

PROBLEMS IN FEDERAL "RECEIVERSHIP" JURISDICTION*

II.

In the portion of this study which appeared in the preceding issue of this Review the problems revolving about friendly federal receiverships were discussed. Of equal importance are the questions relating to the applicability of state receivership statutes in the federal courts.

A.

May state statutes which enlarge the jurisdiction of equity courts to appoint receivers be invoked in the federal courts? Section 65 of the New Jersey Corporation Act¹ is a typical receivership statute² and permits simple contract creditors and stockholders to bring suits for the appointment of receivers to wind up corporate affairs.

Insofar as it permits simple contract creditors to maintain suits without the corporation's consent it goes beyond the general federal equity rule.³ Whether the authority it confers upon stockholders also goes beyond the general equity powers of the federal courts is uncertain. Although many early federal cases refused to entertain stockholders' bills⁴ for the appointment of receivers to wind up corporate affairs,⁵ the later tendency is to

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¹P.L. 1896 p. 298, 1 C.S. 1640 last amended in P.L. 1931 c. 221 p. 545. See *Kessler v. Necker*, 258 Fed. 654 (D.N.J. 1919).

²See *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1923).

³*Hollins v. Brierfeld Coal & Iron Co.*, 150 U.S. 371 (1893); *Felice Perelli Canning Co. v. Certified Food Stores*, 15 F(2d) 891 (D.N.Y. 1926).

⁴In *Burnrite Coal Briquette Co. v. Riggs*, 275 U.S. 208 (1926), the court stated that the federal courts have jurisdiction to appoint at least temporary receivers, upon stockholders' bills alleging gross fraud and mismanagement. Compare *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. 710 (D.Pa. 1905); *Carson v. Allegany Window Glass Co.*, 189 Fed. 791 (D.Del. 1911); *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. 338 (C.C.D.N.C. 1900). But see *Edward v. Bay State Gas Co. of Del.*, 91 Fed. 942 (D.Del. 1898); *Zuber v. Mining Co.*, 180 Fed. 625 (D.Me 1910).

⁵*Republican Mountain Silver Mines v. Brown*, 58 Fed. 644 (C.C.A.8th, 1893); *Sidway v. Missouri Land & Live Stock Co.*, 101 Fed. 481 (C.C.D.Mo. 1900); *Pearce v. Sutherland*, 164 Fed. 609 (C.C.A.9th, 1908); *Maguire v. Mortgage Co.*, 203 Fed. 858 (C.C.A.2d, 1915). See also *Taylor v. Decatur Mineral & Land Co.*, 112 Fed. 449 (C.C.D.Ala. 1901).

Vice Chancellors Buchanan and Berry have, in recent cases, expressed the

the contrary⁶ and the Supreme Court has rendered no authoritative pronouncement⁷ on the question.

Section 65 not only enlarges the class of complainants but also increases the grounds for the appointment of a receiver.⁸ The authority it confers for the appointment of a receiver upon a showing that the business has been and is being conducted at a loss and in a manner greatly prejudicial to the interest of creditors and stockholders⁹ is clearly broader than the general equity powers of the federal courts. May a bill seeking the appointment of a receiver be supported in the federal courts upon the authority of a statute similar to section 65 despite the fact it could not have been sustained under the court's general equity powers?

The Supreme Court has often attempted to delimit the situations in which state statutes enlarging equity jurisdiction will be applied in the federal courts.¹⁰ The usual formula is that statutes creating "remedial rights" will not be applied by

view that the New Jersey Court of Chancery has no general equity jurisdiction to appoint receivers to wind up corporate affairs. See *Smith v. Monmouth Title & Mtge. Co.*, 110 N.J.Eq. 117 (Ch. 1932); *Smith v. Washington Casualty Ins. Co.*, 110 N.J.Eq. 122 (Ch. 1932). In *re Washington Casualty Insurance Company*, 109 N.J.Eq. 483 (Ch. 1932).

⁶ See *O'Neil v. Welch*, 245 Fed. 261 (C.C.A.3rd, 1917); *Klein v. Wilson*, 7 F(2d) 769, 772, 777 (C.C.A.3rd, 1925). But see *In re Clinton Co.*, 288 Fed. 829 (C.C.A.7th, 1923). In practice stockholders' bills to wind up corporate affairs are common. See *Sparkman v. Swan Creek Orchard Co.*, 274 Fed. 107 (D.Del. 1921).

⁷ See *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208 (1926).

⁸ See the statute referred to in *See & Depew v. Fisheries Products*, 9 F(2d) 235 (C.C.A.2d, 1925).

⁹ Under the statute it is necessary to show that the business (1) has been conducted at a great loss; (2) is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders; and (3) cannot be conducted with safety to the public and advantage to the stockholders. *Fox v. Pathe Exchange*, 106 N.J.Eq. 522, 525 (Ch. 1930).

Section 65 authorizes the appointment of a receiver where the company has ceased to do business for want of funds and similar statutory provisions are not unusual. See *See & Depew v. Fisheries Products*, 9 F(2d) 235 (C.C.A.2d, 1925) which deals with a similar provision in a North Carolina statute.

¹⁰ The more recent attempts were in *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1925) and *Henrietta Mills v. Rutherford County*, 281 U.S. 121 (1930). See also *Mathews v. Rodgers*, 76 L.Ed. 271, 276 (1932).

The statement that a party loses no right or remedy of which he might avail himself in the state courts by going into a federal court is of course not literally true. See *Davis v. Gray*, 16 Wall. 203, 221 (1872) and the reference thereto in *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 498 (1923).

The unqualified statement often made that state statutes may not restrict or enlarge the jurisdiction of the federal courts (See *DOBIE, FEDERAL JURISDICTION AND PROCEDURE* (1926) s.336) does not seem to have much meaning.

the federal equity courts although statutes creating "substantive rights" will.¹¹ But the attempt to differentiate between "rights" and "remedies" has led to unbounded difficulty.

The Supreme Court has sustained a lower federal court in assuming jurisdiction, under the authority of a state statute, of a bill to quiet title where the outstanding deed was void on its face.¹² Like results were reached when dealing with bills to quiet title by complainants who were not in possession¹³ and had not established their titles at law.¹⁴ In the absence of statutes the federal courts would not have assumed jurisdiction in the above situations.¹⁵

A state statute authorizing an equitable proceeding attacking the probate of a will on the ground of fraud has been held applicable in the federal courts;¹⁶ and in *Gormley v. Clark*¹⁷ a "Burnt Records Act" was the basis for a suit entertained by a federal court. Other situations which might appear to involve "remedies" within the ordinary use of that term may be listed¹⁸ but the general problem has been fully considered elsewhere,¹⁹

¹¹ In *Henrietta Mills v. Rutherford County*, 281 U.S. 121, 128 (1930) the court said: "The distinction with respect to the effect of state legislation has come to be clearly established between substantive and remedial rights."

The cases have also announced the doctrine that if a state statute creates a right and at the same time prescribes a remedy to enforce it, that remedy will be applied in federal equity courts if it is substantially consistent with ordinary equity proceedings. See *Clark v. Smith*, 13 Pet. 195 (1839); *Grover v. Merritt Development Co.*, 7 F(2d) 917 (D. Minn. 1925). See also *Fourth National Bank v. Franklyn*, 120 U.S. 747 (1887).

¹² *Louisville & Nashville R.R. v. Western Union*, 234 U.S. 369 (1914).

¹³ *Holland v. Challen*, 110 U.S. 15 (1884).

¹⁴ *Clark v. Smith*, 13 Pet. 195 (1839).

¹⁵ *Boston etc. Mining Co. v. Montana Ore Co.*, 188 U.S. 632 (1903); *Frost v. Spitley*, 121 U.S. 552 (1887). Where a state statute permitted an action to quiet title even though the defendant was in possession, the federal court refused to entertain a proceeding under the statute. *Whitehead v. Shattuck*, 138 U.S. 146 (1891). Compare *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684 (1927). See *Wood v. Phillips* 50 F(2d) 714 (C.C.A.4th, 1931).

¹⁶ *Broderick's will*, 21 Wall. 503 (1874).

¹⁷ 134 U.S. 338 (1890).

¹⁸ See *Rich v. Braxton*, 158 U.S. 375 (1895). See also *Langdon v. Sherwood*, 124 U.S. 74 (1887); *Idaho & Ore. Land Co. v. Bradbury*, 152 U.S. 309 (1889); *Fitch v. Creighton*, 24 How. 159 (1860).

