

Suits by Foreign Receivers

Stanley Law Sabbl

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Stanley Law Sabbl, *Suits by Foreign Receivers*, 19 Cornell L. Rev. 442 (1934)
Available at: <http://scholarship.law.cornell.edu/clr/vol19/iss3/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

SUITS BY FOREIGN RECEIVERS

STANLEY LAW SABEL†

"Receiverships are always expensive luxuries", was remarked a few years ago by one of the leading practitioners in the field of corporate reorganization.¹ Courts, too, recognize this and when possible try to expedite this expensive process.² An opportunity for delay with the corresponding expense and possibility of holdup is presented in the collection of assets located in more than one jurisdiction.³ Yet modern business conditions are such that a receivership of any size in this country must of necessity involve assets so located. To formulate in so far as possible the rules applicable to suits by chancery receivers in this situation is the object of this paper.⁴

†Member of New York and Massachusetts Bars.

¹Address by Robert T. Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade*, in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (1931) 133, 163.

²*Palmer v. Bakers' Trust Co.*, 12F. (2d) 747 (C. C. A. 8th 1926) cited and quoted by Swaine, *op. cit. supra* note 1, 165, 166.

An example of the expense specifically involved in an ancillary receivership is presented in the recent reorganization of the Chicago, Milwaukee and St. Paul Railway where the expenses, other than those in the primary district, totaled about 2% of the total receivership and reorganization expenses. This is large in view of the total cost of such reorganization. See Chicago, Milwaukee and St. Paul Railway Receivership Record in the District Court for the Northern District of Illinois, Eastern Division, Equity Consolidated Case No. 4931. But some writers think these expenses insignificant. Lowenthal, *The Railroad Reorganization Act* (1933) 47 HARV. L. REV. 18, 56.

³The increased expense involved is illustrated by *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805 (1898) where the court refused to appoint an ancillary receiver because of the expense involved.

The possibility for hold-ups is implicitly recognized by TRACY, CORPORATE FORECLOSURES, RECEIVERSHIPS AND REORGANIZATIONS (1929) 177, where the author refers to the necessity for a receiver obtaining instructions from the court of appointment where the cause of action involved in a foreign jurisdiction is so small in value as to make it doubtful whether it would be worth the expense of an ancillary receivership in order to realize thereon.

See Kearns, *Interstate Receiverships Practice* (1934) 28 ILL. L. REV. 752.

See 4 POMEROY, EQUITY JURISDICTION (4th ed. 1919) §1669: "Every reason that would operate . . . in favor of the recognition of the rights of a foreign corporation would operate with equal force in favor of the recognition of the receiver."

⁴The topic dealt with herein has been the subject of extensive classification and subclassification in a recent article by Laughlin, *The Extraterritorial Power of Receivers* (1932) 45 HARV. L. REV. 429. The present article does not attempt to improve upon the classifications presented therein but rather seeks first, to formu-

Elsewhere we have carefully examined in detail the general nature of a receiver's rights.⁵ It is sufficient for our purposes here to point out that receivers as aids to courts of chancery have long been an established practice, both in this country and in England.⁶ In general it may be said that the appointment of a receiver by a court of equity is made in order to preserve the property or thing in controversy pending a litigation, and to prevent disintegration and guard against priorities being obtained, so that the property may be subject to such decree as the court might render.⁷

late the principles of law applicable and second, to view these principles in the light of decided cases.

⁵In a forthcoming book on RECEIVERSHIPS AND THE LAW; Sabel, *Equity Jurisdiction in United States Courts with Reference to Consent Receiverships*—I (1934) 19 IOWA L. REV. 406.

⁶For a good discussion of this practise in the federal courts see *Underground Electric Rys. Co. v. Owsley*, 176 Fed. 26 (C. C. A. 2d, 1909); *cf Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454 (1922) not allowing a state statute to extend the receivership "remedy" in the federal courts.

For the state practise see I CLARK, A TREATISE ON THE LAW AND PRACTISE OF RECEIVERS (2d ed. 1929) c. 1, and especially p. 13, note 30 citing *Katz v. DeWolf*, 151 Wis. 337, 138 N. W. 1013 (1912) for the proposition: "It is therefore generally true that courts of general equity jurisdiction with, or without a code, have inherent power to appoint receivers."

Perhaps the earliest English case recognizing the power of the court of chancery to appoint a receiver is *The Duchess of Marlborough v. The Duke of Marlborough*, *Barnardiston's Reports* 69 (1740-1741), the court said that if certain annuities were not paid it would appoint a receiver to collect them. See I SPENCE, *EQUITABLE JURISDICTION OF THE COURTS OF CHANCERY* (1846) 673. The power to appoint receivers was extended to courts of law by the JUDICATURE ACT OF 1873, 36 & 37 VICT. c. 66.

⁷*Heffron v. Gage*, 149 Ill. 182, 36 N. E. 569 (1894); *Keeney v. Home Ins. Co.*, 71 N. Y. 396 (1877). To the effect that a receivership is for the purpose of conserving the integrated asset as a common fund see *Shapiro v. Wilgus*, 287 U. S. 348, 53 Sup. Ct. 142 (1932) (however, this case held that a conveyance to a corporation for the purpose of having a receiver appointed over the corporate assets was a fraudulent conveyance); also note the court's summarization p. 353 of the usual type of allegations in a creditor's bill: "that the levy of attachments and executions would ruin the good will and dissipate the assets." *Cf. Hollins v. Brierfield, Coal and Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127 (1893).

Showalter v. Nunnelley Co., 201 Ky. 595, 257 S. W. 1027 (1924) illustrates an extreme application of preservation of integration. There the court sustained the appointment of a receiver in a suit to reach an equitable life interest held by an individual.

