I. GENERAL CONSIDERATIONS §

7663 Scope of chapter

Much of the law governing the receivership of a corporation applies equally to receiverships in general. This chapter is limited to addressing receivership law as it relates to corporations.

Certain aspects of corporate receivership law are discussed in other chapters of this treatise. These topics include: receiverships of foreign corporations;[1] the effect of receivership on the right to levy an attachment or execution;[2] receivership in connection with corporate dissolution proceedings;[3] corporate reorganization during or following a receivership;[4] and receivers in quo warranto and supplementary proceedings.[5]

7664 History and development of the law

The corporate receivership, like other special forms of receivership, had its origin in the inherent power of an equity court to appoint a custodial officer to receive possession of property that was the subject matter of litigation pending before that court. The purpose of the procedure was to preserve the property until the litigation was resolved and it was determined which party or parties were entitled to the property. This power to appoint a "receiver" pendente lite is one of the oldest remedies exercised and afforded by the equity courts.

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[1]Receivers for foreign corporations, see §§ 8554 et seq.

Power of a foreign corporation to act as receiver, see § 8385.

[2]Effect of appointment of receiver on right to levy process, see §§ 4786 et seq.

[3]Receivers in dissolution proceedings, see §§ 8196 et seq.

[4]Liability of new company for debts and obligations of receiver, see § 7339.

[5]Receivers in quo warranto proceedings, see § 2364.

Receivers in supplementary proceedings, see § 4843.

No particular problem was encountered in applying this remedy where the subject of the litigation was a specific asset or group of assets belonging to a corporation, as would be the case in an action to foreclose a mortgage on corporate property. In this situation, a receiver might be appointed to maintain and preserve the property and to collect the rents for the benefit of the mortgagee pending the foreclosure proceeding. In some cases, however, such as insolvency or threatened insolvency or where there were charges of mismanagement, fraud, and diversion of assets against the corporation's management, the asset in litigation requiring protection was the corporation itself, and not just some particular assets belonging to it. In a number of those cases, particularly where it was alleged that incompetent or fraudulent management had brought about the insolvency or threatened insolvency, the value of the asset in litigation, i.e., the corporation itself, could best be preserved, and sometimes could only be preserved, by continuing its operation as a going business while the issues involved were being litigated.

Some courts were initially reluctant to appoint receivers for a corporation. This reluctance was primarily the result of the misconception that appointing a receiver for the corporation itself, rather than for specific corporate assets, would be tantamount to dissolution of the corporation, an act beyond the power of the court. However, equity courts gradually extended the concept of the corporate receivership until it became a major tool to be used at the instance of creditors or shareholders. Corporate receiverships were useful as a method to (a) provide for the diligent collection of corporate assets and (b) insure the equitable distribution of those assets to the appropriate persons or, if the situation permitted, their return to the reorganized corporation and what would usually be its newly constituted management.

A very important impetus to the development of the equity receivership in this country was provided by the widespread failure of interstate railroads that occurred toward the end of the nineteenth century as a result of overexpansion, corruption, and successive economic depressions, or panics as they were then called. Not only did the rapidly spreading, interstate nature of the assets of these corporations make piecemeal dismemberment both difficult and destructive of the assets' real value, but a major stake in these corpora-

tions was held by their public customers, who were dependent on them for the bulk of the long distance movement of passengers and freight. The courts were confronted with a complex problem in the actions brought to foreclose the mortgages on these railroads because, as they soon realized, the rules governing ordinary foreclosures provided an inadequate solution. The public interest in the continued operation of railroads was commanding. Moreover, it was clear that there was scant, if any, market for a railroad system as a whole, but breaking up a system or line for purposes of a foreclosure sale would obviously render it even less valuable to the security holders.'

It was in this context that the federal courts developed what became known as the federal equity receivership, which, for some fifty years, was the principal method of handling corporations that had serious economic and management problems but for which bankruptcy and dissolution did not seem the best answer. Bankruptcy and dissolution might be discarded as solutions either because it seemed likely that the corporation could, with the court's help, recover its economic health or because it was charged with a public interest that would be adversely affected if the corporation were to cease business. Additionally, the resort to voluntary bankruptcy was often untenable because the forms and methods of bankruptcy administration were rigid and often wasteful, leaving little opportunity to rescue the business as an ongoing entity. If the corporation tried to keep the business running without filing for voluntary bankruptcy, there was also the possibility of disruptive judgments, which would give a preference to a few and likely not defer involuntary bankruptcy.'

