

THE STATUTORY POWER TO APPOINT A COMPANY RECEIVER IN AUSTRALIA

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INTRODUCTION

Prior to 1860 a mortgagee was unable to appoint a receiver out of court unless his mortgage expressly conferred such a power. In its absence, any receiver he appointed was his agent¹ and, consequently, he attracted all the dreaded liabilities of a mortgagee in possession. Lord Cranworth's Act of 1860² implied in mortgage deeds a statutory power to appoint a receiver of rents and profits from land. The scope of this power was enlarged by s.19 of the Conveyancing Act 1881 (U.K.) and its successor, s.101 of the Law Property Act 1925 (U.K.), and similar provisions appear in the general conveyancing statutes of the Australian States.³ The purpose of this article is to highlight the difficulties which attend a statutory appointment and to suggest ways in which some of the problems can be avoided.

The statutory power may be incorporated in all mortgages by deed whether they cover Old Title or Torrens System land.⁴ It allows a very limited appointment simply for the receipt and application of income in accordance with a statutory scheme. Here it differs from the standard form of mortgage debenture which empowers a receiver *inter alia*, to take possession, manage the debtor's business and realise the secured property. The significance of the statutory power has diminished as draftsmen have become increasingly aware of its inherent limitations. Nevertheless, it remains important where the creditor's mortgage deed contains no power to appoint a receiver or where the powers conferred upon the appointee are inadequate. Moreover, some of the cases decided in this area give useful insights into the general position of a receiver appointed out of court in pursuance of a provision in a mortgage debenture.

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¹ *Quarrell v. Beckford* (1816) 1 Madd. 269; 56 E.R. 100.

² 23 & 24 Vict. c.145, s.11.

³ Property Law Act 1974-1975 (Qld.), s.83(1)(c); The Conveyancing Act, 1919, (N.S.W.), s.109(1)(c); Property Law Act, 1958 (Vic.), s.101(1)(c); Law of Property Act, 1936-1975 (S.A.), s.47(1)(c); Property Law Act, 1969-1973 (W.A.), s.57(1)(c); Conveyancing and Law of Property Act 1884 (Tas.), s.21(1)(c).

⁴ Qld. s.77, N.S.W., s.109(5); Vic., s.102; S.A., s.47(1); W.A., s.48; Tas. s.26(1).

Who may Appoint a Receiver under the Statutory Power?

A mortgagee under any mortgage by deed can appoint a receiver in pursuance of the statutory power⁵ even if he has already taken possession of the secured property.⁶ A second or subsequent mortgagee may also appoint such a receiver subject of course to the rights of the first and other mortgagees.⁷ Thus any receiver appointed by a puisne incumbrancer may be displaced by a receiver appointed by a prior mortgagee. While an equitable mortgagee may not take possession of the secured property he too can appoint a receiver under the statute to collect the rents and profits.⁸ Indeed this is the only way he can collect the rents since he is not entitled to demand payment to him directly.⁹

The statutory power does not extend to mortgages under hand or to debentures issued to company creditors *pari passu* with others.¹⁰ In such cases the creditor will be unable to appoint a receiver out of court unless the relevant security document contains an appropriate clause or unless the parties consent to the appointment.

In the United Kingdom certain public health, housing and highway authorities are entitled to appoint a receiver in order to recover expenses (and interest) incurred in respect of work undertaken upon the property or premises of a company in pursuance of their statutory mandates.¹¹ In some Australian States certain public authorities are entitled to a charge upon land in respect of work they have undertaken upon the property¹² but, unlike their British counterparts, they have no statutory power to appoint a receiver.

Who may be appointed?

In most states the general property law statutes empower a mortgagee

⁵ Qld., s.83(1)(c); N.S.W., s.109(1)(c); Vic., s.101(1)(c); S.A., s.47(1)(c); W.A., s.57(1)(c); Tas., s.21(1)(c). See also Law of Property Act 1925 (U.K.), (hereinafter L.P.A. (U.K.)), s.101(1).

⁶ *Refuge Assurance Co. Ltd. v. Pearlberg* [1938] Ch. 687.

⁷ *Vacuum Oil Co. v. Ellis* [1914] 1 K.B. 693, 703.

⁸ This follows from the fact that the definition of "mortgage" in the general conveyancing statutes is broad enough to include equitable mortgages. See L.P.A. (U.K.), s.205 (xvi).

⁹ See *Lever Finance Ltd. v. Neddleman's Trustee* [1956] Ch. 375.

¹⁰ *Blaker v. Herts and Essex Waterworks Co.* (1889) 41 Ch.D. 399, 405-406.

¹¹ See e.g. Housing Act 1957 (U.K.), s.10(7), Housing Act 1974 (U.K.), s.94(4); Public Health Act 1936 (U.K.), s.291; Highways Act 1959 (U.K.), s.181(3) as amended by the Local Land Charges Act 1975, s.19(1).

¹² Local Government Act 1936-1977 (Qld.), s.50(7)(i); Housing Improvement Act 1936-1960 (N.S.W.), s.103(2); Local Government Act 1958 (Vic.), s.604(3); Housing Act, 1958 (Vic), s.58; Health Act 1958 (Vic.), s.414(2); Local Government Act 1934-1978 (S.A.) ss.342(10), 343(5), 616; Health Act 1935-1976 (S.A.), s.69; Local Government Act 1962 (Tas.), s.766.

to appoint "such person as he thinks fit to be receiver".¹³ These provisions are qualified by s.187 of the Uniform Companies Act¹⁴ which prohibits certain persons from being appointed as a receiver of the property of a company and from acting as such. In particular, a corporation may be appointed only where it is authorised by statute to act as receiver of the property of a company. The Trustee Companies Act 1968-1975 (Qld), for example, confers such authority upon certain companies.¹⁵ In certain circumstances s.115(6A) of the Conveyancing Act 1919 (N.S.W.) permits a trust corporation which is a mortgagee or co-mortgagee to be appointed as receiver of the secured property. Yet this provision is too general to displace the restriction in s.187. Thus even in N.S.W. a trust corporation may not act as receiver of the property of a company unless it is given specific statutory authority. The end result is that in all States company receivers are almost invariably registered liquidators.

Kerr states that a mortgagee is subject to a fiduciary obligation when he exercises his statutory power of appointment¹⁶ but such an obligation would only arise if the mortgagee were entrusted with the power for another's benefit.¹⁷ The statutory duties imposed upon the receiver in relation to the money he collects suggest that the appointment is primarily for the benefit of the mortgagee, not the mortgagor.¹⁸ By the same token, the receiver is accountable to both parties.¹⁹ The position is much clearer where the mortgagee purports to exercise an express power of appointment on behalf of a number of debenture-holders in the same series. In such a case the appointor would undoubtedly be under a fiduciary obligation in relation to the appointment and would be expected to appoint a competent and responsible receiver. If he appointed himself receiver in this situation he might not be allowed to claim remuneration for his services.²⁰

¹³ Qld., s.92; N.S.W., s.115(1); Vic., s.109(1); W.A. s.65(1); Tas., s.26(1). See also S.A., s.53 & L.P.A. (U.K.), s.109(1).

