1891

The Appointment, Powers and Liabilities of Receivers

Frank Johnson
Cornell Law School

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THE APPOINTMENT, POWERS

AND

LIABILITIES OF RECEIVERS.

----------by----------

Frank Johnson,
Cornell University,
1881

(Typewritten by
E. W. Davis)
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64 Am. Dec. 482 - 95.
19 Am. Law Reg. 865.
1 Clarke Ch. 297.
CHAPTER I.

OF RECEIVERS GENERALLY.

A receiver, in the legal acceptance of the term, may be defined as an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it." (1)

The appointment of a receiver pendente lite is one of the oldest, and has always been regarded as one of the most salutary and effective remedial agencies of which the court of equity has taken cognizance. The origin of this equitable remedy is involved in doubt; but germs of the present system are found to have existed at a period almost as remote as the rise of equity as a separate jurisprudence. While the jurisdiction of equity, to thus interfere by the appointment of a receiver, has been long recognized; courts of equi-

(1) High on Receivers, Sec. 1;
Booth v Clark, 17 How. (U.S.) 322.
ty have uniformly proceeded with great caution in the exercise of this most extraordinary power.

Formerly a receiver would only be appointed upon special grounds justifying such an interference, in the nature of a bill quasi timet, which procedure was probably borrowed from the title of some of the ancient common law writs. (1) Within more recent periods, we find the appointment of a receiver confined almost exclusively to cases arising out of litigation in the form of a creditor's bill. But in spite of these restrictions, the jurisdiction of the court of equity has gradually and surely extended, until at the present time it embraces almost every class of subject matter over which litigation can arise or the claims of suitors attach.

This extension was brought about in England, largely, by the judicature act of 1873 which provided: that the power to appoint a receiver should be extended to all cases where it should appear to the court to

(1) II. Story's Equity Jurisprudence, Sec. 828.
be just and convenient; and such application might be made unconditionally, or upon such terms and conditions as the court might think just. (1) Similar changes have been brought about in this country, partly by legislative enactment and partly by judicial decisions. Not only has the subject matter, over which a receiver may be appointed, been greatly extended; but it has also become customary to cloth receivers with much greater powers than were formerly conferred upon them. But while the rules of practice and procedure have thus been changed from time to time; the fundamental principles which govern their appointment, determine their powers and fix their liabilities, remain substantially the same.

It is not my purpose to attempt to trace the history of this branch of equity jurisprudence; but rather to give as near as may be the practice and procedure which are necessarily involved in the appointment of receiver, and some of the principal powers and liabilities.

(1) Par. 8 Sec. 25.
ties which attach to that officer. In discussing these points, I shall endeavor to follow the rules of practice and procedure as recognized and enforced by courts of equity in this country at the present time, with special reference to the old chancery practice of New York, which has been very largely followed by most of the states of this country.
CHAPTER II.

APPPOINTMENT OF A RECEIVER

General Principles governing the Appointment

As a general rule, the court will not grant an application for the appointment of a receiver, save in exceptional cases, as in the case of an infant or lunatic, unless a suit is actually pending. (1) In any case the primary object sought to be attained by the appointment of a receiver is to save in tact and undiminished, as far as possible, the subject matter in controversy, for the benefit of those who are found to be equitably entitled. Hence it follows that "the power to appoint a receiver is most usually called into action, either to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction." (2)

In general the party making the application for

(1) Jones v Schall, 45 Mich. 379.
(2) Baker v Administrators of Backus, 32 Ill. 79.
a receiver must show to the satisfaction of the court, that he has some clear right or interest in the property in controversy, and unless relief is granted, he will suffer irreparable injury, through the neglect, misconduct or insolvency of the defendant.

The application for a receiver is always addressed to the sound discretion of the court; (1) but as to the extent of such discretion, there has been some difference of opinion; some courts holding that the power to appoint a receiver is a matter of arbitrary discretion on the part of the court, and when once made, cannot be interfered with on appeal. (2) The better and more generally accepted rule is thus stated by Miller, J.: "while the litigation is pending and involves questions of title, fraud and the like, the appointment and discharge of a receiver is purely discretionary and within the sole power of the court; but where these questions have been passed upon, and there is a definite and fixed right and a clear title, the appoint-

(1) II Story's Equity Jurisprudence, Sec. 831. (2) Wilson v Denis, 1 Hop. Ch. 435.
ment or discharge is not discretionary, and it is not within the power of the court to withhold it. (1)

The controlling elements which determine the advisability of appointing a receiver are the nature and condition of the subject matter, the relation of the parties, the peculiar facts and circumstances attending each case and the probability of the plaintiff being ultimately entitled to a decree. Like most equitable remedies the underlying principles which justify the court of equity in interfering are the possibility of irreparable mischief and the inability of the law to render the relief sought. (2)

Courts exercising Jurisdiction.

The appointment of a receiver is strictly an original process and is exercised almost exclusively by courts having equity power. In states having a separate chancery system, the power to appoint a receiver is generally limited to these tribunals; but in

(1) Milwaukee R.R. Co. v. Scudder, 2 Wall. (U.S.) 510.

(2) For rules governing the appointment of a receiver see Blondheim v. Monroe, 11 Md. Ch. 365; See also valuable note 64 Am. Dec. 432–95.
those states where the system of equity and law have been blended, any court of original jurisdiction may properly make such appointment.

In states which have adopted codes of procedure, the courts which may appoint a receiver are usually determined by special statutory provisions. In New York the supreme court, the superior, city or county courts may appoint a receiver in cases specified in section 713 of the code of civil procedure.

As a general rule the court first acquiring jurisdiction will retain jurisdiction till the end of litigation; and this rule is equally applicable to state and federal courts as well as courts of co-ordinate jurisdiction. (1)

Strictly speaking, a court cannot appoint a receiver over subject matter not within its jurisdiction, but departures from this rule are frequently made, owing to considerations of comity which exists between different courts. (2)

(1) 7 Chicago Legal News, 38.
(2) Taylor v. Insurance Co., 14 Allen 353; See post page 47 and cases cited.
Over what Subject Matter a Receiver may be appointed.

Creditors bill:— In no class of cases has the aid of equity, by the appointment of a receiver, been more frequently invoked than in creditors suits. The property of the debtor equitably belongs to the creditor; and it is to prevent a disposition of the debtor's property during the litigation, that a receiver is appointed in this class of cases.

