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TERMINATION OF SEC RECEIVERSHIPS
IN THE FEDERAL COURTS

THOMAS J. SCHWARZ*

I. INTRODUCTION

THE equity receivership, once the favored method for corporate reorganizations, has long lain dormant. Recently, the Securities and Exchange Commission has revived the equity receiver as a method of enforcement of federal securities laws, especially the Securities Act of 1933,1 the Securities Exchange Act of 1934,2 and the Investment Company Act of 1940.3 In the first eight months of 1974 the SEC requested the appointment of a receiver in the federal court more than fifty times.4 This Article extensively reviews the various

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alternatives open to the court and to the receiver for the disposition of the corporation (the "corporate subject") in a receivership initiated by the SEC.\(^5\)

In the early part of this century equity receiverships were employed to reorganize corporations, most frequently railroads, which had come upon difficult times. The original Bankruptcy Act\(^6\) failed to provide an effective method for corporate reorganization.\(^7\) In 1933, section 77 of the Bankruptcy Act\(^8\) dealing solely with railroad reorganizations, and section 77B\(^9\) for other corporate reorganizations, were adopted as a part of the Bankruptcy Act. Subsequently, in 1938, the Bankruptcy Act was revised\(^10\) and Chapter X was adopted to provide for corporate reorganizations.\(^11\) Since the appointment of a receiver can, under some circumstances, be an act of bankruptcy,\(^12\) the modernization of the Bankruptcy Act has effectively curtailed the equity receivership as a creditors' method of preserving assets and obtaining redress.\(^13\)

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5. This Article will not deal with the grounds for or the propriety of the appointment of a receiver in general, or the obligations of a receiver during the period of the receivership.


7. See generally 6 Collier on Bankruptcy § 0.01, at 5 (14th ed. J. Moore ed. 1972) [hereinafter cited as Collier].


12. See note 90 infra and accompanying text.

13. For a discussion of the use of equity receiverships in connection with creditors' proced-
Although obsolete as a creditors' remedy, equity receiverships have become the judicial remedy preferred by the SEC second only to injunctions.\(^{14}\) Neither the 1933 Act nor the 1934 Act contains any explicit authorization for the appointment of a receiver,\(^{15}\) and the 1940 Act has only a limited provision;\(^{16}\) however, it is now beyond question that the SEC has authority to request the appointment of a receiver in aid of its enforcement jurisdiction.\(^{17}\) In the typical situation the SEC will apply to a court for an injunction and for the appointment of a receiver\(^{18}\) alleging fraud and mismanagement of a public company or a broker-dealer.\(^{19}\) Once the receiver is appointed the SEC remains a party to the litigation and should be consulted on any actions taken by the receiver in connection with the performance of his duties.\(^{20}\)

After the receiver has been appointed and has carried out his initial obligations,\(^{21}\) the important question becomes how to terminate the receivership and permit both the receiver and the belabored court to get on with their other affairs. After an initial discussion of the appropriateness of the application of federal law, the remainder of this Article will deal with the question of termination of the receivership.

\(^{14}\) See note 4 supra.

\(^{15}\) In 1957 the SEC requested an amendment to the 1934 Act to provide for such authorization but no such legislation was passed. See 103 Cong. Rec. 11,635-38 (1957).


\(^{18}\) It has been held that both an injunction and the appointment of a receiver may be granted in one action and that the remedies are not mutually exclusive. SEC v. Fifth Ave. Coach Lines, Inc., 435 F.2d 510, 518 (2d Cir. 1970).


\(^{21}\) See generally 1 R. Clark, A Treatise on the Law and Practice of Receivers §§ 117-22 (3d ed. 1959) [hereinafter cited as Clark].
II. APPLICATION OF FEDERAL REMEDIAL LAW

Although the receiver is appointed to protect rights established under federal securities laws, there is usually no applicable remedial statutory provision for the disposition of the corporate subject. The question thus arises whether *Erie Railroad Co. v. Tompkins* requires that the federal court apply a remedy pursuant to the substantive or conflicts law of the state in which the court sits. The answer is in the negative:

If the case is one governed by federal law, as for example by a congressional enactment governing interstate commerce, state conflicts rules are irrelevant because state law has no bearing on the case. And the same will be true even in the absence of a federal statute if the case so involves federal rights that a "federal common law" governing them can be spelled out.3

In *Bryan v. Bartlett*,24 a federal receiver brought suit to recover on notes owed his corporation. Seeking to assert certain defenses, the defendants urged that state rather than federal law should apply. Noting that jurisdiction was "based, not on diversity of citizenship, but on a federal equity receivership arising from violation of the federal securities regulation statutes," and that the "receiver was appointed . . . to prevent further violations . . . and to preserve the assets for the benefit of the investor-creditors of the companies, who are primarily individual citizens of many different states,"25 the court held:

The policy underlying the federal Securities Act of 1933 is to protect investors from the fraudulent sale of securities and the common loss of investment which follows from violations of the act. In unsnarling the tangled affairs of these corporations to preserve insofar as possible assets for distribution to the defrauded investors, the receiver is performing a federal function. These are substantial reasons for applying a federal rule of decision to this case.26

Similarly, in *J.I. Case Co. v. Borak*,27 the Court held that a shareholder was entitled to more than declaratory relief for proxy violations by his company, stating:

It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong

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22. 304 U.S. 64 (1938).
23. R. Leflar, American Conflicts Law 154 (1968) (footnote omitted). See also notes 45-47 infra and accompanying text.
25. Id. at 32.
26. Id. at 32-33.
done."... Section 27 grants the District Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title ... ."

The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.28

III. THE REMEDIES

Given the applicability of federal law, the question becomes what disposition can be made with respect to the corporate subject.29 The question should be placed in proper perspective. Typically, a corporation in receivership is under the supervision of the federal court sitting in that state where most of the assets of the corporation are located.30 Whether the corporation is foreign, i.e., organized under the laws of a sister state, or domestic, i.e., organized under the laws of the state in which the federal court sits, there are shareholders throughout the country. Does the federal court have the power to: (a) liquidate the corporation; (b) dissolve the corporation; (c) order the receiver to call a shareholders' meeting to consider action; or (d) order the receiver to proceed to the state of incorporation to seek state remedies?

A. Liquidation vs. Dissolution

In spite of the pragmatic similarity between dissolution and liquidation, there exists an important theoretical distinction. Liquidation is


It should also be noted that the problem of forum shopping with which Erie concerned itself does not arise in an action instituted by the SEC since the Commission brings enforcement actions only in federal courts. See 67 Harv. L. Rev. 836, 843 (1954); 59 Harv. L. Rev. 966, 970-72 (1946).

29. Despite the applicability of federal law, state court precedent is helpful.

30. It would be improper to appoint a receiver in a district if most of the assets were elsewhere. See 7 J. Moore, Federal Practice ¶ 66.05(2), at 1927 (2d ed. 1974) [hereinafter cited as Moore]; cf. Gatch, Tennant & Co. v. Mobile & O.R.R., 59 F.2d 217 (S.D. Ala. 1932);
the winding up and distribution of assets among creditors and stockholders. The dissolution of a corporation is the termination of its very existence by the cancelling of its charter. Liquidation by itself does not destroy the corporate shell, although, as a practical matter, once the assets of the corporation have been distributed, the corporation will be unable to pay its franchise tax and will be dissolved pursuant to state law. According to one author, it was first said that liquidation was not dissolution in order to meet the objection that a court of equity could not dissolve a corporation.

An examination of the law of Delaware, the state of incorporation of a great many publicly held corporations, demonstrates the distinction between liquidation and dissolution. Probably the clearest of the cases on this question is *Haas v. Sinaloa Exploration & Development Co.*, where a receiver was appointed on the ground of insolvency. The court noted that the appointment of such a receiver had the effect of transferring the assets of the corporation into a fund for the creditors and stockholders. Thus, the receiver could either reduce the assets to cash and distribute the proceeds among the creditors and stockholders (liquidate) or return the assets to the corporation. "But in neither event is the corporate existence terminated by the receivership decree."

Similarly, in *Lichens Co. v. Standard Commercial Tobacco Co.*, the court acknowledged the distinction:

Originally, jurisdiction to appoint a receiver, in order to wind up a solvent corporation, was largely denied on the theory that it was equivalent to a decree for dissolution, which was generally within the sole province of the legislative body.

... Technically at least the appointment of a receiver does not dissolve the corporation...
The distinction is brought into sharp focus by the statute common to Delaware and many other states under which a dissolved corporation exists only to wind up its business and close its affairs, i.e., to liquidate.

B. Liquidation of the Corporate Subject

1. Power to Liquidate

There has been great confusion in the cases discussing liquidation, resulting primarily from a failure to distinguish between the question of the power of the court to wind up the affairs of a corporation . . . and the question, assuming power, of the advisability of doing so in any particular case. Since it is generally accepted that a suit for the appointment of a receiver and for liquidation may be brought in federal court, the proper question with respect to liquidation (as opposed to dissolution) is whether the court should exercise its power and not whether the power exists.

Perhaps the leading case establishing the power of a federal court to appoint a receiver is Burnrite Coal Briquette Co. v. Riggs. In that case a shareholder brought suit in New Jersey district court for the appointment of a receiver to conserve the assets of a Delaware corporation. The fact that the corporation was foreign was held not to deprive the federal court of jurisdiction to appoint a receiver although the question of liquidation was not raised.

An early decision, Klein v. Wilson & Co., indicated that a federal court had the same power as the state court to appoint a receiver but no power to order winding up. As the cases progressed, however, the courts began to realize that they had the power to liquidate the local assets of a corporation, either foreign or domestic. Although earlier cases had held that state law governed, later cases held that federal, not state law determined whether liquidation could be ordered.

