YALE
LAW JOURNAL

Vol. XXIX MARCH, 1920 No. 5

CONTINGENT AND IMMATURE CLAIMS IN RECEIVERSHIP PROCEEDINGS

RALPH E. CLARK
Cincinnati Bar

Frequently, if a corporation becomes insolvent, a receiver is appointed under the ordinary usages and rules of equity for the purpose of distributing the assets of the corporation to its creditors. When a court of equity thus takes into its possession property of an insolvent corporation, the court thereby deprives creditors of their ordinary legal remedies of levy, execution, etc. In lieu thereof the court invites them to file their claims and share equitably in the assets which it offers to distribute. It would not be equitable for the court to hand over all the assets to the parties to the suit, neglecting other creditors who may have equally valid claims. The court, therefore, orders the receiver to advertise for claimants to file their claims with the receiver or with a master specially appointed for the purpose. By presenting his claim for allowance a claimant submits to certain equitable rules and procedure; he may waive certain remedies, but the receivership does not cancel his substantive rights.[1] The action of the court in thus ordering claims to be filed does not alter the substantive status of claims. A claimant is under no obligation to file his claim, nor is his substantive right outlawed by non-filing. Failure to file is not like the bar of the statute of limitations. The theory upon which relief is given under a suit brought by one creditor, either specifically or

[1] "While insolvency may under certain conditions affect remedies through equitable rules and procedure, it does not change substantive rights or liabilities." Collin, J., in *People v. Metropolitan Surety Co.* (1914) 211 N. Y. 107, 115, 105 N. E. 99.

impliedly on behalf of all, for the administration of the assets of an insolvent corporation, is that such assets form a trust fund of which the creditors are the *cestuis que trustent.* In order to administer this trust a receiver is appointed to preserve and collect the property pending the ascertainment of the rights of creditors as to priority and amount, and then to distribute this property as the court shall order.[2]

It often happens that there are presented for allowance and payment by the receiver claims which are contingent or immature. A contingent claim is one which is not absolutely owing at the time insolvency occurs and the receiver is appointed, but may ripen into an absolute claim later on;[3] an immature claim is one which may be an absolute debt at the time of insolvency and the appointment of the receiver, but may not then be due and payable.[4] In both contingent and immature claims—as indeed in the case of claims absolutely owing and due—the amount may not be liquidated even when they have become due and payable; but this of itself should not prevent allowance.[5]

In discussing the question of the proof of contingent and immature claims we must at the outset distinguish between the substantive rights of claimants against the insolvent corporation, and the legal or equitable remedial rights of claimants to share in the assets which the court has in its possession. The appointment of a receiver is not a proceeding *in rem* but a proceeding *in personam.*[6] In a proceeding between A and B the court will not and cannot directly deprive C of

---

[2] See 1 Clark, *The Law of Receivers* (1918) sec. 479.

[3] A simple example of a contingent claim is that of the holder of a fire insurance policy before a fire has occurred. The measure of value of such a policy at a given date is the amount of unearned premiums, i. e., the cost of obtaining new insurance for the unexpired term of the policy. *In re Albert Life Assurance Co.* (1870) L. R. 9 Eq. 706, 716. If the fire occurs after insolvency and the appointment of a receiver of the insurance company, then as between insurer and insured the face value of the claim is the fire loss covered by the policy. A similar principle applies to life insurance policies. *Lovell v. St. Louis Mutual Life Ins. Co.* (1883) 111 U. S. 264, 274, 4 Sup. Ct. 390. What the face value of such a claim should be as between the insured and other creditors, presents questions which will be discussed below.

[4] A simple example of an immature claim is a promissory note before maturity. The measure of value of this obligation at the time of insolvency and the appointment of a receiver for the corporate maker, is the face value of the note discounted as of the date when the court takes custody of the assets of the corporation. The face value of this note at maturity is the amount agreed to be paid, but the insolvent has been deprived of the use of the money since insolvency and receivership, and therefore the remedial law says that the claimant shall not receive interest after receivership, or that he shall deduct interest, if it has been paid in advance, for the period subsequent to the appointment of the receiver. *Thomas v. Western Car Co.* (1892) 149 U. S. 95, 117, 13 Sup. Ct. 824; *Bank Commissioners v. New Hampshire Trust Co.* (1899) 69 N. H. 621, 623, 44 Atl. 130.

[5] See UNLIQUIDATED CLAIMS, *infra.* [6] 1 Clark, *op. cit.*, sec. 29.

a substantive right. If C has a contract with B, and A brings a suit against B and has a receiver appointed over B's property, this appointment will not cancel B's contract with C. The appointment of a receiver is not to deprive any person of his rights, but to preserve rights. However, the appointment of a receiver over B's property may affect C's remedies against B and against B's property.