Equally broad is Pomeroy's statement of the purpose for the appointment of the receivers of corporations: "The object of the appointment of a receiver of a corporation is the preservation of its property for the benefit of persons interested . . ." 4 POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1919) §1537. For the proposition that the appointment of a receiver is theoretically incidental to the court's main task in a given litigation see *United States v. McCutchen*, 234 Fed. 702, 715 (S. D. Cal. 1915).

We are here primarily concerned with receivers appointed by courts of equity rather than those appointed by administrative authorities such as under the National Bank or Farm Loan Acts.⁸ Likewise we are primarily concerned with such chancery receivers exercising powers derived from the order of the court appointing them rather than those vested in them by statute.⁹

The most important thing to be noticed about a chancery receivership for our purposes is that it does not affect the title to the property to which it relates.¹⁰ Thus, a chancery receiver gets no title but only a right to have the possession of the property as an officer of the court.¹¹ This has generally been the holding of modern cases considering this problem.¹² The same thing is true in the case of chancery receivers for corporations.¹³

If, then, title to specific property is not changed, by the appoint-

⁸See *Kennedy v. Gibson*, 8 Wall. (U. S.) 498 (1869); *Fifer v. Williams*, 5 F. (2d) 286 (C. C. A. 9th, 1927) (receiver of a national bank appointed by the Comptroller of the Currency); *Krauthoff v. Kansas City Joint-Stock Land Bank*, 23 F. (2d) 71 (C. C. A. 8th, 1927) (receiver under Farm Loan Act appointed by Federal Farm Loan Board); Note (1931) 44 HARV. L. REV. 618.

⁹See cases cited in notes 27 and 29, *infra*.

¹⁰*Keeney v. Home Ins. Co.*, *supra* note 7 (holding that a chancery receivership is not a change of title within the meaning of a condition in an insurance policy against change of title); *Southern Plants Co. v. Rochester German Ins. Co.*, 159 N. C. 78, 74 S. E. 812 (1912) *semble*; *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. 476 (1895) *semble*; Note (1910) 16 Ann. Cas. 869; *cf.* *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019 (1889) (holding that a change of a receiver is not a change of title or *possession*).

¹¹4 POMEROV, EQUITY JURISPRUDENCE (4th ed. 1919) §1336.

¹²Federal rule is stated in text: *Board of Drainage Commrs. v. Lafayette South Side Bank of St. Louis*, 27 F. (2d) 286 (C. C. A. 4th, 1928); *Irving Trust Co. v. Spruce Apartments*, 44 F. (2d) 218 (D. C. Pa. 1930); *Michigan Trust Co. v. People of Michigan*, 52 F. (2d) 842, (C. C. A. 6th, 1931); *Nicholson v. Western Loan & Bldg. Co.*, 60 F. (2d) 516 (C. C. A. 9th, 1932).

Recent state cases holding title to be the same as before the receivership and that the receiver gets possession: *McCarthy v. Cutchall*, 209 Iowa 193, 225 N. W. 865 (1929); *Burr v. Wentworth*, 202 Ill. App. 13 (1916); *Anderson v. Macek*, 350 Ill. 135, 182 N. E. 745 (1932); *Scranton Button Co. v. Neonlite Corp. of America*, 105 N. J. Eq. 708, 149 Atl. 369 (1930); *Lathers v. Hamlin*, 102 Misc. 563, 170 N. Y. Supp. 98 (1918); *Jacobs v. Central Vermont Ry. Co.*, 132 Misc. 144, 228 N. Y. Supp. 705 (1928); *Bateman v. Brown*, 297 S. W. 773 (Tex. Civ. App. 1927); *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017 (1916); *Clifford v. West Hartford Creamery Co.*, 103 Vt. 229, 153 Atl. 205 (1931).

¹³*Davis v. Gray*, 16 Wall. (U. S.) 203 (1872); *U. S. Trust Co. v. New York Street Ry. Co.*, 101 N. Y. 478, 5 N. E. 316 (1886); *In re Victoria Steamboats Ltd.*, 1 Ch. D. 158, 66 L. J. (Ch.) 21, (1897). But it has been held by at least one court that it had no inherent power to appoint receivers for a corporation. *Baker v. Louisiana Portable R. R. Co.*, 34 La. Ann. 754 (1882).

ment of a receiver, it must remain in the original owners.¹⁴ This is because the personality of the original owner, who for want of a better term we can designate as receivee, continues, for under the common law title can only vest in a legal person.¹⁵ The receivee thus has the power of being a legal actor¹⁶ except in so far as this power is limited by the power of the court over him.¹⁷ The receivership order or decree is usually accompanied by a direction to the

¹⁴I am purposely excluding here what Pomeroy calls the first class of cases in which a receiver will be appointed, *viz.* "where there is no person entitled to the property who is at the same time competent to hold and manage it during the judicial proceeding." 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1332. Under this class Pomeroy includes receivers over infants, lunatics and decedents' estates. In that guardians, committees and executors or administrators are the usual persons to handle such estates today, POMEROY, *ibid.*, and in that the power of these special representatives have been greatly extended by statute, POMEROY, *ibid.*, thus doing away to a great extent with the necessity of a receiver in such cases, it is believed that these special cases can be safely disregarded in a general discussion of receiverships. At any rate, the interstate problems are different as to these special individuals, see Beale, *Voluntary Payment to a Foreign Administrator* (1929) 42 HARV. L. REV. 597, and probably different in regard to receivers of such estates.

¹⁵This seems implicit in certain jurisprudential writings: see 2 AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. 1885) 886 *et seq.*; POLLOCK, A FIRST BOOK OF JURISPRUDENCE (5th ed. 1923) 176, 177, also PART I chs. V, VII; LITTLETON'S TENURES §11. A concrete illustration of this is presented in the cases holding that a partnership cannot take title in its firm name. *Tidd v. Rines*, 26 Minn. 201 (1879); *Moreau v. Saffarans*, 3 Sneed 595 (Tenn. 1856); see 3 WASHBURN, TREATISE ON AMERICAN LAW OF REAL PROPERTY (4th ed. 1876) 267.

