pressive of this feeling are the words of Dean Pound: "A man's feelings are as much a part of personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary processes of legal growth."[47]

SAM ELSON, '30.

POWERS OF RECEIVERS APPOINTED IN MORTGAGE FORECLOSURE PROCEEDINGS

It often becomes necessary for a court of equity to appoint a receiver of mortgaged property pending foreclosure, either to preserve the corpus of the estate from deterioration, or to sequester the rents and profits to make good an anticipated deficiency, or for some other cogent reason. The question which at times seems perplexing is just how far a court of equity may go in giving the receiver power over property incident to, but not covered by the mortgage. In a recent federal case,[1] a foreclosure suit to sell mortgaged property and apply the proceeds to the mortgage debt, the receiver was directed to take charge of all company property, and to receive the rents, earnings, issues, profits, and income therefrom, although the mortgage did not cover all the assets of the company. On appeal this direction in the case was reversed, because though "the court had power to appoint the receiver—it did not have the power to direct him to take charge of any property not covered by the mortgage." Granting that it is often laid down as a concrete rule that the mortgagee has no equitable right to have the receivership extended over other property of the mortgagor not embraced in the mortgage,[2] still we must not lose sight of the underlying reasons for having a receiver. The object of appointing a receiver is to preserve the property for the benefit of all parties interested,[3] and if this object is best attained by continuing the business, such procedure has a strong argument in its favor. Perhaps the primary objection to such an extension of the receiver's dominion is the hindrance of other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. This general doctrine is stated in *Scott v. Farmers' Loan and Trust Co.*,[4] an important federal case, and will be considered later.

[47] 28 HARV. L. REV. 343.

[1] A. B. Leach & Co. v. Grant (1928), 27F (2d) 201.

[2] As in 27 Cyc. 1623; Gluck & Becker, RECEIVERS OF CORPORATIONS, p. 231; Smith v. McCullough (1881), 104 U. S. 25.

[3] Knickerbocker v. McKinley Coal Co. (1898), 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

[4] (1895), 69 F. 17.

An interesting development in the law of receiverships has been the gradual tendency of the courts to enlarge and extend the powers of receivers. This, however, is merely demonstrative of the growth of equity itself, for the receiver acts in the capacity of an officer of the court and is subject to its bidding. The power to appoint a receiver has always been considered as one of the inherent rights of a court of equity and has been exercised from very early times.[5] A receiver was originally appointed only with a view to winding up the business of the partnership or association; it was never contemplated that he should take charge of the business and continue to conduct it. In *Gardner v. London etc. R. Co.*,[6] Lord Cairnes tersely stated the then prevailing view in England: "It is impossible to suppose that the Court of Chancery can make itself or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real correlative responsibility for the consequences of any imperfect management." Considering the wide scope of authority with which railroad receivers are invested today, and the frequency with which courts are called upon to appoint receivers to operate railroads over extended periods of time, the remarkable change is easily apparent. This liberal tendency is curbed somewhat, however, with regard to the appointment of a receiver in behalf of a foreclosing mortgagee. The objective of such an appointment is the protection of the mortgaged property alone, and unless it can be accomplished the need of a receiver fails.[7] But from the very nature of the situation the appointment of a receiver rests in the discretion of the court.[8]

The early case of *Noyes v. Rich*[9] was one of the first to distinguish sharply between the powers of a receiver under a general creditors' bill and one appointed in a suit to reach specified mortgaged property. There it was said that the right of the mortgagee cannot extend beyond the property mortgaged; and the right of the receiver must necessarily have the same limita-

[5] Williamson v. Wilson (1826), 1 Bland (Md.) 420; Folsom v. Evans (1861), 5 Minn. 338.

[6] (1867), L. R. 2 Ch. App. Cas. 212.

[7] See Cook, CORPORATIONS, Vol. V, Sec. 862, for specific grounds of appointment of receiver in mortgage foreclosures against corporations.