There are many cases[7] wherein the insolvency of the corporation and the appointment of a receiver for its assets, is held to be an anticipatory breach by the corporation of its executory contracts, whether the appointment be voluntary or involuntary on the part of the corporation. This is because the appointment of a receiver takes the business and active management of the corporation out of the hands of the directors and prevents the company from carrying out its executory contracts. The receiver has the option, subject to the orders of the court, to perform or not to perform such contracts. If he does perform, the other party to the contract cannot claim that his contract has been breached. If the receiver does not perform, then there is a breach.[8] Even though the contract is immature or contingent at the time of the appointment, nevertheless, if the corporation has placed itself, or is placed by the court, in a position whereby it cannot respond to the obligations of its contracts when the contingency occurs or the claim matures, then there is an anticipatory breach on the part of the corporation.[9]

Since there has been a repudiation or anticipatory breach of the con-

---

[7] *Wood v. Dumler* (1824, C. C. 1st) 3 Mason, 308; *Isaac McLean Sons Co. v. William S. Butler & Co., Inc.* (1914, D. Mass.) 227 Fed. 325; *Chemical National Bank v. Hartford Deposit Co.* (1895) 161 U. S. 1, 7, 16 Sup. Ct. 439; *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912, C. C. A. 2d) 198 Fed. 721; *Wm. Filene's Sons Co. v. Weed* (1918) 245 U. S. 597, 38 Sup. Ct. 211; *Ogdens, Limited, v. Nelson* [1905] A. C. 109, 112; *Spader v. Mural Decoration Mfg. Co.* (1890) 47 N. J. Eq. 18, 20 Atl. 378; *contra, People v. Globe Mutual Life Ins. Co.* (1883) 91 N. Y. 174; *Lenoir v. Linville Improvement Co.* (1900) 126 N. C. 922, 36 S. E. 185; *Law v. Waldron, Appellant* (1911) 230 Pa. 458, 79 Atl. 647.

[8] *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912, C. C. A. 2d) 198 Fed. 721, 744; *In re Mullings Clothing Co.* (1916, C. C. A. 2d) 238 Fed. 58, 63; *contra, Wells v. Hartford Manilla Co.* (1903) 76 Conn. 27, 55 Atl. 599. See matter further discussed under IMMATURE CLAIMS AND SERVICE CONTRACTS, *infra*.

[9] The appointment of a receiver of an insolvent company deprives the company and its officers of the power to provide for any future losses; therefore the appointment of a receiver in such a case is a breach of a contract of insurance and similar contracts. But since the officers of a mutual company may no longer have the power to levy assessments and collect money to pay future losses, there may not be any fund to pay such losses, and therefore proof of a future loss against a mutual company is not allowed. *Commonwealth v. Mass. Ins. Co.* (1873) 112 Mass. 116; *Commonwealth v. Mass. Ins. Co.* (1875) 119 Mass. 45; *Burdon v. Mass. Safety Fund* (1888) 147 Mass. 360, 17 N. E. 874; *Fogg v. Order of Golden Lion* (1893) 159 Mass. 8, 33 N. E. 692; *Matter of Equitable Reserve Fund Life Ins. Co.* (1892) 131 N. Y. 354, 30

tract, and since the other contracting party has not lost any of his substantive rights by the appointment of a receiver, then he may as in ordinary cases of anticipatory breach, present his claim at once for damages for breach, or wait until the contract matures or the contingency happens and then present his claim. There can be little or no doubt that such a claimant at the time the contingency happens, though subsequent to the appointment of a receiver, has a substantive claim against the insolvent corporation. In other words, as between the contracting parties the claim is undoubtedly good. The difficulty arises not between the contracting parties, but when the contracting party with a claim which was perfected or matured after the appointment of a receiver wishes to share in the property which is claimed to be subject to distribution only to those whose claims were matured or perfected, or the status of whose claims was fixed, at the time of appointment.

CONTINGENT CLAIMS

A court of equity is bound to see that the creditors whom it restrains from pursuing their legal remedies are not deprived of the means of having the assets of the defendant applied to the payment

---

N. E. 114; *People ex rel. Attorney General v. Life and Reserve Association of Buffalo* (1896) 150 N. Y. 94, 45 N. E. 8.

In the case of a mutual insurance company the policy holders are in a sense partners, and they must stand by and see outside creditors paid before their claims have any standing. *Mayer v. Attorney General* (1880) 32 N. J. Eq. 815. In a case of a non-mutual insurance company, policy holders are outside creditors, however, and do not lose their substantive rights against the corporation merely because the company has become insolvent and a private citizen has brought suit for a receiver, or the state has brought suit for dissolution. *Kellock's Case* (1868) L. R. 3 Ch. 769, 779; *In re Albert Life Ass. Co.* (1870) L. R. 9 Eq. 706, 720; *In re Northern Counties of Eng. Fire Ins. Co.* (1880) 17 Ch. D. 337, 341. This decision was good in 1915, but insurance statute of 1909 governed. See *In re United London & Scottish Ins. Co.* [1915] 1 Ch. 578. *Chicago Life Ins. Co. v. Needles* (1884) 113 U. S. 574, 584, 5 Sup. Ct. 681; *New York Security & Trust Co. v. Lombard Investment Co.* (1896, W. D. Mo.) 73 Fed. 537; *Hoyle v. Scudder* (1888) 32 Mo. App. 372; *People v. Security Life Ins. & A. Co.* (1879) 78 N. Y. 114, overruled in *People v. Commercial Alliance Ins. Co.* (1897) 154 N. Y. 95, 47 N. E. 968; *Insurance Commissioners v. People's Fire Ins. Co.* (1894) 68 N. H. 51, 44 Atl. 82; *In re Schloss v. Surety Co.* (1910) 149 Iowa, 382, 128 N. W. 384. See *People v. Metropolitan Surety Co.* (1914) 211 N. Y. 107, 115, 105 N. E. 99. *Contra, Dean & Sons Appeal* (1881) 98 Pa. 103; *People v. Metropolitan Surety Co.* (1912) 205 N. Y. 135, 98 N. E. 412; *Casualty Ins. Company's Case* (1895) 82 Md. 535, 34 Atl. 778. There is not a cancellation of the contract with a non-mutual company, because it takes an agreement of both parties to cancel the contract, unless the contract itself specifically provides for another mode of cancellation. *Chicago Life Ins. Co. v. Needles, supra,* 584. If the policy does provide for cancellation by the company, the receiver may exercise this right and when so notified the policy holder may take out new insurance and so guard the receivership against contingent claims.