¹⁶*Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194 (1902) holding that a foreign corporation in receivership "had legal capacity to sue" and allowing the suit so brought to continue after the appointment of an ancillary receiver. Of course, the receivee may be enjoined from prosecuting suits. 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1613.

¹⁷This power of the court is not always fully exercised: *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 14 Sup. Ct. 915 (1893); *Lehigh Coal and Navigation Co. v. Central R. R. of New Jersey*, 35 N. J. Eq. 426 (1882). On the other hand, the power of the court of appointment is itself limited: *Kain v. Smith*, 80 N. Y. 458 (1880). These limitations indicate that the receivee ceases to be a "legal actor" only in so far as a court which has jurisdiction over him has exercised its power. Too, a person enjoined oftentimes has the legal power of disobeying the injunction and by so doing creating rights in another. *Winston v. Westfeldt*, 22 Ala. 760 (1853).

An alternative line of reasoning to the effect that a court might even be able to increase the receivee's capacity, if necessary, is suggested by the recent case of *In Re Clinton* 41 F. (2d) 749 (S. D. Cal. 1930). (Holding that an insane person could become an involuntary bankrupt where the state court had authorized his petition). There seems to be no justification for limiting the reasoning of this ease to persons not *sui juris*.

receiver to get in certain or all property of the receivee¹⁸ and enjoins both the receivee and third persons interfering with the receiver so doing.¹⁹ In obeying this mandate, the receiver is acting for a legal person²⁰ under the direction of a court which, as we are considering the problem, had jurisdiction over this person.²¹ From this, it is submitted, that when a court enjoins the receivee interfering with the receiver getting in the property²² this injunction would have the affect as between the receiver and the receivee of giving the receiver a power of attorney to sue in the name of the receivee.²³ How far another state will recognize this power vested in the receiver is a matter of the other state's conflicts of laws.²⁴

¹⁸Where a receiver is appointed for some special purpose, as the collection of rents, he is not ordered to take possession of the receivee's property generally. *Wardlaw v. Herrington*, 125 Ga. 828, 54 S. E. 699 (1906). In the usual case, however, the receiver is directed to reduce to his possessions the property and assets of the receivee. *American Brake Shoe & Foundry Co. v. N. Y. Rys. Co.*, 282 Fed. 523 (C. C. A. 2d, 1922), *appeal dismissed*, 262 U. S. 736, 43 Sup. Ct. 704 (1923) *memo.*; *Johnson v. Emerson Phonograph Co.*, 296 Fed. 42 (C. C. A. 2d, 1924); *Cox v. Snow*, 47 Idaho 229, 273 Pac. 933 (1929); *Platt v. N. Y. & Sea Beach Ry. Co.*, 170 N. Y. 451, 63 N. E. 532 (1902). Still, it is a matter of judicial discretion how much property the receiver will be ordered to get in, and in some cases the receiver himself is given discretion as to this. *Adams v. Elwood*, 104 App. Div. 138, 93 N. Y. Supp. 327 (1905).

¹⁹An affirmative injunction is illustrated by an order to the receiver to sell perishables upon which a lien existed free from such encumbrance. *Harned v. Rowand*, 74 N. J. Eq. 264, 69 Atl. 181 (1908). More often the order appointing a receiver has the effect of an injunction against the receivee and third persons interfering with the receiver's possession. *Bowker v. Haight & Freese Co.*, 146 Fed. 257 (C. C. S. D. N. Y. 1906); *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834 (1898). The injunctive effect of such an order as to creditors subject to the jurisdiction of the court will be recognized by the courts of another state. *Gilman v. Ketcham*, 84 Wis. 60, 54 N. W. 395 (1893). ²⁰*Supra* note 16.

²¹This is a self-imposed limitation on the scope of this paper. We are concerned with interstate powers of a receiver, which of course must be derived chiefly from personal jurisdiction over the receivee. See CONFLICTS RESTATEMENT (Am. L. Inst. 1930) §100.

If, however, the property alone is within the jurisdiction of the court, a receiver may be appointed for that property. I CLARK, *op. cit. supra* note 6, §626. The interstate problems possible in such a case would seem in their most difficult aspect to involve only a protection of possession. *Semble, infra* p. 000, note 26. Thus we can confine our attention to cases where the court has jurisdiction over the receivee. ²²*Supra* notes 18 and 19.

²³An analogous situation exists in the case of incompetent persons where the court can bestow the power of managing their property upon another. *Lloyd v. Kirkwood*, 112 Ill. 329 (1884) (infants); *Light v. Light*, 25 Beav. 248, 53 Eng. Rep. 631 (1858) (lunatics).

²⁴See definition of conflict of laws in CONFLICTS RESTATEMENT (Am. L. Inst. 1930) §1 and especially comment *a* thereto.

Before proceeding to view these tentative conclusions in the light of the decided cases, it may be well to mention certain other situations in which a receiver can bring suit in a foreign jurisdiction, but which are fitted by the courts more readily into the legal picture. In all these cases the receiver acquires a cause of action apart from the order of the court appointing him, and is almost universally allowed to enforce such causes of action in the courts of a foreign state. As these classes of cases are referred to here in order to differentiate them from the more controversial problem herein under discussion, it should be sufficient for our purposes merely to enumerate the general classes. *First*, there are the cases in which the receiver enters into legal transactions in relation to property held by him as receiver and brings suit on causes of actions arising out of such transactions,²⁵ as, for example, upon a contract made by him as receiver. *Second*, there are the cases in which a receiver brings suit founded upon a valid possessory right,²⁶ as, for example, against one who wrongfully takes property out of his possession. *Third*, there are the cases in which a receiver sues upon a cause of action which is vested in him by statute,²⁷ as, for example, under

²⁵*Wilkinson v. Culver*, 25 Fed. 639 (C. C. S. D. N. Y. 1885); (suit on a judgment); *Iglchart v. Bierce*, 36 Ill. 133 (1864) (suit on a mortgage); *Merchants' National Bank of Boston v. Pa. Steel Co.*, 57 N. J. L. 336, 30 Atl. 545 (1894) (suit on a contract made by a receiver). So, too, a receiver has been allowed to sue in a foreign jurisdiction on a contract made by the receivee where the performance on the plaintiff's side was by the receiver. *Cooke v. Town of Orange*, 48 Conn. 401 (1880).

