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Mr. Smith, who has been one of the leaders in the drive to suppress crime in the City of Chicago, gave a graphic description of the alliance between crime and politics and the difficulties of rooting out a criminal element which has engrafted itself into every branch of government. He pointed out that as long as criminals can dominate elections a democratic form of government will be doomed to fail in fighting crime. Mr. Smith added that conditions are such that only the Federal government acting under the powers given to the president by the Constitution can effectively "clean up" our larger cities.

Professor Wilson gave a short account of the results achieved to date by the use of the "lie detector." The different reactions of the pulse, respiration, and blood pressure caused by the mental realization that one is telling a lie were described by the speaker. To demonstrate how the "lie detector" could, by recording these reactions, show whether or not the person subjected to the test was telling the truth, Prof. Wilson had Joseph Laughlin, president of the Club, go through a sample test. The success of the test convinced many that the results of these tests should be admissible in evidence.

The Hon. Henry T. Rainey, Speaker of the House of Representatives, was introduced to the members of the Club by Dean Thomas F. Konop at a meeting held in the law library on the morning of October 17. Speaker Rainey visited the College of Law upon the invitation of Dean Konop, who served in Congress with Mr. Rainey from 1911 to 1917. After addressing a few remarks to the students and faculty, the Speaker was presented with a cane, traditional accoutrement of a senior in the College of Law, by Joseph A. Laughlin, president of the Club.

NOTES

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF TRADE OR BUSINESS IN GENERAL.—In the case of *People v. Nebbia*¹ the defendant was convicted in the lower court of violating a statute recently passed by the Legislature of New York fixing a minimum price for the sale of milk. The statute declared that because of the extremely low price at which milk was selling a temporary emergency existed, and the milk industry was made a business affecting the public health and interest until March 31, 1934. A Milk Control Board, composed of three members, was created to fix the minimum price at which milk could be sold. A sale at a price lower than that fixed by the Board was made a crime. The defendant admittedly sold milk at a

¹ 186 N. E. 694 (N. Y. 1933).

price lower than the Board fixed as a minimum. He appealed from the conviction in the lower court on the ground that the statute was unconstitutional as a violation of the provision that no person shall be deprived of his life, liberty, or property without due process of law. The New York Court of Appeals held the statute was valid as a reasonable exercise of the police power.

Under the *Merchantile* theory of government, prevalent in Europe up to about the middle of the eighteenth century, it was not uncommon to regulate prices of merchandise by legislation. This was also done in America to some extent in Colonial days, but the practice was never general in this country. With the adoption of the *Laissez Faire* theory of individualism, the regulation of prices in industry was left to the individual. The constitutions of the several states and of the United States provided that no person was to be deprived of his life, liberty, or property without due process of law. The liberty of making contracts is generally recognized as property; ² so also is the right to carry on a lawful business.³ However, these rights are not absolute; they are subject to a reasonable exercise of the police power by the Government. Under the exercise of the police power it has been recognized that the State has the right to regulate prices in certain cases and in certain types of industries. A business quasi public in nature or affected with a public interest is one of these types.

In *Munn v. Illinois*,⁴ one of the early and leading cases on the matter, the United States Supreme Court held that a statute passed by the Illinois Legislature fixing the maximum prices that could be charged for the storage of grain in elevators at Chicago and other places in the state was not unconstitutional under the "due process" clause in the fourteenth amendment of the United States Constitution. The point was stressed in this case that the elevators being regulated exercised a virtual monopoly in the business. The court based its decision on the theory that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.

In *German Alliance Insurance Company v. Lewis* ⁵ the fixing of maximum and minimum charges for fire insurance was held constitutional in the absence of a monopoly in the business being regulated. The court further held in that case that a business may be so far affected with a public interest as to permit legislative regulation of its rates and charges although no public trust is imposed upon the prop-

² *Mathews v. People*, 67 N. E. 28 (Ill. 1903).

³ *Gray v. Building Trades Council*, 97 N. W. 663 (Minn. 1903).

⁴ 94 U. S. 113 (1876).

⁵ 233 U. S. 389 (1914).

erty, and although the public may not have a legal right to demand and receive service.

In *Block v. Hirsh*⁶ a temporary regulation of the rents of houses was held to be a valid exercise of the police power because of the temporary emergency caused by the World War. The statute in question gave a tenant the privilege of holding over after the expiration of the lease, subject to regulation by the commission appointed by that act, so long as he paid the rent and performed the conditions as fixed by the lease or as modified by the commission. The court declared that circumstances may so change in time or so differ in space as to clothe with a public interest so great as to justify regulation by law an interest which at other times or in other places would be a matter of purely private concern.