of their debts.[10] The remedy of levy and execution, etc., which the court takes away from a creditor whose claim is absolute and fixed at the time of the appointment of the receiver, is also taken away from a creditor who has a contingent claim which after appointment of the receiver and before distribution ripens into an absolute or perfected claim. If the same legal remedy or an equal legal remedy is taken away from both sets of creditors, why should not both sets of creditors be treated the same when the court of equity substitutes its distribution for the method of realization by levy, etc., to which each set of creditors would otherwise be entitled?

It may be said that the creditors whose rights were perfected and absolute at the time of the appointment of the receiver were entitled to bring an action at law at that time and to obtain judgment, levy and execution, and that if they had been allowed to pursue these remedies they would have exhausted the insolvent's property so that any subsequent contingent creditors would not find property on which to levy. The answer is, that if such creditors had so far perfected their legal remedies at the time of the appointment of the receiver as to have acquired a lien or charge on the property, then they, in the equitable distribution, would retain a preference; if, however, they had not secured a judgment or other lien or charge, then they have no legal standing superior to a creditor whose claim ripens or is perfected after appointment and before distribution, unless filing the suit or obtaining the appointment of the receiver gives the plaintiff in such case a lien or charge on the insolvent's property. But the mere filing of such a suit and the appointment of the receiver does not give such a plaintiff a lien or charge on the assets.[11] If the plaintiff in such a case has no lien or charge on the assets, much less has an ordinary unsecured creditor who responds to the court's invitation and files his claim.

One of the points urged against allowing proof of claims which ripen subsequent to the appointment of the receiver and before distribution of assets, is that "the distribution of the assets was an immediate duty on the part of the receiver; its delay is due merely to the fact that time is necessary to realize them."[12] A similar objection is sometimes raised, as follows: "Does the fact that the distribution was necessarily delayed, change the rights of the parties and introduce a new class of creditors who were not creditors at the time

---

[10] *Harrison v. Kirk* [1904] A. C. 1, 5; *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912, C. C. A. 2d) 198 Fed. 721, 740; *Wm. Filene's Sons Co. v. Weed, supra; Isaac McLean Sons Co. v. William S. Butler & Co.* (1914, D. Mass.) 227 Fed. 325, 328.

[11] *In re Albert Life Ass. Co.* (1870) L. R. 9 Eq. 706, 720. *Pennsylvania Steel Co. v. New York City Ry., supra;* 1 Clark, *op. cit.*, sec. 446.

[12] *Dean & Sons Appeal, supra,* 104; see *People v. Commercial Alliance Ins. Co.* (1897) 154 N. Y. 95, 100, 47 N. E. 968.

of the dissolution?"[13] The answer to this argument is that if distribution of all the assets had been made immediately the contingent claimant would have been deprived only of his remedy—just as a creditor whose claim was absolutely owing but who had failed to present it for allowance until after distribution of all the assets would be deprived of his remedy. But if in fact distribution were not made immediately; then when it is made the contingent creditor whose right has meantime become perfected, has a right from the substantive viewpoint equal with that of any unsecured creditor which claim was due when the receiver was appointed. What principle of justice requires him to be excluded from the distribution, provided he holds a claim based on an obligation entered into or an act of the insolvent before the receivership? The only question which presents itself is, whether a court of equity in such a case shall, when distribution is made, give equal remedies to those who have at that time equal substantive rights.