"Whatever be the theory on which the American courts say the acts and obligations of a receiver are in a sense the acts and obligations of a court, nevertheless when the receiver acts he acts and when the receiver incurs obligations he incurs obligations and therefore in relation to such acts and obligations should be allowed to sue in a foreign jurisdiction." I CLARK *op. cit. supra* note 6, §294 citing *Chicago Bonding & Surety Co. v. United States*, 261 Fed. 266 (C. C. A. 7th, 1919).

²⁶*Oakes v. Lake*, 290 U. S. 59, 54 Sup. Ct. 13 (1933); *Pond v. Cooke*, 45 Conn. 126 (1877); *Jenkins v. Purcell*, 29 App. D. C. 209, 9 L. R. A. (N. S.) 1074 (1907); *Chicago, Milwaukee & St. Paul Ry. v. Keokuk No. Line Packet Co.*, 108 Ill. 317 (1883); *Robertson v. Stead*, 135 Mo. 135, 36 S. W. 610 (1896); *Osgood v. Maguire*, 61 N. Y. 524 (1875); *Woodhull v. Farmers' Trust Co.*, 11 N. D. 157, 90 N. W. 795 (1902); *Cagill v. Wooldridge*, 8 Bax. 580 (Tenn. 1876). *Contra*: *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892 (1889) (vigorous dissenting opinions).

²⁷*Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755 (1907); *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415 (1911); *Hale v. Hardon*, 95 Fed. 747 (C. C. A. 1st, 1899); *Goss v. Carter*, 156 Fed. 746 (C. C. A. 5th, 1907); *Irvine v. Baker*, 225 Fed. 834 (S. D. N. Y. 1915); *Bullock v. Oliver*, 155 Ga. 151, 116 S. E. 293 (1923); *Hirning v. Hamlin*, 200 Iowa 1322, 206 N. W. 617 (1925); *Howarth v.*

a statute providing that stockholders' subscription calls or double liability as the case may be run directly to a receiver. *Fourth*, there are cases in which the receiver sues (either in his own name or in that of his assignee, according to the law of the particular state where suit is brought as to such suits on assignments) upon rights acquired by him through voluntary assignment from the receivee,²⁸ as, for example, upon a contract assigned to him. *Fifth*, there are cases in which the receiver brings suit founded upon title to personal property of a corporation which is transferred to him by statute upon dissolution of the corporation by the state which created it,²⁹ as, for example, under a statute which vests the personal property of an insolvent insurance company in the commissioner of insurance.

In all these situations, as already stated, the receiver is almost universally allowed to sue in the courts of another state. The leading cases are collected in the notes to the respective classes. In every one of these classes of cases the receiver has, either through

Lombard, 175 Mass. 570, 56 N. E. 888 (1900); Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489 (1900); Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634 (1913). For a recent case with a good discussion of this problem see: Luikhart v. Spurck, 1 F. Supp. 53 (S. D. Ill. 1932).

This statutory vesting of a cause of action seems similar to the vesting of causes of action under LORD CAMPBELL'S ACT and kindred legislation under which statutes it is held that the statutory designee may sue in any state. Kansas Pacific Ry. Co. v. Cutter, 16 Kan. 568 (1876).

²⁸Ward v. Conn. Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057 (1899); cf. Zacher v. Fidelity Trust & Safety-Vault Co., 106 Fed. 593 (C. C. A. 6th, 1901), *certiorari denied*, 181 U. S. 621, 21 Sup. Ct. 924 (1901).

As to whether such assignment is voluntary or involuntary this is but one aspect of the broader problem of the voluntary or involuntary character of a general assignment for the benefit of creditors. See Sunderland, *Foreign Voluntary Assignments for the Benefit of Creditors* (1903) 2 MICH. L. REV. 112, 180.

²⁹Relfe v. Rundle, 103 U. S. 222 (1880); Parsons v. Charter Oak Life Ins. Co., 31 Fed. 305 (C. C. S. D. Iowa 1887); Hopkins v. Lancaster, 254 Fed. 190 (N. D. Ala. 1918); Martyne v. Amer. Union Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502 (1915); Bockover v. Life Assn. of Am., 77 Va. 85 (1883). But cf. Willitts v. Waite, 25 N. Y. 577 (1862).

This is explained by the control which the state of incorporation has over the corporation. Relfe v. Rundle, *supra*. This doctrine is commonly worded so as to apply only to personal property. See CONFLICTS RESTATEMENT (Am. L. Inst. 1930) §170. This limitation probably goes back to the control which the state of *situs* has over immoveables. See Watkins v. Holman, 16 Pet. (U. S.) 157 (1842). Yet it seems that in the last analysis the state of *situs* has an equal control over immoveables. See Beale, *Living Trusts of Moveables in the Conflict of Laws* (1932) 45 HARV. L. REV. 969. But this is not always apparent to courts and the maxim *mobilia sequuntur personam* is often applied. STORY, CONFLICT OF LAWS (8th ed. Bigelow 1883) §378.

statute,³⁰ his own act,³¹ or an act of the receivee,³² something more than the rights conferred by the order of his appointment; it is only necessary to state these added rights to see the soundness of these decisions.