¹⁹ HUBERMAN AND JAFFE, SOME ASPECTS OF STATE STATUTES ON THE JURISDICTION OF THE FEDERAL COURTS (1928, Harvard Law School); McLEAN AND PITNER, THE EXTENT TO WHICH STATE STATUTES MAY BE ENFORCED IN FEDERAL COURTS (1929, Harvard Law School). See also 7 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931) s. 4111 *et seq*; 1 STREET, FEDERAL EQUITY PRACTICE (1909) s. 29; FOSTER, FEDERAL PRACTICE (5th ed. 1913) s. 82; Note (1932) 32 COL. L. REV. 688.

and the attempt to distinguish between "rights" and "remedies" there criticized. The suggestion has been made that the significant consideration is whether the attempted enlargement of equity jurisdiction would result in the adjudication of a question ordinarily cognizable at law.²⁰ If it would, then the defendant might urge objections based on the "adequacy of the remedy at law," the "constitutional guarantee of a jury trial," and the "constitutional^{20a} or congressional separation between law and equity." Although the receivership cases have failed to receive more than passing mention²¹ they furnish an interesting commentary upon the general problem

In *Scott v. Neely*²² an unsecured simple contract creditor brought a bill to set aside a fraudulent conveyance. A state statute authorized the proceeding and provided that the creditor would obtain a lien by his filing of the bill. In the absence of a statute it is clear that the bill could not be maintained in the federal court; a judgment and return *nulla bona* were necessary under the English law²³ and those requirements were carried over into federal equity.

The Supreme Court held that the bill could not be maintained in a federal court. The grounds for the decision are not left uncertain by the opinion; the court stated that the doctrine of earlier cases that new equitable "rights" created by state statutes would be applied in the federal courts, was subject to the qualification that their enforcement "does not impair any right conferred, or conflict with any inhibition imposed, by the

²⁰ Huberman and Jaffe *supra* note 19.

^{20a} Whether the separation between law and equity is compelled by the Constitution or is subject to control by Congress does not directly concern us. See *Boyle v. Zacharie*, 6 Pet. 648, 658 (1852), and compare *Bennett v. Butterworth*, 11 How. 669, 674 (1850). See McCormick, *The Fusion of Law and Equity in United States Courts* (1928) 6 N.C. L. Rev. 285. In 1792 Congress provided that the forms of proceedings in suits in equity should be according to the principles of courts of equity. 1 Stat. 276 (1792), 28 U.S.C.A. (1926) 723. And the equity jurisdiction has been held to be permanent and uniform throughout the states, *Robinson v. Campbell*, 3 Wheat. 212 (1818); *United States v. Howland & Allen*, 4 Wheat. 108 (1819).

²¹ In FOSTER, FEDERAL PRACTICE (5th ed. 1913) 940, it is said that the federal courts will follow state statutes relating to the appointment of receivers, at least where no question of "jury trial" is involved. Compare 6 CYCLOPEDIA OF FEDERAL PROCEDURE (1929) 977, where it is said that:

"Whether a state statute authorizing the appointment of a receiver under certain circumstances can be enforced in a federal court generally depends on whether the statute creates a remedial or substantive right."

²² 140 U.S. 106 (1891).

²³ *Angell v. Draper*, 1 Vern. 399 (1686).

Constitution or laws of the United States." The court then referred to the seventh amendment preserving the right of trial by jury and to the 16th section of the Judiciary Act of 1789 providing²⁴ that no suit in equity shall be sustained when a "plain, adequate and complete remedy may be had at law," and stated that the constitutional and statutory provisions prohibited the maintenance of the suit. Shortly thereafter in *Gates v. Allen*²⁵ the doctrine of *Scott v. Neely* was reaffirmed.

In *Hollins v. Brierfield Coal & Iron Co.*²⁶ a simple contract creditor brought a bill for the appointment of a receiver. The court stated that such a creditor could not obtain the seizure of his debtor's property even though a state statute authorized such proceedings; the bill was dismissed.²⁷ The applicability of a state receivership statute was not directly presented to the Supreme Court until *Pusey & Jones Co. v. Hanssen*,²⁸ before that decision, however, the lower federal courts had developed a formidable body of law.

On many occasions the lower federal courts had been presented with bills for receivers by simple contract creditors, under the authority of state statutes. The cases divided sharply upon the propriety of such proceedings in the federal courts. The courts which refused to entertain the bills²⁹ rested chiefly upon the defendant's right to a jury trial and the adequacy of the remedy at law; little attempt was made to deny that the statutes created equitable "rights" which might have been applied were it not for the constitutional and statutory inhibitions.

Of the lower federal court cases sustaining the propriety

²⁴ This provision is now Section 267 of the Judicial Code. See *Mathews Slate Co. v. Mathews*, 148 Fed. 490 (D.Mass. 1906) where the court stated that *Scott v. Neely* and *Cates v. Allen* were not rested solely upon the "jury trial" objection.

²⁵ 149 U.S. 451 (1893).

²⁶ 150 U.S. 371 (1893).

²⁷ In a dictum the court announced that the objection that the complainant had not obtained a judgment and return *nulla bona* could be waived.

²⁸ 261 U.S. 491 (1923).

²⁹ *Jacobs v. Mexican Sugar Co.*, 130 Fed. 589 (C.C.D.N.J. 1904); *Atlantic & F.R. Co. v. Western Ry. Co. of Ala.*, 50 Fed. 790 (C.C.A.5th, 1892); *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 60 Fed. 341 (C.C.A.7th, 1894); *Harrison v. Farmers Loan & Trust Co. of N.Y.*, 94 Fed. 728 (C.C.A.5th, 1899); *Davidson, Wesson Implement Co. v. Parlin*, 141 Fed. 37 (C.C.A.5th, 1905); *Mathew Slate Co. v. Mathew*, 148 Fed. 490 (D. Mass. 1906).

of the proceedings,³⁰ *Jones v. Mutual Fidelity Co.*³¹ is the most elaborately reasoned. The court expressed no doubt that the statute created an equitable "right" although it did not recognize the validity of the "right-remedy" distinction. Instead, the court expressed the view that if a state statute authorized a proceeding "equitable in character" it could be invoked in federal equity.³²

When dealing with stockholders' bills under state statutes the courts were not confronted with constitutional and statutory difficulties relating to "jury trial" and "adequate remedy at law". The stockholders had no remedy at law; accordingly, the defendants could not insist upon trials by jury. Admittedly, the proceedings were "equitable in character" for bills^{32a} of administration had long been within equity's exclusive jurisdiction.

The lower federal courts uniformly adopted the view that state receivership statutes authorizing stockholders' bills might be invoked in the federal courts,³³ with equal uniformity, they

³⁰ *Darragh v. Wetter Mfg. Co.*, 78 Fed. 7 (C.C.A.8th, 1879); *McGraw v. Mott*, 179 Fed. 646 (C.C.A.4th, 1910); *Jones v. Mutual Fidelity Co.*, 123 Fed. 506 (C.C.D.Del. 1903).

³¹ 123 Fed. 506 (C.C.D.Del. 1903).

³² At page 517 the court said: "Whether a right or remedy created by a state is to be pursued on the law or equity side of a federal court depends on its essential nature." See also *Gormley v. Clark*, 134 U.S. 338, 347 (1890).

^{32a} The courts might well abandon their "right-remedy" test and adopt the view that state statutes creating new proceedings will be enforced in federal equity where they are equitable in character, judged by accepted principles, and do not violate constitutional and statutory provisions as to "jury trial" and "adequacy of remedy at law." See *Gormley v. Clark*, 134 U.S. 338, 347 (1890). Such a test would meet with stated requirements that equity and law must be kept separate in the federal courts. State statutes relating to the form of the proceedings need not be permitted to vary existing federal equity practice even where the federal equity rules have no governing provisions.

³³ *Jacobs v. Mexican Sugar Co.*, 130 Fed. 539 (C.C.D.N.J. 1904); *Kessler v. Necker*, 258 Fed. 654 (D.N.J. 1919); *O'Brien v. Lashar*, 274 Fed. 526 (C.C.A.2d, 1921), certiorari denied 257 U.S. 640 (1921); *Myers v. Occidental Oil Corporation*, 288 Fed. 997 (D.Del. 1923); *Adler v. Campeche Laguna Corporation*, 257 Fed. 789 (D.Del. 1919); *United States Shipbuilding Co. v. Conklin*, 126 Fed. 132 (C.C.A.3rd, 1903); *McGraw v. Mott*, 179 Fed. 646 (C.C.A.4th, 1910); *Briggs v. Traders Co.*, 145 Fed. 254 (C.C.D. W. Va. 1906); *Stevens v. Empire Casualty Co.*, 180 Fed. 283 (C.C.D. W. Va. 1910). See also *Scattergood v. American Pipe & Construction Co.*, 249 Fed. 25 (C.C.A.3rd, 1918); *Potter v. Victor Page Motors Co.*, 300 Fed. 885 (D.Conn. 1924) where the courts followed state law even in the absence of a statute. Ordinarily, however, it is accepted that federal courts sitting in equity have a body of law, independent of state law.