The right of the creditors to the property or fund in question having been ascertained, the court will proceed to distribute the same among them, according to the extent of their respective interests.

The former New York practice was to appoint a receiver in creditors suits after return of execution unsatisfied, almost as a matter of course. (1) This procedure has been practically superseded by supplementary proceedings under the code, which are more expeditious and equally available.

Dissolution of a partnership:— Here a receiver will

(1) Fitzburg v Everingham, 6 Paiges Ch. 29.
be appointed upon the application of any interested party. (1) But a receiver will not ordinarily be appointed to carry on partnership business, "nor will a dissolution be allowed unless the company is insolvent or fraud is shown or some other good ground exists." (2)

Mortgage foreclosure:— A receiver will only be appointed in this class of cases, when it can be shown that the mortgage premises are insufficient security for the satisfaction of the debt, and that the party personally liable for the debt is insolvent. (3)

Corporations:— The court of equity, in absence of statutory provisions, enters with extreme reluctance and only in cases of absolute necessity into the exercise of its power, to manage through a receiver, the complicated affairs of a corporation. It has been held in a leading English case, (4) that a receiver

(2) Martin v VanSchaik, 4 Paige's Ch. 479.
(3) Warner v Goveneur, 1 Barb. 568;
    Haas et al. v Chicago Building Society 89 Ill. 408;
    But see Corblegen v Hathaway, 11 N.J. Eq. 39,
    the leading New Jersey case upon this point.
(4) Gardner v London Chathan Andover R.R.Co.
    2 Law Reports (Ch. Div.) 201.
should not be appointed except in the course of proceedings, in which the result of the decree would be a virtual dissolution of the corporation. Under the former equity practice, simple misconduct or bad faith on the part of some or all of the trustees or officers, would not constitute sufficient ground for the appointment of a receiver.

But all this has been changed by legislative enactment in nearly every state, and in some states the opposite extreme seems to have been reached. Permanent receivers are appointed who are empowered to take the property out of the hands of the corporate managers, and to carry on the business of the corporation, in connection with the court, issue receivers certificates, which take priority over antecedent liens, and are otherwise clothed with extensive and dangerous powers.

"More than two-thirds of the great railroad corporations of our country have at some time during their
existence, been under the control of a receiver."

This condition of affairs has been brought about largely,
by the increasing tendency of the courts, to allow a
receiver to take possession of the corporate property
and conduct its business, in cases of financial em-
barrassment only.

The exercise of this great liberality has not
always been conducive to the best interests of cor-
porate creditors; and many protest by eminent author-
ities have been made against any further extension in
this direction. (1)

This extraordinary power should only be called
into activity, when it is indispensably necessary to
protect some clear right, which would otherwise be lost
or greatly endangered, and which cannot be saved or
protected in any other way. This rule should be equal-
ly applicable to every class of subject matter over
which courts of equity can exercise jurisdiction.

Joint Stock Associations:— The rules governing the ap-

(1) See dissenting opinion by Miller J. in Barton v
Barbour 14 Otto (U.S.) 126;
See also 21 Am. Law Review, 141.
Appointment of a receiver in cases effecting the average joint stock association are practically the same as those in partnership cases; but if the joint stock association has been incorporated, and has assumed the powers and liabilities of a corporation proper, then, the rules of appointment will conform more nearly to those existing in the case of a corporation.

In an action for specific performance:— A receiver may be appointed in this class of actions when it appears that the purchaser can be compelled to execute his contract, and that the circumstances of the case render such an appointment necessary. (1)

In an action for a divorce:— A receiver may in certain cases be appointed over the property of the husband, to enable the court to apply so much of the property as may be necessary to the support of the defendant during the litigation. (2)

In case of executors and administrators:— A receiver will be appointed in this class of cases when it can

(1) Boehein v Wood, 20 Wall. (U.S.) 650.
(2) Kirby v Kirby, 1 Paige's Ch. 261.
be clearly shown that there is eminent danger of their wasting or misapplying the assets, or that a portion of the trust fund will be lost through their misconduct or negligence. (1)

In case of trustees:— Under circumstances analogous to those just mentioned in the case of the executors and administrators, a receiver will be appointed over the property under the control of a trustee.

In case of infants and lunatics:— The court of chancery frequently interferes by the appointment of a receiver to protect the estate of an infant. (2)

So also in the case of a lunatic when proceedings have been commenced for the appointment of a commission. (3)

To secure the rents and profits:— A receiver may be appointed over real property for its better protection, and to secure the rents and profits pendente lite. (4)

In the case of joint tenants and tenants in common:— In rare instances equity will appoint a receiver over

(1) Middleton v Dodswell, 13 Veses Ch. 266; II Story's Equity Jurisprudence, Sec. 856.
(2) Matter of Kenton, 5 Binn. 613.
(3) Matter of Vanhorn, 7 Paige Ch. 246.
(4) High on Receivers, Sec. 553; Post v Door, 4 Ed. Ch. 412.
property involved in a litigation growing out of conflicting claims of joint tenants, or tenants in common.

In case of vendor and purchaser:— The court will grant a receiver in this class of cases, only when it appears that such summary proceedings are absolutely necessary to protect the rights of both parties in the cause.

In insolvency proceedings:— Here a receiver may be appointed almost as a matter of course irrespective of the nature of the controversy, whenever the court deems a receiver necessary to fully protect the rights of the litigating parties.

Thus I have briefly enumerated the principal subject matter over which a receiver may be appointed, and the general principles applicable to the same; but it must not be understood, that the appointment of a receiver is confined to these cases alone, for the appointment of a receiver is a matter resting entirely within the sound discretion of the court, and will always be governed by a consideration of the principles.
already mentioned and the equities which are involved in each particular case.

Who may be appointed.

The general, almost universal, rule requires that a receiver should be a disinterested party. To appoint a party who is interested in the property, or subject matter in litigation, would in most cases tend to defeat the very objects, for which a receiver should be appointed.

A receiver should be a person of the highest integrity, and of peculiar independence of character. He must be able to act with entire impartiality and must not be susceptible to any advances towards favoritism. Further he should be a person of large and varied business knowledge and experience. The amount of knowledge and ability required varies with the nature of the subject matter, over which the receiver is to be appointed; but in all cases it should be sufficient to
enable him to transact the business incumbent upon him, without the intervention of a third party.

