

## Receivers

### FEDERAL PRACTICE — POWER OF CHANCERY RECEIVER TO MAINTAIN ACTION IN FOREIGN JURISDICTION — VENUE — EQUITY

According to the orthodox doctrine, a chancery receiver having no authority other than that which would arise from his appointment as such, cannot maintain an action in another jurisdiction. *Boothe v. Clark*, 17 How. Rep. (U.S.) 322, 15 L. Ed. 164 (1854). This view has been expounded and criticized in numerous articles and treatises. Wickersham, "Primary & Ancillary Receivers," 14 VA. L. REV. 599 (1928); First, "Extraterritorial Powers of Receivers," 27 ILL. L. REV. 492 (1932); Laughlin, "The Extraterritorial Powers of Receivers," 45 HAR. L. REV. 429 (1932); Rose, "Extraterritorial Actions by Receivers," 17 MINN. L. REV. 704, 708 (1933); Billig, "Corporate Reorganization," 17 MINN. L. REV. 237, 255 (1933). The doctrine has recently been qualified to the extent that objection to the capacity or manner of the foreign receiver's power to sue has been held to be a personal privilege, like that of individual capacity of parties plaintiff, and hence waived if not raised seasonably. *McCandless v. Furland*, 55 S. Ct. 42, 79 L. Ed. 32 (Nov. 1934). In this case a Pennsylvania federal receiver, on his own motion was appointed ancillary receiver in a New York federal court. The objection to his capacity to sue, however, was not raised until the receiver brought the principal action, and then not until on appeal.

Justice Brandeis in recognizing that the incapacity of the foreign receiver to sue in the Federal court may be waived, did not sanction the practice of some lower federal courts which permit the appointment of an ancillary receivership on application of the receiver himself. Cf. Gen. Ord. in Bankruptcy, sec. 51 (11 U.S.C.A. sec. 53). However, the Supreme Court expresses their view more clearly in *Mitchell v. Maurer*, 55 S. Ct. 162, (Dec. 1934), wherein Justice Brandeis seems to say that where original jurisdiction in the federal court depends on diverse citizenship, this diversity must be shown in the bill for ancillary appointment. In this case the original Delaware state receiver was a statutory successor, with title, so that the disability to sue on the ground of *Boothe v. Clark*, supra, is not in point.

In *Mitchell v. Maurer*, supra, Justice Brandeis recognizes the doctrine that, when original federal jurisdiction is based on diversity of citizenship, similar diversity need not be shown in ancillary or interven-

tion proceedings in the same district, but he expresses a strong doubt both as to whether the rule may be extended to such actions when brought in other districts, and as to whether a suit for the appointment of an ancillary receiver in another federal district could be classed as an ancillary suit within the meaning of this rule. *Cinn, etc., R. Co. v. Indianapolis, etc., R. Co.*, 270 U.S. 107, 46 S. Ct. 221, 70 L. Ed. 490 (1926); *Rouse v. Leitcher*, 156 U.S. 47, 49, 15 S. Ct. 266, 39 L. Ed. 341 (1895); *White v. Ewing*, 159 U.S. 36, 15 S. Ct. 1018, 40 L. Ed. 67 (1895). In *Raphael v. Trask*, 194 U.S. 272, 278, 24 S. Ct. 647, 48 L. Ed. 973 (1904), it is intimated that the jurisdiction of a federal court cannot be based upon an original suit in another federal court. It should be noticed that in the *Mitchell* case, supra, the original receiver was appointed in the Delaware state court so that what Justice Brandeis said as to necessity of diversity in an ancillary proceeding is dicta, but very strong dicta.

It would seem from these two cases, *McCandless v. Furland*, supra, and *Mitchell v. Maurer*, supra, that while the practice of some of the lower courts allowing ancillary appointment upon application of the original equity receiver, may continue, yet if such appointment is seasonably challenged by a creditor in an action against him, the right to sue will not be sustained. Capacity to sue, however, should be distinguished from jurisdictional questions, as the latter cannot be waived. *Mansfield, etc., R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

The federal provision which prohibits suits between citizens of different states to be brought elsewhere than in the district of the residence of either plaintiff or defendant (28 U.S.C.A. Sec. 112, Judicial Code Sec. 51, amended) can cause no practical difficulties in cases which involve consent receiverships because the requirement of venue is a privilege or personal exemption and may be waived by the defendant. *Matrazzo v. Hustis*, (D.C.N.Y. 1919) 256 Fed. 882; *Central Trust Co. v. McGeorge*, 151 U.S. 129, 14 S. Ct. 286, 38 L. Ed. 98 (1894). Such waiver is conclusive upon intervening creditors. *Central Trust Co. v. McGeorge*, supra; *Horne v. Pere Marquette R. Co.*, 151 Fed. 626 (1907); Hughes, "Federal Practice," Vol. 3, sec. 223, (p. 425). However, in a contested case it would be more difficult to satisfy the requirement by obtaining a resident in each state in which ancillary appointment is sought.