From these cases it is clear that the United States Supreme Court has tended to increase rather than decrease the scope and application of the police power with regard to the regulation of prices. Yet it is to be noted that in all of the cases, except the *Insurance Company* case,⁷ the regulation being considered was a fixing of a maximum rather than a minimum price; and without exception, the purpose of the regulation was to protect the consumer. In the New York case under consideration, however, the regulation fixed a minimum price primarily for the protection of the producer of milk. Yet under modern society the relation between one class of people and the others is so intricate that the prosperity of the whole depends upon the prosperity of each one. It is impossible for one class to enjoy prosperity while another class suffers in depression.

It seems, therefore, that the New York court was entirely justified in holding that the regulation was for the benefit of the people as a whole, and was a valid exercise of the police power. Of course, there will always be those who will say that the fixing of a minimum price for milk is an unwarranted application of the principle that the State has the right to regulate prices of a business affected with a public interest. They may be answered in the words of Mr. Justice McKenna:⁸ "It would be a bold thing to say the principle is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application."⁹

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⁶ 256 U. S. 135 (1921).

⁷ *Op. cit. supra* note 5.

⁸ *German Alliance Insurance Co. v. Lewis, op. cit. supra* note 5.

⁹ For further reference on the Regulation of Prices, see Cooley on Constitutional Law, p. 305; Black's Constitutional Law, p. 412; Constitutional Law, 6 R. C. L. 224.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.—As the juggernaut of economic depression pursues its relentless leveling course, the laws pertinent to the relation of debtor and creditor become increasingly important, and their application becomes a matter of national debate. The debtor seeks legal ways to protect what property he has from the machinery set up to enforce the payment of debts. The creditor, faced with the possibility of having to write off certain debts as total losses, looks to the law to preclude this event.

The device most commonly used among small debtors is the transfer of a husband's property to his wife. There seems to be a quite widespread delusion that this scheme is impregnable, certain to baffle creditors. The creditor knows that, generally speaking, his wife's property cannot be taken to pay his debts. He knows, too, that in effect he will still have control of the property, and that upon his death it will be available to his dependents. The transfer is often effected while the husband is perfectly solvent, his caution warning him to provide for future contingencies. As a result the practice of putting the title to all property in the wife's name is a common one in the United States. A review of the laws concerning the effect of a property transfer from husband to wife as affecting the rights of the husband's creditors is, therefore, apropos at this time. For the sake of clearness the subject is best divided into a consideration of contracts and gifts.

Under the common law a husband and wife could not contract with each other because for all legal purposes they were considered as an entity, and the wife was considered as being without contractual volition.¹ In equity such contracts would, in many instances, be enforced, though unenforceable at law; but under the general doctrines of equity no contract would be recognized which was unfair or detrimental to the interests of third persons.² Thus, the validity of a contract between a husband and wife is now to be determined from the statutes and the interpretations thereof in each particular state. The interpretation of statutes conferring upon women general contractual capacity is important. While the majority of the courts hold that such general statutes destroy the common law unity upon which the incapacity was based and, therefore, permit a husband and wife to contract with each other,³ yet a few states hold that such statutes being in derogation of the common law should be construed as giving only

¹ 30 C. J. 669, Husband and Wife, § 248, Notes 75, 77.

² *In re Hoffman*, 199 Fed. 448 (1912); *Leach v. Rains*, 149 Ind. 152 (1897).

³ *North v. North*, 166 Ill. 179, 46 N. E. 729 (1897); *Townsend v. Huntzinger*, 41 Ind. App. 223, 83 N. E. 619 (1908).

For a typical statute, see *Compiled Laws of Michigan* (1929) § 13057. Cases interpreting this statute: *Randall v. Randall*, 37 Mich. 563 (1877); *Ransom v. Ransom*, 30 Mich. 328 (1874).

such powers as are specifically named and thus deny a married woman the power to contract with her husband.⁴

Like all contracts, a contract between husband and wife must be supported by a good consideration, and this is especially true when such contracts are being attacked by creditors of the husband.⁵ A conveyance for an adequate consideration with no intent on the part of the grantee to defraud the creditors of the grantor will be upheld against the creditors.⁶ The question of what will constitute an adequate consideration is thus presented. All the devices which have been used at one time or another cannot be mentioned, but the more important can be indicated.

