## CHAPTER XI

# *A FRIENDLY CREDITOR SUES*

Although Judge Wilkerson had told Mr. Shaw that he would be available to put the St. Paul company into receivership on March 18, the bankers had to make other provisions in order to effect the receivership. The private conference which Mr. Shaw had with the Judge was not enough. The bankers' lawyers felt that it would not have been enough even if the conference had been as public as is generally required of judicial proceedings. They felt that even the railway company itself could not appear in open court and single-handed, or with the banker's concurrence, ask to be put into receivership. The difficulty experienced by the lawyers was not on the question of privacy or publicity, for when the receivership "business was done," it was apparently done in the Judge's private rooms, and not in the public court-room. The difficulty which the lawyers felt was due to their opinion that they must arrange for an obsolete ceremony. They thought that they had to find a creditor of the railway to bring a lawsuit against it and ask as part of that lawsuit that the railway property be taken over by court receivers.

The question came up at the lawyers' conference in Mr. Swaine's room the Sunday before the receivership. Mr. Shaw was asked whether any of his regular clients in Chicago were creditors of the St. Paul company. He was not sure. It was decided to leave to him and to the company's Chicago attorney, Mr. Field, the task of finding a creditor for the purpose. The

bankers' lawyers handed to Mr. Shaw the papers which they had prepared and printed for the occasion—the complaint to be signed by the creditor, and the order to be signed by the judge. To be sure, there were blanks to be filled in, such as the name of the plaintiff and the amount of money due him. It was also decided that Mr. Shaw's firm should be the lawyers for the plaintiff. They would thus be formally connected with the receivership and have a legal standing to take part in it from the moment it began.

Mr. Field and Mr. Shaw, armed with the papers and flanked by bankers' lawyers, who went along to see that nothing went amiss, took the Broadway Limited back to Chicago and made an early Monday morning start on their work. Arrived at the company offices, Mr. Field sent for one of its vice-presidents, Mr. Sparrow. The latter testified to the conversation, as follows:

"He told me first of all that the receivership had been decided on. . . . He said the first step in setting the machinery in motion was to secure a friendly creditor to file a bill [of complaint], and he asked me what coal companies with headquarters in Chicago we owed substantial sums of money to."

Mr. Sparrow at once thought of Mr. Spratlen's friends at the Binkley Coal Company and mentioned their names, Mr. Howard and Mr. Binkley.

"He then asked me if I thought the Binkley Coal Company would act in this capacity. I told him I did not know, the way to find out was to ask them. He asked me if I would ask them. I said yes. All right, he said, he would like me to ask them, and of course impress upon them the necessity of treating this information as confidential and not make it known in any way, either in case they would or would not, and if they were willing to act in that capacity to go and see Mr. Shaw.

"I called up the Binkley Coal Company offices. I ascertained that Captain Howard was over at the Athletic Club . . . and I got in communication with him at the Athletic Club. I told him that I wanted to see him on an important matter, wanted to see him right away; and he said, all right, he was over there, and



to come over and see him. I told him we would probably want to have Mr. Binkley present and asked if he was around. He said yes, he was right there.

"So I went over and saw them both, told them what I had been asked to ask them, asked them if they would be willing to act. They wanted to be quite sure that this was what the railroad wanted done, it was a friendly thing, and not in any way unfriendly. I told them to the best of my knowledge that was what I had been asked by Mr. Field and they said all right, if that was what was wanted, they would be willing to act.

"They asked me if it was going to involve them in any expense of litigation. I told them I did not know anything about that, I never had been in one of these things before, but they could find out from Mr. Shaw. I asked them to go over and see him at once, and they said they would."

Mr. Howard testified that "Mr. Binkley asked him [Sparrow] if he did that, whether it would be satisfactory to the officials of the . . . Railroad. . . . He said it would. . . . He said that Winston, Strawn & Shaw had full details of the matter and were prepared to file the petition if we would sign it."

Thereupon Mr. Howard was questioned, thus:

*Mr. Grady:* So, as a matter of fact, you did not employ that firm yourself, but they were secured for you by the railway company?

*Mr. Howard:* No, sir, we employed them.

*Mr. Grady:* They had already been retained to act for you?

*Mr. Howard:* No, sir.

*Mr. Grady:* Didn't you say that they would act?

