## CHAPTER XIX

# *THE RECEIVERS BALANCE THE SCALES BETWEEN THE SECURITY-HOLDERS*

Besides defending and promoting the interests of the St. Paul security-holders in dealing with others, the receivers were required to act as assistants to the Judge, in disputes within the family. Like the Judge, they had to give the security-holders an opportunity of stating their views, presenting the facts, and checking the accuracy of the statements and wisdom of the proposals of their opponents. Mr. Hanauer himself repeatedly urged, in his testimony before the Interstate Commerce Commission, that the receivers were court officers and must maintain their impartiality.

Two of the three receivers had training and experience in maintaining a judicial frame of mind and in recognizing the delicate and high standards imposed upon public officials, particularly judicial officials operating under a United States Judge. Mr. Potter and Mr. Brundage had both held public office. Both were lawyers of many years' standing and were therefore trained in the niceties of trusteeship and of judgeship.

The chief receiver, Mr. Byram, was without the advantage that his colleagues had for understanding the new and special obligations resting upon him as an officer of the court. He came to his new post from the circle of large corporation executives, in which at times more indulgent standards obtain than those observed by judges. The conflict between the two sets of standards had an





early test in the buying of St. Paul stock by President Byram.

No judge in charge of a receivership estate may with propriety purchase the securities of the company in receivership. He is guardian for the security-holders. He can get fuller information than they. He is able to know in advance of them facts indicating that receivership securities are selling at levels which are too low. He can even cause steps to be taken in the receivership estate which will depress or lift the market value of the securities. Receivers, exercising more power and being closer to the property than the judge, are in an even better position than he to benefit personally at the expense of their wards. The rule of policy which forbids buying by the receivership judge applies with much greater force to the receivers to whom he entrusts the property. The subject was discussed when Mr. Byram was on the stand:

*Mr. Ekern:* Mr. Byram, what do you think of the propriety of you as the receiver of this road buying its . . . stock . . . ?

*Mr. Dynes:* Just a moment. I don't see how that is material. The conduct of the receiver is not under inquiry here.

*Mr. Ekern:* . . . This is the most unheard-of thing.

*Mr. Dynes:* Oh, is it? . . .

. . . . .

*Mr. Ekern:* . . . Just think of the power that places in the hands of the receiver.

*Mr. Byram:* . . . I am a citizen of this country. I am interested in this property, and I cannot see where there is any impropriety in my making an investment of part of my savings in its securities. I cannot see any question about that at all.

Subsequently, when Mr. Byram was again questioned, he testified to the millions of dollars he and his co-receivers had been spending for additions and improvements to the railroad property.

*Mr. Miller:* All of these things that you are telling us about

now, you expect to be reflected in future years in reduced costs of operation, do you not?

*Mr. Byram:* Yes, I think so.

*Mr. Miller:* Who is that going to benefit primarily?

*Mr. Byram:* The owners of the property.

.....

*Mr. Miller:* Well, the man who sold you that thousand shares of stock the other day won't realize any of that benefit, will he?

*Mr. Byram:* No.

.....

*Mr. Miller:* When you bought it, you knew that you were taking advantage of your opportunity as receiver to improve the condition of this road, to add to the value of the equity in the future, did you not?

*Mr. Dynes:* Just a moment. I think that involves a question of the receiver's relationship to the court, probably. I do not represent the receivers here, I represent only the corporation. Mr. Towner represents the receivers. . . . I would like to know what Mr. Towner thinks of that before we go on with it.

*Mr. Miller:* The court did not tell you to buy that thousand shares of stock, did it?

*Mr. Towner:* I have not entered an appearance in the case. . . . If I may be permitted to do it, I would like to, on my own account, make that objection. This is apparently developing into a criticism of something that Mr. Byram has done as an officer of the court. . . .

*Commissioner Cox:* As I understood the question, the question was that when Mr. Byram purchased this stock, that he knew that what was done for the road in the nature of improvements, and so forth, would increase the value of that stock in the future. If that is the question, it may be answered.

.....

*Mr. Miller:* Did you know when you purchased that stock



what you were doing as receiver to improve the equity behind the bonds of this railroad?

*Mr. Byram:* Yes, and that is a matter of public knowledge, because all the things we do are authorized by the court and are publicly announced.

*Mr. Miller:* You think the man who sold you that stock had the same knowledge?

*Mr. Byram:* If he wanted to have it, he could have it.

.....

*Mr. Miller:* Well . . . the unfortunate stockholders who have to part with their stock as a result of this performance won't get any benefit from the improvement to the equity which you are now making . . . ?

*Mr. Byram:* If they sell their stock, they won't.

This may explain the failure to grasp other principles affecting the company's president when he was elevated to the position of receiver.