It has been contended that since interest on claims is not allowed subsequent to the appointment of a receiver, therefore, for the same reason contingent claims ripening subsequent to that date should not be allowed. The Connecticut Supreme Court of Errors has said:

"No debt can arise against an insolvent estate in the hands of a receiver. From this principle comes the general rule that only claims as then existing can be recognized as obligations of the estate. For this reason interest cannot be allowed on claims after insolvency has been judicially declared."[14]

The contention that the rule governing contingent claims is based on the rule governing the payment of interest on claims, is not sound, because both rules, however they may be stated, must rise or fall on their own merits and are based or should be based on an effort of the court of equity to distribute the assets of the insolvent ratably and equitably to the creditors, as their substantive rights shall appear. In regard to debts arising against an insolvent estate in the hands of a receiver, it may be said that it would be a vain thing for a court to take possession of the property of an insolvent and hold it to answer to the claims of the plaintiff and of all persons to whom the insolvent had, by contract or otherwise, made himself or his property liable, if subsequent to the time when the court takes possession of the property the insolvent himself could alienate the property or burden it with new and future liabilities created by his acts or contracts entered into, subsequent to the time of the appointment of a receiver. Furthermore, an insolvent corporation cannot incur new debts after the court takes custody of its property, because the active business is taken out of the hands of the directors;[15] and no liens or

[13] *Dean & Sons Appeal, supra,* 105.

[14] *Lippitt v. Thames Loan & Trust Co.* (1914) 88 Conn. 185, 206, 90 Atl. 369.

[15] *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912, C. C. A. 2d) 198 Fed. 721, 740.

executions can be levied against the insolvent's property subsequent to the appointment of a receiver, because the property is in *custodia legis*. A claim for interest accruing subsequent to the appointment of a receiver, and a contingent claim ripening subsequent to the appointment of a receiver, are not debts arising or coming into existence or originating against the estate in the hands of a receiver. Such debts arose or originated previous to the appointment of a receiver, and were created by the insolvent himself before the receivership, although the amount owing on such obligations may be a different sum at a time subsequent to the appointment of the receiver, than it was previous to or at the time of the appointment. Claims for interest, and contingent claims which ripen subsequent to the appointment of a receiver, cannot be annulled by a court of equity, but such court is bound to recognize them as valid claims against the estate of the insolvent. The court, however, cannot pay all creditors in full, even without interest, which may have accrued subsequent to the time of appointment; so all claims which would otherwise bear interest subsequent to the time of the appointment are by this so-called rule of interest denied interest after that date. When the court refuses to allow the payment of interest which has accrued subsequent to the appointment of a receiver, this is not of itself a denial of the substantive right of the claimant to interest. A reason for this rule of interest is briefly stated in *Thomas v. Western Car Company*[16] as follows: "The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." A further equitable reason is frequently given: Interest is allowed as compensation for the use of another's money. When the insolvent's property has been placed in the hands of a receiver, the insolvent no longer has the use of this money for which normally he would be required to pay interest. If a claimant presents a claim fixed as to amount at the time of the appointment of a receiver, but not due until subsequent to such appointment, unearned interest will be deducted from this claim. In other words, if the relation of debtor and creditor exists at the time of appointment, although the claim is not yet due and payable, nevertheless the insolvent has had the use of the claimant's property and must pay interest to that time; subsequent to that time the insolvent has been deprived of the use of the property by the court, and therefore interest will not be allowed or will be deducted. In the case of a contingent claim becoming due subsequent to the time of the appointment, interest does not play the same part in measuring the value of the claim because this claim might never become due, and therefore the relation of debtor and creditor did not exist in an absolute perfected sense until the contingency took place. In other words, in the case of a contingent claim, the insolvent, not absolutely owing the claimant money at the time of appointment, cannot be held to be using the claimant's money

[16] (1893) 149 U. S. 95, 117, 13 Sup. Ct. 824.

up to that time. After the claim is perfected by the contingency happening, the relation of debtor and creditor between claimant and insolvent has been perfected; but since the insolvent has not thereafter the use of this money which is in the court's possession, no interest will be allowed on the claim.

Another point urged by those who wish to make distribution on the basis of such claims only as were absolute and perfected at the time of appointment is that this method of distribution is the most convenient. It is frequently true that much has to be done by a receiver which is not convenient in order to follow the usages and rules of equity and to do equity. It is further stated by some of the advocates of the rule just mentioned, that to fix any other date will allow the receivership to be prolonged indefinitely. The answer to this objection is that it is necessary to have the receiver collect some money before he can make a distribution, and it is necessary for claims to be presented. The court must, therefore, fix a time subsequent to the time of the appointment of the receiver for the allowance of claims and the distribution of the assets. This time should be a reasonable time according to the exigencies of the situation. If it is possible and equitable to collect and distribute all the money within a few weeks or months after the appointment, any claim which becomes perfected or accrues afterwards will not of course disturb past dividends, and it cannot participate in any further dividends if all the property has already been distributed.

Some recent New York Court of Appeals cases[17] have discussed at length the matter of proof of contingent and immature claims. That the New York courts have encountered great difficulty in passing upon such claims is evidenced by dissenting opinions in several of the cases. The court has started out with the premise that claims which are contingent at the time of the appointment of the receiver cannot share in the assets of the insolvent corporation, thus following the decision of *People v. Commercial Alliance Life Insurance Company,*[18] which overruled what is believed to be the true rule governing proof of contingent claims as laid down by *People v. Security Life Insurance Company.*[19] After the New York courts have once refused to allow any contingent claims to be proved, it seems to us natural that they should encounter many difficulties in endeavoring to do justice to all claims upon distribution of the assets of an insolvent corporation.[20]

---

[17] *People v. Metropolitan Surety Co.* (1912) 205 N. Y. 135, 98 N. E. 412; *People v. Metropolitan Surety Co.* (1914) 211 N. Y. 107, 105 N. E. 99; *In the Matter of Empire State Surety Co.* (1915) 214 N. Y. 553, 108 N. E. 825; *In the Matter of Empire State Surety Co.* (1915) 216 N. Y. 273, 110 N. E. 610.