A party occupying a fiduciary relation, or any relation incompatible with the character of a receiver, will not be appointed. (1) Thus it is that trustees and guardians will not be appointed over the property or fund under their control. An attorney in the cause has been held to be absolutely disqualified to hold his office. (2)

Neither should a party be appointed who has any interest, which in any way conflicts with the interest of the estate or fund in controversy; or who has at any time been guilty of fraud, or misconduct in connection with the same.

It is generally necessary that the person selected should be a resident of the state or jurisdiction in which the action is pending. This rule, however, has no application to a receiver appointed by a federal court. (3)

(1) Sykes v Hastings, 11 Vesey Ch. 363.
(2) Garland v Garland, 2 " 157.
   Byckman v Parkins, 5 Paige Ch. 548.
These general principles may be somewhat modified by the agreement of all the parties concerned, but a clear departure from them will rarely be sought for, and less frequently granted.

Time of Appointment.

Under the former practice, both in this country and in England, the court would not entertain an application for the appointment of a receiver until the defendant had appeared and answered. But great injustice and hardship often resulted from a strict adherence to this arbitrary rule; and courts of equity gradually relaxed the former practice, and even made departures from it, in cases of emergency, where delay would result in irreparable loss or great injustice to the party seeking relief. (1)

It may now be regarded as the prevailing practice for courts to appoint a receiver at any stage of the proceedings after the filing of the bill, upon suffic-

(1) West v Swan, 3 Ed. Ch. 420.
Clark v Higley, 1 Md. Ch. 70.
ient cause being shown. A receiver may also be ap-
pointed at the final hearing or even after, where the
relief sought is indispensably necessary for the pro-
tection of the parties in interest. (1)

Under the equity practice, a court will not be
justified in appointing a receiver, unless an action
has been commenced, save in the exceptional cases of
infants and lunatics previously mentioned. In some of
the states the time of appointment is regulated by stat-
ute; but little change from the old practice has taken
place.

Manner of Appointment.

By motion for order of appointment:— Such motion
should be addressed to the court, and should be based
upon affidavits showing the necessity for the relief
sought, unless the papers on which the moving party
seeks the relief are already on file in the case. (2)

Notice of this motion should be served upon all

(1) Hills v Moore, 15 Beaver 175.
(2) Hungerford v Cushing, 8 Wis. 320.
necessary and interested parties, and should state the object of the application, and upon what pleadings and papers, if any, the motion will be founded. (1) To justify departure from this established rule, requiring notice of application, the facts and circumstances rendering such summary proceedings necessary, must be fully set forth. (2) Only in extreme cases, where the delay which would follow from giving notice would be likely to result in a loss or diminution of the property to which the receivership relates or where irreparable injury would be sustained, will notice be dispensed with. Thus where the defendant has absconded, or is about to remove property from the state, no notice is necessary. (3) So if the defendant has voluntarily appeared, notice has held to have been waived. (4)

The affidavits upon which the plaintiff bases his motion should be clear and unequivocal, and not mere general allegations or expressions of opinion.

(1) Tibbals v. Sargeant, 14 N.J. Eq. 449.
(2) Verplanck v. Merchuntile Ins. Co. 2 Paiges Ch. 436
(3) High on Receivers, Sec. 117.
(4) Gibson v. Martin, 8 Paiges Ch. 471;
If fraud is alleged those specific acts constituting the alleged fraud must be stated. (1)

The object of notice is to give the defendant an opportunity to be heard in his defense, and he may appear at the hearing and present affidavits supporting his position, and tending to defeat the plaintiff's motion. (2)

At the time appointed, the court hears the affidavits which have been presented, and examines the pleadings which are on file in the case, if there be any, and from a consideration of the evidence thus submitted determines the propriety of granting the application. If the motion be denied the plaintiff can only obtain relief from such decree by presenting new affidavits which constitute sufficient ground to justify the court in sustaining his motion.

If the court grants the application for a receiver an order for his appointment should be drawn up, and should contain in general outline the principal

(2) Edwards on Receivers, 66.
powers and duties which are delegated to him, and a suf-
ficient description of the subject matter of the receive-
ership to enable the receiver to readily identify it. (1)
The order may also contain instructions in regard to the
management of the trust property; but no directions as
to its final disposition can properly be made until the
rendition of the final decree.

The court may draw up this order, or it may allow
one as submitted by the plaintiff's attorney, or one,
the terms of which have been agreed upon by the parties
in interest. (2) The latter practice would seem to
be the most equitable one, but under no circumstances,
will the court allow an order which contains provisions
that are contrary to public policy.

As soon as the order is secured it should be en-
tered with the clerk, and a copy of the same should be
served upon all interested parties. (3)

The court may appoint a suitable person to act
as receiver or it may refer the matter to a master in

(1) Crow v Wood, 18 Beavan 271.
(2) Whitney v Belden, 4 Paiges Ch. 139
(3) Edward on Receivers 67.
In the former case the court may name the receiver upon the hearing —— and where this is done notice of the appointment should be served with the order, and also upon the party appointed —— or it may reserve the appointment pending a settlement of the order by the agreement of the parties. (1)

The former New York practice, and the prevailing practice at the present time, in states having a separate equity system, is for the court to refer the matter of appointing a receiver to a master in chancery. The court may empower the master to appoint a receiver and take from him the necessary security, or it may simply empower him to report to the court the names of one or more suitable persons to act in that capacity, in which case his selection must be approved by the court. (2)

In either case the master should be provided with a certified copy of the order of reference. Some

(1) VanSant. Eq. Pr. Sec. 485.
authorities hold this to be absolutely necessary. (1)

The master usually proceeds to bring the interested parties together by means of the summons. This is simply a paper in the form of a notice, entitled in the cause and signed by the master, appointing a time and place for a hearing preliminary to the selection of a receiver. (2)

If the personal examination of any party summoned is desired, the summons should be underwritten by the master, setting forth the object of such attendance. (3)

In case the defendant makes default in appearing, a motion for an attachment may be made, and if the defendant does not then appear, the court will allow the attachment to issue. (4)

At the hearing, it is customary for the master to receive written proposals from any interested person, containing the name of the party whom they wish to act as receiver. If the defendant does not appear such proposals are usually confined to the moving party.

