ports this view, holding that the facts did not justify a reversal of the judgment of the trial court. However, since one of the attendants, as soon as he discovered the thief, attempted in vain to stop him, there is perhaps some justification for the court's decision.

ARCH. R. HICKS, JR.

RECEIVERS

APPOINTMENT WHEN CORPORATION CONSENTS—COLLATERAL ATTACK.

The First National Bank & Trust Co. of Hamilton, a creditor of the Fischer Hardware Co., took judgment upon a cognovit note against the company on March 2, 1932. After entry of judgment a motion was made for a receiver on the ground that execution would jeopardize the financial stability of the Hardware Co., the assets of which should be conserved for the benefit of general creditors. The company consented to such appointment.

September 21, 1933, the plaintiff, Michigan State Industries, filed suit against the Hardware Co. on a book account and recovered judgment, but execution was returned unsatisfied. Proceedings in aid, instituted November 13, 1933, were dismissed upon determination that the plaintiff was not entitled to subject property in the hands of the receiver to execution upon his judgment.

The Court of Appeals said that the appointment of the receiver was void, notwithstanding the defendant corporation's consent, there being no jurisdiction since there was an adequate remedy at law by levying execution. Being void, such appointment was open to collateral attack. But the plaintiff's delay in filing suit was held to amount to laches sufficient to give rise to estoppel, so that there was no error in dismissing the proceeding in aid of execution. *Michigan State Industries* v. *Fischer Hardware Co.*, 19 Ohio Abs. 184, 2 Ohio Op. 171, 197 N.E. 785 (1934).

In Ohio, the power to appoint receivers is conferred by statute. A receiver may be appointed: "4. After judgment, to dispose to property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment. . . . 6. In all other cases in which receivers heretofore have been appointed by the usages of equity." General Code, Sec. 11894.

The general assertion is often made that ordinarily a receiver will not be appointed at the instance of a mere simple contract creditor. The

creditor must first exhaust his remedies at law, chief among which is the recovery of judgment and return of execution unsatisfied. Clark on Receivers (2nd Ed.), Sec. 187; Pomeroy's Eq. Juris (4th Ed.), Vol. 4, Sec. 1546. See: *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 43 Sup. Ct. 454, 67 Law Ed. 763 (1923); *In re Richardson's Estate*, 294 Fed. 349 (1923). There is also dictum to this effect in Ohio, *Hoiles* v. *Watkins*, 117 Ohio St. 165, 157 N.E. 557, 61 A.L.R. 1203 (1927), but this ground of appointment has been expressly provided in part 4 of the code section, above, and part 6 recognizes that still broader grounds exist for the appointment of a receiver within the general equity jurisdiction of the courts.

Receivership is a remedy ancillary in nature, and the power of appointment can be invoked only in a pending suit brought to obtain relief which the court has power to grant. *Hoiles* v. *Watkins, ante; Shearer* v. *Union Mortgage Co.*, 28 Ohio App. 373, 162 N.E. 696 (1928). Appointment will be refused where the court can find another and less stringent means of protecting the rights of the parties. *Hoiles* v. *Watkins, ante.* A receive will not be appointed for the sole purpose of continuing the business of the defendant under the protection of the court and of preventing creditors from levying on the corporate property. Couse's Ohio Private Corporations (1924), Vol. 2, Page 2177. This is especially true where there is a clear indication of collusion, as where the plaintiff was secured to bring action by the directors and guaranteed against an expense. *Moss National Bank* v. *Lakeside Co.*, 19 O.C.C. 365, 10 Cir. Dec. 542 (1990).

However, it seems that where proper equitable grounds are shown, there are few cases in which the court has not jurisdiction to interfere, by appointment of a receiver, to preserve the property for the party entitled. A creditor may invoke the jurisdiction of an equity court to appoint a receiver where the officers of an insolvent corporation refuse nates in order to constitute the occupant a passenger and not a to take steps to preserve its property and pay its debts, *Cheney* v. *Cycle Co.*, 20 O.C.C. 19, 10 Cir. Dec. 717 (1900); where the debtor fails to fulfill a contract to pay off the indebtedness, *Miami Press* v. *Whitaker Paper Co.*, 47 Ohio App. 187, 191 N.E. 475, 16 Abs. 543, 40 O.L.R. 229 (1933), *Levinson* v. *Jaskulek*, 23 Ohio App. 134, 155 N.E. 405 (1926); or where it is necessary for the preservation of property pending litigation, *National Salt Co.* v. *Salt Co.*, 8 O.N.P. 325, 11 Ohio Dec. 348, 352 (1901). Where the corporation is making no effort to pay its debts, the court is authorized to appoint a receiver upon application of the surety. *Barbour* v. *National Exchange Bank*, 45 Ohio St.