Less than two weeks after his appointment he learned that Chicago bankers were planning to organize a committee on behalf of one class of St. Paul securities. Mr. Byram urged them not to organize until they had conferred with Mr. Hanauer. He sent a telegram in code to warn Mr. Hanauer immediately of the danger of the formation of a committee by someone other than himself. Whether the coding of the telegram was solely for the purpose of keeping secret a fact fraught with such importance to the bankers or was for some other purpose as well, the fact that there had been so questionable a relationship between one of the receivers and one of the contending groups of reorganizers became public in the Commission's investigation.

Subsequently the relationship between the entire receivership administration, including the receivers and their lawyers, and the bankers was brought to the front. The independent stockholders' committee had asked the court for permission to take part in the receivership as a matter of right. This, as already

noted, was opposed by the bankers and met the open opposition in court of the lawyers for the Binkley Coal Company and the lawyer who said he was specially retained to speak for the railway company. Mr. Shaw, as attorney for the receivers, also took sides against the independents.

A month later the independent committee settled its disputes with the bankers, in a conference with the bankers' lawyer, Mr. Cravath, at his office in New York. Part of the compromise arrangement was that the committee, though not becoming a formal party and reserving the right to apply for such a position if ever deemed necessary, should have the right to take part in the court proceedings on the very matters which it had previously specified when Mr. Shaw opposed. Mr. Shaw's firm then accepted the arrangement made with the bankers in New York. The attorneys talked to the Judge, and to the lawyers for the "parties," and it was fixed up. They then wrote a letter to the independent committee, specifying the subjects as to which the committee was to have a right to be in the court proceedings, which copies word for word language of the agreement made with Mr. Cravath.

The change of mind which the receivers' attorneys experienced in so short a time simply followed a changed attitude on the part of the committee toward the bankers. The independent stockholders ceased to cross swords with the bankers, and instead joined hands with them. The independents had learned that the way to evoke a friendlier attitude on the part of the receivers was to go to New York and talk to the bankers.

Prior to this compromise, when the committee asked the court for permission to become a "party" to the receivership proceedings, the committee had criticized two of the receivers for having publicly favored the bankers' reorganization plan. At the time when they did this, there was a public controversy over the plan, which was widely reported in the press. A contest in court also seemed inevitable. Impartiality was called for, both in the Judge and in the receivers. The contending sides had not yet presented the facts and arguments which they would desire to submit to



neutral court officials.

The action of the receivers in taking sides under such circumstances was criticized by the attorney for the Iselin committee, which represented the independent stockholders. He said:

"I do not think that any receiver of this court had any business to do anything of that sort, because, after all, the receiver is not speaking for an individual; he is supposed to be the right hand of the court, and I question, seriously question, the propriety of any receiver in this court doing anything of that sort. . . .

"Have they received the advice and direction of the court on that subject? They have not. . . .

"What does it mean when the receivers of this court go out to the public and say they advocate a particular plan? Aren't the public led to believe that the court is in favor of this particular plan? Doesn't it mean practically that others are foreclosed from presenting any plan or formulating any plan, and that they will not have any encouragement in this court?

". . . A false appearance has been given up to the present time. . . .

"There is not anybody here protecting our interest. This whole machinery is a Kuhn, Loeb–National City machine. . . . I know it would never be the case with your Honor, but the court is not sitting here simply to register the will of a certain financial group, and yet up to this time that is all that has been done in this case. There has been no independence, nobody else has had a voice here."

Subsequently Mr. Shaw rose to speak as attorney for the receivers. He was something more than their lawyer. He was an official of the court, appointed by a formal order signed by Judge Wilkerson, to protect its administration of the affairs of the St. Paul property. Mr. Shaw denied that the receivers had taken sides, but did not deny that they had publicly advocated the bankers' reorganization plan. He said that the petition filed by the independent committee did not state its objection to the receivers' action in technically proper form, and that it should therefore be debarred from stating the objection orally to the

Judge. He finally claimed that the receivers had spoken in their private capacity when they advocated the bankers' plan. Some of Mr. Shaw's comments will be quoted. He said:

"Now, may it please the Court, we have passed the time in this proceeding when we can discuss matters of courtesy. We are considering . . . rights and duties. . . .

"Now, let us consider the statement of the right which is made by the intervenors' petition in this court. . . . Now, at the conclusion of paragraph 12 it is said, referring to Mr. Byram and Mr. Potter, two of the receivers of the Court, 'that they have publicly favored the Kuhn-Loeb reorganization plan.'

". . . Now, I must confess, your Honor, that when I read those . . . statements they seemed to me wholly innocuous. They could be just as well construed as statements of commendation as they could be construed as statements of criticism. . . ."