(1) Quackenbush v Leonard, 10 Paiges Ch. 18.
(3) "" "" "" "" "" "" 620.
(4) Edward on Receivers 71.
In the selection of a receiver the master should exercise sound discretion and appoint the person whom he considers best fitted to fill the place, irrespective of party recommendation or self solicitation. (1)

Frequently more than one receiver is appointed over the same subject matter, but their interests must be such that they will in no way conflict. This may be done when the duties involved in the performance of the trust, would be so great as to render it impracticable for one person to attempt to perform them; or where different courts have appointed different receivers over the same property.

When the master has selected a proper person to act as receiver, he should fix the amount of his bond, and see that sufficient and proper securities are given. (3)

The master should then make a report to the court, stating the proceedings which have been taken and the result obtained. (4) If the master has only been empowered to recommend some proper person to the court to

(1) Leaspinassee v Bell, 2 Jac. & W. 436.
(2)
(3) Edward on Receivers, 75.
(4) II Barb. Ch. Pr. 517
act as receiver, his selection must be approved by the court, and until such confirmation, the party appointed cannot legally enter into the performance of his duties. (1)

If either party is dissatisfied with the master's selection he cannot except to it; but must make a special application to the court, that the master review his decision. (2) This application may be made either by petition or by motion, if by petition, the petition should state the grounds of objection. (3) By an order to show cause:— This is an ex parte order and is granted upon motion by the plaintiff, and should be served upon all interested parties. It is in effect notice to such parties to appear at a certain time and place, and show cause why receiver should not be appointed.

Upon the appearance of the parties notified, substantially the same proceedings are taken as upon an ordinary motion, save that the burden is upon the defen-

(1) In the Matter of the Eagle Iron Works, 3 Paige Ch. 388.
(2) Brower v Brower, 2 Ed. Ch. 21.
(3) Thrape v Thrape, 12 Vesey Ch. 517;
   In the Matter of the Eagle Iron Works. supra.
unt to show why a receiver should not be appointed. For this purpose he may offer affidavits, which may be rebutted by counter affidavits on the part of the plaintiff. If the defendant shows to the satisfaction of the court, that the rights of the parties in interest can be fully protected without the appointment of a receiver; or that the appointment of a receiver will in no way add to their security, the application will be denied, otherwise it will be granted, in which case, the manner of his appointment will be the same as upon an ordinary motion. (1) The practice under the code.—This is in many respects similar to that formerly prevailing under the old chancery practice. (2) Indeed, in some respects, it is almost identical.

(1) See upon manner of appointment generally, II, Barb. Ch. Pr. 308-318; High on Receivers, sec. 82-118; Edward on Receivers, 64-95; Beech on Receivers, Sec. 71-75. (2) Wetter v Chlieper, 7 Abb. Pr. 92; Robinson v Hadley, 11 Beavan 614; Ireland v Nichols, 37 How. 222;
In general a receiver may be appointed at any stage of the proceedings, but application must be made by motion at a special term of the court. The court may grant the order and appoint a receiver at once, or it may refer the matter to a referee, who stands in the same relation to the court as the master formerly did.

The rules governing the appointment of receivers, except those which are specially provided for are laid down in the code of civil procedure, (1) and will be found, upon careful examination, not to vary materially from the old practice. (2)

Sections 1788 - 1789 provide for the appointment of a receiver in an action to dissolve a corporation and are in effect but an extension of the former practice in such cases.

Under the code a receiver appointed pendente lite is called a temporary receiver till after judgment is rendered; and though exempt from many of the duties

(1) Section 1716 - 1716, Code Civil Pro.
(2) For full discussion of this subject and review of authorities, see note in 10 Abb. N.C. 359; See also article in 28 Alb. Law Jour. 326;
" " " II, Wait's Practice, 202 - 272;
" " " I, VonSant Eq. Pr. 324 - 409.
and liabilities of a permanent receiver, yet he is held to a strict accountability by the court appointing him, for any departure from his prescribed powers and duties.

The court may also direct a judgment debtor to convey or deliver to the receiver, any property of which he may be the owner, in much the same manner as under the old chancery system. (1)

Security.

This has long been considered as one of the essential prerequisites, before a receiver can enter upon the performance of his duties. It is usually in the form of a bond or recognizance, with sufficient securities, for the faithful performances of his duties. The amount of this bond varies with the nature and value of the subject matter of the receivership.

Formerly security must always be given, except in cases where the parties themselves agreed upon a receiver, and also agreed to dispense with the usual

(1) Code of Civil Pro. Sec. 1877,
security. (1) But in New York the obligations of a receiver to give adequate security for the faithful performance of his trust is regarded as being founded upon the general practice of the courts of equity; and it is held to be within the power of the court to dispense with security, where it is plainly unnecessary. (2) Security, however, is seldom dispensed with, even in New York, the usual practice being for the court to require at least two sufficient sureties.

The sureties are generally approved by the court, unless other provisions are made in the order of appointment, when they may be appointed by the clerk of the court out of which the order issued. The bond upon being properly executed should be filed with the clerk, and until this is done, the receivers title and authority does not vest.

(1) Manners v Fruze, 11 Beaver, 36.
(2) High on Receivers, Sec. 120.
CHAPTER III.

POWERS OF A RECEIVER.

General Nature of.

Since a receiver is an officer of the court appointing him, and a representative of all parties, who may establish claims in the case, it follows that his powers independent of the court, are limited in extent, and confined almost exclusively to such as are necessarily implied by virtue of his position, or are conferred upon him by the course and practice of the court.

As a general proposition, it may be said, that a receiver can act only under the authority of the court; but as it would be incompatible with the dignity of the court, to be obliged to direct the performance of his every act, and superintend the execution of the same, it follows as a matter of course, that a receiver is vested with a considerable amount of discretion in the
discharge of his minor duties.

In the exercise of such discretion he should at all times endeavor to act in good faith, and in such a manner as not to prejudice the rights of any interested parties.

If at any time doubt arises as to the proper course to pursue, he should apply to the court for the requisite information. (1) If the powers relative to the execution of his trust are stated in the order appointing him, he should be careful not to exceed the prescribed limits. In brief, his authority is the authority of the court appointing him, and cannot be materially restricted or enlarged, even by the agreement of the parties at whose instance he was appointed.

