Corporate Receivership in North Carolina

John G. Golding

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INTRODUCTION

The corporate receivership had its origin in the courts of equity, but North Carolina enacted statutes governing receivership at an early date.[1] Although the provisions on this subject are fairly explicit, especially in regard to the procedural aspects of receivership law, they do not restrict the inherent power of an equity court to order a receivership in an appropriate case.[2] Rather they leave the matter in the sound discretion of the judge.[3]

An ancillary remedy, receivership is used principally "(1) to preserve, *pendente lite,* specific property which is the subject of litigation; (2) to tide an individual or corporation over a temporary period of financial embarrassment; and (3) as a State substitute for Federal Bankruptcy, to prevent preferences and to assure the equitable distribution of the assets of an insolvent."[4] Corporate receivership is restricted almost entirely to the last point.

APPLICATION AND HEARING

A prerequisite to any application for a receiver is the issuance of summons and the filing of the complaint in the principal action. Such summons "must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company" by publication,[5] which will also be sufficient

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[1] See N. C. REV. STAT. c. 26 (1837); N. C. REV. CODE c. 26 (1854); N. C. CODE c. 16 (1883); N. C. REV. §§ 1219-1232 (1905).

[2] Sinclair v. Moore Central R. R., 228 N. C. 389, 45 S. E. 2d 555 (1947); Lewis v. John L. Roper Lumber Co., 99 N. C. 11, 18 S. E. 52 (1888); Skinner v. Maxwell, 68 N. C. 400 (1873).

[3] J. L. Thompson Co. v. Pope, 183 N. C. 123, 110 S. E. 765 (1922).

[4] Sinclair v. Moore Central R. R., 228 N. C. 389, 395, 45 S. E. 2d 555, 560 (1947).

[5] N. C. GEN. STAT. § 55-131 (1950) ("publishing a copy [of the summons] at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh.").

service on the corporation itself "if no officer can after due diligence be found in the State."[6] Then, since "any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers,"[7] application may be made to any judge of the superior court in the district, whether he is the resident judge, or the one assigned to the district, or the one holding the courts therein by exchange, for appointment of a receiver.[8] A clerk of court does not have authority to appoint a receiver,[9] nor does a justice of the peace.[10]

The application must be in writing and should state specifically the facts which justify receivership.[11] The complaint may be used as an affidavit, or submitted with additional affidavits.[12] The resident judge or the judge holding the courts of the district may hear the application and issue an order setting a date and place for the hearing, and directing the corporation to show cause why receivership should not be allowed. Such hearing may be held before any superior court judge of the district, as, for example, the resident judge on a day after the close of the term.[13] If the application for the receiver is made at term time, generally no notice is required, since the parties, being in court, are charged with notice of all proceedings.[14] Although fixing the place for hearing outside the district in which the principal action is pending is improper, this is a mere irregularity which, if not excepted to in apt time, cannot be used as the basis of appeal.[15]

In emergency cases, where it seems probable that the property may be destroyed, secreted, or removed unless action is taken immediately, any judge of the superior court may order a temporary receivership without notice, making the order returnable before the proper judge within twenty days and providing that notice be given to the other party to appear for a hearing, which can be held anywhere in the district.[16] In such a case, the plaintiff must give "a written undertaking, executed by two sufficient sureties to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum mentioned in the undertaking, which the corporation may sustain by

[6] *Ibid.*
[7] N. C. GEN. STAT. § 1-501 (1953).
[8] Worth v. Piedmont Bank, 121 N. C. 343, 28 S. E. 488 (1897); Corbin v. Berry, 83 N. C. 28 (1880); N. C. GEN. STAT. 1-493 (1953).
[9] York v. McCall, 160 N. C. 276, 76 S. E. 84 (1912).
[10] Marshall v. Western North Carolina R. R., 92 N. C. 322 (1885).
[11] See McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 891, p. 1007 (1929).
[12] See City National Bank v. Bridges, 114 N. C. 381, 19 S. E. 642 (1894).
[13] Stith v. Jones, 101 N. C. 360, 8 S. E. 151 (1888).
[14] Hemphill v. Moore, 104 N. C. 379, 10 S. E. 313 (1889) (case involved injunction, but same principle applies).
[15] Galbreath v. Everett, 84 N. C. 546 (1881).
[16] N. C. GEN. STAT. §§ 1-493, 494 (1953).

reason of the . . . appointment of the receiver, if the court finally decides that the plaintiff was not entitled thereto."[17]

At the hearing on the order to show cause, all "stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice prescribes."[18] The corporation may resist the application, or, as is often the case where the corporation is insolvent, it may admit the allegations of the complaint and join in the prayer for the appointment of a receiver. If the latter course is pursued and it later appears that the action was not taken in good faith, the proper means of attacking the receivership would be by motion in the cause and appeal rather than by collateral attack.[19] Our court has pointed out that:

> . . . if done in good faith, such admissions are insufficient to show fraud or collusion, nor does it deprive the proceeding of its adversary character, or the court of its jurisdiction. In many instances the owner of property for which a Receiver is sought cannot in good faith deny the allegations of the complaint, and the best interest of such defendant may require acquiescence in the request for a Receiver.[20]

Proper Cases for Receivership

Because of the ancillary nature of receivership, a party seeking receivership before judgment must show two things to the satisfaction of the court: (1) an apparent right to the final relief requested in the main action, and (2) facts which justify the court's taking control of the corporate assets in the interim.[21] Receivership cannot be obtained, then, as an end in itself. It is not granted as a matter of right, but rests in the sound discretion of the court.[22] Since receivership unavoidably results in severe damage to the credit and reputation of a corporation, it is considered a harsh remedy and the courts jealously restrict its application.[23] Therefore, the judge in passing on a motion for a receiver must consider the consequences of the action to both parties, and must not unnecessarily injure one to remove "some slight

[17] N. C. Gen. Stat. § 55-135 (1950).
[18] N. C. Gen. Stat. § 55-131 (1950).
[19] Where the order for receivership is regular on its face, it is not subject to collateral attack even where the receivership is by consent. Hall v. Shippers Express, Inc., 234 N. C. 38, 65 S. E. 2d 333 (1951) (Same attorney represented both plaintiff-creditor and the corporation).
[20] *Id.* at 40, 65 S. E. 2d at 335.
[21] N. C. Gen. Stat. § 1-502 (1953); Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820 (1911); Witz, Biedler & Co. v. Gray, 116 N. C. 48, 20 S. E. 1019 (1895).
[22] J. L. Thompson Co. v. Pope, 183 N. C. 123, 110 S. E. 765 (1922).
[23] Neighbors v. Evans, 210 N. C. 550, 187 S. E. 796 (1936); Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 775 (1931).

disadvantage to the other."[24] He should "weigh all the circumstances, including the nature of the property and its likelihood to be destroyed or spirited away during the litigation, and the probability on the other hand of its value being seriously impaired by its being placed in the hands of a receiver. . . ."[25]

The above approach is the basis for the holding that ordinarily a simple contract creditor should not be granted a receivership of the debtor corporation, absent its consent, unless he has "some peculiar equity or beneficial interest in the property of the corporation," since he has not pursued his remedy at law.[26] Similarly a simple tort creditor who has not reduced his claim to judgment is probably not entitled to receivership to safeguard his rights.[27] Where the unsecured creditors bring a creditor's bill in equity, however, seeking dissolution of the corporation and division of its assets among themselves and all other creditors, the greater equity they command may justify receivership.[28] Of course, the judgment creditor who has had execution returned unsatisfied has a clear right to a receiver, since he has exhausted his remedy at law.[29]

Receivership is rarely employed in actions against solvent corporations, since there is little danger that the plaintiff will be unable to realize on the relief which he may obtain in the main action. Thus receivership is not granted where a fraudulent conveyance is alleged, but there is no showing that the party to whom the property was transferred is insolvent,[30] or where plaintiff's property is in defendant's possession under contract and no danger of insolvency is established.[31]

[24] Venable v. Smith, 98 N. C. 523, 526, 4 S. E. 514, 515 (1887).

[25] Whitehead v. Hale, 118 N. C. 601, 603, 24 S. E. 360 (1896). Receivership is proper where the debtor has confessed judgments with fraudulent intent and executions have been levied on the only property of the debtor within the state in favor of non-resident creditors who seek to remove such property from the state. Stern & Co. v. Austern, 120 N. C. 107, 27 S. E. 31 (1897).

[26] Sinclair v. Moore Central R. R., 228 N. C. 389, 396, 45 S. E. 2d 555, 561 (1947) ("The action on the debt is an action at law, involving no equity, whereas receivership proceedings are equitable in nature and receivers are appointed . . . in furtherance of some equitable relief to which the applicant establishes a *prima facie* right."). The language in Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 20 (1911) would indicate that such a creditor could obtain a receivership. However, it should be noticed that the creditor in that case was one who sold on a conditional sale contract.

[27] The holding of Sinclair v. Moore Central R. R., *supra* note 26, would seem to bar such a remedy.

[28] Sinclair v. Moore Central R. R., 228 N. C. 389, 397, 45 S. E. 2d 555, 561 (1947).

[29] N. C. GEN. STAT. §§ 1-363 to 1-366 (1953). Where the tax list has been delivered to the sheriff and he has been unable to collect, this is equivalent to having an execution returned unsatisfied, and the taxing body may obtain a receivership. State and Guilford County v. Georgia Co., 112 N. C. 35, 17 S. E. 10 (1893).

[30] Rheinstein v. Bixby & Katz, 92 N. C. 307 (1885); Levenson & Co. v. Elson, 88 N. C. 182 (1882).

[31] Ellington & Guy, Inc. v. Currie, 193 N. C. 610, 137 S. E. 869 (1927). Nor

Nor can a plaintiff who deposited his stock with a solvent corporation as collateral for a note which he gave to secure the purchase price obtain receivership in his action for an accounting of the assets.[32] Even where the deed of trust on which the action is brought specifically provides for receivership on filing of suit for default, the court can exercise its equitable power to refuse the appointment.[33]

In such cases, the court can instead exercise its prerogative to accept from the defendant a bond payable to the plaintiff in an amount double the sum demanded by him, with at least two justified sureties to protect the plaintiff during the action.[34] This bond is a substitute for receivership, and prevents all persons who are parties at the time it is given from later renewing their request for a receiver, although it does not bar others from so applying.[35] It can be accepted at the outset, and may be also taken after receivership has been ordered, in which case the receiver will be discharged and the assets returned.[36] Even though the defendant subsequently goes bankrupt, the state court can order the cause to proceed to trial, any judgment rendered to be collectible by execution, only from the sureties, who would then prove such judgment as a claim in the bankruptcy proceedings.[37] Only in the rare case where the solvent defendant refuses to give bond or cooperate with the court in other respects would receivership be granted.[38]

Receiverships, consequently, are ordered principally in cases where it is apparent that the corporation is dying from inactivity or lack of funds and that court control for the protection of its creditors will do little additional harm to the company. Usually dissolution is requested as part of the main relief.

Dissolution may be sought in a civil action by the corporation itself, by a creditor or stockholder, or by the authority of the Attorney General in the name of the State where the corporation is "insolvent,[39]

will it be granted in a suit for rescission where the insolvency of defendants is not shown. Carter v. Hoke, 64 N. C. 309 (1869).

[32] Huet v. Piedmont Springs Lumber Co., 138 N. C. 493, 50 S. E. 846 (1905).

[33] Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 475 (1931).

[34] N. C. GEN. STAT. § 1-503 (1953); Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428, 160 S. E. 475 (1931); Hurwitz v. Carolina Sand & Gravel Co., 189 N. C. 1, 126 S. E. 171 (1924); Jones v. Jones, 187 N. C. 589, 122 S. E. 370 (1924).

[35] Sinclair v. Moore Central R. R., 228 N. C. 389, 45 S. E. 2d 555 (1947).

[36] See Gordon v. Calhoun Motors, Inc., 222 N. C. 398, 23 S. E. 2d 325 (1942).

[37] *Ibid.* But see Thompson v. Dillingham, 183 N. C. 566, 112 S. E. 321 (1922).

[38] See Hurwitz v. Carolina Sand & Gravel Co., 189 N. C. 1, 126 S. E. 171 (1924).