133, 12 N.E. 5 (1887). A receiver will be appointed at the instance of stockholders where there is evidence of fraud and gross mismanagement by the directors *Phoenix Portland Cement Co.* v. *Shadrach*, 18 Ohio App. 264, 2 Ohio Abs. 124 (1924); *Heintzman* v. *Tenacity Loose-Leaf Metal Co.*, 17 Ohio Dec. (N.P.) 554, 4 O.L.R. 552 (1906); *Divine* v. *Auto Co.*, 9 O.N.P. (N.S.) 204, 20 Ohio Dec. 128 (1909).

The Court of Appeals in the principal case seems to have erred in its assumption that the lower court had no power to appoint a receiver under the facts presented. It is true that the court has no power to act, regardless of consent, where there is no jurisdiction of the subject matter by reason of a statute exempting homestead property, *Wehrle* v. *Wehrle*, 39 Ohio St. 365 (1883); or where the plaintiff has no judgment or lien and brings action in an insolvency court which has no jurisdiction to render a personal judgment for money, *Wiedemann Brewing Co.* v. *Herman*, 2 Ohio App. 260, 20 O.C.C. (N.S.) 187, 28 Cir. Dec. 362 (1913). But there is no evidence of such lack of jurisdiction in the principal case. The federal courts have adopted the rule that where the court has jurisdiction over the necessary parties and the subject matter, and power to afford the relief sought, the defense that the plaintiff has not exhausted his remedy at law or is not a judgment creditor may be waived, and when waived, as it may be by the corporation consenting to the appointment of a receiver, the case stands as though the objection had never existed. *In re Metropolitan Ry.*, 208 U.S. 90, 28 Sup. Ct. 219, 52 Law Ed. 403 (1908). See: *Shapiro* v. *Wilgus*, 287 U.S. 348, 53 Sup. Ct. 142, 77 Law Ed. 149 (1932); *In re Penny*, 10 Fed. Supp. 637 (1935). The Ohio courts agree that a receiver may be appointed on behalf of a simple contract creditor where it is necessary to conserve the assets of the corporation and the corporation consents. *Mason* v. *Wade Furnace Co.*, 29 O.N.P. (N.S.) 173 (1932); *Rapp* v. *Cincinnati Plastic Relief Co.*, 10 O.C.C. (N.S.) 575, 20 Cir. Dec. 433 (by implication, 1908); *Cincinnati Equipment Co.* v. *Degnan*, 184 Fed. 834 (C.C.A. Ohio, 1910). *Contra*, on slightly different facts: *Gott* v. *Shultze Co.*, 12 O.N.P. (N.S.) 206, 21 Ohio Dec. 604, 56 Bull. 397 (1911). Other states have adopted this view. *Ill. Refining Co.* v. *Ill. Coal Co.*, 130 Okl. 27, 264 Pac. 904 (1928); Clark on Receivers (2nd Ed.), sec. 188; Thompson on Corporations (2nd Ed.), Vol. 8, sec. 6337. This rule will be applied, although the corporation is solvent, where it appears that the assets would not be sufficient to pay all the creditors if left to a general welter of attachment. *Luhrig Colleries Co.* v. *Interstate Coal & Dock Co.*, 281 Fed. 265

(1922). Some states, such as Michigan, refuse to recognize consent receiverships. *National Lumberman's Bank* v. *Lake Shore Machinery Co.*, 260 Mich. 440, 245 N.W. 494 (1932), noted in 31 Mich. L.Rev. 1001 (1933).

In the principal case, the creditor bank had obtained a judgment lien before the receiver was appointed, and certainly was in no worse position than the ordinary simple contract creditor. A similar situation was presented in *Starr Mfg. Co.* v. *Underwood*, 12 Ohio Abs. 271, 37 O.L.R. 168 (1932), where the plaintiff creditor obtained judgment for $106 and the appointment of a receiver the same day, the defendant corporation consenting. The Court of Appeals refused to set the receivership aside, on the application of several dissatisfied stockholders.