Without Application to the Court.

Right to take possession:— A receiver upon being appointed may proceed at once to take possession of the property over which he is appointed, without

(1) People v Life Ins. Co. 79 N.Y. 267.
further order or leave of the court, if no opposition is offered by the party in possession. (1) In case the party in possession refuses to convey the property to the receiver, the receiver may apply to the court for an order compelling him to do so.

In New York it is held that "the receiver's title and right to possession vests back to the date of the original order for the appointment, although the proceedings may not be perfected till a later date; and that the receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment, are superior to those of a judgment creditor who levies upon the property, under his judgment during such interval." (2)

In no case is the receiver authorized to use force for any improper means to obtain possession of the property. In some states an assignment of the realty must be made to the receiver before his right of possession accrues; (3) but nearly all of the states,

(1) Parker v Browning, 8 Paige's Ch. 388.
(2) Stute v Sturges, 5 Abb. Pr. 428.
    Wilson v Wilson, 1 Barb. Ch. 592.
    Storm v Wadell, 2 Sandif. Ch. 494.
(3) Chautauqua County Bank v Hanley, 19 N.Y. 378.
he would be empowered to possess himself of the personality by virtue of his order of appointment. (1)

His possession once obtained, becomes the possession of the court, and will not be permitted to be disturbed without its consent. (2) This rule is thus stated by Swayne J.: "nor will the court permit the possession of the receiver to be disturbed by force, nor violence to be offered to his person, while in the discharge of his official duties. In such cases the court will vindicate its authority and if need be punish the offender by fine, imprisonment or contempt."(3)

This power should be exercised with the utmost caution, and only when the property sought to be taken possession of, is clearly a part of the subject matter of the receivership. If the receiver is uncertain, as to the identity of the subject matter, recourse should be had to the court to determine this question.

Management of the trust property:– A receiver likewise has some discretion in regard to the manage-

(3) Davis v. Gray, 16 Wall. (U.S.) 218.
ment of the property entrusted to his care. This discretion is limited almost exclusively to the minor and less important details in the performance of his duties; and arises either from the nature of the subject matter over which he is appointed, or is implied from the instructions of the court.

Though this discretion is allowed, the receiver is nevertheless amenable to the court for its proper exercise; and unless he employs a reasonable amount of business care and diligence, the court will hold him responsible for any loss of the trust funds which may result.

A receiver may make such repairs of the property under his control as are absolutely necessary for its preservation; but the court looks with suspicion upon any expenditures for this purpose, and if any question arises as to their necessity or propriety, the court may refer the matter to a master for investigation.
With the exceptions just noted, a receiver has little control over the trust property, and whenever questions arise whose decision would materially effect the interest of the party, it would be a gross violation of his trust, for him to act without application to the court.

Employing help: A receiver may employ such help as may be necessary to carry out the instructions of the court. (1) But he will not be allowed any expenses which he has incurred in employing held to perform, that which he, himself, might have done. (2)

A receiver may employ suitable counsel, when necessary, but he is prohibited from employing the attorney of either the plaintiff or defendant in the case, when he is acting adversely to any of the parties in the litigation. (3)

Protecting the trust property: It is the duty of a receiver to take all proper means to protect the property under his control, and the court will sustain any reasonable conduct on the part of the receiver.

(1) Taylor v Sweet, 40 Mich. 766.
(2) Carey v Long, 45 How. Pr. 504.
(3) Byck v Parkins, 5 Paige Ch. 545; The matter of Rob. Ainsley, Receiver 1 Ed. Ch. 576
which it deems necessary to accomplish this end. (1) This is especially true in cases where the property is threatened with sudden destruction, or where the delay incurred by application to the court would result in serious loss or diminution of the trust estate. As emergencies of this kind do not frequently arise, a receiver will seldom be called upon to act without express authority from the court.

Under the Direction of the Court.

This class embraces those powers which can only be exercised under the immediate supervision and control of the court. From the nature of a receiver's position and his intimate relation to the court, it will be readily seen, that this class of powers must be the most extensive and important which he is called upon to perform.

Continuing business:-- In absence of express instructions from the court, a receiver has no author-

(1) Iddings v Bruen, 4 Sandf. Ch. 415.
ity to continue the business of the party or corporation over whose property he has been appointed. The primary object for which a receiver is appointed is not to embark in business enterprise; and this will only be allowed when it will be subservient to the best interests of those beneficially entitled. (1)

Examples of this occur most frequently in the case of corporations and partnership. And a receiver has been duly authorized to continue such business, a court will allow him considerable latitude in the management of the same, provided no radical departure from the customary method of conducting the business is attempted.

Receivers are often given the control and management of extended lines of railroad; and when thus appointed often carry on for a considerable time very extensive business operations, employing a large number of servants, and performing for the public generally all the functions of a common carrier. So, in

(1) Jackson v. Deforest, 14 How. Pr. 81.
the case of partnerships, when it is deemed expedient by the court, that the business of the concern be continued, receivers are often entrusted with its control. But in these cases, as in others of a similar nature, the source of their power is the court itself, and they still remain accountable to it for the faithful discharge of their duties.

Making sales:— A receiver has no power to dispose of any portion of the property or fund under his control, without the consent of the court expressed or implied. Such power is usually conferred upon the receiver by direct order of the court, but it may arise by implication; as where a receiver is appointed over property of a perishable nature, or where he is empowered to engage in some business, the successful prosecution of which, requires the purchase and sale of commodities which form a part of the subject matter of the receivership.