[8] Parry v. West (Ia., 1924), 197 N. W. 297. The courts are constrained to be more liberal in the appointment of receivers in the aid of mortgagees or bondholders of a railroad. High, RECEIVERS, Chap. XI, p. 309, says: "The insolvency of the mortgagor and inadequacy of the mortgage security may be regarded as sufficient ground for relief. This is the usual principle governing the application of receivers in aid of the foreclosure of mortgages." But *cf.* Pullan v. Cincinnati etc. R. Co. (1865), 4 Biss. (U. S.) 35; Rice v. Paul etc. R. Co. (1878), 24 Minn. 464.

tion. In that case certain specified creditors had a mortgage lien on part of an insolvent's assets, and perhaps the court was over-zealous in guarding the right of the other creditors. In 1875 the doctrine of *Noyes v. Rich* was extended to a railroad case, *State v. Jacksonville etc. R. R. Co.*[10] In that case a dispute arose as to the right of a receiver appointed under mortgage foreclosure to assume control over a branch line. In a lengthy decision the court finally decided against the receiver on the ground that "a mortgagee cannot be said to have any equitable rights looking to receivership in the property of the mortgagor, beyond that included in the mortgage."

Perhaps this general doctrine was best stated in *Scott v. Farmers' Loan and Trust Co., supra.* A creditor intervened in mortgage foreclosure proceedings on a railroad, and sought an order discharging certain land from the custody of the receivers and granting him leave to sell the same on execution to satisfy his judgment. The court granted him this relief, basing its decision on this ground: "A mortgagee has the undoubted right to subject the mortgaged property to the payment of the mortgage debt, to the exclusion of all general creditors of the mortgagor and persons holding junior liens thereon; but as to all property of the debtor not included in the mortgage, the mortgagee is in no better plight than if he had no mortgage." Other important cases upholding this general rule are stated below.[11] In its application, no distinction is made between mortgages on real property and chattel mortgages. However, a distinction is apparently made between private corporations and public corporations, particularly railroads, where the public interest is concerned and where a public duty is owed to furnish transportation. Whether the extended powers of a receiver of a public corporation are justified is certainly a matter open for

[9] (1862), 52 Me. 115.

[10] (1875), 15 Fla. 201, 280.

[11] Smith v. McCullough (1881), 104 U. S. 25; St. Louis A. etc. R. Co. v. Whitaker (1887), 68 Tex. 630, 5 S. W. 448; State v. Union Bank (1896), 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Central Trust Co. v. Worcester Cycle Mfg. Co. (1902), 114 F. 659; Price v. Howsen (1924), 197 Ia. 324, 197 N. W. 62; also see Gluck & Becker, RECEIVERS OF CORPORATIONS, p. 231. An interesting situation arose in Thomas v. Armstrong (1915), 51 Ok. 203, 151 P. 689, L. R. A. (1916B) 1182. A mortgage was given for an undivided one-half interest in a printing plant. The property was of such a nature that it was impossible of division into aliquot parts. It was there said: "Granting that the court had power to appoint a receiver, it had not power to appoint a receiver for all the property of defendants within this state when the property involved was a one-half interest. The court was without jurisdiction to appoint a receiver to take charge of property which was not involved in the litigation."

debate. We can easily conceive numerous objections to allowing a court of equity to assume through its officers unhampered control of great railroads.

In considering over what property the power of a receiver appointed in mortgage foreclosure proceedings should extend, it is important that we first distinguish such a receivership from those instituted by general creditors of a business or by stockholders in a corporation. Where the debtor is insolvent and a receiver is appointed on application of creditors, the theory on which the aid of the court is invoked is that such procedure will result in the greatest ultimate benefit for all the parties concerned. The creditors will derive a greater percentage of their claims or perhaps recover them entirely, and the business of the debtor will not be destroyed by bankruptcy proceedings. The courts are quite hesitant about appointing a receiver even on the application of general creditors, particularly for a corporation.[12] Creditors of a corporation are not entitled to the appointment of a receiver as a matter of absolute right, unless by statutory provision. And even under statute, the matter has generally been addressed to the sound discretion of the court.[13] So ordinarily creditors of an insolvent debtor or corporation must resort to the often unsatisfactory remedies provided by law. When a receiver is appointed in such cases, however, it is only natural that the receivership should extend over all the property of the business or corporation. This is also true where the receivership is instituted by stockholders in a corporation, for their attack is usually against the officers of the company for mismanagement of its affairs. The position of the mortgagee or bondholder who applies for a receiver is somewhat different from that of the creditor or stockholder, insofar as his right against the debtor is limited to specified property. But where both the mortgagee and mortagor will benefit by allowing a receiver to carry on the business of the mortgagor, as, for instance, where the value of the mortgaged property is insufficient to secure the debt, it seems that the rigid rule of *Scott v. Farmers' Loan and Trust Co.* should recognize an exception. That there has been a tendency in this direction cannot be denied.

