RECEIVERS—TORT LIABILITY.—A receiver is a ministerial officer of the court in possession of property, *custodia legis,* for the purpose of performing certain perfunctory duties as to the property, until the process of litigation decides to whom the property or restricted rights in it shall inure.[1] Because, where the receivership is of a corporation, the appointment of a receiver does not work a dissolution of the corporation, we have a double headed hydra existing, with an active receiver who has no title to the property and a nebulous corporation which exists but can do nothing.[2] During the continuance of the receivership torts occur which do not differ in kind or quality from those torts ordinarily occurring where a person holds property or carries on a business. It is important, recognizing the receiver's public position, to examine the degree of immunity from tort liability, if any, which attaches to his position as an officer of the court. The leading New Jersey case of *Little v. Dusenbury*[3] decides that he is not immune to the extent that state and municipal officers are. However, the case is silent on whether the receiver is to be invested with any amount of liability because of his public position. The rule that the cases appear to have adopted in refusing to safeguard these officers of the court beyond the procedural requirement that claimants must obtain leave of the court before instituting the suit, is, logically, a safe and salutary one. The reason springs out of the fact that a receiver acts in a representative capacity for the individuals involved in the litigation on behalf of the court which is invested with title.[4] The requirement of

1. State v. Norfolk & S. R. R., 152 N. C. 785, 67 S. E. 47 (1910). "Property of a corporation in the possession of a receiver, in insolvency, is held in custodia legis, cum onere, for the benefit of all legal claimants." Stanton v. Metropolitan Lumber Co., 107 N. J. Eq. 345, 347, 152 Atl. 653 (Ch. 1930).

2. "Putting a corporation in charge of a receiver does not work its dissolution. The corporation continues to exist until its dissolution is effected by surrender or judicial decision." State (Pros.) v. Board of Assessors, 57 N. J. L. 53, 29 Atl. 442 (Sup. Ct. 1894). "As the corporation can do no act while the receiver is in full control, it can commit no offense." State of Indiana v. Wabash Ry., 15 West 449, 17 N. E. 909 (1888).

3. 46 N. J. L. 614 (E. & A. 1884).

4. "The court never allows any person to interfere with money or property in the hands of a receiver without leave." Hoffman v. Kahn, 119 N. J. Eq. 171, 181 Atl. 528 (Ch. 1935).

"A receiver is not exempt from liability to answer for injuries inflicted by wrongdoing or negligence of those he employs in operating the railroad. Yet, the liability is not a personal one, but falls mainly on the receiver as a representative of the property

leave of court is merely to prevent vexatious and unreasonable suits from being started.[5] Where liability does attach, in an action for a tort which allegedly was committed during the receivership, the receiver is liable in his official capacity and not in his individual capacity, if the tort arose fairly in the course of receivership.[6] "The liability is essentially liability of the fund and not of the custodian."[7] The receiver is answerable officially for the torts committed by those appointed to assist, further, and carry on the business which he must perform as receiver.[8] Of course, if the receiver or agent attempts to serve a "double purpose" in performing the particular acts out of which the third party is injured, *i.e.*, if he is doing an act for his own benefit as well as for the benefit of the receivership at the time when the injury occurred, then the numerous agency cases which decide the frolic, departure, and detour doctrine would manifestly apply.[9]

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and fund managed by the court, and damages recoverd from such liability are thus to be collected." Vanderbilt v. Little, 43 N. J. Eq. 669, 12 Atl. 188 (E. & A. 1888). "The manner in which a judgment rendered (against a receiver) shall be made, shall necessarily be under the control of the court having custody through its receiver." Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139 (1889).

5. You determine your liability by a petition in the cause in which the receiver was appointed rather than an independent suit. In so doing you cannot require a jury trial, that being within the discretion of the court. However, you may petition to bring an independent action which is often more appropriate. HIGH, RECEIVERS § 244; Palys v. Jewett, 32 N. J. Eq. 302 (1880).

6. Notes (1932) 80 U. OF PA. L. REV. 949.

7. Bartlett v. Cicero, 177 Ill. 68, 52 N. E. 339 (1898). Knickerbocker v. Benes, 95 Ill. 434, 63 N. E. 174 (1902).

8. "For torts committed by his servants while operating the railroad under his management, he is responsible under the principle of respondeat superior. The liability, however, is not a personal liability, but a liability in his official capacity only." McNulta v. Lockridge, 141 U. S. 50 (1891). This is the leading case on the subject. Little v. Dusenbury, *supra* note 2, is to the same effect.

In England the receiver's liability for a tort is treated analogous to the liability of a trustee for a tort. The receiver, in England, is held personally liable, just as the trustee is, and is allowed a right of reimbursement. 7 FLETCHER, ENCYCLOPEDIA OF CORPORATIONS § 7864.

In Gardner v. Martin, 123 Miss. 218, 85 So. 182 (1922) the slander uttered by an employee of a receiver of a hotel was held imputable even to the extent of allowing punitive damages.