A receiver will ordinarily be allowed to sell
personality and collect such outstanding debts, as are necessary to a final disposition of the property, without express directions of the court. (1) When a receiver has been authorized to sell realty, he may give a deed of the same, but such deed does not become absolute till ratified by the court. (2)

Frequently the court refuses to ratify a sale made by a receiver, when it appears that the consideration received is grossly inadequate, or where there are circumstances which raise a presumption of fraud or improper conduct in connection with the sale. The purchaser takes the property subject to this implied condition; and hence, the power of rescission which may be exercised by the court cannot be said in any way to "impair the obligation of contract." (3)

A receiver has no power to purchase at his own sale, in absence of statutory provisions, unless stipulations to that effect are agreed upon by the interested parties. (4) If the receiver procures the sale

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(1) Rockwell v Merwin, 8 Abb. Pr. (N.S) 380.
(2) Krontz v Northern Bank, 16 Wall. (U.S.) 96.
(3) Vandervelt v Receiver Little, 48 N.J. Eq. 669.
sale by fraud or imposition upon the court, an action
would lie to set aside the sale, even though relief
might be had upon motion before the court appointing
him. (1)

Paying out money:— The court is very reluctant
to allow a receiver to expend any of the funds belong-
ing to the trust property, without its consent, (2)
and only in cases of absolute necessity, when such ex-
penditures are small in amount, and are made in good
faith, and for the benefit of those ultimately entitl-
ed, will the court allow the receiver to be reimbursed
for such outlays. (3)

This rule has been long recognized and strictly
enforced, and the receiver who disregards it acts at
his peril, and will be liable for any loss which may
result, and will be subject to removal at the pleasure
of the court.

Nothing would be more productive of serious re-
sults, than for the court to allow a receiver free dis-

(1) Hackley v Draper, 60 N.Y. 88.
(2) 11 Story's Eq. Jurisprudence, 853 a.
(3) Condry v A.R.Co., 93 U.S. 352.
position of the trust funds. (1)

If at any time it becomes necessary to pay out money to meet legitimate expenses, the receiver should apply to the court for leave to do so. (1) Such application should be made in the form of a petition and should ordinarily be in writing, and should contain a statement of the amount to be expended, the specific object therefore, and the name or names of the party or parties to whom such money or property is to be delivered. The court will grant such a petition whenever, in the exercise of its discretion, it deems such expenditure necessary and proper.

Bringing and defending actions:— In the performance of his varied duties, a receiver is often called upon to bring or defend an action in relation to the subject matter under his charge. For this purpose a receiver occupies substantially the same position which was occupied by the original party, against whom or over whose estate he was appointed. (2)

(1) Hooper v Winston, 24 Ill. 454.
(2) High on Receivers, Sec. 205.
but since, a receiver is an officer of the court appointing him, he is powerless to institute proceedings, either at law or in equity, in regard to the sub-matter of the receivership, without express authority from the court. (1) When such authority has been conferred upon him, he must set forth in his pleadings, and prove that he was duly appointed receiver, and acts under the direction of the court. (2)

As to whether a receiver should sue in his own name, or in the name of the original party in whose favor the action accrued, depends upon the jurisdiction in which such action was brought. In New York, Louisiana, Tennessee, New Jersey, Georgia and Maine, a receiver may sue in his own name; but in Pennsylvania, Indiana, Illinois, Mississippi and Wisconsin, suit must be brought in the name of the original party. (3) In New York and some of the other states this question has been settled by legislation. (4)

Owing to the position which a receiver occupies,

(1) Story Eq. Jurisprudence, Sec. 323 a; Merritt v Lyon, 16 Wend. 410.
(2) Dayton v Connah, 16 How. Pr. 326.
(3) High on Receivers, Sec. 209 - 10, & cases cited.
(4) Nathan v Whitlock, 6 Paige Ch. 152.
it follows that any defense which may be set up by the original party, is equally available, when suit is brought by a receiver.

Upon the trial the usual practice and procedure obtains and nothing further need be stated upon this subject in this connection.

When an action is sought to be commenced against a receiver, an entirely different question is presented. As a general rule, a receiver cannot be sued without the consent of the court appointing him.
The courts are unanimously agreed upon this proposition in case of an attempt made to interfere with the actual possession of the property, which a receiver holds; but as to whether an independent action at law, may be maintained against a receiver, to enforce a liability which he has incurred by reason of his conduct, or by virtue of his relation to the trust property, is a question which has caused much discussion, and upon which the courts are not entirely in harmony.
The generally prevailing opinion, however, seems to be, that the prosecuting party must first obtain the consent of the court. (1)

S. D. Thompson, editor of the Central Law Journal, in commenting upon an Iowa case which had been decided contrary to this rule, said: "This decision is clearly against the might of authority. A receiver has been said to be the arm of the court appointing him and to admit that such can be sued in another court, without the consent of his own court, is virtually to admit that one co-ordinate court can sue another; a doctrine absurd as a legal proposition and mischievous in its consequences."

(1) Angel v Smith, 9 Vesey Ch. 335;
Taylor v Baldwin, 14 Abb. Pr. 166;
Robinson v Atlantic & Western R.R. Co. 66 Pa. St. 160;
Wieland v Sampson, 14 How. (U. S.) 65;
Farton v Barbour, 104 U. S.;
Jones v Brown, 9 S. E. 873;
Mellendy v Barbour, 73 Va. 544;

Contra:—
Allen v Central R.R. of O. 42 Ia. 683;
Kinney v Crocker, 18 Wis. 75;

Apparantly contra:—
Blumenthal v Brainerd, 38 Vt. 408;
Lyman v R.R. Co. 38 Vt. 167, (c. c. 10 Ct. 346);
Page v Smith, 99 Mass. 395;
Hills v Parker, 111 Mass. 508.
The proper procedure in such cases would seem to be, for the aggrieved party to petition the court for leave to sue the receiver, or to make a motion for an order of the court granting the relief sought.

(1) The court is exceedingly adverse to allow an action to be brought against its receiver, and it will usually grant the relief sought by means of an order whenever the same results can be obtained, and thus obviate the necessity of bringing an action.

Extra Territorial Powers.

As a general proposition, the jurisdiction of a receiver is concurrent with that of the court appointing him, but there are some well recognized exceptions to this general rule. For example: where a receiver is appointed over a corporation, which has been created by the combined legislation of several states and whose property extends into different jurisdictions and consists, as in the case of railroads, of one

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(1) Riggs v Whitney, 18 Abb. Pr. 388;
Wiswall v Sampson, 14 How. (U.S.) 65.
indivisible whole, a receiver appointed in one jurisdiction may exercise control over the entire line. (1) But this doctrine is repudiated by some of the states, (2) and the contrary doctrine has likewise been laid down in the federal courts. (3) The only way these cases can be reconciled is to hold that in the former line of cases, the exercise of such jurisdiction was not detrimental to the creditors of the judgment debtor, while in the latter line of cases it was. (4) Professor Hamilton, after an exhaustive discussion of this question embodying a careful review of the authorities, concluded that the following propositions were sustained by the weight of authority:

1. "Any court may appoint a receiver, over property without its jurisdiction as well as within.

