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Corporations - Ex Parte Appointment of Temporary Receiver - Receivership

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It is submitted that the court should apply the rules of conventional servitudes to building restrictions rather than import a body of law which is regarded as confused even against its natural common law background.[24] Very little hardship would be occasioned by rejecting the rules of equitable restrictions running with the land. Act 326 of 1938[25] has reduced prescription against contractual building restrictions to two years; thereby giving our rules of servitudes a commercial practicability which they lacked at the time *Hill v. Ross*[26] was decided. In addition, instruments containing restrictions in Louisiana are usually drawn up by lawyers who are familiar with the rules of civil law property. If the parties wish to include additional methods of extinction of the restrictions, there is no legal impediment.[27]

R.B.L.

CORPORATIONS—EX PARTE APPOINTMENT OF TEMPORARY RECEIVER—RECEIVERSHIP—In a stockholder's action for the appointment of a receiver of a defunct corporation the trial court appointed a temporary receiver without complying with the necessary formalities set forth in the Louisiana general receivership statute, Act 159 of 1898, as to notice, hearing, and recordation of the order appointing the receiver for ten days on the receivership order book. The appellant questioned the authority of the court to make such an ex parte appointment. The court held that since Louisiana courts had appointed receivers through the exercise of their inherent power prior to any statutory control, and there was no express provision in the general receivership statute forbidding the appointment of a temporary receiver, the courts retained the power to appoint an ex parte temporary receiver subsequent to the passage of the statute. *Foster v. Koretke Brass & Manufacturing Company, Limited*, 3 So. (2d) 668 (La. 1941).

(1938) 1 LOUISIANA LAW REVIEW 80, 112-114. On the other hand the extinction by tacit renunciation has remained a narrow concept due to the requirement of express verbal or written permission to build works presupposing annihilation of the servitudes. Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858).

24. For an excellent enumeration and analysis of the many conflicting theories of equitable restrictions see Clark, op. cit. supra note 4, at 148-165.

25. Dart's Stats. (1939) §§ 2062.3-2062.4.

26. 166 La. 581, 117 So. 725 (1928).

27. Second paragraph of Art. 709, La. Civil Code of 1870: "The use and extent of servitudes thus established are regulated by the title by which they are granted, and if there be no title, by the following rules."

The power to appoint a receiver for a corporation has been recognized in Louisiana since 1848. In the leading case of *Brown v. Union Insurance Company*[1] the court referred to the exercise of this power by the English chancery courts[2] and stated that in a proper case the courts of Louisiana could appoint receivers, through the exercise of the powers given them by Article 21 of the Civil Code. During the forty years following this case there were numerous instances of the exercise of such authority by Louisiana courts without any statutory authority, as warranted by the exigencies of the case.[3] It was recognized during this early period, however, that the courts had no authority to appoint a receiver ex parte.[4]

In 1898 the legislature passed Act 159 which authorized the court to appoint receivers in various circumstances, expressly prescribing the procedure to be followed.[5] Prior to the principal case the supreme court had consistently refused to uphold *any* ex parte appointment of receivers.[6] In the instant case, however,

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1. 3 La. Ann. 177, 182 (1848). By way of dictum the court said: "We would, on a proper case being made out, feel ourselves authorized to order the appointment of a manager in the interim for the purpose of winding up and putting an end to the concern. This appointment would in no wise differ from that of a receiver, which our courts frequently make. . . ."

2. See Carlan v. Drury, 1 Ves. & B. 154, 35 Eng. Reprint 61 (1812).

3. In re Moss Cigar Co., Ltd., 50 La. Ann. 789, 793-794, 23 So. 544, 546 (1898), the court said: "Our courts, without any direct statutory provision on the subject, have, in aid of their jurisdiction, and as warranted by the exigencies of cases, adopted and established the practice of appointing receivers." See In the Matter of Mechanics' Society, 31 La. Ann. 627 (1879); Gridley v. Connor, 2 La. Ann. 87 (1847) (partnership); Stark v. Burke, 5 La. Ann. 740 (1850); Pratt v. McHatton, 11 La. Ann. 260 (1856) (partnership); McNair v. Gourrier, 40 La. Ann. 339, 4 So. 310 (1888) (partnership); In re Liquidation of Mitchell-Borne Constr. Co., 145 La. 379, 82 So. 377 (1919) (partnership).

4. Turgeau v. Brady, 24 La. Ann. 348 (1874); State ex rel. Brittin v. New Orleans, 43 La. Ann. 829, 9 So. 643 (1891). In Mestier v. A. Chevallier Pavement Co., Ltd., 51 La. Ann. 142, 145, 24 So. 799, 800 (1898), the court stated: " 'No principle of law is better settled than that courts have no power to appoint receivers ex parte without notice or hearing of the party in interest, and unless a basis for the appointment is alleged and proved' . . . . [W]e are aware of no authority for the appointing of a receiver ex parte in a pending suit against a corporation. . . ."