In Averill v. McCook, 86 Mo. App. 346 (1900) the servants of the receiver of a railroad negligently ran into a cow. It was held that there was a cause of action against the receiver officially. To the same effect is Little v. Dusenbury, *supra*.

9. Donaldson v. Ludlow, 94 N. J. L. 306, 110 Atl. 640 (Sup. Ct. 1920); Croneeker

Given two or several joint tort-feasors with one of them a receiver, the weight of authority allows the joinder of the receiver with the other tort-feasors as defendants, except where the nature of the tort is such that it cannot be committed by more than one person or where the tort grows out of the ownership of land as joint tenants or tenants in common.[10] It would be proper to recall at this point the tendency away from the formal and technical common law rules on joinder of parties to a suit toward the liberal modern rules which allow a joinder wherever the causes can be conveniently tried together.[11] The court should be liberal in granting leave to join a receiver in his official capacity as a party defendant to a tort suit, with the added restriction that this should be limited to those actions where the court in its discretion will grant leave to sue the receiver in an action outside the receivership proceedings. The rationale from this discussion is that a receiver who jointly commits a tort is not immune from liability merely because he is a functionary of the court. The rule that all who contribute to a tort are liable jointly, clearly applies to receivers.[12]

Where the tort is committed prior to the inception of the receivership and is non continuing in nature, receivers are generally answerable in their official capacity.[13] This is based on the fact that a receiver becomes an officer of the court in administering the assets of the insolvent corporation, where the receivership involves a corporation, or the property where the

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v. Hall, 92 N. J. L. 450, 105 Atl. 213 (E. & A. 1918); Riley v. Standard Oil Co., 231 N. Y. 301, 132 N. E. 97 (1921).

10. Tandrup v. Sampsill, 234 Ill. 526, 85 N. E. 331 (1908) allows a receiver to be joined with another corporation, where they, as receivers, are jointly and severally liable for a personal injury caused by themselves and another company. "The injured party may sue one, or any, or all of several joint wrongdoers, and recover against as many as the proof shows are liable." This familiar rule is reiterated in the light of the problem of joinder of a receiver and another. This case recognizes and reiterates the exceptions outlined in the body.

11. N. J. SUP. CT. RULES §§ 16-19. HARRIS, PLEADING AND PRACTICE IN N. J. 231.

12. Hagy v. Hafner, 86 N. J. L. 502, 94 Atl. 48 (Sup. Ct. 1914); La Bella v. Brown, 103 N. J. L. 491, 133 Atl. 82 (Sup. Ct. 1926).

13. There is a conflict of authority in allowing a recovery in a suit for torts or of a non continuing nature, where the tort was committed prior to the receiver's appointment. Two states, Missouri and North Carolina have allowed recoveries. The District of Columbia, Florida, Iowa, and Maryland courts have denied a recovery. Generally where the tort is of a continuing nature you can maintain the suit, 7 FLETCHER, *op. cit. supra* note 8, § 7868.

receivership involves the custody of property.[14] On the other hand, in situations where the tort, being of a continuous nature, such as a continuing nuisance or a continuing trespass, was commenced prior to the appointment of the receiver and continued during the receiver's period of service, the courts have held receivers officially liable, except where the nature of the tort is such that the receiver, if he were an individual, would be required to have knowledge of the existence and continuance of the tort before he can be held liable.[15]

A succeeding receiver is officially liable for a tort committed by his receiver predecessor. This liability has been placed by one court on the basis that the receiver is a corporate sole.[16]

When the receivership is of an insolvent corporation, it is compatible with the spirit of the law to require him alone to answer officially for any torts committed by the receivership, or committed for the benefit of the receivership, since the receiver is the active participant.[17] After a receiver is appointed, corporate existence is merely nominal and depends on the theory that a corporation has unlimited life unless the charter is surrendered by the corporation or destroyed by the state.[18] Where the receiver is officially liable the extent of his liability is commensurate with, and admeasured by, the amount of property over which the receiver has custody.[19] The existence of the possibility of liability is looked upon by

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14. The jurisprudential analysts classify torts as an action in rem for analytical purposes. HOLLAND, ELEMENTS OF JURISPRUDENCE.

15. Sheat v. Lusk, 98 Kans. 614, 159 Pac. 407 (1916): "They (receivers) cannot escape liability because the culvert had been built before they had been placed in charge of the railroad. They stand in the shoes of the corporation and are charged with the duties and responsibilities of maintaining the railroad and crossings in the safe conditions that were incumbent upon the railroad, itself, before they were appointed." See Lamb v. Roberts, 196 Ala. 679, 72 So. 309 (1916).

16. "His position is somewhat analogous to a corporate sole." McNulta v. Lockridge, *supra* note 8.

17. *Supra* note 2.

18. BLACKSTONE'S COMMENTARIES (Cooley's ed.) 467, "But as all personal rights die with the person, . . . it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons who may maintain a perpetual succession, and enjoy a kind of legal immortality."