[39] "Insolvent" has been defined as "unable to meet liabilities after converting all of the property or assets belonging to the person or estate into money, at market prices, and applying the proceeds, with the cash previously on hand, to the payment of them." Silver Valley Mining Co. v. North Carolina Smelting Co., 119 N. C. 417, 418, 25 S. E. 954 (1886). However, such an extreme condition is not required, since N. C. GEN. STAT. § 55-124 (1950) makes "imminent

or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights."[40] In such a case a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases.[41] A receiver may also be appointed where the corporate existence has expired by limitation.[42]

The above statutes, although used in the majority of cases to obtain receivership, do not provide the only authority for seeking a receiver. Nor do they create an absolute right to such provisional relief. The court must still balance the equities of the parties to arrive at its decision. Thus, receivership will be allowed where the insolvency coupled with corporate action to dispose of assets threatens the safety of the fund and bond is not offered.[43] (In cases of serious insolvency such security would be impossible to raise.)

Where property sold under conditional sale is being used by the insolvent buyer and is rapidly depreciating in value, receivership can be used to preserve such property.[44] In a proper case receivership might be available to preserve a corporation where a deadlock among the owners or directors threatened the solvency of the company.[44a]

Even though insolvency is admitted, however, if it appears that the property is appreciating rather than depreciating in value, and that there is little likelihood that the corporation will dispose of its assets, a court will be reluctant to grant a receivership before judgment—especially when the major part of the worth of the company lies in its goodwill which would be destroyed by a receivership.[45] Furthermore,

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danger of insolvency" sufficient. See Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358 (1915) (The company's "condition from the present management is such as to threaten loss, if not eventually insolvency . . .").

[40] N. C. GEN. STAT. § 55-124 (1950). Also: N. C. GEN. STAT. §§ 55-126, 129 (1950).

[41] N. C. GEN. STAT. § 55-147 (1950).

[42] *Ibid.*

[43] "The safety of the fund is threatened both by the fraud and insolvency of the defendants." Peoples National Bank v. Waggoner, 185 N. C. 297, 117 S. E. 6 (1923) (defendant partnership had fraudulently obtained funds of plaintiff bank and was spending them in its business); Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 (1894) (suit to set aside assignment for benefit of creditors); City National Bank v. Bridgers, 114 N. C. 381, 19 S. E. 642 (1894) (assignment to allegedly insolvent trustee; defendants denied trustee's insolvency and refused to offer bond); Nimocks v. Cape Fear Shingle Co., 110 N. C. 230, 14 S. E. 684 (1892) (confession of judgment on allegedly fictitious debts in favor of corporate officers; corporation merely asserted that debts were genuine); Forsaith Machine Co. v. Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869 (1891) (corporation delayed registration of plaintiff's mortgage until it had confessed judgment in favor of officers and secured them with mortgage).

[44] Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820 (1911).

[44a] But such relief cannot be given in summary proceedings. *In re* Hotel Raleigh, Inc., 207 N. C. 521, 177 S. E. 648 (1934).

[45] Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360 (1896).

any inequitable conduct on the part of the plaintiff may bar such ancillary relief, as where the deed of trust which secures his bond provides that no bondholder can request a receiver, and there has been no demand upon the trustee to sue for foreclosure.[46] It has been pointed out that requesting receivership in violation of an arbitration clause "will be considered as a strong circumstance, with the other evidence, as to the right of the party who breached the agreement to have a receiver appointed."[47]

Failure to pay dividends, in itself an indication of financial distress, can be the basis for involuntary dissolution and receivership. It is provided by statute that when "stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this State" can show that in the three preceding years there have not been sufficient earnings "to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation,"[48] or that "the corporation has paid no dividend for six years preceding said application," or where stockholders owning one-tenth or more of the paid-up common stock can prove that there has been no dividend on the common stock for ten years, after hearing the judge "may adjudge a dissolution of the corporation and shall appoint one or more receivers."[49] If it appears to the court that the corporation is either insolvent or in imminent danger of insolvency, it may appoint a temporary receiver pending dissolution.[50] However, it has been held that if it appears that the failure to earn dividends was due to temporary conditions rather than mismanagement, dissolution and receivership will not be allowed.[51] Nor can a stockholder obtain relief under the statute if it appears that he participated in the management and did not object to the corporate action which was calculated to expand capital.[52]

So far some of the causes of dissolution, and instances where receivership may be granted pending dissolution have been noted. But dissolution may also be allowed on a voluntary basis where the board of directors deem it advisable and two-thirds of the stockholders consent in writing to such action.[53] Involuntary dissolution can be ordered where there has been abuse of corporate powers to the injury

[46] Jones v. Atlantic & Western R. R., 193 N. C. 590, 137 S. E. 706 (1927).
[47] Ellington & Guy, Inc. v. Currie, 193 N. C. 610, 613, 137 S. E. 869, 871 (1927).
[48] Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373 (1933) (No distinction is made between preferred and common stock in applying this 5% rule).
[49] N. C. GEN. STAT. § 55-125 (1950).
[50] *Ibid.*
[51] Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373 (1933).
[52] Winstead v. Hearne Brothers & Co., 173 N. C. 606, 92 S. E. 613 (1917).
[53] N. C. GEN. STAT. § 55-121 (1950).

of the public or of the stockholders, creditors or debtors of the company,[54] or non-user of the corporate powers for two or more consecutive years,[55] or where the corporation has been convicted of a persistent criminal offense.[56]

Where dissolution is ordered the corporate existence is continued by statute for three years for the purpose of prosecuting and defending actions by or against the company, and enabling it gradually to settle and close its concerns, to dispose of its property, and to divide its assets.[57] During this time the directors may be continued as trustees with extensive powers,[58] or the court may remove them on application of a stockholder or creditor[59] and appoint receivers.[60] The statutory remedy is exclusive of all others, and failure to institute receivership within the three-year period bars subsequent relief.[61]

Order and Review

The judge's decision as to whether or not receivership is to be granted, based on the factors already discussed, is embodied in his order. However, it is not proper to settle finally questions raised by the pleadings as to the rights of the parties in disposing of the motion for a receiver.[62] Though the ruling should be accompanied by a finding of fact, it is sufficient for the judge merely to examine the affidavits and determine whether sufficient cause was shown for ancillary relief[63] unless the losing party requests specific findings.[64] The facts must be

[54] N. C. Gen. Stat. § 55-124 (1950).

[55] N. C. Gen. Stat. §§ 55-124, 55-126, 55-127 (1950). There is no minimum number of shareholders required. Lasley v. Walnut Grove Mercantile Co., 179 N. C. 575, 103 S. E. 213 (1920).

[56] N. C. Gen. Stat. § 55-124 (1950). There have been instances where a corporation was dissolved by legislative enactment. Western North Carolina R. R. v. Rollins, 82 N. C. 524 (1880).

[57] N. C. Gen. Stat. § 55-132 (1950).

[58] N. C. Gen. Stat. § 55-133 (1950).

[59] "Anyone who has a right to require the fulfillment of an obligation or contract for the payment of money is a creditor in the strict technical sense of the term—any one, in other words, who has a debt or demand against another upon contract, express or implied, for the payment of money." Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 401, 428, 70 S. E. 820, 823 (1911). The rule of Sinclair v. Moore Central R. R., 228 N. C. 389, 396, 45 S. E. 2d 555, 561 (1947) would probably not apply where the receivership was requested by a simple contract or tort creditor *after* the corporation had been dissolved, since receivership would not injure the company in such a case.

[60] N. C. Gen. Stat. § 55-139 (1950). See Latta v. Catawba Electric Co., 146 N. C. 285, 59 S. E. 1028 (1907).

[61] Von Glahn v. De Rosset, 81 N. C. 468 (1879). However, the statutory bar arises only in cases of actual dissolution; mere cessation of business activity is not enough. Heggie v. Peoples Bldg. and Loan Ass'n., 107 N. C. 581, 12 S. E. 275 (1890).

[62] Forsaith Machine Co. v. Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869 (1891) (not proper to decide questions raised as to validity of judgments confessed by corporation or the effectiveness of the mortgage or deed of trust).

[63] City National Bank v. Bridgers, 114 N. C. 381, 19 S. E. 642 (1894).

[64] Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360 (1896).

reduced to writing, but it is permissible to postpone this provided it is done within a reasonable time after the order is entered.[65] When the order is regular on its face and the court is one with jurisdiction in receivership cases and possesses jurisdiction over the subject-matter, the order is not subject to collateral attack.[66] Instead, appeal is the proper means of securing redress,[67] but there is a presumption that the order was correct.[68] Unless specific findings of fact were made, the judge is presumed to have found the facts for the appellee.[69] Such finding of facts is not binding on appeal, however.[70] Where the evidence leaves material questions at issue not free from doubt, the supreme court will not overrule an order appointing a receiver;[71] nor will it require that the "proof should be as full and as complete as if the trial was before the jury upon the main issues."[72]

Selection of the Receiver

There are no statutory provisions governing the choice of the judge appointing a receiver for a corporation. Consequently, "the selection of a receiver is largely in the sound discretion of the judge of the Superior Court, and such discretion will not generally be reviewed unless it has been greatly abused."[73] A corporation may act as a receiver.[74] A sheriff may be appointed.[75] In the case of banks the Commissioner of Banks is a statutory receiver.[76] Several receivers may be appointed, although the supreme court has criticized such a course unless absolutely necessary.[77] It is not necessarily wrong to chose an attorney in the cause,[78] but the court should not select as re-

[65] Forsaith Machine Co. v. Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869 (1891) (three or four days after entry is not unreasonable).

[66] Hall v. Shippers Express, Inc., 234 N. C. 38, 65 S. E. 2d 333 (1951); Rousseau v. Call, 169 N. C. 173, 85 S. E. 414 (1915).

[67] Jones v. Thorne, 80 N. C. 72 (1879).

[68] Whitehead v. Hale, 118 N. C. 601, 24 S. E. 360 (1896).

[69] *Ibid.*

[70] Sinclair v. Moore Central R. R., 228 N. C. 389, 45 S. E. 2d 555 (1947); Pearce Bros. & Co. v. Elwell, 116 N. C. 595, 21 S. E. 305 (1895).

[71] Nimocks v. Cape Fear Shingle Co., 110 N. C. 230, 14 S. E. 684 (1892).

[72] Pearce Bros. & Co. v. Elwell, 116 N. C. 595, 597, 21 S. E. 305 (1895).

[73] Mitchell v. Aulander Realty Co., 169 N. C. 516, 521, 86 S. E. 358, 360 (1915).

[74] Western North Carolina R. R. v. Rollins, 82 N. C. 524 (1880).

[75] Simmons v. Allison, 118 N. C. 761, 24 S. E. 740 (1896).

[76] Blades v. Hood, 203 N. C. 56, 164 S. E. 828 (1932).

[77] Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 535, 36 S. E. 39, 41 (1900). "The necessity of the appointment of more than one receiver, we cannot see; and while we do not intend to criticize harshly the action of the judges who made these appointments, it may be well for us to call attention to the almost universal habit throughout the whole country to . . . appoint more than one receiver, and to allow them for their services . . . large and excessive commissions; and that unless the judges . . . exercise cautious scrutiny and diligent care, great injustice to creditors must result."

[78] Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358 (1915) (". . . although it is a practice not to be commended unless done by consent.").

ceiver a party interested in the action.[79] In an extreme case the receiver might be removed upon application to the proper judge.[80]

Before he can assume his duties, the receiver must execute and file with the clerk of the court in which the action is pending a bond payable to the adverse party with at least two sureties in an amount fixed by the appointing judge, "conditioned for the faithful discharge of his duties as receiver."[81] The judge has power to order the receiver to later give a new bond with other sureties.[82] An action on this bond will not lie until the receiver has failed to obey an order of the court in respect to the assets in his custody, so the proper procedure is to move in the cause that the receiver be required to account for the assets, and if after such account he fails to comply with a command to pay the effects into court, his failure makes both himself and the sureties liable on the bond.[83] Leave of court must be obtained to sue on the bond in an independent action.[84]

Effect of Receivership

The order for receivership, whether it is temporary or permanent, gives the court exclusive jurisdiction over the assets of the corporation which are within the state at that time. Thereafter no other court in the state can appoint a receiver for the property, even if the application for such relief was before it at an earlier date.[85] However, since the appointment of receivers has no extra-territorial effect, foreign creditors can still attach corporate property located in another state or obtain receivership in that state to administer such assets.[85a]

[79] Fisher v. Southern Loan & Trust Co., 138 N. C. 91, 50 S. E. 592 (1905) (plaintiff's attorney); Black v. Gentery, 119 N. C. 502, 26 S. E. 43 (1896) (plaintiff-stockholders). The practice has been indulged in, however. See Clayton v. Ore Knob Copper Co., 109 N. C. 385, 14 S. E. 36 (1891) (plaintiff-stockholders).