Mr. Shaw was, however, faced with the fact that the independents' lawyer had made an extended argument in person, criticizing what the receivers had done and making it abundantly clear that criticism was intended. Mr. Shaw said:

"Now, may it please the Court: It was not until we got into the court room and listened to the verbal statements of the counsel for the intervenors that we finally learned . . . that it was the desire of counsel for the intervenors that those . . . sentences should be construed as critical, rather than as commendatory. . . . The receivers had no reason to anticipate when they came into court to consider this petition of intervention that any criticism would be made with respect to any action of theirs which had never been mentioned in the petition. . . .

"And with great respect I say to the Court that counsel should be rebuked for assailing the officers of the Court under the protection of this innocuous and harmless intervening petition, without any notice of any kind or character whatever that he intended to make any criticism of any kind."

The statement in the stockholders' petition reported an improper act by the receivers and therefore would ordinarily be construed by a lawyer as being critical rather than commendatory. Whether or not Mr. Shaw's firm had read it as commendatory, they had full notice of its intended meaning when the stockholders' attorney first spoke in court. This was three days before Mr. Shaw arose to reply, but apparently three days was not deemed by him sufficient time in which to prepare his answer to the charge of improper conduct by the receivers. He insisted upon such technical answer as he could muster.



Finally the Judge asked him to discuss the realities and to assume that the court knew what the receivers had done.

*The Court:* I mean the receivers are officers of the court. . . . There arises a conflict of stockholders having one thought as to what is to become of the property, and other stockholders having another thought as to what is to be done with the property. . . . And it is a fact that the receivers have become interested on the side of a part of the stockholders . . . [that fact] gives to those who differ from the receivers on that subject the right to come into the lawsuit to be heard on questions of administration only. That seems to me to be what he is trying to say here. . . .

*Mr. Shaw:* If the Court please, I will try to answer that question. But first let me point out to you that it is unnecessary for the decision of this case, as this now stands on this record, to ever consider that question, because there is not a single, solitary averment in the petition that justifies the inference which your Honor has placed upon it.

*The Court:* Well, there are two.

*Mr. Shaw:* What are they?

*The Court:* The first one he has in his petition, he said: "and the said Byram and said Potter did publicly favor the said Kuhn Loeb Reorganization Plan."

*Mr. Shaw:* Now, stop for a second.

*The Court:* That is one of them. The other is the averment in which he says there are other stockholders which favor another plan.

*Mr. Shaw:* Please just wait a second. Let's consider this as a

strict matter of pleading, as a strict matter of pleading.

*The Court:* Yes.

*Mr. Shaw:* All right. Is there any criticism of a man because he favors a plan and there is nothing said about the plan, good, bad, or indifferent? Hasn't a man got a right to favor a plan?

*The Court:* That gets down to a question—

*Mr. Shaw:* Of pleading.

*The Court:* Whether the receivers, the officers of the Court, in a proceeding of this kind, may properly favor any plan of reorganization. That is the question that is involved here.

*Mr. Shaw:* I venture to say to the Court, while it is no assault or criticism, is it not a fact that they favor a plan?

*The Court:* That is about all there is to this motion, Mr. Shaw, whether the receivers of this Court may publicly favor any plan of reorganization, and if they do favor any plan, what is to be done about it.

*Mr. Shaw:* Well, all right.

*Mr. Miller (the special attorney for the railway company):* Shaw, isn't that a mere conclusion?

*Mr. Shaw:* I am going to answer. It seems there are so many things to be said about it. In the first place, Mr. Miller is right when he says it is a statement of mere conclusion, what, if anything, the receivers favor, so that the Court may tell whether they have favored the plan or not. This is a statement of the conclusion of the pleaders. . . . No reliance of any kind should be placed upon the conclusion of the pleaders, that we may eliminate it from the case. But let's get ahead and indulge in the assumption, let's assume that they want to amend their petition, let me go ahead and say this—

*The Court:* Let's assume for the purpose of the argument that the Court knows what its receivers have done in advertisements which have been sent out about this plan.

*Mr. Shaw:* Let's assume all that.

*The Court:* Let's assume the Court knows what its own officers have been doing.



*Mr. Shaw:* Then all right. The question is this, stated in another way: Does the mere fact that Mr. Byram—

*The Court:* Officers of the court.

*Mr. Shaw:* Officers of this court or administrators of the parties, deprive them—

*The Court:* No.

*Mr. Shaw:* May I state it in a little different way?

*The Court:* Yes.