(1) Natural love and affection is not a good consideration. The conveyance is only voluntary and is void as to creditors.⁷ In *Dirks v. Union Savings Association*,⁸ McCoy, J., said: "As between husband and wife a voluntary transfer of property by gift in consideration of love and affection only is a good consideration as between them, but it is not a sufficient consideration as against creditors of the donor. It is a fraud though the parties had no present intent to commit a fraud. In the eye of the law everyone is presumed to intend the natural consequences of his acts."

(2) The release of a wife's inchoate right of dower will constitute a valuable consideration for a reasonable⁹ conveyance of property by a husband to his wife.¹⁰

(3) In many instances the services of the wife are recited as the consideration for the conveyance. At common law the husband was entitled to the services and earnings of his wife and he could not by giving them to her, or investing them, or by permitting her to invest them in property in her own name withdraw them or the property from the claims of his existing creditors.¹¹ In most jurisdictions, how-

⁴ *Crosby v. Clem*, 209 Mass. 193, 95 N. E. 297 (1911).

⁵ *Hinkle v. Downing*, 116 Iowa 693, 88 N. W. 1088 (1902); *Fox v. Peck*, 151 Ill. 226, 37 N. E. 873 (1892).

⁶ *Bondle v. Commercial Nat. Bank*, 174 Pac. 44 (Cal. 1918); *Seavey v. Seavey*, 114 Me. 14, 95 Atl. 265 (1915); *Frank v. Von Boyer*, 236 N. Y. 473, 141 N. E. 920 (1923).

⁷ *Farrand v. Caton*, 69 Mich. 235, 37 N. W. 199 (1888).

In *Arbough v. Alexander*, 164 Ia. 635, 146 N. W. 747 (1914), the court, while holding that love and affection was sufficient consideration for a deed from a husband to his wife, specifically pointed out that the plaintiff was not a creditor who could object to the conveyance.

⁸ 40 S. D. 529, 168 N. W. 578 (1918). See also *Kelly v. Stubblefield*, 26 S. W. (2d) 28 (Tex. 1930).

⁹ *Huwe v. Knecht*, 10 Ohio App. 487 (1919).

¹⁰ *Bigelow, Fraudulent Conveyances*, 578; *Citizen's Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146 (1889).

¹¹ *Union Trust Co. v. Fisher*, 25 Fed. 178 (1885); *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486 (1891). See also, *Fraudulent Conveyances*, 27 C. J. 422, § 28.

ever, in conformity with the general lessening of the strict provisions of the common law relative to coverture, the rule has been relaxed and a woman is allowed to retain earnings acquired in the conduct of a separate business with the express or implied consent of her husband.¹² Since money earned in this way belongs to the wife it may be used as consideration for a conveyance.¹³ It is to be noted, however, that neither the performance of ordinary household duties,¹⁴ nor the assistance given to a husband in carrying on his business,¹⁵ is a valid consideration for a conveyance. Fead, J., in *Detroit Security Trust Co. v. Gitre*,¹⁶ said: "The statute does not convert the marital relationship into a business partnership nor raise a money debt from husband to wife for her services to him, even though they take her outside the strict ambit of the domestic circle and consist of aid to him in his business."

(4) Whether or not the savings of a wife from money given to her by her husband for personal or household expenses constitute a sufficient consideration for a conveyance is a moot question. Naturally, the different circumstances of the cases, the amount of the fund, the efforts of the wife, the absence of a fraudulent design, account for the contrariety of opinion.¹⁷

When the consideration for the contract is monetary its adequacy is to be determined by the financial condition of the husband at the time of the conveyance and the good faith of the wife.¹⁸

The simplest contract transaction for a debtor-husband to devise would consist of a gift of money to his wife and the subsequent use of the money by the wife as consideration for a contract. Naturally, this gift would first have to be valid before it could be used by the wife as a consideration. If the gift is not valid, the money is still the husband's, and the property in the wife's name which represents the gift may be reached by the husband's creditors.

¹² *Boots v. Griffith*, 89 Ind. 246 (1883); *King v. Wells*, 106 Iowa 649, 77 N. W. 338 (1898).

¹³ *Draper v. Buggee*, 133 Mass. 258 (1881); *Gilbert v. Glenny*, 75 Iowa 513, 39 N. W. 818 (1888).

¹⁴ *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160 (1883); *Quidont v. Perteaux*, 18 N. J. Eq. 472 (1867). As to keeping boarders see, *Gilbert v. Glenny*, *op. cit. supra* note 13.

¹⁵ *Henze v. Rogatzky*, 165 N. W. 629 (1917); *Detroit Security Trust Co. v. Gitre*, 254 Mich. 66, 235 N. W. 884 (1931).

¹⁶ *Op. cit. supra* note 15.