[18] (1897) 154 N. Y. 95, 47 N. E. 968. [19] (1879) 78 N. Y. 114, 128.

[20] *In the Matter of Empire State Surety Co.* (1915) 214 N. Y. 553, the court allowed services rendered subsequent to date of liquidation to be proved, thus getting a little away from the strict interpretation of the New York rule as

IMMATURE CLAIMS AND SERVICE CONTRACTS

Discussing more at length the matter of immature claims, we will pass over the promissory note case[21] because it presents so few difficulties. A more complicated immature claim, or claim in the nature of an immature claim, is that of a service contract. If the insolvent corporation agreed to perform service and the contract is still executory, the receiver may at his election under certain circumstances perform the service and so prevent a breach of contract. However, a court cannot superintend the performance of services, and therefore will not allow specific performance in such cases against the insolvent before receivership or against its receiver after receivership.[22] A more common case, however, arises when an insolvent corporation has agreed to accept services and pay for the same and such contract is executory at the time of the appointment of the receiver.[23] The receiver in such a case may accept certain services, pay for the same under court orders, and relieve the company from damages for breach of contract, either in whole or in part. If the receiver does not accept the services, then there is a breach of the contract.[24] Whether or not there has been substantial damages, and what these are, are further questions.

When a corporation has entered into a service contract to accept services for a definite time and to pay a definite sum, such a contract has many points of similarity with a promissory note for a certain sum at a certain time. In other words, this is a definite claim, immature at the time of appointment of the receiver—a total definite sum has been agreed to be paid but is not yet due. Consideration must be given in such cases, however, to the readiness and willingness of the party to perform, and deductions must be made depending on the possibility of the party securing other employment,[25] and further deduction must be made as in the case of promissory notes in discounting or measuring the value of such claims at the time of appointment of the receiver, not at the time when due and payable.

The appointment of a receiver to take over the assets of an insolvent individual, may or may not prevent such insolvent from accepting service and paying for the same. The insolvent individual may, after appointment of the receiver, earn or receive sufficient money to pay for services subsequently rendered, in which case there may be no breach of such contract or service. However, the appointment of a receiver

---

laid down in *People v. Commonwealth Alliance Life Ins. Co.* (1897) 154 N. Y. 95, 47 N. E. 968.

[21] See note 4, *supra.*

[22] *Express Co. v. Railroad* (1878) 99 U. S. 191, 25 L. ed. 319.

[23] *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912, C. C. A. 2d) 198 Fed. 721.

[24] *Isaac McLean Sons Co. v. William S. Butler, Inc., supra,* 328.

[25] *Yelland's Case* (1867) L. R. 4 Eq. 350.

of a partnership nearly always follows, or occurs at the same time as, a dissolution of the partnership; and the appointment of a receiver of an insolvent corporation although not cutting short its corporate life[26] nevertheless incapacitates it from doing further business.[27]

A number of English cases can be found discussing the status of a service contract when a company is wound up and its assets distributed.[28] In the leading case,[29] a party agreed to perform service for an insurance company at a stated salary *per annum* for a stated period. The company went into the hands of a receiver before the period had expired. The court held that the result of the appointment of the receiver was to dismiss the employee, and he was entitled to recover damages for such breach of the executory contract. A long line of English cases hold squarely that the winding up of a company is a dismissal of a servant, and that such servant is entitled to recover damages for such dismissal.[30]

The law in the United States federal courts, as expressed by Judge Story, seems to be clear.[31] However, there is a very important New York case, *People v. Globe Mutual Life Insurance Company*,[32] which flatly holds that the insolvency of a corporation and an injunction by the sovereign state against the company from doing business is a legal termination of the business which could have been reasonably in the minds of the contracting parties as a possible intervention of some *vis major*, and can not be relied upon as a breach of the contract.[33]

---

[26] The question whether or not actual dissolution of a partnership or corporation by the sovereignty releases such partnership or corporation from executory contracts was discussed by the early commentators. See 1 Blackstone, *Commentaries* (1765) 484; 2 Kyd, *Corporations* (1793) 516; Grant, *Corporations* (1850) 303. A late English case, *In re Higginson & Dean* (1899) 1 Q. B. 325, refuses to follow Blackstone except on the assumption that no more was meant by him than that after the dissolution the individuals who were members or officers of the corporation cannot sue or be sued in respect to its rights and obligations. This case cites with approval the decision of Judge Story in *Wood v. Dumler, supra,* wherein Judge Story propounds the trust fund theory of capital stock and says that the individual stockholders are not liable for the obligations of the corporation, either before or after the dissolution, in their private capacities. Later on Judge Story in *Mumma v. Potomac Co.* (1834, U. S.) 8 Pet. 281, says that the obligation of the company under these service contracts may be enforced against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers.