To return, then, to our main thesis. The situation that gives the courts their greatest difficulty is that in which a chancery receiver, who, as we have seen, has merely a right of possession of the debtor's assets as an officer of the court appointing him,³³ brings suit without any additional right or authority in the courts of a foreign jurisdiction to collect chattels or chose in action belonging to the receivee.

Such a problem was before the court in the leading case of *Booth v. Clark*.³⁴ In that case a chancery receiver appointed upon a creditor's bill in a New York state court brought suit in the circuit court of the District of Columbia to recover certain funds awarded to Clark by commissioners under the Mexican Treaty upon claims accruing anterior to the plaintiff's appointment as receiver. The case finally came before the Supreme Court of the United States, and the Court held that a receiver could not sue in the Courts of a foreign jurisdiction merely because of the order of a Court elsewhere which appointed him, in the absence of some conveyance or statute vesting property in him.

This case has settled the law in the United States courts as to the extraterritorial powers of a chancery receiver. It has been followed by a long line of decisions.³⁵ In its most recent adjudication on this

³⁰The rights mentioned under classes three and five are of course statutory and, at least in relation to these rights, the receiver cannot be said to be a chancery receiver. ³¹Classes one and two. ³²Class four.

³³*Supra* notes 11 and 12.

³⁴17 How. (U. S.) 322 (1854).

³⁵*Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244 (1902); *Great Western Mining & Mfg. Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770 (1905); *Keatley v. Furey*, 226 U. S. 399, 33 Sup. Ct. 121 (1912); *Sterrett v. Second Nat. Bank*, 248 U. S. 73, 39 Sup. Ct. 27 (1918); *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 43 Sup. Ct. 480 (1922); *Zacher v. Fidelity Trust & Safety-Vault Co.*, 106 Fed. 593 (C. C. A. 6th, 1901), *certiorari denied* 181 U. S. 621, 21 Sup. Ct. 924 (1901); *Lewis v. American Naval Stores Co.*, 119 Fed. 391 (C. C. E. D. La. 1902); see *Strout v. United Shoe Machinery Co.*, 195 Fed. 313, 319 (D. C. Mass. 1912); *Coal and Iron R. R. Co. v. Reherd*, 204 Fed. 859, 881 (C. C. A. 4th, 1913); *Aschraft v. Brean*, 51 F. (2d) 301, 302 (M. D. Pa. 1931). See also *Bay State Gas Co. v. Rogers*, 147 Fed. 557, 559 (C. C. Mass. 1906) where the suit was brought in the receivee's name and where, although there was an ancillary receiver appointed at the forum, the court said: "... this suit could not have been brought or maintained in the name of the corporation by Pepper simply by virtue of the power vested in him by the Circuit Court for the District of Delaware" (this dictum should be compared with the quotation in the text page 450 from *Great Western Mining & Mfg. Co. v. Harris*). Cf. *In re Bankshares Corp.*, 50 F. (2d) 94 (C. C. A. 2d, 1931) where the court refused to allow foreign receiver to intervene in bankruptcy, and refused to apply the usual equity rule noted *infra*, note 58.

topic, *Sterrett v. Second National Bank*,³⁶ the Supreme Court said:

"Since the decision of this court in *Booth v. Clark* it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed."

In so far as these cases hold that a chancery receiver has only such right to possession as the court appointing him can give there is no room to quarrel with their holdings. That this is precisely the holding of the majority of these cases can be seen from the fact that in all but one of the Supreme Court cases dealing with this problem the receiver was attempting to sue in his own name.³⁷ That a chancery receiver is vested with no cause of action or right to property by the mere order of his appointment is apparent from our previous discussion.³⁸ However, we have seen that as between the parties the order appointing a receiver vests him with at least the power to manage the receivee's suit,³⁹ there is nothing (unless contained in the order of appointment) to prevent the receivee suing in a foreign state.⁴⁰ That such a suit could be maintained by the receivee though handled by the receiver was denied by the Supreme Court of the United States unanimously in *Great Western and Mining Mfg. Co., by L. C. Block, its receiver, v. Harris*.⁴¹ In that case suit was brought by the receiver to recover damages from the estate of a deceased director alleged to have been caused by the director's mismanagement and misappropriation of certain funds belonging to the company. The court on *certiorari* affirmed the dismissal of the bill on the authority of *Booth v. Clark* and said of the contention that the receiver was authorized to institute the action in the name of the corporation that no express authorization had been shown and thus the Court said:

"Nor do we think the jurisdiction is established because the action is authorized to be instituted by the receiver in the name of the corporation. Such action subjecting local assets to a foreign jurisdiction and to a foreign receivership would come within the reasoning of *Booth v. Clark*. If a recovery be had, although in the name of the corporation, the property will be turned over to the receiver, to be by him administered under the order of the court appointing him."

³⁶*Supra* note 35, at 76, 39 Sup. Ct. at 28.

³⁷See cases note 35, *supra*. *Great Western Mining & Mfg. Co. v. Harris* cited therein is the case in which the receiver sued in the name of the receivee.

³⁸See note 10, *supra*.

³⁹Page 446, *supra* and see also note 23.

⁴⁰*Ibid*.

⁴¹*Supra* note 35, at 577, 25 Sup. Ct. at 775.

The reasoning of the Court is not altogether clear. Recovery in the name of the receivee would at least vest legal title in him⁴² and the receiver has been given the power to manage the suit. In reality it seems that the Court is so imbued with the doctrine of *Booth v. Clark* that it cannot allow a suit to be managed by one whom it will not allow to sue. It is hard to see how the debtor who is in fact sued by his creditor can object. Nevertheless, this case must be taken as settling the law for the federal courts; the situation is now one that can probably only be changed through statute.⁴³ There however remains under the federal rule the possibility that if the receivee had authorized the suit the receiver would be allowed to manage it.⁴⁴ Such authorization should not be difficult to obtain in cases where the receivership is in fact consensual.⁴⁵

Fortunately, the federal cases just disposed of do not settle the

⁴²See note 10, *supra*.

