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Federal Procedure -- Jurisdiction of Federal Courts -- Appointment of Ancillary Receivers

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It is to be noted, however, that such an exception, if there be one, should be strictly limited to hospital records. The necessity in that case, *i.e.* the multiplicity of entrants, is not present in the case of the usual physician's office records, notations of physicians examining applicants for employment and the like. Nevertheless, in such cases the other principles mentioned above are applicable,[13] and the evidence in the present case would seem to be admissible as an entry in the regular course of business.[14]

JOEL B. ADAMS.

Federal Procedure—Jurisdiction of Federal Courts—Appointment of Ancillary Receivers.

There is a firmly established rule that a federal court has jurisdiction of an ancillary proceeding, regardless of the citizenship of the parties, the amount in controversy, or any other factor that ordinarily would determine jurisdiction, provided the court had jurisdiction of the principal suit.[1] In the case of *Mitchell v. Maurer*,[2] the Supreme Court of the United States raised two questions regarding the application of the rule, which, it stated, did not appear to have been decided by that Court, and which it declined to decide, as unnecessary to the disposition of the problem presented. First—may the rule ever be applied to a proceeding brought in the federal court of another district? Secondly—if so, is a

Co., 60 S. W. (2d) 730 (Mo. App. 1933); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1930).

[13] Douler v. Prudential Ins. Co. of America, 143 App. Div. 537, 128 N. Y. S. 396 (1911) (records of doctors and nurses admitted as past recorded recollection); Adler v. New York Life Ins. Co., 33 F. (2d) 827 (C. C. A. 8th, 1929) (office record of deceased physician admitted as regular entry); New York Life Ins. Co. v. Bullock, 59 F. (2d) 747 (S. D. Fla. 1932) (physician's medical history card admitted as regular entry); Royal Indemnity Co. v. Industrial Commission, 88 Colo. 113, 293 Pac. 342 (1930) (examining physician's report made in connection with laborer's application for employment admitted as regular entry); Leburn v. Boston & M. R. R., 83 N. H. 293, 142 Atl. 128 (1928) (report of employer's physician who examined plaintiff after former injury admissible as regular entry); *cf.* Simmons v. Means, 8 Smedes & M. 397 (Miss. 1847) (physician's account book admitted); Clark v. Smith, 46 Barb. 30 (N. Y. 1866) (physician's books admissible to show number of calls made by him). A collection of cases bearing on the admissibility of physician's records to show birth, death, etc. will be found in Note L. R. A. 1915 F. 803. There seems to be a split of authority over the admissibility of physicians' death certificates. Cases on this point are collected in Note (1922) 17 A. L. R. 359.

[14] It is not clear, however, upon what principle the evidence was admitted. The following is quoted from the opinion: "The doctor's notations on the card were admissible as a part of the *res gestae* of the plaintiff's application for work. They were shown to have been made under circumstances making it reasonably apparent that they truly represented the facts they purported to set down. They are in effect declarations by the plaintiff himself that he was fit and able to work." 73 F. (2d) at 473.

[1] 2 HUGHES, FEDERAL PROCEDURE (1931) §1192.

[2] 55 Sup. Ct. 162 (1934).

proceeding for the appointment of ancillary receivers in another federal district an ancillary suit within the meaning of the rule?

In the principal case, primary receivers appointed by a state court had petitioned for the appointment of ancillary receivers in the federal district court in another state. The Circuit Court of Appeals[3] had affirmed the appointment made by the District Court, remarking[4] that "an ancillary suit in a federal court does not depend on diverse citizenship". The Supreme Court reversed the decree, on the ground that the requisite diversity of citizenship was lacking,[5] and stated that the position of the Circuit Court was unsound, in view of the fact that the primary appointment was made by a state court. The opinion, however, expressly recognizes the rule as applicable to proceedings in intervention, and to independent suits which are ancillary to an original suit in the same court.[6]

It is to be noted that the questions raised refer to *federal,* not *equity* jurisdiction,[7] and are not coincidental with the question of the power of a receiver to sue out of the district of his appointment.[8]

Statements such as that of the Circuit Court of Appeals apparently find their origin in authority in a *dictum* of the Circuit Court of Appeals in *Bluefields S. S. Co. v. Steele.*[9] That *dictum* clearly answers both questions raised by the Supreme Court in the principal case in the affirmative. The Court said, "While an ancillary proceeding of the kind here considered [a proceeding for the appointment of an ancillary receiver] will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court." It will be noticed, however, that the Court, during the course of its discussion of this point, cited but one case[10]—one which does not support its proposition.

[3] 69 F. (2d) 233 (C. C. A. 9th, 1934). [4] *Id.* at 238.

[5] One of the three primary receivers was a citizen of Delaware, as was the defendant insurance company. This point was apparently relied upon at no stage of the proceedings, but was looked to by the Supreme Court on its own motion.

[6] 55 Sup. Ct. 162, 164 (1934), citing Cincinnati, etc., R. Co. v. Indianapolis, etc., Ry. Co., 270 U. S. 107, 46 Sup. Ct. 221, 70 L. ed. 490 (1926), and White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. ed. 67 (1895).

[7] For cases illustrating aspects of the latter problem, see, for example, Bluefields S. S. Co. v. Steele, 184 Fed. 584 (C. C. A. 3d, 1911); Walker v. U. S. Light & Heating Co., 220 Fed. 393 (S. D. N. Y., 1915); Trustees System Co. of Pa. v. Payne, 65 F. (2d) 103 (C. C. A. 3d, 1933).