There are several lower federal court cases holding that a federal equity court has no power to appoint a receiver for an individual even though he consents. See *Davis v. Hayden*, 238 Fed. 734 (C.C.A.4th, 1916), certiorari denied 243 U.S. 636 (1917). See also *In Re Richardson's Estate*, 294 Fed. 349 (D.Tex. 1923); *Maxwell v. McDaniels*, 184 Fed. 311 (C.C.A.4th, 1910). In *Davis v. Hayden* the

held that statutory grounds for the appointment of receivers could be invoked in the federal courts by stockholders,⁸⁴ judgment or lien creditors⁸⁵ and simple contract creditors where the defendant consented.⁸⁶ Several of the courts refused, however, to apply the provisions of state statutes permitting decrees of dissolution;⁸⁷ the thought that corporations were creatures of the state, and could be destroyed only by their creators, probably motivated this result.

The Supreme Court's decision in *Pusey & Jones Co. v. Hanssen*^{87a} settled the conflict in the lower federal courts as to whether a simple contract creditor could maintain a bill for the appointment of a receiver, under the authority of a state statute. The court, in denying such jurisdiction, rested heavily upon *Scott v. Neely* and its decision may be placed upon the ground that the defendant may defeat the proceeding by insisting upon its right to a jury trial. The court's language, however, is troublesome.

When the court said that the appointment of a receiver determines "no substantive right,"^{87b} it probably did not intend to convey the thought that no receivership statute could create "rights" within its "right-remedy" test. If the "right-remedy" test should be abandoned⁸⁸ in favor of a rule permitting all sta-

court said that a state statute could not confer such jurisdiction. The opinion, however, is entirely unsatisfactory.

⁸⁴ See *e.g.* *Jacobs v. Mexican Sugar Co.*, 130 Fed. 589 (C.C.D.N.J. 1904) where the court held that a stockholders' bill could be maintained under section 65 of the New Jersey Corporation Act, although a general creditors' bill would not be entertained. See also *Kessler v. Necker*, 258 Fed. 654 (D.N.J. 1919).

⁸⁵ *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1 (C.C.A.3rd, 1903); *United States Shipbuilding Co. v. Conklin*, 126 Fed. 132 (C.C.A.3rd, 1903).

⁸⁶ *McGraw v. Mott*, 179 Fed. 646 (C.C.A.4th, 1910).

⁸⁷ See *Conklin v. United States Shipbuilding Co.*, 140 Fed. 219 (D.N.J. 1905); FLETCHER, CYCLOPEDIA OF CORPORATIONS (1920) 9166. See also *Hirsch v. Independent Steel Co.*, 196 Fed. 104 (C.C.D.W.Va. 1911) and compare *Briggs v. Traders Co.*, 145 Fed. 254 (C.C.D.W.Va. 1906); *Stevens v. Empire Casualty Co.*, 180 Fed. 283 (C.C.D.W.Va. 1910); *Emmons v. National Mut. Bldg. & Loan Ass'n of New York*, 135 Fed. 689 (C.C.A.4th, 1905). See also *Gaylord v. Fort Wayne M. & C. R. Co.*, Fed. Case No. 5284 (C.C.D.Ind. 1875); *Hardon v. Newton*, Fed. Case No. 6054 (C.C.D.Conn. 1878).

^{87a} 261 U.S. 491 (1923).

^{87b} 261 U.S. 491, 496 (1922). The language referred to is the following: "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."

⁸⁸ See McLEAN AND PITNER, THE EXTENT TO WHICH STATE STATUTES MAY BE ENFORCED IN FEDERAL COURTS (1929, Harvard Law School).

tutory proceedings "equitable in character" and violating no constitutional inhibitions, to be maintained in the federal courts, there can be no doubt that a stockholder's bill may be brought in the federal courts. An early abandonment of "right-remedy" language is extremely unlikely;³⁹ there should, however, be little difficulty in reaching a like conclusion, even under the accepted test. Surely a statute enabling a stockholder to bring a bill to wind up corporate affairs creates as much of a "right" as do statutes permitting proceedings to quiet title, and to establish title, under a burnt records act. If a statute which permits the winding up of a corporation's affairs and the distribution of its assets to interested persons in a situation where no such result could formerly be approximated does not create a "right" within the meaning of the cases, then the Supreme Court's differentiation between rights and remedies has even less substance than has been generally suggested⁴⁰

In the course of its opinion the court in *Pusey & Jones Co. v. Hanssen* said:⁴¹

"The Delaware statute does not confer upon creditors the right to have a receiver appointed. . . . Insolvency is made a condition of the Chancellor's jurisdiction; but it does not give rise to any substantive right in the creditor . . . It makes possible a new remedy, because it confers upon the Chancellor a new power."

If the court intended to announce that whenever a statute makes it discretionary with the chancellor to appoint a receiver it may not be invoked in the federal courts, then most state receivership statutes will be excluded. The appointment of statutory receivers is generally discretionary;⁴² if the term "right" carries a charm, then it would seem not improper to state that the statute confers upon the stockholder the "right"

³⁹ See the reaffirmance of the "right-remedy" test in *Henrietta Mills v. Ruth-erford County*, 281 U.S. 121 (1930). In 33 YALE L. J. 193, 195 (1923) it is suggested that the proper terminology would be "remedial substantive rights" and "remedial adjective rights" in place of the usual differentiation between "remedial rights" and "substantive rights".

⁴⁰ The attempt to distinguish between rights and remedies has been generally condemned. See *supra* note 19.

⁴¹ 261 U.S. 491, 499 (1923). But see *Mackenzie Oil Co. v. Omar Oil & Gas Co.*, 120 Atl. 852 (Del. 1923).

⁴² See *e.g.* *Koch v. Morsemere Trust Co.*, 107 N.J.Eq. 516 (1931). Similarly the appointment of a receiver by a court under its general equity powers is usually a matter of discretion.

to have the chancellor exercise his discretion.⁴³ Certainly the fact that the chancellor may in his discretion refuse to appoint a receiver should have no bearing upon the applicability of the statute in the federal courts.

There have been but few pertinent decisions rendered since *Pusey & Jones Co. v. Hanssen*.⁴⁴ In *Guardian Savings & Trust Company v. Road Improvement District*⁴⁵ a state statute provided for the appointment of a receiver to collect taxes, which had been pledged to secure bonds issued by a road district. The Supreme Court held that the statute could be invoked in the federal court. Here, of course, the objections raised in *Scott v. Neely* and *Pusey & Jones Co. v. Hanssen* were not present. Although the court's opinion is not helpful,^{45a} its decision would seem to dispose of the thought that no statutory receivership proceeding may be invoked in the federal courts.

In *Pierce Petroleum Corporation v. Empire Gas & Fuel Co. of Maine*⁴⁶ the circuit court of appeals for the fifth circuit held that a state statute authorizing the appointment of a receiver, in actions between partners or others jointly interested in property, created an equitable right, which could be invoked in the federal courts. Here again the defendant could not assert any right to a jury trial; the court was apparently not troubled by the fact that the statute did not require the appointment of a receiver but conferred a discretionary power upon the lower court.

In the only recent case dealing directly with our problem, *See & Depew v. Fisheries Products Co.*,⁴⁷ the Circuit Court of

⁴³ Assuming that in the absence of a statute the stockholder could not bring the bill the statute permits him to present the bill and have the chancellor exercise his discretion. Undoubtedly arbitrary action by the chancellor would be upset by the appellate court.

⁴⁴ 261 U.S. 491 (1923).

⁴⁵ 267 U.S. 1 (1924). See also *Browning v. Hooper*, 3 F(2d) 160 (D.Tex. 1924).

^{45a} The pertinent portion of the court's opinion reads as follows: "The state law is not merely an enlargement of the remedial powers of a local court as in *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491; it recognizes the inadequacy of the remedy at law and is an attempt to give to purchasers of bonds the assurance of adequate relief against shortcomings that experience has taught the business world to apprehend. We see no reason why it should not succeed. *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718. *Stansell v. Levee Board*, 13 Fed. 846. *Supervisors v. Rogers*, 7 Wall. 175."

⁴⁶ 17 F(2d) 758 (C.C.A.5th, 1927).

⁴⁷ 9 F(2d) 235 (C.C.A.2d, 1925).

Appeals for the Second Circuit said:

"Chapter 22, of the Consolidated Statutes, provides for a suit wherein a receiver may be appointed in case the corporation has suspended its ordinary business for want of funds. But this statute did not confer upon a stockholder or a creditor a substantive right, but merely gave a new remedy and such remedy is not available in the federal courts. *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 43 S. Ct. 454, 67 L. Ed. 763."

If the foregoing statement is followed,⁴⁸ then stockholders' statutory bills and bills on statutory grounds will not be available in the federal courts. As has already been indicated these statutes do not present the objections which compelled the decisions in *Scott v. Neely* and *Pusey & Jones Co. v. Hanssen*; they provide for proceedings "equitable in character" and seem to create what are as fully "rights" as do the numerous statutes which have been held applicable in the federal courts.⁴⁹

In practice, proceedings in the federal courts under state statutes are common. Of the 100 cases examined in the United States District Court for the district of New Jersey, 30 contained prayers for statutory receivers, 50 contained some reference to statutory grounds, and 32 were based exclusively on statutory grounds.

