Appointment of a Receiver Without Notice in Indiana

I. Introduction

A receiver[1] is a court-appointed officer whose function is "to receive and preserve the property or fund in litigation . . ., when it does not seem reasonable that either party should hold it."[2] Although typically the court appoints a receiver after the adverse party has had an opportunity to be heard, in certain situations the rights of the moving party cannot be protected by any means short of obtaining a receivership before notice and hearing.[3] The remedy affords the petitioning party immediate protection from loss or destruction of assets in the hands of an adverse party.[4] However, if complete

---

[1]Receiverships are generally of two types, (1) The preservation type, and (2) the liquidation type. Usually the moving party seeks a preservation receiver. For example, during the pendency of a foreclosure action, a receivership is sought to preserve the subject matter of the foreclosure until the rights of the parties are established at trial. Generally, a preservation receiver must manage the affairs of an ongoing business. The liquidation receiver, on the other hand, is typically appointed by the court only *after* a legal proceeding for the purpose of liquidating the assets of a failing business, paying the debts, and distributing anything which remains. Its function is usually similar to that of the executor of an estate. 2 R. Townsend, Securities and Creditor's Rights 553 (1976). Because the issue of the appointment of a receiver without notice most often arises in the case of preservation receiverships, all subsequent references in this note to receivers, unless otherwise indicated, refer to preservation receiverships.

[2]J. High, Treatise on the Law of Receivers 2 (1876).

[3]If a person in control of assets has time to waste or improperly apply assets, there may be little left to preserve. Indiana courts soon after the adoption of the receivership statute recognized this consideration:

> The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. *From the very nature of the power and of the purposes for which it may be invoked, its efficiency depends on the promptness with which it may be exercised.*

Bitting v. Ten Eyck, 85 Ind. 357, 360 (1882) (emphasis added). *See also* Meyering v. Petroleum Holdings Inc., 227 Ind. 313, 86 N.E.2d 78 (1949); H-A Circus Operating Corp. v. Silberstein, 215 Ind. 413, 19 N.E.2d 1013 (1939).

[4]The appointment of a receiver during the pendency of a lawsuit or at the commencement of legal proceedings, as in the case of a receiver appointed without notice, is for the purpose of preserving the status quo or of protecting the property pending notice and hearing. Vogel v. Chappell, 211 Ind. 310, 312-13, 6 N.E.2d 953, 955 (1937). Notwithstanding the potential for a receiver to preserve and protect the assets pending the final disposition of the legal questions, and aside from the difficulty in having a receiver appointed with notice, much less without notice, the caveat issued by the court in Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 79 N.E.2d 399 (1948), should be kept in mind by all who seek the appointment of a receiver:

> [T]he power should be exercised with great caution and never indulged unless the danger of loss or injury is imminent. "*A receivership is not a*

relief is to be accorded the moving party, the rights of the party in possession must be infringed upon. Due process requires that no person will be deprived of his property without notice and hearing.[5] There are, therefore, two competing considerations: Whether to afford full protection to the moving party at the expense of the rights of the party in possession or to accord the moving party something less than full and adequate relief with the risk that justice will be altogether thwarted.[6]

The problem is compounded because the Indiana General Assembly has not provided any legislative guidance in this area,[7] except to specifically provide for the ex parte appointment of a receiver.[8] The courts, therefore, are left with the task of determining when notice and hearing may be dispensed with, without

---

panacea for all business ills. The remedy may be worse than the disease. Even the suggestion of a receivership, as all know, may cause capital to hide in its shell."

Id. at 245-46, 79 N.E.2d at 404 (emphasis added) (quoting 16 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7697, at 90 (repl. ed. 1942)). This portion of the court's opinion in *Indianapolis Dairymen's Co-op.* is significant in the discussion of receiverships without notice because: (a) It points out that a party petitioning for a receiver might be well-advised to consider an alternate course of action because a receiver is by no means the solution to all business problems, and (b) it suggests an additional reason for seeking the appointment of a receiver without notice since an unannounced takeover of the assets may prevent an unexplained "disappearance" of the assets.

[5]*E.g.*, Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193 (1915).

[6]The courts must balance the need to protect the plaintiff's claim to the assets against the debtor's constitutional and legal rights to his property. The party seeking the appointment of a receiver clearly bears the burden of proving the need for the receivership. Corbin v. Thompson, 141 Ind. 128, 129, 40 N.E. 533, 533 (1895). The court in *Corbin* held:

> The power of the courts to appoint receivers is one of the highest and most unusual character vested in courts of chancery, and is never exercised in doubtful or evenly balanced cases; but is exercised only where justice would in all probability be defeated by withholding it.

Id. at 129, 40 N.E. at 533. *Accord*, Ziffrin v. Ziffrin, 242 Ind. 351, 358, 179 N.E.2d 276, 279 (1962); Jones v. Becker, 212 Ind. 248, 254, 8 N.E.2d 587, 590 (1937). In addition, courts generally go a step further and require the moving party to demonstrate a probability that it will ultimately succeed on the merits. Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 243, 79 N.E.2d 399, 403 (1948); Hawkins v. Aldridge, 211 Ind. 332, 341, 7 N.E.2d 34, 38 (1937).

[7]The Indiana Legislature enacted the receivership statute in 1881. Act of Apr. 7, 1881, Ch. 38, § 245, 1881 Ind. Acts 240. Except for a minor change in 1911, Indiana statutory law has remained unchanged for almost the last 100 years. IND. CODE § 34-1-12-1 (1976). Furthermore, the Indiana Code adopted the principles applied by the equity courts before the formation of the Code. Bitting v. Ten Eyck, 85 Ind. 357, 360 (1882). *Accord*, State *ex rel.* Makar v. St. Joseph County Circuit Court, 242 Ind. 339, 347, 179 N.E.2d 285, 289 (1962) (The authority of a court to appoint a receiver exists only by statute and not at common law.).

[8]IND. CODE § 34-1-12-9 (1976).

violating the adverse party's constitutional rights.[9] Over the years, the Indiana courts have developed a rather elaborate rule, yet there is some question whether the courts have gone far enough in protecting the rights of the party in possession. Despite the shortcomings of the court-adopted rule and the resulting constitutional questions involved in the unannounced seizure of another person's property, and despite the grave consequences which may befall the party petitioning for the appointment, parties nevertheless continue to press for ex parte receiverships because of the need for a prompt and efficient recovery of endangered property.

The issues which surround the risky practice of having a receiver appointed before notice is served will be discussed in this Note.

II. General Procedure for Appointment of a Receiver With Notice

The discussion of the appointment of a receiver before notice can be better understood by first considering the procedure for the appointment of a receiver *with* notice.

An incredible aspect of the long history[10] of the receivership

---

[9]In attempting to protect these constitutional rights, three fundamental principles guide the courts: (1) "Relief by a receivership is an extraordinary remedy and radical in nature," Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 662, 221 N.E.2d 340, 343 (1966) (*See, e.g.*, Youngstown Sheet & Tube Co. v. Patterson-Emerson-Comstock, 227 F. Supp. 208, 216 (N.D. Ind. 1963); Lafayette Realty Corp. v. Moller, 247 Ind. 433, 439, 215 N.E.2d 859, 862 (1966); Ziffrin v. Ziffrin, 242 Ind. 351, 358, 179 N.E.2d 276, 278 (1962)]; State *ex rel.* Makar v. St. Joseph County Circuit Court, 242 Ind. 339, 347, 179 N.E.2d 285, 289-90 (1962)); (2) "such power should only be exercised when it is clear that no other full and adequate remedy exists whereby justice between the parties may be affected and a wrong prevented," Ziffrin v. Ziffrin, 242 Ind. 351, 358, 179 N.E.2d 276, 278 (1962); and (3) "[s]uch powers are exercised by a court of equity with due care and caution," Jones v. Becker, 212 Ind. 248, 254, 8 N.E.2d 587, 590 (1937). In considering the appointment of a receiver without notice, the courts apply these principles to the party seeking the receiver with great scrutiny. Henderson v. Reynolds, 168 Ind. 522, 526, 81 N.E. 495, 496 (1907).