[8] See Note (1906) 4 L. R. A. (N. S.) 824; HIGH, RECEIVERS (4th ed. 1910) 271-85.

[9] 184 Fed. 584, 587 (C. C. A. 3d, 1911).

[10] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458 (1900).

On the other side is the decision in *Winter v. Swinburne*.[11] It was there held that a creditors' bill could not be prosecuted in the circuit court in aid of an execution on a money decree recovered in the district court (in the same district) in admiralty, or for enforcement or collection of such a decree, all parties being citizens of the same state. The Court based its conclusion upon the premise that the rule—that "where a bill filed on the equity side of the court is not an original suit, but ancillary and dependent, jurisdiction is maintained without regard to the citizenship of the parties"—applied only where the ancillary bill was filed in the same court. The cases cited by the Court were illustrative of the rule as applied to proceedings which were in fact in the same court, but none of them *required* that the proceedings all be in the same court. The opinion expressly admits that "direct adjudication of the precise question involved is wanting."[12] Since the facts are so clearly distinguishable, we are again left with the bare, abstract proposition that the first question should be answered in the negative.

With such a paucity of judicial expression upon the problem, it remains one requiring all the considerations of logic and policy attending one of first impression. As to the second question, it is difficult to perceive why, if suits by and against a receiver, as such, in the court of his appointment are ancillary,[13] such suits in the court of another district would be any the less so.[14] Further, if, in order to maintain such suits in a foreign district, ancillary appointment is necessary,[15] why is not the petition for such appointment clearly ancillary to the purpose of the principal action? To hold otherwise would be to put a new connotation upon the word itself.[16] To that extent, the Court in the *Bluefields* Case would seem to be upon safe ground.

If the second question is to be answered in the affirmative, no very cogent arguments present themselves for answering the first otherwise, especially where the question involves courts of the same sovereign. An action, having the requisite elements to give a federal district court jurisdiction, can be brought as well in one district as in another, provided, of course, that the improper venue is waived.[17] If that is so, either of—say—two district courts could take jurisdiction of the principal suit, and the one having jurisdiction of the principal suit would

[11] 8 Fed. 49 (C. C. E. D. Wis. 1881).
[12] *Id.* at 52.
[13] HIGH, RECEIVERS (4th ed. 1910) §§60a-b; 2 HUGHES, FEDERAL PROCEDURE (1931) §§1205, 1208.
[14] See Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 917 (C. C. Me. 1903).
[15] 2 HUGHES, FEDERAL PROCEDURE (1931) §1213.
[16] BLACK, LAW DICTIONARY (3d ed. 1933).
[17] A well-established principle, impliedly recognized by the Court in the principal case, 55 Sup. Ct. 162, 165 (1934). Also, 3 HUGHES, FEDERAL PROCEDURE (1931) §2223.

then have jurisdiction also of the ancillary proceedings, regardless of the usual requisites for federal jurisdiction in the latter. In view of that situation, would it not be a bit incongruous to hold that, if one district court had jurisdiction of the principal suit, the other could not rely upon *that* jurisdiction to sustain the ancillary proceedings brought before it? Policy would seem to demand that the district courts stand in readiness to aid one another without undue formality, and that, as long as the system of equity receiverships exists, it be given every assistance to the speedy and efficient accomplishment of its purpose.[18]

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Mortgages—Contract of Assumption—Consideration.

A certain E. C. Vest was heavily indebted to various persons. Some of these creditors held first and second mortgages on two lots owned by him; the rest were unsecured. In order to put this property beyond the reach of the latter group, he conveyed it to his mother-in-law, Mrs. Booth; and, apparently for the purpose of creating the appearance of a sufficient consideration, she assumed the secured debts. She then reconveyed by warranty deed to her daughter, Mrs. Vest. The property having been sold to satisfy a prior lien, the second mortgagee makes claim in the present suit against Mrs. Booth's estate on the agreement of assumption.[1] The West Virginia court *held,* the promise was without consideration and hence unenforceable.[2]

Under this view of the transaction, Mrs. Booth was only a conduit,[3] and the conveyance to her was merely a sham device to get title

[18] Compare §56 of the Judicial Code, 28 U. S. C. A. §117 (1927), and REPORT PAMPHLET No. 1: THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1926-27), ANNUAL REPORT OF SPECIAL COMMITTEE ON EQUITY RECEIVERSHIP, 19-31.

[1] The suit was originally brought in chancery by the receiver of a bank, which held an unsecured claim reduced to judgment against Mrs. Booth, to set aside certain conveyances made by her to her children and children-in-law on the grounds that they were voluntary and made without consideration and to defraud and hinder creditors. Pending this suit, Mrs. Booth died. Thereupon, her administrator was substituted, and he made all of her heirs and all persons making claims against the estate parties defendant. The appellee, a second mortgagee of the lots, was made a party as one of the latter group. She answered by setting up the claim against the estate in her cross-bill. Brief of Appellee in the Supreme Court of Appeals of West Virginia in the case of Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935) pages 2-5.

[2] Lawhead v. Booth, 177 S. E. 283 (W. Va. 1935). The sole authority cited by the court was 1 WILLISTON, CONTRACTS (1920) §394, which says that a promisor of a third party beneficiary contract may set up want of consideration as a defense to a suit by the beneficiary.

[3] The so-called "conduit" cases are, however, not in point. They deal with the problem of the attaching of liens upon the property of the conduit. Stow v. Tifft, 15 Johns. 458 (N. Y. 1818) (Does dower attach to the interest of a purchase money mortgagor?); Mills v. Van Voorhies, 20 N. Y. 412 (1859).