2. "Property within the jurisdiction passes to a receiver per se and the receiver may assert his

(1) Funk v St John, 29 Barb. 585;
Ellis v B.& C.R.R. Co. 107 Mass. 1;
Wilmer v Atlantic & Hal. Co. 2 Woods 418.
(3) Both v Clark, 17 How. (U.S.) 322.
(4) Hurd v City of Elizabeth, 41 N.J.L. 1.
right against any court.

S. "Property outside of the jurisdiction passes by the appointment per se as against the debtor and his privies, but not against creditors of the debtor, residing in the foreign jurisdiction, where the property is situated, and the courts of such foreign jurisdiction will protect the rights of their own creditors to the property of the debtor, that is within this jurisdiction, as against a receiver appointed by another court.

4. "Where the receiver has once obtained rightful possession of the property, he was appointed to take charge of, he will not be deprived of its possession, even though he remove with it to a foreign jurisdiction." (1)

The doctrine just enunciated rests solely upon the comity of the courts, and subject to the modifications previously mentioned, receivers are usually allowed, through courtesy to exercise the same powers

(1) Article in 22 Am. Law Reg. (N.S.) 269.
in a foreign jurisdiction as in their own.

Statutory Powers.

The law of receivers has undergone a remarkable development during the last two or three decades. In many of the states statutory have been enacted, who objects have been to more accurately determine and fix the varied powers and liabilities of a receiver. As a result of this legislation the powers of receivers have in many cases been greatly enlarged and extended. Nothing has contributed more to produce this result, than the rapid growth of modern corporate enterprise, and the attempt of legislators to meet such growth by appropriate legislation, adapted to new exigencies which have constantly arises in this branch of the law.

It is not, however, a part of my theme to discuss the law applicable to statutory receivers, and I will simply refer the student who is interested in this subject, to the statute of his own state.
CHAPTER IV.

LIABILITIES OF A REceiver.

To the Court.

By virtue of the relation which a receiver occupies, it follows logically, that he is at all times amenable to the court which has appointed him, for the faithful performance of the duties which he assumes. To hold otherwise would be to reflect upon the court itself; for that court who does not impose upon its own officers the same liabilities which others under like circumstances are made to bear would indeed be recreant in the discharge of its duty.

Accordingly, we find that a receiver is protected by the court, only so far as is necessary to subserve the purpose for which he was appointed, and only when he is engaged in the lawful performance of his duties. Under these circumstances, if loss occurs without any
fault on the part of the receiver, the court will not require him to make such loss good. (1)

But if the receiver is acting beyond the scope of his implied authority, or derogation of some express instruction of the court, he will be held liable for any loss or depreciation of the fund entrusted to his care, though such loss was wholly unexpected and not likely to have happened from the course pursued, and although the conduct of the receiver was entirely free from improper motives. (2)

Receivers are to a certain extent governed by the same rules of conduct and subject to the same liabilities as trustees and others in a fiduciary relation. (3) They should never mingle the trust funds with their own, nor use or invest them for their own benefit. (4) If they do, they become liable for any profits which may accrue from the same, and in case they suffer the trust funds to be mingled with their own, the burden is upon them to show what part of the

(1) Union Bank Case, 37 N.J.Eq. 430.
(2) Matter of Staford, 11 Barb. 53.
(4) of the Guardian Saving Institution 78 N.Y. 408.
funds thus blended belongs to them, and the remainder will be regarded as belonging to the estate. (1)

A Receiver must at certain stated or regular periods, and whenever called upon by the court, render a full and satisfactory statement of his various receipts and expenditures in connection with the property under his control. (2) The court will never allow this report which is technically called an accounting to be dispensed with. And in nearly every case of this kind, where a receiver unreasonably delays to submit his report, the court may, in the exercise of its discretion, require him to pay interest upon any balance, which remains in his hands, from the time when such request was made until his accounting is finally rendered.

It is customary for the court to examine and pass upon the various items contained in a receivers report; and until finally approved by the court, a receiver is personally liable for any unauthorized ex-

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(1) Utica Ins. Co. v Lynch, 11 Paige Ch. 520.
(2) Kerr on Receivers, 233.
penditure which he has made. Further specific cases in which a receiver will become personally liable to the court appointing him, need not be given, since in most cases this can be determined by an application of the general principles already stated.

To third Parties.

In general: A receiver is not only responsible to the court appointing him, but he is also responsible to third parties whom his conduct affects, for the proper discharge of his duties. Indeed, the primary object which impels the court to so readily take cognizance of every act of misconduct on the part of a receiver, is to protect the rights and interests of the parties whom he is appointed to represent.

Though this liability to third parties accrues upon every breach of trust effecting their rights, the consent of the court must ordinarily be obtained before it can be enforced. The court itself may take
cognizance of the receiver's liability and determine it, or permit the aggrieved party to sue at law. (1) When the relief sought is clearly within the jurisdiction of the court of equity to grant, the better practice is to seek the aid of the court by petition. This method is much more economical and equally expeditious.

A receiver will not, however, be held personally liable for acts performed in his official capacity, but he will not be allowed to shield himself behind this screen, when acting beyond the scope of his authority, or in violation of his trust.

Contracts:— A contract entered into by a receiver without the consent of the court, expressed or implied, does not bind the estate, and the receiver becomes individually liable to the performance of the same. (2) But if the contract should be manifestly beneficial to the interested parties, the court will in most cases ratify it, and thus relieve the receiver from personal liability. (3)

(1) Klien v Jewett, 26 N.J. Eq. 476;
See cases cited, supra, page 45 & 46.
(2) Ryan v Rand, 20 Abb. N.C. 313.
(3) Krontz v Northern Bank, 16 Wall. 196.
In some of the states it has been held that a receiver will not be bound by the contracts of his predecessor; (1) but in most states, this question is settled by the court, by incorporating into the order appointing a new receiver, the terms upon which he is to assume control of the business.