That one body of law should be administered in both federal and state courts seems evident;⁵⁰ where no constitutional or statutory considerations are involved there seem to be no sufficient reasons for denying the applicability of such receiver-ship statutes in the federal courts.

B.

May a state statute limit the ordinary power of the federal courts to appoint receivers? Statutes providing that no receivers shall be appointed for domestic banks and insurance companies except upon applications by the commissioner of bank-

⁴⁸ In *McNamee v. Bankers Union*, 25 F(2d) 614 (C.C.A.2d, 1928) the question was left open. Compare *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208 (1926).

⁴⁹ The cases dealing with the problem generally are collected in the works referred to in note 19.

⁵⁰ Compare Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 526 (1928).

ing and insurance, or the attorney general, are not uncommon.⁵¹ Have they any effect in local^{51a} federal courts?

On many occasions the Supreme Court has said that "the jurisdiction of federal courts sitting as courts of equity" may not be "diminished by state legislation"⁵² and that state legislation may not narrow "a remedial right to proceed in a federal court sitting in equity".⁵³ Equally numerous are the assertions that "the jurisdiction of the courts of the United States over

⁵¹ See *e.g.* ALA. CODE (1928) s. 8398—(No application for the appointment of a receiver of a benevolent association except by the attorney general); ARK. STATUTES, s. 6112 (Crawford & Moses Digest 1921 (same)); OHIO GEN. CODE (Page's Ed. 1931) s. 9487 (same). Some statutes provide that no suit for a receiver shall be brought except by the supervisor of banking. See the statutes collected in 44 HARV. L. REV. 618, 623 (1931). The more usual statutes permit banking commissioners to take possession of banks without court orders. See 44 HARV. L. REV. 618, 622 (1931).

Many of the statutes in the cases hereinafter dealt with permit the attorney general alone to bring suit. For our purpose it is immaterial whether the person designated is the attorney general or the commissioner of banking or insurance. See *McGarry v. Lentz*, 13 F(2d) 51 (C.C.A.6th, 1926), certiorari denied 273 U.S. 716 (1926). See PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927) 451.

Recent New Jersey statutes, as judicially construed, provide that creditors and stockholders may not obtain the appointment of receivers for domestic banks or insurance companies unless the Commissioner of Banking and Insurance has, after demand, refused to act. P.L. 1931 c. 641; P.L. 1931 c. 244; *Smith v. Washington Casualty Insurance Co.*, 110 N.J.Eq. 122 (Ch. 1932); *Smith v. Monmouth Title & Mtge. Co.*, 110 N.J.Eq. 117 (Ch. 1932). Prior to the recent amendment, the New Jersey Statutes permitted stockholders and creditors to bring bills in equity for receivers. See *Koch v. Morsemere Trust Company*, 107 N.J.Eq. 516 (Ch. 1931).

Whether the recent New Jersey Statutes will be applied in the federal court for the district of New Jersey will depend upon the considerations discussed in the text.

Under a recent amendment to section 65 of the New Jersey Corporation Act it is necessary that a stockholder or stockholders bringing a bill for the appointment of a receiver own at least ten per centum of the capital stock of the corporation. P.L. 1931 c. 221. The Circuit Court of Appeals for the third circuit has indicated that under the general equity powers of the federal courts, a stockholder may bring a bill for the appointment of a receiver without regard to the amount of stock held by him. *O'Neil v. Welch*, 245 Fed. 261 (C.C.A.3rd, 1917). If the New Jersey statute is applied in the federal court for the district of New Jersey it will result in a limitation of that court's general equity jurisdiction to appoint receivers. Whether it will be applied will depend upon the considerations considered in the text. We are not here concerned with whether section 65 as amended is unconstitutional as to prior stockholders on the ground that it alters their existing contracts and deprives them of an existing remedy. Cf. *Pennsylvania Co. v. Marens*, 89 N.J.L. 633 (E&A 1916); *Scarne v. Inhabitants of Belleville*, 39 N.J.L. 526 (Sup. Ct. 1877); *Kean v. Johnson*, 9 N.J.Eq. 401 (Ch. 1853).

^{51a} As to whether they have any effect in foreign federal courts see *infra* note 76.

⁵² *Mississippi Mills v. Cohn*, 150 U.S. 202, 204 (1893).

⁵³ *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 498 (1922).

controversies between citizens of different states cannot be impaired by the laws of the states."⁵⁴

Many state statutes have attempted to limit suits to state courts; they have been uniformly held to be without effect in the federal courts.⁵⁵ A contrary conclusion would permit states to seriously curb the effect of the diversity clause.

In the well known *Lupton*⁵⁶ case the court considered the effect, in the federal courts, of a state statute prohibiting foreign corporations, doing business within the state without a license, from suing upon local contracts. The court held that the statute did not apply in the federal courts.

This decision was considerably more far reaching than earlier decisions. No attempt was made to confine actions to state courts; indeed, the statute prohibited actions in state courts.⁵⁷ Furthermore, the state statute merely attempted to

⁵⁴ *Payne v. Hook*, 7 Wall. 425, 430 (1868).

⁵⁵ Where a statute creates a new right any attempt to limit its enforcement to state courts will be ineffectual. *Railway Co. v. Whitton*, 13 Wall. 270 (1871).

Statutes providing that counties may be sued only in county courts will not bar federal jurisdiction. *Cowles v. Mercer County*, 7 Wall. 118 (1868); *Chicot County v. Sherwood*, 148 U.S. 529 (1893). Similarly, statutes limiting suits to state probate court do not affect the federal courts. *Smith Purifier Co. v. McGroarty*, 136 U.S. 237 (1890); *Waterman v. Canal Louisiana Bank Co.*, 215 U.S. 33 (1909).

Statutes forbidding foreign corporations from resorting to the federal courts, or revoking their licenses if they do so, are unconstitutional. See *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922).

See also *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239 (1905); *Blount v. Kansas City Southern Ry. Co.*, 5 F(2d) 967 (D.La. 1925); *Green's Adm. v. Creighton*, 23 How. 90, 107 (1859).

⁵⁶ *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912). There are many recent cases following the doctrine of this case. *Finchly v. Finchly Co.*, 40 F(2d) 736 (D.Md. 1929); *Republic Creosoting v. Boldt Construction Co.*, 38 F(2d) 739 (C.C.A.6th, 1930); *Emporium Iron Co. v. Matlack Coal & Iron Co.*, 30 F(2d) 364 (C.C.A.3rd, 1929). Compare *Utah Const. Co. v. St. Louis Const. Co.*, 254 Fed. 301 (D.N.M. 1916).

In *Lappe v. Wilcox*, 14 F(2d) 861 (D.N.Y. 1926) the court held that the New York arbitration statute providing for a stay of proceedings where the contract contains an arbitration clause has no application in the federal courts.

⁵⁷ The court expressed the view that the statute did not attempt to apply to federal courts since it forbade suits "in the courts of New York." Compare *McGarry v. Lentz*, 13 F(2d) 51 (C.C.A.6th, 1926) where the court said:

"This section 9487 of the General Code of Ohio is decisive of the present issue, if its provisions are applicable to affect rights asserted in the federal courts of equity. This in turn is dependent upon whether the intended purpose and effect of the enactment are to define the jurisdiction of courts 'in this state' (a phrase which would include the federal courts in Ohio, *Merko v. Sturm Co.*, 233 F68, C.C.A. 138, C.C.A. 6) * * *

The court in the *Lupton* case stated that if the statute expressly attempted to govern in the federal courts it would be inapplicable.

effectuate the state's policy pertaining to foreign corporations; the decision of the Supreme Court went a long way in defeating that policy.

When presented with state statutes forbidding the appointment of receivers except on applications of designated persons, the lower federal courts⁵⁸ turned to the cases dealing with statutes attempting to confine suits to state courts.⁵⁹ The distinctions between the cases are, however, apparent. State statutes creating ordinary rights and limiting their enforcement to state courts are merely attempts to restrict the diversity jurisdiction of the federal courts; no justifiable policy supports the limitation.

Statutes forbidding the appointment of receivers except on application of the commissioner of banking and insurance are, however, based solely upon the thought that exclusive administrative control will effect the most desirable ends. They are nowise directed at the jurisdiction of the federal courts.⁶⁰ It is indeed true that practically, the suit will not be brought in the federal courts; usually the lack of diverse citizenship will prevent that.⁶¹ But though the effect of the statute is to limit the jurisdiction of the federal courts the limitation is necessary to enable the carrying out of a highly justifiable state policy. Surely the state is not unreasonable in its belief that exclusive administrative control of insurance companies and banks is preferable to judicial control.⁶²

Despite the apparent differences between the receivership statutes and other statutes, which would result in limiting the

⁵⁸ *Morril v. American Reserve Bond Co.*, 151 Fed. 305, 317 (C.C.D.Mo. 1907). See *Welch v. Union Casualty Ins. Co.*, 238 Fed. 968, 977 (D. Pa. 1917) reversed in *O'Neil v. Welch*, 245 Fed. 261 (C.C.A.3rd, 1917); *Farrell v. Stoddard*, 1 F(2d) 802 (D.N.Y. 1924). But see *Lyon v. McFeebry*, 171 Fed. 384 (C.C.A.3rd, 1909).