¹⁷ Held a good consideration in *Smith v. Reber*, 18 Atl. 462 (N. J. Ch. 1889). As to property purchased by the wife with savings see, *Ford Lumber and Mfg. Co. v. Cord*, 150 Ky. 738, 150 S. W. 991 (1912); *Milkman v. Arthe*, 221 Fed. 134 (1914).

¹⁸ *Schwenck v. Hess*, 99 S. E. 255 (W. Va. 1919); *American Trust Co. v. Kaufman*, 119 Atl. 747 (Penn. 1923).

A gift by a husband to his wife is, as a general rule, valid against subsequent creditors but not against those subsequent creditors to whom the donor contemplates becoming indebted when he makes the gift.¹⁹ The difficulty of proving this last proposition is apparent.²⁰ The wife's knowledge of the husband's fraudulent intent, is unimportant, if the husband be insolvent.²¹ The creditor-husband's intent is the material point to consider.²²

A husband may make a valid gift to his wife as long as he retains property amply sufficient to pay his debts.²³ This rule is much more equitable than the view once propounded by Chancellor Kent (and still held by some courts), namely, that if the party be indebted at all at the time of the gift the conveyance is conclusively fraudulent as to existing creditors.²⁴ A man's moral obligation to provide for his wife and children is a natural consideration for the conveyance and there can be no presumption of fraud if the donor remains solvent. A decision which makes any gift to a wife or family subject to attack by creditors if at the time of the gift the donor was a debtor exalts the rights of a creditor at the expense of the debtor's dependents. It gives the creditors an unwarranted protection and security. When it is shown that at the time of the transfer the husband was insolvent, the transaction is then considered conclusively fraudulent as to creditors.²⁵

As indicated above existing creditors are the only ones who have the right to set aside a fraudulent conveyance. Subsequent creditors must prove that the conveyance was made with the intent to defraud them. Professor Hanna states that the case of *Harlan v. Maglaughlin*²⁶ established this prevailing American rule.²⁷ If, however, the donor

¹⁹ *Sawyer v. Metters*, 133 Wis. 350, 113 N. W. 682 (1907); *Lavigne v. Tobin*, 52 Neb. 686, 72 N. W. 1040 (1897).

²⁰ For an example of circumstances showing no intent to defraud subsequent creditors, see *Todd v. Nelson*, 109 N. Y. 316, 16 N. E. 360 (1888).

²¹ *Garner v. St. Banking Co.*, 150 Ga. 6, 102 S. E. 442 (1920); Annotation, 17 L. R. A. 728.

²² *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200 (1880).

²³ *Tanner v. Frink*, 103 Neb. 817, 174 N. W. 417 (1919).

²⁴ *Reade v. Livingston*, 3 Johns. Ch. 481 (1818). Changed in N. Y. by Section 265 of the Real Property Law, and Section 37 of the Personal Property Law. But see *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7 (1895).

²⁵ *Tobias v. Adams*, 201 Cal. 689, 258 Pac. 588 (1927); *Roberts, Johnson, and Rand v. Baker*, 224 Ky. 414, 6 S. W. (2d) 474 (1928).

²⁶ 90 Pa. 293 (1879).

²⁷ Hanna, *Cases on Creditor's Rights*, 130.

retains possession of the gift and secures credit on the strength of such possession either existing or subsequent creditors may set the gift aside.²⁸

Upon an inquiry at the instance of creditors into a transaction between husband and wife the general rule requiring the utmost good faith between parties in confidential relations will be applied. Thus a wife claiming under a transfer from her husband as against other creditors has the burden of showing the validity of the transaction.²⁹ Nor does the fact that she is in possession relieve her of this burden.³⁰ In *Dalley's Assigned Estate*³¹ the court said: "Fraudulent collusion between husband and wife is so easy of execution and so difficult of proof that it is the well-settled rule that a wife claiming as a creditor against other creditors of the husband must prove her claim by evidence clear and satisfactory to a degree beyond that required of other creditors, and leave no doubt of its good faith and its truth in fact."

Any phase of the law of debtor and creditor is naturally subject to the fluctuations of political fortune. Election contests are often but clashes between the opposing interests of debtor and creditor. Political ascendancy is reflected in the decisions of courts and prevailing public opinion influences the logic of judges. Conflicting decisions on this subject in the United States can also be explained by the economic status of the various states. The so-called "debtor" states, largely agrarian in population, favor the debtor; and the "creditor" states just as naturally favor the creditor. But, while these facts operate upon the development of the law, its present state as it pertains to fraudulent transfers from husband to wife is generally harmonious and fundamentally equitable. No court will countenance any actual fraud or unjust enrichment. All the rules mentioned previously have these considerations as their basis. These rules are sometimes difficult to enforce because men who consider themselves strictly honest are often able to convince themselves that certain transfers are not fraudulent although they actually are. The law cannot hope to control the consciences of men; it can only set standards.

