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CLAIMS PROVABLE IN RECEIVERSHIP PROCEEDINGS.

Although the power of the English Court of Chancery to appoint receivers is "one of the oldest remedies" of that Court and although some of the most important questions arising in the whole field of commercial law concern the liquidation of insolvent corporations by receivers, many portions of the law of receivers remain curiously unsettled. This is particularly so as to the question of claims provable against the assets in the hands of a receiver. Thus in Connecticut the Aetna Indemnity Company has been in process of liquidation by receivers since early in 1911, but it is only now that the law has been partially settled by two recent decisions in these proceedings: Bashford-Burnmister Company v. Aetna Indemnity Company (1919, Conn.) 105 Atl. 470; Husbands v. Aetna Indemnity Company (1919, Conn.) 105 Atl. 480.2

1 Giffard, V. C. in Hopkins v. Worcester, etc. Canal Co. (1868) L. R. 6 Eq. 437, 447; 1 Clark, Receivers (1918) sec. 4.
2 For complete statement of facts, see Recent Case Notes, infra. In addition to the points herein discussed, other interesting questions arose. Thus the claimants were held to have been excused from presenting their claims within the time limited by the court by reason of the fact that the receivers, by court authority, had contested in foreign jurisdictions the suits on the claims there pending.
These cases deal with two very important questions: (1) within what time must claims mature in order to be provable in the receivership proceedings and share in the dividend from the assets held by the receiver? and (2) what constitutes a matured claim as distinguished from a contingent claim?

The rules recently announced in New York have influenced the course of decisions in Connecticut. In the first of a series of cases the New York Court of Appeals held that claims, to share in the dividend, must have matured at the time of the commencement of the action in which the receiver is appointed; and that a claim against a surety on a bond given in substitution of an attachment in a suit where judgment was not obtained until after the receiver's appointment, was contingent and could not share in the dividend. Next it held, though with a vigorous dissenting opinion, that claims under the United States Statute, of unpaid materialmen against the surety on the bond of the contractor for government works and improvements, were contingent, judgment not having been secured prior to the receivership in the federal court specified in the statute.

Subsequent to these decisions the lower courts in Connecticut adopted the New York rule for the Aetna Receivership, and this rule was applied against many claims in this receivership, until it has now been at least partially set aside by the principal cases above referred to. The New York court has meanwhile modified its position very materially in holding that materialmen under this same federal statute might share in the dividend where they had instituted suit in the federal court prior to the receivership, although such suit had not gone to judgment.

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*People v. Metropolitan Surety Co. (Matter of Fleet v. Yaeger) (1912) 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1912D 1180. The decision that the claim was contingent until judgment was obtained in the suit in which the bond was substituted for the attachment is obviously correct. Judgment was necessary to settle the question whether there would be any claim.

*People v. Metropolitan Surety Co. (Matter of Smith Co. v. Yaeger) (1914) 211 N. Y. 107, 105 N. E. 99, three judges dissenting. The Act of Congress of August 13, 1894, ch. 280, amended by Act of February 24, 1905, ch. 778, 33 Stat. L. 811 (U. S. Comp. St. 1916, sec. 6923), provides that a contractor on government works shall give the usual surety bond with the additional obligation that he shall promptly pay all persons supplying labor or materials in the prosecution of the work. The Act then provides for suit on this bond by such materialmen, stating that the suit shall be brought in the federal court for the district in which the contract was to be performed "and not elsewhere." The government may bring suit within six months from the date of completion of the contract, during which period no suit may be instituted by materialmen, though they may intervene in any suit brought by the government. Only one action is to be brought, all other claimants intervening in that action.

*Matter of Empire State Surety Co. (1915) 216 N. Y. 273, 110 N. E. 610. Two of the three judges who dissented here were with the majority of the court in the case referred to in note 4, supra, but the complexion of the court had changed in the meantime. The court attempts to distinguish the previous decision on the ground that here claimants had instituted suit in the federal
The principal cases, which are decisions in favor of claimants, do not definitely settle the first question, namely within what time claims must mature in order to share in the dividend. They seem to tend toward the New York rule applied in the trial court and urged by the receiver, inasmuch as they state the rule that claims must have matured prior to the institution of receivership proceedings, but hold that the claims in question had so matured. At most, the cases are only dicta on this point and in the absence of any discussion it may still be considered open in Connecticut. The point deserves careful consideration. While the New York Courts state the rule generally, it may there be rested on the New York Statute.7 The bankruptcy rule is the same, but there likewise it follows from the wording of the Bankruptcy Act.8 It has, however, been applied generally in many cases.9 For a time it appeared to be the usual rule, but seems now to be losing in favor, due in large measure to the forceful opinion of Judge Noyes for the Circuit Court of Appeals for the Second Circuit, in the New York City Railway Receivership.10 Only recently the Supreme Court of the

court before the receivership, whereas in the previous decision no suit had been, or could have been, instituted, six months not having elapsed since the completion of the work. It is submitted that there is no real ground of distinction between the cases. Either the form of remedy under the Statute is so far part of the right created that the claim is contingent until judgment is obtained, or right and remedy are distinct and the claim matures when the default or breach of bond occurs. On the New York rule see also Matter of Empire State Surety Company (1915) 214 N. Y. 553, 108 N. E. 825.