In *City of Defiance v. McGonigale*, 150 Fed. 689 (C.C.A.6th, 1907) a state statute providing that no non-resident shall be appointed as a receiver was held inapplicable in the federal courts.

⁵⁹ See *Morril v. American Reserve Bond Co.*, 151 Fed. 305, 317 (C.C.D.Mo. 1907). See *Farrell v. Stoddard*, 1 F(2d) 802 (D.N.Y. 1924).

⁶⁰ See 44 HARV. L. REV. 618 (1931).

⁶¹ Although not necessarily so, the commissioner and attorney general will be residents.

⁶² See *McGarry v. Lentz*, 13 F(2d) 51 (C.C.A.6th, 1926). See the editorial entitled "*A Judicial Scandal*" in 51 AM. L. REV. 780 (1917) in which the United States district court for the district of Massachusetts was severely criticized for appointing a receiver for the "Royal Arcanum" despite a state statute forbidding such action. See also PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927) 454.

jurisdiction of federal courts sitting in equity, several of the lower federal courts have stated that they have no effect in the federal courts.⁶³ The Supreme Court has not dealt with the question.

One line of cases, however, lends support to the view that the receivership statutes may be held applicable to the federal courts. In *McGarry v. Lentz*⁶⁴ a member of a fraternal benefit society brought a bill for an injunction. A state statute provided that "no application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof" shall be entertained by any court unless the same is made by the Attorney General. The circuit court of appeals for the sixth circuit held that the statute barred the action in the federal court; and its decision has been followed⁶⁵ in later cases. In several earlier cases, involving suits for receivers by members of mutual insurance com-

⁶³ See *supra* note 58. Compare *Couper v. Shirley*, 75 Fed. 168 (C.C.A.9th, 1896).

⁶⁴ 13 F(2d) 51 (C.C.A.6th, 1926) certiorari denied 273 U.S. 16 (1926).

⁶⁵ *Haynes v. Fraternal Aid Union*, 34 F(2d) 305 (D.Kans. 1929); *Soptich v. St. Joseph Nat. Benef. Ass'n*, 34 F(2d) 566 (D.Kans. 1926); *Cook v. Illinois Bankers' Life Ass'n*, 46 F(2d) 782 (C.C.A.7th, 1931). In the *Haynes* case the court indicated that the rule of *McGarry v. Lentz* applies even where the state statute is enacted after the complainant had become a member. It was alleged and not denied that the complainant's policy was "subject to existing and future statutes and by-laws". But the court's opinion indicates that it would have reached the same result under the "reserved power" to alter and amend corporate charters. The court said:

"The Supreme Court of Kansas has definitely held that a member of such a society is bound by changes made in the by-laws after his policy was issued, increasing his dues, notwithstanding a provision in his contract agreeing not to raise his dues. *Dey v. K.&L. of S.*, 113 Kan. 86, 213 P. 1006.

"Moreover, the Supreme Court of the United States has held the same. *Supreme Lodge, Knights of Pythias v. Nims*, 241 U.S. 574, 36 S.Ct. 702, 704 60 L.Ed. 1179, L.R.A. 1916 F.919; *Supreme Lodge, Knights of Pythias v. Smyth*, 245 U.S. 594, 385 S.Ct. 210, 62 L.Ed. 492. In the *Nims* case, the Supreme Court said:

"As to later members, we can have no doubt, notwithstanding the difference of opinion in state courts, that the right to amend extends to a change in the rates to be paid * * *."

Referring to ordinary life insurance companies the court said:

"In the case of the ordinary life insurance company, the statutes of the state of its incorporation do not become a part of its contracts made in other states * * *. A fortiori, a policy holder of another state is not bound by statutes passed after his policy is issued; as a matter of fact, such after enacted statutes do not affect the rights of resident policy holders, for they may impair the obligation of his contract."

Reference to ordinary life insurance companies is made later in the text.

panies and fraternal benefit societies, the federal courts had reached the same conclusion.⁶⁶

In *McGarry v. Lentz*⁶⁷ the court stated that the important distinction was between enactments, the intended purpose and effect of which were to "define the jurisdiction" of the federal courts and those which were "merely regulatory of corporations". If the former, then the state statute would have no application in the federal court; if the latter, it would become a part of the contract of membership which would control the rights of the members.

In determining whether the statute should be considered as "merely regulatory" or as an "attempt to regulate the jurisdiction of the federal courts," the court considered and approved the policy of the state legislation. The statute in the *Lupton* case was clearly not intended to define the jurisdiction of the federal court; but the policy in that case was not as forceful.

The suggestion in *McGarry v. Lentz* that the statutory provision is "contractually binding" is troublesome. The result of the case seems highly desirable⁶⁸ but it may sufficiently be rested upon the thought that state statutes not aimed at the jurisdiction of the federal courts and reasonably adapted to carrying out a justifiable policy of a state will be applied in local federal courts. Insofar as contract terminology is used merely to achieve that result it is not objectionable; its possible evils lie, however, in further conclusions which logical considerations may suggest.

As to stockholders and members of societies there is ample authority that their rights are limited by the law of the state of incorporation.⁶⁹ And there is authority that some statutes of

⁶⁶ *Cummings v. Supreme Council of Royal Arcanum*, 247 Fed. 992 (D.Mass. 1918). See also *Brown v. Equitable Life Assur. Society*, 142 Fed. 835 (C.C.D. N.Y. 1906) reversed in 151 Fed. 1 (C.C.A.2d 1907), reversed in 213 U.S. 25 (1908). Compare *Dill v. Supreme Lodge*, 226, Fed. 807 (D.Mo.1915). See also *Supreme Council of Royal Arcanum v. Hobart*, 244 Fed. 385 (C.C.A.1st, 1917).

⁶⁷ 12 F(2d) 51, (1926), certiorari denied 273 U.S. 716 (1926). See also the opinion of the lower court in 9 F(2d) 680 (D.Ohio 1925).

⁶⁸ See the heated condemnation following a district judge's action to the contrary in 51 Am. L. Rev. 780 (1917).

⁶⁹ See *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 542 (1915); *Relfe v. Rundle*, 103 U.S. 222 (1880); *Coltrane v. Templeton*, 106 Fed. 370 (C.C.A.4th, 1901); *Giesen v. London & Northwest American Mortg. Co.*, 102 Fed. 584 (C.C.A.8th 1900). See also *Nashua Savings Bank v. Anglo-American Co.*, 198 U.S. 221 230 (1903); *Bernheimer v. Converse*, 206 U.S. 516 (1907).

the state of incorporation become part of the ordinary creditor's contracts,⁷⁰ although the more usual expression is that his contracts are governed by the law of the place of contract.⁷¹ The last mentioned thought led a district court in a recent case⁷² to state that suits by policy holders of ordinary insurance companies would not come within the doctrine of *McGarry v. Lentz*.

It would be indeed unfortunate to confine the decision in *McGarry v. Lentz* to suits by members of fraternal societies and stockholders generally. The desirability of having the federal courts give effect to state statutes forbidding the appointment of receivers except upon application of the proper administrative officer is as evident, where the company is an ordinary insurance company or a bank, as in the other situations. If contract language is deemed helpful there should be no difficulty in concluding that statutes of the state of incorporations relating to the winding up of the corporation become part of the company's contracts wherever made even though ordinary statutes might not.⁷³ It would seem to create no hardship to require foreign creditors to look to the state of incorporation for matters which so intimately concern the corporate continuance.

The contract language of the courts leads to a further inquiry. Suppose a statute should provide that no receiver should be appointed for any domestic corporation except upon application of the attorney general. Such statutes would, if applicable in the federal courts, substantially eliminate the federal receivership. It might be suggested that, viewed as a contract, it should be enforced in the federal courts; yet it is hardly likely

⁷⁰ *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883). Cf. *Second Russian Insurance Co. v. Miller*, 268 U.S. 552, 560 (1925). See also *State Nat. Bank of Cleveland v. Sayward*, 91 Fed. 443 (C.C.A.1st, 1899).

⁷¹ See *Northwestern Mut. Ins. Co. v. McCue*, 223 U.S. 234 (1912); *Wheeler v. Business Men's Acc. Ass'n of America*, 247 Fed. 677 (D.Mo. 1918); *New York Life Ins. Co. v. Rees*, 19 F(2d) 781 (C.C.A.8th, 1926).