In *Mitchell v. Maurer*, supra, another situation arises which has vexed the courts for some time, but which it was not necessary to decide due to the ruling that the receiver was not properly appointed in the

ancillary proceeding. That is, whether or not the federal courts will apply their ordinary rules of comity in cases which involve concurrent jurisdictions. *Covell v. Hyman*, 111 U.S. 176, 182, 28 L. Ed. 390 (1884). In the *Mitchell* case, supra, there was a contest between a California State Insurance Commissioner and a federal ancillary receiver for the possession of California property of a foreign insurance company. If the federal receivership had been upheld the property in question would have been placed in the hands of the federal receiver, although in fact it was in the hands of the state official when the federal receiver was appointed. The ordinary rules of concurrent jurisdiction in such cases were laid down in *Harkin v. Brundage*, 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457 (1928), which held that when two suits have substantially the same purpose and jurisdictions of the courts are concurrent, the one whose jurisdiction and process are first invoked by the filing of the bill is entitled to possession of the property, but that when the remedies sought are dissimilar, the court which first actually takes possession will prevail. See *Moran v. Sturges*, 284 of 154 U.S., 14 S. Ct. 1019 (1894); Tracey, "Corporate Foreclosures," Chap. 7, sec. 74, 75, 76; Clark, "Receivers," Vol. 1, Chap. 9, sec. 288, 289, 290, 291.

The effect of this test would be to pit the federal and state machinery against each other in actions which involve the liquidation of insurance companies, banks, and building and loan associations. This unfortunate result, however, is avoided in three recent cases, in which Justice Stone while recognizing the rules of *Harkin v. Brundage*, supra, held that in the absence of a showing that the interest of the federal petitioners would not be adequately protected under the state procedure, the federal courts in exercise of their judicial discretion should relinquish their jurisdiction in favor of the administration by the state official, even though the federal courts could have established prior jurisdiction. *Pennsylvania v. Williams*, 55 S. Ct. 380 (Feb. 1935); *Penn. Gen. Casualty Co. v. Pennsylvania*, 55 S. Ct. 386 (Feb. 1935); *Gordon v. Ominsky*, 55 S. Ct. 391 (Feb. 1935); see also *Gordon v. Washington*, 55 S. Ct. 584 (April 1935).

While the Supreme Court has thus applied the doctrine of comity to avoid unseemly contests between federal and state courts, in *Clark v. Willard*, 55 S. Ct. 356 (Feb. 1935), it sanctions a refusal of comity in state court contests between foreign receivers who are vested with title, and local creditors. Consult note, 48 Har.L.Rev. 845 (1935). Receivers who are vested with title, either as statutory successors or as assignees, are recognized exceptions to the rule of *Boothe v. Clark*,

supra. *Relfe v. Rundle*, 103 U.S. 222, 26 L. Ed. 337 (1880); *Hawkins v. Glenn*, 131 U.S. 319, 9 S. Ct. 739 (1889). But these cases did not decide that the receiver's title should be recognized in other states to the detriment of local creditors.

In the *Clark* case, supra, Justice Cardozo upheld the rule that a foreign statutory successor may sue, but he also recognized that local state policy may refuse recognition of a foreign receiver's statutory title when such recognition would upset executions by local judgment creditors. A dictum in the *Clark* case, supra, has a substantial bearing on the rule of *Converse v. Hamilton*, 224 U.S. 243, 32 S. Ct. 415, 56 L. Ed. 479 (1912), which required that full faith and credit be given the judgment of a court of the domicile of a corporation establishing calls against stockholders double liability. In reference to this case, Justice Cardozo said that nothing herein affected the power of the state of the forum "to subject the proceeds of the cause of action or any other assets to the claims of local creditors."

*Clark v. Willard*, supra, recognizes the rule of the assignment cases that only through comity will statutory assignments be given extra-territorial recognition. It would seem, then, at best, that a privilege of foreign suit is of doubtful protection, either when there are creditors of the forum who may attach, or when the rule of the forum permits similar attachment by creditors from other states. Cf. Rose, "Extra-territorial Actions by Receivers," supra, 704, 732. Only in corporate reorganization cases may such preferential policies be avoided, by invoking the jurisdiction of sections 77 and 77B of the Bankruptcy Act, 11 U.S.C.A. 205 and 207. It has been suggested that the jurisdiction of the federal courts in all types of receiverships be extended to include the entire country. See Annual Report of Special Committee on Equity Receiverships of the Association of the Bar of the City of N. Y. 299-331 (1927); Billig, "Corporate Reorganization," supra, 237, 256; Rose, supra, 704, 731. Another remedy would be for the states to enact statutes allowing the ancillary receivers of foreign insolvent corporations to prevail over attaching creditors. See Ark. Dig. (1921) (Crawford-Moses) sec. 5886. Applied in *Standard Lumber Co. v. Henry*, 74 S.W. (2d) 226 (1934). Consult note, 48 HAR. L. REV. 835, 841 (1935).

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