

the receiver may be entitled to according to law," means all such proper, legitimate and necessary outlay and expenses as the receiver incurred in the discharge of his duties and pursuant to

the authority with which he was vested by the court as its officer. *Hardt v. Levy*, 1897, 20 App.Div. 400, 46 N.Y.S. 815, affirmed 155 N.Y. 660, 49 N.E. 1097.

§ 1217. Commissions

(a) A receiver shall be entitled, in addition to his necessary expenses, to such commissions upon the sums received and disbursed as may be allowed by the court, as follows:

(1) On the first twenty thousand dollars, not exceeding five percent;

(2) On the next eighty thousand dollars, not exceeding two and one-half percent; and

(3) On the remainder, not exceeding one percent.

(b) If the commissions of the receiver so computed do not amount to one hundred dollars, the court in its discretion may allow such sum not exceeding one hundred dollars as shall be reasonable.

(c) When more than one receiver shall be appointed, the compensation herein provided shall be divided between them, as the court directs.

(L.1961, c. 855.)

Historical Note

Derivation. Gen.Corp.Law of 1929, §§ 191, 192. Formerly sections 277 and 278; renumbered 191 and 192 respectively, L.1929, c. 650; repealed by L.1973, c. 451, § 2. Former section 277 derived from CCP, § 2431-a, added L.1906, c. 293. Former section 278 derived from L.1883, c. 378, § 2, amended L.1886, c. 275, § 1; L.1901, c. 506, § 1; L.1906, c. 349, § 1.

Legislative Studies and Reports

1. Source: McKinney General Corporation Laws §§ 191 and 192.
 2. Changes: Revised.
- Comment: This section applies the commission scale set forth in General Corporation Law § 191, which is now limited to receivers in voluntary dissolutions, to all proceedings under the article. As a result the restrictions imposed by General Corporation Law § 192 have been eliminated.

Cross References

Commissions of receivers generally, see CPLR 8004.
Comparable provisions, see Not-For-Profit Corporation Law § 1217.

Library References

Receivers ⇨ 196 to 198.
C.J.S. Receivers §§ 386, 387, 389.

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1. Purpose

The Act of 1883 was passed, in view of the scandals which had been set afloat in respect to the administration of the affairs of insolvent corporations through receivers; the object of the act was to supplement the existing legislation, in respect to the winding up of the affairs of insolvent corporations, and to provide further restrictions and safeguards against the misuse or depletion of corporate funds in the hands of the receivers. *United States Trust Co. v. New York, etc., R. Co.*, 1886, 101 N.Y. 478, 5 N.E. 316. See, also, *In re Warren E. Smith Co.*, 1898, 31 App.Div. 39, 52 N.Y.S. 877.

2. Law governing

Laws 1883, c. 378, § 2, which related to the fees of receivers of corporations applied only to receivers of corporations appointed in proceedings in insolvency and not to those appointed in actions to foreclose corporate mortgages; the fees of the latter were governed by section 3320 of the Code of Civil Procedure [now CPLR 8004], which provided for fees of receivers "except as otherwise specially prescribed by statute." *United States Trust Co. v. New York, etc., R. Co.*, 1886, 101 N.Y. 478, 5 N.E. 316.

Commission of receiver appointed under article 11 to administer judicial dissolution of corporation should have been

computed under this section governing commission rates for receivers, rather than under general provision for receivers' commissions under CPLR 8004. *Matter of T.J. Ronan Paint Corp.*, 1984, 98 A.D.2d 413, 469 N.Y.S.2d 931. See, also, *In re F.G.A. Concrete Const. Corp.*, 1966, 26 A.D.2d 639, 272 N.Y.S.2d 458; *La Vin v. La Vin*, 1953, 281 App.Div. 888, 119 N.Y.S.2d 573, appeal denied 281 App.Div. 984, 121 N.Y.S.2d 89.