Generally, in order to allow ex parte relief under these principles, it must appear that an emergency situation exists and that the delay inherent in giving notice would cause irreparable harm to the moving party. Lafayette Realty Corp. v. Moller, 237 Ind. 433, 439, 215 N.E.2d 859, 862 (1966); Meyering v. Petroleum Holdings, 227 Ind. 313, 325, 86 N.E.2d 78, 82 (1949); Largura Constr. Co. v. Super-Steel Products Co., 216 Ind. 58, 61, 22 N.E.2d 990, 992 (1939); Bookout v. Foreman, 198 Ind. 543, 546-47, 154 N.E. 387, 388 (1926).

[10]The receivership remedy is one of the oldest forms of equitable relief, dating from the reign of Edward VI in England. 65 Am. Jur. 2d *Receivers* § 1 (1972). The remedy was introduced into American jurisprudence with the other equity powers of early American courts. However, much of the modern law has evolved since the Industrial Revolution, which brought a boom in business and the general economic growth of the nation. Perhaps this is, in part, the problem associated with receiver-

remedy is that the Indiana General Assembly has not outlined a clear procedure for the obtaining of a receiver.[11] Although the vagueness of the statute enables the courts to exercise a great degree of discretion and flexibility, the lack of direction with which practitioners are left persists.

The first step in seeking the appointment of a receiver is to file a lawsuit[12] and have a summons issued to the defendant, the adverse party.[13] The plaintiff usually alleges impropriety on the part of the person in control of the assets[14] and petitions for the appointment of a receiver.[15] The appointment of a receiver is an ancillary

---

ships. Courts in the closing years of the twentieth century are still applying legal principles developed during the infancy of business in the late 1800's. Indiana law has followed the same course.

[11]Darby, *Need of a New Receivership Statute in Indiana*, 4 IND. L.J. 266 (1929). Darby's severe criticism of the Indiana receivership statute 50 years ago is still accurate because the statute has not been amended since he wrote: "Our receivership statute in Indiana is now 47 years old. It is obsolete and insufficient in many respects. Our circuit and superior court judges are entitled to more aid from the Legislature . . . than the present statute affords." *Id.* at 266.

[12]Winona, Warsaw, Elkhart & South Bend Traction Co. v. Collins, 162 Ind. 693, 694, 69 N.E. 998, 999 (1904).

[13]State *ex rel.* Busick v. Ewing, 230 Ind. 188, 190, 102 N.E.2d 370, 371 (1951); Alexandria Gas Co. v. Irish, 152 Ind. 535, 536, 53 N.E. 762, 763 (1899). In *Alexandria Gas Co.* the court held:

> The question presented is whether the court had jurisdiction to appoint a receiver without notice, before a summons had been issued on said complaint against appellant. It is settled law in this State that in an action like this the court has jurisdiction to appoint a receiver only after the commencement of an action, and while it is pending. The process must be delivered to the officer authorized to serve it before the action is deemed commenced.

Id. at 536-37, 53 N.E. at 763 (citations omitted).

[14]*See, e.g.*, Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 241-42, 79 N.E.2d 399, 402 (1948) (a derivative action alleging mismangement of the corporation, including failure to file an annual report, lack of notice of annual meeting, accumulating excess income without distribution to the members, deducting without authorization a small fee from milk sold through the co-op, and paying a fee, allegedly an unnecessary expense, to a corporation in which defendant was beneficially situated).

[15]The application for appointment of a receiver must allege one or more statutory grounds for the relief. IND. CODE § 34-1-12-1 (1976) sets forth seven general conditions which will justify the appointment of a receiver:

> Sec. 1. A receiver may be appointed by the court, or the judge thereof in vacation, in the following cases:
>
> First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim.
>
> Second. In actions between partners, or persons jointly interested in any property or fund.
>
> Third. In all actions when it is shown that the property, fund or rent, and profits in controversy, is in danger of being lost, removed or materially injured.
>
> Fourth. In actions by a mortgagee for the foreclosure of a mortgage, and

action[16] and envisions the adverse party's possession of property which, for various reasons, requires protection.[17] Additionally, the plaintiff must establish that he has an interest in the property which is the subject matter of the lawsuit;[18] hence the appointment of a receiver is an in rem proceeding.[19]

---

the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed or materially injured; or when such property is not sufficient to discharge the mortgaged debt, to secure the application of the rents and profits accruing before a sale can be had.

Fifth. When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

Sixth. To protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person entitled thereto the rents and profits thereof.

Seventh. And in such other cases as may be provided by law; or where, in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties.

[16]Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 243, 79 N.E.2d 399, 403 (1948); State *ex rel.* Busick v. Ewing, 230 Ind. 188, 190, 102 N.E.2d 370, 371 (1951). In *Ewing*, the court held:

> The petition for the appointment of receiver was filed as a separate action, and the appointment of a receiver was the sole relief therein sought by the plaintiffs. This case comes within the general rule that proceedings for the appointment of a receiver are ancillary in their nature and must be supported by a principal action. To confer jurisdiction upon the court in this case, it is therefore necessary that a principal action be filed to which the receivership is ancillary.

230 Ind. at 189-90, 102 N.E.2d at 371 (citations omitted). *But see* Supreme Sitting of the Order of the Iron Hall v. Baker, 134 Ind. 293, 305, 33 N.E. 1128, 1131 (1893).

[17]*See* notes 126-33 *infra* and accompanying text.

[18]According to the court in Steele v. Aspy, 128 Ind. 367, 27 N.E. 739 (1891):

> To authorize the interposition of the court by the appointment of a receiver, it was essential that the appellee should show either a clear legal right in himself to the property in controversy, or that he had some lien upon or property right in it, or that it constituted a special fund out of which he was entitled to satisfaction of his demand. It was essential, to authorize the exercise of such jurisdiction, for the appellee to show that he had a present, existing interest in the property.

128 Ind. at 368, 27 N.E. at 740. *See also* State *ex rel.* Busick v. Ewing, 230 Ind. 188, 191, 102 N.E.2d 370, 372 (1951).

[19]*See* Hellebush v. Blake, 119 Ind. 349, 350, 21 N.E. 976, 977 (1889); Michigan Trust Co. v. Probasco, 29 Ind. App. 109, 114-15, 63 N.E. 255, 257 (1902). According to the court in *Hellebush*:

> We are satisfied that the circuit court did have authority to appoint the receiver, notwithstanding the fact that the defendant was not a resident of this State. The property of which the court was asked to take possession through its receiver was within its jurisdiction, and it had authority to preserve and dispose of the property, through the medium of a receiver, in order to prevent its loss or destruction.