[80] Hall v. Shippers Express, Inc., 234 N. C. 38, 65 S. E. 2d 333 (1951); Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358 (1915).

[81] N. C. Gen. Stat. § 1-504 (1953). The party obtaining a receivership must furnish bond only where the receivership is a temporary one granted without notice to the corporation. The order is not void, however, for failure to require a bond from the receiver. Nesbitt & Bros. v. Turrentine, 83 N. C. 536 (1880).

[82] N. C. Gen. Stat. § 1-504 (1953).

[83] Bank of Washington v. Creditors, 86 N. C. 323 (1882); Atkinson v. Smith, 89 N. C. 72 (1883). If the receiver has already been discharged the order of discharge may be set aside and vacated for fraud or mistake by a motion in the cause in which the receiver was appointed. Then his liability on the bond may be enforced. Haas v. Cathey, 199 N. C. 796, 156 S. E. 92 (1930).

[84] Black v. Gentery, 119 N. C. 502, 26 S. E. 43 (1896). However, failure to allege that leave has been obtained can be cured by failure to demur on that ground, or where there is demurrer, by averring leave of court, if such were the fact. Black v. Gentery, *supra*.

[85] Worth v. Piedmont Bank, 121 N. C. 343, 28 S. E. 488 (1897) ("The court will take notice of fractions of a day."). A dictum in an earlier case had indicated that priority of application might be the determining factor. *See* Parks v. Sprinkle, 64 N. C. 637 (1870).

[85a] Kruger v. Bank of Commerce, 123 N. C. 16, 31 S. E. 270 (1898); Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650 (1905); Blackwell v. Life

In most instances a creditor of the corporation cannot take any effective steps to improve his position; his rights are frozen as of the time of the appointment.[86] If he has a lien on assets of the corporation and also has possession, he can continue in possession, but can be ordered not to sell the property.[87] If he has already docketed a judgment against the company and caused execution to issue against its land, he will not be allowed to have the land sold without leave of court.[88] He can have the property under a deed of trust sold only with court approval.[89] If he is a resident and intends to bring suit in another state, attaching corporate property there, he may be enjoined from doing so.[90] If he has already begun suit, but does not succeed in docketing a judgment until after the appointment, he obtains no priority over the general creditors.[91] If an operating receivership is decreed, however, it is proper for one who has already begun suit to proceed with his action joining the receiver as a party defendant.[92] Ordinarily a party will not be allowed to begin separate suit after the commencement of the receivership,[93] since "the law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed."[94] However, where a person is injured while the corporation is being operated by a receiver he may, with leave of court, institute action against the receiver.[94a] Where the cause of action arises while the company is being operated by a receiver ap-

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Ass'n., 141 N. C. 117, 53 S. E. 833 (1906) (But where the only assets of the corporation within the state are premiums to become due on policies which carry no personal liability on the part of the holder it would be useless to appoint a receiver.)

[86] Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918).

[87] Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838 (1898).

[88] Pelletier v. Greenville Lumber Co., 123 N. C. 596, 599, 31 S. E. 855 (1898). (The "exclusive possession of the receiver does not interfere with or disturb any pre-existing liens, preferences or priorities, but simply prevents their execution by holding the property intact until the relative rights of all parties can be determined.").

[89] C. D. Kenny Co. v. Hinton Hotel Co., 206 N. C. 591, 174 S. E. 501 (1934). *See* Bolich v. Prudential Insurance Co. of America, 202 N. C. 789, 164 S. E. 335 (1932).

[90] Davis v. Butters Lumber Co., 132 N. C. 233, 43 S. E. 650 (1903).

[91] Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8 (1917). But see Dillard v. Walker, 204 N. C. 67, 167 S. E. 632 (1932), commented on in Note, 11 N. C. L. REV. 365 (1933).

[92] Alford v. Seaboard Air Line Ry., 202 N. C. 719, 164 S. E. 125 (1932); Black v. Consolidated Railway & Power Co., 158 N. C. 468, 74 S. E. 468 (1912).

[93] Black v. Consolidated Railway & Power Co., 158 N. C. 468, 74 S. E. 468 (1912).

[94] National Surety Corp. v. Sharpe, 233 N. C. 83, 84, 62 S. E. 2d 501, 503 (1950).

[94a] Wilson v. Rankin, 129 N. C. 447, 40 S. E. 310 (1901) (Where suit is merely an action to establish a debt and not to interfere with the management of the company, obtaining leave is a mere formality and omission to do so can be cured by failure to demur.).

pointed by the federal court no leave is needed to sue in the state court.[94b]

Although the receiver must qualify before he can assume his duties, upon appointment he is vested with title to all the real and personal property of the insolvent corporation, wherever situated, and all its franchises, rights, privileges and effects[95] and the corporation is divested of its title to them.[96] The receivership has no effect as concerns the existence of the corporation itself.[97] It does, however, end the powers of the stockholders and directors, and they can make no contract to bind the company after the appointment.[98] The receiver holds legal title and possession as the agent of the court for the beneficial owners; consequently, his title is not such as would cause forfeiture under a non-alienation clause in a life insurance policy.[99] Instead, the assets are said to be *in custodia legis;*[100] any interference with the receiver's possession is punishable as contempt of court.[101]

The receivership in most respects destroys no rights of those who dealt with the corporation. All lawful liens existing at the time of appointment continue to exist.[102] Thus judgments previously docketed create a lien on the realty,[103] and where personal property has been levied upon by execution or attachment prior to the receivership this lien will be respected. Receivership does not have the effect *eo instanti*

[94b] 28 U. S. C. A. § 125 (Supp. 1952); Lassiter v. Norfolk Southern R. R., 163 N. C. 19, 79 S. E. 264 (1913). However, leave should be obtained where the cause of action arises before the appointment. Sellers v. Carolina R. R., 205 N. C. 149, 170 S. E. 632 (1933). But an answer to the merits waives the defect. Hollowell v. Norfolk & Southern Ry., 153 N. C. 19, 68 S. E. 894 (1910).

[95] N. C. GEN. STAT. § 55-149 (1950); National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Teague v. Teague Furniture Co., 201 N. C. 803, 161 S. E. 530 (1931); Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925). Under the former practice the receiver held possession of the property but was not vested with title. Battle v. Davis, 66 N. C. 252 (1872).

[96] N. C. GEN. STAT. § 55-149 (1950); Yelverton Hardware Co. v. Piland & Sons Garage Co., 184 N. C. 125, 113 S. E. 601 (1922). Because it cannot control him, the corporation is not criminally responsible for the receiver's acts. State v. Norfolk & Southern Ry., 152 N. C. 785, 67 S. E. 42 (1910).

[97] Pinchback v. Mining Co., 137 N. C. 172, 49 S. E. 106 (1904).

[98] Lenoir v. Linville Improvement Co., 117 N. C. 472, 23 S. E. 442 (1895).

[99] Southern Pants Co. v. Rochester German Ins. Co., 159 N. C. 78, 74 S. E. 812 (1912).

[100] Harrison v. Brown, 222 N. C. 610, 24 S. E. 2d 470 (1943); State v. Whitehurst, 212 N. C. 300, 193 S. E. 657 (1937).

[101] Nobles v. Roberson, 212 N. C. 334, 193 S. E. 420 (1937); Delozier v. Bird, 123 N. C. 689, 31 S. E. 834 (1898); Corbin v. Berry, 83 N. C. 28 (1880).

[102] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45 (1915); Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748 (1910); Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461 (1900). "Until such jurisdiction takes hold of the assets they are subject to the action of the individual creditors, and such preferences may be made by the corporation as a natural person might make under the same circumstances of insolvency." Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765 (1894).

[103] Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461 (1900).

to stop the running of interest on all of the interest-bearing obligations of the corporation, at least where the liability is for a lien debt.[104] Contractual obligations of the corporation continue, and can be enforced by[105] or against[106] the corporation. One exception to the rules above stated is found in the case of employment contracts. Probably because of the belief that the officers of the corporation are usually responsible for its going into receivership, it is ruled that:

> . . . performance by a corporation of an executory contract to pay for services to be rendered by its officers, agents or employees, pursuant to contracts of employment, subsequent to the appointment of a receiver for the corporation, becomes impossible as the result of an act of the law, and that therefore the contract is discharged.[107]

Tax liability of the company continues.[108]

Powers of the Receiver

As an officer, or arm of the court, the receiver proceeds to collect and conserve the assets under its strict supervision. Within thirty days after his appointment he must give the court a "full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it."[109] The court can also require him to give reports of his actions at any time during the receivership.[110] He can ask the court for instructions as to his duties while in his office.[111] However, the court will

[104] Moore v. Watauga & Yadkin R. R., 173 N. C. 726, 92 S. E. 361 (1917). But payments by the receivers on a note of the company do not prevent the bar of the statute of limitations as to the sureties. Shelby National Bank v. Hamrick, 162 N. C. 216, 78 S. E. 12 (1913).

[105] Coleman v. Carolina Theatres, Inc., 195 N. C. 607, 143 S. E. 7 (1928) (but lease can be cancelled if receiver defaults on rent). In cases where the corporation has failed to perform the conditions required by the contract through its insolvency and cessation of operations, the other party has the right to treat the contract as terminated. Wildes v. Nelson, 154 N. C. 590, 70 S. E. 940 (1911) (contract to sell patented articles and pay royalties to patentee).

[106] Lamson Co. v. Morehead, 199 N. C. 164, 154 S. E. 50 (1930) (lease contract).

[107] Wade v. Mutual Bldg. and Loan Ass'n., 196 N. C. 171, 174, 145 S. E. 18, 19 (1928). It has also been ruled that in such cases the appointment has the practical effect of *enjoining* the company from carrying out the contract. Lenoir v. Linville Improvement Co., 126 N. C. 922, 36 S. E. 185 (1900).

[108] Stagg v. George E. Nisson Co., 208 N. C. 285, 180 S. E. 658 (1935) (franchise tax).

[109] N. C. Gen. Stat. § 55-149 (1950).

[110] *Ibid.*

[111] See Currie v. Southern Manufacturers Club, Inc., 210 N. C. 150, 185 S. E. 666 (1936) (payment of personal property taxes); Stagg v. George E. Nisson Co., 208 N. C. 285, 180 S. E. 658 (1935) (franchise tax during operating receivership); Simmons v. Allison, 118 N. C. 761, 24 S. E. 740 (1896) (renting of property).

not instruct as to the distribution of funds until the receiver has them in hand.[112]

To aid him in settling the corporate estate the receivership is given broad powers. He can send for persons and papers, and "examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath" which he may administer, in regard to the affairs and transactions of the company, its assets and debts. If the person refuses to be sworn or answer the questions, or "refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt."[113]

Although two early decisions held that receivers had no authority to foreclose under the power of sale in a mortgage held by the corporation,[114] at least not unless the mortgagors were before the court,[115] the receiver now has this power by statute. He can foreclose mortgages, deeds of trust, and other liens executed to the corporation.[116] At the foreclosure sale a fee simple title to the land can be conveyed.[117]

The receiver can sell, convey and assign all of the estate, rights, and interest of the corporation.[118] However, he does not have authority to dispose of a capital asset without approval of the court.[119] Consequently he should apply for an order to sell such property,[120] and care should be taken that the owner of the property is not unduly prejudiced

[112] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 117 N. C. 308, 23 S. E. 450 (1895).

[113] N. C. GEN. STAT. § 55-151 (1950). See also N. C. GEN. STAT. § 55-148 (1950). The court may require that all important papers of the corporation be turned over to the receiver in the original order setting up the receivership, or may do so later on plaintiff's motion. Manufacturers & Jobbers Finance Corp. v. Lane 221 N. C. 189, 19 S. E. 2d 849 (1942).

[114] Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 118 N. C. 556, 24 S. E. 116 (1896); Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 117 N. C. 308, 23 S. E. 450 (1895).

[115] "It may be possible, if this point were presented in a case before the Court, a foreclosure . . . might be sustained; but if we were to so hold in this matter—where the mortgagors are not before the Court, it would be but obiter and they would not be bound by it." Strauss v. Carolina Interstate Building and Loan Ass'n., 118 N. C. 556, 562, 24 S. E. 116, 117 (1896).