7 So also in Bridgeport v. Aeina Indemnity Co. (1916) 91 Conn. 197, 99 Atl. 566. Cf. however, Wells v. Hartford Manilla Co. (1903) 76 Conn. 27, 40, 55 Atl. 599.

8 Art. VI of General Corporation Law of N. Y. An order is passed sequestrating the property of the corporation and dissolving the corporation. The distribution takes place first among the creditors whose claims represent a fixed liability at the time of the commencement of the action and the order of sequestration. People v. Metropolitan Surety Co. (1916, N. Y.) 171 App. Div. 15, 156 N. Y. Supp. 1027, 1130.

9 Sec. 63 of the Bankruptcy Act; Re Pettingill (1903, D. Mass.) 137 Fed. 143, 146; Re Neff (1907, C. C. A. 6th) 137 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; and cases cited notes 10 and 11 infra.


11 Pennsylvania Steel Co. v. New York City Ry. (1912, C. C. A. 2d) 198 Fed. 721, 736. See page 741 of 198 Fed.: "It is not a light thing for a Chancery Court acting without statutory direction to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it." The court points out that this is not inconsistent with the rule of cases like Lippitt v. Thames Loan & Trust Co. (1914) 88 Conn. 185, 206, 90 Atl. 369, that no interest is allowed upon claims after the appointment of a receiver.
United States, speaking through Mr. Justice Holmes, has approved Judge Noyes' opinion and held that receivers, in the absence of statutory law, have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude a claim maturing within a reasonable time before distribution can be made.\textsuperscript{11} Here claims which matured within the period allowed by the court for the filing of claims were permitted to share in the dividend. Other cases have suggested other and later periods within which claims should mature to share in the dividend, notably within the period to the order declaring the dividend, or within a period limited by special order of court.\textsuperscript{12}

Advocates of the stricter rule say that theoretically the division of the assets is made as of the date of the institution of proceedings. But this is not an argument, and actually division is never made then and is usually not made for some years thereafter. The entire question is one of policy, not of logic; the real argument for the stricter rule is that it is one of convenience, that a point of rest must be reached at some time in order that the affairs of the insolvent corporation may be wound up and its assets distributed, or else such proceedings can never terminate, and that in order to hasten this time the period should be set as far in advance as possible. In any event, so it is contended, some deserving creditors must suffer for the benefit of the many, and this early date is as fair as any which can be selected and is the most desirable date from the administrative standpoint. But the difficulty is that the date of institution of proceedings is not in the control of the court, and, if not fixed by chance, may be fixed by the acts or connivance of interested parties, either creditors or the debtor,—the parties litigant—who thus juggle with the contractual relations of those claimants whose contracts are still executory. Contractual relations should not be fixed in such a haphazard manner.\textsuperscript{13} If they must be interfered with at all by a court of equity, they should be fixed directly by the court by its own order and in such manner as will make for as little interference as is consistent with due expedition in liquidating the property under the court's control. It is even doubtful if there would be very great delay in settlement if the time when the dividend is declared is to be taken as the point of rest, but certainly there will be


\textsuperscript{13} It may be said that as judgment may still be obtained against the debtor, contractual relations are not interfered with. But the judgment is of no value if the receiver holds all the debtor's assets. It may be that the primary relations resulting from the contract are not interfered with. But the secondary relations which concern the enforcement of any judgment dealing with these primary relations are interfered with.
none if the point chosen is that of the time within which claims must be filed. As the court will, for good cause shown, extend the time for presenting claims so as to prevent all injustice, it seems eminently fair to take this as the point of rest. The stricter rule does shut out, without statutory authority, many claims which, in all fairness, should share in the dividend, without thereby hastening settlement of the estate. The only gain under this rule is an increase in dividend to certain claimants at the expense of others fully as deserving. This is a result which ought not to appeal to a court of equity.

The Connecticut court has, however, adopted an eminently fair rule as to what are matured claims. In the first case under discussion the court held that unpaid materialmen might, under the United States Statute above referred to, share in the dividend to be paid by the receivers of the surety on the contractor’s bond, although judgment was not obtained in the federal court until after the receiver’s appointment in the state court. In the second case, where a principal in an indemnity bond was in default prior to the receivership of the surety, but the amount was not ascertained until judgment was thereafter entered in a foreign jurisdiction, it was held that the claim was not contingent, the court pointing out the well settled distinction between claims which are really contingent and claims which have matured, but where the amount of damages is unliquidated.