¹⁴ Uniform Companies Act 1961-1962 (hereinafter referred to as U.C.A.). Support for the proposition that U.C.A., s.187 or its equivalent qualifies the statutory power to appoint a receiver under the general conveyancing statutes can be found in the maxim *generalia specialibus non derogant*. See *Seward v. Vera Cruz* (1884) 10 App. Cas. 59, 68; *Goodwin v. Phillips* (1908) 7 C.L.R. 1, 14. See also Companies Act 1948 (U.K.), ss.366-367.

¹⁵ Namely, Queensland Trustees Ltd. and the Union Fidelity Trustee Company of Australia Limited.

¹⁶ Walton, *Kerr On the Law and Practice as to Receivers* (15th ed., 1978), 286.

¹⁷ See generally P. D. Finn, *Fiduciary Obligations* (1977), 1-5.

¹⁸ See below p. 19. See also *Cholmondeley (Marquis) v. Clinton* (Lord) (1820) 2 JAC & W. 1, 183; 37 E.R. 525, 594.

¹⁹ See *Re Maskelyne British Typewriter Ltd.* [1898] 1 Ch. 133 and *British America Nickel Corporation Ltd. v. M. J. O'Brien Ltd.* [1927] A.C. 369.

²⁰ See *Nicholson v. Tutin* (1857) 112 R.R. 86; 43 W.R. 401. There, land was conveyed

When may the receiver be appointed?

In general, although the statutory power arises when the mortgage money is due²¹ it is not exercisable until certain conditions are satisfied. Apart from an express provision in the mortgage, the mortgagee cannot appoint a receiver under the relevant statute in most states before he becomes entitled to exercise the power of sale conferred by the appropriate Conveyancing Act or Real Property Act. The Queensland provision is broader as it permits an appointment once the mortgagee becomes entitled to invoke the power of sale conferred by the Property Law Act 1974-1975 or "any other Act".²² Yet in relation to a mortgage registered under the Land Act, the Miners' Homestead Leases Act, or the Mining Act of that State, an appointment can only be made after the mortgagee becomes entitled to take possession of the mortgaged property.²³

There are slight variations in the circumstances which will allow a mortgagee to invoke his power of sale and his consequential power to appoint a receiver under the general conveyancing statutes. In Queensland, section 84 of the Property Law Act 1974-1975 provides that the power of sale is exercisable after:

- (a) default has been made in payment of the principal money or interest or any part thereof secured by the instrument of mortgage, and notice requiring payment of the amount the failure to pay which constituted the default under such instrument of mortgage has been served on the mortgagor and such default

subject to incumbrances to trustees on trust for the mortgagor's creditors. The mortgagees employed one of the trustees as their agent to collect the rents of the property. The trustee's claim for commission was rejected because the court would not allow a person to place himself in a position where his interest might conflict with his duty. Although a mortgagee who appoints himself receiver does not thereby become a trustee he is nevertheless subject to stringent fiduciary obligations in relation to the money he collects and might therefore be denied remuneration for his services as a receiver.

On the other hand, where the mortgagee is a company one of its directors who is appointed as receiver will be entitled to remuneration because he does not stand in a fiduciary relationship to the mortgagor; *Bath v. Standard Land Co.* [1911] 1 Ch. 618. In relation to company receivers, however, this is an academic point because U.C.A., s.187 or its British equivalent prohibits the appointment of an officer of either the mortgagee company or the mortgagor company as receivers.

²¹ It appears that in New South Wales and *semble* Queensland the power arises upon the execution of the mortgage deed. In the other States the power crystallises when the mortgage money is due. See Vic., s.101(1)(c); S.A., s.47(1)(c); W.A., s.57(1)(c); Tas., s.21(1)(c). See also L.P.A. (U.K.), s.101(1)(iii).

²² Property Law Act 1974-1975 (Qld.), s.92(1).

²³ *Id.*

has continued for a space of thirty days from service of the notice;²⁴ or

- (b) default has been made in the observance or fulfillment of some provision contained in the instrument of mortgage or implied by this or any other Act and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed and performed, and notice requiring the default to be remedied has been served on the mortgagor; and such default has continued for the space of thirty days from service of the notice.²⁵

The stringent conditions which must be satisfied prior to a statutory appointment have caused many draftsmen to provide for an earlier appointment. Indeed, in some cases—commonly where a short-term loan is involved—the receiver is appointed on execution of the mortgage.²⁶ More often, the draftsman abridges the period of default after which a receiver may be appointed. Any such variations or extensions to the mortgagee's statutory power to appoint a receiver expressed in the mortgage deed, operate as if they were contained in the statute itself.²⁷ Moreover, if there is any inconsistency between the statutory provisions and the mortgage deed, the latter prevails.²⁸

A mortgagee can replace a receiver who dies after his appointment under the statutory power. If the new appointment is made promptly there will be no break in the continuity of the receivership.²⁹ Apparently the original default by the mortgagor is sufficient to justify the appointment of a successor to the deceased receiver. Similar principles should apply where the original receiver retires or is removed.

In most states, a mortgagee retains his statutory right to appoint a receiver even if the mortgagor company goes into liquidation.³⁰

²⁴ Similar provisions exist in the other States: N.S.W., s.111(2); Vic., s.103(a) and (b); S.A., s.48(a) and (b); W.A., s.59(1); Tas. s.22(1). In the United Kingdom; see L.P.A., s.103(i) and (ii).

In some States different Acts determine when the power of sale is exercisable in respect of Torrens land. See Real Property Act 1900 (N.S.W.), ss.57-58. Transfer of Land Act 1958 (Vic.) s.77(1); The Real Property Act 1886-1975 (S.A.) s.133; Transfer of Land Act 1893-1972 (W.A.), s.108.

²⁵ Similar provisions exist in some of the other States: N.S.W., s.111(2)(c); Vic., s.103(c); S.A., s.48(c). In the United Kingdom see L.P.A., s.103(iii).

²⁶ *United Realisation Co. Ltd. v. Commissioners of Inland Revenue* [1899] 1 Q.B. 361 and *Portman Building Society v. Galloway* [1955] 1 W.L.R. 96.