As detailed by Justice Cardozo, the equity receivership flourished in this atmosphere.' At the suit of friendly creditors, financially distressed corporations joined in the prayer

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[1]15 Minn. L. Rev. 261; 7 Mich. L. Rev. 239.

Origin and history of the receivership institution, see 9 St. Louis L. Rev. 111 to 117.

For a discussion of receiverships in general, see 7 Yale L.J. 299 to 307.

Foreclosure of corporate mortgages, see §§ 3213 et seq.

[2]U.S.—Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 56 S. Ct. 412, 80 L. Ed. 591 (1936).

[3]U.S.—Duparquet Huot &

for the appointment of a receiver to stave off other creditors more selfish or impatient and foster whatever value was latent in the assets. There is little doubt that many of these receiverships were legitimate and helpful. Nonetheless, the practice was abused, which was reflected in the decisions of the courts. At times, the receiver was used as an instrument of fraud. At times, however fair in its beginnings, it was inordinately prolonged. At times it had a tendency to entrench delinquency in power and to stifle inquiry into acts of waste or spoliation. In light of the abuses of the federal equity receivership, there was a need for a more open, responsible, efficient and closely regulated remedy. This method was to place cases under the supervision of a court of bankruptcy.'

This development of federal equity jurisdiction was largely replaced by the enactment of the reorganization provisions of the Federal Bankruptcy Act, former section 77 in 1933 and former section 77B in 1934.[5] By the enactment of section 77 of the Bankruptcy Act, Congress made statutory provision for the reorganization of railroads engaged in interstate commerce where the railroad was insolvent or unable to meet its debts as they matured.' Section 77B extended the same relief to other types of corporations.

§ 7665 Definitions and distinctions

There is a very clear distinction between the appointment of a receiver for certain assets of a corporation and the appointment of a receiver for the corporation itself.' A receiver may still be, and often is, appointed to perform the original

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Moneuse Co. v. Evans, 297 U.S. 216, 56 S. Ct. 412, 80 L. Ed. 591 (1936).

[4]U.S.—Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 56 S. Ct. 412, 80 L. Ed. 591 (1936).

[5]11 U.S.C.A. §§ 205, 207. These sections, as revised, were incorporated in chapters X to XIV (§§ 501 to 1103) of the Bankruptcy Act dealing with corporate reorganizations and arrangements (now the Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.).

[6]See Henn, on Corporations (1961) § 389; Sutherland, Suggestions for improvement in section 77 of the Bankruptcy Act, 14 Bus. Law 487.

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la.—Wheelahan v. Ungar & Wheelahan, P.L.C., 657 So. 2d 789 (La. Ct. App. 4th Cir. 1995).

N.Y.—People v. F. H. Smith Co., 230 A.D. 268, 243 N.Y.S. 446 (4th Dep't 1930).

role of custodian of specific property to insure its preservation while litigation concerning its ownership and proper disposition is being conducted.[2] Such a receiver may be referred to as a "passive" receiver. Where, however, a receiver is sought for the corporation itself, the receiver's role is likely to be broader and more active. A receiver in such a case is more likely to be the agent through which the court provides the ultimate relief sought in the action: the collection of assets illegally diverted to officers or shareholders, the equitable distribution of the corporate assets in insolvency, the overhaul of the corporate management, and in some cases, the restoration of the corporation to economic health.'

As shown by the history of the federal railroad receiver-

N.Y.—New York Consolidated Laws, Business Corporations, authorizing the attorney general to enjoin schemes for the fraudulent sale of corporate shares and securities to the public and to have a receiver appointed for property so fraudulently obtained, does not authorize the appointment of a receiver for a defendant corporation itself. People v. F. H. Smith Co., 230 A.D. 268, 243 N.Y.S. 446 (4th Dep't 1930).

[2]Colo.—Midland Bank v. Galley Co., 971 P.2d 273 (Colo. App. 1998).

Iowa—Firstar Bank Ames v. Poston, 551 N.W.2d 340 (Iowa Ct. App. 1996).

N.J.—Kaufman v. 53 Duncan Investors, L.P., 368 N.J. Super. 501, 847 A.2d 35 (App. Div. 2004).