119 Ind. at 350-51, 21 N.E. at 977.

The application for the receiver may be for the appointment of a receiver pendente lite,[20] in which case it may either be with or without notice, or for the appointment upon the final adjudication of the issues before the court, in which case notice is not at issue, for there has already been a full adjudication of the rights of the parties. If the applicant seeks appointment pendente lite with notice, the statute provides that a receiver "shall not be appointed . . . until the adverse party shall have appeared; or shall have had reasonable notice of the application for such appointment . . . ."[21] At the hearing on the application, the applicant must show that he will very probably prevail on the merits in the main action against the defendant.[22] The defendant then has the opportunity to refute plaintiff's allegations but is not required to put forth any evidence since the burden of proof is upon the plaintiff.[23] If the plaintiff sustains his burden, then the court will appoint a receiver.

III. Nature of the Problems Associated with Appointment Without Notice

The problems associated with the appointment of a receiver without notice arise because some cases mandate this type of extraordinary relief for the full protection of a moving party's rights, and the statute provides for appointment without notice, yet the

---

[20]"Pending the suit; during the actual progress of a suit; during litigation." Black's Law Dictionary 1290 (rev. 4th ed. 1968).

[21]Ind. Code § 34-1-12-9 (1976). Another problem which arises under the statute is that it does not define "reasonable notice"; Indiana courts have taken varying views on this issue.

[22]*See, e.g.*, Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 243, 79 N.E.2d 399, 403 (1948); Hawkins v. Aldridge, 211 Ind. 332, 338, 7 N.E.2d 34, 37 (1937). *But cf.* American Reclamation & Ref. Co. v. Klatte, 256 Ind. 566, 573, 270 N.E.2d 872, 876 (1971); Powell v. Powell, 160 Ind. App. 132, 134, 310 N.E.2d 898, 901 (1974) (Both cases involve the granting of a temporary restraining order without notice.). In *Klatte*, the court held that it was not necessary for the moving party to make a case which would ultimately prevail at the final hearing, "but only that there be shown a set of facts sufficient to justify further investigation by a court of equity." 256 Ind. at 573, 270 N.E.2d at 876.

[23]Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 245, 79 N.E.2d 399, 404 (1948); Stair v. Meissel, 207 Ind. 280, 286, 192 N.E. 453, 455-56 (1934). According to the court in *Indianapolis Dairymen's Co-op.:*

> Nor does an application for the appointment of a receiver relieve the plaintiff of the burden of proof on that issue. The defendant is not placed in a position where it must appear and show cause why a receiver should not be appointed, for this would be relieving the plaintiff of the burden of proof. In this case the burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence that a receiver should be appointed under the equitable rules in such cases.

226 Ind. at 245, 79 N.E.2d at 404 (citations omitted).

United States Constitution demands due process of law.[24] Furthermore, the moving party faces grave repercussions if the court countermands the appointment.[25] Indiana courts, caught between these competing considerations, must weigh the need for protection of the complaining party's property interest against the constitutional rights of the party in possession of the property, the prima facie owner.[26]

A. The Need For Extraordinary Relief

At times, situations have arisen which have required the extraordinary relief that only the appointment of a receiver without notice can provide.

The court in *Interstate Refineries, Inc. v. Barry*[27] affirmed the appointment of a receiver without notice where a corporation organized in Delaware operated oil refineries, oil fields, and gasoline stations in states other than Delaware. The corporation, heavily in debt, organized a corporation in Virginia with a name very similar to that of the Delaware corporation and began secretly transferring the assets of the Delaware corporation to the Virginia corporation for the purpose of escaping the claims of the shareholders and creditors. In addition to the fraudulent transfer of assets, the Delaware corporation neglected the management of its refineries, oil fields, and service stations. The creditors and shareholders, upon discovering defendant's actions, filed suit asking for injunctive relief and immediately petitioned for the appointment of a receiver without notice. The plaintiffs had to act expeditiously, lest the assets be put beyond their reach and the business be allowed to drift further into debt. Only the immediate appointment of a receiver without notice would protect such interests.[28]

---

[24]U.S. CONST. amend. XIV, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[25]*See* notes 53-55 *infra* and accompanying text.

[26]Albert Johann & Sons Co. v. Berges, 238 Ind. 265, 267, 150 N.E.2d 568, 569 (1958); Hawkins v. Aldridge, 211 Ind. 332, 343, 7 N.E.2d 34, 39 (1937). The court in *Albert Johann & Sons*, 238 Ind. at 267, 150 N.E.2d at 569, stating a reoccurring theme, held, in part: "'[T]he appointment of a receiver ex parte and without notice to take over one's property or property which is prima facie his is one of the most drastic actions known to law or equity; . . . it should be exercised with extreme caution . . . .' 45 Am. Jur. Receivers §90, p. 81 [(1943)]."

[27]7 F.2d 548 (8th Cir. 1925).

[28]The court of appeals recognized the urgency of the situation: "[I]mmediate action is imperative to preserve the property of the corporation and protect the stockholders from irremediable loss." *Id.* at 552 (citations omitted).

In *H-A Circus Operating Corp. v. Silberstein*,[29] a Missouri court had appointed a receiver over the assets of a circus corporation and authorized the appointment of an ancillary receiver in Indiana. The creditors came to Indiana and petitioned the Indiana court for the appointment of a receiver without notice on the grounds, *inter alia*, that the circus property was presently in Indiana and readily movable. If the creditors had had to wait until notice was issued and a hearing was held, the circus would have had an opportunity to load the property and flee the state. The court, understanding the predicament, granted the application and appointed a receiver without notice to protect the property pending an adjudication of the rights of the parties.[30] The Indiana Supreme Court affirmed the appointment of the ancillary receiver without notice to protect the creditor's recovery from the great danger that the circus property might easily be moved and because the Missouri court had already made the determination that a receivership was proper.[31]

The possibility that the assets may be removed from the court's jurisdiction is not the only justification for a court to appoint a receiver without notice. An emergency situation arose under a different set of circumstances in *Meyering v. Petroleum Holdings, Inc.*[32] The defendants, all residents of Michigan, owned half interest in four oil and gas leases in Indiana. The plaintiffs owned the other half interest. In seeking the appointment of a receiver without notice, plaintiffs alleged a number of specific facts which made the appointment of a receiver ex parte necessary: (1) Defendants owed them $9,000 for expenses in developing the leases; (2) one of the leases would be forfeited within one week if a well was not drilled within that time; (3) without the monies owed by defendants, the plaintiffs did not have sufficient funds to proceed with the drilling; and (4) on another lease, a competitor's well on an adjoining piece of property was draining the oil and gas reserves from plaintiffs' and defendants' lease. If plaintiffs had to wait for the perfection of notice, irreparable and material injury would occur.[33] The court

---

[29]215 Ind. 413, 19 N.E.2d 1013 (1939).

[30]*Id.* at 417, 19 N.E.2d at 1014.

[31]*Id. Accord*, Security Sav. & Loan Ass'n v. Moore, 151 Ind. 174, 175, 50 N.E. 869, 870 (1898).

[32]227 Ind. 313, 86 N.E.2d 78 (1949).

[33]The court in Rotan v. Cummins, 236 Ind. 394, 140 N.E.2d 505 (1957), commenting upon *Meyering*, held, *inter alia*:

> The adverse parties were non-residents and had no agents in this state upon whom notice or process could be served; service by publication would have required 51 days, and during that period the failure to drill the said wells would have resulted in substantial damage to the plaintiff. The inadequacy of an appointment with notice or of a restraining order in such circumstances is obvious.