[116] N. C. GEN. STAT. § 55-148 (1950). This authority is also given by N. C. GEN. STAT. § 55-150 (1950).

[117] Wachovia Bank & Trust Co. v. Hudson, 200 N. C. 688, 158 S. E. 244 (1931).

[118] N. C. GEN. STAT. § 55-148 (1950). Where land is sold by the receiver without warranty, the transaction is like a sheriff's sale where only the interest of the execution debtor is sold and if the title purchased is defective the buyer can get no refund. Tate v. Davis, 152 N. C. 177, 67 S. E. 503 (1910).

[119] Federal Reserve Bank of Richmond v. Neuse Mfg. Co., 213 N. C. 489, 196 S. E. 848 (1938). Refusal to grant injunction forbidding the sale of property in the hands of a receiver but levied upon by a judgment creditor, however, may constitute implied leave of the court to have the sale. Pelletier v. Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855 (1898).

[120] See N. C. GEN. STAT. § 1-505 (1953).

by a sale. In cases where the corporation is insolvent, the property will have to be sold eventually, so such prejudice will not exist.[121] If the property is encumbered with mortgages or other liens, the legality of which is in dispute, and is of the type that would deteriorate materially in value pending the litigation, the court may order public or private sale of the property free of encumbrances, the price to be held in court subject to the lien.[122] The sale may be made in disregard of the minor requirements of the deeds or instruments, such as publication of notice, etc., where this procedure "works no substantial impairment of the value of the security, and is for the best interest of the owners and others having claim upon the assets."[123] The lien-holder may be allowed to bid in and make payment by deducting the price from the corporation's debt to him.[124] The land can, with consent of the lien-holder, be offered for sale in the alternative, either encumbered or free of the lien, and the most satisfactory bid accepted.[125]

Unless authority has been expressly given to the receiver by the court to sell and convey on specified terms,[126] the sale must be confirmed before the buyer can obtain any rights. Until that time he is a mere preferred proposer, and bidding can be reopened.[127] Confirmation may be given outside the county in which the action is pending upon proof that written notice has been given at least ten days prior to date of confirmation to each creditor who has filed his claim with the receiver.[128] Where encumbered property is sold clear of liens, the resident judge of the district or the judge holding the courts of the district may confirm the sale after the receiver has published notice at least ten days prior to the confirmation to all interested persons that he will apply for confirmation.[129] The question of confirmation rests principally in the sound legal discretion of the judge, and while mere inadequacy of price may at times afford good reason for refusing to confirm a sale, it is not always controlling.[130]

[121] Forsaith Machine Co. v. Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869 (1891).
[122] N. C. GEN. STAT. § 55-154 (1950); Martin v. Vanlaningham, 189 N. C. 656, 127 S. E. 695 (1925).
[123] Lasley v. Scales, 179 N. C. 578, 580, 103 S. E. 214, 215 (1920).
[124] Kelley v. McLamb, 182 N. C. 158, 108 S. E. 435 (1921).
[125] Harvey v. Kinston Knitting Co., 194 N. C. 734, 140 S. E. 746 (1927).
[126] Harrison v. Brown, 222 N. C. 610, 24 S. E. 2d 470 (1943).
[127] Attorney General v. Roanoke Navigation Co., 86 N. C. 409 (1882) (Biddings are reopened when an advance of 10% is offered before confirmation and in apt time, which is at the term ensuing the sale. Bidding cannot be reopened after confirmation, however, unless there has been fraud in its broadest sense.).
[128] N. C. GEN. STAT. § 1-506 (1950). See Atlantic National Bank v. Peregoy-Jenkins Co., 147 N. C. 293, 61 S. E. 68 (1908) (improper to grant motion for final sale made outside the county in which action was pending and without notice to parties to be affected).
[129] N. C. GEN. STAT. § 55-154 (1950).
[130] Copping v. Hillsboro Clay Mfg. Co., 153 N. C. 329, 69 S. E. 250 (1910)

To prevent a sale, a motion in the cause is the proper procedure,[131] or where a sale has been made, a motion to recall it can be used,[132] but such motion cannot be made out of the county and district in which the action was pending and without notice.[133]

The statute gives the receiver power to appoint agents, and to "do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business."[134] Thus, where necessary, he can hire attorneys,[135] insure the property, or hire a watchman to protect it.[136] He can also rent out the assets[137] and petition the court for permission to pledge them or borrow on them while winding up the corporate affairs.[138]

Whether he can operate the company as a going business, however, is another matter. Certainly this can be done where none of the creditors object,[139] and the lien creditors may then be required to share in the expenses.[140] In such a case receiver's certificates may be authorized,[141] but the date of maturity must not be more than two years after date of issue.[142] However, because of the risk involved to the rights of the lien creditors, the courts are averse to allowing an operating receivership of private corporations, "except in cases where a person or corporation is temporarily financially embarassed and the temporary stay of creditor pressure is essential to the preservation of the business. . . ."[143] Hence, by the latest authority, if an operating

(No higher bid was offered and the property was subject to rapid depreciation). See Attorney General v. Roanoke Navigation Co., 86 N. C. 409 (1882) (Courts of equity have absolute power over all sales made under their orders, and can confirm them or set them aside and re-open bidding.).

[131] Lasley v. Scales, 179 N. C. 578, 103 S. E. 214 (1920).

[132] National Surety Corp. v. Sharpe, 233 N. C. 644, 65 S. E. 2d 137 (1951).

[133] *Ibid.*

[134] N. C. GEN. STAT. § 55-148 (1950).

[135] Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 117 N. C. 308, 23 S. E. 450 (1895).

[136] Kelley v. McLamb, 182 N. C. 158, 108 S. E. 435 (1921).

[137] State v. Turner, 106 N. C. 691, 10 S. E. 1026 (1890); see also C. D. Kenney Co. v. Hinton Hotel Co., 206 N. C. 591, 174 S. E. 501 (1934); Simmons v. Allison, 118 N. C. 761, 24 S. E. 740 (1896).

[138] Blades v. Hood, 203 N. C. 56, 164 S. E. 828 (1932).

[139] National Surety Corp., v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Humphey Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 93 S. E. 971 (1917).

[140] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[141] Sinclair v. Moore Central R. R., 228 N. C. 389, 45 S. E. 2d 555 (1947).

[142] *Ibid.*, construing N. C. GEN. STAT. § 62-89 (1950). See Armour & Co. v. People's Laundry Co., 171 N. C. 681, 89 S. E. 19 (1916) where certificates were issued without consent of lienholders.

[143] Sinclair v. Moore Central R. R., 228 N. C. 389, 396, 45 S. E. 2d 555, 560 (1947); Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838 (1898); Roberts v. Bowen Mfg. Co., 169 N. C. 27, 32, 85 S. E. 45, 48 (1915). There have been cases which held otherwise. See Wood v. Woodbury & Pace, Inc., 217 N. C. 356, 8 S. E. 2d 240 (1940); Armour & Co. v. People's Laundry Co., 171 N. C. 681, 89 S. E. 19 (1916), where the business was carried on without the consent of the mortgagee and he was charged with a share of

receivership is allowed without the consent of the secured creditors all losses must be borne by the general creditors.[144]

Suit By The Receiver

The corporate receiver has authority to "institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment."[145] Thus he can sue to recover proceeds of fire insurance,[146] realty,[147] funds wrongfully withheld by agents,[148] misappropriated funds,[149] preferences,[150] damages for mismanagement,[151] and stock assessments.[152] Ordinarily when he is invested with full power as a receiver he can bring appropriate necessary actions without special leave or direction of the court,[153] although the court can restrict this right.[154] Such suit can be in the name of the corporation[155] or in his own[156] or both.[157] He can make the cor-

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the expense. The holding of this opinion seems abandoned by the ruling in National Surety Corp. v. Sharpe, 236 N. C. 35, 50, 72 S. E. 2d 109, 123 (1952). "It would . . . offend the first principle of economic righteousness to permit an operating receiver to hazard the property rights of lienholders without their consent in a perilous private enterprise merely because the court may entertain the uncertain hope that some pecuniary advantage might thereby be obtained for the general creditors or some other third persons." See Note, 19 N. C. L. Rev., 89 (1940).

[144] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[145] N. C. Gen. Stat. § 55-148 (1950). See also N. C. Gen. Stat. § 1-366 (1953) (Court may by order forbid debtor of corporation to dispose of property pending judgment in receiver's suit). Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859 (1924) (Corporation instituted suit, and after it became insolvent receiver was made a party plaintiff).

[146] See Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944 (1912).

[147] See Harris v. Hilliard, 221 N. C. 329, 20 S. E. 2d 278 (1942); Asheville Division v. Ashton, 92 N. C. 579 (1885).

[148] See Cummer Lumber Co. v. Seminole Phosphate Co., 189 N. C. 206, 126 S. E. 511 (1925).

[149] See La Vecchia v. North Carolina Joint Stock Land Bank, 218 N. C. 35, 9 S. E. 2d 489 (1940); Bank of Vance v. Crowder, 194 N. C. 312, 139 S. E. 604 (1927).

[150] See text at notes 195 to 202.

[151] See text at notes 190 to 193.

[152] See text at notes 203 to 218.

[153] Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931); Weill v. First National Bank, 106 N. C. 1, 11 S. E. 277 (1890). Under the former chancery rule the receiver could not sue without order of the court. See Battle v. Davis, 66 N. C. 252 (1872).

[154] Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931); Weill v. First National Bank, 106 N. C. 1, 11 S. E. 277 (1890).

[155] Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944 (1912); Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893 (1904); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894).

[156] Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944 (1912); Gray v. Lewis, 94 N. C. 392 (1886). Under the former practice the receiver could sue only in the name of the corporation. Battle v. Davis, 66 N. C. 252 (1872).

[157] Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944 (1912).

poration a party, or sue as the sole plaintiff.[158] In either case it is essentially a suit by the corporation.[159] When he sues as receiver, for venue purposes, his personal residence controls.[160] If his authority as receiver is challenged he can prove it by a copy of the order appointing him.[161] Service on the receiver is service on the corporation,[162] and service on a local agent of the corporation in sufficient service on the receiver.[163]

In contrast to his right to initiate actions without special order, the receiver must obtain leave of court to appeal a decision adverse to the corporation or its creditors, or such appeal will be dismissed[164] No leave should be granted when the appeal would be in behalf of one portion of the creditors as opposed to another rather than in the interest of the corporation or its creditors as a whole. In such a case the dissatisfied creditor must bear the expense of his own appeal.[165]

Because the appointment of a receiver has no extra-territorial effect, a chancery receiver has no power to bring suit as a matter of right in another state.[166] However, he is usually permitted to do so as a matter of comity where the action will not unduly prejudice state residents.[167] It would be proper to petition for leave of court to sue, stating facts to justify this request,[168] although our court has also ruled that it is not necessary to obtain leave.[169] Where a receiver is a quasi-assignee or statutory successor to a corporation under the laws of the

[158] Boyd v. Royal Insurance Co., 111 N. C. 372, 16 S. E. 389 (1892).
[159] Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894).
[160] Biggs v. Bowen, 170 N. C. 34, 86 S. E. 692 (1915).
[161] Boyd v. Royal Insurance Co., 111 N. C. 372, 16 S. E. 389 (1892); State v. Turner, 106 N. C. 691, 10 S. E. 1026 (1890).
[162] Grady v. Richmond & Danville R. R., 116 N. C. 952, 21 S. E. 304 (1895).
[163] Grady v. Richmond & Danville R. R., 116 N. C. 952, 21 S. E. 304 (1895); Farris v. Receivers of Richmond & Danville R. R., 115 N. C. 600, 20 S. E. 167 (1894).
[164] C. D. Kenny Co. v. Hinton Hotel Co., 208 N. C. 295, 180 S. E. 697 (1935). For an example, see Stagg v. George E. Nissen Co., 208 N. C. 285, 180 S. E. 658 (1935).
[165] Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461 (1900) (not where question is merely over method in which fund should be allocated among admittedly valid claims); Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 118 N. C. 556, 24 S. E. 116 (1896) (not in interest of one portion of stockholders against the other).
[166] Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928); Kruger v. Bank of Commerce, 123 N. C. 16, 31 S. E. 270 (1898).
[167] Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931); Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928); Commonwealth Mutual Fire Insurance Co. v. Edwards, 124 N. C. 116, 32 S. E. 404 (1899). *See* Kruger v. Bank of Commerce, 123 N. C. 16, 31 S. E. 270 (1898).
[168] Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928).
[169] Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931). In such a case if the receiver's authority is denied by the answer it should be proved by a certified transcript from the foreign court. Van Kempen v. Latham, 195 N. C. 389, 142 S. E. 322 (1928); Person v. Leary, 127 N. C. 114, 37 S. E. 149 (1900) (subsequently filed affidavits of defendant amounted to admission of validity of appointment).

state which chartered it, he can sue in a foreign jurisdiction as a matter of right, for his authority must be honored under the full faith and credit clause of the Federal Constitution.[170]

In bringing suit, the receiver acts in a dual capacity: (1) He assumes all the rights of the corporation and can assert any claim belonging to it,[171] and (2) he has all the rights of its creditors, whom he also represents.[172]

> Where the right to relief depends upon the existence of claims against the estate represented and the insolvency of such estate or the necessity of collecting the demand sued on in order to pay debts, those facts must be alleged, but where the right of action does not depend upon the existence of such facts they need not be alleged.[173]

In an action by or against the receiver all the rights, both legal and equitable, of the corporation, its creditors, and the adverse party in the suit may be settled.[174] Thus the receiver can raise any defenses of the corporation where it is defendant,[175] and a person sued by him can assert his defenses against the corporation, provided they are also good against its creditors.[176] Where the receiver of a bank brings suit, the surety on a note of an insolvent can set-off amounts due him for services, deposits, and on certificates of deposit not yet payable;[177] and a

[170] Pink v. Hanby, 220 N. C. 667, 18 S. E. 2d 127 (1941). See Van Kempen v. Latham, 201 N. C. 505, 160 S. E. 759 (1931) (However, his authority to sue can have no effect in regard to the jurisdiction acquired over corporate property by the North Carolina court through attachment). See Note, 6 N. C. L. REV. 477 (1928).