5. La. Act 159 of 1898, §§ 2, 6, 8, 10 [Dart's Stats. (1939) §§ 1210, 1214, 1216, 1218].

6. The court stated in State ex rel. Dauphin v. Ellis, 108 La. 521, 536-537, 32 So. 335, 342 (1902): "Upon the question of the necessity for affording a hearing to the parties interested before appointing a receiver in any case the decisions of this court have been uniform and emphatic. 'Courts have no power to appoint a receiver ex parte, without notice to, or hearing of, the parties in interest.' " Accord: Hutchinson v. Rice, 109 La. 29, 33 So. 57 (1902). See Uncle Sam Planting & Manufacturing Co. v. Reynaud, 157 La. 955, 957, 103 So. 276, 277 (1925). But see In re F. H. Koretke Brass & Mfg. Co., Ltd., 195 La. 415, 425, 196 So. 917, 920 (1940): "These ex parte orders should not

the court draws a distinction between permanent and temporary receivers, and concludes that the statute applies only to the former.[7] But is this conclusion correct? The statute, in terms, makes no distinction between permanent and temporary receivers. The broad terminology used in the title ("to authorize and *regulate* the practice of appointing receivers . . .") and the use of such phraseology in Act 26 of 1900, amending Act 159 of 1898, which specifically applies to the defunct corporation in this case ("In *all* cases where *any* corporation . . .") indicates that it was the design of the statute to cover the entire field of appointing receivers for corporations. This interpretation is supported by other considerations. The act carefully enumerates the grounds on which a person may secure the appointment of a receiver.[8] It provides, moreover, for extreme situations in which the judge may exercise his discretion and compel an immediate hearing in a summary manner in term time or vacation,[9] or for an injunction to keep affairs of the corporation in statu quo pending the hearing and determination of the application,[10] or for discretionary issuance of an order by the court before notice has been spread on the receivership order book for ten days if necessity warrants such action.[11] Finally, there is the additional fact that this act provides for operating as well as liquidating receivers.[12] The fact, moreover, that in *all* previous cases the court has insisted that these statutory procedural requirements be met indicates strongly that the court has interpreted this statute as being comprehensive.[13]

It is conceded that the courts could exercise this power of appointing receivers, in the absence of statutory regulation, in reliance upon Article 21 of the Civil Code and Article 130 of the Code of Practice. But after statutory regulation of the subject—

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have been signed until ten days after the entry in the receivership order book. . . . These ex parte orders are therefore clearly illegal and invalid."

7. See Foster v. F. H. Koretke Brass & Mfg. Co., Ltd., 3 So. (2d) 668, 671 (La. 1941).

8. La. Act 159 of 1898, § 1 [Dart's Stats. (1939) § 1209].

9. Id. at § 2 [Dart's Stats. (1939) § 1210].

10. Id. at § 3 [Dart's Stats. (1939) § 1211].

11. Id. at § 8 [Dart's Stats. (1939) § 1216].

12. Id. at § 1 [Dart's Stats. (1939) § 1209].

13. "Act 159 of 1898 . . . specifically regulates the appointment of receivers for corporations. . . . 'Where the legislature has prescribed the cases in which a receiver may be appointed and other provisional remedies granted, the specification of the cases in which a receiver may be had excludes every other case, and prohibits the appointment except as authorized.'" State ex rel. Dauphin v. Ellis, 108 La. 521, 537, 32 So. 335, 342 (1902). See Cappel v. Liberty Lbr. Yard, Inc., 169 La. 356, 360, 125 So. 270, 271-272 (1929).

if the act is designed to be comprehensive—it follows that, regardless of what the previous powers of equity may have been, the statute must be followed,[14] and the broad scope of its operation cannot be restricted by any distinction which may be drawn between temporary and permanent receivers.

The distinction between temporary and permanent receivers is readily made in the exercise of equity jurisdiction in other states,[15] but its application marks a new addition to the vocabulary of the legal practitioner in Louisiana.

It is conceded that the courts of the state should have the power of appointing temporary receivers, ex parte if need be, when an immediate appointment is necessary, but, for the reasons already stated, the subject is regarded as a matter for legislative consideration. Doubtless the time is ripe for a thorough reexamination of the state's receivership legislation with a view to such revision as the times require.

R. O. R.

PRESCRIPTION AGAINST THE STATE—ACT 310 OF 1936—In 1903 Emmett Alpha forfeited a tract of land to the state for taxes. In 1938 he redeemed the land and quit-claimed it to the plaintiffs. Alleging that the defendant claimed ownership of the property, the plaintiffs brought this action to try title. The defense relied upon pleas of ten and thirty years prescription, no mention being made of Act 310 of 1936.[1] The defendant alleged possession in his

14. In determining the question of equity, we do not consider that the court has any right to substitute its personal judgment as to what is equitable when positive law has spoken and told the parties what their legal rights are." See Bryson v. Lee, 181 La. 1019, 1024, 160 So. 797, 798 (1935). See Federal Land Bank v. Rester, 164 La. 926, 931, 114 So. 839, 840 (1927).

15. The power to appoint a receiver pendente lite is incidental to the jurisdiction of a court of equity, but should be exercised only in case of necessity. See National Guarantee Credit Corp. v. Worth & Co., Inc., 274 Pa. 148, 117 Atl. 914 (1922). Accord: Herring v. New York, L. E. & R. R., 105 N.Y. 340, 12 N.E. 763 (1887); Decker v. Gardner, 124 N.Y. 334, 26 N.E. 814 (1891); Gallagher v. Asphalt Co. of America, 67 N.J. Eq. 441, 58 Atl. 403 (1904). High, Receivers (4 ed. 1910) 128, § 111; Tardy, Smith on Receivers (2 ed. 1920) 14, § 3; 53 C.J. (1931) "Receivers," 17-18, 19-20, §§ 1, 3.

1. Dart's Stats. (1939) 8455.2: "In all cases where immovable property has been, or may be, adjudicated or forfeited to the state of Louisiana for nonpayment of taxes and has been or is subsequently redeemed by a purchaser in good faith and by just title, or by the heirs or assigns of such purchaser, prescription shall not be interrupted or suspended during the period that title to such immovable property is vested in the state of Louisiana, provided that this act shall not apply to or affect the three-year prescription provided