The amount of a temporary receiver's commission where he was appointed on an application for the voluntary dissolution of a corporation was governed by sections 1547-1549 of the Civil Practice Act [CPLR § 8004 et seq.]; he was not limited to a commission based upon the cash which actually came into his hands; he could, in an extreme case, and as a maximum, be allowed the statutory rate of the value of the property coming into his hands for receiving and protecting the same. *Matter of Smith Co.*, 1898, 31 App.Div. 39, 52 N.Y.S. 877.

Where action, in which receiver was appointed, was not an action by a stockholder or general creditor for the appointment of a receiver of an insolvent corporation, but was an action by a mortgagee against a mortgagor to foreclose the mortgage and for a receiver during foreclosure, commissions of receiver were not to be computed under former General Corporation Law, § 192 [now this section] but under the Civil Practice Act [CPLR], though one of the defendants and principal mortgagor was a corporation. *Murphy v. Pfeiffer Glass, Inc.*, 1958, 15 Misc.2d 214, 180 N.Y.S.2d 639, modified on other grounds 11 A.D.2d 902, 202 N.Y.S.2d 937.

3. Expenses, recovery of

Time records of attorney of receiver appointed for administration of dissolution of corporation were insufficient to support award of attorney fees applied for by receiver; affidavit of services was required upon application to fix counsel fees on quantum meruit basis, and standard to be applied was fair and reasonable value of services rendered, taking into account time spent, difficulties involved in matters in which services were rendered, nature of services,

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amount involved, professional standing of the counsel, and results obtained. *Matter of T.J. Ronan Paint Corp.*, 1984, 98 A.D.2d 413, 469 N.Y.S.2d 931.

Sum of \$10,000 was an ample award for legal services rendered for receiver of dissolved corporation in view of fact that the matter was settled prior to service of an answer by sole debtor and involved merely collection of facts, negotiations, and final settlement of one account after service of summons and complaint and before service of an answer. In *re F. G. A. Concrete Const. Corp.*, 1966, 26 A.D.2d 639, 272 N.Y.S.2d 458.

It is proper for the court to direct the receiver to retain from the assets of the corporation a specified sum as a fund from which to pay the necessary expenses of administration including his fees as receiver. *Matter of Atlas Iron Const. Co.*, 1897, 19 App.Div. 415, 46 N.Y.S. 467.

4. Sums received and disbursed—Generally

Commissions should not be allowed upon receipts and disbursements having only a constructive and not an actual existence; premium notes and loans, made on life insurance policies, are not assets upon which the receiver is entitled to commissions, as they merely constitute offsets against the liability of the company. *Atty. Gen. v. North American Life Ins. Co.*, 1882, 89 N.Y. 94.

The word "sums" as here used is construed as meaning totals or amounts and, as so construed, the commissions of a receiver are to be computed on the value of the entire property that comes to his hands and is distributed by him, where the property consists of cash, securities, notes, bonds, mortgages, evidences of indebtedness or choses in action. *People v. Brooklyn Bank*, 1909, 64 Misc. 538, 118 N.Y.S. 722.

What shall be deemed "sums received and disbursed" is said to be a matter of construction of the statute, in respect to which the courts are governed by the nature and purpose of the trust, and not necessarily by adjudications giving construction to other statutes on the subject relating to different trusts although susceptible of analogous interpretation; the

court will also regard the consideration deemed contemplated by the statute, by way of execution of the trust which supports the right to commissions. *People v. Mutual Ben. Associates*, 1886, 39 Hun 49.

5. — Particular cases

Where a receiver has advanced money to pay taxes upon lands covered by mortgages in the hands of the superintendent of insurance then being foreclosed, which advances were repaid from the proceeds of the foreclosure, the receiver is not entitled to commissions upon the sum so refunded. *Atty. Gen. v. North American Life Ins. Co.*, 1882, 89 N.Y. 94.

Where a receiver is appointed not by reason of insolvency but in consequence of a disagreement as to the management of the corporate affairs and the business is carried on by the owners of the stock, acting in connection with a clerk appointed at the expense of the receivership, he is not entitled to a commission on the sums received and expended by said persons in the management of the business, his commission being limited to that on the amount received on the sale of the property at auction, this being the only sum actually received and disbursed by him. *Matter of Woven Tape Skirt Co.*, 1881, 85 N.Y. 506.