[171] Harris v. Hilliard, 221 N. C. 329, 20 S. E. 2d 278 (1942) (Mortgagees foreclosed on partnership's property and purchased it through an agent at their own foreclosure sale); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894) (Receiver sued on note owed to corporation).

[172] Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538 (1912) (Suit for unpaid capital stock); Pender v. Speight, 159 N. C. 612, 75 S. E. 851 (1912) (Directors retired capital stock while company was insolvent); McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169 (1907) (Directors sold assets and took payment directly to themselves); Graham v. Carr, 130 N. C. 271, 41 S. E. 379 (1902) (Corporation paid debt on which director was surety); Pender v. Mallett, 123 N. C. 57, 31 S. E. 351 (1898) (Defendants fraudulently put possession of property in relative).

[173] Harris v. Hilliard, 221 N. C. 329, 332, 20 S. E. 2d 278, 280 (1942).

[174] Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894).

[175] Peoples Bank & Trust Co. v. Tar River Lumber Co., 221 N. C. 89, 19 S. E. 2d 138 (1942) (statute of limitations); Brinson v. Mill Supply Co., 219 N. C. 505, 14 S. E. 2d 509 (1941) (*ultra vires*); Brinson v. Mill Supply Co., 219 N. C. 498, 14 S. E. 2d 505 (1941) (*ultra vires*); Charles A. Riley Co. v. W. T. Sears & Co., 154 N. C. 509, 70 S. E. 997 (1911) (usury).

[176] Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859 (1924) (note given for stock solicited in violation of Blue-Sky law).

[177] Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894). The case held that, both as to debts owed by the bank and as to debts owed to the bank, the fact that the debt had not matured was no bar. The court indicated, however, that a surety could not use a debt to him as a set-off "where he is in-

bank which is creditor of a corporation in receivership can apply the latter's deposit against a note due from it.[178] But a corporate debt cannot be used as a set-off by a person assessed for an unpaid stock subscription, for:

> . . . the defendant's claim is lacking in one of the essentials of a valid counterclaim, that the parties, debtor and creditor, must claim in the same right. The receivers now claim for creditors, and defendants are only entitled to an offset to the extent of the dividends declared . . .[179]

Nor can a debtor use a claim against the company which was assigned to him after the appointment of the receiver as a set-off except to the extent of the dividend which will be paid on it.[180]

The receiver's right to initiate suit for recovery of corporate assets is exclusive; so long as the right asserted is that of the company or its creditors in general, no individual can sue on such right without cause.[181] The individual has the right, however, to sue for a loss peculiar to himself, for in such case the cause of action does not pass to the receiver.[182] Hence where the negligence of officers causes a misapplication of bank deposits and subsequent insolvency, the wrong is to the bank and only the receiver can sue.[183] But if the bank is insolvent to the knowledge of the officers when they receive a deposit, the receipt is a wrong to the individual depositor, for which he can bring action.[184]

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demnified by the real debtor, or when the latter can be compelled to pay." *Id.* at 331, 19 S. E. at 373. (If this were allowed, the principal might arrange for the surety to pay by using his set-off and then might reimburse him).

[178] Continental Trust Co. v. Spencer, 193 N. C. 745, 138 S. E. 124 (1927).

[179] Whitlock v. Alexander, 160 N. C. 465, 474, 76 S. E. 538, 542 (1912). See Davis v. Industrial Mfg. Co., 114 N. C. 321, 329, 19 S. E. 371, 372 (1894). Although debts owed by a corporation in receivership cannot be used by a debtor of the company as a counterclaim in a suit on a debt contracted while the receivership is in operation, a debt contracted by the receiver may be used for this purpose. Charlotte, C. & A. R. R. v. Chester & Lenoir Narrow-Guage R. R., 118 N. C. 1078, 24 S. E. 769 (1896).

[180] Brown v. Brittain, 84 N. C. 552 (1881). This case involved an assignment for the benefit of creditors, but the principle embodied in it was approved in Davis v. Industrial Mfg. Co., 114 N. C. 321, 329, 19 S. E. 371, 372 (1894).

[181] Roscower v. Bizzell, 199 N. C. 656, 155 S. E. 558 (1930); Ham v. Norwood, 196 N. C. 762, 147 S. E. 291 (1929); Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925); Bickley Clothing Co. v. Green, 187 N. C. 772, 122 S. E. 847 (1924).

[182] Minnis v. Sharpe, 198 N. C. 365, 151 S. E. 735 (1930); Bane v. Powell, 192 N. C. 387, 135 S. E. 118 (1926); Houston v. Thornton, 122 N. C. 365, 29 S. E. 827 (1898).

[183] Roscower v. Bizzell, 199 N. C. 656, 155 S. E. 558 (1930); Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925). Where, however, a private corporation, not a bank, received money from plaintiff to be applied on mortgages and the general manager misapplied such funds, plaintiff could sue since the corporation held the money as trustee rather than debtor. Minnis v. Sharpe, 198 N. C. 365, 151 S. E. 735 (1930).

[184] ". . . the taking and receiving money from the depositor, thus swelling the

If the receiver is unwilling to enforce a right of the corporation the individual can begin action alleging that he has made demand on the receiver to sue but has been met with refusal.[185] No leave of court is necessary in this event.[186] He can also request that the court order the receiver to sue or remove him.[187] The court may conclude, however, that because of the insolvency of the debtor or the weakness of the cause of action it would be unwise to charge the assets of the receivership with the expense of the litigation, and may permit the individual to proceed at his own expense.[188] If there then is a judgment which substantially increases the assets of the corporation it inures to the benefit of all stockholders and creditors. Therefore, the receiver may be made a party defendant "in order that the recovery, if any, may be distributed by him in accordance with the orders and decrees of the court, just as other assets in his hands are distributed."[189]

Misconduct of Officers and Preferences

As representative of the company and its creditors, the receiver can proceed against the directors and managing officers where there has been mismanagement of the corporation.[190] For these persons are held to be trustees or quasi-trustees in respect to the performance of their official duties, and are liable for harm caused by wilful or negligent failure to execute them properly.[191] They are not, as a rule, responsible for "mere errors of judgment, nor for slight omissions from which the loss complained of could not have reasonably resulted."[192] However, "where they accept these positions of trust they are expected and re-

assets of an insolvent bank, is a wrongful act done by him personally and individually . . ." Wall v. Howard, 194 N. C. 310, 311, 139 S. E. 449, 450 (1927); Bane v. Powell, 192 N. C. 387, 135 S. E. 118 (1926).

[185] Ham v. Norwood, 196 N. C. 762, 147 S. E. 291 (1929); Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925); Coble v. Beall, 130 N. C. 533, 41 S. E. 793 (1902) (where demand on receiver is not alleged, demurrer should be sustained).

[186] Ham v. Norwood, 196 N. C. 762, 147 S. E. 291 (1929).

[187] *Ibid.* The court can remove a receiver under N. C. Gen. Stat. §§ 1-504 (1953) and 55-147 (1950).

[188] Ham v. Norwood, 196 N. C. 762, 147 S. E. 291 (1929).

[189] *Id.* at 767, 147 S. E. at 293; Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925).

[190] Ham v. Norwood, 196 N. C. 762, 147 S. E. 291 (1929); Braswell v. Morrow, 195 N. C. 127, 141 S. E. 489 (1927) (Directors allowed secretary-treasurer to take complete control and carelessly mature the stock of the building and loan association before it reached par value); North Carolina Corporation Commission v. Harnett County Trust Co., 192 N. C. 246, 134 S. E. 656 (1926); Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195 (1925) (failure to supervise business and make loans only to those with adequate security); Besseliew v. Brown, 177 N. C. 65, 97 S. E. 743 (1918) (failure to attend directors' meetings; allowing secretary to manage without supervision and abscond with funds).

[191] Braswell v. Morrow, 195 N. C. 127, 141 S. E. 489 (1927); North Carolina Corporation Commission v. Harnett County Trust Co., 192 N. C. 246, 134 S. E. 656 (1926).

[192] Braswell v. Morrow, 195 N. C. 127, 130, 141 S. E. 489, 490 (1927).

quired to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty, usually the care that he shows in the conduct of his own affairs of a similar kind. . . ."[193]

It has been held that until receivership "takes hold of the assets they are subject to the action of the individual creditors, and such preferences may be made by the corporation as a natural person might make under the same circumstances."[194] Thus the insolvent company can confess judgment in favor of a pre-existing debt.[195] However, the receiver can sue to retrieve preferences given to the officers and stockholders of the corporation, for these persons will not be permitted "to take advantage of their knowledge of the insolvent condition of the concern, and their power to *use and control the assets,* to pay their own debts, or to relieve them from special liabilities to the injury of other creditors."[196] He can recover from the officer who shortly before receivership draws a check on the corporation in discharge of its debt to himself.[197]

Although an officer can buy assets of the corporation where the price is fair, open, honest and without fraud,[198] the receiver can recover if the proceeds from the sale were used by the company to pay off a debt on which the officer was surety.[199] While an officer can make loans to the corporation and take a lien back,[200] he cannot have a pre-existing obligation secured by a mortgage or confession of judg-

[193] Besseliew v. Brown, 177 N. C. 65, 67, 97 S. E. 743, 744 (1918).

[194] Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 516, 20 S. E. 765, 766 (1894).

[195] *Ibid.* It was also held that the confession of judgment could be attacked by creditors within sixty days, but the statutory provision relied on by the court has since been dropped from N. C. GEN. STAT. § 55-40 (1950).

[196] Graham v. Carr, 130 N. C. 271, 274, 41 S. E. 379, 381 (1902); Teague v. Teague Furniture Co., 201 N. C. 803, 161 S. E. 530 (1931); Whitlock v. Alexander, 160 N. C. 479, 76 S. E. 483 (1912); Hill v. Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 107 (1893).

[197] Teague v. Teague Furniture Co., 201 N. C. 803, 161 S. E. 530 (1931).

[198] Graham v. Carr, 130 N. C. 271, 41 S. E. 379 (1902). But where it was voted to sell the assets to an officer for sixty per cent of their value, the officer participating in the vote, such sale was "absolutely void" as to the receiver. Pender v. Speight, 159 N. C. 612, 75 S. E. 851 (1912).

[199] Graham v. Carr, 130 N. C. 271, 41 S. E. 379 (1902). In Whitlock v. Alexander, 160 N. C. 479, 76 S. E. 483 (1912) the company issued bonds secured by a mortgage on its assets, which bonds were purchased by directors. The proceeds were used directly to discharge a demand note on which the directors were sureties. The court, while not allowing the receiver to recover from the directors because the proceeds never became "assets of the company, subject to general distribution," invalidated the mortgage. This left the directors in the position of general creditors, and they were no better off than if they had paid the note and become subrogated.