A receiver cannot contract so as to bind the party or corporation, over whose property he was appointed. It usually happens, however, that upon the discharge of the receiver, and the restoration to the party or corporation of their property, that "the court prescribes conditions upon which the property may be taken back; and usually the party or corporation is required to assume and carry out such contracts in relation to the property as the receiver has, by order of the court entered into." (2)

If a party is induced to enter into a contract, relying upon the personal liability of the receiver, the receiver will not thereafter be allowed to show

(2) Chas. Fiske Beach Jr. in letter to writer.
that he was contracting in his official capacity, but will be responsible for the performance of the contract, since it was his duty to state in what capacity he contracted, at the time the contract was made.

Torts: Where the conduct of a receiver has been such as to make him liable to an action in tort, courts of equity will rarely take cognizance of the case, but will allow the injured party to resort at once to his remedy at law. It is somewhat questionable, whether equity would have jurisdiction in this class of cases, and the weight of authority seems to be that it would not. (1) Certainly if this jurisdiction does exist, it has seldom, if ever, been exercised.

From the moment of his appointment, a receiver is subject to peculiar liabilities. The Federal courts have even gone so far as to hold that a receiver who takes possession of property which is not included within his trust will be liable to an action.

of trespass, though acting in perfect good faith and with the intention of carrying out the instructions of the court. (1) A receiver will be liable for any negligence on his part, which causes any loss or diminution of the trust property, or results in personal injury. (2)

Whether a receiver is officially liable for the negligence of his employees, is a question of great importance. This question has been decided in the affirmative by a very large majority of the courts of this country. In Ohio, New Hampshire, Vermont, New Jersey, Iowa, and Massachusetts, and indeed in nearly every state where this question has arisen it has been held that a receiver occupies the same position which the party or corporation whose property has been confiscated formerly did, and this being the case, they are not entitled to any immunities from the ordinary liabilities of persons conducting such business, and are consequently liable to the same extent that the

(2) Kaiser v Keller, 21 Ia. 95.
original party or corporation would have been. (1) Though this line of reasoning is sound in principle, and is clearly sustained by weight of authority, the courts of New York have allowed themselves to be unwittingly led into an apparently contrary doctrine. In Cardot v Barney, (2) a case which has caused the profession no little amount of trouble, the court say: "A receiver who acts in no other capacity than as an officer of the court is not liable for an action of negligence causing the death of a passenger, where no personal neglect is imputed to him, either in the selection of agents, or in the performance of any duty."

That the court, in deciding this case, intended to hold that the trust funds or corporate property could not be reached through the medium of a receiver, and applied to the liquidation of just claims growing out of the negligence of a receiver's employees is not so evident; but this seems to be the conclusion of courts.

(1) Merde Administrators v Holbrook, 20 U.St.137;
Klien v Jewett, 26 N.J.Eq. 474;
R.R.Co. v Davis, 25 Ind. 583;
Pomentum v Brainerd, 38 Vt. 402;
Page Smith, 99 Mass. 396;
(2) 63 N.Y. 281.
and text book writer generally. Mr. High in his standard work on receivers, (1) in commenting upon Cardot v Barney, and an earlier New York case, (2) makes the entirely too broad, and somewhat misleading statement, that: "In view of these decisions, there would seem to be absolutely no remedy in New York to one sustaining loss or damage through the operation of a railroad by a receiver." Later he refers to Smith v Kain, (3) and another more recent case, (4) which he regards as modifying but not materially changing the doctrine promulgated in Cardot v Barney.

Mr. Beach, on the contrary, regards Smith v Kain as practically overruling Cardot v Barney. For myself, I must confess that I do not see that Smith v Kain directly overrules Cardot v Barney. The real point decided in Smith v Kain would seem to be: "that if a receiver leases and operates a road over which he has not been appointed he becomes liable even though the court consent to his so doing."

(1) High on Receivers, Sec. 395, b.
(3) 80 N.Y. 458.
(4) Woodruff v Erie R.R.Co. 98 N.Y. 609.
True there is any amount of dicta in this case, clearly showing the disapproval of the court to the ruling in Cardot v Barney, and a tendency of the court to break away from their former position; and there can be but little doubt that if this question came fairly before the courts of this state, "New York would be in line with other civilized communities upon this question." (1)

The liability of a receiver does not cease with the termination of the suit, pending which he was appointed, but continues until his final discharge by the court. After his discharge a receiver cannot be made personally liable for any acts done in his official capacity or otherwise, if they have been ratified by the court.

Neither will the party or corporation over whose property a receiver was appointed be subject to the liabilities which he has incurred during his office, unless they expressly agree to assume them. (2)

(1) But see Henderson v Walker, 55 Geo. 481.
(2) Davis v Duncan, 19 Fed. Rep. 477;
Mentz v Buffalo R.R. Co., 53 N.Y. 61;
R.R. Co. v Stringfellow, 44 Ark. 322;
Bell v Indianapolis R.R. Co., 53 Ind. 57;
Contra:
Sandford v People, 55 Ill. 558.
The rule upon this somewhat doubtful proposition is thus stated by Mr. Bonch: "It was formerly the rule in discharging the receiver of a railway, to impose upon the corporation, liability for the torts of the receiver and his employees, but, commencing with the Wabash case, a different rule has obtained, and now no intelligent counsel would allow an order to be entered imposing that liability upon the company. The theory upon which the more modern doctrine rests is this: there is no privity whatever between the person injured by the receiver's tort and the corporation, and there is therefore, no reason why the corporation should be made liable."

If a receiver incurs personal liabilities which he is unable to meet, the injured party may proceed against his sureties who are liable for his default to an amount equal to that specified in the receivers bond. In this event the surety is entitled to be reimbursed as far as may be out of any balance due the
receiver from the estate, as determined by the receiver's accounting.

Thus we see that a receiver's position does not avail him as a defense, when he has been guilty of any act which would ordinarily make him amenable to the injured party were he acting independently of the court.

Even this brief study of the law of receivers is sufficient to impress the careful student with the fact that the position of a receiver is one fraught with great responsibility, and calls for the exercise of the greatest amount of business skill and fidelity. In the discharge of his duties, a receiver will often encounter many obstacles and be subject to many and peculiar temptations which will require the highest integrity and independence of character to overcome. The interests which he is appointed to represent are various and conflicting, and often involved in doubt; yet he should under all circumstances be the equal representative of all interested parties: through all
the conflict and strife of litigation, he should remain impartial and unaffected by the advance of rival claimants, working with one great object in view and that to prove himself worthy of his trust.

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