*Mr. Howard:* Mr. Sparrow said to me that they were familiar with the details and if we would go and talk with them we could arrange to employ them.

*Mr. Grady:* Didn't you say a moment ago he said they were prepared to file the bill if you would sign it?

*Mr. Howard:* That is correct.

*Mr. Grady:* Is it not a fact you had never done any business

with that firm, had you, prior to this time, and they had never represented you prior to this time?

*Mr. Howard:* Not the Binkley Coal Company, no, sir.

*Mr. Grady:* . . . The printed form of the bill of complaint . . . the only thing left in blank was the name of the plaintiff, the name of the defendant and the amount of the bill?

*Mr. Howard:* I think that was correct.

*Mr. Grady:* And there was nothing stated in that bill as to whether it was for coal or other material that was furnished; it was printed complete, requiring only the signature and filling in of those three blank spaces; that is your recollection, is it not?

*Mr. Howard:* That is my recollection, yes.

When the Athletic Club conference broke up, the three men acted accordingly. Mr. Sparrow went back to the railroad offices and reported to Mr. Field, who telephoned Mr. Shaw that the plaintiff was on his way to Mr. Shaw's office. Mr. Binkley signed the paper that afternoon. Mr. Howard sold a thousand shares of St. Paul stock short. He did not "tip it off to anybody." "I did not feel I was privileged to do that."

The procedure was of course the reverse of that followed in a real lawsuit, as brought out in the following question put to Mr. Shaw:

*Mr. Grady:* In other words, the defendant selected the plaintiff?

*Mr. Shaw:* Certainly. What else would they do? . . .

In the fraudulent receivership case in which Judge Wilkerson had appointed Mr. Brundage as receiver and the United States Supreme Court criticized the receivership, the United States Circuit Court of Appeals had this to say: "It is, happily, not a frequent occurrence that an attorney for a debtor seeks the creditor and urges him to bring suit against his client."

The method followed by Mr. Shaw led to further questioning in the Commission's investigation. One point related to the



fact that the lawyers had secured a plaintiff to petition the railway into receivership before the board of directors had voted for that step.

*Mr. Shaw:* I was informed while there [in Mr. Swaine's room on March 15] by someone that the board of directors felt that the St. Paul had reached the end of its rope and could not go on, and that there would have to be a receivership in order to protect the property.

*Mr. Prentice:* Did you take any pains to verify it?

*Mr. Shaw:* No. I would take the representations made by the general counsel of such a company, at a serious gathering of that kind, as being one hundred per cent true.

*Mr. Prentice:* All right. Was that representation made to you by Mr. Field [the general counsel of the St. Paul company]?

*Mr. Shaw:* I would not say that it was.

*Mr. Prentice:* Then why did you say that you would take the representations of the general counsel as true, if he did not make them to you?

*Mr. Shaw:* Oh, be patient. I said it was made in his presence. . . .

*Mr. Prentice:* The question is whether or not it was desired by the board of directors, or by Kuhn, Loeb & Company. . . .

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*Mr. Shaw:* . . . No lawyer who is not a pettifogger would question the integrity of a statement of that kind, made under those circumstances, sir. . . .

.....

*Mr. Shaw:* . . . Gentlemen of the standard of those who were in that room would not make a misrepresentation; at least, I do not believe they would; and I accepted their statement as being true one hundred per cent.

The procedure followed by the bankers' lawyers actually con-

flicted with the conduct of some of the lawyers whom they called into the case. Considerable confusion resulted, as illustrated by what befell Mr. Shaw. When he appeared before Judge Wilkerson on March 18, he nominally and formally appeared as attorney for the Binkley company, which had retained him on March 16. On March 20, when the Judge signed an order appointing Mr. Shaw's firm as special attorneys for the receivers, the firm resigned its position as lawyers for the coal company. The receivers agreed to pay their special counsel a drawing account of two thousand dollars per month. Mr. Shaw's first bill to the receivers for this drawing account was for the period beginning March 16. This date was two days before there were either receivers or receivership, and four days before Mr. Shaw's firm was appointed counsel for the receivers by the court's order. The bill was paid promptly. The voucher was called for by Interstate Commerce Commission officials, but the railroad attorney refused to produce it until he could put someone on the witness-stand to explain it.

*Mr. Grady:* Prior to March 18, 1925, for whom did you appear in the Binkley Coal Company transaction, Mr. Shaw?