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²⁸ *Karst v. Kane*, 136 N. Y. 316, 32 N. E. 1073 (1893). See also *Wilson v. Carpenter*, 17 Wis. 512 (1863), and *Goetz v. Newell*, 183 Wis. 559, 198 N. W. 368 (1924), which hold that the donor must part not only with the possession, but with dominion over the property.

²⁹ 27 C. J. *Fraudulent Conveyances*, p. 792, Note 61; contra: *State Bank of Winsted v. Strandberg*, 180 N. W. 1006 (Minn. 1921); *Crenshaw v. Halvorsen*, 183 Iowa 148, 165 N. W. 360 (1917).

³⁰ *Stevens v. Corson*, 30 Neb. 544, 46 N. W. 655 (1890).

³¹ 200 Pa. 140, 49 Atl. 755 (1901).

RECEIVERSHIPS IN MORTGAGES.—The practice of appointing a receiver in mortgage foreclosure proceedings originated at an early date in the English Court of Chancery and all the leading principles which first governed it were well settled in England long before the American Revolution. In recent years there has been a rapid development of the law of receiverships and, both by judicial decisions and statutory enactments, the scope of the practice has been broadened and extended so as to adapt equitable principles to the requirements of commercial advancement. The purpose in naming a receiver is not regarded as an end in itself, but only as a means to better secure a necessary and ultimate end.

A receiver is a person appointed by a court to take into his custody, control and management the property or funds of another pending judicial action concerning them. Apart from statutes, a receiver is a person appointed by the court to preserve the property in question only *pendente lite*.¹ He is supposed to be an indifferent person as between the parties to the cause, whose function or office it is to receive and preserve the property or fund in litigation *pendente lite*, when it is made apparent to the court that the rights of the parties concerned require such protection.²

A receiver may be appointed in, and *only in*, a pending cause,³ and a receiver will not be appointed where there is another safe, expedient, adequate, and less drastic remedy at law or in equity.⁴ Generally, the mortgage debt must be already due and there must be such default as to entitle the mortgagee to commence an action to foreclose the mortgage and the bill must be actually filed before a receiver can be appointed.⁵ A receiver may be appointed, however, before the entry of the deficiency decree.⁶ Despite the general requirements, in

¹ Meyers et al. v. Occidental Oil Company, 288 Fed. 997 (1923).

² Gaither v. Stockbridge, 67 Md. 222, 10 Atl. 309 (1887).

³ "Where notice in an action has been served, defendant has appeared and the parties are before the court, an action is pending so as to authorize the court to appoint a receiver, though defendant's appearance may have been special or the notice or service may have been defective. An erroneous order appointing a receiver is not cause of reversal, if followed by a second and proper order, and no harm is shown to have resulted." Hellebush v. Blake, 119 Ind. 349, 21 N. E. 976 (1889), Syl. § 2.

⁴ Jacob Schack v. Edward B. McKey, 97 Ill. App. 460 (1901).

⁵ "Where a mortgage to secure several notes contemporaneously executed provides that all the notes shall become due on default in the payment of any of them, on such default the mortgagee may proceed to foreclose for the notes due by their tenor, or may declare them all due, and foreclose for the entire debt pursuant to the terms of the mortgage, but he cannot have a receiver appointed to take charge of the mortgaged premises and collect rents pending the maturity of all the notes, and then have foreclosure." Phillips v. Taylor, 96 Ala. 426, 11 So. 323 (1892), Syl. § 1.

⁶ Helen J. Bolton v. Starr, 223 Ill. App. 39 (1921).

cases where waste, destruction or inextricable confusion may result without prompt action of the court, the court will make the appointment at any stage of the suit the facts require it.⁷ Sometimes a receiver may be appointed before defendant is affected with notice of the pendency of the suit, upon a proper case of urgent necessity made in the original or a distinct petition and supported by evidential facts.⁸ A further and more distinct explanation shows that a receiver may be properly appointed without notice, and before giving the adverse party an opportunity to be heard, in, and only in, an extreme and exceptional case, in which there is a great emergency and an imperious and most stringent necessity for an immediate appointment, as where the adverse party is out of the jurisdiction of the court and cannot be found and served with notice.⁹ According to some authorities, even where there is an emergency, a temporary receiver should be appointed only until a day fixed for a hearing on the trial to show cause.¹⁰