⁴³The present statutes apply to "property in different districts in the same state." 36 STAT. 1102 (1911), 28 U. S. C. §116 (1926) and "property in different states in same circuit" 36 STAT. 1102 (1911), 28 U. S. C. §117 (1927). These statutes apply to contiguous property such as railroads. However, there would seem to be no inherent objection to allowing a federal receiver to sue at least in any federal court. The new §77 of the BANKRUPTCY ACT, 47 STAT. 1474 (1933), 28 U. S. C. SUPP. VII, §205 (1933) does away with ancillary receiverships for reorganizations of railways thereunder. See Lowenthal, *The Railroad Reorganization Act (1933)* 47 HARV. L. REV. 18, 56. There is now pending a bill dealing with reorganizations of other than railroad companies and patterned after §77 of the BANKRUPTCY ACT and which would therefore apparently do away further with ancillary receiverships in the case of proceedings brought thereunder. H. R. No. 5884 which was passed by the House and referred to the Senate Judiciary Committee June 6, 1933. See Lowenthal, *supra* at p. 22. Kearns, *supra* note 3, at 765, suggests two possible alternative amendments to the present Federal law, to provide for appointment of primary receivers as ancillary receivers except upon objection by an interested party or to amend Section 56 of the Judicial Code, 36 STAT. 1102 (1911), 28 U. S. C. 117 (1926), to provide for nation-wide receivership. The first seems but a restatement of what has long been the prevailing practice. See Byrne, *The Foreclosure of Railroad Mortgages in the United States Courts* in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION (1917) 77, 89 *et seq.* The second would probably be construed similarly to the construction of the section as it now stands in *Lion Bonding & Surety Co. v. Karatz*, *supra* note 14, at p. 87, to only include integral properties of a physical nature. It is doubtful if a change, even of this latter type, and even if these objections were not so, could be practically done without providing for some sort of local administration. See pending House of Representatives' Bill, *supra*, for a more practical solution.

⁴⁴See quotation from *Great Western Mining & Mfg. Co. v. Harris*, *supra* page 450 of the text.

⁴⁵For example of how closely the corporate receivee often works with the receiver see Swaine, *op. cit. supra* note 1, p. 179.

problem. It is only when the requisite basis of federal jurisdiction exists that a case can get into the federal courts.⁴⁶ Diversity of citizenship exists in practically all the cases involving interstate suits by receivers and would probably exist in a large majority of the cases where the action is in the name of the receivee.⁴⁷ However, the requisite three thousand dollar monetary requirement of such suits must be present in order to get into the federal courts through diversity of citizenship, directly or by removal.⁴⁸ It is in the smaller claims, which cannot be brought in or removed to the federal courts, that the expense, confusion and delay of ancillary proceedings are all out of proportion to the amount of the claim involved. It is here that economic arguments would have their fullest force.⁴⁹ That is, it is economically absurd to require the appointment of an ancillary receiver for the very purpose of properly preserving the assets of the receivee in cases where this requirement would impose a greater burden than the particular assets located in a foreign state are worth. This requirement in such a case would seem to give the person who had assets of or owed debts to the receivee a weapon of defense entirely apart from anything that concerns him. A valid release is all that he is entitled to demand. An ancillary receivership may have some justification where the problem is complicated by the very largeness of the amount of money involved. But where the amount is small, should this be necessary, at least where there are no competing interests?

That is the problem that has often confronted state courts. Yet the prestige of the Court that decided *Booth v. Clark* is such and the logic of the opinion so strong⁵⁰ that the state courts have generally refused to allow a foreign chancery receiver to sue as a matter of

⁴⁶ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (4th ed. 1931) §9 and Chs. IX: "Diversity of Citizenship" and XIII: "Removal of Cases from State to Federal Courts."

⁴⁷The special problems raised in connection with federal jurisdiction cannot be disposed of here. Very intricate problems in this field may have incidental bearing on our problem such as that presented in the case of corporations incorporated under the laws of more than one state. See ROSE, *id.* §272.

⁴⁸See note 46, *supra*.

⁴⁹GOODRICH, HANDBOOK CONFLICT OF LAWS (1927) 443, says: "... it is very convenient for the receiver and the interests of the persons whom he represents, if he may sue in another state. It saves time; it saves expense of another receivership with its necessary formality of appointment, accounting, and so on."

⁵⁰"That the court cannot send its marshal or sheriff outside of its jurisdiction to seize property cannot be disputed. Upon the same principle, it can send no other officer or agent to collect money outside of its territorial limits." 17 FLETCHER, CYCLOPEDIA PRIVATE CORPORATIONS (revised and permanent ed. 1933) §8567.

right in his own name on causes of action belonging to the receivee.⁵¹ In most of these cases the courts lay down a rule that will not allow a receiver to sue in a foreign state where the rights of local creditors are involved.⁵² In other cases the suit was brought in the name of the receiver in states which had no real party in interest statutes at the time.⁵³ Only one case can be found in which the refusal to allow suit was not based upon the presence of local creditors or in which the suit was not brought in the receiver's name in a state that had no real party in interest statute.⁵⁴ If these cases not allowing a foreign receiver to sue present the only alternative to the economically expedient rule suggested above, we have a conflict between logic and policy.