An interesting picture of what the courts are actually doing is presented in Thomas Billig's volume, "Receiverships in Franklin County, Ohio," the report of a study made during 1927 and 1928. The defendant consented to the appointment of a receiver in 51 out of 69 cases instituted by judgment creditors, and 30 of the judgments resulted from the filing of cognovit notes. In most of these cases, the judgment, filing of petition for a receiver, and appointment were virtually simultaneous (See pages 29, 30 and 57). Mr. Billig also found 35 cases wherein the creditor had no judgment at the time of filing his petition for a receiver, and 19 of these were typical consent receiverships (See pages 75 and 80). Such practices constitute strong evidence of what amounts to the "usages of equity," under part 6 of Section 11894, General Code.

The facts of the principal case do not present grounds for a collateral attack on the appointment of a receiver. Where the court has power to appoint a receiver, the exercise of that power, however erroneous, cannot be collaterally attacked. *Barbour* v. *National Exchange Bank, ante; Egbert* v. *Third Ward Bldg. Ass'n.*, 8 O.N.P. 507, 9 Ohio Dec. (N.P.) 646 (1887); Cook on Corporations (8th Ed.), Vol. 5, Page 3934. See *Clarke* v. *Thomas*, 34 Ohio St. 46, 58 (1877); *Wehrle* v. *Wehrle, ante; Grant* v. *Leach*, 280 U.S. 351, 50 Sup. Ct. 107, 74 Law Ed. (1930). The appointment of a receiver by consent of the president of the defendant corporation on the ground of insolvency, is not open to collateral attack on showing that the corporation was in fact solvent and the president had no authority to consent. *Gum Co.* v. *Zimmerman*, 240 Fed. 637 (C.C.A. Ohio, 1917). As stated in *Superior Oil Corp.* v. *Matlock*, 47 Fed. (2nd) 993 (1931), the fact that a creditor has not reduced his claim to judgment does not go to jurisdiction in any event. The same would be true of levying execution.

The court's error in the principal case was in denying the existence of the power to appoint a receiver. By injecting the estoppel argument,

the court in fact upheld the appointment, and this result is in accord with the views expressed above and the evident tendency of the Ohio decisions, as well as the actual practice.

EDWIN R. TEPLE.

SET-OFF AND COUNTERCLAIM

RIGHT OF SET-OFF BETWEEN BANKER AND DEPOSITOR.

In *H. & G. Coleman, Inc., et al.* v. *Winters National Bank & Tr. Co.*, 48 Ohio App. 98, 192 N.E. 478, 16 Abs. 415 (1934), the Union Trust Co. of Dayton under a written contract leased to the defendants certain offices in the Union Tr. Co. Bldg. for a term of five years commencing May 1, 1931. The rent was payable in monthly installments. The Union Tr. Co. became insolvent, and on October 1, 1931, the Superintendent of Banks took possession of the property and sold and assigned all right and interests therein to the plaintiff, Winters Bank. At the time of the insolvency the defendant, Coleman, Inc., had a large deposit in the bank, which he seeks to set off against the rent which had accrued from the time that the Superintendent of Banks took charge to the date of the suit and for which the plaintiff bank here sues. The court denied the set-off.

The courts have often said that the relationship between the bank and the depositor is that of debtor and creditor. *Shaw* v. *Bauman*, 34 Ohio St. 25 (1877), *Cincinnati etc. Co.* v. *Metrop. Nat. Bank*, 54 Ohio St. 60, 42 N.E. 700 (1896); *Blake* v. *Hamilton Dime Savings Bank*, 79 Ohio St. 189, 20 L.R.A. (N.S.) 290 (1908) *Smith* v. *Fuller*, 86 Ohio St. 57, 99 N.E. 214 (1912); *Cleveland Tr. Co.* v. *Scobie*, 114 Ohio St. 241, 48 A.L.R. 182 (1926); *Guaranty Tr. Co.* v. *State*, 36 Ohio App. 45, 172 N.E. 674 (1931). And in Ohio the reciprocal rights of set-off, both legal and equitable, exist between a bank and its customers, with the same general force and effect as between debtors and creditors generally. *Smith* v. *Fulton*, 31 N.P. (N.S.) 49 (1933).

We have a situation for the applicability of legal set-off when a debtor-creditor relationship exists, and mutual and matured debts exist as against each other. See Sec. 11319 and 11321, G.C. It is necessary that the claims of both parties be matured and that the demands be in the same right and capacity, or as it is ordinarily expressed, that there be mutuality of time and parties. *Andrews* v. *State*, 124 Ohio St. 348, 178 N.E. 581 (1931); *Shoneberg* v. *Platt*, 36 Ohio App. 118, 172 N.E. 685 (1931). Hence, in law, a debt not yet due and payable may not