39. Del. Code Ann. tit. 8, § 278 (Supp. 1968) provides in part: “All corporations [which have been dissolved] . . . shall nevertheless be continued, for the term of three years from such . . . dissolution . . . for the purpose of . . . enabling them gradually to settle and close their business . . . .”

40. See 19 C.J.S. Corporations § 1728 (1940).


42. 274 U.S. 208 (1927) (Brandeis, J.).

43. Id. at 209.

44. Id. at 214.

45. 7 F.2d 772, 775 (D.N.J. 1925).


In *SEC v. Fiscal Fund, Inc.*, 48 a Delaware district court was requested to appoint a receiver for a Delaware corporation. The action was brought to enjoin violations of the 1940 Act where the management of the fund had ceased to function. 49 The court ordered liquidation stating that it need not look to the state law but only to the federal law as this receivership was a remedial right of a federal court of equity that "cannot be enlarged or limited by state law." 50

In *Bailey v. Proctor*, 51 the court held "that a court of equity has inherent power to appoint a receiver to liquidate a corporation or investment trust where fraud, mismanagement or abuse of trust is present whether or not insolvency is likewise present." 52 *Bailey*, however, did not involve liquidation of a foreign corporation. The court also stated that the intervening solvency of the trust did not deprive it of jurisdiction because, once jurisdiction was assumed, it continued until equity was done. 53 Nor was the Investment Company Act's failure to provide for liquidation seen as an obstacle. 54

More recently, in *Los Angeles Trust Deed & Mortgage Exchange v. SEC*, 55 the court stated:

We do not dispute the fact that it is within the well established power of the federal court, sitting as a court of equity, to order liquidation of a solvent corporation where there is no other course available to remedy a situation that needs solution. 56

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49. Id. at 714.
50. Id. at 715. At the same time as the law was developing in the federal courts, the state courts were beginning to recognize their power to appoint receivers to take charge of the local assets of foreign corporations. See, e.g., In re Mercantile Guar. Co., 238 Cal. App. 2d 426, 48 Cal. Rptr. 589 (1st Dist. 1965) (liquidation ordered); Low v. R.P.K. Pressed Metal Co., 91 Conn. 91, 99 A. 1 (1916); Scholl v. Allen, 237 Ky. 716, 36 S.W.2d 353 (1931); Starr v. Bankers' Union of the World, 81 Neb. 377, 116 N.W. 61 (1908); Hill v. Dealers' Credit Corp., 102 N.J. Eq. 310, 140 A. 569 (1928); Wettenel v. Robinson, 288 Pa. 362, 136 A. 673 (1927); Cunliffe v. Consumers' Ass'n of America, 280 Pa. 263, 124 A. 501 (1924); Note, Internal Regulation of Foreign Corporations, 29 Colum. L. Rev. 968 (1929); Note, Jurisdiction to Liquidate the Affairs of a Foreign Corporation on a Stockholder's Bill, 44 Harv. L. Rev. 437 (1931).
52. 160 F.2d at 81.
53. Id. at 82.
54. Id. at 83. In a later proceeding, Bailey v. Proctor, 166 F.2d 392 (1st Cir. 1948), the court held that the former decision "quite clearly contemplated dissolution of the trust." Id. at 396. The court, however, vacated the district court's order to dissolve and allowed the trust to continue after the creditors were paid off: "Since no one will be injured, we see no reason not to allow the present equitable owners of the trust property to decide what to do with their own money." Id. at 397.
55. 264 F.2d 199 (9th Cir. 1959).
56. Id. at 211.
Despite the recognition of their power to liquidate, however, some courts refused to exercise jurisdiction on grounds of forum non conveniens where a foreign corporation was involved. Thus, in *Marion v. British Type Investors, Inc.*, the court held:

For this court to compel such winding up would amount to an interference with the management of the internal affairs of a foreign corporation, which this court should not undertake but should leave to the Delaware courts.

Most of the recent cases, however, have not been troubled with the state of incorporation. For example, in *Dallasega v. Victoria Amusement Enterprises*, all the assets of a Delaware corporation were in Pennsylvania but the Pennsylvania district court refused to liquidate because the remedy was too drastic for the situation. However, the court noted that the corporation was foreign in a technical sense only, implying that had the situation been more compelling, liquidation would have been ordered. And, more recently, in *Bellevue Gardens, Inc. v. Hill*, it was held per now Chief Justice Burger, that the court had inherent power to liquidate foreign corporations whose assets were within the District of Columbia.

2. The Propriety of Liquidation

Although the federal courts have the power to order liquidation, the propriety of exercising that power is a separate issue. Two problems presented by a liquidation order were discussed in *Los Angeles Trust Deed & Mortgage Exchange v. SEC*, in which an action was brought to restrain violations of federal securities legislation. The district court appointed a receiver with instructions to liquidate. Reversing, the Ninth Circuit noted that: (i) since the trial court found insolvency, liquidation, if appropriate, should proceed in bankruptcy; and (ii) liquidation would be an additional penalty not contemplated by Congress. These problems will be discussed in inverse order.

58. Id. at 756.
60. Id. at 698. See Williamson v. Missouri-Kansas Pipe Line Co., 56 F.2d 503 (7th Cir. 1932), where, although liquidation was not requested, the court did inquire into the internal affairs of a foreign corporation.
61. 297 F.2d 185, 187 (D.C. Cir. 1961). See also Jacobs v. Tenney, 316 F. Supp. 151, 170 (D. Del. 1970), where the court stated: "A federal court has the power to inquire into the internal affairs of a foreign corporation and the power to appoint a receiver of a foreign corporation—even when the assets of the corporation lie outside the district of the appointing court."
63. 186 F. Supp. at 890.
64. 285 F.2d at 182.
a. Liquidation—"An Additional Penalty"

The problem whether liquidation imposes an additional penalty is not unique to remedies for securities violations. In another context the Supreme Court has indicated that:

When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.65

The 1940 Act provides for liquidation in cases where there has been a failure to register.66 However, as noted previously, no similar provision is included for other violations of the 1940 Act, or for violations of the 1933 Act or the 1934 Act.67 Although it is arguable that liquidation is impliedly prohibited except for violations of the registration provisions of the 1940 Act, the full jurisdiction of the court may be exercised unless a statute expressly prohibits the exercise of inherent equity powers.68 Therefore, that liquidation may not be expressly permitted by statute should not present an obstacle to its utilization in an appropriate situation.

b. Receivership vs. Bankruptcy

Whether liquidation should be through the bankruptcy court rather than through an equity receivership presents a more serious problem.69

i. Railroad Reorganization Cases

During the late 1930's and early 1940's some decisions questioned the propriety of permitting an equity receiver to reorganize railroads since section 77 of the Bankruptcy Act 70 had been passed specifically for that purpose. In New England Coal & Coke Co. v. Rutland Railroad,71 a receiver had been appointed to reorganize a railroad.

65. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960). Even in Los Angeles Trust, the court recognized this when it stated: "[C]ongress must be taken to have acted cognizant of the historic power of equity to provide complete relief . . . ." 285 F.2d at 182.

66. 15 U.S.C. § 80a-41(e) (1970) provides in pertinent part: "In any proceeding . . . to enforce compliance with section 80a-7 of this title, the court as a court of equity . . . shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of [the company's] assets, subject to such terms and conditions as the court may prescribe."

67. See note 15 supra and accompanying text.


69. For a discussion of this issue with respect to the benefits of bankruptcy, see Ass'n of the Bar of the City of New York, Annual Report of Special Committee on Equity Receiverships for 1926-27, 321-24 (1927).


71. 143 F.2d 179 (2d Cir. 1944).
The court held that the proper tribunal would be the bankruptcy court, noting that it would frustrate the purpose of section 77 of the Bankruptcy Act to allow the equity receivership to continue. Moreover, the court was not impressed with the argument that the administration of the receivership had proceeded to such a point that it would be detrimental to all concerned to discharge the receiver.

In *Atlantic Coast Line Railroad v. St. Joe Paper Co.*, a proceeding under the Bankruptcy Act for reorganization of an insolvent railway corporation, a lower court dismissed the proceeding and ordered that the trustee turn over the corporation's property to himself as equity receiver. Holding that the property should have remained with the trustee in bankruptcy, the court of appeals said:

Since the United States District courts are courts of law (civil and criminal), equity, admiralty, and bankruptcy, it is ordinarily more logical to shift from an equity receivership to a bankruptcy proceeding than it is to reverse the movement. Courts of equity may enjoin suits at law and keep creditors at bay, but they cannot discharge debts, reduce or adjust them, or otherwise impair the obligations of contracts; but the bankruptcy courts, within the limits of the Fifth Amendment, may do any and all of these things.

The reluctance to use an equity receiver to reorganize a railroad is attributable to a desire not to frustrate the specific intent of section 77 and therefore should not serve as authority to deny liquidation through an equity receivership in a securities case. Chapter X is a general provision for all business corporations enacted before business had developed to its present stage and before man had learned the fine art of misusing securities and defrauding investors. Permitting a receiver to liquidate a non-railroad corporation in an appropriate situation would not frustrate the general purpose of Chapter X, which is to provide a ready remedy for corporate reorganizations.