The grounds upon which a receiver may be appointed are intrinsically composed of any unreasonable misuse of the property which would necessitate protection for the mortgagee against total loss of his investment. While the remedy of receivership will not be granted except upon equitable grounds and for substantial reason, where it appears to the court that the equitable rights of the parties can be fully protected by the appointment of a receiver and considerable loss or damage may otherwise be occasioned to the mortgagee, a receivership is justifiable.¹¹ The right of the complainant as mortgagee to the appointment of a receiver pending a suit for foreclosure rests upon the general principle that the appointment is necessary for the preservation of the property and its appropriation to pay their mortgage debt.¹² Chief among the grounds for appointing a receiver, are,

⁷ *Columbia Finance Co. v. Morgan et al.*, 45 S. W. 65 (Ky. App. 1898).

⁸ "There is no lack of power to appoint a receiver in a law action; and that, too, before the defendant is affected with notice of the pendency of the suit, upon a proper case made in the original or a distinct petition, and supported by evidential facts." *Jones v. Graves*, 20 Ia. 596 (1866), Syl. § 2.

⁹ *Edward H. Cooper v. El Louise Schoeberlein*, 247 Ill. App. 170 (1928).

¹⁰ *St. Louis Ry. Co. v. Weir*, 135 Mo. 230, 36 S. W. 357 (1896).

¹¹ *Broad, etc., Nat. Bank v. Larsen*, 88 N. J. Eq. 245, 102 Atl. 265 (1917); *Meyer v. Thomas*, 30 So. 89 (Ala. 1901).

¹² "An appeal will lie to the supreme court from a decree rendered by the chancellor on appeal to him revoking and annulling the order of the register by appointing a receiver without notice. The right of a mortgagee to the appointment of a receiver pending a suit for the foreclosure under his mortgage rests upon the general principle that the appointment is necessary for the preservation of the mortgaged property and its appropriation to the payment of the mortgage debt. The appointment of a receiver is a matter of sound judicial discretion when there is a reasonable probability that the person asking therefor will ultimately succeed in obtaining the general relief sought for by his suit; and, being based upon the fact that there is no other adequate remedy or means of accomplishing the desired

we find: (1) Abandonment of the property; (2) Disposition of or interference with the property; (3) Inadequacy of security and insolvency of the debtor; (4) Danger of waste or injury; (5) Pledge of rents and profits; (6) Provisions for receivership in mortgage; (7) Failure to pay taxes or insure; (8) Lack of right or capacity to care for property; and (9) Fraud.

Abandonment may be sufficient ground to require the appointment of a receiver for its protection and care.¹³

Disposition or interference with the property, under proper circumstances, will allow equity to make such restraining orders as may be necessary to prevent such acts, and to accomplish such purpose it may appoint a receiver. Also, equity may compel the surrender of the possession of mortgaged property, pending the litigation, to prevent its being carried out of the jurisdiction or being converted.¹⁴

Inadequacy of security and insolvency of the debtor may justify the receivership especially where other equitable grounds exist.¹⁵ In one case it was held so where the rents had been appropriated by the mortgagor to his own use and he had not paid taxes or overdue interest, so as to depreciate the security. Whether the inadequacy of the security has been caused by the wrongful act of the mortgagor or not is immaterial.¹⁶

Some cases have held that it is sufficient to show that the mortgaged property is *probably* insufficient to satisfy the mortgage debt or of *doubtful or uncertain sufficiency*.¹⁷ Each case must rest upon its own facts, and the question is whether it appears to the court that the equitable rights of the parties can be protected only by such appointment.¹⁸ Mere possibility of future insufficiency however has been held insufficient grounds for appointment,¹⁹ although it may be justified without showing the actual insolvency of the mortgage debtor,

objects of the judicial proceedings, must be exercised in view of the circumstances of the particular case, for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and the subject matter." *Meyer v. Thomas, op. cit. supra* note 11, Syl., p. 265, § 2.

¹³ *Collins v. Gross*, 51 Wash. 516, 99 Pac. 573 (1909).

¹⁴ *Meridian Oil Co. v. Randolph*, 26 Okla. 634, 110 Pac. 722 (1910).

¹⁵ *Donnelly v. Butts*, 137 Minn. 1, 162 N. W. 674 (1917).

¹⁶ *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80 (1907).

¹⁷ *Philadelphia Mortgage & Trust Co. v. Oyler*, 61 Neb. 702, 85 N. W. 899 (1901).