²⁷ *Qld.*, s.83(3); N.S.W., s.109(2); Vic., s.101(3); S.A., s.47(3); W.A., s.57(3); Tas., s.21(2). In the United Kingdom see L.P.A. s.101(3).

²⁸ *Qld.* s.83(4)(b); N.S.W., s.109(3); Vic., s.101(4); S.A. s.47(4); W.A., s.57(4); Tas., s.21(3). The United Kingdom equivalent is L.P.A., s.101(4).

²⁹ *Re a Contract between R. W. Hill Ltd., and Simmons* [1920] W.N. 386.

³⁰ *Re Hale, Lilley v. Foad* [1899] 2 Ch. 107, 117; *Barclay's Bank Ltd. v. Kiley* [1961] 1 W.L.R. 1050.

However, in Victoria leave of the Supreme Court is required in certain cases, namely where the statutory power to appoint a receiver is made exercisable by reason of the mortgagor's committing an act of insolvency or being adjudged an insolvent.³¹

Mode of appointment

Most of the general conveyancing statutes require the appointment to be made by writing under the hand of the mortgagee.³² An invalid deed can satisfy the requirement of a written appointment.³³ In New South Wales and Queensland the appointment must be made by the mortgagee by writing in a prescribed form.³⁴ Furthermore, in New South Wales the document of appointment must be registered.³⁵

Since the statutory power is usually exercisable only upon default in the performance of a covenant in the mortgage or in the payment of money due under the deed, a formal demand is not necessary. It is enough if the mortgagor is notified of the default and the statutory period elapses before he redeems himself. A mortgage deed may, of course, require that a demand be made before the mortgagee can pursue his statutory remedies. Such a provision makes a demand along the following lines essential:

To the mortgagor:

Dear Sir,

We are now making demand upon you for payment forthwith of the full amount of your liability to the [mortgagee] as shown below:

Failing your immediate compliance the [mortgagee] will be free to pursue its remedies against the property: . . . (address), charged as security."

Any receiver appointed in the absence of the requisite demand would be the agent of the mortgagee, not the mortgagor.³⁶ Consequently the secured creditor would be liable for his acts and omissions.

An appointment of a receiver as attorney with power to execute deeds in the company's name can only be made by writing under the common

³¹ Property Law Act 1958 (Vic.), s.111. The United Kingdom equivalent is L.P.A., s.110.

³² Vic., s.109(1); S.A., s.53(1); W.A., s.65(1); Tas., s.26(1). See also L.P.A. (U.K.), s.109(1).

³³ *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] Ch. 375.

³⁴ See Qld., s.92(9) and Form 9 of the Second Schedule to the Property Law Act 1974-1975. In New South Wales, see s.115(1) and Conveyancing Act Regulations 1961, regl. 86.

³⁵ E. A. Francis, *The Law and Practice in All States of Australia relating to Mortgages and Securities for the Payment of Money* (2nd ed., 1975) 109.

³⁶ *Barclay's Bank Ltd. v. Kiley* [1961] 1 W.L.R. 1050.

seal of the company.³⁷ If, on the other hand, the receiver is intended to have power to sign agreements or other instruments not under seal then it is sufficient for the board of directors or other governing body of the mortgagor company to make the appointment by resolution or otherwise.³⁸ In Tasmania these powers of attorney must be registered.³⁹

Validity of the appointment

It is not incumbent upon a person paying money to a receiver appointed under the statute to inquire whether any case has happened to authorise the receiver to act.⁴⁰ A receipt issued by a receiver appointed prematurely is, therefore, a sufficient discharge for any of the mortgagor's debtors. On the other hand, an invalid appointment carries serious consequences for the mortgagee. A receiver appointed under the statute is an agent of the mortgagor who is solely responsible for his acts or defaults unless the mortgage otherwise provides.⁴¹ If the statutory requirements regulating the appointment are not satisfied the mortgagee is denied this protection and he is liable for the appointee's acts or omissions.

There are a number of grounds upon which the mortgagor company and probably any mortgagee other than the one responsible for the appointment can challenge its validity. First, they might allege that the mortgage deed was not properly executed. Secondly, they might argue that the mortgagee's power to appoint a receiver was not yet exercisable in terms of the statute. Thirdly, they might assert that the appointee is prohibited from being appointed as receiver and from acting in that capacity by s.187 of the Uniform Companies Act. Finally, they might

³⁷ U.C.A., s.35(3). Compare Companies Act 1948 (U.K.), s.34.

³⁸ Property Law Act 1974-1975 (Qld.), s.46(2); Conveyancing Act 1919 (N.S.W.), s.51A(2); Property Law Act 1958 (Vic.), s.74(2); Property Law Act 1969-1973 (W.A.), s.10(3).

In South Australia the Law of Property Act 1936-1975 contains no similar provision but The Real Property Act 1886-1975, s.155 provides that any person (including a body corporate) may authorise any other person to act for him to execute all or any instruments that may be necessary for giving effect to any dealing with any land, and for that purpose may, if he thinks fit, use the form in the thirteenth schedule "to the Act". In the absence of a more general provision affecting land not covered by the Torrens statute, it might be necessary to ensure that the appointment of the receiver as the company's attorney is in writing under the company's seal. See *Reid Murray Holdings Limited (in liq.) v. David Murray Holdings Proprietary Ltd.* (1972) 5 S.A.S.R. 386.

³⁹ Powers of Attorney Act 1934 (Tas.) s.3.

⁴⁰ Qld., s.92(4); N.S.W., s.115(4); Vic., s.109(4); S.A., s.53(4); W.A., s.65(4); Tas., s.26(4). The United Kingdom equivalent is L.P.A. s.109(4).

⁴¹ Qld., s.92(2); N.S.W., s.115(2); Vic., s.109(2); S.A., s.53(2); W.A., s.65(2); Tas., s.26(2). The United Kingdom equivalent is L.P.A. s.109(2).

claim that the formal requirements involved in an appointment have not been satisfied.

What property is covered by the appointment?