### ii. Securities Cases

Completely apart from the questionable authority of the railroad reorganization cases, some federal securities cases have indicated that...
the remedy of liquidation ought to be limited. In *Lankenau v. Coggeshall & Hicks*, the SEC commenced an action to enjoin an allegedly insolvent broker from further trading and for the appointment of a receiver. The court discussed the propriety of having the receiver liquidate:

Less well established is the scope of the powers that a receiver may be granted. Thus, the power to liquidate the estate has been held in one circuit to be almost nonexistent under the analogous provisions of the Securities Act of 1933, . . . see *Los Angeles Trust Deed & Mortgage Exch. v. SEC*. . . . Similarly, in *Esbitt v. Dutch-American Mercantile Corp.*, . . . we expressed strong reservations as to the propriety of allowing a receiver to liquidate; it was permitted only because it had been virtually completed by the time the appeal had been decided. As we said in *Esbitt*, which also concerned a receiver appointed in an action under the Securities Act of 1933, receiverships ancillary to SEC actions against brokers or broker-dealers should not be continued, *in a case involving insolvency*, beyond the point necessary to get the estate into the proper forum for liquidation—the bankruptcy court.

In *Los Angeles Trust Deed & Mortgage Exchange v. SEC*, an action was brought to restrain violations of federal securities legislation and to have a receiver appointed for the corporate defendants. After holding that it had authority to appoint the receiver to take over the assets “in order that they might not be dissipated, or wasted, and so that the status quo may be maintained,” the court considered the propriety of ordering the receiver to liquidate the respective corporate defendants:

> We are referred to no authority which authorizes the court to require . . . liquidation . . . when there has been no bankruptcy proceedings. The trustee in bankruptcy is the person to liquidate, if that be necessary, under the usual and ordinary supervision of a Referee in Bankruptcy.

> The trial court has found insolvency in the bankruptcy sense, but there is no apparent reason here why the violation of the Securities Act and the Securities Exchange Act should lead to a different type of final liquidation than that which is had for the normal corporate bankrupt. In true bankruptcy, procedures are better geared for creditors and depositors to give them a day in court and protect their rights. Also, the Bankruptcy Act . . . has provisions for reorganization.

> In our judgment the receiver here should be regarded as one pendente lite. . . .

> It is appreciated that the conservator type of receivership which we have insisted upon is not well adapted to a business the very essence of which is promotion and, apparently, depends on a constant inflow of new business. However, a receiver does seem required. But, we are not yet willing to order liquidation. . . . *We do not hold that liquidation can not ever be effected. Possibly some circumstances might arise which would justify such a result. And, it could even eventuate in this case, but we hold “not now.”*

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77. 350 F.2d 61 (2d Cir. 1965).
78. Id. at 63 (emphasis supplied) (citations omitted).
80. Id. at 181.
81. Id. at 182 (emphasis supplied) (citation omitted). See also *SEC v. S & P Nat’l Corp.*, 360 F.2d 741, 750-51 (2d Cir. 1966).
While the Los Angeles Trust court stated that it had been referred to no decisions which authorized liquidation, it did not hold that the power does not exist. Nonetheless, in view of the availability of bankruptcy proceedings, the court was concerned with the propriety of exercising that power.

In Esbitt v. Dutch-American Mercantile Corp., the Second Circuit also questioned the use of an equity receivership to perform the functions of the bankruptcy court.

The record plainly indicates that the First Discount Corporation is hopelessly insolvent and is in the process (almost completed) of liquidation. We see no reason why violation of the Securities Act should result in the liquidation of an insolvent corporation via an equity receivership instead of the normal bankruptcy procedures, which are much better designed to protect the rights of interested parties. . . . Were it not for this court's decision in Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., . . . from which we are reluctant to depart without full briefing, though it may possibly be distinguishable, we should feel compelled on our own motion to direct the District Court to order the filing of a bankruptcy petition. However, the receivership has progressed almost to completion without objection and it would apparently not be in the interests of the parties to direct that further proceedings be diverted into bankruptcy channels.

However, while the Second Circuit did allow the receiver to liquidate, its language once again points out its concern with the propriety of exercising that power.

In Manhattan Rubber Manufacturing Co. v. Lucey Manufacturing Co., upon which Esbitt relied, the Second Circuit reversed an order commanding the directors of the defendant corporation to file a voluntary petition in bankruptcy, or to admit in writing the corporation's inability to pay its debts and its willingness to be adjudged a bankrupt. The court noted that unless there is a ground for an involuntary bankruptcy,

[n]o solvent corporation can be adjudged a bankrupt without its consent. It must be a voluntary act of the board of directors, or a creditor may show the commission of an act of bankruptcy.

The conflict regarding whether bankruptcy or equity receivership is the proper vehicle for liquidation has become more apparent in recent decisions involving SEC enforcement actions. In SEC v. Arkansas Loan & Thrift Corp., the SEC petitioned for an injunction against a
corporation which allegedly had used fraudulent means to sell securities. The defendant directors and officers of the corporation moved for transfer of the proceedings to bankruptcy. Rejecting the motion on the dual grounds that much work had been done by the receiver for the benefit of the creditors, and that it would not be in the interests of the creditors to divert further proceedings into bankruptcy channels, the court stated:

The Receiver has been successful in many of his efforts notwithstanding the attitude of the directors and trustees. Thirteen suits have been filed by the Receiver to foreclose mortgages and to obtain judgments against some, if not at all, of the movants. . . . Volumes could be written about the work that has been done by the Receiver for the benefit of the creditors, but space forbids the enumeration or even attempted enumeration of all the actions taken by him. To say the least, his task has not been any easy one.87

By allowing the liquidation to continue, the court impliedly recognized its power to order liquidation. The order was affirmed by the Eighth Circuit in 1970 in an opinion which recognized the power of the court to order liquidation and noted that "[w]hether it is appropriate to do so depends on the underlying circumstances."88

In Blair & Co. v. Foley,89 Blair & Co. was a brokerage house and a member of the New York Stock Exchange. Because of operating losses, Blair & Co. entered into an agreement with the Exchange pursuant to which trustees of the Exchange's Special Trust Fund would make loans and guarantees to assist Blair & Co.'s customers against loss. In return, the Exchange had the right to appoint a liquidator of its own choosing. After the trustee had been appointed by the Exchange, holders of subordinated debentures of Blair & Co. filed an involuntary petition in bankruptcy against the financially troubled corporation. On cross-motions for summary judgment the referee in bankruptcy held that the appointment of the trustee constituted the fifth act of bankruptcy.90 On appeal, the court held that the Exchange-appointed liquidator was not the type of trustee or receiver contemplated by the fifth act of bankruptcy because: (i) he was not appointed by a court, (ii) he did not have legal title to the property, and, (iii) most importantly, the appointment of the trustee did not

87. Id. at 1247.
89. 471 F.2d 178 (2d Cir. 1972), vacated and remanded, 414 U.S. 212 (1973), dismissed as moot, 495 F.2d 299 (2d Cir. 1974).
90. "Acts of bankruptcy by a person shall consist of his having . . . while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property . . . ." 11 U.S.C. § 21(a)(5) (1970).
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prevent creditors from continuing to pursue the assets as is normally the case when a court appoints a trustee or receiver.91

In SEC v. Alan F. Hughes, Inc.,92 a receiver was appointed because of the corporation’s improper maintenance of records and its questionable business practices. Under the terms of the appointment, the receiver was to serve until such time as the Securities Investor Protection Corporation could determine whether to install its own trustee.93

The order appointing the receiver authorized him to liquidate only “if necessary.”94 On appeal, the defendants attacked both the initial appointment of the receiver and the subsequent appointment of the SIPC trustee. Upholding the appointment of the receiver, the court noted that the case did not involve a situation “where the only purpose of the receivership was to bring about a quick liquidation.”95 Therefore, the court approved the appointment of the receiver on the basis that the appointment was necessary to install promptly “a responsible officer of the court who could . . . ‘ascertain the true state of affairs . . . report thereon to the court’ . . . and preserve the corporate assets”96 prior to the appointment of any SIPC trustee.

In In re Naftalin & Co.,97 an equity receiver had been appointed in an action commenced by the SEC. Thereafter, and within four months of the appointment of the receiver, creditors petitioned in bankruptcy citing Naftalin’s alleged insolvency at the time the receiver was appointed as the act of bankruptcy. Naftalin argued that once jurisdiction had been asserted by a federal court under section 27 of the 1934 Act98 the bankruptcy court’s jurisdiction was necessarily precluded. The district court dismissed the argument, holding that under section 27 jurisdiction could be in either the district court or the bankruptcy court. The court also determined that its role was to “make an adjudication of bankruptcy [in which] any concern with the SEC laws

91. 471 F.2d at 181-82. Subsequent to the Second Circuit’s decision, Blair & Co. filed under Chapter XI of the Bankruptcy Act. Thereafter, the bankruptcy court entered an order of confirmation approving Blair & Co.’s plan for handling claims. See 495 F.2d at 299. Although certiorari was originally granted, 411 U.S. 930 (1973), the Supreme Court vacated and remanded the matter to the Court of Appeals to determine whether the issue had become moot by reason of the intervening order of the bankruptcy court. 414 U.S. 212 (1973). The Second Circuit dismissed for mootness. 495 F.2d at 299.
92. 461 F.2d 974 (2d Cir. 1972).
94. 461 F.2d at 978.
95. Id. at 983.
96. Id. (quoting SEC v. S & P Nat’l Corp., 360 F.2d 741, 750-51 (2d Cir. 1966)).
seems quite incidental. The fact that there may be a parallel or substantially parallel procedure under the SEC laws is irrelevant. 9
Furthermore, the court noted that under section 2(a)(21) of the Bankruptcy Act, 100 if the appointment of the equity receiver were made within four months of the date of bankruptcy, the bankruptcy court could compel a turnover of the assets by the equity receiver. 101 The court concluded that it should refer the matter to the referee in bankruptcy for his determination regarding whether the equity receiver had been appointed at a time while Naftalin was insolvent, thus giving rise to the fifth act of bankruptcy. 102
In SEC v. Bowler, 103 the Fourth Circuit reversed the district court's approval of a plan of reorganization and the denial of the SEC's request for a receiver and ordered the appointment of a receiver. In so doing the court noted:

A proceeding under Chapter X of the Bankruptcy Act would be the most appropriate and most promising solution for the financial difficulties of the corporate defendants. Under it the rights of all parties, creditors and investors, could be adequately protected, and they would have full opportunity to participate and be heard in the proceedings. But defendants have not seen fit to initiate such a proceeding, and an involuntary petition for reorganization will not lie unless and until a receiver has been appointed or an act of bankruptcy has been committed. 104

In In re Colorado Trust Deed Funds, Inc., 105 the court affirmed the dismissal of a Chapter X proceeding where a pending receivership had resulted from an SEC action. The court determined that in view of the pending receivership, Chapter X was not necessary to protect the interests of the creditors and stockholders. 106

The above cases indicate both the conflict between equity receivership and bankruptcy and the courts' hesitancy to exercise their power to liquidate under an equity receivership. Several factors should be pointed out. The cases deal not with the power of the court but with the propriety of exercising that power. While Lankenau points to Los Angeles Trust as having "held [the power] to be almost nonexistent," 107

101. 315 F. Supp. at 468.
102. Id. at 471. See note 90 supra.
103. 427 F.2d 190 (4th Cir. 1970).
105. 311 F.2d 288 (10th Cir. 1962).
106. Id. at 290 (citing Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78 (1942)). Chapter X contains a provision which permits dismissal of a petition if "a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such prior proceeding." 11 U.S.C. § 546(a) (1970).
107. 350 F.2d at 63.
this is both a contradiction in terms and an incorrect reading of the Ninth Circuit's opinion. *Los Angeles* said only that "[w]e are referred to no authority which authorizes the court to require . . . liquidation," and later indicated that some circumstances might exist which would "justify" liquidation.\(^{108}\) Indeed in *Esbitt* the court acknowledged that power when it confined its discussion to the propriety of allowing liquidation to continue.\(^{109}\) *Lankenau* itself does no more than to state:

[R]eceiverships ancillary to SEC actions against brokers or broker-dealers *should* not be continued, *in a case involving insolvency*, beyond the point necessary to get the estate into the proper forum for liquidation—the bankruptcy court.\(^{110}\)

The courts' hesitancy is most evident when insolvency is a factor in the cases. Where the company is insolvent, by definition, creditors will not be fully satisfied and, a fortiori, neither will stockholders. Thus, in order to protect their rights and to ensure an equitable distribution, established bankruptcy procedures may be more suitable than receivership. Where however, the corporation is solvent, all of the creditors can be paid, and there is less possibility of inequity. Nevertheless, in cases such as *Arkansas Loan*,\(^{111}\) *Esbitt*,\(^{112}\) and *Colorado Trust*,\(^{113}\) where insolvency is present, the courts have allowed the receiver to continue the receivership and liquidate where much had already been accomplished for the benefit of the shareholders and creditors, and it would not have been in their interest to divert further proceedings into bankruptcy channels.\(^{114}\)

Finally, *Manhattan Rubber*,\(^{115}\) *Blair*\(^ {116}\) and *Bowler*\(^ {117}\) indicate that no corporation can be forced into bankruptcy without having committed an act of bankruptcy. Of course under *Blair*, the court appointment of a receiver for an insolvent corporation would be an act of bankruptcy.\(^ {118}\) Synthesizing the cases, a rule emerges that liquida-

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108. 285 F.2d at 182 (emphasis added).
109. 335 F.2d at 143.
110. 350 F.2d at 63 (emphasis added).
111. 294 F. Supp. at 1236.
112. 335 F.2d at 143.
113. 311 F.2d at 289.
114. In *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 n.28 (2d Cir. 1972), the court noted that a conflict had arisen between the equity receiver and a receiver appointed pursuant to the Bankruptcy Act. Although the equity receiver at first disputed a ruling by the bankruptcy court giving priority to the bankruptcy receiver, a compromise was reached between the bankruptcy receiver and the equity receiver. See *SEC v. Manor Nursing Centers, Inc.*, 71 Civ. 3627 (S.D.N.Y. Dec. 30, 1971) (stipulation).
115. 5 F.2d at 42.
116. 471 F.2d at 184.
117. 427 F.2d at 196.
118. 471 F.2d at 181-82.
tion in bankruptcy rather than through receivership should occur where (i) the corporation is insolvent at the time the receiver is appointed, (ii) an involuntary petition in bankruptcy has been filed by a creditor, or a voluntary petition has been filed by the corporation and (iii) the receivership has not advanced to the point where bankruptcy would duplicate the receiver's efforts. In the case of the appointment of a receiver of a solvent corporation, however, since the mere appointment of a receiver would not constitute an act of bankruptcy, the receiver, under appropriate circumstances, should be free to liquidate. Wherever possible, the receiver should make reference to the bankruptcy laws to insure an equitable distribution of the liquidated assets. After liquidation any monies owing to unlocated shareholders should be deposited and held in court. Unclaimed monies owing to unlocated shareholders should not be disbursed to the other shareholders since to do so would cut off their rights as shareholders, and effect a dissolution of their interests.

119. The filing of a "voluntary" petition by the receiver without consent of the board of the corporation would be improper since the receiver's very existence is involuntary. Cf. SEC v. Bowler, 427 F.2d 190, 196 (4th Cir. 1970); Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., 5 F.2d 39, 42 (2d Cir. 1925).

120. Since the Bankruptcy Act requires that an involuntary petition be filed within four months of the receiver's appointment, the probability is that within those four months the receivership would not have advanced to a point where bankruptcy would be duplicative. See 1 Collier §§ 3.506, 3.706. See also 11 U.S.C. § 546(4) (1970). For a discussion of when the appointment of a receiver constitutes an act of bankruptcy, see Annot., 14 A.L.R. Fed. 881 (1973).

121. Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co., 5 F.2d 39, 42 (2d Cir. 1925); SEC v. Fiscal Fund, Inc., 48 F. Supp. 712, 715 (D. Del. 1943); SEC v. Fleetwood Sec. Corp. of America, 64 Civ. 1379 (S.D.N.Y., filed Jan. 28, 1971). Of course, other acts of bankruptcy may have occurred which would result in the filing of an involuntary petition. See also SEC v. S & P Nat'l Corp., 285 F. Supp. 415 (S.D.N.Y. 1968), discussed at note 196 infra and accompanying text, where as a result of a vote of shareholders a plan of liquidation and dissolution of a solvent corporation was approved.


124. In SEC v. Fleetwood Sec. Corp. of America, 64 Civ. 1379 (S.D.N.Y., filed Jan. 10, 1973), shareholders who would have been cut off had their shares of the liquidation been distributed to others made application pursuant to 28 U.S.C. § 2042 (1970) after the close of the receivership and received their distribution.

125. But cf. Jacobs v. Tenney, 316 F. Supp. 151, 170 (D. Del. 1970), where it was strongly implied that the court would subordinate management's stock to publicly held stock. However, under bankruptcy, missing shareholders could be cut off. See Duebler v. Sherneth Corp., 160 F.2d 472, 473 (2d Cir. 1947); Knapp v. Detroit Leland Hotel Co., 153 F.2d 715, 717 (6th Cir. 1946); Hendrie v. Lowmaster, 152 F.2d 83, 85 (6th Cir. 1945). See also In re Koch, 116 F.2d 243 (2d Cir. 1940), cert. denied, 313 U.S. 565 (1941). Shareholders can also be cut off where a specific
3. Grounds for Liquidation

Assuming that liquidation is not "an additional penalty" and that liquidation will not be confined to bankruptcy court in all cases, the next step is to determine the circumstances which should induce a court to order liquidation through equity receivership. Since most public companies are incorporated in Delaware, reference is made to Delaware as well as to federal authority.

Broadly stated, it has been held by federal and state courts that a court may order liquidation notwithstanding solvency, when it has been proved that there has been fraud, gross mismanagement or abuse of trust by the officers or majority shareholders, abandonment of corporate functions, or where the object for which the company was formed has become impossible of attainment.

a. Delaware

While the Delaware courts do not doubt their power to appoint a liquidating receiver, they are reluctant to do so where the corporation is solvent. Accordingly, in Berwald v. Mission Development Co., the court stated:

The extreme relief of receivership to wind up a solvent going business is rarely granted. To obtain it there must be a showing of imminent danger of great loss resulting from fraud or mismanagement.

In Hall v. John S. Isaacs & Sons Farms, Inc., the court echoed this reluctance, but indicated the instances when it would act:


127. For a discussion of the conflict between federal and state court receivers, see Harkin v. Brundage, 276 U.S. 36 (1928). See also Golden v. Reiter, 60 Civ. 2124 (S.D.N.Y. 1962), holding that the appointment of a receiver by a New York state court pursuant to state law regulating securities did not interfere with federal regulation of securities or federal bankruptcy jurisdiction and that creditors of the corporate subject would not be prevented from petitioning in bankruptcy. But see SEC v. Republic Nat'l Life Ins. Co., 378 F. Supp. 430 (S.D.N.Y. July 11, 1974) holding that the appointment of a federal receiver for a Texas insurance company was unnecessary despite alleged serious violations of the securities laws because the matter had come under the control and supervision of the Insurance Commissioner of the State of Texas.


129. 40 Del. Ch. 509, 185 A.2d 480 (Sup. Ct. 1962).