Id. at 398-99, 140 N.E.2d at 506-07.

cautiously affirmed the ex parte appointment: "We approach a consideration of this case with full realization that upon very few occasions has this court affirmed the appointment of a receiver without notice."[34]

Again the court looked to the property which was the subject matter of the proceeding in order to determine whether to affirm the appointment of a receiver without notice. However, unlike *Interstate Refineries* and *H-A Circus*, in which the fear expressed was that the assets were being placed beyond the court's jurisdiction, the danger involved in *Petroleum Holdings* was physical damage to the property itself. In both types of emergency situations, the court affirmed the appointment of a receiver without notice.

As long as there is the possibility that this type of extraordinary relief may be required, the remedy of appointment without notice of a receiver must remain available. Thus the problem: The statute provides for appointment of a receiver without notice,[35] and some fact situations mandate such relief; yet, as will be shown, serious constitutional questions arise if property which is prima facie that of the party in possession is taken without notice and hearing.[36]

B. The State Permits Appointment Of A Receiver Without Notice

The statute provides as the general rule that a receiver may not be appointed until the adverse party has had an opportunity to be heard. Then, as an exception to the general rule, the statute additionally permits appointment without notice upon the showing of sufficient cause:[37] "Receivers shall not be appointed, either in term or vacation, in any case, until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit."[38]

C. The Constitutional Problem

The seizure of another's property without notice or hearing is a textbook example of violation of due process of law. In the words of Chief Justice White:

> That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing

---

[34]227 Ind. at 321, 86 N.E.2d at 81.

[35]IND. CODE § 34-1-12-9 (1976).

[36]*See* cases cited in note 26 *supra*.

[37]*See* H-A Circus Operating Corp. v. Silberstein, 215 Ind. at 415-16, 19 N.E.2d at 1014; Hawkins v. Aldridge, 211 Ind. at 343, 7 N.E.2d at 38-39.

[38]IND. CODE § 34-1-12-9 (1976).

> but statement. . . . And that a corporation not more than an individual is subject to being condemned without a hearing or may be subjected to judicial power in violation of the fundamental principles of due process as recognized in *Pennoyer v. Neff* . . . .[39]

The fundamental principles to which Chief Justice White refers are: (1) Notice to the adverse party, and (2) hearing by a judicial tribunal before the matter is finally determined.[40]

The due process violation involved in the appointment of a receiver without notice was precisely stated by the Indiana Supreme Court in *State ex rel. Makar v. St. Joseph County Circuit Court*:[41] "The appointment of a receiver is an extraordinary equitable remedy. The action affects one of man's most cherished and sacred rights guaranteed by the United States Constitution—the right to be secure in his property. This right is fundamental to every society in which men are free."[42] Notwithstanding the long history of the receivership remedy in Indiana, the legislature has not enacted guidelines to guarantee the constitutional rights of the parties involved and thus has left the courts on uncertain ground whenever the issue arises.

In comparison, the temporary restraining order is also an extraordinary equitable remedy[43] and poses a potential constitutional

---

[39]Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193-94 (1915).

[40]*Accord*, Town of Walkerton v. New York, Chicago & St. Louis R.R., 215 Ind. 206, 214, 18 N.E.2d 799, 803 (1939); State *ex rel.* Lebanon Discount Corp. v. Superior Court, 195 Ind. 174, 180, 144 N.E. 747, 749 (1924); Falendar v. Atkins, 186 Ind. 455, 460, 114 N.E. 965, 967 (1917).

[41]242 Ind. 339, 179 N.E.2d 285 (1962).

[42]*Id.* at 347, 179 N.E.2d at 289 (footnote omitted).

[43]A temporary restraining order is a preliminary step to the granting of a permanent injunction, IND. R. TR. P. 65, and is granted to maintain the status quo until the final determination on the merits. Powell v. Powell, 160 Ind. App. 132, 134, 310 N.E.2d 898, 901 (1974); State *ex rel.* American Reclamation & Ref. Co. v. Klatte, 256 Ind. 566, 573, 270 N.E.2d 872, 875-76 (1971). As with the appointment of a receiver without notice, a temporary restraining order will only issue when extreme necessity demands it. The court in Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 79 N.E.2d 399 (1948), in comparing injunctive relief, of which a temporary restraining order is part, held:

> The power of appointment is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency, and in a clear case, or in a case of "extreme necessity," where it appears that the appointment is necessary either to prevent fraud or to save the property from injury or threatened loss, or destruction, and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. *This is the rule with respect to injunctions; it applies a fortiori with respect to the appointment of a receiver.*

Id. 245, 79 N.E.2d at 404 (emphasis added) (quoting 16 W. FLETCHER, CYCLOPEDIA OF

problem because of the taking of a person's property without prior notice, yet the Indiana rules of court specifically impose certain procedural requirements on the granting of a temporary restraining order in an effort to satisfy the constitutional demands of due process.[44] A further restriction is that "[n]o restraining order . . . shall issue except upon the giving of security by the applicant, in such sum as the court deems proper . . . ."[45] Thus, the court will only grant a temporary restraining order, a less severe action than the appointment of a receiver,[46] for a limited period,[47] and only if the applicant has posted a bond to indemnify the adverse party in the event of a wrongful order.

The courts, on the other hand, when considering an application for the appointment of a receiver without notice, do not have legislation or court rules to aid in determining what procedure will be constitutionally sufficient.[48] The statute requires only that "sufficient cause" be shown before a court may dispense with the notice requirement but does not define the term.[49] There is no statutory requirement that the appointment be temporary until notice is given and a hearing held[50] or that the party seeking the appointment

---

THE LAW OF CORPORATIONS § 7697, at 90-93 (repl. ed. 1942)). Thus, both receivership and restraining order are issued for comparable reasons and both are considered "extraordinary remedies."

[44]IND. R. TR. P. 65(B)(2) requires:

> Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice, and shall expire by its terms within such time after entry, not to exceed ten [10] days . . . .

[45]IND. R. TR. P. 65(C).

[46]A temporary restraining order merely preserves the status quo and prevents the adverse party from taking action as specified in the order. *E.g.*, Powell v. Powell, 160 Ind. App. at 134, 310 N.E.2d at 901. A receiver, on the other hand, dispossesses the adverse party from the property which is the subject matter of the action and in some cases assumes control of the business and the day-to-day operations. *See* Lafayette Realty Corp. v. Moller, 247 Ind. 433, 438, 215 N.E.2d 859, 861 (1966).

[47]IND. R. TR. P. 65(B) provides that the effective period is 10 days

> unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period.

[48]The last clause of IND. CODE § 34-1-12-9 (1976) is the only statutory authority for the appointment of a receiver without notice. State *ex rel.* Makar v. St. Joseph County Circuit Court, 242 Ind. at 347, 179 N.E.2d at 289-90.

[49]For appointment of a receiver, notice must first be given except upon sufficient cause shown by affidavit. IND. CODE § 34-1-12-9 (1976).