Under the general property law statutes a receiver may be appointed of the income of the mortgaged property, or any part thereof.⁴² In most states it is possible to appoint a receiver of the whole or any part of an interest in income, or of a rent charge or other periodical sum if such property is included in the security.⁴³ Where a mortgagor company is owed book debts and other business debts of a capital nature and these amounts are covered by the mortgage, a receiver appointed under the statute should forthwith give notice to the debtors demanding payment to him. Otherwise the debts remain within the order and disposition of the mortgagor company and are available for distribution among its general creditors in a liquidation.⁴⁴

Effect of the appointment

(i) upon the company

An appointment under the statutory power does not displace the board of directors of the mortgagor company because the statute confers no powers of management upon the receiver.⁴⁵ In *Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.*⁴⁶ the board of directors was able to institute proceedings against the debenture holders in the company's name for breach of contract even though the defendants had appointed a receiver to realise the assets of the company and to carry on its business for their benefit. The Court of Appeal sanctioned the proceedings because they were in the company's interest and they did not encroach upon the rights of the debenture holders *qua* debenture holders. Although the directors could not after the appointment dispose of the company's assets they were still obliged to exploit them for the benefit of the company. Moreover, since the company was not called upon to finance the action out of its own resources it was difficult to see how the debenture holder could be adversely affected in his capacity as a secured creditor. The principle in the *Newhart Developments Ltd.*

⁴² Qld., s.83(1)(c); N.S.W., s.109(1)(c); Vic., s.101(1)(c); S.A., s.47(1)(c); W.A., s.57(1)(c), Tas., s.21(1)(c). The United Kingdom equivalent is L.P.A., s.101(1)(iii).

⁴³ The only exceptions are New South Wales and Tasmania.

⁴⁴ *Rutter v. Everett* [1895] 2 Ch. 870; *Re Pawson's Settlement* [1917] 1 Ch. 541.

⁴⁵ Cf. *Hawkesbury Development Co. Ltd. v. Landmark Finance Pty. Ltd.* [1969] 2 N.S.W.R. 782, 790.

⁴⁶ [1978] 2 W.L.R. 636, C.A.

case applies *a fortiori* to a receiver appointed under the statute since he has no power to carry on the company's business and, therefore, no authority to interfere in the management of the company.

Trading contracts should not be affected since a statutory appointment does not prevent the company from honouring its obligations. But the receiver could demand any income produced by the company's business activities if such income is covered by the mortgage. However, the limited scope of the appointment saves the receiver from the mental agony of resolving counterclaims and rights of set-off arising out of the company's trading. Similarly, contracts of employment normally survive the appointment of a receiver under the statute and there is no suggestion that the company's employees are automatically dismissed.⁴⁷

Where book debts are included in the mortgage an appointment under the general Conveyancing Acts does not of itself perfect the assignment of the debts to the mortgagee. It is still necessary to give the debtor appropriate notice of the assignment.⁴⁸ Moreover, the fact that the company's tenant pays rent to the receiver prevents the company's claim becoming statute-barred even if the rent is not enough to keep the mortgage interest down.⁴⁹

Usually a statutory appointment effects no change in the occupation or possession of the company's premises.⁵⁰ The receiver is not entitled, therefore, to demand a fresh agreement from public utilities for the supply of water, gas or electricity without first paying the company's arrears. But where a mortgagee in possession appoints a receiver under the statute he divests himself of possession and reverts it in the mortgagor.⁵¹ In these circumstances new agreements for the supply of essential services are warranted.

(ii) upon the mortgagee

A mortgagee retains his right to sue for the debt notwithstanding the appointment of a receiver under the statutory power.⁵² Moreover, payments made by the receiver to the mortgagee under the statute ensure that the secured creditor's claim against the mortgagor does not run

⁴⁷ See generally J. O'Donovan, "Corporate Redundancy" (1976) 4 *Australian Business Law Review* 257.

⁴⁸ *Rutter v. Everett* [1895] 2 Ch. 872.

⁴⁹ See *Kerr on Receivers*, 302.

⁵⁰ Cf. *Meigs v. Wickenden* [1942] 2 K.B. 161; *Richards v. Overseers of Kidderminster* [1896] 2 Ch. 212.

⁵¹ *Anchor Trust Co. Ltd. v. Bell* [1926] Ch. 805, 817 per Lawrence J. Cf. *re Prytherch* (1889) 42 Ch. D. 590 where a mortgagee in possession was seeking to relinquish his position to a receiver whom he hoped would be appointed by the Court.

⁵² *Lynde v. Waithman* [1895] 2 Q.B. 180.

foul of the Statutes of Limitations.⁵³ The appointment has a more significant effect upon the mortgagee's powers: it divests him of all powers given to the receiver by the statute. This is so even if the receiver refuses to exercise some of his statutory powers.⁵⁴

(iii) effect on other creditors

A receiver appointed by a mortgagee under the statutory power automatically displaces a receiver appointed earlier by a puisne incumbrancer. On the other hand, such an appointment does not dislodge a receiver appointed by the court at the suit of a subsequent mortgagee. Unless the original court order appointing the receiver expressly reserves the rights of the puisne incumbrancer, the holder of the prior mortgage must ask the court to discharge its receiver.⁵⁵ The title of a receiver appointed under the statute does, however, prevail over that of a receiver appointed by a judgment creditor.⁵⁶ In addition, if a receiver were appointed in pursuance of the statute prior to the service of a garnishee order nisi, the title of the mortgagee and his receiver would override the garnishor's claim.⁵⁷

Powers of the receiver

(i) the statutory powers

A receiver appointed under any of the general conveyancing statutes has power to demand and recover all the income of the property of which he is appointed receiver.⁵⁸ One form of income which is commonly collected under this power is rent. The receiver should give the mortgagor's tenants immediate notice of his appointment and demand that arrears and all future rents be paid to him. Otherwise the tenants may pay rent to the mortgagor and obtain a valid receipt from him even if they have notice of the mortgagee's charge.⁵⁹ The receiver may not, however, be entitled to demand all the rent yielded by the mortgagor's property. For

⁵³ *Portman Building Society v. Gallwey* [1955] 1 W.L.R. 96.

⁵⁴ *Woolston v. Ross* [1900] 1 Ch. 788.

⁵⁵ *Re Metropolitan Amalgamated Estates* [1912] 2 Ch. 497, 502; *Underhay v. Read* (1887) 20 Q.B.D. 209.

⁵⁶ *Kerr on Receivers*, 289; See also *Johns v. Pink* [1900] 1 Ch. 296 where it was held that the appointment of a receiver by the mortgagee of a lease extinguished or suspended the rights of the owner of the property who had become a tenant by *eligit* in order to recover arrears of rent from the mortgagor.

⁵⁷ See *Hirsch v. Coates* (1856) 25 L.J.C.P. 315; *Re General Horticultural Co.*; *Ex parte Whitehouse* (1886) 32 Ch. D. 512; *Glegg v. Bromley* [1912] 3 K.B. 474.

⁵⁸ Qld., s.92(2); N.S.W., s.115(3); Vic., s.109(3); S.A., s.53(3); W.A., s.65(3); Tas., s.26(3). The United Kingdom equivalent is L.P.A., s.109(3).