130. Id. at 512, 185 A.2d at 482.

Under some circumstances courts of equity will appoint liquidating receivers for solvent corporations, but the power to do so is always exercised with great restraint and only upon a showing of gross mismanagement, positive misconduct by the corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation . . . .

As a result of these stringent requirements, there are few Delaware cases in which such relief has been granted. Indeed, one court noted that "[t]he cases directly in point are not numerous, but there are many judicial statements which recognize that rule" with respect to the court's power to liquidate.

One case in which the conduct of the chief executive and principal shareholder was such as to necessitate the appointment of a liquidating receiver is *Tansey v. Oil Producing Royalties, Inc.* There, the defendant was charged with fraud and mismanagement in making loans to the company at high interest rates and for no apparent purpose other than to obtain continuing interest payments for his personal use, in using the company's funds to make loans to others without receiving security and without the approval of the other officers and directors, and in using the company's funds for investment in other enterprises dominated by him. The purpose of the company was to purchase and retain oil royalties but with one minor exception, none had been purchased since 1930. No meetings of officers or directors had been held since 1932 and officers had been changed without election by directors. No financial statements were ever issued. The defendant also testified that he had no intention of continuing the business of the company. Deciding to appoint a liquidating receiver, the court stated:

> The cumulative effect of the foregoing facts combined with the defendant's attitude with respect to the rights of preferred stockholders, his advanced age and his "strange" ideas concerning proper corporate management as evidenced by his actions and testimony, impel me to conclude, in the exercise of my discretion, that the strong evidence necessary for the appointment of a receiver for a solvent corporation exists here in ample measure.

In *Berwald v. Mission Development Co.*, and in *Warshaw v. Calhoun*, where the plaintiffs requested the appointment of liquidating receivers because of apparent acts of mismanagement, the courts

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134. 36 Del. Ch. 472, 133 A.2d 141 (1957).
135. Id. at 480, 133 A.2d at 147.
137. 43 Del. Ch. 148, 221 A.2d 487 (Sup. Ct. 1966).
concluded that they could not interfere with the business judgment of a corporation absent a showing of bad faith or abuse of discretion. The court in Warshaw remarked that the situation was unfortunate but not illegal and that the majority had the right to continue the company in its present form. Concluding, the court stated:

There has been, therefore, no showing of imminent loss to Securities [the company] flowing from fraudulent or illegal action on the part of the majority stockholders or the directors. Such being the case, a receiver may not be appointed to liquidate Securities.138

On the other hand, in Theodora Holding Corp. v. Henderson,139 the court refused to order liquidation where acts of mismanagement had occurred but there was no insolvency. Thus, while it is evident that where conduct resembles that of the defendant in the Tansey case liquidation will be ordered, it will not be ordered where there is merely apprehension of future misconduct,140 or where, though near insolvency as a result of mismanagement it appears that no fraud was involved.

b. Federal

Although requiring the same egregious conduct on the part of management, the federal courts have shown a more lenient attitude toward a request for the appointment of a liquidating receiver than the courts of Delaware, particularly when the request is made by the SEC. In Aldred Investment Trust v. SEC,141 the court found that the trustees of a Massachusetts business trust had liquidated 30 percent of the trust assets, selling some shares below market price, in order to acquire cash for their personal acquisition of a horse racing association. For this affirmative misconduct, the court appointed a receiver with the power either to reorganize or liquidate the insolvent trust.142 After several plans of reorganization were rejected, the court ordered liquidation.143

The Aldred Investment Trust liquidation order was affirmed two years later in Bailey v. Proctor.144 During the period of the receiver-

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138. Id. at 156, 221 A.2d at 491.
140. See 16 Fletcher § 7724. In Lichens the court set forth the circumstances which would cause it to act (i.e., positive misconduct, breach of trust, etc.) adding that such relief would be granted “probably, except in rare cases, only when insolvency has resulted from such misconduct.” 28 Del. Ch. at 223, 40 A.2d at 451.
142. Id. at 733.
143. See Bailey v. Proctor, 160 F.2d 78 (1st Cir.), cert. denied, 331 U.S. 834 (1947).
144. Id. See 60 Harv. L. Rev. 816 (1947).
ship the trust had become solvent as the result of an appreciation in value of certain securities. In answer to the appellant's contention that the solvency deprived the court of jurisdiction, the court refused to rescind its order of liquidation, stating:

[A] court of equity has inherent power to appoint a receiver to liquidate a corporation or investment trust where fraud, mismanagement or abuse of trust is present whether or not insolvency is likewise present. . . .

. . . Other grounds for the appointment of a receiver having been present, the court's jurisdiction is not defeated by the supervening solvency.145

In Campbell v. Pennsylvania Industries, Inc.,146 the court added the element of "deadlock between contending factions seeking to control and manage a corporation"147 to the list of instances when a liquidating receiver may be appointed, and enumerated the other common circumstances as

abandonment of corporate functions, failure of corporate purposes, and gross fraud and mismanagement on the part of directors and controlling stockholders involving a breach on their part of the fiduciary or quasi-fiduciary duty owed to minority stockholders.148

Nevertheless, the court in Campbell refused to appoint a liquidating receiver despite the probability of an abuse of trust by the directors, because there was no present, imminent danger of serious loss to the stockholders. Adhering to the Delaware decisions on this point, it added that such danger "appears to be a necessary condition precedent to the exercise of such drastic powers."149

Ten years later in Bellevue Gardens, Inc. v. Hill,150 the appointment of a liquidating receiver was held justified where there existed a pattern of conduct by the dominant stockholders, and a disposition on their part to continue the pattern, which was seriously prejudicial to the rights and interests of the minority . . . [and where] there was no readily available market for the stock of the minority.151

Bellevue Gardens involved two close corporations with interlocking directorships. The assets of one corporation were siphoned off into the other which was owned by one of the directors, unduly depressing the market value of the minority's stock.152 Significantly, the court

145. 160 F.2d at 81-82 (citations omitted). Although the plan was modified by a subsequent proceeding, Bailey v. Proctor, 166 F.2d 392 (1st Cir. 1948), the modification took other factors into account.
147. Id. at 205.
148. Id.
149. Id. at 206 (footnote omitted).
150. 297 F.2d 185 (D.C. Cir. 1961) (Burger, J.).
151. Id. at 187.
sounded the oft-mentioned, but seldom followed, principle that a liquidating receiver may be appointed where "abuse of trust is present whether or not insolvency is likewise present."\textsuperscript{153}

An example of egregious conduct coming at the outset of the corporate venture was presented by \textit{SEC v. Arkansas Loan & Thrift Corp.},\textsuperscript{154} where the proceeds from a fraudulent sale of securities were used to benefit the management rather than the investors, contrary to representations made by management at the time of the sale. Noting that "[s]uch conduct definitely constitutes mismanagement and abuse of trust,"\textsuperscript{155} the court justified the appointment of a liquidating receiver over the insolvent corporation. Similarly, in \textit{SEC v. Gulf Intercontinental Finance Corp.},\textsuperscript{156} liquidation of related corporations was ordered where securities had been sold in violation of the federal securities acts and, \textit{inter alia}, no competent management was available to conduct the business and affairs of the corporations.\textsuperscript{157} Moreover, in \textit{SEC v. Gray Line Corp.},\textsuperscript{158} liquidation of a public corporation was ordered where, as a result of the consummation of an agreement carried out by the receiver, the corporation had no assets other than cash.\textsuperscript{159}

A possible exception to the egregious conduct requirement of the federal courts occurs in the case of an insolvent broker-dealer.\textsuperscript{160} In this situation, the federal courts have, despite the language in \textit{Lankenau v. Coggeshall & Hicks},\textsuperscript{161} referred to previously,\textsuperscript{162} required little beyond a showing of insolvency. However, since it has been held

\begin{itemize}
\item \textsuperscript{153} 297 F.2d at 187 (quoting Bailey v. Proctor, 160 F.2d 78, 81 (1st Cir.), cert. denied, 331 U.S. 834 (1947)).
\item \textsuperscript{155} Id. at 1244.
\item \textsuperscript{156} 223 F. Supp. 987 (S.D. Fla. 1963).
\item \textsuperscript{157} See also SEC v. Bennett & Co., 207 F. Supp. 919 (D.N.J. 1962). In \textit{SEC v. S & P Nat'l Corp.}, 285 F. Supp. 415 (S.D.N.Y. 1968), a plan of liquidation and dissolution was proposed to be voted upon by shareholders where there had been violations of both the 1934 Act and the 1940 Act (including failure to file required financial reports with the SEC), no shareholder meeting had been held for eleven years, the corporations were not conducting any substantial business and there was a possibility of further injury from attempts by the wrongdoers to dissolve the corporation. The Court of Appeals for the Second Circuit had previously expressed its hesitancy about permitting the receiver to liquidate. See SEC v. S & P Nat'l Corp., 360 F.2d 741, 750 (2d Cir. 1966). However, in S & P the liquidation was contingent upon shareholder approval; thus it was less objectionable.
\item \textsuperscript{159} See also SEC v. Abrams, SEC Lit. Release No. 4611 (May 22, 1970) (violations of the 1933 Act, 1934 Act and 1940 Act).
\item \textsuperscript{160} See, e.g., 3 L. Loss, Securities Regulation 1508-10 nn.105 & 106 (2d ed. 1961) [hereinafter cited as Loss] and cases cited therein.
\item \textsuperscript{161} 350 F.2d 61 (2d Cir. 1965).
\item \textsuperscript{162} See note 110 supra and accompanying text.
\end{itemize}
under the "shingle theory" that by holding itself open for business a broker-dealer impliedly warrants its solvency and because insolvency results in a violation of the SEC's net capital rule—thereby frustrating the lawful realization of a broker-dealer's corporate purpose—there is at least impliedly fraudulent conduct.