[27] *Chemical National Bank v. Hartford Deposit Co., supra.*

[28] *Clark's Case* (1869) L. R. 7 Eq. 550; *Ex parte Logan* (1870) L. R. 9 Eq. 149; *McClure's Case* (1870) L. R. 5 Ch. App. 737; see *Dean and Gibbs* (1872) 41 Ch. (N. S.) 476.

[29] *Yelland's Case, supra.*

[30] *Shirreff's Case* (1872) L. R. 14 Eq. 417; *MacDowall's Case* (1886) 32 Ch. D. 366.

[31] *Wood v. Dumler, supra; Mumma v. Potomac Co., supra; Pennsylvania Steel Co. v. New York City Ry.* (1912, C. C. A. 2d) 198 Fed. 721, 741.

[32] (1883) 91 N. Y. 174.

[33] See 1 Clark, *op. cit.*, sec. 516.

The New Jersey courts have allowed the claimant to recover damages for the breach of a duty arising from contract caused by the receivership and dissolution of the corporation under statutory authority.[34] We do not believe the proposition laid down in *People v. Globe Mutual Life Insurance Company* is in accordance with the rules of equity. We believe the untenable position taken by the court in *People v. Globe Life Insurance Company* has possibly induced some of the New York courts in later years to lay down doctrines concerning proof of claims in receiverships which are not strictly in accord with the rules of equity. When a corporation is insolvent and its assets are placed in the hands of a receiver, if the corporation cannot or does not perform its duties arising from executory contracts there is a breach.[35] Even if there is a dissolution of the corporation and the legal entity is destroyed in any mode provided by local state laws, nevertheless the remaining assets are still held in trust for the company or for its creditors and stockholders.[36] If a creditor has a substantive right against the corporation, he cannot be deprived of that substantive right in a suit against the company either by the attorney general or by a private citizen.[37] His ordinary remedy may, however, be taken away by the action of the court.[38]

The main difficulty in proving against the assets in the hands of a receiver claims arising from service contracts, is in finding an answer to the question: Did the service contract provide for payment of a definite sum to the contracting party for a definite period, or did the party agree to work on a commission?[39] If a party agrees to perform work for a definite, fixed and absolutely certain salary, his substantive right is not necessarily affected by the prosperity or the adversity of the company or its dissolution.[40] If, however, a party agrees to work on a commission basis, can the court find in the contract an expressed or implied condition that the employer shall continue for any stated period of time to supply him with the means of earning his uncertain and unascertained commissions? When the employer goes into the hands of a receiver, if the court cannot find an agreement, express or implied, that the employer will not cease to employ, there has been no breach of contract.

Unliquidated Claims

A claim at the time of insolvency may be unliquidated, yet the holder of such a claim may have as just and valid a right to recover against

---

[34] *Spader v. Mural Decoration Mfg. Co., supra;* 1 Clark, *op. cit.,* sec. 516.
[35] *In re Higginson & Dean, supra,* 331, and cases and discussion therein.
[36] *Wood v. Dumler, supra.*
[37] *People v. Metropolitan Surety Co.* (1914) 211 N. Y. 107, 115, 105 N. E. 99.
[38] *Chicago Life Ins. Co. v. Needles, supra.*
[39] *In re R. S. Newman Lim.* (1916) H. B. & W. cases 129.
[40] *Cowasjee Nanabhoy v. Lallbhoy Vullubhoy* (1876) L. R. 3 Ind. App. 200.

the insolvent as one who holds a liquidated claim.[41] The court of equity which has appointed a receiver has taken away from such claimant his remedy of levy, execution, etc., against the assets of the insolvent and may also have issued an injunction against suing the corporation, thereby preventing such a claimant from reducing his unliquidated claim to judgment. In addition to this, the usages and rules of equity prevent any claimant from bringing suit against the receiver of the insolvent corporation, except by permission of the appointing court or of an enabling statute. In other words, the court of equity appointing the receiver has deprived claimants of their ordinary legal and equitable remedies. It is therefore the court's privilege and duty to supply other equitable remedies in lieu thereof. The court does this by inviting claimants to submit their claims to a receiver or to a master for allowance and liquidation, or rejection, with proper provision for the receiver's or master's findings to be reported to the court for confirmation.

A certain time must elapse before claims can be properly presented and liquidated in this manner; therefore, the court will hold up payment of dividends and distribution until such reasonable time has elapsed. In other words, the court should fix the earliest date possible for the declaration of a dividend, having in mind the proof and liquidation of claims. There is always a conflict between the desire on the one hand to expedite matters and pay creditors who have uncontested liquidated claims, and on the other hand to be just and fair to those whose claims are contested and in process of liquidation.[42] When a date has been fixed by the court for bringing in claims and distributing a dividend, and certain claims are still in process of liquidation, a court may, if the circumstances justify, pay a dividend on liquidated claims and hold up a reasonable amount for later payment of a similar dividend on the claims in process of liquidation.