[3]U.S.—A "receiver" is an indifferent person between parties, appointed by the court to receive the rents, issue, or profits of land, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it. Liberte Capital Group, LLC v. Capwill, 462 F.3d 543, 2006 FED App. 0340P (6th Cir. 2006).

Mich.—In re Guaranty Indem. Co., 256 Mich. 671, 240 N.W. 78 (1932) (definitions of receiver).

N.J.—Receivership is not end in itself. Orshefsky v. Mechanics Trust Co. of New Jersey, 120 N.J. Eq. 527, 187 A. 779 (Ch. 1936).

Okla.—Operators Royalty & Producing Co. v. Tulsa Rig, Reel & Mfg. Co., 1936 OK 303, 176 Okla. 442, 56 P.2d 400 (1936).

Or.—Home Mortg. Co. v. Sitka Spruce Pulp & Paper Co., 148 Or. 502, 36 P.2d 1038 (1934) (definitions of receiver).

Pa.—The court may appoint a trustee in receivership to manage a husband's corporation in order to prevent his fraudulent misappropriation of his wife's marital property. Mayhue v. Mayhue, 336 Pa. Super. 188, 485 A.2d 494 (1984).

S.C.—In re American Slicing Mach. Co., 125 S.C. 214, 118 S.E. 303 (1923) (definitions of receiver).

Tex.—Dixie Cotton Machinery Co. v. Garber, 63 S.W.2d 895 (Tex. Civ. App. Dallas 1933); Zanes v. Mercantile Bank & Trust Co. of Texas, 49 S.W.2d 922 (Tex.

ships, there are few functions of a receiver that cannot be evolved by innovative use of the inherent powers of the equity court. In many states, however, those powers have been augmented or supplemented by statute.' Consequently, distinctions must sometimes be made between receivers who rely exclusively on a court of equity for their authority and statutory receivers who, though they may be appointed by an equity court, may have powers that the equity courts could not grant in the absence of statutory authorization.'

The appointment by a court is usually regarded as essential to the status of a "receiver," although the term may sometimes be used to describe a party who has not been appointed by a court.'

While the appointment of a receiver is sometimes compared to a writ of attachment,' the comparison has validity only in the case of a receiver appointed pendente lite to preserve certain specific corporate assets involved in the

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Civ. App. Dallas 1932). Utah—Walker Bros., Bankers, v. Intermountain Milling Co., 65 Utah 340, 237 P. 228 (1925).

Wyo.—Neiderjohn v. Thompson, 38 Wyo. 28, 264 P. 699 (1928) (definitions of receiver).

[4]Statutory receiverships, see § 7673.

U.S. —Receiverships in Louisiana are strictly statutory and equity receiverships are unknown to local law, Mayer v. Gros, 116 F.2d 733 (C.C.A. 5th Cir. 1940).

La.—There is also a vast difference between the two kinds of receiverships as respects their effect on dissolution of corporation for which appointed. Levy v. Union Indemnity Co., 146 So. 182 (La. Ct. App., Orleans 1933).

N.Y.—Prince v. Schlesinger, 116 A.D. 500, 504, 101 N.Y.S. 1031 (1st Dep't 1906) (lengthy discussion of distinctions between chancery and statutory receivers).

Utah—Riches v. Hadlock, 80 Utah 265, 15 P.2d 283, 288 (1932) (bank commissioner and chancery receiver distinguished).

Receivership as ipso facto forfeiture or dissolution, see § 8004.

[6]U.S.—Blair & Co., Inc. v. Foley, 471 F.2d 178 (2d Cir. 1972) (ruling that a liquidator, nonjudicially appointed for insolvent brokerage corporation pursuant to agreement with New York Stock Exchange, was not a "receiver" within meaning of Bankruptcy Act, 11 USCA § 21(a)(5)), judgment vacated by Foley v. Blair & Co., Inc., 94 S.Ct. 405 (U.S. 1973).

Jurisdiction and power to appoint receivers generally, see § 7668.

[7]Tex.—"The appointment of a receiver is in effect an attachment, sequestration or equitable execution, or writ." Lubbock Oil Refining Co. v. Bourn, 96 S.W.2d 569 (Tex. Civ. App. Amarillo 1936).

litigation, such as in a foreclosure action.' The circumstances created by the levy of an attachment or the service of a writ of injunction are not the same as those created by an order of court taking possession of a litigant's property by a receivership; the writs are not alike in principle.'