[200] Hill v. Pioneer Lumber Co., 113 N. C. 174, 178, 18 S. E. 107, 108 (1893) (". . . it would be looked upon with suspicion, and strict proof of its *bona fides* would be required."); Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 63 S. E. 2d 637 (1951).

ment.[201] Where assets are sold for a consideration moving directly to the director-stockholders, the sale is void as to creditors.[202]

The receiver can also destroy preferences created by the corporation's purchasing its own stock[203] or distributing assets through excessive dividends.[204] Because the capital stock is regarded as a trust fund for creditors,[205] an insolvent corporation cannot purchase its own stock[206] even where it had made an agreement several years previously to do so.[207] Where it buys such stock and thereafter becomes insolvent the receiver can recover from the shareholder the amount received by him, where it is necessary to pay corporate debts.[208] The stockholder is free, of course, to sell his interest to an officer of the corporation.[209]

Similarly, where corporate debts make it necessary, the receiver can sue to collect as assets all unpaid subscriptions, including those for which inadequate consideration was given.[210] The stockholder can be liable up to the amount of such unpaid subscription.[211] Payment for stock may be made in property which is reasonably necessary for the legitimate business of the company,[212] "and in the absence of actual fraud the judgment of the directors as to the value of the property

[201] Hill v. Pioneer Lumber Co., 113 N. C. 174, 18 S. E. 107 (1893) (The judgment can be attacked for fraud in an independent action). Where judgment was confessed to one who held a note on which the president of the company was surety, the court refused to hold the officers who had not been a party to the transaction. It concluded that the diligence of the creditor, not the fraud of an officer, had induced the confession. Howard v. Central Tobacco Warehouse Co., 123 N. C. 90, 31 S. E. 371 (1898).

[202] McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169 (1907). The court allowed the receiver to enter a claim for the value of the assets in the receivership of the insolvent purchaser, and to recover a *pro rata* share of the amount not to exceed what was due the creditors of the selling corporation.

[203] Shuford v. Brown, 201 N. C. 17, 158 S. E. 698 (1931); Fuller v. Motor and Tire Service Co., 190 N. C. 655, 130 S. E. 545 (1925).

[204] Chatham v. Mecklenburg Realty Co., 180 N. C. 500, 105 S. E. 329 (1920) (Judgment creditor does not need to have receiver appointed and can sue directly shareholders who received assets). An existing creditor would not be prejudiced by a stock dividend since no assets are divested thereby, but a subsequent creditor might have a right to complain. If issued in good faith, however, a stock dividend cannot be questioned. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538 (1912).

[205] Fuller v. Motor and Tire Service Co., 190 N. C. 655, 130 S. E. 545 (1925); Heggie v. Peoples Building and Loan Ass'n., 107 N. C. 581, 12 S. E. 275 (1890).

[206] Shuford v. Brown, 201 N. C. 17, 158 S. E. 698 (1931); Pender v. Speight, 159 N. C. 612, 75 S. E. 851 (1912); Heggie v. Peoples Building and Loan Ass'n., 107 N. C. 581, 2 S. E. 275 (1890).

[207] Fuller v. Motor and Tire Service, 190 N. C. 655, 130 S. E. 545 (1925).

[208] Pender v. Speight, 159 N. C. 612, 75 S. E. 851 (1912).

[209] Shuford v. Brown, 201 N. C. 17, 158 S. E. 698 (1931); Shuford v. Scruggs, 201 N. C. 685, 161 S. E. 315 (1931).

[210] Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376 (1917); Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538 (1912); Hobgood v. Ehlen, 141 N. C. 344, 53 S. E. 857 (1906); Harmon v. Hunt, 116 N. C. 678, 21 S. E. 559 (1895).

[211] Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 (1894).

[212] Hobgood v. Ehlen, 141 N. C. 344, 53 S. E. 857 (1906); Clayton v. Ore Knob Copper Co., 109 N. C. 385, 14 S. E. 36 (1891).

shall be conclusive."[213] However, the North Carolina Supreme Court has ruled that "a valuation grossly excessive and knowingly made may be conclusive on this subject."[214] Where this is the case the receiver may collect the deficiency. The stock subscription cannot be met by purchasing shares from another person rather than from the corporation.[215] Neither can the subscriber vary the written terms of his subscription by showing a secret agreement whereby he was only required to take a smaller number of shares.[216] He may not use as a set-off an amount allegedly due him from the company,[217] except to the amount of the dividend it will produce.[218]

PRESENTMENT OF CLAIMS

To minimize the expense of adjusting the affairs of the insolvent corporation all persons who have claims against the debtor and desire to participate in the distribution of the estate must present their claim in writing to the receiver.[219] In rare cases the appointing court will grant leave to a claimant to bring instead an independent action against the receiver where he proves his claim was disallowed and shows good cause why separate suit should be allowed.[220]

> No definite rule can be adopted as to what is 'good cause,' but the place where the cause of action arose, venue, the convenience of witnesses, additional costs, and other circumstances, addressed to the discretion of the court, should be considered.[221]

Where the claimant has once been a party, however, to bring such

[213] N. C. GEN. STAT. § 55-63 (1950).

[214] Whitlock v. Alexander, 160 N. C. 465, 464, 76 S. E. 538, 540 (1912); Hobgood v. Ehlen, 141 N. C. 344, 53 S. E. 857 (1906); Clayton v. Ore Knob Copper Co., 109 N. C. 385, 14 S. E. 36 (1891) (Payment in property is sufficient except where "simulated, grossly inadequate and fraudulent, and intended to serve fraudulent purposes."). The burden of proving that the property was taken in payment at its true value is upon the person who alleges payment. Goodman v. White, 174 N. C. 399, 93 S. E. 906 (1917).

[215] Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376 (1917). See Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680 (1888).

[216] Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376 (1917) (However, where the incorporators sign under agreement with other subscribers that in so doing they act for them all, and the corporation accepts the list as an asset and collects from the other subscribers, the incorporators are given credit for these other collections.).

[217] *Ibid.*

[218] Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538 (1912).

[219] N. C. GEN. STAT. § 55-152 (1950); National Surety Corp. v. Sharpe, 233 N. C. 83, 84, 62 S. E. 2d 501 (1950); National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950). See Crutchfield v. Hunter, 138 N. C. 54, 50 S. E. 557 (1905).

[220] National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950); Black v. Consolidated Railway & Power Co., 158 N. C. 468, 74 S. E. 468 (1912).

[221] Black v. Consolidated Railway & Power Co., 158 N. C. 468, 473, 74 S. E. 468, 470 (1912).

separate suit, even with leave, hazards his chances of participating in the assets because distribution may be allowed before his action is determined.[222]

The court may limit the time for presentation and proof of claims in the receivership and may bar all claimants who fail to file within this period from participating in the assets.[223] However, the judge may in his discretion permit presentation of a claim after the deadline, and even after partial payments have been made in distribution if there is enough of a surplus so as not to interfere with payments already made.[224]

The receiver must investigate each claim[225] and report his decision on its validity and priority to the term of the superior court subsequent to his finding. Exceptions thereto may be filed within ten days after notice of the receiver's findings and not later than within the first three days of the term by any person interested.[226] "The judge may, in his discretion, extend the time for filing such exceptions."[227] If on exception "a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived."[228]

[222] Delafield v. Lewis Mercer Construction Co., 118 N. C. 105, 108, 24 S. E. 10, 11 (1896) ("No reason appears why such claims of the appellant could not have been determined in this action.").

[223] "The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time." N. C. GEN. STAT. § 55-152 (1950); National Surety Corp. v. Sharpe, 233 N. C. 98, 59 S. E. 2d 593 (1950).

[224] Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 304, 92 S. E. 6 (1917).

[225] He has plenary power under N. C. GEN. STAT. §§ 55-151 and 55-152 (1950) to examine claiments and witnesses on oath in regard to the claims and to require the production of relevant books and papers. National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950).

[226] N. C. GEN. STAT. § 55-153 (1950). "The term 'any person interested' undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid, or of less dignity than that alleged by him. Moreover, a creditor, who has a valid claim, is certainly a 'person interested' for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, whose payment will exhaust or reduce the receivership assets, otherwise available for the satisfaction of his claim." National Surety Corp. v. Sharpe, 232 N. C. 98, 102, 59 S. E. 2d 593, 596 (1950).

See Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785 (1944) (failure to except to report barred relief).

Where exceptions are not filed within the first three days of the term following the filing of the report they are not void and are before the court for consideration in the absence of motion or order to strike. Benson v. Roberson, 226 N. C. 103, 36 S. E. 2d 729 (1945).

[227] N. C. GEN. STAT. § 55-153 (1950).

[228] *Ibid.*; North Carolina Bessemer Co. v. Piedmont Hardware Co., 171 N. C. 728, 88 S. E. 867 (1916) (error to decide controverted issues at chambers).

Where objections are filed to an order allowing a claim, which order adjudicated contested issues of fact without consent, evidence or findings, it is error to deny a motion to set the allowance aside and grant a hearing on the objections which if true would be a valid defense to the claim. Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N. C. 432, 31 S. E. 2d 353 (1944).

ORDER OF PRIORITY

The order of priority of payment of claims proved against the receivership estate is determined by North Carolina law,[229] except where federal law prevails.[230] Partially because the basic North Carolina statute on priorities is extremely terse,[231] and principally because of the myriad of fact situations that arise in receivership cases, there has been much litigation on this point. Although it is not practical to discuss all possible priorities, a brief description of the order of preferences can be given.

1. *Property Not Belonging to Debtor*

Receivership distributes only the debtor's property, so assets held by the corporation as bailee would be returned to the true owner without being subjected to liens of any sort.[232] It would seem that the same treatment should be given to goods acquired by the insolvent in a purchase that was void as to non-assenting creditors of the vendor.[233]

2. *Preferred Creditors*

A primary purpose of receivership is "the preservation of the rights of lien creditors as they exist at the time of the appointment. . . ."[234] Therefore, creditors holding mortgages, deeds of trust, and conditional sales contracts are entitled to their security where the instrument was recorded before the time of the receivership.[235] There are certain

[229] Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650 (1905) (foreign state's license fees not preferred debt under North Carolina law).

[230] Leggett v. Southeastern People's College, Inc., 234 N. C. 595, 68 S. E. 2d 263 (1951).

[231] N. C. GEN. STAT. § 55-137 (1950). "After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders proportionately, according to their respective shares."

[232] General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928) (Receiver gets no title to bailed property); Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 169 S. E. 274 (1933).

[233] First National Bank v. Waynesville Furniture Co., 200 N. C. 371, 157 S. E. 13 (1931) (Deed is null and void and "cancelled on the record"). But see McIver v. Young Hardware Co., 144 N. C. 478, 57 S. E. 169 (1907) (Court held sale void but indicated plaintiff might recover only *pro rata* with other creditors of insolvent).

[234] National Surety Corp. v. Sharpe, 236 N. C. 35, 50, 72 S. E. 2d 109, 123 (1952).

[235] Vanderwal v. Vanco Dairy Co., 200 N. C. 314, 156 S. E. 512 (1930) (conditional sale and chattel mortgage); Morris v. Y. & B. Corp., 198 N. C. 705, 153 S. E. 327 (1930) (Corporate property was deeded to president who personally gave mortgage to lender and then reconveyed property to corporation which assumed the debt).

In some cases where the mortgaged property has been sold, the notes given

exceptions to this rule which will be taken up subsequently.[236] In ordinary cases the priority created by the lien instrument will be respected even where it is given by the insolvent shortly before the receivership to secure a pre-existing debt.[237] Where, however, such instrument is unrecorded at the beginning of the receivership it creates no rights, since the general creditors then become "creditors for a valuable consideration within the meaning of our registration statute."[238] The creditor has, therefore, only an unsecured general claim.[239]

Likewise, where a form of collateral is held by the creditor he is secured to the extent of its value. Where the requirements of the law of pledges are met the pledgee can realize on the assets he holds.[240] Similarly, a commission merchant who has advanced money has a common law factor's lien upon goods consigned to him while they are in his possession, no written or verbal agreement being necessary.[241] The mechanics' lien[242] gives the person who "makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property . . ." the right to hold it until paid for his work, and to sell it after a stipulated period.[243] His lien is superior to an earlier mortgage lien,[244] and although the creditor can be restrained from selling until the validity of his claim is determined, he is entitled to the value of the lien "free from any possible or probable charges

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therefor may be considered as a substitute for the mortgaged property, and the proceeds will be credited to the mortgage debt and not distributed among the general creditors of the mortgagor. Harvey v. Kinston Knitting Co., 197 N. C. 177, 148 S. E. 45 (1929).