In summary, therefore, as a condition to liquidation, aside from the situation of the insolvent broker-dealer, both federal and state courts require the existence of fraud, misconduct, or abuse of trust which results in either (i) the incapacity of the corporation to carry on its business, (ii) imminent danger to the stockholders from the continuation of the corporation or (iii) abandonment of the corporate purpose. When these strict requirements are added to the other limitations upon the court's ordering liquidation by a receiver, there will be few cases in which liquidation will be an appropriate remedy.

C. Dissolution

The power of a federal court to dissolve rather than merely liquidate a state chartered corporation presents a more esoteric question. Because of the availability and effectiveness of other remedies, and perhaps because of the convoluted jurisdictional problems raised, few federal courts have ruled on the question. For this reason, the viability of dissolution as a remedy for a federal receiver remains unclear.

The threshold problem is jurisdictional. A fundamental precept of corporation law is that a corporation is an artificial being created by a state. It follows that "the state . . . which grants the corporation its franchise . . . has exclusive and supreme power to withdraw it and to forfeit the corporate charter or dissolve the corporation." Relying on

163. See, e.g., 3 Loss 1482-1500, 1508.
164. 17 C.F.R. § 240.15c3-1 (1974).
166. See generally 3 Loss 1508-14; 6 id. at 3728-34 (Supp. 1969); 60 Harv. L. Rev. 816 (1947).
167. "The formal cancellation of the franchise to operate granted to the corporation by the state is not necessary in the usual case to the carrying out of the functions of receivership by the courts." Smith v. Aeolian Co., 53 F. Supp. 636, 638 (D. Conn. 1943). A federal court may avoid the question by directing the receiver to seek dissolution in the proper state court (see Part III(C) infra) or by ordering a shareholders' meeting for the purpose of voting on a plan of reorganization which would result in dissolution. See SEC v. S & P Nat'l Corp., 273 F. Supp. 863 (S.D.N.Y. 1967); Part III(D) infra.
169. 17 Fletcher § 8579, at 931 and cases cited. Cf. Fed. R. Civ. P. 17(b), which provides in
this principle, state\textsuperscript{170} and federal courts\textsuperscript{171} have consistently refused to dissolve foreign corporations. Actions to dissolve domestic corporations have proved more troublesome.

A corollary of the principle that the corporation is created by the state is that "a court of equity has no power . . . to decree the dissolution of a domestic corporation . . . unless such extraordinary power has been conferred upon it by the terms of some statute."\textsuperscript{172}

Although this rule applies to state courts as well as to federal courts of equity,\textsuperscript{173} most states have enacted statutes which permit an action for dissolution to be maintained in state court under specified circumstances.\textsuperscript{174} A well established rule of federal practice states:

[If a state legislature, by a valid law, create a right essentially equitable in its nature, prescribing a remedy for its enforcement substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in a federal court of equity in the same form as it is in the state courts.\textsuperscript{175}]

pertinent part: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

\textsuperscript{170} The New York cases are illustrative. In Silver Lake Bank v. North, 4 Johns. Ch. 370, 373 (N.Y. 1820), the chancellor refused to consider whether a Pennsylvania corporation should forfeit its charter for acting ultra vires. Similarly in Barclay v. Talman, 4 Edw. Ch. 123 (N.Y. 1842), aff'd, 4 Edw. Ch. 131 n. (N.Y. 1843), the court denied jurisdiction to dissolve a Maryland bank which had transferred all its assets, stating: "Although a denizen of this State, this corporation is foreign and alien to our laws and over which, for the purpose of dissolving it and winding up its affairs, the courts of this State can have no jurisdiction." Id. at 130. Later cases are in accord. See, e.g., Vanderpoel v. Gorman, 140 N.Y. 563, 572, 35 N.E. 932, 936 (1894); Merrick v. Van Santvoord, 34 N.Y. 208, 222 (1866); Horton v. Thomas McNally Co., 155 App. Div. 322, 330, 140 N.Y.S. 357, 363 (2d Dep't 1913); Miller v. Barlow, 88 App. Div. 529, 533-34, 85 N.Y.S. 310, 313-14 (1st Dep't 1903), rev'd on other grounds sub nom. Miller v. Quinny, 179 N.Y. 294, 72 N.E. 116 (1904); Henry Dreyfuss & Co. v. Charles Seale & Co., 18 Misc. 551, 552, 41 N.Y.S. 875, 876 (Sup. Ct. 1896), rev'd on other grounds, 37 App. Div. 351, 55 N.Y.S. 1111 (1st Dep't 1899). For other state cases supporting this view, see Annot., 19 A.L.R.3d 1279 (1968).

\textsuperscript{171} See, e.g., Quinn v. Jaloff, 71 F.2d 707, 710-11 (9th Cir. 1934); Ward v. Foulkrod, 264 F. 627, 634 (3d Cir. 1920); Maguire v. Mortgage Co. of America, 203 F. 858, 859 (2d Cir. 1913); Republican Mt. Silver Mines, Ltd. v. Brown, 58 F. 644, 648 (8th Cir. 1893); Carson v. Allegany Window Glass Co., 189 F. 791, 798 (C.C.D. Del. 1911); Sellman v. German Union Fire Ins. Co., 184 F. 977, 978 (C.C.D. Del. 1909); Parks v. United States Bankers' Corp., 140 F. 160 (C.C.S.D.N.Y. 1905); 3 Clark § 755.

\textsuperscript{172} Republican Mt. Silver Mines, Ltd. v. Brown, 58 F. 644, 648 (8th Cir. 1893).

\textsuperscript{173} Clark characterizes this rule as "unanimous." 3 Clark § 802.1, at 1454. See cases collected id. at n.688. Recent state cases, however, have suggested that the power to dissolve may be inherent in a court of equity. See, e.g., Liebert v. Clapp, 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963); Lavant v. Kowal, 350 Mich. 232, 86 N.W.2d 336 (1957), noted in 36 Texas L. Rev. 660 (1958).


\textsuperscript{175} Land Title & Trust Co. v. Asphalt Co. of America, 127 F. 1, 18 (3d Cir. 1903); Accord, Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 500 (1923); Holland v. Challen, 110 U.S. 15, 24
Since there is no inherent federal equity power to dissolve a creature of the state, the question arises whether a particular state dissolution statute creates a substantive right which can be enforced in a federal court.

In *Conklin v. United States Shipbuilding Co.*, a federal receiver seeking to dissolve a New Jersey corporation in the federal court for the district of New Jersey invoked a statute which provided for dissolution in the discretion of the New Jersey Court of Chancery. Rejecting the argument that the statute empowered a federal equity court to dissolve, the court stated:

It does not seem to me that section 69 of the New Jersey act, which authorizes the New Jersey Court of Chancery to make a decree dissolving an insolvent corporation and declaring its charter forfeited and void, creates any right enforceable in a federal court. The corporation is the creature of the state. It derives its life from the state. It possesses the powers conferred by the state. The period of its existence is determined solely by the will of the state, and the state has conferred upon her Court of Chancery alone the power to act as its executioner.

On the other hand, in *Smith v. Aeolian Co.*, the court considered a Connecticut statute which gave to the holders of ten percent of the shares of stock in a corporation the right to wind up and dissolve the corporation. Construing the statutory designation of the Connecticut Superior Court as an effort to “[establish] the venue of such actions within the state judicial system rather than an effort to confine...”

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(1884); Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817, 828 (4th Cir.), cert. denied, 290 U.S. 675 (1933).

176. Grocery Supply, Inc. v. McKinley Park Services, Inc., 128 F. Supp. 694, 696 (D. Alas. 1955) (“But in the absence of statute, equity does not have the power to destroy that which the state has created...”). See also notes 170 & 171 supra and accompanying text.

177. 140 F. 219 (C.C.D.N.J. 1905).

178. N.J. Gen. Corp. Act of 1896, Ch. 185, § 69, [1896] Laws of N.J. 300, provided in pertinent part: “[T]he court of chancery may, in its discretion... direct the receiver to reconvey to the corporation all its property... and in every case in which the court of chancery shall not direct such reconveyance, said court may, in its discretion, make a decree dissolving the corporation and declaring its charter forfeited and void.”