7666 Classes of receivers

Corporate receivers may include receivers of the following classes: (1) receivers appointed pendente lite of property that is the subject matter of litigation, such as a receiver appointed in a suit to foreclose a corporate mortgage;' (2) receivers appointed in connection with a prayer to wind up a business although no dissolution of the corporation is sought; (3) receivers appointed for the purpose of running a business temporarily; (4) receivers appointed due to insolvency of a corporation;[3] and (5) receivers appointed upon the dissolution of a corporation or in proceedings to dissolve a corporation.'

Receivers may also be classified as statutory or chancery, temporary or permanent, special or general, passive or active, friendly and ancillary.'

As stated above, a statutory receiver is one appointed in accordance with statutory provisions who derives his or her power from the statute and from the general scope of the

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[1]Nature of receivership proceeding, see § 7742.

[9]0r.—"The courts take notice of the fact that business institutions, especially those financial in character, rarely survive a receivership. (citations omitted) A writ of attachment merely impresses a lien upon the defendant's property, and a writ of injunction interferes with the control which the defendant would ordinarily exercise over his property or conduct, but the purpose of a receivership is to exceed the effectiveness of both of these writs by taking the custody of property away from the defendant and placing it in charge of the court's officer." McKinney v. Nayberger, 138 Or. 203, 6 P.2d 228 (1931).

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'Receivers in mortgage foreclosure proceedings, see § 7667.

[2]Appointing receiver to carry on business, see § 7705.

[3]U.S.—Grocery Supply v. McKinley Park *Services,* 15 Alaska 469, 128 F. Supp, 694 (Terr. Alaska 1955).

Insolvency as ground for appointment, see §§ 7718 et seq.

[4]Receivers in dissolution proceedings, see §§ 8196 et seq.

[5]N.J.—Kaufman v. 53 Duncan Investors, L.P., 368 N.J. Super. 501, 847 A.2d 35 (App. Div. 2004).

law of his or her appointment. The receiver may be appointed by an equity court or by a designated administrative official or agency.' Statutory provisions govern the receivership of substantially all troubled or insolvent banks, either under the National Bank Act' or the banking laws of the various states.' A chancery receiver, as distinguished from a statu-

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[6]U.S.—Barons v. First Nat. Bank of Plainville, Kan., 28 F.2d 615 (D. Kan. 1928).

N.J.—Gallagher v. Asphalt Co. of America, 67 N.J. Eq. 441, 58 A. 403 (Ch. 1904).

Ohio—Warner v. Mutual Bldg. & Inv. Co., 128 Ohio St. 37, 190 N.E. 143 (1934).

Ohio—Liquidating receiver of bank does not occupy status of statutory receiver in some states. Farkas v. Fulton, 130 Ohio St. 390, 4 Ohio Op. 523, 199 N.E. 850 (1936).

Ohio—The superintendent of building and loan associations is a statutory receiver who, like other receivers, acts under direction of common pleas court of county wherein association is located. Irvin v. Mutual Bldg. & Inv. Co., 50 Ohio App. 228, 2 Ohio Op. 443, 20 Ohio L. Abs. 147, 198 N.E. 44 (8th Dist. Cuyahoga County 1935), rev'd on other grounds by Slocum v. Mutual Bldg. & Inv. Co., 130 Ohio St. 312, 199 N.E. 175 (1935).

'U.S.—Steele v. Randall, 19 F.2d 40 (C.C.A. 8th Cir. 1927).

U.S.— He is not an agent of the bank, but an officer of the United States. Liberty Nat. Bank of South Carolina, at Columbia, v. McIntosh, 16 F.2d 906 (C.C.A. 4th Cir. 1927).

Pa.—A conservator, appointed for a national bank under the Act of Congress, March 9, 1933 (12 U.S.C.A. § 203 a receiver, with limited jurisdiction, subject to the control of the Comptroller of the Currency. In re Hober's Estate, 118 Pa. Super. 209, 180 A. 140 (1935).