The comparatively recent case of *First National Bank v. Detroit Trust Co.*[14] recognizes the power of a court of equity to ap-

[12] The mere fact that a corporation is insolvent does not constitute ground for appointment of a receiver. Luhrig Collieries Co. v. Interstate Coal and Dock Co. (1922), 281 F. 265. But by statute in some states a receiver may be appointed if a corporation is insolvent or in imminent danger of insolvency. Adler v. Campeche Laguira Corp. (1919), 257 F. 789.

[13] Pusey & Jones Co. v. Hanssen (1922), 279 F. 488, overruled on another point, 261 U. S. 491.

[14] (1918), 248 F. 16.

point a receiver in foreclosure proceedings, with authority to continue the business of the mortgagor. "Although this power is one which is cautiously exercised, yet the court may in its discretion grant such relief when such a course seems necessary to preserve the property or secure a more advantageous disposition." In the *First National Bank* case a bill was brought to foreclose a mortgage on the property of a lumber company. It appeared that if the property were ordered sold on foreclosure its full value would not be realized, and the proceeds would be entirely absorbed by the first mortgage. The first and second mortgagees and a majority of those secured by the third mortgage all requested or assented to the appointment of a receiver, with authority to continue the business. Of course there is great doubt whether such a conclusion would have been reached if all the mortgagees had not consented to such a proposal. In granting the order the court proceeded on the same theory as in general receiverships, *viz.*, continuance of operation was necessary to preserve the property.[15]

The problem of when a managing receivership is proper is so closely identified with the question of allowing a receiver under foreclosure proceedings to assume control over property only *incident* to the mortgage that they may be considered in the same light. It has been stated as an orthodox rule[16] that a managing receivership is never undertaken except with the view to winding up the affairs of the company and a sale of its property, the business being taken over and continued in order that the whole may be disposed of in the end as a going concern. The tendency, however, is to relax this rule.[17] It is not difficult to conceive of situations where a court might be prompted by other considerations, even more forceful, in appointing a receiver to carry on a business. One of the reasons why a receiver is appointed so readily in a suit against a railroad is the difficult problem of selling to advantage the railroad itself or the company's equity therein on execution.

The liberal tendency of the courts is shown in a comparison of two United States Supreme Court cases, *Cowdrey v. Galveston, Houston etc., R. R.* (1876),[18] and *Cake v. Mohun* (1896).[19] In the former case it was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hand, beyond what is

[15] The doctrine of the First National Bank case is enunciated in 34 Cyc. 284, and is affirmed as to the court's power in foreclosure proceedings in 27 Cyc. 1631.

[16] Gutterson & Gould v. Lebanon Iron & Steel Co. (1907), 151 F. 72.

[17] Cook, CORPORATIONS, Sec. 862.

[18] 93 U. S. 352.

[19] 164 U. S. 311.

absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city to aid in the construction of a railroad parallel with the one in his hands, were held properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge. It was said in *Cake v. Mohun*:

> "Admitting to its fullest extent the general proposition laid down by this court in Cowdrey, v. Galveston, Houston etc. R. R., that a receiver has no authority, as such, to continue and carry on the business of which he is appointed receiver, there is a discretion on the part of the court to permit this to be done temporarily when the interests of the parties seem to require it. Under such circumstances, the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the receivership."

It is hardly to be disputed that a receiver in foreclosure proceedings may, where it is of advantage to the parties, be authorized to carry on the business even of a private corporation.[20] But generally where such an appointment is made, the mortgage covers all the property of the corporation. The problem would be far more difficult where the mortgage did not cover all its assets. Ordinarily in such a case the mortgagee or bondholders would be forced to institute foreclosure proceedings by suit. But where the mortgage covers *practically* all the assets of the company, and the security would plainly prove inadequate on foreclosure, would it be within the power of the court to install a managing receivership? In the case of a railroad, where the mortgage covered all the rolling-stock, or all the trackage and other property except the rolling-stock, the court might be forced to appoint such a receiver on the ground of practical necessity. By agreement of all interested parties, mortgagor, first, second, and other mortgagees, and other lien holders, a managing receiver might be appointed even for a private corporation or business as in the *First National Bank* case.[21] The case of

[20] Pacific Northwest Packing Co. v. Allen (1918), 109 F. 16.