⁷² *Haynes v. Fraterna Aid Union*, 34 F(2d) 305 (D.Kans. 1929). See also *supra* note 66.

⁷³ See *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883); *Relfe v. Bundle*, 103 U.S. 222 (1880). See also *Brooks v. Smith*, 290 Fed. 33, 38 (C.C.A.1st, 1923). Regardless of what view one takes as to whether the ordinary statutes of the state of incorporation affect contracts made outside the state (cf. the problem raised in *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); 41 HARV. L. REV. 390 (1928)), there should be little difficulty in looking upon the statute under consideration as a term of the contract if that approach is thought helpful.

that such a conclusion will be reached.⁷⁴ If the federal courts believe that a statute is aimed at the jurisdiction of the federal courts, or results in a limitation of the federal equity jurisdiction without a forceful policy supporting the resulting limitation, there is little doubt that it will not be applied by the federal courts.⁷⁵ The contract language of the cases would seem to be little more than a make-weight to assist in reaching a conclusion otherwise desirable.⁷⁶

⁷⁴ See *Morrill v. American Reserve Bond Co.*, 151 Fed. 305, 317 (C.C.D. Mo. 1907). See also cases cited in notes 55, 56, 58, 59 *supra*.

⁷⁵ Compare the cases cited in note 56 *supra*.

⁷⁶ It is difficult to reconcile the contract language of the cases with the holding in *Lappe v. Wilcox*, 14 F(2d) 861 (D.N.Y. 1926) where the New York arbitration statute was held not applicable in the federal court. Why had not the plaintiff contracted not to sue?

Compare the cases in which statutes forbidding removal or revoking licenses of foreign corporations in the event of removal have been held unconstitutional. See *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922); *Harrison v. St. Louis etc. R.R.*, 232 U.S. 318 (1914).

Why in the *Lupton* case is not the statute a part of the contract?

In *Cook v. Illinois Bankers' Life Ass'n*, 46 F(2d) 782 (C.C.A.7th, 1931), certiorari denied 76 L.Ed. 10 (1931) a member of an Illinois Life Association brought suit in a federal district court sitting in California. The district court dismissed the bill. This was affirmed by the Circuit Court of Appeals on the ground that an Illinois statute forbidding suits except by the attorney general of Illinois barred the suit. The court used "contract" language and relied on *McGarry v. Lentz*.

The problem in the *Cook* case is different from that raised in *McGarry v. Lentz*. There, a member of an Ohio society brought suit in a federal district court sitting in Ohio; it was held that an Ohio statute barred the suit. Although the court used some "contract" language we have suggested that the case may be rested upon the thought that state statutes not aimed at the jurisdiction of the federal courts and reasonably adapted to carrying out a justifiable policy of a state will be applied by a federal court sitting in that state. The desirability of the conclusion reached in *McGarry v. Lentz* seems evident.

The *Cook* case raises different considerations. In support of the view that the federal court should assume jurisdiction it might be urged:

- (1) That no "local" policy is involved.
- (2) That the burden upon local policy holders in requiring them to seek relief from a distant administrative officer is unduly great.
- (3) That the foreign administrative officer may not be more qualified to deal with the local affairs of the Association than the federal court.
- (4) That if the federal court declines jurisdiction the local state court which has no peculiar fitness to handle the matter is exclusively vested with the power of administering local assets.

On the other hand, there is much to be said for the conclusion reached in the *Cook* case. The foreign administrative officer will often be best fitted to determine whether a proceeding for the appointment of a receiver should be instituted. The use of "contract" language, however, seems entirely unsatisfactory for situations may arise where it would be highly expedient for the federal court to entertain the bill. A more satisfactory approach would be to deny to the statute any "contractual" effect resulting in an absolute limitation of federal jurisdiction. The federal courts should, however, consider the statute when exercising their discretion as to whether a receiver should be appointed. Hesi-

One further thought should be expressed; if the federal courts should hold inapplicable the state statutes forbidding the appointment of a receiver except upon application of the commissioner of banking and insurance, a satisfactory result may be reached by a different approach. Admittedly, the appointment of a receiver is discretionary; the statutory provision may well be considered sufficient ground for the refusal to appoint a receiver at the behest of a stockholder or creditor although jurisdiction to do so is deemed to exist. The decision in *Dill v. Supreme Lodge, Knights of Honor*⁷⁷ may well be justified upon that basis. There a state statute forbade the appointment of receivers for fraternal societies except upon application of the attorney general. A member of the society brought a bill for the appointment of a receiver; the attorney general advised that the state had no objection to the proceedings and a receiver was accordingly appointed. If the statute was applicable it would seem to have deprived the court of power to proceed; if inapplicable, the attorney general's consent would seem to have removed the force of the thought that a proper exercise of discretion might require that the federal court decline jurisdiction.⁷⁸

C.

Suppose the state statute provides for administrative liquidation of banks and insurance companies but contains no provision that the administrative proceeding shall be exclusive. Many state statutes permit the administrative officer to obtain the appointment of a receiver, upon application to a court;¹ other statutes permit the taking of possession without a court

tation should be displayed in appointing receivers for foreign insurance companies generally; where there is a statute forbidding suits against such companies, except by the attorney general, there is additional cause for hesitation, and should generally result in a refusal to exercise jurisdiction.

⁷⁷ 226 Fed. 807 (D.Mo. 1915).

⁷⁸ The foregoing discussion would apply with equal force to building and loan associations and other corporations which may be assimilated to banks and insurance companies. In many states building and loan associations are under the supervision of banking commissioners.

¹ See statutes collected in 44 HARV. L. REV. 618, 622 (1931); PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES (1927) 95, 437.

order.² What effect do such statutes have in local federal courts?

The state courts have generally held that, even in the absence of an express provision to that effect, the administrative proceeding, provided by the statute, is exclusive.³ Here the federal courts should have no hesitancy in treating the matter as though there were an express prohibition against suits by persons other than the proper administrative officer;⁴ the considerations attendant upon that situation have been discussed. Where, however, the administrative proceeding is construed not to be exclusive⁵ new considerations arise; problems of conflicting jurisdictions are the most troublesome. Since the courts have turned for guidance to the cases dealing with ordinary corporations it seems desirable to review briefly, the doctrine there announced.

The Supreme Court has often held that where a court has taken possession of the assets of a corporation through a receiver no other court will be permitted to interfere.⁶ Where, however, a federal court appoints a receiver in a suit instituted after a state suit seeking the appointment of a receiver had been instituted, the result is less clear. Here the governing principle is considered to be a matter of comity.⁷ In an early case Mr. Justice Bradley expressed the view that the court which first took actual possession would prevail.⁸ The objection that under

² These statutes are more frequent when dealing with banks than with insurance companies. See 44 HARV. L. REV. 618, 622 (1931). See also note 51 *supra* for references to pertinent New Jersey statutes.

³ See 2 TARDY'S SMITH ON RECEIVERS (2d Ed. 1920) 1442; 44 HARV. L. REV. 618, 623 (1931). See also Union Savings & Investment Co. v. District Court of Salt Lake County, 44 Utah 397 (1914); Puklesimer v. Abbott, 101 W.Va. 127 (1926). But see Dickerson v. The Case County Bank, 95 Iowa 392 (1895). See also cases cited note 51 *supra*.

⁴ Compare Lyon v. McKeefrey, 171 Fed. 384 (C.C.A.3rd, 1909).

⁵ See Dickerson v. The Case County Bank, 95 Iowa 392 (1895). See also Koch v. Morsemere Trust Co., 107 N.J.Eq. 516 (1951) dealing with a New Jersey statute which has since been amended. P.L. 1931 C. 641.

⁶ Wabash R.R. v. Adelbert College, 208 U.S. 38 (1908). See Porter v. Sabin, 149 U.S. 473 (1893); Farmer Loan & Trust Co. v. Lake Street Railroad Co., 177 U.S. 51 (1900); Moran v. Sturges, 154 U.S. 256 (1894); Shields v. Coleman, 157 U.S. 168 (1895); Leadville Coal Co. v. McCreery, 141 U.S. 475 (1891). See also M. H. Hussey Lumber Co. v. Puget Sound Saw Mills & Shingle Co., 37 F(2d) 117 (D.Wash. 1930).

⁷ Empire Trust Co. v. Brooks, 232 Fed. 641 (C.C.A.5th, 1916). But compare Harkin v. Brundage, 276 U.S. 36, 43 (1928).

⁸ Wilmer v. Atlanta & Richmond Airline Ry. Co., Fed. Case No. 17775 at 80 (C.C.D.Ga. 1875). See also Knott v. Evening Post Co., 124 Fed. 342 (D.Ky. 1903).

Mr. Justice Bradley's rule "jurisdiction is frequently made to depend upon a race between marshals and sheriffs, likely to result in unseemly controversies between the state and federal courts"⁹ caused it to be received with disfavor; it never received any substantial support.