[50]In Stair v. Meissel, 207 Ind. 280, 192 N.E. 453 (1934) (the appointment of a receiver without notice affirmed), the court held: "Our statute does not require that an

before notice post bond to indemnify the adverse party in the event of a wrongful appointment.[51] Despite the lack of legislative assistance, and because the appointment of a receiver without notice necessarily involves the taking of one's property contrary to the fundamental elements of due process,[52] the due process rights of the adverse party must in some way be safeguarded. Therefore, the Indiana courts have adopted strict substantive and procedural requirements designed to protect the constitutional rights of the adverse party. However, before addressing the question of how Indiana courts have attempted to protect the constitutional rights of the dispossessed party, there is one other practical problem which confronts a party petitioning the court for the appointment of a receiver without notice. Severe repercussions may result from the wrongful appointment of a receiver. Apart from the possible constitutional violations involved in the depriving of a person of his property without notice and hearing, the party moving for the ex parte receivership faces potential personal liability if the appointment should later be found to be erroneous. From the perspective of the practitioner, these repercussions are a more important consideration than the possible constitutional deprivations of the adverse party. For this reason, in order to fully appreciate what the courts have done in shaping a workable rule as well as the shortcomings of the rule which had developed, one must consider the possible negative consequences of the wrongful appointment.

---

appointment of a receiver made without notice shall be temporary and continue only until hearing held pursuant to notice; nor is there any statutory provision for either setting the appointment aside or confirming it." *Id.* at 284, 192 N.E. at 455. *But cf.* Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 661, 221 N.E.2d 340, 342-43 (1966) (notwithstanding the absence of legislative authority, the court held: "[I]t unquestionably is error for a trial court to appoint a receiver without notice and fix no time whatever for a prompt notice and hearing.").

[51]Fagan v. Clark, 238 Ind. 22, 27, 148 N.E.2d 407, 409 (1958). The court, in comparing the remedy of receivership ex parte to relief by injunction or temporary restraining order held:

> Relief by receivership is an extraordinary remedy and is never exercised if there is an adequate remedy at law or the harm can be prevented by injunction or restraining order. In the latter instance a bond affords some protection against an improvident order made for such equitable relief. However, in the case of a receivership, the statute does not provide for any bond indemnifying the injured party in case of an erroneous appointment of a receiver. Because of the radical nature of the remedy through receivership, this court does not look with favor upon an appointment without notice.

Id. at 26-27, 148 N.E.2d at 409 (citations omitted).

[52]As stated, due process requires notice and hearing before taking a person's property. Yet where a receiver is appointed without notice, the party in possession is dispossessed of his property without either notice or hearing.

D. Repercussions from the Wrongful Appointment of a Receiver Without Notice

Because liability for the wrongful appointment without notice of a receiver usually depends upon the particular fact situation, the discussion which follows suggests generally what a moving party may face if later it is found that he was not entitled to the receivership and that the adverse party was wrongfully dispossessed of its property.

Damage for the wrongful appointment of an ex parte receivership may include damages for: (1) The expenses attibutable to the appointment, maintenance, and termination of the receivership,[53] (2) abuse of process and malicious prosecution,[54] and (3) defamation of personal character and business reputation.[55] Additionally, exemplary damages may be awarded in some cases.[56]

If a receiver is wrongfully appointed, the moving party can be made to bear the costs of the receiver as well as expenses associated with the adverse party's reversal of the order appointing the receiver.[57] Furthermore, such expenses may not be charged against the fund of which the receiver has possession.[58] Thus, the

---

[53]O'Malley v. Hankins, 209 Ind. 461, 463, 199 N.E. 558, 559 (1936); Brock v. Rudig, 69 Ind. App. 190, 196, 119 N.E. 491, 492 (1918); Noxon Chem. Prods. Co. v. Leckie, 39 F.2d 318, 321 (3d Cir. 1930).

[54]65 AM. JUR. 2d *Receivers* § 132 (1972).

[55]*Cf.* Perry v. Columbia Broadcasting Sys., Inc., 499 F.2d 797, 800 (7th Cir. 1974) (Although the court was not faced with a receivership issue, theoretically the same principles may apply to the wrongful appointment of a receiver.).

[56]*Cf.* Mowes v. Robbins, 68 Ind. App. 82, 86, 20 N.E. 51, 52 (1918); Citizens' St. R.R. v. Willoeby, 134 Ind. 563, 569, 33 N.E. 627, 629 (1893) (Neither case involves receiverships, yet the rules stated in each might be applicable to the wrongful appointment of a receiver.).

[57]O'Malley v. Hankins, 209 Ind. 461, 463, 199 N.E. 558, 559 (1936); Noxon Chem. Prods. Co. v. Leckie, 39 F.2d 318, 321 (3d Cir. 1930).

[58]The court in O'Malley v. Hankins, 209 Ind. 461, 199 N.E. 558 (1936), a leading Indiana case on this subject, unequivocally held:

> It cannot be questioned that, when a judgment appointing a receiver is reversed on appeal and vacated upon the ground that there were insufficient facts established to justify the appointment, neither the defendant nor the property for which the receiver was appointed can be charged for the services of the receiver, or the receiver's attorneys, or the plaintiff's attorneys.

Id. at 463, 199 N.E. at 559. Similarly, the court in Noxon Chem. Prods. Co. v. Leckie, 39 F.2d 318 (3d Cir. 1930), held:

> All such compensation, to which the several parties might be entitled, must be taxed against the plaintiff, whose proceeding it was, and upon whom the blame for the wrong committed must legally rest. When the court is without jurisdiction, the cases are unanimous in holding that the court is without power to make any charge upon the assets or expenses for compensation.

Id. at 321.

moving party, in addition to being saddled with his own expenses in pursuing the appointment of the receiver, must also bear the costs of a receiver's compensation for services rendered, the receiver's attorney fees, and the adverse party's attorney fees associated with the vacation of the appointment.

Additionally, the wrongful appointment of a receiver without notice may subject the moving party to damages for malicious prosecution or abuse of process.[59] An action for malicious prosecution will lie if the adverse party can establish: (1) The defendant instituted the prosecution, (2) the defendant acted maliciously and without probable cause, and (3) the prosecution terminated in the plaintiff's favor.[60] An action for abuse of process, on the other hand, lies for the improper use of process after it has been issued and not for maliciously causing the process to issue.[61] Thus, if the moving party maliciously caused process to issue and the appointment to proceed or if it improperly used the process and appointment after issuance, the moving party may be liable for these additional elements of damages.

Also the appointment ex parte of a receiver may subject the moving party to damages arising out of a defamation action. The appointment of a receiver may cause disastrous consequences to a person's individual esteem and his business reputation. Generally,

---

[59]*Cf.* Cassidy v. Cain, 145 Ind. App. 581, 587-88, 251 N.E.2d 852, 856 (1969); Boyd v. Hodson, 117 Ind. App. 296, 301, 72 N.E.2d 46, 48 (1947) (neither *Cassidy* nor *Boyd* involved the appointment of a receiver, yet the rule laid down in each conceivably could be applied to a wrongful receivership).

[60]*E.g.*, Cassidy v. Cain, 145 Ind. App. 581, 587-88, 251 N.E.2d 852, 856 (1969).