[236] In some cases it is necessary to charge the lien security with the expense of receivership costs, taxes, and labor liens.

[237] Vanderwal v. Vanco Dairy Co., 20 N. C. 314, 156 S. E. 512 (1930). As has been already indicated, however, a director or stockholder cannot take advantage of such protection.

[238] Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 297, 63 S. E. 2d 637, 640 (1951), referring to N. C. GEN. STAT. § 47-20 (1950). Also: M. & J. Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949); National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208 (1928); General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928). But see Gresham Mfg. Co. v. Carthage Buggy Co., 152 N. C. 633, 68 S. E. 175 (1910), where a creditor who had sold property to the company on what appeared to be an unrecorded conditional sale contract was allowed a lien, the court holding that the receiver took whatever title the company had and nothing more.

[239] Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1918).

[240] Garrison v. Vermont Mills, 154 N. C. 1, 69 S. E. 743 (1910). But there must be delivery to the pledgee. Boney & Harper Milling Co. v. J. C. Stevenson Co., 161 N. C. 510, 77 S. E. 676 (1913).

[241] N. C. GEN. STAT. § 44-75 (1950). See Garrison v. Vermont Mills, 154 N. C. 1, 69 S. E. 743 (1910).

[242] N. C. GEN. STAT. § 44-2 (1950).

[243] If the value of the article exceeds fifty dollars he can sell after ninety days from the time the work was completed; if fifty dollars or less, the period is thirty days. N. C. GEN. STAT. § 44-2 (1950).

[244] Johnson v. Yates, 183 N. C. 24, 110 S. E. 603 (1922). See Note, 1 N. C. L. REV. 127 (1922).

which might be fixed upon it, if it went into the hands of a receiver, for costs and expenses of the suit. . . ."[245]

Certain non-possessory liens are also allowed. One who does work on a building has a lien for the resulting debt on both the building and lot on which it stands[246] which is prior to every other lien or encumbrance attaching to the property subsequent to the time at which the work was commenced or the materials were furnished.[247] A statutory factor's lien can be obtained by proper registration, after which actual or constructive possession by the factor is unnecessary, such lien to be superior to all subsequent liens save one arising in favor of a mechanic or landlord.[248] Where property is attached a lien is created, which commences at the date of the levy of attachment in the case of personalty and which relates back to the time of the filing of the order of attachment with the clerk in the *lis pendens* docket in the case of realty,[249] and such liens are superior to the rights of general creditors.[250]

The supreme court in an early case indicated that equitable liens, which do not depend upon possession but which "arise either from a written contract, which shows an intention to charge some particular property with a debt or obligation, or are declared by a court of equity from the facts and circumstances of a case," would be given priority over general creditors' claims in receivership proceedings.[251] However, although not ruling out altogether the possibility of recognition of such liens,[252] the court has refused to allow them in subsequent decisions.[253]

Although bringing an action confers no right of priority upon the

[245] Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 586, 29 S. E. 838, 839 (1898).

[246] N. C. GEN. STAT. § 44-1 (1950).

[247] King v. Elliot, 197 N. C. 93, 147 S. E. 701 (1929); Lookout Lumber Co. v. Marion Hotel, 109 N. C. 658, 14 S. E. 35 (1891). But a mortgage recorded prior to the time when work was begun is superior. McAdams v. Piedmont Trust Co., 167 N. C. 494, 83 S. E. 623 (1914).

[248] N. C. GEN. STAT. §§ 44-70 to 44-74, and § 44-76 (1950).

[249] N. C. GEN. STAT. § 1-440.33 (1953).

[250] Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461 (1900); German Looking Glass Plate Co. v. Asheville Furniture & Lumber Co., 126 N. C. 888, 36 S. E. 199 (1900) (attachment on foreign judgment).

[251] Garrison v. Vermont Mills, 154 N. C. 1, 4, 69 S. E. 743, 744 (1910).

[252] "These liens . . . while ordinarily enforceable as between parties and privies . . . as a general rule are treated as being void as to a receiver representing the general creditors of a receivership estate." Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 297, 63 S. E. 2d 637, 640 (1951).

[253] Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 63 S. E. 2d 637 (1951) (Notes and deed of trust had been signed by only the secretary of the corporation, and were undelivered and unrecorded); Hood v. Macclesfield Co., 209 N. C. 280, 22 S. E. 2d 220 (1935) (alleged purchase of lots and payment on insolvent's oral agreement to hold and convey them as buyer directed). See also M. & J. Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949).

plaintiff, when a judgment[254] has been obtained and properly docketed[255] the realty in the counties wherein such judgment is filed passes to the receiver subject to a general lien in favor of the judgment creditor. If several judgments have been so docketed the liens take priority according to the time at which they were docketed.[256] In the case of personalty the judgment lien is effective if levy is made before receivership.[257] Except where the insolvent is a public service corporation and the judgment is for "labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured,"[258] the lien is subordinate to prior registered deeds of trust, mortgages, and conditional sales.[259] If the judgment was obtained by unconscionable means the other creditors can assert the want of equity in the lien-holder, force him to surrender his priority and share as a general creditor.[260]

The creditor who holds collateral to secure his debt can nevertheless receive a *pro rata* dividend on the entire debt as it existed at the time of the appointment of the receiver and rely on his collateral also.[261] If he wishes, he can first enter a claim for the entire amount to which he would have been entitled as a general creditor, subsequently realizing on his collateral to the extent necessary to bridge the gap between the amount of the dividend and his total claim. Any excess collateral will then be returned to the receiver.[262] Possibly the secured creditor might be permitted to completely exhaust his collateral first and then enter a claim for the full amount of his debt as it existed at the time of the appointment, obtaining a *pro rata* recovery to the extent necessary to make him whole. It would be wise to avoid this latter procedure, how-

[254] The judgment against an insolvent corporation merely establishes the debt and does not of itself give the judgment creditor a preference. Lacy v. Clinton Loan Ass'n., 132 N. C. 131, 43 S. E. 586 (1903).

[255] See N. C. GEN. STAT. § 1-234 (1953).

[256] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461 (1900).

[257] N. C. GEN. STAT. § 1-313(1) (1953). See Weisenfield & Co. v. McLean, 96 N. C. 248, 2 S. E. 56 (1887).

[258] N. C. GEN. STAT. § 55-44 (1950); Howe v. Harper, 127 N. C. 356, 37 S. E. 505 (1900). (Notice the limitations which have been put on § 55-44 by amendment since the time of this case, however.).

[259] Amoskeag Mfg. Co. v. Yadkin Cotton Mills, Inc., 200 N. C. 10, 156 S. E. 101 (1930).

[260] Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 (1894) (Plaintiff split his account to obtain J. P. jurisdiction and more speedy treatment).

[261] North Carolina Corporation Commission v. Central Bank & Trust Co., 200 N. C. 808, 158 S. E. 925 (1931); Central Bank & Trust Co. v. Jarrett, 195 N. C. 798, 143 S. E. 827 (1928); Boney & Harper Milling Co. v. J. C. Stevenson Co., 161 N. C. 510, 77 S. E. 676 (1913); Merchants National Bank v. Flippen, 158 N. C. 334, 74 S. E. 100 (1912). See Winston v. Biggs, 117 N. C. 206, 23 S. E. 316 (1895) (assignment for the benefit of creditors).

[262] Boney & Harper Milling Co. v. J. C. Stevenson Co., 161 N. C. 510, 77 S. E. 676 (1913).

ever, since at present North Carolina law on this point is uncertain.[263]

North Carolina confers a statutory lien on the assets of a corporation in favor of all persons doing "labor or services of whatever character" in its regular employment for all such services rendered within the two months preceding the date when precedings in insolvency are actually instituted.[264] Although labeled a lien the security conferred is actually a "right of payment"[265] which gives such wages[266] priority over all other liens that can be acquired on the assets of the corporation.[267] However, the section has been interpreted to subordinate only those liens arising on the property after the corporation acquires it[268] since when the property passes to the corporation subject to a mortgage, or a purchase money mortgage is given, the company only takes the equity of redemption as an asset.[269] Wages are defined as "the compensation given by a master or employer to a hired person or employee . . . ,"[270] so contractors cannot,[271] and officers of the cor-

[263] The line of cases cited in footnote 261 *supra* uniformly upheld the so-called Chancery rule, under which it is immaterial whether the secured claimant realizes on his security and then enters his full claim or receives a *pro rata* dividend on his full claim first. However, in United States Fidelity and Guaranty Co. v. Hood, 206 N. C. 639, 175 S. E. 135 (1934), where a secured depositor of a bank had exhausted its collateral, and then filed a claim with the receiver for the full amount and assigned such claim to the indemnitor who paid the creditor the balance due, the court allowed the indemnitor a *pro rata* dividend only on the sum which it had paid. Since a subsequent case, Rierson v. Hanson, 211 N. C. 203, 189 S. E. 502 (1936), indicated that in receivership cases the Chancery rule was favored in North Carolina, it may be that the scope of the *U. S. Fidelity and Guaranty Co.* rule will be restricted to the basic fact situation there present. However, the decision should sound a note of warning for the creditor holding security. See Note, 13 N. C. L. REV. 239 (1935).

[264] N. C. GEN. STAT. § 55-136 (1950). There is no priority for wages earned prior to the two-month period. Cummer Lumber Co. v. Seminole Phosphate Co., 189 N. C. 206, 126 S. E. 511 (1925). And although an early case, Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331 (1915), held otherwise the section does not apply to wages earned during receivership. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[265] Leggett v. Southeastern People's College, Inc., 234 N. C. 595, 600, 68 S. E. 2d 263, 268 (1951).

[266] Priority will be given to that part of vacation pay which can be attributed to the work done in the two-month period, but there is no priority for severance pay since it is in the nature of liquidated damages. *In re* Port Publishing Co., 231 N. C. 395, 57 S. E. 2d 366 (1949).

[267] N. C. GEN. STAT. § 55-136 (1950).

[268] "One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debt, past or prospective, does so with the knowledge that . . . the lien of his mortgage is subject to be displaced in favor of laborers' liens. . . ." Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971, 974 (1917).

[269] Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 93 S. E. 971 (1917) (Company took some land subject to mortgage and bought other land on purchase money mortgage); Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331 (1915) (subject to mortgage); Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45 (1915) (subject to mortgage).

[270] Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 86 S. E. 184 (1915).

[271] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 86 S. E. 184 (1915).

poration probably cannot[272] obtain this priority. Nor can one who performed work on a single occasion claim the priority.[273]

3. *Taxes*

A federal statute[274] provides a lien for taxes due[275] the United States on all property of an insolvent debtor, creating a right of priority which attaches upon the appointment of a receiver.[276] Since the state laborer's lien arises at the same instant it is subordinate to such tax lien.[277] The tax priority is not effective "against any mortgagee, pledgee, purchaser, or judgment creditor,"[278] however, until notice has been filed in the office of the register of deeds of the county within which the property subject to such lien is situated.[279] Consequently, one who dockets a judgment, registers a chattel or real estate mortgage, or in some manner obtains a "prior specific lien embracing specific property of the debtor as contra-distinguished from a general inen embracing all his property"[280] and has rights superior to the federal government in receivership. An attaching creditor who has not obtained judgment when notice is filed has inferior rights.[281]

When a lien for state taxes has attached, by listing the property in the case of realty and by levying on it in the case of personalty,[282] this lien is not terminated by subsequent receivership proceedings.[283] Even where the lien does not exist the taxes owed, together with interest, penalties and costs, are "a preferred claim, second only to administration expenses and specific liens. . . ."[284] Consequently, where

[272] Alexander v. Farrow, 151 N. C. 320, 66 S. E. 209 (1909) (Case involved assignment for benefit of creditors but the same policy would probably apply). *But see* Mascot Stove and Mfg. Co. v. Turnage, 183 N. C. 137, 110 S. E. 779 (1922).

[273] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[274] REV. STAT. § 3466 (1875); 31 U. S. C. § 191 (1946).

[275] "A debt due is a debt accrued, and a debt is accrued when all events have occurred which fix and determine the liability of the debtor to the creditor." Leggett v. Southeastern People's College, Inc., 234 N. C. 595, 599, 68 S. E. 2d 263, 267 (1951).