Temporary receiver of corporation was not entitled to commissions on the amount which was on deposit in the corporate bank account when he assumed his duties nor on the interest generated thereon since such sums were not received and disbursed by him. In *re Kraemer*, 1972, 40 A.D.2d 1053, 338 N.Y.S.2d 913, appeal denied 32 N.Y.2d 609, 342 N.Y.S.2d 1025, 295 N.E.2d 655.

Temporary receiver of property of corporation appointed in stockholder's derivative action took no title to realty of corporation and where receiver was not granted power to transfer realty and none had been transferred and, at time of order awarding commissions, no relief was sought which called for conversion or transfer of realty, receiver was entitled to commissions on rents received by him from realty, but his right to an allowance based on value of the realty should await determination until final accounting. *La Vin v. La Vin*, 1953, 281 App.Div. 888, 119 N.Y.S.2d 573, appeal

denied 281 App.Div. 984, 121 N.Y.S.2d 89.

As to the commissions it is sufficient to say that the award was based upon the moneys that actually passed through the receiver's hands, which were collected by him and were paid out by various orders of the court; the fact that portions of this amount were subsequently paid out to persons claiming an interest in the fund or in money in his hands in settlement of claims against him as receiver, or having claims for liens upon the property of the corporation, did not prevent the receiver from being entitled to commissions upon the amount he actually received and disbursed. *Matter of Little*, 1900, 47 App.Div. 22, 62 N.Y.S. 27, affirmed 1901, 165 N.Y. 643, 59 N.E. 1125.

Where a receiver pays off an incumbrance upon property which he sells free and clear from debt, he is entitled to a commission on the amount paid to free the property from such incumbrance as so much money received and disbursed; such a transaction is not within the principle of the cases holding that executors, trustees or receivers selling property subject to incumbrances upon it are not entitled to commissions upon the amount of the incumbrances, as in the latter class of cases the incumbrances themselves are not paid but the purchaser receives the property subject to that which is upon it. *Matter of Security Life Ins., etc., Co.*, 1883, 31 Hun 36.

6. Rates of commission

The rate on sums received and disbursed, prescribed by former General Corporation Law, § 192 [now this section] as commissions payable to receivers of a corporation, was not a mandatory rate for interim allowance but a permissible maximum rate. *La Vin v. La Vin*, 1953, 281 App.Div. 888, 119 N.Y.S.2d 573, appeal denied 281 App.Div. 984, 121 N.Y.S.2d 89.

7. Payment of commission—Persons liable

Reasonable fees of temporary receiver appointed for foreign corporations, which had allegedly been nationalized by foreign government, and which allegedly had assets in New York, should be paid by plaintiff, who brought action for ap-

pointment of receiver, and plaintiff should be entitled to reimbursement from any corporate assets coming into hands of permanent receiver who might be appointed. *Talmon v. Societatea Romana Pentru Industria De Bumbac*, 1954, 206 Misc. 449, 132 N.Y.S.2d 776.

8. — Time of

Under provision of former General Corporation Law, § 192 [now this section] for commissions on moneys received and disbursed by receivers, the common practice was to award one-half of proper commission percentage when moneys were received and one-half when they were disbursed. *La Vin v. La Vin*, 1953, 281 App.Div. 888, 119 N.Y.S.2d 573, appeal denied 281 App.Div. 984, 121 N.Y.S.2d 89.

9. Reduction of commission

Although receiver appointed under this article for administration of dissolution of corporation would have been entitled to \$23,704.46 as interim commission under this section governing receivers' commissions, taking into account all facts and circumstances, considering nature of services rendered, time expended over 14-month period and sums "received and disbursed," receiver was entitled to commission of \$15,000, inclusive of disbursements and travel expenses. *Matter of T.J. Ronan Paint Corp.*, 1984, 98 A.D.2d 413, 469 N.Y.S.2d 931.

A receiver whose allowance has been reduced on the ground of being excessive may, in a proper case, instead of being compelled to return the entire amount in excess of that to which he was entitled, be allowed a credit for money advanced by him to protect the corporate assets. *People v. Brooklyn Bank*, 1913, 157 App.Div. 171, 142 N.Y.S. 75.