⁵⁹ *Vacuum Oil Co. v. Ellis* [1914] 1 K.B. 693.

example, where the charge is restricted to the mortgagor's land, any rent attributable to the mortgagor's furniture or chattels is not recoverable by the receiver. In such cases an agreement as to the rental of the furniture and chattels will be implied and the total rent apportioned.⁶⁰ Moreover, if the court has appointed a receiver at the suit of a puisne incumbrancer it appears that a receiver subsequently appointed under the statute by a prior mortgagee will require leave to collect future rents.⁶¹

The receipt of rent by a receiver does not of itself create a tenancy by estoppel between the tenant and the mortgagee: the receiver as agent of the mortgagor cannot by his actions bind the mortgagee to a tenancy relationship.⁶² On the other hand, as Pennycuik J. pointed out in *Barclays Bank Ltd. v. Kiley*:⁶³

the mortgagee and the tenant may by mutual agreement create the relationship of landlord and tenant as between themselves. Such relation may be created by express words or by conduct, and the question whether it has been created is one to be determined on the facts . . ."⁶⁴

*Chatsworth Properties Ltd. v. Effiom*⁶⁵ gives a clear indication of the type of evidence required to establish such a tenancy. In that case the mortgagee's solicitors wrote to the mortgagor's tenant advising that a receiver had been appointed and instructing him to pay rent not to his "former landlords" but to the receiver. The letter made no reference to the mortgage. Moreover, a new rent book was issued to the tenant describing the landlord as "R. C. Richardson, Receiver". The Court of Appeal rejected the mortgagee's claim for possession holding that in these circumstances any reasonable man would believe a fresh tenancy had been created. While a tenancy by estoppel created in this manner does not terminate the receivership, it does prevent the receiver obtaining possession of the leased property.

The statute enables the receiver to sue for rent in the name of the mortgagor but in such proceedings the tenant may raise a counterclaim against the mortgagor for breach of the covenants in the lease. For this reason the suit will often be instituted in the name of the mortgagee particularly where the mortgagor has attorned tenant to the secured creditor.

⁶⁰ *Salmon v. Matthews* (1841) 8 M. & W. 827; 151 E.R. 1275.

⁶¹ *Kerr on Receivers*, 288.

⁶² *Lever Finance Ltd. v. Neddleman's Trustee* [1956] Ch. 375, 382.

⁶³ [1961] 1 W.L.R. 1050.

⁶⁴ *Id.*, 1054. See also *Stroud Building Society v. Delamont* [1960] 1 W.L.R. 431, 436.

⁶⁵ [1971] 1 W.L.R. 144.

In Queensland, New South Wales and Western Australia the receiver is empowered to recover the income of the secured property by "action or otherwise", in the name either of the mortgagor or the mortgagee to the full extent of the estate or interest which could be realised by the mortgagor. In the other states he has the additional power to distrain but in Victoria he may not use this method to recover rent.⁶⁶ The receiver is also empowered to give effectual receipts for the income he demands and recovers under the statute.⁶⁷ Moreover, as we have seen, a person paying money to the receiver need not question whether any case has happened to authorise the receiver to act.⁶⁸

(ii) delegated powers

In addition to the statutory powers described above, a receiver is entitled in most states to exercise any powers which are delegated to him pursuant to the statute.⁶⁹ In New South Wales and Victoria, a mortgagee may commit to the receiver his statutory powers of leasing and accepting surrenders of leases.⁷⁰ These powers are restricted by the words, "as if such mortgagee were in possession of the land." In the absence of an express provision in the mortgage, an equitable mortgagee is not entitled to possession and cannot therefore create a lease or accept a surrender. Thus he cannot delegate such powers.

In the other states the relevant property law statutes do not specify which of the mortgagee's statutory powers may be delegated. However, the statutory power of sale can be exercised in most states "by any person for the time being entitled to receive and give a discharge for the mortgage money."⁷¹ A receiver appointed under the statute falls within this category and there would appear, therefore, to be no need for a distinct delegation of this power. In addition, the receiver may be required by the mortgagee to use the money he receives to obtain and maintain fire insurance to the extent of the mortgagee's interest in any

⁶⁶ Landlord and Tenant Act 1958 (Vic.), s.12. Distress for rent is still an available remedy in South Australia and Tasmania: Landlord and Tenant Act 1936-1978 (S.A.), ss.13-46; Landlord and Tenant Act 1935 (Tas.), ss.27-59. In the United Kingdom see L.P.A., s.109(3).

⁶⁷ Qld., s.92(3); N.S.W., s.115(3); Vic., s.109(3); S.A., s.53(3); W.A., s.65(3); Tas., s.26(3). The United Kingdom equivalent is L.P.A., s.109(3).

⁶⁸ Qld., s.92(4); N.S.W., s.115(4); Vic., s.109(4); S.A., s.53(4); W.A., s.65(4); Tas., s.26(4). The United Kingdom equivalent is L.P.A., s.109(4).

⁶⁹ Qld., s.92(3); N.S.W., s.115(3); Vic., s.109(3); S.A., s.53(3); W.A., s.65(3). In the United Kingdom see L.P.A., s.109(3).

⁷⁰ In N.S.W., by deed; Conveyancing Act 1919, ss.106(16); 107(11); in Victoria, by writing: Property Law Act 1958, ss.99(17), 100(13). In the United Kingdom see L.P.A. ss.99(19) and 100(13).

⁷¹ Qld., s.89; N.S.W., s.112(5); Vic., s.106(1); S.A., s.51(1); W.A., s.62. In the United Kingdom see L.P.A., s.106(1).

buildings, effects or property of an insurable nature comprised in the mortgage.⁷² The mortgagee's written direction to insure does not merely confer power upon the receiver; it also places him under an obligation.

(iii) limitations on the receiver's powers

Even if the mortgagee delegates certain specific powers in pursuance of the relevant statute the receiver's powers are severely limited. Perhaps the most important restriction is that he is not entitled to carry on the mortgagor's business.⁷³ Thus he may not make a payment on account of an unsecured debt.⁷⁴ He can collect income but not assets, for example, book debts.⁷⁵ His powers in relation to tenants are equally deficient: he has no power to recover possession, to pursue an action for ejectment, to terminate a tenancy or to increase the rent; his powers to collect rent produced by foreign property are inadequate;⁷⁶ and in most states he has no power to create a tenancy or to accept surrenders of leases. Without the mortgagee's authority he is not even entitled to insure the mortgaged property or to effect necessary and proper repairs.⁷⁷ These restrictions flow from the fact that the mortgagee retains the prior right to the income of the property until his interest is paid.⁷⁸ It follows that the receiver is accountable to the mortgagee for any unauthorised expenditures on insurance or repairs.