[276] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Leggett v. Southeastern People's College, Inc., 234 N. C. 595, 68 S. E. 2d 263 (1951); Bishop v. Black, 233 N. C. 333, 64 S. E. 2d 167 (1951).

[277] Leggett v. Southeastern People's College, Inc., 234 N. C. 595, 68 S. E. 2d 263 (1951).

[278] INT. REV. CODE § 3672.

[279] INT. REV. CODE § 3672 allows state law to provide for the requisite notice. See N. C. GEN. STAT. § 44-65 (1950).

[280] National Surety Corp. v. Sharpe, 236 N. C. 35, 45, 72 S. E. 2d 109, 120 (1952).

[281] Bishop v. Black, 233 N. C. 333, 64 S. E. 2d 167 (1951).

[282] N. C. GEN. STAT. § 105-340 (1950).

[283] N. C. GEN. STAT. § 105-376 (1950). See Reichland Shale Products Co. v. Southern Steel & Cement Co., 200 N. C. 226, 156 S. E. 777 (1930) (but not where land has been disposed of before the receivership or sold by tax collectors).

[284] Section 105-376, passed in 1939, was apparently designed to overrule the holding in Currie v. Southern Manufacturers Club, Inc., 210 N. C. 150, 185 S. E. 666 (1936) that where there was no levy on personality prior to sale of the property by the receiver, there could be no preferred claim for taxes on such property.

the lien exists the state taxes have priority over all secured debts;[285] where there is no tax lien they still are superior to labor liens and other general liens. The receiver has the duty to pay such taxes out of the trust funds.[286] In addition, the tax officer has power to take possession of as much property as is necessary to meet the taxes, whether state, county, town or municipal, without applying to the court for permission to do so.[287]

4. *Cost of Administration*

The cost of administration of a receivership is the expense of collecting, preserving, and distributing the assets of the corporation.[288] It includes the allowance for the receiver, who is to be given, before distribution, "a reasonable compensation . . . for his services, not to exceed five per cent upon receipts and disbursements. . . ."[289] Part of this allowance may be granted while the receivership is in progress.[290] The amount approved is within the discretion of the court, and on appeal[291] it will not be altered unless based on the wrong principle or clearly inadequate or excessive.[292] It is an expense payable in full rather than a debt.[293]

Court costs[294] and necessary lawyers' fees[295] are also part of the administrative expenses, as are broker's commissions,[296] bookkeeping and clerical expenses, auditing costs, premiums on fire insurance on the property in receivership, wages for watchmen employed to guard the property, and the cost of sale of the assets in receivership.[297] Taxes during receivership are also part of this cost.[298]

[285] N. C. GEN. STAT. § 105-376 (1950). Federal tax liens, however, are superior. See National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 105 (1952).

[286] N. C. GEN. STAT. § 105-412 (1950). He is personally liable for the taxes if he fails to do so. N. C. GEN. STAT. § 105-253 (1950).

[287] N. C. GEN. STAT. § 55-160 (1950).

[288] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[289] N. C. GEN. STAT. § 55-155 (1950). This means a maximum of five per cent on receipts and five per cent on disbursements. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39 (1900). See Graham v. Carr, 133 N. C. 449, 45 S. E. 847 (1903).

[290] Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39 (1900). But see Delafield v. Lewis Mercer Construction Co., 118 N. C. 105, 24 S. E. 10 (1896) (allowance premature before work is finished).

[291] If the order is interlocutory, exceptions should be entered. There can be no appeal until the final order distributing assets. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39 (1900).

[292] Where a false principle was used the award will be set aside; if the amount is inadequate or excessive the court will alter or modify. Graham v. Carr, 133 N. C. 449, 45 S. E. 847 (1903). *Accord,* Talbot v. Tyson, 147 N. C. 273, 60 S. E. 1125 (1908); Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39 (1900) .(Court slashed amount to be allowed).

[293] Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770 (1894).

[294] N. C. GEN. STAT. § 55-155 (1950).

[295] See Graham v. Carr, 133 N. C. 449, 45 S. E. 847 (1903).

[296] Harrison v. Brown, 222 N. C. 610, 24 S. E. 2d 470 (1943).

[297] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[298] Stagg v. George E. Nissen Co., 208 N. C. 285, 180 S. E. 658 (1935).

As a general rule administrative expenses are charged against the unencumbered assets of the estate and are not properly shared by the secured creditors.[299] "The effect is to tax the whole sum against the holder of the lowest lien, and to pay the prior liens in full."[300] However, where the encumbered property has been managed, cared for and sold through the receivership, the court may decree the charges therefor to be a claim superior to other liens.[301] Administration expenses have priority, in any event, over tax claims[302] and labor liens.[303] Unless lien-holders consent they can under no circumstance be forced to share in the expense of an operating receivership for a private corporation.[304] Consequently, the cost of this type of activity can be collected only from income or the unencumbered assets of the estate. If there is not sufficient property of this type, it will be applied to the cost on a *pro rata* basis.[305]

5. *General Creditors*

A claimant who holds no security or lien and is not preferred by statutory provision shares in the assets as a general creditor.[306] He participates only in what assets are left after all priority debts and the cost of administration have been satisfied, prorating with others in like

[299] Wood v. Woodbury & Pace, Inc., 217 N. C. 356, 8 S. E. 2d 240 (1940); Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 280, 63 S. E. 1048 (1909). Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 93 S. E. 971 (1917) drew on the rule as to labor liens to hold that one who lent to a company on mortgage security did so with the knowledge that the mortgage might be displaced by receivership expenses.

[300] Hickson Lumber Co. v. Gay Lumber Co., 152 N. C. 270, 271, 67 S. E. 579 (1910).

[301] Wood v. Woodbury & Pace, Inc., 217 N. C. 356, 8 S. E. 2d 240 (1940); Bank of Pinehurst v. Mid-Pines Country Club, Inc., 208 N. C. 239, 179 S. E. 882 (1935); Stagg v. George E. Nissen Co., 208 N. C. 285, 180 S. E. 658 (1935). "As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment." National Surety Corp. v. Sharpe, 236 N. C. 35, 52, 72 S. E. 2d 109, 125 (1952).

In Kistler v. Wilmington Development Co., 214 N. C. 630, 172 S. E. 413 (1938) it was held that an order ratifying an agreement between the receiver and a lienholder, in which the latter agreed to surrender his right for a deficiency claim in return for the rents from the security property, was *res judicata*. Hence no charge for receivership expenses could be subsequently made.

[302] N. C. GEN. STAT. § 105-376(d) (1950).

[303] Labor liens are fixed, as we have seen, on the "assets" of the corporation. By N. C. GEN. STAT. § 55-155 (1950) the administration expenses are to be paid before any of the "assets" are distributed.

[304] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952). The case abandoned the contrary rule of Armour & Co. v. People's Laundry Co., 171 N. C. 681, 89 S. E. 19 (1916) and followed the *dictum* in Roberts v. Bowen Mfg. Co., 169 N. C. 27, 32, 85 S. E. 45, 48 (1915).

[305] This is true even though the debts were contracted with express approval of the court. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[306] "Preferences are not favored by the law, and can only arise by reason of some definite statutory provision or some fixed principle of common law which creates special and superior rights in certain creditors over others." Western Carolina Power Co. v. Yount., 208 N. C. 182, 185, 179 S. E. 804, 805 (1935).

position—parties with claims for breach of contract,[307] ordinary unsecured loans,[308] unregistered deeds of trust,[309] unrecorded mortgages,[310] judgments entered after receivership has begun,[311] and wage claims not within the statutory priority standards.[312]

6. *Stockholders*

If anything remains after all debts have been met it is returned to the stockholders, the owners of preferred shares taking first, *pro rata.* "If there still be a surplus, it shall be divided and paid to the general stockholders proportionately. . . ."[313] Because the capital stock is considered to be a trust fund for the creditors,[314] no attempts to set up a preference in the charter or stock certificates will be effective in altering the statutory requirement.[315]

DISTRIBUTION AND DISCHARGE

Distribution of the corporate assets can be made only on order of court[316] and should not be allowed until all the funds have been collected[317] and the status of all claims entered against the corporation ascertained.[318] The receiver may, with permission of the court, use such funds as are necessary to defray the cost of collection.[319] No order of distribution shall issue until the receiver has shown to the satisfaction of the court that he mailed notice at least twenty days prior to the time set for hearing to all parties who filed claims, giving the date and place at which the hearing would occur.[320] Although no

[307] See Raleigh Banking and Trust Co. v. Safety Transit Lines, 200 N. C. 415, 157 S. E. 62 (1931); Arnold v. Porter, 122 N. C. 242, 29 S. E. 414 (1898).

[308] Costner v. Piedmont Cotton Mills, Co., 155 N. C. 128, 71 S. E. 85 (1911).

[309] Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 63 S. E. 2d 637 (1951).

[310] M. & J. Finance Corp. v. Hodges, 230 N. C. 580, 55 S. E. 2d 201 (1949).

[311] Lacy v. Clinton Loan Ass'n., 132 N. C. 131, 43 S. E. 586 (1903).

[312] National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952).

[313] N. C. GEN. STAT. §§ 55-137 (1950) and 55-61 (Supp. 1953).

[314] Fuller v. Motor and Tire Service Co., 190 N. C. 655, 130 S. E. 545 (1925).

[315] Ellington v. Raleigh Bldg. Supply Co., 196 N. C. 784, 147 S. E. 307 (1929); Kinston Cotton Mills v. Wachovia Bank and Trust Co., 185 N. C. 7, 115 S. E. 883 (1923); Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747 (1910).

[316] National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950). See N. C. GEN. STAT. § 55-153 (1950).

[317] National Surety Corp v. Sharpe, 236 N. C. 35, 72 S. E. 2d 109 (1952); Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 117 N. C. 308, 23 S. E. 450 (1895); *same case,* 118 N. C. 556, 24 S. E. 116 (1896).

[318] National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950). However, where a person who could have taken part in the proceedings instead brings separate action, the court need not wait until his suit is settled before ordering distribution. Delafield v. Lewis Mercer Construction Co., 118 N. C. 105, 24 S. E. 10 (1896).

[319] Strauss v. Carolina Interstate Bldg. and Loan Ass'n., 118 N. C. 556, 24 S. E. 116 (1896).

[320] N. C. GEN. STAT. § 55-153 (1950). If the record shows that this was not done the order will be vacated on appeal. National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. 2d 593 (1950).

exception was taken to the report of the receiver, objection can still be registered to the order of distribution for it will present the question of whether the priority of payment is correct, based on the receiver's findings.[321]

When all assets have been administered the receiver can apply for an order of discharge, which cannot be granted until the receiver has proved that he has met the same requirements as to giving notice that apply in regard to orders of distribution.[322] This allows any unsatisfied parties opportunity to object to the discharge.[323]

After discharge if it is subsequently found that additional property of the defunct corporation still exists it is proper to apply for a new receiver.[324] Because the liability of the receiver terminates with his official existence and the order of discharge is not subject to collateral attack, the correct method to recover against such receiver for misconduct is to make a motion in the cause that his discharge be set aside for fraud or mistake.[325]

CONCLUSION

A discussion of the corporate receivership in any one particular jurisdiction is necessarily subject to the restrictions imposed by the lack of judicial decision or statutory provision relating to the varied fact situations which may arise. In the foregoing we have endeavored to outline the law of corporate receivership in North Carolina as the same has been declared by statutes and decisions to date.

[321] Bishop v. Black, 233 N. C. 333, 64 S. E. 2d 167 (1951). Where an order directing payment of a certain item is issued, exception taken to a subsequent order in the proceedings entered after such claim had been paid is too late to present the correctness of the order of payment. Eno Investment Co. v. Protective Chemicals Laboratory, Inc., 233 N. C. 294, 63 S. E. 2d 637 (1951).

[322] N. C. GEN. STAT. § 55-153 (1950).

[323] It was formerly the rule that when the party who had procured the appointment of the receiver had been satisfied he had a right to have the receivership terminated. Because receivership is for the benefit of all the creditors this rule has been abandoned. Lenoir v. Linville Improvement Co., 117 N. C. 471, 23 S. E. 442 (1895).

[324] Howe v. Harper, 127 N. C. 356, 37 S. E. 505 (1900).

[325] Haas v. Cathey, 199 N. C. 796, 156 S. E. 92 (1950).