A more satisfactory test, which seemed, for some time, to have received the sanction of the Supreme Court,¹⁰ was adopted by many of the lower federal courts.¹¹ Under this test the court in which the bill is first filed prevails, if from the nature of the suit it is evident that "in the progress of the litigation the court may be compelled to assume the possession and control of the property."¹²

Several of the lower federal courts adopted still another test: if the objects of the suits are substantially identical then the court in which the bill is first filed prevails; otherwise the court which first takes possession prevails.¹³ This test received the sanction of the Supreme Court in *Harkin v. Brundage*¹⁴ where the court, speaking through Chief Justice Taft, said:

"As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so because it

⁹ *Adams v. Mercantile Trust Co.*, 66 Fed. 617 (1895). See 41 HARV. L. REV. 70 (1927). On the general question of conflict of Jurisdiction between state and federal courts in receivership cases see: 21 HARV. L. REV. 279 (1908); 41 HARV. L. REV. 70 (1927); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930). See also Shelton, *Conflict Between Federal and State Courts*, 96 CENT. L. J. 37 (1923); Mercer, *Receiverships of Corporations*, 3 GA. BAR ASS'N REP., 121 (1886); 8 COL. L. REV. 213 (1908); 36 YALE L. J. 419 (1927); 4 VA. L. REV. 229 (1917).

¹⁰ See *Farmers Loan & Trust Co. v. Lake Street R.R. Co.*, 177 U.S. 51 (1900); *Palmer v. Texas*, 212 U.S. 118, 129 (1909). But compare *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447 (1910).

¹¹ *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772, 776 (D.Kans. 1913) *aff'd* 209 Fed. 300 (C.C.A.8th, 1913); *O'Neil v. Welch*, 245 Fed. 261 (C.C.A.3rd, 1917); *Chillicothe Furniture Co. v. Revelle*, 14 F(2d) 501 (C.C.A.8th, 1926).

¹² *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772, 776 (D.Kans. 1913) *aff'd* 209 Fed. 300 (C.C.A.8th, 1913). See *Farmers Loan & Trust Co. v. Lake Street R.R. Co.*, 177 U.S. 51 (1900).

¹³ *Knudsen v. First Trust & Savings Bank*, 245 Fed. 81, 85 (C.C.A.9th, 1917); *Empire Trust Co. v. Brooks*, 232 Fed. 641 (C.C.A.5th, 1916).

¹⁴ 276 U.S. 36 (1928). See also *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 447 (1910). See 37 YALE L. J. 832 (1928); 41 HARV. L. REV. 804 (1928). See Kaufman, *The Current Conflict Between the Court of Chancery and the Bankruptcy Court* (1932) 1 MERCER BEASLEY L. REV. 3, 6.

may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction."

The view adopted by the *Brundage* case is far from satisfactory. It is not uncommon for state and federal courts to disagree as to whether the objects of the suits are identical;¹⁵ and where the objects are not identical the matter is left to be determined by the objectionable race between sheriffs and marshals. The difficulties might be reduced by adopting a liberal attitude in determining whether suits are identical; all suits seeking the appointment of receivers to administer corporate assets should be considered identical. It seems clear that bills should not be considered dissimilar merely because one is brought by a stockholder and the other by a creditor;¹⁶ yet the court in the *Brundage* case found enough to declare the bills dissimilar, in the fact that the stockholder's bill did not pray for an injunction against creditors, whereas the creditor's bill sought such relief.

The other difficulty referred to may be obviated by considering the appointment of a receiver as equivalent to possession, thus avoiding possible combats for possession between marshals and sheriffs. Several of the earlier federal cases had adopted this view¹⁷ although the opinion in the *Brundage* case seems to insist on physical possession.

It may be questioned whether the test of the *Brundage* case should not give way entirely to one giving due considera-

¹⁵ See e.g. *Kessler v. Necker*, 258 Fed. 654 (D.N.J. 1919) and *Michel v. Necker*, 90 N.J.Eq. 171 (1919).

¹⁶ See *Ward v. Foulkrod*, 264 Fed. 627 (C.C.A.3rd 1920). The various situations which may arise are too numerous to be listed here. Some are referred to in *Harkin v. Brundage*, 276 U.S. 36 (1928). See also *McAtamney v. Commonwealth Hotel Const. Corp.*, 296 Fed. 500 (D.N.Y. 1924); *Havner v. Hegnes*, 269 Fed. 537 (C.C.A.8th 1920); *Empire Trust Co. v. Brooks*, 232 Fed. 641 (C.C.A.5th 1916); *Knudsen v. First Trust & Savings Bank*, 245 Fed. 81 (C.C.A. 9th 1917); *Patterson v. Veasey*, 295 Fed. 163 (D.Ga. 1924); *Jackson v. Parkersbury & O. V. Electric Ry. Co.*, 233 Fed. 784 (D.W.Va. 1916).

¹⁷ *Waters v. Shinn*, 178 Fed. 345 (D.Ark. 1907). Compare *Chillicothe Furniture Co. v. Revelle*, 14 F(2d) 501 (C.C.A.8th, 1926).

tion to the relative capabilities of the courts;¹⁸ this thought is especially important when dealing with the conflict between federal receivership proceedings and state administrative proceedings.

1. *Lion Bonding Co. v. Karatz*¹⁹ involved a conflict between a federal court and a state administrative body. Under a Nebraska Statute the supervision of insurance companies was committed to the Department of Trade and Commerce. The statute provided that whenever a domestic insurance company was insolvent the Department could apply to the state court for an order directing the company to show cause why the Department should not be permitted to take possession of its property. Upon the Department's application and the company's consent, the state court entered a decree and the Department took possession of the assets. Subsequently, the state court, under statutory authority, entered an order directing the liquidation of the company's affairs. After the Department had taken possession, a bill for the appointment of a receiver was filed in a federal court for the district of Minnesota and receivers were appointed. A copy of the order of appointment was then filed with the federal court for the district of Nebraska. The receivers filed a bill in the federal court for the district of Nebraska, praying that the Department of Trade and Commerce be directed to surrender possession to the receivers appointed by the federal court; the Supreme Court held that the bill was properly dismissed by the district court.

In the course of its opinion the Supreme Court said that the property was in possession of the state court before the federal bill was filed;²⁰ and that, accordingly, the federal court had no jurisdiction to appoint receivers. The desirability of the court's conclusion may hardly be denied;²¹ it would seem to sup-

¹⁸ In 41 HARV. L. REV. 70, 73 (1927), the following suggestion is made: "It is submitted that the desirable procedure for a federal court when a bill praying for the appointment of a receiver is filed, and when a state receivership suit is pending, would be to decide whether this is a case where the state courts would grant substantial justice to all the parties concerned, or whether it is a situation in which control through the federal courts would be preferable, and then to act accordingly." See *Kansas City Pipe Line Co. v. Federal Title & Trust Co.*, 217 Fed. 187 (C.C.A.8th 1914); *Towle v. American Bldg. Loan & Inv. Co.*, 60 Fed. 131 (C.C.D.Ill. 1894).

¹⁹ 262 U.S. 77 (1923).

²⁰ At page 88.

²¹ See 2 TARDY'S SMITH ON RECEIVERS (2d Ed. 1920) 1442.

port the view that possession taken by an administrative officer, pursuant to a court order, will preclude interference by other courts.

The court's assimilation of such administrative officers to judicial receivers renders a line of federal cases troublesome. For certain purposes bank commissioners have been called "receivers";²² for other purposes they have been differentiated from receivers.²³ The federal courts have repeatedly entertained actions, to establish trusts on funds being administered by state banking and insurance commissioners, without leave of the state courts under whose orders the commissioners were acting.²⁴ Admittedly, such actions would not be entertained against judicial receivers.²⁵ None of the cases has suggested, however, that the federal courts would have power to appoint receivers to replace the administrative officers.²⁶

2. Suppose a state administrative officer takes possession under a statute which permits him to do so without a court order. Will a federal court subsequently appoint a receiver upon application by a stockholder or creditor? Here the decision in *Lion Bonding Co. v. Karatz* may be distinguished, yet the reasons underlying that decision should compel a like result. That the administrative officer is, in the ordinary situation, better fitted to handle the affairs of a company which has been under his continuous supervision since its incorporation²⁷ seems

²² They have been held to be "receivers" within the meaning of the Bankruptcy Act. *Bramwell v. United States Fidelity & Guaranty Co.*, 299 Fed. 705 (C.C.A.9th, 1924) affirmed in 269 U.S. 483 (1926).

²³ See *Allen v. United States*, 285 Fed. 678 (C.C.A.1st, 1923). Compare *People's Trust Co. v. United States*, 23 F(2d) 381 (C.C.A.1st, 1928).