(iv) extension of the statutory powers

Some of the limitations in the powers of a receiver appointed under the statute can be overcome by an application to the court but it is preferable to extend the range of his powers in the mortgage itself. In each state the property law statute provides that the statutory powers may be varied or extended by the mortgage deed and further that any such variations or extensions shall operate in the same manner and with the same effects as if they were contained in the Act. Indeed the Acts expressly recognise that the statutory provisions shall take effect subject to the

⁷² In New South Wales, Victoria, South Australia and Tasmania the statute refers merely to fire insurance: N.S.W., s.115(7); Vic., s.109(7); S.A., s.53(7); Tas., s.26(7). The Queensland provision, s.92(7), refers to insurance against fire, storm and tempest. In Western Australia the receiver may be directed by the mortgage to take out and maintain insurance in respect of fire, storm, tempest and earthquake. The United Kingdom provision refers to "fire, life, or other insurances." See L.P.A., s.109(8)(iii).

⁷³ See *Harold Meggitt Ltd. v. Discount Finance Ltd.* (1939) 39 W.N. (N.S.W.) 23.

⁷⁴ See *Re Hale, Lilley v. Foad* [1899] 2 Ch. 107, 119.

⁷⁵ *Rutter v. Everett* [1895] 2 Ch. 872.

⁷⁶ *Kerr on Receivers*, 91-92, 302.

⁷⁷ *White v. Metcalf* [1903] 2 Ch. 567.

⁷⁸ *Visbord v. F.C.T.* (1943) 68 C.L.R. 354, 385.

terms of the mortgage deed.⁷⁹ Thus a deed which confers broader powers upon a receiver than those given by the statute is not thereby invalidated.⁸⁰ On the other hand, an extension of the statutory powers can produce the effect that the receiver is no longer deemed to be an agent of the mortgagor.⁸¹ Accordingly, it is advisable to state in the mortgage deed that the receiver shall be an agent of the mortgagor who shall be solely responsible for the receivers acts or defaults.

The Duties and Liabilities of the Receiver

In New South Wales there is an exception to the general proposition that a receiver appointed under the statute is the agent of the mortgagor: where a mortgagee or a number of mortgagees is entitled to appoint a receiver under the statute and the mortgagee or one of the co-mortgagees is a trust corporation then, if such corporation is appointed receiver, it shall not be deemed to be the agent of the mortgagor.⁸² Subject to this qualification, a receiver appointed under the statute is almost invariably the agent of the mortgagor for all purposes, not merely for the receipt of the rents or profits.⁸³

Money paid to a receiver is held by him in a fiduciary capacity⁸⁴ and must be applied in accordance with a statutory order of payments.⁸⁵ It may be convenient to consider *seriatim* the steps in the prescribed order for the application of receipts. First, subject to the provisions of the statute as to the application of insurance money,⁸⁶ he is required to "discharge all rents, taxes, rates and outgoings whatever affecting the mortgaged property." His limited agency usually produces no change in the mortgagor's possession or occupancy. It follows that he must use the money he receives to pay arrears of rent in addition to future rents accruing during the period of his receivership. He incurs no personal liability for these rents unless he has given a personal promise to pay or unless he warrants that he has authority to enter into a tenancy agreement as a principal.⁸⁷

⁷⁹ Qld., s.83(3) and 4(b); N.S.W., s.109(2) and (3); Vic., 101(3) and (4); S.A., s.47(3) and (4); W.A., s.57(3) and (4); Tas., s.21(2) and (3). In the United Kingdom, see L.P.A. s.101(4).

⁸⁰ *Richards v. Overseers of Kidderminster* [1896] 2 Ch. 212, 219.

⁸¹ *Id.*

⁸² Conveyancing Act 1919 (N.S.W.), s.115(6A).

⁸³ *Hand v. Blow* [1901] 2 Ch. 721.

⁸⁴ See *Palmer v. Carey* [1926] A.C. 703, 706.

⁸⁵ Qld., s.92(8); N.S.W., s.115(8); Vic., s.110; S.A., s.53(8); W.A., s.66; Tas., s.26(8). In the United Kingdom, see L.P.A., s.109(8).

⁸⁶ There is no such qualification in New South Wales and Tasmania.

⁸⁷ *Robinson Printing Co. Ltd. v. Chic* [1905] 2 Ch. 123; *Central London Electricity v. Berners* [1945] W.N. 51.

In *Central London Electricity Ltd. v. Berners*⁸⁸ a receiver and manager wrote to a public utility in the following terms soon after his appointment in pursuance of a clause in a debenture:

In consideration of your agreeing to afford without interruption a supply of electricity to the above premises now in my occupation I hereby undertake as receiver for the debenture holders of Gordon Chambers Co., Ltd., to pay to you all outstanding and future charges in respect of electricity supplied . . . to such premises. For and on behalf of the debenture holders of the above named company.

J. H. B. Barcroft, receiver . . .

Mr. Justice Hallett held that the receiver had not undertaken a personal liability to pay the electricity charges. Nor had he represented that he had authority to bind the debenture holder personally. Thus he was not liable in damages for a breach of warranty of authority. By the same token, as indicated earlier, a receiver appointed under the statute is obliged to pay any arrears of gas, water and electricity charges if he wishes supply to be continued.

His duty to pay "all . . . outgoings whatever affecting the mortgaged property" does not cover unsecured debts, such as repair costs, even if they were incurred in relation to the property. In the absence of an agreement between the mortgagor and the mortgagee, such a payment is authorised only where the mortgage confers broad powers of management upon the appointee. Presumably the receiver would be given credit for any expenses necessarily incurred to prevent a forfeiture of the property. A failure to pay rents, taxes and rates can produce this result and the general term "outgoings" is probably qualified by the words which precede it. But the word is open to a broader meaning. For example, would a receiver be entitled to deduct, under this heading, the costs of employing a caretaker to take charge of the mortgaged property? The answer would probably be "no" because it is not sufficient for the outgoings to be in respect of the mortgaged property; they must affect that property. The caretaker's wages might, however, be included in the receiver's commission as part of the "costs, charges, and expenses incurred by him as receiver." This would, in effect, reduce the receiver's net remuneration.

A public authority cannot sue the receiver for damages if he fails to pay rates, taxes or other outgoings out of his receipts for it does not belong to the class for whose benefit and protection the statutory duty

⁸⁸ [1945] W.N. 51.

was created.⁸⁹ However, a mortgagor can sue the receiver to recover any damages caused if he fails to pay the rates and taxes.⁹⁰

The receiver's second major obligation is to keep down all annual sums and other payments, and the interest on all principal sums having priority to the mortgage in respect of which he is appointed receiver. Here the statutes recognise that a receiver might be appointed by a puisne mortgagee and provide some protection for the prior mortgagee.