[61]Brown v. Robertson, 120 Ind. App. 434, 437, 92 N.E.2d 856, 857-58 (1950). The court in *Robertson* compared a cause of action for malicious prosecution with that of abuse of process:

> "The distinctive nature of an action for abuse of process, as compared with an action for malicious prosecution, is that the former lies for the improper use of process after it has been issued, not for maliciously causing process to issue. Where the matter complained of concerns the issuance of process, the action is either strictly or by analogy one for malicious prosecution. In this category are included actions for the malicious institution of criminal proceedings, the wrongful and malicious procurement of attachment or other process of seizure, and the institution of bankruptcy proceedings. In such cases it is, for obvious reasons, generally held that want of probable cause and the existence of malice in procuring the issuance of the process, as well as a termination favorable to the plaintiff, are essential to the maintenance of the action. But where the thing complained of is not that issuance of the process was wrongfully procured, but that, having been issued, it was willfully perverted, so as to accomplish a result not commanded by it or lawfully obtainable under it, the action has been denominated by well-considered cases as one for the abuse of process." 1 Am. Jur., Abuse of Process, § 3, p. 176.

Id. at 437-38, 92 N.E.2d at 858.

"[u]nder Indiana law . . . a statement may be defamatory when it is such as would tend to hold the plaintiff up to hatred, contempt, or ridicule, or when it causes him to be shunned or avoided or tends to injure him in his profession, trade, or calling."[62] Given the proper set of circumstances, an aggrieved party may be able to make a case for defamation arising from the wrongful appointment of a receiver.

Finally, if the moving party sought the appointment fraudulently,[63] or with malice or in heedless disregard of the consequences,[64] then it may also be subject to exemplary damages.

These possible repercussions to the moving party should cause a person to carefully consider whether or not its predicament demands such an extraordinary remedy.

IV. How Indiana Courts Guarantee Due Process

A. General Approach

Despite the seemingly inherent violation of due process involved in the taking of another's property without notice or hearing, the Indiana courts, in strictly construing the statute and in rigidly applying to the facts of each case the standard which has evolved over the years for appointing a receiver without notice, have sought to safeguard the rights of both the party in possession of the property and the one seeking possession of it.

An adverse party's rights are protected in two ways: (1) The statute only permits appointment without notice in exceptional cases;[65] and (2) the courts strictly construe the statute.[66] This dual

---

[62]Perry v. Columbia Broadcasting Sys., Inc., 499 F.2d 799, 800 (7th Cir. 1974). Additionally, according to the court in Prosser v. Callis, 117 Ind. 105, 19 N.E. 735 (1889):

> The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous. Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggest that the plaintiff is suffering from any infectious disorder, or which have a tendency to injure him in his office, profession, calling, or trade; and so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society.

Id. at 107-08, 19 N.E. at 736.

[63]*Cf.* Mowes v. Robbins, 68 Ind. App. 82, 86, 120 N.E. 51, 52 (1918) (does not involve the appointment of a receiver, but does state a rule which might find application in the wrongful appointment of a receiver).

[64]*Cf.* Citizens' St. R.R. v. Willoeby, 134 Ind. 563, 569, 33 N.E. 627, 629 (1893) (does not involve the wrongful appointment of a receiver, but does state a rule which could easily be applied to the receivership situation given the proper circumstances).

[65]Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907).

[66]Fagan v. Clark, 238 Ind. 22, 26, 148 N.E.2d 407, 409 (1958); State *ex rel.* Makar v. St. Joseph County Circuit Court, 242 Ind. 339, 347, 179 N.E.2d 285, 289-90 (1961).

safeguard is actually a two-tiered protection rather than two independent methods by which the adverse party's rights are protected. The significance of the two-tiered standard is that it generally is more difficult to satisfy a second higher level requirement than a second requirement of the same degree as the first. The courts are empowered to act by virtue of the statute which permits appointment without notice only in exceptional cases[67] and then the courts, in construing what constitutes an "exceptional case," strictly interpret those words.[68] Thus, as will be shown, the appointment of a receiver without notice will not often occur.[69]

The Indiana statute[70] sets forth as the general rule that the adverse party must have notice and an opportunity to be heard before the court will appoint a receiver. Appointment without notice is the exception to the general rule.[71] Thus, the first level of protection is that a party petitioning for the appointment of a receiver without notice must demonstrate to the court that the exception rather than the general rule should apply.[72]

---

[67]IND. CODE § 34-1-12-9 (1976).

[68]*See* Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907).

[69]There have been very few Indiana cases in which the appointment of a receiver without notice has been sustained on appeal. Meyering v. Petroleum Holdings, Inc., 227 Ind. 313, 86 N.E.2d 78 (1949); H-A Circus Operating Corp. v. Silberstein, 215 Ind. 413, 19 N.E.2d 1013 (1939); Stair v. Meissel, 207 Ind. 280, 192 N.E. 453 (1934).

[70]IND. CODE § 34-1-12-9 (1976).

[71]The court in *Henderson* held: "When such notice can be given it should be given, unless there is imminent danger of loss, or great damage, or irrevocable injury, or the greatest emergency, or when by the giving of notice the very purpose of the appointment of a receiver would be rendered nugatory . . . ." 168 Ind. at 527-28, 81 N.E. at 496 (quoting North Am. Land & Timber Co. v. Watkins, 109 F. 101, 106 (8th Cir. 1901)).

[72]*See* Inter-City Contractors Serv., Inc. v. Jolley, 257 Ind. 593, 595, 277 N.E.2d 158, 160 (1972); Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 662, 221 N.E.2d 340, 343 (1966); Albert Johann & Sons Co. v. Berges, 238 Ind. 265, 267, 150 N.E.2d 568, 569-70 (1957); Environmental Control Syss., Inc. v. Allison, 314 N.E.2d 820, 824 (Ind. Ct. App. 1974).

As a prelude to the discussion which follows, consider what the court in *Henderson* held to be "exceptional cases":

> The exceptional cases are when the defendant is beyond the jurisdiction of the court, or cannot be found, or when some emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction or loss; or when notice itself will jeopardize the delivery of the property, over which the receivership is extended in obedience to the order of the court. It must be a case of imperious necessity, requiring immediate action, and where protection cannot be afforded the plaintiff in any other way.

168 Ind. at 527, 81 N.E. at 496 (citations omitted). The *Henderson* holding sets forth in a broad way the guidelines which courts should follow when considering such a case, but does not specifically define what must be shown or the degree of certainty required of such a showing. Neither does the statute aid in determining what is suffi-

The second level of the two-tiered approach is that courts are reluctant to exercise their statutory power.[73] The basis for this reluctance is that the courts are eminently aware of the constitutional problems[74] involved in the taking of a person's property,[75] especially in the case of a receiver without notice where the receiver takes the property without forewarning. The court in *Fagan v. Clark*[76] summarized well the attitude of Indiana courts:

> [W]e are not inclined to extend or broaden the privileges of one who asks for a receiver without notice. On the other hand, we are inclined to throw all the protection possible around the aggrieved party who had been deprived of his property by an ex parte hearing and without notice.[77]

Therefore, the courts in strictly construing what is required to elevate a case to that of an "exceptional" case, provide further protection for the adverse party's rights.

B. The Development of Indiana Case Law—The Johann Rule

Indiana courts have attempted to relieve the tension created by the competing considerations of the constitutional guarantee of due process and the property interests of the party seeking the appoint-

---

cient cause to support the appointment of a receiver without notice. Wabash Ry. v. Dykeman, 133 Ind. 56, 32 N.E. 823 (1892).