¹⁸ *Broad & Market Nat'l. Bank v. Larson*, 88 N. J. Eq. 245, 102 Atl. 265 (1917).

¹⁹ "A receiver will not be appointed on foreclosure when the debtor is insolvent merely because the property at some future time may become insufficient to pay the mortgage debt. Ordinarily a receiver will not be appointed in a foreclosure suit when the mortgaged property is the homestead of the mortgagor." *Laune v. Hauser*, 58 Neb. 663, 79 N. W. 555 (1899), Syl. § 1.

the inadequacy of the security being sufficient to justify it.²⁰ It has been held that, where the security is inadequate and the mortgage debtor is insolvent, a receiver may be appointed although there is an indorser or grantor of the debt who is solvent or responsible.²¹

Danger of waste or injury may be sufficient grounds for the appointment of a receiver where it is shown that the property, if allowed to remain in the possession of the mortgagor, is in imminent danger of being wasted, depreciated, or materially injured.²² But an act of waste does not always justify the appointment of a receiver; it is necessary to show that the injury will so depreciate the value of the property that it will not thereafter afford adequate security.²³ It has been held that the fact that the property has decreased in commercial value is no cause for the appointment of a receiver, where this is incident to a general depreciation of farming property, nor that the mortgagor has failed to pay the interest, when this is due to a failure of the crops.²⁴

It has also been held that mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, although attended with the decay and dilapidation inseparable from disuse is not such destruction or waste as to entitle the mortgagee to a receiver pending foreclosure.²⁵ However, the mortgagee cannot have a receiver where he himself has taken possession of the property and is running it and receiving the rents and income.²⁶ It is not the policy of courts of equity to take charge of real estate and manage and control it through the aid of a receiver as against the party in possession asserting title in himself, unless it is shown to be in imminent danger of great waste or irreparable injury. In realty, the substance of the litigation is not capable of destruction or removal, and hence the necessity for a receiver can seldom be so urgent as in other cases.²⁷

When rents and profits are pledged for the payment of a debt, together with the land itself they constitute a fund primarily liable

²⁰ *Schultz v. Stiner*, 97 Kan. 555, 155 Pac. 1073 (1916).

²¹ "In an action to foreclose a real estate mortgage, where the property pledged is insufficient to pay the debt, and the party primarily liable therefor is insolvent, the trial court is authorized, on an application by the mortgagee, to appoint a receiver for the mortgaged property; and in such case it is immaterial that a person who is solvent is liable for the debt, as indorser or guarantor." *Buck v. Stuben*, 63 Neb. 273, 88 N. W. 483 (1901), Syl. § 1.

²² "A receiver may be appointed if the facts justify it, at any time while a suit is pending, and after appeal to the supreme court from a final judgment the suit is still pending, so that the lower court may, on application, make such appointment." *Brinkman et al. v. Ritzinger*, 82 Ind. 358 (1882), Syl. § 1.

²³ *Justus v. Fagerstrom*, 141 Minn. 323, 170 N. W. 201 (1918).

²⁴ *Horner v. Dey*, 61 N. J. Eq. 554, 49 Atl. 154 (1901).

²⁵ *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90 (1889).

²⁶ *Sleeper and others v. J. H. Iselin & Co.*, 59 Ia. 379, 13 N. W. 341 (1882).

²⁷ *Kelley v. Steel*, 9 Ida. 141, 72 Pac. 887 (1903).

for the debt, and in this case a receiver may be appointed, on the application of the mortgagee without showing that the land is inadequate as security and without question of the mortgagor's solvency.²⁸ But still, even here, the appointment of a receiver is not a matter of course and the court may exercise its discretion as in other cases and refuse the appointment if there appears to be no reason for granting it, as where it appears that the premises are adequate security for the mortgage debt or where it affirmatively appears that the rents and profits were not pledged.²⁹ A court of equity has power to appoint a receiver and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits on the property, but such action may not be taken unless there are proper grounds therefor. However, under the theory that a mortgagee has no lien on the rents of, and profits from, the mortgaged premises where such rents and profits are not pledged by the mortgage, it has been held that the inadequacy of the security or the insolvency of the mortgage debtor, or both are not *per se* grounds for the appointment of a receiver to collect the rents and profits, especially where such rents and profits have already been assigned by the mortgagor.³⁰

Provisions for receivership in the mortgage, such as a stipulation that the mortgagee shall be entitled to have a receiver appointed upon default and the commencement of foreclosure proceedings, shall be ample justification for such appointment, if not as a matter of course, still upon any showing of equitable grounds therefor, or if no good reason against the appointment is shown.³¹ If the statute law so restricts the power of appointments that such appointment would not be proper in the particular case, jurisdiction to make the appointment cannot be conferred by stipulation in the mortgage.³² If the stipulation is valid, it is binding on a purchaser of the premises, and is not revoked by the death of the mortgagor. Also, if the stipulation is otherwise

²⁸ Ball v. Marske, 202 Ill. 31, 66 N. E. 845 (1903).