*Mr. Shaw:* I will state it and then I will go ahead and answer your question. Deprive them of their right as individuals to have an opinion and to express it. Now when it comes to their duty as receivers, when they come before the bar of the court, asking the court to do something with respect to the property which they are administering, that is one thing. Then anything that they may do as officers of the court—but I say to the court without fear of successful contradiction whatsoever, that the mere fact that they are receivers does not deprive them of their rights as individuals to have and favor any plan, even though somebody else may think it good, bad, or indifferent. That is their privilege as living human beings. What they must do as officers of the court is very different then from the opinions which they may hold. But I say further that we are never confronted with that until some challenge is made that the opinion which they expressed was wrong. That is not in this petition. Have I answered the Court's inquiry, so that the Court, at least, can get my view with respect to it?

*The Court:* . . . Wouldn't the fact that he becomes a partisan to some plan . . . give others who differ from him . . . if he continues to be a receiver, a right to be heard on the questions of administration?

*Mr. Shaw:* Why, the only remedy for that, may it please the Court, again taking a very different point of view, I say it is a most natural thing in the world for anyone who has any interest in this property, bonds or stock, or that of a general creditor, to ask these people, who are in close connection with it all the time, have you got any opinion of this.

Somewhat earlier Mr. Shaw made this remark: "So far as the Kuhn, Loeb plan is concerned, there is no averment that they did not have any right to have an opinion. May I inquire if the mere fact that these gentlemen were appointed receivers of this property destroyed the right and privilege they have to think? Does it destroy their privilege as individuals to assert an opinion?"

Such compartmenting of the receivers' official acts and their private acts with respect to the property in receivership obviously reflected no realities. The press inevitably coupled their position as receivers with their views on the reorganization of the property of which they were receivers. And the security-holders, the people who were to be influenced, would not draw the fine-spun distinctions presented to the court by the receivers' attorney. Instead of a plain admission that the receivers had done wrong, the attorneys for the receivers engaged in an argument which meant, in effect, this: that an official who must remain impartial until both sides have presented their case may in his private capacity, and before he has given both sides full opportunity to be heard by him, arrive at a decision on the disputed matter, announce it to the world, and permit his name and his announcement to be used by one of two contending sides for partisan purposes.

Mr. Shaw's claim that the receivers had simply exercised the right of free speech when they endorsed the bankers' plans was bettered by Mr. Byram. He felt he had a right to advocate the Kuhn, Loeb–National City Bank plan in his capacity as stockholder.

*Mr. Byram:* In regard to my approval of the plan . . . I was then a stockholder and was therefore interested from the standpoint of a stockholder in any plan as to the disposal of my stock.

*Mr. Ekern:* You were acting then as a stockholder in endorsing that plan?

*Mr. Byram:* Well, certainly I had a right to say that in my capacity as a stockholder. I was interested.



The receivers who took sides in favor of the bankers were protected by the Judge's tendency to regard himself as an umpire rather than as an administrator. So long as no one complained to him of receivers' acts which he would have held improper if complaint had been made, he remained inactive.

The independent committee's criticism of the two receivers had one strange consequence. The incident was turned into a weapon against critics of the receivers and the bankers. During the Interstate Commerce Commission's investigation some of the questions put to Mr. Byram were met with the argument that he could not answer without disobeying the Judge. Mr. Byram and Mr. Dynes said that after the former had been criticized for his support of the bankers' plan he had been instructed by the Judge not to discuss the plan. On this ground Mr. Byram refused to answer questions which he or Mr. Dynes construed as within the Judge's prohibition. In brief, one disservice to the St. Paul security-holders was used, by a strange twist, as the justification for a second disservice to them.

It was within the power of the Judge to go further than he did. He might have notified the security-holders to disregard the receivers' advocacy of the bankers' plan. The Judge might even have done more, in view of an intimation he himself gave, that partisanship would disable the receivers from performance of their duties.

This was also the view of Mr. Hanauer. More than two years after he had been given the public support of two of the receivers, he testified in response to his own attorney's question.

*Mr. Swaine:* The receivers of an insolvent property do not reorganize the property?

*Mr. Hanauer:* I don't see how they could. The receivers are the court themselves. The court must be free to listen to all plans and all objections to plans and not be in the position of trying to put through a special plan themselves. They could not enter into differences of opinions between various classes of security-holders, in my opinion.

A year earlier, in the Commission investigation, Mr. Hanauer said that if receivers participated in reorganization disputes, "I am not at all sure whether application could not be made to remove them." He was at the time arguing against the drafting of reorganization plans by receivers. What a majority of the receivers did in the St. Paul case was to throw their support in advance of any hearing to one partisan group against its opponents.

The intimations in the Judge's remarks that this would disqualify receivers and in Mr. Hanauer's testimony that it might be ground for their removal were only academic utterances in the St. Paul receivership. The receivers initially proposed by the bankers continued in control of the property, and the attorneys brought into the case by the bankers continued as lawyers for the receivers, throughout the entire receivership period.