[21] See Makeel v. Hotchkiss (1901), 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131. A mortgagee filed a bill to foreclose his mortgage on a hotel. A receiver was appointed by the consent of two other persons, who each claimed the equity of redemption. Although granting that courts of equity have the power to continue a business under a receiver and make his charges and expenses a charge upon the property, it was added that this power must be exercised with great caution.

Leader Publishing Co. v. Grant Trust Co.[22] is interesting in this connection. This was a suit by the trustee for holders of bonds secured by a mortgage on the property of the defendant publishing company to foreclose the mortgage and to procure the appointment of a receiver for the mortgaged property. The property was not of sufficient value to pay the mortgage debt. Said the court: "In a case such as this where the mortgaged property is used for business purposes of such a nature that the discontinuation of the business would destroy or greatly impair the value of the property, the court may authorize the receiver to carry on the business while he remains in charge." That case also held that a receiver may be appointed in a foreclosure suit when the property is not sufficient to discharge the mortgage debt, even though there is no insolvency.

In appointing receivers for railroad corporations the courts have been governed by necessities which do not exist in the cases of other corporations. The law of railroads has had a growth along separate lines, and that this distinction is proper, particularly with regard to receiverships, is demonstrated by the Supreme Court case of *Barton v. Barbour.*[23] The plaintiff sought to establish a demand against the receiver of an insolvent railroad for personal injuries. In the course of its decision, the court showed how the insolvency of a railroad gives rise to two different courses of proceeding:

(1) The old method, usually applied to banking, insurance, and manufacturing companies of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction.

(2) The new method of giving the receiver power to continue the ordinary operations of the corporation, and as soon as the interest of all parties having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim. The conclusion reached by the court was that the first method often proved highly injurious and resulted in a total sacrifice of the property. The cessation of the business of a railroad for a day would be a public injury. Since railroads take their rights subject to the rights of the public, they must be content to enjoy them in subordination thereto. So we see that the court acts with due regard for the public—that the interests of the public may not suffer detriment by the nonuser of the franchises. It might be further remarked that by proceeding in this manner the interests of creditors are promoted as well as are those of the public.

[22] 1914), 182 Ind. 651, 108 N. E. 121.
[23] 1881), 104 U. S. 126, 135.

Proceedings for the appointment of receivers in actions for the foreclosure of railway mortgages are regarded as *in rem*, to the extent that they seek to reach such property of the corporation as was mortgaged to secure the bondholders.[24] Under the doctrine of *Noyes v. Rich* the right of the receiver to the possession of the corporate property, being subject to the same limitations governing the rights of the mortgagee bondholders in whose behalf he was appointed, should extend only to the specific property which is the subject of the litigation and covered by the mortgage. Professor High[25] says that a court of equity, having appointed a receiver over a railway in an action for the foreclosure of a mortgage, may exercise all necessary powers with reference to the protection and preservation of the property for the benefit of its creditors which are not in excess of the powers of the corporation itself. Accordingly, it has been held that the court may authorize the receiver to lease other lines of the railway to be operated in connection with and as part of the road over which he is appointed when such course is necessary for the interest of creditors.[26]

In considering how far the powers of a receiver appointed under mortgage foreclosure should extend, it is important to bear in mind exactly what a mortgage is. The mortgagee has a right of dominion over the subject of the mortgage, but the fundamental property right is in the mortgagor, even though it is contingent. Of course the situation of the parties can be reversed or modified by express stipulation of the parties. The mortgagee has no right, under ordinary circumstances, to look to any other property of the mortgagor for reimbursement. One can then hardly question the logic of the holding in *Noyes v. Rich*, that since the right of the mortgagees cannot extend beyond the property mortgaged, the right of the receiver must necessarily have the same limitation. While this rule is not often violated, still the courts are far from backward in extending the powers of the receiver when it is apparent that all interested parties will ultimately benefit and that they so agree. While the power of a court of equity as a railroad executive may well be doubted, the duty owed to the public to furnish constant transportation, and the practical impossibility of realizing the fair value of the railroad under execution or foreclosure have apparently outweighed this objection. In the cases of receiverships other than railroads the courts have generally followed the rule of logic as stated above, the few exceptions being based on the ground of necessity or consent of the interested parties. It

[24] High, RECEIVERS, p. 309.
[25] Note 24, *supra*.
[26] Gilbert v. R. R. Co. (1880), 33 Grat. 586.

is submitted that these exceptions are justified, for it rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested.

JOSEPH J. CHUSED, '30.