*Mr. Shaw:* Do you mean technically?

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*Mr. Grady:* Professionally.

*Mr. Shaw:* . . . My firm was counsel of record for the Binkley Coal Company.

Thereupon Mr. Grady referred to the payment of Mr. Shaw's bill by the receivers.

*Mr. Grady:* I notice this voucher presented says "Services to date from the 16th of March, 1925."

*Mr. Shaw:* Yes, sir, it does.

*Mr. Grady:* Well, as attorney for the receivers? . . . That is right, is it not?



*Mr. Shaw:* The voucher speaks for itself, sir.

.....

*Mr. Grady:* . . . What services were you rendering for the receivers two days before they were appointed?

*Mr. Shaw:* I would not say, technically speaking, that I was rendering any service for the receivers, and neither is that bill to be considered in any technical way of that character either.

.....

*Mr. Grady:* . . . What service did you render for the receivers . . . between the 16th day of March and the 18th day of March 1925?

*Mr. Shaw:* I was rendering services constantly for the corpus of this property. . . . It is quite immaterial whether the bill was dated on the 16th or on the 18th or on the 14th, from my point of view.

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*Mr. Grady:* . . . Did you render any services for them [the receivers] before they were appointed?

*Mr. Shaw:* The answer is in the record, sir.

.....

Later, the question was raised again at various points in the examination.

*Mr. Grady:* The service . . . between the 16th and 18th day of March was not rendered for the Chicago, Milwaukee & St. Paul road, or for the receivers at all, was it?

*Mr. Shaw:* I said it was rendered, as I said awhile ago, for the corpus. That is what I said. I have answered that the only way I am going to answer it. You may draw your own conclusion, whatever you please.

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*Mr. Grady:* But you made that charge against the receivers for services which you rendered in the name of the Binkley Coal Company as your client?

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*Mr. Shaw:* I rendered a bill for services rendered for the corpus of this property; and the date, as I said, in my judgment, was quite immaterial. . . .

*Mr. Grady:* But in the rendition of which service you appeared for the Binkley Coal Company and not the defendant railway company?

*Mr. Shaw:* On the records of the Court? . . . Yes, that is right.

*Mr. Grady:* You put a correct statement on the records of the court, did you not?

*Mr. Shaw:* You can decide for yourself as to that.

.....

*Mr. Shaw:* . . . The service was rendered for the corpus of the property. What more can I say?

*Mr. Grady:* The Binkley Coal Company never paid you anything for that service, did it?

*Mr. Shaw:* Not yet.

*Mr. Grady:* Have you charged them also for it?

*Mr. Shaw:* Not yet.

*Mr. Grady:* Do you intend to?

*Mr. Shaw:* I do not know whether I will or not.

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*Mr. Grady:* I thought you said you had been paid for it by this five-thousand-dollar charge for that service.

*Mr. Shaw:* You heard what I said.

*Mr. Grady:* Is that a fact?

*Mr. Shaw:* The record speaks for itself. . . . It is perfectly clear to any man who has intelligence enough to understand what I did. . . .



Subsequently, effort to obtain a fuller explanation was made by Mr. Prentice, representing eighteen million dollars' worth of the bonds which were in default. He was speaking, in effect, for one-twelfth of the assets from which Mr. Shaw's fees were being paid. Mr. Shaw's response was: "I answered that question yesterday the best that I can answer it." Finally Mr. Prentice asked him: "What service between the times mentioned did you render to the Chicago, Milwaukee & St. Paul Railway Company?" The answer was: "I rendered the service of taking the necessary legal steps to protect that property from dismemberment."

Mr. Grady asked Mr. Shaw about this statement. The colloquy was as follows:

*Mr. Grady:* Who was threatening a dismemberment of that property, or of that corpus?

*Mr. Shaw:* I think that was all gone into yesterday also.

*Mr. Grady:* I have asked you a very simple question. Who was threatening dismemberment of that property?

*Mr. Shaw:* I think I will just let my answer stand to that question as made yesterday. They asked that question then. It is really so silly!

Mr. Shaw said, with respect to his service before there was any receivership: "At the time I was rendering it, I did not know precisely for whom it would be. . . . But that did not affect the service." When he went to court to have the St. Paul put into receivership, he "had no arrangement for compensation with anybody." No charge against the Binkley Coal Company appeared on his books, and he agreed he had been paid by the receivers' check for the period when he was representing the coal company.