Courts which refuse to allow contingent claims which are perfected subsequent to the appointment of the receiver,[43] will confine the proof and allowance of claims to those which were absolutely owing at the time of appointment; yet the amount of such claims may not then have been liquidated.[44] In other words, the rule which allows claims to be liquidated after the appointment of the receiver does not neces-

---

[41] *Pennsylvania Steel Co. v. New York City Ry. Co., supra,* 740, 741, 742; *Isaac McLean Sons Co. v. William S. Butler & Co., supra,* 328; *Lothrop v. Reed and Another* (1866) 95 Mass. 294; *Chemical National Bank v. Deposit Co.* (1895) 156 Ill. 522, 41 N. E. 225; *Chemical National Bank v. Hartford Deposit Co., supra.*

[42] *Buzzell v. Aetna Indemnity Co.* (1917) 91 Conn. 359, 361, 100 Atl. 32, (1919) 28 YALE LAW JOURNAL, 677, note.

[43] See New York rule, note 18, *supra.*

[44] *Bridgeport v. Aetna Indemnity Co.* (1916) 91 Conn. 197, 99 Atl. 566; *Matter of Empire State Surety Co.* (1915) 216 N. Y. 273; *MacDonald v. Aetna Indemnity Co.* (1919) 93 Conn. 140, 105 Atl. 470, 480.

sarily let in contingent claims which were not perfected before the appointment. On the other hand, in jurisdictions which permit the allowance of contingent claims which are perfected before distribution, the fact that such claims when perfected are unliquidated should not of itself preclude them from proof and allowance, if the difficulty of fixing the amount can be overcome with reasonable certainty and without undue delay.[45]

Claims Reduced to Judgment Subsequent to Appointment of Receiver

A creditor who has obtained a judgment at the time of the appointment of a receiver generally has a lien on the property of the insolvent, which lien will be preserved and honored in the receivership. However, it frequently happens that at the time of the appointment of the receiver suits are pending in other courts against the insolvent. If these suits are pending in the jurisdiction of the appointing court, the court will not ordinarily enjoin their prosecution. If the suit is pending in another jurisdiction, the appointing court cannot enjoin its prosecution.[46] The appointing court may or may not authorize the receiver to take part in such litigation. However the case may be, it frequently happens that judgments are entered against the insolvent company subsequent to the appointment of a receiver. The holder of such a judgment cannot levy execution against the property in the hands of the receiver. All he can do is to present his judgment to the appointing court and ask to have it allowed as the measure of his claim. The appointing court, unless some unusual circumstance is present, will accept that amount as the amount due. The appointing court, however, is the actual distributor of the money and is the court to decide what are the valid claims against the fund. In those courts and jurisdictions which permit the proof and allowance of a contingent claim which has been perfected after the appointment of the receiver and before distribution, a judgment secured subsequent to the appointment of the receiver on such a contingent claim will ordinarily be allowed.

A difficulty, however, arises in those jurisdictions which refuse to allow a claim which is perfected subsequent to the appointment of a receiver and before the distribution.[47] Suppose in the case of a contingent claim that the conditions necessary for the ripening of this claim have taken place before the appointment of a receiver but that a judgment is not secured on said claim until subsequent to the appointment. Can such a judgment be proved against the assets? We believe that it is impossible to lay down a hard and fast rule cov-

---

[45] *Pennsylvania Steel Co. v. New York City Ry. Co., supra.*

[46] *MacDonald v. Aetna Indemnity Co., supra,* 480.

[47] See cases and text in note 17, *supra.*

ering such cases, but that the criterion must be: does the contract on which the claim is predicated provide that the claim shall be perfected by certain events alone happening, or must the claim be perfected by certain events happening and in addition thereto suit being brought and judgment entered?

Fixing a Time for Presentation of Claims

It is, of course, impossible for the court to make at once distribution of the assets. The court will therefore order the receiver to collect the assets and to notify claimants to present their claims on or before a certain date or be barred from the distribution. Such a notification is nothing more nor less than a statement by the court that it will make equitable distribution of these assets; that it requires time to collect the same; that the court requires proper proof; and that at a certain time it will make distribution to those creditors who comply with the court's orders. It is not fair to those claimants who have valid and perfected claims at the time of appointment to delay the distribution beyond a reasonable time. If the court delayed distribution until the statute of limitations had run against all possible claims, justice would not be accomplished.

When the court fixes a time limit for presentation of claims and distributes property and assets at that time, this does not necessarily fix the status of claims as of the date of distribution, nor change claims which were contingent at the time of appointment into perfected claims. In other words, those jurisdictions which refuse proof and allowance of a claim which was contingent at the time of appointment,[48] will not allow such a claim to be proved, even if perfected before the time fixed for presenting claims. If it were true that those claimants whose claims were perfected at the time of appointment have a "vested" right, or something in the nature of a lien or charge, against the assets then owned by the insolvent, the fixing of a subsequent time for proving and paying claims would not oust them of their exclusive right to appropriate the assets and would not allow a contingent claimant whose claim was perfected subsequent to the appointment to come in and share in the distribution. However, our understanding of the usages and rules of equity is that in an equitable receivership of an insolvent corporation, when neither the bankruptcy statute nor a state statute intervenes, unsecured creditors do not by virtue of the appointment of a receiver obtain any lien, charge or other equitable interest over or in the assets. Therefore, if other claims having their origin in contract or tort entered into or occurring before the appointment of a receiver are perfected subsequent to the appointment and before distribution of the assets as provided for by order of the court, they should share in such distribution. The courts now are