²⁹ Winans v. Smith, 199 Ia. 715, 202 N. W. 745 (1925).

³⁰ Best v. Schermier, 6 N. J. Eq. 154 (1847).

³¹ "The action of the court in appointing a receiver on the application of the grantee in a deed of trust, pending foreclosure, where the deed pledges the rents and profits, and authorizes the appointment of a receiver in case of default, and where the grantor failed to observe his agreement to keep the building, in which the property chiefly consisted, insured, and suffered interest due and unpaid to accumulate, is not erroneous, especially where the grantor is permitted to retain possession of the homestead and other parts of the premises to be rented for his support.

"A receiver appointed pending an action of foreclosure of a deed of trust containing a stipulation for the appointment of a receiver 'during the pendency of the suit' is properly permitted to continue in possession after the decree of foreclosure, and before the sale of the premises." Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76, 64 N. E. 1085 (1902), Syl. §§ 1, 2.

³² Couper v. Shirley, 75 Fed. 168 (1896).

valid, it is enforceable regardless of the insolvency of the mortgagor.³³ A receivership clause in a mortgage does not *prima facie*, or as a matter of right, entitle the mortgagee to the appointment of a receiver, the question still remaining within the discretion of the court.³⁴ It will not appoint him where reasonable ground therefor is not shown and the appointment should not be made where there is no danger of ultimate loss of the property or waste thereof or where the property appears to furnish ample security.³⁵

Failure to pay taxes or insure may or may not warrant the appointment of a receiver, depending upon whether such fact destroys or impairs the value of the security.³⁶ It has been held that the delinquency in the payment of taxes is no ground for the appointment of a receiver where the mortgagor is not shown to be insolvent.³⁷ On the ground that the mortgagee may both insure and pay taxes due upon the property, it has been held that the failure of the mortgagor to insure the property or his failure both to insure the property and pay the taxes does not alone justify the appointment of a receiver.³⁸ Where a party in possession of a mortgaged property is not required to insure same for benefit of the mortgagee, a receivership is not justifiable.³⁹

Lack of right or capacity to care for the property may furnish grounds for appointing a receiver when there is no person having a

³³ *Stevens v. Pearson*, 202 Ill. App. 22 (1916).

³⁴ "Ordinarily, before a receiver will be appointed *pendente lite* on the application of a mortgagee, he must show that the mortgaged premises are insufficient to secure his debt and that the mortgagor, or maker of the note, is insolvent.

"The beneficial title to mortgaged property is in the mortgagor, and provisions therein for the sequestration of the rents and profits of the mortgaged premises are not of controlling force." *Aetna Life Ins. Co. v. Broeker et al.*, 166 Ind. 576, 77 N. E. 1092 (1906), Syl. §§ 1, 2.

³⁵ *Gilbert v. Berry*, 190 Ia. 351, 180 N. W. 197 (1920).

³⁶ "The appointment of a receiver in a bill to foreclose a second mortgage was fully justified where taxes remained unpaid beyond the time covenanted for their payment, and there were several unpaid special assessments and one special assessment had been forfeited for nonpayment, and where the charges as to such default contained in complainant's affidavit were not denied in defendant's affidavit, but only in the answer which was not under oath." *Sarah Althausen v. Sarah Kohn*, 222 Ill. App. 324 (1921), Syl. § 1.

³⁷ *Lick v. Stroh*, 134 Wash. 490, 236 Pac. 88 (1925).

³⁸ "Since a mortgagee in a mortgage stipulating that the mortgagor shall keep the property insured for the benefit of the mortgagee, and pay taxes, or, in a mortgage silent on the subject, may insure the property and pay the taxes and charge the cost thereof as a part of the original claim, the failure of the mortgagor to insure the property and pay the taxes does not alone justify the appointment of a receiver." *Ferguson v. Dickinson*, 138 S. W. 221 (Tex. Civ. App. 1911), Syl. § 2. For other cases, see: *Mortgages*, Cent. Dig., §§ 243, 1374, 1375; Dec. Dig., §§ 124, 468.

³⁹ *Ferguson v. Dickinson*, *op. cit. supra* note 38.