[73]An indication of this reluctance is the general theme with which many courts preface their opinions—receivership without notice is an extraordinary remedy. The use of this language demonstrates their hesitancy to invoke such measures. By definition an "extraordinary" remedy is one not commonly employed. BLACK'S LAW DICTIONARY 699 (rev. 4th ed. 1968). Furthermore, only on rare occasions have Indiana courts affirmed the appointment of a receiver without notice, evidencing this reluctance. *See* H-A Circus Operating Corp. v. Silberstein, 215 Ind. 413, 416, 19 N.E.2d 1013, 1014 (1939). *See also* Lafayette Realty Corp. v. Moller, 247 Ind. 433, 438-39, 215 N.E.2d 859, 861 (1966); Fagan v. Clark, 238 Ind. 22, 26, 148 N.E.2d 407, 409 (1958); Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907); Wabash Ry. v. Dykeman, 133 Ind. 56, 65, 32 N.E. 823, 826 (1892); Environmental Control Syss., Inc. v. Allison, 161 Ind. App. 148, 153, 314 N.E.2d 820, 823 (1974).

[74]*See* State *ex rel.* Red Dragon Diner, Inc. v. Superior Court, 239 Ind. 384, 158 N.E.2d 164 (1959), wherein the court held:

> Notice, giving a defendant opportunity to be informed regarding the nature of the action and reasonable opportunity to make a defense, is an essential element of due process. Our statutes which specifically limit the authority of the court to appoint receivers without notice is in implementation of the above constitutional guarantee.

Id. at 385-86, 158 N.E.2d at 165 (footnotes omitted).

[75]*See, e.g.*, Jones v. Becker, 212 Ind. 248, 254, 8 N.E.2d 587, 590 (1937); Kent Ave. Grocery Co. v. George Hitz & Co., 187 Ind. 606, 608, 120 N.E. 659, 660 (1918).

[76]238 Ind. 22, 148 N.E.2d 407 (1958).

[77]*Id.* at 31, 148 N.E.2d at 412.

ment of a receiver without notice. Although one praying for the extraordinary relief must overcome rather formidable obstacles, a general disfavor and reluctance on the part of the courts to employ their statutory authority, as well as a great amount of precedent to support the courts' denial of the remedy,[78] factual situations have arisen in the past and no doubt will arise in the future which mandate appointment without notice. The discussion which follows precisely details the evolution of the elements of proof which the party petitioning for appointment without notice will have to satisfy in order to compel a generally unsympathetic court to grant a motion for receivership without notice. The analysis not only will aid a practicing attorney, but more importantly, the analysis will also indicate how the requirements announced by the courts provide a great degree of protection for an unwitting party in possession.

As previously demonstrated, Indiana courts have consistently hesitated to grant a motion for the ex parte appointment of a receiver; not until the Indiana Supreme Court handed down its decision in *Albert Johann & Sons Co. v. Berges*,[79] however, did the court explicitly indicate what a party petitioning for appointment without notice must establish.[80]

The *Johann* rule is not particularly novel; the holding is significant, however, in that for the first time it was possible to analyze a court's holding in any particular case against an explicit standard, as well as to measure the standard itself against the constitutional re-

---

[78]Fagan v. Clark, 238 Ind. 22, 148 N.E.2d 407 (1958); Rotan v. Cummins, 236 Ind. 394, 140 N.E.2d 505 (1957); Johann v. Johann, 232 Ind. 40, 111 N.E.2d 473 (1953); Second Real Estate Invs., Inc. v. Johann, 232 Ind. 24, 111 N.E.2d 467 (1953). *See* note 83 *infra*.

[79]238 Ind. 265, 150 N.E.2d 568 (1958).

[80]The following have been established in Indiana as conditions precedent to the appointment of a receiver without notice:

1. The complaint must affirmatively show (a) a probability that plaintiff will be entitled to judgment; (b) that there not only is cause for the appointment of a receiver, but that there is sufficient cause for such appointment without notice; and (c) that plaintiff's rights cannot be protected by a restraining order or other adequate remedy, and if this is shown, then it must be further shown that the emergency necessitating the appointment could not have been anticipated in time to give notice or that waste or loss is threatened and delay until notice can be given will defeat the object of the suit.

2. The only evidence which is proper under § 3-2602 [IND. CODE § 34-1-12-1 (1976)] to be considered by the trial court must be in the form of affidavits, which may include or consist of the verified complaint.

3. The facts justifying the relief sought must be shown by the affidavits or verified complaint, and mere conclusions of a plaintiff will not suffice.

Id. at 268, 150 N.E.2d at 569-70 (footnotes omitted).

quirement of the fourteenth amendment of the United States Constitution.

The *Johann* rule consists of a substantive rule which sets forth the factual setting which must be present and the formal procedural requirements for an application for the appointment of a receiver without notice. The discussion which follows first considers the substantive aspects and then the procedural requirements.

The *Johann* holding is derived from a compilation of previous court holdings[81] reversing the appointment of a receiver without notice. Prior to *Johann*, when the court reversed the appointment without notice, it generally focused on one or two reasons why the appointment in that particular case was not justified.[82] Such procedure was proper since the plaintiff has the burden of proving every element of its case.[83] Thus, if the defendant convinced the court of any fallacy in plaintiff's reasoning then the court properly reversed the appointment.

Under the *Johann* rule, one element of proof that the plaintiff must demonstrate by a preponderance of the evidence is that it will ultimately prevail on the merits.[84] The rationale for this part of the rule should be obvious. The courts will only appoint a receiver when the situation clearly demands such relief[85] and justice between the

---

[81]*See, e.g.*, Second Real Estate Invs. v. Johann, 232 Ind. 24, 31-32 n.3, 111 N.E.2d 467, 471 n.3 (1953) (quoting 1 R. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS § 82, at 111-12 (2d ed. 1929)) (adopting a rule very similar to that as found in condition one of the *Johann* rule):

> The statutes of Indiana provide specifically that a receiver can only be appointed without notice upon sufficient cause shown by affidavit. The Supreme Court of Indiana lays down three salutary rules governing such appointment. These rules are substantially covered by the statement of the author in the beginning of this section, nevertheless they will bear repetition as stated by the Indiana court as follows:
>
> 1. That the property is about to be wasted, destroyed or removed beyond the jurisdiction.
>
> 2. That the issuing of a temporary restraining order or other relief that may be obtained, will not protect the property until notice can be given.
>
> 3. That delay until notice can be given will defeat the object of the suit.

See also cases cited in note 78 *supra*.

[82]*E.g.*, Hawkins v. Aldridge, 211 Ind. 332, 343, 7 N.E.2d 34, 38 (1937) (stressing the availability of alternate remedies as the reason for reversing the ex parte appointment); Bookout v. Foreman, 198 Ind. 543, 546, 154 N.E. 387, 388 (1926) (reversing appointment because the moving party's failed to demonstrate an emergency situation).

[83]The plaintiff has the burden of proving by a preponderance of the evidence that the appointment of a receiver is necessary. Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 245, 79 N.E.2d 399, 404 (1948). *See generally* note 23 *supra*.

[84]*See generally* note 6 *supra*.

[85]*E.g.*, Hawkins v. Aldridge, 211 Ind. 332, 343, 7 N.E.2d 34, 38 (1937).

parties cannot be effectuated in any other way.[86] If the plaintiff cannot establish that he will ultimately prevail on the merits, the court will not put itself in the position of being reversed, and furthermore the court, in balancing the property interests of each party, will not order a receiver pendente lite to seize the property of the prima facie owner[87] only to return the property after the case is finally adjudicated.