181. Law of Sept. 18, 1930, § 3467, Conn. Gen. Stats. (repealed 1959), now Conn. Gen. Stats. Ann. §§ 33-383, -385 (1960). The statute provided in pertinent part: “[W]henever any good and sufficient reason exists for the dissolution of such corporation, any stockholder or stockholders owning not less than one-tenth of its capital stock may apply to the superior court in the county wherein such corporation is located for the dissolution of such corporation and the appointment of a receiver to wind up its affairs.”
such actions to the state rather than the federal courts,"182 the court distinguished earlier cases and, holding that the Connecticut statute conferred a substantive right, stated:

If the right to dissolution and distribution of the assets is substantive within the meaning of the Pusey & Jones case, and if the machinery of the court is adapted to the carrying out of the method of relief granted to shareholders through the state courts by the statute, there appears to be no compelling reason for the federal court to refuse relief in an action under the statute.183

In *Belcher v. Birmingham Trust National Bank*,184 the trustee of an inter vivos trust sought the dissolution of an Alabama corporation in federal district court. The Alabama Corporation Law,185 which was patterned after section 90 of the Model Business Corporation Act,186 permitted dissolution in a number of circumstances. Although apparently no direct attack was made on the federal court's power to implement the Alabama statute, the court opined:

[Section 21(78) [of the Alabama Corporation Law] modified and liberalized the existing law and extended the *jurisdiction* of the court to liquidate and dissolve a corporation. Guided by equitable considerations and the applicable principles of law, the ultimate decision remains one for the trial court based upon the particular facts of each case.187

Although the *Belcher* court decided not to dissolve the corporation, but instead ordered a semi-liquidation, it is clear that it believed it had the power to do so since it reserved jurisdiction to order dissolution in the event that its order of semi-liquidation could not be effectuated.188 Nevertheless, the court cited no authority for its power to order

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182. 53 F. Supp. at 639.
183. Id. In *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1923), to which the court referred, the Supreme Court distinguished between "substantive" equitable rights and those equitable rights which were merely "remedial." A remedial right conferred upon the chancellor a new power and thus could not be enforced in federal courts. Id. at 500. It has been suggested that the Erie doctrine has undermined this distinction. See, e.g., *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 825, 825 (3d Cir. 1959) ("Today ... it is likely that the Delaware statute involved in the Pusey & Jones case would be regarded as supplying a substantive right which the federal courts in a diversity action would recognize."); *Pasos v. Pan Am. Airways, Inc.*, 229 F.2d 271, 272 (2d Cir. 1956); *Lummus Co. v. Commonwealth Oil Ref. Co.*, 195 F. Supp. 47, 52 n.24 (S.D.N.Y.), vacated on other grounds, 297 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962); *Note, The Equitable Remedial Rights Doctrine: Past and Present*, 67 Harv. L. Rev. 836 (1954).
185. Ala. Code tit. 10, § 21(78) (1973 Supp.), provides that a corporation can be dissolved: "(a) In an action by a stockholder when it is established: . . . (2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or (3) That the corporate assets are being misapplied or wasted . . . ."
186. 348 F. Supp. at 147 n.19.
187. Id. at 148.
188. Id. at 153.
dissolution but merely assumed it from the breadth of the Alabama statute.

Assuming, therefore, the existence of a broad state statute which does not limit the power to issue a decree of dissolution to a particular state tribunal, and which would give the federal receiver standing to request dissolution, the power exists, at least in theory, for the issuance of a decree of dissolution by a federal court. There would appear to be at least three reasons, however, why a federal court should not order dissolution in an action commenced by the SEC absent a vote of the shareholders. First, as in Belcher, the use of liquidation, a less drastic remedy, should afford all the relief necessary. Second, at least with respect to a foreign corporation, forum non conveniens would seem to require denial of the relief. Finally, because under most state statutes dissolution is not complete until certain action is taken by a state official, the power to dissolve even a domestic corporation would be subject to veto by an official not before the court. The possibility that the state official might refuse to enter the decree raises the undesirable specter of a federal court

189. It could be argued that the receiver has the same standing as a shareholder or director. See notes 198-204 infra and accompanying text.

190. State courts typically have invoked the doctrine of forum non conveniens to avoid interfering with the internal affairs of a foreign corporation. See, e.g., Langfelder v. Universal Laboratories, Inc., 293 N.Y. 200, 56 N.E.2d 550 (1944); Cohn v. Mishkoff Costello Co., 256 N.Y. 102, 175 N.E. 529 (1931) (per curiam). In Mook v. Berger, 26 App. Div. 2d 925, 274 N.Y.S.2d 855 (1st Dep't 1966) (per curiam), the court dismissed an action where the plaintiff sought a direction that the defendant perform certain acts which would cause a foreign corporation to be dissolved, stating: “Discretion, convenience and expedience, as well as the settled policy of the State in matters of this nature which go ‘to the very heart of the corporation's affairs’ . . . and indeed would terminate its very existence, warrant rejection of the suit and dismissal of the action herein.” Id., 274 N.Y.S.2d at 856 (citation omitted).


191. E.g., N.Y. Bus. Corp. Law § 1111(d) (McKinney 1963), which provides: “The clerk of the court or such other person as the court may direct shall transmit certified copies of the judgment or final order of dissolution to the department of state and to the clerk of the county in which the office of the corporation was located at the date of the judgment or order. Upon filing by the department of state, the corporation shall be dissolved.”

192. The Attorney General of Delaware has stated that a Delaware corporation cannot be dissolved or its charter forfeited by a decree or judgment of any court except the Delaware Court of Chancery and thus that the Secretary of State should refuse to file a decree of the United States District Court for the District of Delaware which ordered dissolution. Op. [Del.] Att'y Gen. (Jan. 13, 1944).

State courts have refused to honor purported decrees of dissolution entered by foreign courts. See, e.g., Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924), in which, with respect to Russia's nationalization of the assets of a New York corporation, Chief Judge Cardozo
issuing either an ineffective remedy or a writ of mandamus to a state official. Given these problems, it would appear that dissolution without shareholder approval should seldom, if ever, be ordered by a federal court in an SEC proceeding. Liquidation, or the remedies discussed hereinafter, should provide all the relief necessary.

D. The Power to Call a Shareholders' Meeting

Federal cases indicate that the receiver of a corporation may call a meeting of shareholders. In SEC v. Fifth Avenue Coach Lines, Inc., a receiver had been appointed to manage the affairs of a company allegedly mismanaged by those formerly in control. At the time of the receiver's appointment, it was contemplated that a shareholder's meeting would be held in the near future since none had been held during the previous two years. When the receiver moved for an order authorizing the calling of the meeting, the court concluded that plans for the meeting should proceed, ordering that a large block of stock of uncertain status not be allowed to vote, and stated: "It is high time that the other stockholders of Fifth have an opportunity which they have not had in some years to elect a board of directors."

In SEC v. S & P National Corp., the SEC alleged that corporate defendants had acted as an investment company in violation of the 1940 Act and had committed various violations of the 1934 Act. During the course of the litigation, settlement discussions ensued, resulting in the proposal of a settlement plan which included, inter alia, the calling of a shareholders' meeting for the purpose of voting upon the liquidation and dissolution of the subject corporation. The court approved the plan and subsequently the shareholders voted to liquidate and dissolve.

In Prickett v. American Steel & Pump Corp., a receiver, appointed by the federal district court for a corporation which held...
approximately 57 percent of the voting stock in the defendant corporation, petitioned the Delaware Court of Chancery to convene a stockholders' meeting.\textsuperscript{199} The defendant argued that the receiver lacked standing to bring the petition because he was not a stockholder. Rejecting the argument, the court held that, as a receiver pendente lite, the plaintiff was authorized to take actions available to a stockholder of the defendant corporation.\textsuperscript{200}

By way of analogy, it would seem that if the receiver of a stockholding corporation may act as a stockholder (i.e., call a meeting), then the receiver of a corporation, serving in place of its directors, may act with the same power as the directors and officers.\textsuperscript{201} Thus, Fletcher states:

Where the receiver conducts the business of the corporation, he takes the place of the directors in the management of the corporate affairs . . . .\textsuperscript{202}

Since calling a meeting of shareholders is typically one of the duties of the directors of a corporation,\textsuperscript{203} the receiver may call such a meeting.

The calling of a shareholders' meeting is clearly the remedy most consistent with the policy of the federal securities laws in favoring the democratization of public companies. The receiver is neither elected by nor directly accountable to the shareholders. The mere circumstance that a corporation is in receivership, rather than subject to a board, is no justification for subjecting the shareholder to further injury by denying him a voice on major corporate policy decisions which directly affect him. Whether the appropriate solution be liquidation, dissolution or the commencement of a new life through the election of a new board of directors,\textsuperscript{204} a shareholders' meeting, unless unobtainable or impractical because of limitations of time or amount of funds available for distribution,\textsuperscript{205} should be the favored forum for determining the disposition of the corporate subject.

\textsuperscript{199} Del. Code Ann. tit. 8, § 211 (Supp. 1968), provides in part: "If there be a failure to hold the annual meeting for a period of thirty days after the date designated therefor, or if no date has been designated, for a period of thirteen months after the organization of the corporation or after its last annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder."

\textsuperscript{200} 251 A.2d at 578.

\textsuperscript{201} See Landy v. FDIC, 486 F.2d 139, 147 (3d Cir. 1973), cert. denied, 94 S. Ct. 1979 (1974). Indeed, the receiver is in control of the corporation to the extent that before a derivative suit may be commenced, a demand must be made on the receiver, instead of the board of directors, to commence the action. Id. See Fed. R. Civ. P. 23.1.

\textsuperscript{202} 16 Fletcher § 7813, at 412 (footnote omitted).


\textsuperscript{204} The receiver, acting in the place of management, should make appropriate recommendations at the meeting.

\textsuperscript{205} See, e.g., SEC v. Fleetwood Sec. Corp. of America, 64 Civ. 1379 (S.D.N.Y., filed Oct. 19, 1972).
E. The Power of the Court to Order the Receiver to Proceed to the State of Incorporation

Because of the limitations on liquidation and dissolution in the federal courts and because the calling of a shareholders' meeting may be either difficult or inappropriate, it is important to consider the possibility of sending the receiver to the state of incorporation to take appropriate action. In the case of a domestic corporation, no serious question arises since the district court has jurisdiction over the receiver when he acts within the confines of the district. However, where a foreign corporation is involved, questions arise as to the receiver's "extraterritorial" power—the power to go outside the district of appointment.

Although receivers fall into several categories, the two principal types are (i) statutory receivers and (ii) equity receivers. A statutory receiver is one in whom the assets of the corpus are vested pursuant to a statute which calls for the receiver's appointment or pursuant to a conveyance. An equity receiver (typically appointed in SEC actions) is one appointed under the inherent equity power of a court rather than pursuant to statute.