He was asked about the truth of various statements in the legal paper, the so-called bill of complaint, on which the St. Paul was put into receivership. This paper was submitted by him to Mr. Binkley, was sworn to by Mr. Binkley, and was

signed by Mr. Shaw and also by his firm. He said: "You will have to ask the man who made it. I did not make it. Are you assailing the jurisdiction of the receivership? . . . The bill speaks for itself, sir. I have nothing to say about its contents. I did not swear to it."

Later he referred to the meeting of lawyers in Mr. Swaine's room in New York. Mr. Shaw was asked how he could know that statements in a legal paper about a creditor who had not yet been chosen would be true. He said: "I read the bill over, and after consulting with counsel for the company, and the other gentlemen in the room, I was satisfied that the averments were true. At any rate, what difference does that make? If they are not true, you can assail it in the federal court. That is where the jurisdiction is—that is, if you have any right to assail it."

Mr. Shaw was asked whether Mr. Binkley read the legal paper before he swore to it, and replied that he thought he had, but, "what difference does that make? . . . I am asking you what difference it makes. If it is true, it is true, and if it is false, it is false. That is all there is to that."

He was asked whether the coal company, as stated in the legal paper, had demanded payment of its bill and been refused payment by the railroad company. The following colloquy ensued:

*Mr. Grady:* Did you attempt to collect it before you brought this suit?

*Mr. Shaw:* No, I did not. I filed the bill [of complaint].

*Mr. Grady:* You did not want it paid, did you?

*Mr. Shaw:* I certainly did. I would love to see it paid. I wish the . . . railway company could pay all of its bills.

*Mr. Grady:* I am talking about this particular client now, whom you were then representing.

*Mr. Shaw:* I made no more special effort to collect his than any other creditor.

*Mr. Grady:* Well, did you have any other claims?

*Mr. Shaw:* No.

*Mr. Grady:* Did you make any attempt to secure the payment of the $125,000?



*Mr. Shaw:* What a foolish line of questions this is! You know very well I did not. . . . You know this plaintiff was selected to help preserve this property. What is the use of fooling about that?

Some months later, when the Binkley Coal people were put on the witness-stand, the theory was still being advanced that they were the real clients of the Shaw firm and would have to pay them. The danger that compliance with Vice-president Sparrow's request might involve the Binkley Coal Company in expense had been the subject of question at the initial conference in the Athletic Club, and apparently Mr. Binkley had been satisfied on this score before he acted. Not only had he never used Mr. Shaw's firm before, but when he testified, he was unable to state its name correctly. He said in the Interstate Commerce Commission's investigation, however: "We paid our own attorneys' fees. We are to pay them."

The procedure followed by the bankers' attorneys in introducing a friendly creditor as an ostensible litigant against the railway had other consequences besides those of satisfying a legal anachronism. The bankers who set up this straw plaintiff used it on occasion as if it were a real plaintiff, and used it for the partisan advantage of the bankers against security-holders of the company. They employed the device with full realization that it was a mere form, permeated with unrealities, but when it served their purpose, those fictions were treated as if they were true and were used to strengthen the bankers' position. The matter calls for some elucidation.

The Binkley Coal Company never had any real interest in putting the St. Paul company into receivership, or in continuing it there. The coal company's concern with the matter was less than that of the first mortgage bondholders, who had no interest at all, because the property was earning more than enough to pay the interest charges on those bonds. The Binkley Coal Company had a more secure position than that of the first mortgage bonds,

by reason of a rule of law that creditors who furnish materials to a railway during the six months preceding its insolvency must be paid first. Even though there is not enough money to pay mortgage bondholders, those who have supplied such materials must be paid. This was the case of the Binkley company. As its president testified, "we did not feel insecure . . . about our claim against the railroad. . . ." Whether the St. Paul was put into receivership or not, his concern was bound to be paid, just as the first mortgage bondholders were sure of getting their interest paid. The coal company had no more real interest or right in the St. Paul receivership than they.