19. "Such damages being part of the operating expenses, are accorded the same priority of payment as belongs to other necessary expenses of the receivership, and will be paid out of the net income if that is sufficient, but in event of a deficiency

the court as an operating expense.[20]

After the receivership is lifted and the corporation again receives title to what was its property, the receiver is no longer liable. The corporation is liable then for any tort committed during the receivership.[21] The theory, upon which the corporation is now liable, is that the claims against the receiver on his discharge follows the fund which is now in the corporation's hands.[22] A more perplexing problem arises under this analysis where the receiver has individually committed a tort in the scope of the receivership business, and it is a question of fact whether the acts which the receiver was performing at the time of the tort were for his own benefit as an individual or for the benefit of the corporation. In such an event, it seems logical to conclude that the receiver can be joined individually as a defendant tort feasor along with the corporation.

Where a receiver acts under an order of the court, the order is "sheath of legal immunity" unless the court improvidently assumed jurisdiction beyond its jurisdictional powers.[23] This immunity extends to the receiver both in his official and in his individual capacities.[24] However, if the receiver in collecting the effects of the receivership, under an order of appointment, takes property by force, without a court order granting him the authority to possess that property, he is held personally liable.[25]

The court, before it allows a recovery from the receivership in cases where the receiver has been found individually and officially liable, tests whether or not the tort can with fairness be considered as arising out of the business.[26] If it decides that it cannot be regarded as fairly within the receivership, there can be no recovery from the corpus even though

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they will be paid out of the corpus." Bartlett v. Cicero, *supra* note 7. Green v. Coast Line R. R., 97 Ga. 15, 24 S. E. 814 (1896) accords the judgment creditor the same priority for the purposes of satisfying a receiver's tort liability as other expenses.

20. *Ibid.*

21. Bartlett v. Cicero, *supra* note 7, is a direct holding on this point.

22. *Ibid.*

23. Cliffort v. West Hartford Creamery, 103 Vt. 229, 153 Atl. 205 (1931); Brictson Mfg. Co. v. Close, 25 F. (2d) 794, 804 (C. C. A. 8th, 1928). His right to possess goods in another jurisdiction. Carter v. Mitchell, 225 Ala. 287, 142 So. 514 (1932).

24. *Ibid.*

25. He should in a doubtful situation apply to the court for an order. McAffee v. Bankers Trust Co., 253 Mich. 685, 235 N. W. 807 (1931).

26. Notes (1932) 80 U. OF PA. L. REV. 949.

the receiver is individually insolvent.[27] These rules, however, are subject to the limitation that a receiver can not be sued in his official capacity after his discharge.[28]

TAXATION—PERSONAL PROPERTY—LIEN.—In recent years, numerous municipalities in New Jersey have resorted to a more stringent enforcement of the personal property taxes as a means of raising sufficient revenue for their increased expenditures, and as a means of distributing the tax burden more equitably. This policy has been beset with numerous difficulties, for the legislature has not seen fit to provide as thorough and complete a law for the taxing of personalty as it has for the taxing of realty. Moreover, the enforcement of a personal property tax in past years has been so lax that there is a scarcity of judicial construction of the statute.

One of the problems which arises recurrently is whether a municipality can distrain for personal property taxes against goods in the hands of a purchaser, in a case where the taxes were assessed against the seller before the sale took place.[1] The determination of this question depends upon whether, at the time of the sale, the tax was a lien on the property itself, whether such lien, having attached, follows the property in the hands of a purchaser, and whether such lien, having so followed the property, may be enforced by distraint.

It is well settled that taxes for personal property are not, generally, a lien thereon until after a distress and levy has been made.[2] So, ordinarily, if the person assessed sells the goods before any distraint for the tax has been made, the purchaser takes free of the tax, assuming, of course, that the sale was not a fraudulent one in an attempt at evasion.[3] If the sale is made after distress and levy on the goods, the purchaser takes subject to the tax.[4] The only way in which the taxes may be a lien other than

27. *Ibid.*

28. HIGH, RECEIVERS (2d ed.) § 398b.

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1. 7 N. J. L. J., nos. 14, 15.

2. Public School Trustees v. Trenton, 30 N. J. Eq. 667 (E. & A. 1879); Hardenburgh v. Converse, 31 N. J. Eq. 500 (Ch. 1879); Paterson v. O'Neill, 32 N. J. Eq. 386 (E. & A. 1880); Lydecker v. Palisades Land Co., 33 N. J. Eq. 415 (Ch. 1881); Smith v. Specht, 55 N. J. Eq. 47, 42 Atl. 599 (Ch. 1899).

3. Manzo v. Manzo, 99 N. J. Eq. 97, 133 Atl. 190 (Ch. 1926).

4. Maish v. Bird, 22 Fed. 180 (C. C. 1884); Palmer v. Pettingill, 6 Idaho 346, 56 Pac. 653 (1898).