The right of an equity receiver to sue or proceed extraterritorially, was first discussed in the landmark case of Booth v. Clark, where it was held that a foreign equity receiver had no extraterritorial power to sue in his own name in a federal court. While Booth involved a receiver appointed by a foreign state, the decision has also been applied to federally appointed receivers. Simply stated, the traditional doctrine is as follows:

[An ordinary chancery receiver is a mere arm of the court appointing him ... and is clothed with no power to exercise his official duties in other jurisdictions.]

In other words, the power of a receiver is viewed as coextensive with

206. 1 Clark § 16.
207. Id. § 12.
208. See generally Laughlin, The Extraterritorial Powers of Receivers, 45 Harv. L. Rev. 429 (1932); Sabel, Suits by Foreign Receivers, 19 Cornell L.Q. 442 (1934); Comment, The Right of a Foreign Receiver to Sue in a Federal Court, 7 U. Pitt. L. Rev. 211 (1941).
209. 58 U.S. (17 How.) 321 (1854).
211. E.g., Great W. Mining & Mfg. Co. v. Harris, 198 U.S. 561 (1905); Collins v. McDonald, 98 F.2d 258 (D.C. Cir. 1938); Fowler v. Osgood, 141 F. 20 (8th Cir. 1905).
that of the jurisdiction of the appointing court.\textsuperscript{213} The court cannot grant to a receiver that which it does not itself have.\textsuperscript{214}

Because of the problems created in the federal courts by \textit{Booth v. Clark},\textsuperscript{215} Congress gave receivers control over land or other property lying within the same circuit as that of the district court.\textsuperscript{216} Subsequently, legislation\textsuperscript{217} was enacted which vested the receiver with "complete jurisdiction and control of all [real, personal or mixed] property [in the other districts] with the right to take possession thereof"\textsuperscript{218} upon his filing of the complaint and order of appointment in the other district courts. Perhaps most importantly for the purpose of this Article, the section also gave the receiver capacity to sue in any district without ancillary appointment. Thus, at present, a receiver appointed by a federal court can, either in aid of an order of liquida-

\textsuperscript{213} It is generally accepted that an equity receiver has no right to sue in a state court other than the appointing court. See, e.g., \textit{Wright v. Phillips}, 60 Cal. App. 578, 213 P. 288 (2d Dist. 1923); \textit{Howarth v. Angle}, 162 N.Y. 179, 56 N.E. 489 (1900); \textit{State ex rel. Haavind v. Crabelle}, 114 Ohio 504, 151 N.E. 755 (1926); \textit{Booker v. Ennis}, 86 Pa. Super. 145 (1926); \textit{Hardee v. Wilson}, 129 Tenn. 511, 167 S.W. 475 (1914).

Some states, however, permit suit as a matter of comity. E.g., \textit{Van Kempen v. Latham}, 195 N.C. 389, 394, 142 S.E. 322, 324 (1928): "We must be friendly with other states and nations if we want other states and nations to be friendly with us." Other state authorities allowing suits by foreign receivers are as follows: \textit{Wright v. Phillips}, 60 Cal. App. 578, 213 P. 288 (2d Dist. 1923); \textit{Hallam v. Ashford}, 24 Ky. L. Rptr. 870, 70 S.W. 197 (Ct. App. 1902); \textit{Stevens v. Tilden}, 122 Minn. 250, 142 N.W. 315 (1913); \textit{Shipman v. Treadwell}, 200 N.Y. 472, 93 N.E. 1104 (1911); \textit{Hazlett v. Woodhead}, 28 R.I. 452, 67 A. 736 (1907); \textit{Hardee v. Wilson}, 129 Tenn. 511, 167 S.W. 475 (1914). See also \textit{Cohen v. La Vin}, 210 F.2d 550 (2d Cir. 1954). Until recently, Delaware was not among them and denied authority to sue even as a matter of comity. \textit{Stockbridge v. Beckwith}, 6 Del. Ch. 72, 33 A. 620 (1887).

Since Stockbridge is an 1887 case and the trend in the states has been toward comity, it is possible that it may no longer accurately represent the law of Delaware. \textit{See Prickett v. American Steel & Pump Corp.}, 251 A.2d 576 (Del. Ch. 1969), where the court held that a receiver appointed by the United States District Court for the District of Delaware had authority to proceed with an action requesting the calling of a shareholders' meeting for a Delaware corporation. See text accompanying notes 198-200 supra. Moreover, if there is a statute which vests title in the receiver, then a foreign receiver may sue in Delaware. \textit{Drug, Inc. v. Hunt}, 35 Del. 339, 352, 168 A. 87, 92 (1933).

\textsuperscript{214} \textit{See}, e.g., \textit{Grant v. Leach & Co.}, 280 U.S. 351, 361-62, modified, 281 U.S. 689 (1930); \textit{Hale v. Allinson}, 188 U.S. 56, 68 (1903); \textit{First Nat'l Bank v. Robinson}, 107 F.2d 50, 54 (10th Cir. 1939); \textit{Collins v. McDonald}, 98 F.2d 258, 259 (D.C. Cir. 1938). The court could, of course, order the parties before it to perform certain acts outside the jurisdiction since the parties are subject to the contempt power of the court. See, e.g., \textit{Pouliot v. West India Fruit Co.}, 283 Mass. 182, 186 N.E. 52 (1933); 1 Clark §§ 71(b), 259(a).

\textsuperscript{215} 58 U.S. (17 How.) 321 (1854); see note 209 supra and accompanying text.

\textsuperscript{216} Act of March 3, 1911, ch. 231, § 56, 36 Stat. 1102.


\textsuperscript{218} Id.
tion or any other order, take control of property anywhere in the United States and sue in any federal court.219

In Prickett v. American Steel & Pump Corp.,220 a receiver appointed by a federal court was granted standing to commence an action in the state court. The receiver sought pursuant to Delaware law to enlist the aid of the chancery court to call a stockholders' meeting. Although the propriety of the receiver's appointment had not yet been finally decided in the federal court, the chancery court nevertheless granted the requested relief and called the shareholders' meeting. Citing the federal statute221 and the broad powers granted to the receiver by the federal district court, the court stated that "there can be no question about his authority to proceed with this action."222

Since the receiver is authorized by statute223 to proceed in any district in which he has made the required filings and in effect the statute turns the equity receiver into a statutory receiver,224 it would appear that the limitations on a federal court's ordering dissolution and liquidation can be overcome by having the receiver commence an action in the state of incorporation for relief under the corporation statute of the state.225 Any objection to the propriety of the relief requested can then be litigated in the most proper forum. When the receiver's power to sue in the state of incorporation is combined with his power to convene a shareholders' meeting, the limitations discussed previously with respect to liquidation and dissolution become of significance only in the situations where a shareholders' meeting would be either unobtainable or inappropriate.226

IV. CONCLUSION

This Article has attempted to review the relevant authorities with respect to the disposition of corporations in receivership. Although not

220. 251 A.2d 576 (Del. Ch. 1969).
221. See text accompanying notes 216-19 supra.
222. 251 A.2d at 578. Although the receiver had been appointed for a corporation which was a stockholder of the defendant corporation, rather than over the defendant corporation itself, that distinction is of no significance.
224. Compare Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 A. 620 (1887), denying comity to a foreign chancery receiver, with Drug, Inc. v. Hunt, 35 Del. 339, 351-52, 168 A. 87, 92 (1933), holding that a foreign vested receiver may sue in Delaware.
225. If the subject corporation were foreign, the receiver would first have to file pursuant to 28 U.S.C. § 754 (1970) in the federal district court of the state of incorporation.
226. As, for example, where the cost of calling and having the meeting would be overly expensive as compared with the remaining assets of the corporation. See, e.g., SEC v. Fleetwood Sec. Corp. of America, 64 Civ. 1379 (S.D.N.Y., filed Oct. 19, 1972).
expressly discussed, one possibility upon termination of the receivership might be the resumption by the corporation of its business through the election of a new board of directors.\textsuperscript{227} The failure to discuss that possibility is not intended as a deprecation of receivers or receiverships in the federal courts or of the federal judges who administer them. Rather, it is a statement of probability. Since no receiver can be appointed before a minimum level of misconduct or mismanagement by those in control of the corporation has been surpassed, most corporations which become the subject of federal court receiverships have little likelihood of future well-being.

If there is any rule which can be gleaned from the authorities discussed, it is that federal courts should move cautiously before taking action which would have the effect, whether pragmatically or legally, of ending the corporation's existence without shareholder approval. Thus, wherever possible, the determination as to the plight of the corporate subject should be made by the public investors. Of course, there may be situations where the size of the corporate estate might make it meaningless to call a shareholders' meeting to determine the path to be chosen. However, since the receivership exists essentially for the benefit of the public investors, they should be consulted to determine whether they wish to continue their investment, or whatever is left of it, in the corporate vehicle or whether they wish the return of their funds. In those situations where the value of the receivership assets makes it inappropriate to call a meeting of shareholders, the views of the receiver and the SEC, absent compelling evidence to the contrary, should be followed. But, in all situations, no matter what assets remain in the receivership, the court, the SEC, and the receiver should recognize that the equity receivership is a flexible tool which should be applied in each case for the greatest good without stringent and technical obedience to procedural niceties.\textsuperscript{228} If the receivership is utilized with such flexibility, its exhumation from the chancellor's crypt will have been for the public good.*


\textsuperscript{228} Thus, for example, the SEC should not require a formal proxy statement for the calling of a shareholders' meeting or an elaborate registration statement for a corporate transaction which would otherwise require such a document. The advantage of an equity receivership over bankruptcy is demonstrated in SEC v. W. L. Moody & Co., 374 F. Supp. 465 (S.D. Tex. 1974).