It is suggested that in reaching its decision in the first case the court made more difficulty out of the situation than was necessary. The court refers to the usual rule that a court controlling receivership proceedings may decide whether it shall determine for itself all claims of or against a receiver, or will allow them to be litigated elsewhere, but then states that this rule must give away in this case to the express provisions of the Act of Congress creating the right and the remedy and definitely naming the court, i.e. the federal court, in which the remedy must be pursued. It therefore holds that the trial court was

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18 In Buzzell v. Aetna Indemnity Co. (1917) 91 Conn. 359, 100 Atl. 32, the court held the matter of extension of time to be a question of discretion. For liberal practice in extending the time for presenting claims to a receiver, see London & S. & F. Bank v. Willamette Steam Mill & M. Co. (1897, C. C. S. D. Cal.) 80 Fed. 226; Grinnell v. Merchants Insurance Co. (1863, Ch.) 16 N. J. Eq. 283; Patterson v. Patterson & Brothers (1897, Ch.) 55 N. J. Eq. 604, 38 Atl. 205; Wall v. Young (1895, Ch.) 54 N. J. Eq. 24, 33 Atl. 526; Richter v. Merchants Natl. Bank (1866) 65 Minn. 237, 67 N. W. 995; Taylor v. Moore (1897) 64 Ark. 23, 49 S. W. 258; Bank of Washington v. Creditors (1877) 80 N. C. 9; McNeal Pipe & Foundry Co. v. Wolman (1894) 114 N. C. 178, 19 S. E. 109; Eddy, Petitioner (1887) 15 R. I. 474, 8 Atl. 694.

19 See note 4, supra.

powerless to determine the validity and amount of the liabilities of the surety under this bond, and that the Congressional Act displaces pro tante the jurisdiction of the court appointing the receiver, though the judgment itself does not affect the assets in the hands of the receiver until it is presented to the court of the receivership and the judgment creditor has intervened in the receivership action.

Obviously the receiver’s assets are not affected by the judgment until it is proved in the receivership proceedings.\(^\text{17}\) Is such proof only a matter of form, and must the court of the receivership accept the judgment of the federal court? The decision seems so to hold. If the remedy under the Statute is so far a part of the right created by the Statute as this, it would seem they are altogether inseparable, so that until the remedy is followed, there is no right; or in other words, any claim under the statute remains contingent until judgment is obtained.\(^\text{18}\) Under the equitable rule allowing claims to mature after the institution of the receivership proceedings, such claim would still not necessarily be barred from sharing in the dividend. But is not the Connecticut court, under its own construction of the Federal Act, in reality here allowing a claim which was contingent at the date of the receivership?

But it is submitted that the true construction of the Federal Act is that the requirement as to the place of suit is merely a restriction on the remedy,—on the adjective relations, as distinguished from the substantive relations, arising under the Statute—which a court of equity in settling the affairs of an insolvent corporation need not require.\(^\text{19}\) A court of equity which has taken possession of the affairs of a corporation for purposes of liquidation should, for reasons of administrative convenience at least, have the power, as it admittedly has in all ordinary cases, to decide the manner and place where claims shall be adjusted. Why should it not have that power in this case? Is it so hampered that it cannot recognize statutory causes of action, only judgments?\(^\text{20}\) It is submitted that the court of the receivership not only may, but should, recognize statutory causes of action, though in this extraordinary proceeding it should not be hampered by the restrict-


\(^{18}\) This was the theory of the court in \textit{People v. Metropolitan Surety Co.} (1914) 211 N. Y. 107, 105 N. E. 99; \textit{supra}, note 4.

\(^{19}\) This was the theory of the dissenting judges in \textit{People v. Metropolitan Surety Co.}, \textit{supra}, note 4: “There is a vital distinction between a condition of liability and a condition of the enforcement of that liability.”

\(^{20}\) Compare the decisions of which \textit{Flash v. Connecticut} (1883) 109 U. S. 371, 3 Sup. Ct. 263, is an example, that where the statutory liability of one is subject to the condition precedent of an unsatisfied judgment against another, performance of this condition is rendered unnecessary by the other’s bankruptcy. In \textit{Blair v. St. Louis H. & K. R.} (1884, C. C. E. D. Mo.) 19 Fed. 861 the court of the receivership permitted persons claiming statutory liens to file them with the receiver with the same force and effect as if filed respectively in the state courts.
tions placed upon the enforcement of such causes by means of suit in ordinary litigation. In making its equitable distribution it should recognize substantive relations, whether arising under statute or otherwise, while the manner in which it is proceeding would make it unnecessary that it follow restrictions on adjective relations.