²⁴ See *Porter v. Beha*, 12 F(2d) 513 (C.C.A. 2d, 1926); *Farrell v. Stoddard* 1 F(2d) 802 (D.N.Y. 1924); *Bean v. Stoddard*, 2 F(2d) 62, (D.N.Y. 1923). See also *United States v. Adams*, 9 F(2d) 624 (D.La 1925); *United States v. Brook* 5 F(2d) 265 (D.La. 1925); *United States v. Oklahoma*, 261 U.S. 253 (1923); *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483 (1926).

²⁵ *Merryweather v. United States*, 12 F(2d) 407 (C.C.A.9th, 1926). But compare *Guaranty Trust Co. v. North Chicago St. Ry.* 130 Fed. 801 (C.C.A.7th, 1904); *Met. Trust Co. v. Lake Cities Electric Ry.* 100 Fed. 897 (C.C.D.Ind. 1904).

²⁶ See *Allen v. United States*, 285 Fed. 678 (C.C.A.1st, 1923), where the court declared a trust to exist but did not order payment. But compare *Porter v. Beha*, 12 F(2d) 513 (C.C.A.2d, 1926).

²⁷ See 2 TARDY'S SMITH ON RECEIVERS (2d Ed. 1920) 1442; 44 HARV. L. REV. 618 (1931); PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES (1927) *passim*. See also *O'Neil v. Welch*, 245 Fed. 261 (C.C.A.3rd, 1917). But see *Towle v. American Bldg. Loan & Inv. Co.*, 60 Fed. 131 (C.C.D.Ill. 1894); *Welch v. Union Casualty Ins. Co.*, 238 Fed. 968 (D.Pa. 1917) reversed in 245 Fed. 261 (C.C.A.3rd, 1917).

too clear to warrant extended discussion.

In *Bank of Bay Biscayne v. Hankins*²⁸ a creditor brought a bill for the appointment of a receiver for a state bank which have been closed by the state comptroller. The comptroller had taken possession of its assets and was proceeding with its liquidation. The district court appointed a receiver but this was reversed by the circuit court of appeals for the fifth circuit.²⁹ Recent decisions by the third and eighth circuits lend further support to the view that once an administrative officer has taken over the liquidation of a domestic bank or insurance company, a federal court will not replace him by its receiver.³⁰

3. In *O'Neil v. Welch*³¹ a bill was first filed against an insurance company in the state court pursuant to statutory provisions for administrative liquidation; a stockholder's bill was then filed in a federal district court and a receiver was appointed. The state court then ordered that the company be liquidated by the insurance commissioner pursuant to the statute. The federal district court³² refused to revoke its appointment; this was reversed by the Circuit Court of Appeals. The court referred to the cases dealing with the conflict of jurisdiction in receiverships of ordinary corporations and adopted the view that the filing of the bill is determinative of jurisdiction, where the property is essential to a final disposition of the matter. The court distinguished *Lyon v. McKeefry*³³ on the ground that there, the bill was filed in the federal court before any action was taken in the state court.

²⁸ 42 F(2d) 209 (C.C.A.5th, 1930).

²⁹ The opinion of the court indicates that it was of the belief that it had the "power" to appoint a receiver but that a proper exercise of discretion required the withholding of that power.

³⁰ In *Krauthoff v. Kansas City Joint Stock Land Bank*, 23 F(2d) 71 (C.C.A. 8th, 1927), the court held that it could not interfere where the farm loan board had appointed a receiver for a land bank under statutory authority. In *Port Newark National Bank v. Waldron*, 46 F(2d) 296 (C.C.A.3rd, 1930) the court held that it had no authority to appoint a receiver, where the comptroller of the currency had placed an examiner in a national bank before the bill in the federal court was filed.

Where the state commissioner is acting arbitrarily the situation may well require a contrary conclusion. See *Bank of Bay Biscayne v. Hankins*, 42 F(2d) 209, 210 (C.C.A.5th, 1930).

³¹ 245 Fed. 261 (C.C.A.3rd, 1917). See *Mitchell v. Lay*, 48 F(2d) 79 (C.C.A.9th, 1930).

³² *Welch v. Union Casualty Ins. Co.*, 238 Fed. 968 (D.Pa. 1917).

³³ 171 Fed. 384 (C.C.A.3rd, 1909).

Where a state administrative officer institutes proceedings before any proceedings are instituted in a federal court it seems clear that the state suit should be permitted to prevail.³⁴ The advantages of permitting the statutory proceedings to control are manifold; the advantages which may be obtained by a federal receivership³⁵ will generally be outweighed. The test adopted by *O'Neil v. Welch* enabled a desirable result in the situation there presented, but as has been already stated, that test was rejected by the Supreme Court in *Harkin v. Brundage*,³⁶ in favor of the view that the filing of the bill controls only where the objects of the suits are identical. The wisdom of permitting administrative proceedings to control will, however, probably be sufficiently forceful to lead to a liberal determination of similarity, enabling the desired result.

4. Where the federal suit is instituted first and statutory proceedings are subsequently instituted, adherence to the rule of *Harkin v. Brundage* might lead the federal courts to assume jurisdiction. It is here that the suggestion that considerations of expediency should be permitted to govern is especially pertinent. In the ordinary case the statutory proceeding will be best adapted to achieve the desired result. *Harkin v. Brundage* does not compel a federal court to assume jurisdiction merely because it is authorized to so do. The appointment or continuance of a receivership is discretionary and a sound exercise of discretion may require that the federal court relinquish jurisdiction to a state administrative body even though it need not do so.³⁷ And in the rare instances where the advantages of a federal receiver-

³⁴ There may be situations where a federal court would be better fitted to handle the liquidation. Compare *Towle v. American Building Loan & Inv. Co.*, 60 Fed. 131 (C.C.D.Ill. 1894). But even in such situations the desirability of avoiding conflicts between courts may well require that the state court be permitted to prevail.

³⁵ Compare *Towle v. American Bldg. & Inv. Co.*, 60 Fed. 131 (C.C.D. Ill. 1894).

³⁶ 276 U.S. 36 (1928). The court held that where the objects of suits are identical the filing of the bill prevails; otherwise the taking of possession controls. Of course, the foregoing rule applies only in suits dealing with property as distinguished with suits *in personam*. It is settled that in actions *in personam* priority of jurisdiction is immaterial. See *Kline v. Burke Construction Co.*, 260 U.S. 226, 235 (1922).

³⁷ *Amos v. Trust Co. of Florida*, 54 F(2d) 286 (C.C.A.5th, 1931). See 41 HARV. L. REV. 70 (1927); *Kansas City Pipe Line Co. v. Fidelity Title & Trust Co.*, 217 Fed. 187 (C.C.A.8th, 1914). See also *Watson v. National Life & Trust Co.*, 189 Fed. 872 (C.C.A.8th, 1911).

ship would outweigh the advantages of the administrative proceedings the federal courts might well decline to relinquish jurisdiction.³⁸

Of the New Jersey district court cases four involved insurance companies. Of these, three were friendly receiverships; in all three cases the court appointed receivers, apparently without consideration of the nature of the defendant. The other case was a contested receivership; here also, the court appointed receivers. In the contested case the commissioner of banking and insurance was notified; the court deferred the appointment of a receiver chiefly because of the commissioner's suggestion to that effect, and ultimately the commissioner consented to the appointment of a receiver by the court.

In the event that the new New Jersey statutes relating to the appointment of receivers for domestic banks and insurance companies are held applicable in the local federal court then the course to be pursued is evident—receivers may not be appointed for such companies upon the application of creditors or stockholders unless the commissioner of banking and insurance has, after demand, refused to act.³⁹ But even if the state statutes are held inapplicable the federal court should display greater hesitancy in appointing receivers for such companies than it has in the past.

The federal court should not appoint receivers of insurance companies without notice to the proper state administrative officer, even where the defendants consent to the appointments. When an application for a receiver of a corporate defendant subject to the supervision of an administrative officer is presented, the court should refuse to act until the commissioner has been afforded the opportunity of being heard.⁴⁰ The court will then be in a position to properly exercise its discretion; if

³⁸ Compare *Towle v. American Bldg. Loan & Inv. Co.*, 60 Fed. 131 (C.C.D. Ill. 1894).

³⁹ See note 51 *supra*.

⁴⁰ Apparently the practice of the New Jersey district court in appointing receivers for corporations subject to state supervision without requiring that the local administrative officer be notified is general throughout the districts. See *Merchant & Insurer Reporting Co. v. Jones*, 220 Fed. 791 (C.C.A.9th, 1915); *Stevens v. Empire Casualty Co.*, 180 Fed. 283 (C.C.D.W.Va. 1910). See also *Robinson v. Mutual Reserve Life Ins. Co.* 162 Fed. 800 (C.C.D.N.Y. 1908).

a proceeding by the commissioner is already pending the court should have no hesitancy in declining jurisdiction. And even where the federal proceeding is prior in time, the court may well conclude, after being advised of the commissioner's position, that the matter should be left to administrative control.

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