[48] *Ibid.*

very liberal in extending time in order to allow claimants who have had no notice or opportunity, to come in and prove.[49] Claims are sometimes allowed to be filed at a later date *nunc pro tunc*. If a party, however, has been guilty of laches, the time will not be extended nor will his claim be allowed to be filed.[50]

Conclusion

From the foregoing considerations we believe the usages and rules of equity covering proof and allowance of contingent and immature claims against the assets of an insolvent corporation in the hands of an equitable receiver, when no statute provides otherwise,[51] to be as follows:

1. As soon as possible after the appointment of a receiver, the appointing court should make an order fixing a time limit for receiving claims. The time limit fixed for receiving claims should be the earliest date consistent with gathering in the assets and receiving and passing on claims duly presented. The court's order should direct the receiver to give notice by publication of the time limit for receiving claims. The receiver may be further directed by the court to send a copy of this notice to all known creditors and parties having rights arising from executory contracts against the insolvent corporation. No claims should be permitted to be presented or allowed subsequent to the time limit fixed by the court, unless the court for good cause shown extends the time or enters the claims *nunc pro tunc*.

2. When it appears that there are assets on hand or about to be collected, sufficient for the payment of a dividend, the court may authorize the receiver to give notice of his intention to declare a dividend at a definite time, which time should be at the same time or subsequent to the time limit fixed for receiving claims. Notice of such intention to declare a dividend should be given by publication, and a copy of such notice should be sent to all known creditors, and such notice should be given within a reasonable time before a dividend is declared.[52] The court may, on the day fixed, order the first dividend paid on those claims duly presented, proved and allowed. If claims are allowed by the court to be presented and proved subsequent to the time limit for presenting claims, such claims should not upset dividends already paid; but should receive the same amount in payment

[49] *Buzzell v. Aetna Indemnity Co., supra,* 361; *Bank of Washington v. Creditors* (1877) 80 N. C. 9; *Pattberg v. Lewis Pattberg & Bros.* (1897) 55 N. J. Eq. 604, 606, 38 Atl. 205; *Grunnell v. Merchants Ins. Co.* (1863) 16 N. J. Eq. 283, 284; *MacDonald v. Aetna Indemnity Co., supra,* 480.

[50] *Pennsylvania Steel Co. v. New York City Ry. Co.* (1915, C. C. A. 2d) 229 Fed. 120.

[51] N. Y. Gen. Corp. Law, secs. 230 ff.; also Laws of 1911, ch. 266, referred to in *Matter of Empire State Surety Co.* (1915) 214 N. Y. 553, 567, 108 N. E. 825.

[52] See N. Y. Gen. Corp. Law, sec. 253; also English Companies (Winding up) Rules 150 (1).

as such claim would have been entitled to receive on the first dividend before any distribution should be made to other creditors,[53] provided such claims were perfected and presentable before or at the time the first dividend was ordered paid.

3. Claims which were contingent at the time of the appointment of the receiver but became absolute and perfected at time of presentation and before the day fixed for filing claims, should share in the first dividend. If a contingent claim becomes absolute and perfected after the time fixed for presenting claims and paying the first dividend has passed, such a claim, although valid against the insolvent corporation, should not be allowed unless the court shall extend the time for presentation or allow such a claim to be entered *nunc pro tunc*. But such a claim should participate in funds ordered paid subsequent to the time the claim actually became perfected and absolute. It should not upset dividends already ordered paid; neither should such a claimant receive the same amount he might have received on the first dividend before any distribution was made to other creditors,[54] because such claimant had no right to any first dividend. But if there are still funds in the hands of the receiver not yet ordered distributed at the time such claim becomes absolute and perfected and is presented, we see no valid reason why such claimant should not participate in a subsequent distribution of such funds.

4. Claims which are immature at the time of the insolvency and the appointment of the receiver, if such claims are absolutely fixed at such a time as to amount due and as to time when payable, should be proved as other claims, but interest will not be allowed thereon subsequent to the appointment of the receiver; and if interest has been prepaid by the insolvent corporation for any period subsequent to such appointment, such prepaid interest will be deducted from the amount of the claim as proved.

5. The fact that claims at the time of the insolvency and the appointment of the receiver, or at the time of presentation, may be unliquidated, should not of itself prevent proof and allowance of such claims, provided they may be liquidated and their value fixed with reasonable certainty and without undue delay.

6. Claims which are in suit at the time of the appointment, or on which suit is brought subsequent to the time of the appointment, come under the head of unliquidated claims and should not be rejected simply because they are unliquidated, or because judgment has not yet been entered fixing the amount of such claims. The appointing court, when such pending suits and prospective or possible judgments are brought to its attention, should hold up sufficient assets to pay a dividend on such a judgment when entered, provided such claims may be brought to judgment without undue delay.

---

[53] See N. Y. Gen. Corp. Law, sec. 262. [54] *Ibid.*