In general, policy has prevailed. That is, a foreign chancery receiver is generally allowed to sue if domestic creditors are not prejudiced thereby.⁵⁵ Here the cases fall into the converse pattern from that presented in the cases just referred to where the receiver was not allowed to sue. In none of these cases allowing suit were local creditors involved.⁵⁶ In most of them the suit was brought in the name of the receivee⁵⁷ or if brought in the name of the re-

⁵¹Ward v. Pacific Mutual Life Ins. Co., 135 Cal. 235, 67 Pac. 124 (1901); Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 Atl. 620 (1887); Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250 (1890); Wyman v. Eaton, 107 Iowa 214, 77 N. W. 865 (1899); Homer v. Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. 883 (1901); Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. 79 (1892); Seaboard Air-Line Ry. v. Burns, 17 Ga. App. 1, 86 S. E. 270 (1915); see Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091 (1894); So. Building & Loan Assn. v. Price, 88 Md. 155, 41 Atl. 53 (1898); Union Guardian Trust Co. v. Broadway Nat. Bank & Trust Co., 138 Misc. 16, 245 N. Y. Supp. 2 (1930); Van Tuyt v. Carpenter, 135 Tenn. 629, 188 S. W. 234 (1916).

⁵²This is so as to all cases cited in note 51, *supra* except Homer v. Barr Pumping Engine Co., and Filkins v. Nunnemacher.

⁵³Stockbridge v. Beckwith, *supra* note 51; Homer v. Barr Pumping Engine Co., *supra* note 51.

⁵⁴Filkins v. Nunnemacher, *supra* note 51.

⁵⁵Barley v. Gittings, 15 App. Cases D. C. 427 (1899); Richardson v. So. Florida Mort. Co., 102 Fla. 313, 136 So. 393 (1931); Metzner v. Bauer, 98 Ind. 425 (1884); Lycoming Fire Ins. Co. use of Beeber, Receiver v. Langley, 62 Md. 196 (1884); Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713 (1892); Bodge v. Skinner Packing Co., 115 Neb. 41, 211 N. W. 203 (1926); Hurd v. City of Elizabeth, 41 N. J. L. 1 (1879); Stone v. Penn Yan, Keuka Park & Branchport Ry., 197 N. Y. 279, 90 N. E. 843 (1910); Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931); Bank v. McLeod, 38 Ohio St. 174 (1882); Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475 (1914); Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526 (1883).

⁵⁶See cases noted in 55, *supra*.

⁵⁷Lycoming Fire Ins. Co. v. Langley, *supra* note 55; Lycoming Fire Ins. Co. v. Wright, *supra* note 55.

ceiver, there existed a real party in interest statute,⁵⁸ although a few courts in their zeal to adopt what appeared to them to be a sensible rule seem to have allowed the suit in the receiver's name without such a statute.⁵⁹ These cases are usually referred to as announcing a doctrine based upon comity,⁶⁰ but that word does little to clarify the picture. Who are domestic creditors is a question which has received various interpretations⁶¹ and is beyond the scope of this paper. In general it may be said that their interest in an ancillary proceeding may outweigh the interest in a quick and inexpensive collection of assets by the receiver.⁶²

Do these cases, which by and large reach a just result, do violence to the logic of the situation? It is submitted that they do not and that their result can generally be explained by the contention which was rejected by the Supreme Court in *Great Western Mining and Mfg. Co. v. Harris*⁶³ that the receiver has the power to sue for the receivee in a foreign state bringing the suit in the name of the receivee. We have seen that on theory this logically follows from the

⁵⁸*Richardson v. So. Florida Mort. Co.*, *supra* note 55; *Metzner v. Bauer*, *supra* note 55; *Comstock v. Frederickson*, *supra* note 55; *Bodge v. Skinner Packing Co.*, *supra* note 55; *Stone v. Penn Yan, Keuka Park & Branchport Ry.*, *supra* note 55; *Van Kempen v. Latham*, *supra* note 55; *Bank v. McLeod*, *supra* note 55.

Where the foreign receiver sues in equity the court will usually allow the suit to be brought in the receiver's own name. *Boulware v. Davis*, 90 Ala. 207, 8 So. 84 (1890) (suit to foreclose a mortgage); *Runk v. St. John*, 29 Barb. 585 (N. Y. 1859) (action to set aside a fraudulent conveyance); *Bidlack v. Mason*, 26 N. J. Eq. 230 (1875) (suit to recover property taken from the state by fraud). These cases offer no real difficulty; it has been said that the principle embodied in the real party in interest statutes is that which always existed in equity. *Field v. Maghee*, 5 Paige 539 (N. Y. 1836); see *FIRST REPORT OF THE COMMISSIONERS ON PLEADING AND PRACTISE IN NEW YORK (1848) 123-125*.

⁵⁹*Barley v. Gittings*, *supra* note 55; *Hurd v. City of Elizabeth*, *supra* note 55; *Hardee v. Wilson*, *supra* note 55.

⁶⁰See note 55 *supra*.

⁶¹For a good general statement of the rule of comity and its exceptions see *Hardee v. Wilson*, *supra* note 55. However, even where there is an ancillary receivership local creditors will not be preferred in the final distribution in the absence of a specific lien or trust fund provided for their protection. *People v. Granite State Provident Assn.*, 161 N. Y. 492, 55 N. E. 1053 (1900); *Brunner v. York Bridge Co.*, 78 W. Va. 702, 90 S. E. 233 (1916).

The privilege of suing in jurisdictions other than their appointment is almost universally conceded to receivers, now, as a matter of comity or courtesy, unless such a suit is inimical to the interests of local creditors, or to the interests of those who have acquired rights under a local statute or unless such a suit is in contradiction to the policy of the forum. See *GOODRICH, HANDBOOK, CONFLICT OF LAWS (1927) 443, 444*.