[8]*U.S.—A* bank commissioner, in winding up the affairs of an insolvent bank under the New Hampshire statute, does not act merely in an executive or administrative capacity, but as an officer of the court in the nature of a receiver. People's Trust Co. v. U.S., 23 F.2d 381 (C.C.A. 1st Cir. 1928); Nature of a bank commissioner in Oklahoma. U.S. Fidelity & Guar. Co. v. Ottawa County Nat. Bank, 32 F.2d 368 (N.D. Okla. 1929).

Ariz.—Sawyer v. Ellis, 37 Ariz. 443, 295 P. 322 (1931) (superintendent of banks as statutory receiver).

Fla.—Bryan v. Bullock, 84 Fla. 179, 93 So. 182 (1922) (discussing nature of such agent or appointee).

Ga.—Macon Grocery Co. v. Mobley, 174 Ga. 185, 162 S.E. 711 (1931) (superintendent of banks as statutory receiver); Mobley v. Marlin, 166 Ga. 820, 144 S.E. 747 (1928) (superintendent of banks as statutory receiver).

Iowa—The Iowa statute providing that the superintendent of banking henceforth shall be the sole and only receiver for state banks is only prospective in its operation. Andrew v. Bevington Say. Bank, 206 Iowa 869, 221 N.W. 668 (1928).

N.Y.—In re Bank of Cuba in New York, 198 A.D. 733, 191 N.Y.S.

tory receiver, is one appointed by a court exercising its inherent equity power, independently of any statute, and whose authority is derived from, and whose duty is prescribed by, the order of appointment.'

Receivers may also be classified as temporary or permanent, the former being appointed merely to act until a permanent receiver is appointed and put in charge or until the petition for the appointment of a permanent receiver is dismissed as unjustified. Very often, the person appointed a temporary receiver will be continued in office if the receivership is made permanent.' Although ordinarily, the duties of

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88 (1st Dep't 1921) (superintendent of banks as statutory receiver).

Okla.—State v. Ray, 1928 OK 361, 131 Okla. 45, 267 P. 844 (1928) (superintendent of banks as statutory receiver).

Okla.—Under the statutes in some states the state bank commissioner, in taking over the assets of an insolvent bank, is, in effect, a public receiver, with all his duties in relation to the disposition of assets thereby defined and fixed. Van Meter v. State, 1928 OK 384, 132 Okla. 230, 270 P. 41 (1928).

'U.S.—Boonville Nat. Bank v. Blakey, 107 F. 891 (C.C.A. 7th Cir. 1901).

U.S.—Statutory receivers are to be distinguished from chancery receivers as to title to the property. Quincy, Missouri & Pacific R. Co. v. Humphreys, 145 U.S. 82, 95, 12 S. Ct. 787, 36 L. Ed. 632 (1892).

Md.—Hughes v. Hall, 118 Md. 673, 85 A. 946 (1912).

Mo.—Naslund v. Moon Motor Car Co., 345 Mo. 465, 134 S.W.2d 102 (1939).

N.J.—The terms equitable receiver, chancery receiver, pendente lite receiver, and common-law receiver, are often used interchangeably. Lippmann v. Hydro-Space Technology, Inc., 77 N.J. Super. 497, 187 A.2d 31 (App. Div. 1962) (general equity receiver as pendente lite).

"It is obvious horn book law that no permanent receiver of a corporation can be appointed on immediate presentation of a complaint which the debtor challenges." Brewster v. Kable News Co., 148 F.2d 610 (C.C.A. 2d Cir. 1945).

La.—•Foster v. F. H. Koretke Brass & Mfg. Co., 198 La. 402, 3 So. 2d 668 (1941).

N.J.—Gallagher v. Asphalt Co. of America, 67 N.J. Eq. 441, 58 A. 403 (Ch. 1904).

N.Y.--Mitchell v. Banco De Londres y Mexico, 192 A.D. 720, 183 N.Y.S. 446 (1st Dep't 1920).

N.Y.—A court cannot appoint a temporary receiver where the corporation is insolvent. Garibaldi v. City of Yonkers, 198 Misc. 1100, 102 N.Y.S.2d 200 (Sup 1949).

N.Y.—Temporary receiver is merely custodian and agent of court to take and hold possession without title and had no power either to continue or discontinue authority of any officer or agent. Garibaldi v. City of Yonkers, 198 Misc. 1100, 102 N.Y.S.2d 200 (Sup 1949).