Next, he is required to apply his receipts in payment of his commission. The statutes provide that the maximum commission shall be five per centum on the gross amount of all money collected.⁹¹ This fee covers the receiver's remuneration *and* all costs, charges and expenses he incurs as receiver. He is, however, entitled to request the court to exercise its discretion to award a higher rate.⁹² Such an application can be made in foreclosure proceedings or redemption proceedings and possibly by an originating summons.⁹³ An increase in the statutory maximum will be awarded only in exceptional circumstances where the receiver encounters unexpected difficulties in collecting the rents or profits. It is not clear whether the court's order can operate retrospectively. On the other hand, the fact that the order is intended to cover the receiver's remuneration and *all* costs, charges and expenses incurred by him suggests that it may govern the commission to be paid throughout the receivership and not merely from the date of the judgment.⁹⁴

Where the appointment is made under the powers contained in any instrument, the liquidator or official manager of the mortgagor company may apply to the Court to fix the receiver's remuneration.⁹⁵ A similar application is not possible in respect of a receiver appointed under the statute. Thus it appears that the court has no jurisdiction to reduce the rate of commission prescribed by the mortgage deed unless it exceeds the statutory minimum.

After deducting his commission the receiver must apply his receipts in payment of the premiums on certain types of insurance taken out in pursuance of the statute or the mortgage deed or on the written direc-

⁸⁹ *Liverpool Corporation v. Hope* [1938] 1 K.B. 751, 755.

⁹⁰ *Visbord v. F.C.T.* (1943) 68 C.L.R. 354, 385.

⁹¹ Qld., s.92(6); N.S.W., s.115(6); Vic., s.109(6); S.A., s.53(6); W.A., s.65(6); Tas., s.26(6). In the United Kingdom see L.P.A., s.109(6).

⁹² *Id.*

⁹³ *Kerr on Receivers*, 297. See also the Rules of Supreme Court of the Australian States: Qld., 0.64, r.1(9) and (11); N.S.W., Pt.7, rr. 1-7; Vic., 0.54, r.1; S.A., 0.54, r.9; W.A., 0.59, r.1(15) and 0.58, r.1; Tas., 0.61, rr.1 and 3.

⁹⁴ Contrast U.C.A. s.189 and *Re Greycaine Ltd.* [1946] Ch. 269. See also *Companies Act 1948*, (U.K.), s.371.

⁹⁵ U.C.A., s.189. See also *Companies Act 1948* (U.K.), s.371.

tion of the mortgagee.⁹⁶ He is then expected to pay the costs of executing necessary or proper repairs directed in writing by the mortgagee.⁹⁷

The next step in the order of application of his receipts is the payment of the interest due and unpaid and accruing due in respect of any principal money due under the mortgage. He is bound to pay the mortgagee arrears of interest as well as interest accruing after his appointment⁹⁸ but the mortgagor can claim a refund of any amounts over paid to the mortgagee unless his claim is out of time.⁹⁹ If the receiver pays the mortgagee interest which is statute barred he commits a breach of his statutory duties: the word "due" in the relevant sections means "legally due and recoverable."¹⁰⁰ The obligation to pay only interest due or accruing due can be enforced by the mortgagor, the mortgagee and, probably, any puisne incumbrancers.¹⁰¹

Finally, the mortgage may by written direction require the receiver to apply the money he receives towards the discharge of the principal money due under the mortgage. The order of application receipts can be varied by the consent of all parties concerned¹⁰² so that some of the money collected by the receiver might be applied in payment of the principal due under the mortgage without first paying the interest. Such an arrangement, however, does not affect the mortgagee's tax position. Any receipts which, under the statute, should be applied in payment of the interest will be included in the mortgagee's assessable income.¹⁰³

Any residue must be paid to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property. The person entitled to receive the surplus is *prima facie*, the mortgagor or his assigns, his personal representatives or their assigns.¹⁰⁴ Where a puisne incumbrancer has appointed a receiver the residue must be paid to that receiver. Again, if a subsequent mortgagee has taken possession he is entitled to be paid the surplus. As mentioned earlier, a mortgagee in possession may appoint a receiver under the statute. If such a mortgagee

⁹⁶ Qld., s.92(8)(c); N.S.W., s.115(8)(c); Vic., s.110(c); S.A., s.53(8)(c); W.A., s.66(c); Tas., s.26(8)(c). In the United Kingdom, see L.P.A., s.109(8)(iii).

⁹⁷ As noted earlier, a receiver has no authority to effect repairs on his own initiative and he would be liable for any money misapplied in this way. *White v. Metcalf* [1903] 2 Ch. 567.

⁹⁸ *National Bank v. Kenney* [1898] 1 R. 197.

⁹⁹ *Re Jones' Estates* [1914] 1 I.R. 188.

¹⁰⁰ *Hibernian Bank v. Yourell* [1919] 1 I.R. 310.

¹⁰¹ *Yourell v. Hibernian Bank* [1918] A.C. 372, 386-387.

¹⁰² *Yourell v. Hibernian Bank* [1918] A.C. 372.

¹⁰³ *Visbord v. F.C.T.* (1943) 68 C.L.R. 354.

¹⁰⁴ *Turner v. Walsh* [1909] 2 K.B. 484, 494; *Portman Building Society v. Gallwey* [1955] 1 W.L.R. 96.

is still in possession when the residue is determined he is entitled to the balance. He must then account for any surplus to the persons entitled to receive it. This may be the mortgagor or a subsequent mortgagee or a receiver appointed by such mortgagee.

The application of the residue poses a problem for the receiver in two situations: first, where he is uncertain who is entitled to the surplus and secondly, where the person entitled cannot be found. Since the receiver is not "appointed under the powers contained in any instrument" he may not apply to the Court for directions under section 188(3) of the Uniform Companies Act. Kerr suggests that he might obtain a ruling from the court under Order 85, r.2 of the Rules of the Supreme Court which is restricted in its application to questions arising in the administration of a deceased person's estate or in the execution of a trust.¹⁰⁵ He also comments that the receiver might be able to pay the residue into court under s.63 of the Trustee Act 1925 (U.K.).¹⁰⁶ It is implicit in both these suggestions that a receiver appointed under the statutory power is a trustee in respect of the residue. Mortgagees have been held to be trustees of surplus proceeds remaining after they have exercised their powers of sale and discharged their debts.¹⁰⁷ In such cases, they have been allowed to pay the residue into court under the equivalent of s.63 of the Trustee Act 1925 (U.K.).¹⁰⁸ Similarly there would appear to be no reason why a receiver who holds surplus funds in his hands should not be treated as a bare trustee and allowed to pay the money into court.