This discussion leads directly to the question whether claims founded on executory contracts of the insolvent,21 unfulfilled by the receiver, are provable. Clearly a receiver acting for the benefit of all creditors may find an executory contract so burdensome that he should not carry it out. May he refuse to complete it so that the obligee is without redress against the insolvent's property? Many cases so hold.22 In a leading case23 the Connecticut Supreme Court of Errors has urged that the “privilege”24 of the receiver to refuse to carry out a burdensome contract would be a barren privilege if the claimant could then prove his claim for the breach. Yet his power of refusal may even then not be entirely barren; and as a matter of equity and fair dealing why should he have a privilege of refusal which will deprive the obligee of his contract merely to enrich other creditors? Moreover, by what law does a court of equity obtain authority thus in reality, if not in form, to impair the obligation of contracts?25 It is submitted that as a matter of justice, as well as law, the individual should not be sacrificed to add a few dollars to the dividend of the many.26

21 The word “insolvent” is used advisedly, since no dispute as to liability arises if the estate ultimately proves solvent or more than sufficient to pay other creditors. See Wells v. Hartford Manilla Co., note 6, supra; cf. note 13, supra.


24 “Privilege” is hardly the correct term, inasmuch as the very question for decision by the court was whether the receiver had a privilege. The expression should have been “power” here. The court does ultimately hold that there is a privilege. See Hofeld, Fundamental Legal Conceptions (1913) 23 Yale Law Journal, 1; (1917) 26 ibid. 710; Corbin, Offer and Acceptance, etc. (1917) 26 ibid. 186 ff.

25 Cf. note 13, supra.

It is held under the Bankruptcy Act that the appointment of a receiver over a corporation by a state court constitutes a breach of the corporation's executory contracts, so that the obligees under such contracts may prove their claims against the corporation if it later goes into bankruptcy. This seems entirely proper and would lead to this: that where the receiver may repudiate executory contracts of the insolvent corporation over which he is receiver, these obligees should thereafter, where permitted by the Bankruptcy Act, take measures to force the corporation into bankruptcy and thus share in the corporation's assets. In other words, this rule would naturally and properly have the effect of ousting the state court of jurisdiction.

It would seem that the true end to be sought in the settlement of an estate by receivers is the distribution of the assets, so far as consistent with a reasonably prompt settlement, among all those who have actual claims against the insolvent, and that it is not to shut out as many of such creditors as possible in order that the remaining creditors should receive an increased dividend. Hence the principal cases are commendable as tending towards such equitable distribution.

**EFFECT OF WAR ON BUSINESS ASSOCIATIONS**

A recent decision of the House of Lords, *Rodrigue v. Speyer Brothers* (1918) 119 L. T. Rep. 409, raises a new aspect of the rule denying non-resident alien enemies the privilege of suing in municipal courts during the war. In that case, a partnership of six persons, of whom five were British and one a German residing in Germany—the partnership on the outbreak of the war being thereby dissolved—brought an action in the liquidation proceedings to recover a pre-war debt due the firm. All the partners being joined as co-plaintiffs, the

Hardy (1890) 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17. Thus in Spader v. Mural Dec. Mfg. Co., supra, it is said by the court: "Natural justice demands that those who suffered from breaches of contract should be included in the distribution, even though the breaches and consequent damages follow the insolvency." Cf. also *Tiffen Glass Co. v. Stoehr* (1896) 54 Ohio St. 157, 43 N. E. 275; *Yolland's Case* (1857, Wood, V. C.) L. R. 4 Eq. 350; *Ex parte Clark* (1869, James, V. C.) L. R. 7 Eq. 550; *Ex parte Logan* (1870, Romilly, M. R.) L. R. 9 Eq. 149; *In re Dale & Plant, Ltd.* (1889, Kay, J.) L. R. 43 Ch. D. 235; *In re Newdigate Col. Ltd.* (1912) 1 Ch. 468. Some of the cases attempt to distinguish between voluntary and involuntary receiverships, basing the distinction on the point whether or not the corporation admitted insolvency and joined in the prayer for the appointment of a receiver. It is then suggested that such claims are provable when the receivership is voluntary and not when it is involuntary. There seems to be no sound reason for this distinction. *In re Ross & Son, Inc.* (1915, Del. Ch.) 95 Atl. 311, 314.

In *re Mullings Clothing Co.* (1916, C. C. A. 2d) 238 Fed. 58.

See *People ex rel Attorney General v. Security Life Ins. Co.* (1879) 79 N. Y. 267, 271, that the receiver is not to advocate the cause of one claimant against another.