⁶²But see *Hardee v. Wilson*, *supra* note 55 and *GOODRICH, ibid.*

⁶³See discussion of this case p. 450 of the text *supra, et seq.*

control which the court appointing the receiver has over the receiver.⁶⁴ The applicability of this doctrine even to cases where suit is allowed in the name of the receiver can be worked out from the fact that most of the states where such cases are found require suits to be brought in the name of the real party in interest.⁶⁵

Many states have these statutes requiring actions to be brought by the real party in interest.⁶⁶ Although in the absence of such statutes it is generally held that a chancery receiver cannot sue in his own name on causes of actions belonging to the receiver,⁶⁷ it has been held that under these statutes such suits may be brought in the receiver's own name.⁶⁸ This requirement is obviously procedural in nature⁶⁹ and the law of the forum would apply thereto.⁷⁰ Thus it would seem that in regard to such suits by foreign receivers these statutes must be complied with.⁷¹ In the states in which these

⁶⁴See pp. 446 and 450 of the text, *supra*.

⁶⁵See note 58, *supra*.

⁶⁶ALA. CODE (Michie, 1928) §5699 (except suits on "Commercial" instruments); ARIZ. CODE (Struckmeyer, 1928) §3737; ARK. DIG. STAT. (Crawford & Moses, 1921) §1089; CAL. CODE CIV. PROC. (Deering, 1931) §367; COLO. COMP. LAWS (1921) §3; FLA. COMP. LAWS (1927) §4201; IDAHO CODE (1932) §5-301; IND. ANN. STAT. (Burns, 1933) §2-201; IOWA CODE (1931) §10967; KAN. REV. STAT. ANN. (1923) c. 60, §401; KY. CODES ANN. (Carroll, 1932) Civil Prac. §18; LA. CODE OF PRAC. (Dart, 1932) §15 ("one having a real and actual interest"); MICH. COMP. LAWS (1929) §14010; MINN. STAT. (Mason, 1927) §9165, MO. STAT. ANN. (1932) §698; MONT. REV. CODE (Choate, 1921) §9067; NEB. COMP. STAT. (1929) §20-301; NEV. COMP. LAWS (Hillyer, 1929) §8543; N. Y. CIV. PRAC. ACT (1920) §210; N. C. CODE ANN. (Michie, 1931) §446; N. D. COMP. LAWS ANN. (1913) §7395; OHIO GEN. CODE (Page, 1931) §11241; OKLA. STAT. (1931) §142; ORE. CODE ANN. (1930) §1-301; S. C. CODE (1932) §397; S. D. COMP. LAWS (1929) §2306; UTAH REV. STAT. (1933) §104-3-1; WASH. REV. STAT. (Remington, 1932) §179; WIS. STAT. (1931) §260.13; WYO. REV. STAT. (1931) §89-501.

⁶⁷I CLARK, *op. cit. supra* note 6, §587; see *Underhill v. Rutland R. R. Co.*, 90 Vt. 462, 467, 98 Atl. 1017, 1018 (1916): "It is an established principal of the common law, and a settled doctrine of this state, that an action in a court of law for the enforcement of a right must be in the name of the person having legal title . . . No exception exists at common law in favor of a receiver, and we have no statute creating one."

⁶⁸In *Leonard v. Storrs*, 31 Ala. 488, 491 (1858) the court referred to the fact that legal title to the note upon which suit was brought was in another, but allowed suit in the receiver's name saying: "We hold that he was the party *really interested*, within the meaning of section 2129 of the Code, and that the action was properly brought in his name." *Richardson v. So. Fla. Mort. Co.*, 102 Fla. 313, 136 So. 393 (1931); *Henning v. Raymond*, 35 Minn. 303, 29 N. W. 132 (1886).

⁶⁹CONFLICTS RESTATEMENT (Am. L. Inst. 1931) §637.

⁷⁰CONFLICTS RESTATEMENT (Am. L. Inst. 1931) §612.

⁷¹See *Merchants' Loan & Trust Co. v. Clair*, 36 Hun 362 (1885), *aff'd*. 107 N. Y. 663, 14 N. E. 414 (1887): "The statute of New Jersey authorizing the

real party in interest statutes have been adopted⁷² they should obviate the difficulties we have been considering. In these states the receiver managing the receivee's suits, in so far as this is allowed,⁷³ could do so in his own name. Thus these statutes offer a rationale through which the rule of policy can be made into one of logic as well.

So worked out the results are not difficult to formulate:

- I. A chancery receiver, without additional rights:
 - A. Can never sue in the federal courts.
 - B. Cannot sue even in the state courts where the rights of local creditors are involved.
 - C. Where the rights of local creditors are not involved
 1. May sue in the state courts in the receivee's name where there is no real party in interest statute.
 2. May sue in the state courts in his own name where there is such a statute.

Whether all this classification represents a tendency towards a more general recognition of a foreign receiver,⁷⁴ or whether these distinctions are the ultimate ones in this field, it is perhaps too early to predict. Whether a given case represents the utmost extent to which the law will go on the one hand, or a growing tendency in the law on the other, depends perhaps upon what one thinks of the case. Thus when the present writer says that we have here an illustration of a growing tendency, he is simply stating his opinion of what he believes to be desirable.⁷⁵

receiver to bring an action in his own name or otherwise has no extraterritorial force. The *lex fori* governs as to the manner of commencing actions, and a claim presented by a foreign creditor to our courts for consideration must be prosecuted in the name of the real party in interest, for the reason that our statute so declares, its language being 'every action must be prosecuted in the name of the party in interest.'" (*sic*).

⁷²See note 66, *supra*.

⁷³*I.e.* subject to the limitation as to local creditors, p. 453 of the text, *supra*.

⁷⁴Such a tendency is illustrated by the cases referred to in note 59, *supra*; see Loughlin, *supra* note 4.

⁷⁵Where the question is one of recognizing a foreign created right there would seem to be more room for considering the desirability of a particular rule in a given case than when it involves a choice of one of two possible laws. See Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173.