Within a few weeks after the receivership was begun, the receivers paid the coal company $162,000. It had claimed in its friendly suit $125,000. The additional $37,000 was presumably for other coal sales. But the books of the receivers showed that about two hundred dollars of the amount sued for remained unpaid. This was unknown even to Mr. Binkley until the day he went on the witness-stand, twenty months after the receivership had begun. Just before he went in to testify, he was told of this fact. His associate, Mr. Howard, had been a practicing lawyer, and it was thought that he might be able to explain the purpose of keeping the two hundred dollars open. He said that he thought there was some reason for it, but he did not know what the reason was. Asked whether the real purpose was to enable the coal company to remain in the case as a formal party and to have the privileges incident to such a position, he said he did not know.

When the coal company went into the case, its officers could have changed their attitude from that of a friendly to that of an unfriendly plaintiff; they could have dismissed the lawyers provided by the bankers and chosen others, unfriendly to the bankers. To be sure, this might have cost the Binkley Coal Company its profitable relations with the St. Paul receivers. In any event, it did not happen. The voice of the coal company in the lawsuit continued throughout to be that of lawyers affiliated with the bankers. When Mr. Shaw's firm gave up this client in order to



take on the receivers as clients, new counsel for the plaintiff were provided. At first the record failed to show any connection between these new lawyers and the bankers. But later these lawyers appeared in the case in a second capacity: as the attorneys for the bankers' representatives in connection with the reorganization. It was all in the family.

The friendly creditor, with the ostensible two-hundred-dollar claim, was on occasion brought into action in the receivership proceeding. One such occasion was in October 1925, months after the coal company had been fully paid. An independent committee, opposed to the St. Paul bankers, and representing $27,000,000 par amount of the St. Paul stock, tried to share in the privileges which had up to that time been exclusively in the hands of the so-called parties to the court proceeding. These, and these alone, could take part as a matter of right in that proceeding. One of this small, privileged, and close-knit group was the friendly plaintiff. The $27,000,000 committee asked that it be accorded as good a right as the $200 creditor. But the attorneys for the latter opposed this request. They made no mention of the fact that their client had really been paid out of the case. They said:

"Of course our interest in this case is perhaps very small, as compared with the magnitude of the other interests here, but we are anxious that this litigation shall be determined as promptly as possible, so that we and other general creditors may be paid. My client does not believe that the granting of this petition [of the independent stockholders' committee] will bring that end about; he does not believe it would tend to terminate this proceeding sooner. I therefore oppose the granting of this petition, on that sole and single ground."

It was the established policy of the attorneys of the St. Paul bankers to oppose intervention in receiverships by any security-holders except those connected with and supporting the bankers. They felt that participation by any opponents would be a source of trouble to them.

Their enlistment and use of the friendly creditor in the St.

Paul case was the subject of so much comment that Mr. Shaw felt impelled, while on the witness-stand in the Commission's investigation, to express such justification as he deemed appropriate. The following are some of the expressions he placed in the record:

*Mr. Shaw:* . . . In fact, I may say to you that from the time we started on this matter, the course of conduct which we followed was that outlined and approved by the Supreme Court of the United States in the matter of the Metropolitan Street Railway Company, reported in 208 U. S. 90.

*Mr. Grady:* Yes. But that is nothing new at all, Mr. Shaw, except as to the "approved."

*Mr. Shaw* [*continuing*]: And I am surprised at your question.

*Mr. Grady:* You mean permitted rather than approved, do you not?

*Mr. Shaw:* I meant what I said.

*Mr. Grady:* Is the word "approved" in it?

*Mr. Shaw:* I meant what I said, sir.

Later in his testimony Mr. Shaw said: "There is nothing that has been done in connection with this receivership which is violative of good ethics or good practice or good procedure."

Mr. Shaw said that "there was nothing unusual done, there was nothing mysterious about it. It was a plain and simple thing." He felt that "there is nothing to be ashamed of." Persons to whom receivership proceedings are a mystery may wonder how the Binkley Coal Company could afford to pay, out of its two-hundred-dollar ostensible claim, such prominent lawyers as Winston, Strawn & Shaw. Apparently it paid nothing to that firm, and the latter were paid in their capacity as attorneys for the receivers. But the coal company had a second firm of attorneys in succession to the first, and other counsel in other districts, acting for it as plaintiff against the St. Paul company. These other attorneys would want to be paid. The layman may wonder still more when he learns that these other attorneys of



the Binkley Coal Company received $34,500 in legal fees. But the coal company did not pay the fees. They were paid out of the corpus—that is, out of the railway property.