The court may, in determining the question as to the amount of the receiver's commission, take into consideration the manner in which he has executed his trust and may be justified in allowing no commissions upon funds improvidently used by him. *Matter of Commonwealth Fire Ins. Co.*, 1884, 32 Hun 78.

10. Extra compensation

Where party accepted appointment as a receiver of a corporation, he became

an officer of the court in the control of the corporation, and as such was not allowed to continue a pre-existing arrangement for his compensation in excess of commissions allowed him by statute. *Salmon v. Schenectady Mason Supply Corp.*, 1951, 276 App.Div. 609, 102 N.Y.S.2d 91.

Where the amount of a receiver's compensation is fixed by statute, the court has no power to exceed the amount allowed therein under the guise of extra compensation. *In re Orient Mut. Ins. Co.*, 1892, 66 Hun 633, 21 N.Y.S. 237.

The law contemplated one commission which is the entire compensation provided for collecting. *Atty.-Gen. v. Continental Life Ins. Co.*, 1884, 32 Hun 223.

In one of the early cases it is decided that a receiver is not authorized to act as counsel in the business of the trust, so as to entitle him to extra counsel fees; the commission allowed by law being intended as full compensation for his personal services in the execution of his trust. *Matter of Niagara Bank*, 1836, 6 Paige 213.

11. Solvency of corporation

On application for dissolution of corporation, whether voluntary or involuntary, there is no distinction between solvent or insolvent corporation in terms of receiver's fee or commission. *Matter of T.J. Ronan Paint Corp.*, 1984, 98 A.D.2d 413, 469 N.Y.S.2d 931.

12. Successive receivers

In determining the compensation of a receiver it has been decided that he is entitled, in addition to his necessary ex-

penses, to such commission, not exceeding five per centum upon the sums received and disbursed by him, as the court allows, but he will not be allowed commissions on property received and delivered to his successor in office. *Moe v. Thomas McNally Co.*, 1910, 138 App. Div. 480, 123 N.Y.S. 71.

Where a receiver resigns, before his trust is fully executed, the court will not allow him any commissions for service which he voluntarily escapes and the burden of which his successor takes. *People v. Mutual Ben. Associates*, 1886, 39 Hun 49.

Where the receiver first appointed dies, his successor is not entitled to the full commission on funds collected by his predecessor, the second receiver's only duty in respect to such sums being merely to disburse them. *Atty.-Gen. v. Continental Life Ins. Co.*, 1884, 32 Hun 223.

13. Unauthorized receivers

If an order appointing ancillary receivers is unauthorized, the court cannot without defendant's consent direct that they be paid or reimbursed out of defendant's property. *Moe v. Thomas McNally Co.*, 1910, 138 App.Div. 480, 123 N.Y.S. 71.

The fact that an order appointing receivers has been vacated does not establish that they are not entitled to compensation as a matter of law, if the order was not vacated for lack of jurisdiction but merely because improvidently granted. *People v. Oriental Bank*, 1909, 129 App.Div. 865, 114 N.Y.S. 440.

§ 1218. Special provisions relating to actions or special proceedings against foreign corporations

(a) In any action or special proceeding brought against a foreign corporation under this article, the following provisions shall apply:

(1) Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided.

(2) An order directing service by publication of the summons shall be made upon application of a plaintiff in any such action and

shall be founded upon a verified complaint, alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized or that its authority or existence has been terminated or cancelled in the jurisdiction of its incorporation, or that it has ceased to do business, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this article in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

(3) The order directing service of the summons shall require the publication thereof in a newspaper published in the state of New York in the English language at least once a week for four successive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its incorporation.

(4) In any such action, the summons shall be served personally or an order directing service thereof by publication shall be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service shall be made complete by the continuance thereof.

(5) If served by publication, service of the summons shall be deemed complete on the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made.

(6) In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, nationalized, or its authority or existence has been otherwise terminated or cancelled, the court shall thereupon direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and proper-