receivership—has still been preserved. The ground of liability of the successor grows out of the relation of the former receiver to the property which he operated, and of the continuation and identity of that relation between the property and the receiver.⁶⁴

No action can be maintained against the receiver after such officer has been discharged and the property transferred to a purchaser under an order of court. However, when the final decree reserves to the court power to enforce as liens upon the property all liabilities incurred by such receiver,⁶⁵ such purchaser takes the property subject to all claims against the receiver. So, too, if current earnings are invested in capital improvements which without sale are returned to the company with its other property at the close of the receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings.⁶⁶ When the property, however, has been sold free from all claims in tort or contract, and such claims have been made payable only out of the purchase price, it seems that a discharge of a receiver before judgment is rendered in a foreign court should abate any suit there pending, subject to revival against all persons within the jurisdiction claiming the fund.⁶⁷

The effect of a judgment against the receiver in his official capacity is further illustrated by the situation presented when a judgment is not paid by a receiver and the plaintiff seeks to hold the surety on the receiver's bond on the theory that the receiver has not properly administered the duties of his trust. Here it is held that the mere fact that the judgment is not paid is not proof of the receiver's failure to discharge "faithfully the duties of his trust". Thus he may rely on expenditures made in pursuance of the order of the court as to distribution. If the effect of the judgment is that particular money be paid over, a result is achieved similar to the situation where the

⁶³ *Brown, Receiver v. Gray*, 76 Tex. 444, 447, 13 S. W. 472 (1890); *Gray v. Grand Trunk West. Ry.*, 156 Fed. 736 (C. C. A. 7th, 1907).

⁶⁴ *McNulta v. Lockridge*, *supra* note 14.

⁶⁵ *Farmers Loan & Trust Co. v. Central R. R. of Iowa*, *supra* note 9; *Hanlon v. Smith et al.*, 175 Fed. 192 (C. C. N. D. Iowa, 1909) (purchasers may intervene in suit against receiver).

⁶⁶ *Texas Pac. Ry. v. Johnson*, 76 Tex. 421, 13 S. W. 463 (1890) *aff'd*, 151 U. S. 81, 14 Sup. Ct. 250 (1893); in this case not only was no judgment *in rem* given but the district court of Louisiana would seem to have had no jurisdiction to have given such judgment since the property at all times was in Texas. For the application of current railway income to current expenses, before the payment of mortgage indebtedness see *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415 (1905).

⁶⁷ *Cf. Smith v. Jones Lumber & Mercantile Co.*, *supra* note 62 (involving federal receiver). The decree frequently provides that litigation shall continue till its final determination against the receiver. 1 CLARK, RECEIVERS § 574.

judgment is to pay in due course of administration. A showing that such particular money has been otherwise distributed under previous order of court negatives liability on the part of the surety.⁶⁸

When a judgment is rendered against the foreign receiver personally, the problem is essentially simple. Ample authority recognizes the rule that the right and obligation created under foreign law ought to be enforced just the same as any claim based upon a foreign contract or foreign tort.⁶⁹ And it is settled law that such a judgment rendered by a sister state has behind it the "full faith and credit" clause.⁷⁰ On the other hand, when the judgment is rendered against the receiver officially, the considerations are not nearly so direct. The court had jurisdiction over the defendant receiver and the subject matter. It chose under the law of the state to render not a personal but an official liability decree. The jurisdiction was personal yet the judgment is in the nature of a judgment that might have been rendered in an *in rem* action. Yet the judgment cannot be a lien against the property in the hands of the receiver, because such property is in another state, *in custodia legis*, and subject to control of the court in possession of the property. American receivership law thus makes the personal action yield a claim on a special fund.

The problem is essentially bound up with the principles underlying the administering of the fund for the benefit of the creditors.⁷¹ The federal courts, since the act permitting suits against federal receivers in state courts for operations during the receivership,⁷² have given practical recognition to judgments secured as to the amount and validity of the claims. However, the words "subject to the general equity jurisdiction" of the appointing court have been interpreted to mean that the time when and the manner in which the judgment shall be paid, the adjustment of equities between all persons having claims against the property, and the just distribution of the fund according to the rights of the several parties interested in it must all necessarily be under the control of the court having custody of the property of the receiver.⁷³ The underlying opinion is that the general leave granted by the federal act to sue in any court would be of no effect unless such were the rule.⁷⁴

⁶⁸ *Coe v. Patterson*, 122 App. Div. 76, 106 N. Y. Supp. 659 (1907).

⁶⁹ *GOODRICH*, *op. cit. supra* note 4, at 454; *cf. Pruy v. McCreary*, 105 App. Div. 302, 93 N. Y. Supp. 995 (1905); *aff'd*, 182 N. Y. 568, 75 N. E. 1130 (1905) (action to be released from provisions of contract induced by fraud before attempt to enforce the contract).

⁷⁰ *GOODRICH*, *op. cit. supra* note 4, at 458.

⁷¹ Priorities of payment of claims will be dealt with in a later chapter on distribution. *Cf. Pruy v. McCreary*, *supra* note 69, where the decree did not involve administration of the fund.

⁷² *Supra* note 53.

⁷³ *Dillingham v. Hawk*, 60 Fed. 494 (C. C. A. 5th, 1894); *Central Trust Co. v. St. Louis Ry.*, 41 Fed. 551 (C. C. E. D. Ark. 1890); *American Brake Shoe & Foundry Co. v. Pere Marquette R. R.*, 263 Fed. 237 (E. D. Mich. 1920).

⁷⁴ *Wilcox v. Jones*, 177 Fed. 870 (C. C. A. 4th, 1910).

In the state courts a similar result could easily be made to follow. Courts holding that leave to sue does not affect jurisdiction to grant a judgment can adopt the doctrine in the federal cases. If the court is committed to the theory that such failure to receive leave to sue affects jurisdiction, it can distinguish between the problems where it is asked to give effect to a judgment rendered elsewhere and where it is asked to render the judgment in the first instance. Any disinclination to submit to the supposed dictation of another court in respect to the validity and amount of the claim on the fund is purely sentimental.⁷⁵ A judgment on the same issues and between the same parties should not be reinvestigated merely because the property cannot be reached without the approval of the appointing court.⁷⁶

⁷⁵ Beach, *Effect of Judgment Claims in Receivership Proceedings*, *supra* note 61, at 680.

⁷⁶ The writer wishes to express his appreciation of the general supervision and helpful hints given him by Dean Herbert F. Goodrich, of the University of Pennsylvania Law School.