Section 196 of the Uniform Companies Act requires a receiver "*appointed on behalf of the holders of any debentures of a company secured by a floating charge*" to pay certain preferred debts, such as

¹⁰⁵ *Kerr on Receivers*, 300.

0.85, r.2 provides that "An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or in connection with which the question arises or the relief is the Court of a trust. The action may be brought for the determination of any question arising in the execution of the trust: 0.85, r.2(2)(a). Similar provisions exist in the Rules of the Supreme Court in most states but they are largely restricted in their application to "trustees under any deed or instrument". See e.g. Qld.: 0.4, r.12(g); Vic., 0.55, r.3(d); S.A., 0.55, r.1(d); W.A., 0.58, r.2; Tas., 0.65, r.1. See also N.S.W., pt. 68, r.2.

¹⁰⁶ *Kerr on Receivers*, 300.

Similar provisions exist in all the Australian states: Trusts Act 1973 (Qld.), s.102; Trustee Act 1925-1969 (N.S.W.), s.95; Trustee Act 1958 (Vic.), s.69; Trustee Act 1936-1974 (S.A.), s.47; Trustee Act 1962-1972 (W.A.), s.99; Trustee Act 1898 (Tas.), s.48.

¹⁰⁷ *Re Walhampton* (1884) 26 Ch. D. 391.

¹⁰⁸ *Banner v. Berridge* (1881) 18 Ch. U. 254.

wages and leave entitlements, out of the assets coming into his hands in priority to any claim for principal or interest in respect of the debentures. A receiver acting under the power contained in the Property Law Acts is usually appointed by the holder of a fixed charge and would not therefore be subject to this obligation.¹⁰⁹

Both the mortgagor and the mortgagee are entitled to an account from the receiver as to the application of his receipts.¹¹⁰ It may well be that only the mortgagee who made the appointment is entitled to such an account but the fruits of any action he might bring against the receiver would be held for the benefit of all the mortgagees.¹¹¹ While the mortgagees will share the amount recovered in accordance with their priority, the mortgagor will bear the loss caused by any misapplication of the money received by the appointee. Thus, in the accounts between the mortgagee and mortgagor the latter will not be given any credit for the amount misappropriated.¹¹²

Given the nature of his agency, a receiver appointed under the statute incurs no personal liability provided he acts within the limits of the authority conferred on him. As the appointment involves no change in occupation or ownership of the mortgaged property, the receiver is not usually liable for any statutory obligations imposed upon the "occupier" or the "owner" apart from the rates and taxes which he is specifically required to pay out of his receipts.¹¹³ However, there is no rule of thumb in these matters and one must consider the Act in question in each case to ascertain whether the receiver is liable.¹¹⁴

Effect of winding up upon the receiver's powers and liabilities

While it is true that in a winding-up the receiver can no longer be the agent of the mortgagor company¹¹⁵ and incur any liabilities on its behalf, it does not necessarily follow that he becomes the agent of the mortgagee.¹¹⁶ Moreover, liquidation does not curtail the receiver's statutory powers. Whether he exercises these powers on behalf of him-

¹⁰⁹ *Re Lewis Merthyr Consolidated Collieries, Limited* [1929] 1 Ch. 498.

¹¹⁰ *Leceister Permanent Building Society v. Butt* [1943] Ch. 305; *Jeffreys v. Dickson* (1866) 1 Ch. App. 183; *Visbord v. F.C.T.* (1943) 68 C.L.R. 354, 386.

¹¹¹ *Yourell v. Hibernian Bank Ltd.* [1918] A.C. 372. *Carberry v. Gardiner* (1936) 36 S.R. (N.S.W.) 559, 573-574.

¹¹² *White v. Metcalf* [1902] 2 Ch. 567.

¹¹³ *Contrast Meigh v. Wickenden* [1942] 2 K.B. 160 and *Solomons v. R. Gertzenstein Ltd.* [1954] 2 Q.B. 243.

¹¹⁴ See *Solomons v. R. Gertzenstein Ltd.* [1954] 2 Q.B. 243, 256.

¹¹⁵ *In re Courts (Emergency Powers) Act 1939 and In re S. Brown and Company General (Warehousemen) Ltd.* [1940] Ch. 961.

¹¹⁶ See *Re Wood's Application* [1941] Ch. 112, 116; *Gaskell v. Gosling* [1897] A.C. 575.

self as principal or as agent for the mortgagee is a question of fact in each case.¹¹⁷ In the absence of an express authority from the mortgagee, it would be difficult to escape the conclusion that the receiver was acting on his own behalf.¹¹⁸ He would be personally liable to third parties dealing with him, subject of course to any right of indemnity he may have against the mortgagee.

Removal and discharge

A mortgagee may remove a receiver appointed under the statute and appoint a replacement by writing under his hand.¹¹⁹ The appointment terminates when the receiver is notified of his removal.¹²⁰ Once again, however, the receivership will be regarded as continuous if the substitute is appointed promptly¹²¹ and in such a case the mortgagor will not be entitled to collect any rents during the interim period. Curiously although the receiver is deemed to be the agent of the mortgagor, he cannot be dismissed by the mortgagor¹²²—yet another reminder of the appointee's special and limited agency.

When the receivership itself is completed the appointee is entitled to a release or discharge from the mortgagee and will usually seek an indemnity in respect of all claims which might arise out of his receivership. However, at this stage his bargaining power is minimal and he would be better advised to seek a comprehensive indemnity from the mortgagee before he accepts his appointment.

CONCLUSION

As we have seen, the statutory power is automatically incorporated into mortgagees by deed unless it is expressly modified or excluded. It is not surprising, therefore, that it is moderate in its terms and limited in its scope. The parties are free to build upon the statutory scheme, to extend it and to vary it. It was never intended to confer comprehensive powers upon receivers; rather it was a statutory recognition of a well-established conveyancing practice. Viewed in this light many of its limitations can be excused. Nevertheless mortgagees and their legal advisers must ensure that they are acutely aware of its drawbacks so that they do not fall into the trap of overestimating its utility.

¹¹⁷ *Gaskell v. Gosling* [1897] A.C. 575.

¹¹⁸ See *Thomas v. Todd* [1926] 2 K.B. 511.

¹¹⁹ Qld., s.92(5); N.S.W., s.115(5); Vic., s.109(5); S.A., s.53(5); W.A., s.65(5); Tas., s.26(5). In the United Kingdom see L.P.A., s.109(5).

¹²⁰ See *Windsor Refrigerator Co. v. Branch Nominees* [1961] Ch. 375, 398.

¹²¹ Re a contract between R. W. Hill Ltd. and Simmons [1920] W.N. 386.

¹²² *Visbord v. F.C.T.* (1943) 68 C.L.R. 354, 382.