Secondly, not only must the plaintiff establish that appointment of a receiver with notice is necessary, but also that there are sufficient grounds for dispensing with the need for notice.[88] The rationale for this part of the rule is also straight forward. The moving party must first satisfy all of the requirements for appointment *with* notice and then demonstrate that there exists some additional reason why notice cannot be given in the particular fact situation. The appointment without notice to the dispossessed party is obviously a much more drastic action than the appointment of a receiver after the merits of the case have been fully adjudicated and after both parties have had an opportunity to present evidence and argue their cases. Therefore, an appointment without notice requires a higher degree of proof.

Another element of the plaintiff's case is a showing that the emergency giving rise to a prayer for appointment without notice cannot be forestalled until notice can be given and a hearing held by granting a temporary restraining order or other adequate relief.[89]

---

[86]*See, e.g.*, Hawkins v. Aldridge, 211 Ind. 332, 341, 7 N.E.2d 34, 38 (1937); Bookout v. Foreman, 198 Ind. 543, 547, 154 N.E. 387, 388 (1926); Goshen Woolen Mills Co. v. City Nat'l Bank, 150 Ind. 279, 286, 49 N.E. 154, 156 (1898). Theoretically, appointment of a receiver occurs only when there is no other "full and adequate remedy." Thus, if any alternate remedies to the appointment of a receiver are applicable to a particular fact situation, not only should they be used, but they must be used. Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907).

[87]*See* note 26 *supra*.

[88]Hampton v. Massey, 215 Ind. 247, 248, 19 N.E.2d 464, 465 (1939); Ledger Publishing Co. v. Scott, 193 Ind. 683, 685-86, 141 N.E. 609, 609 (1923). The court in *Ledger Publishing Co.* held:

> To justify the appointment of a receiver without notice, not only must one of the statutory causes for the appointment exist, but *each* of the following conditions must be shown, namely, that the property is about to be wasted or removed beyond the jurisdiction of the court; that delay *until notice can be given* will defeat the object of the suit; that the issuing of a temporary restraining order, or other relief that may be obtained, will not protect the property until notice can be given.

193 Ind. at 685-86, 141 N.E. at 609.

[89]Hawkins v. Aldridge, 211 Ind. 332, 343, 7 N.E.2d 34, 39 (1937); Bookout v. Foreman, 198 Ind. 543, 546-47, 154 N.E. 387, 388 (1926); Tucker v. Tucker, 194 Ind. 108, 111-12, 142 N.E. 11, 13 (1924).

Unless notice will defeat the object of the suit, it must be given.[90] The United States Court of Appeals for the Fifth Circuit held in *Cabanissa v. Reco Mining Co.*:[91] "When such notice can be given it should be given . . . ."[92] The countervailing circumstances which cause the giving of notice to be impractical are at the very heart of this Note. This rule announced by *Johann* is an attempt to outline, with the greatest specificity, what the moving party must present to a court in order to entitle him to the appointment of a receiver without notice.

The courts are most sensitive to a situation in which the appointment of a receiver without notice is absolutely required to maintain the status quo until notice can be given. Even where the facts appear compelling and the wrongdoing by the party in possession is blatant, a court will not necessarily grant the petition appointment of a receiver without notice. The circumstances which precipitated the suit in *Johann* are a typical situation in which the facts seem compelling, yet upon close scrutiny the court determined that an ex parte receivership would not be proper. In *Johann* the plaintiff in its verified complaint cited specific acts of impropriety committed by the corporation's president, including the purchase of a $6,500 speed boat with corporate funds,[93] the pledge of corporate stock to secure a personal debt, the doubling of accounts payable during a period when the case account fell by fifty percent, as well as the imminent danger of insolvency[94] which plagued the corporation. Notwithstanding this seemingly compelling set of circumstances, the supreme court reversed the trial court's appointment of a receiver without notice. The court held that the petition failed to demonstrate an emergency which would cause the appointment of a receiver without notice to be the only remedy whereby justice between the parties could be served.[95]

Another element of the *Johann* rule is that the emergency which the petitioner claims exists must not have been reasonably foreseeable: "It is well settled that a party seeking injunction or the appointment of a receiver cannot by his own delay or failure to act promptly create an emergency which will excuse his giving the re-

---

[90]Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907) (citing Cabanissa v. Reco Mining Co., 116 F. 318, 323-24 (5th Cir. 1902)); Chicago & Southeastern Ry. v. Cason, 133 Ind. 49, 51, 32 N.E. 827, 828 (1892).

[91]116 F. 318 (5th Cir. 1902).

[92]*Id.* at 324.

[93]The Albert Johann & Sons Corporation was in the business of directing funerals.

[94]Imminent danger of insolvency is a statutory ground for the appointment of a receiver. IND. CODE § 34-1-12-1(5) (1976).

[95]238 Ind. at 270, 150 N.E.2d at 570.

quired notice to the adverse party."[96] Again, the rationale for such a rule is not difficult to understand. To hold otherwise would function as a disincentive for attorneys to explore alternative means of relief. Furthermore, the courts of equity have long frowned upon granting relief to a party who has slumbered on his rights.

The final substantive showing required by *Johann* is that plaintiff's rights cannot be adequately protected by a temporary restraining order or other remedy.[97] Again, the *Johann* court merely stated what had been the rule for several years:[98] The courts simply will not appoint a receiver without notice except where it is absolutely necessary to do justice between the parties.[99] If alternate forms of relief are available and such relief is sufficient to safeguard the rights of the parties, then the court will deny the application for receiver without notice in favor of the alternative.[100]

---

[96]Henderson v. Reynolds, 168 Ind. 522, 529, 81 N.E. 494, 496 (1907).

[97]238 Ind. at 267, 150 N.E.2d at 571 . *See also* Ledger Publishing Co. v. Scott, 193 Ind. 683, 686, 141 N.E. 609, 609 (1923).

[98]*E.g.*, Hawkins v. Aldridge, 211 Ind. 332, 343, 7 N.E.2d 34, 38 (1937) (citing Kent Ave. Grocery Co. v. George Hitz & Co., 187 Ind. 606, 608-09, 120 N.E. 659, 660 (1918)): "[A] receiver will not be appointed without notice when a court, as in this state, has authority to grant a temporary restraining order without notice, and where the issuance of such an order would afford ample protection until notice can be given . . . ." Similarly, the court in Henderson v. Reynolds, 168 Ind. 522, 81 N.E. 494 (1907), held: "[A] receiver will not be appointed without notice when a court, as in this State, has the power to grant a temporary restraining order, without notice, and the same is ample to protect the property until notice is given and the application for a receiver heard and determined." *Id.* at 527, 81 N.E. at 496.

[99]*See* note 86 *supra* and accompanying text.

[100]A temporary restraining order is the most often utilized alternate form of relief; *see generally* Bookout v. Foreman, 198 Ind. 543, 546, 154 N.E. 387, 388 (1926); Tucker v. Tucker, 194 Ind. 108, 111, 142 N.E. 11, 13 (1924). Other substitute remedies include attachment and garnishment; *see* Hawkins v. Aldridge, 211 Ind. 332, 342, 7 N.E.2d 34, 38 (1937). In *Hawkins* the court held:

> Attachment is a remedy at law, available to one seeking a money judgment, where the defendant has threatened to cheat, hinder, or delay his creditors, or where he is intending to leave the state with intent to defraud his creditors. Attachment would have provided ample relief. But here, also, a bond is required to protect the defendant.
>
> In May v. Greenhill et al. (1881) 80 Ind. 124, where the complaint was in many respects similar to the one under consideration, it was held that the plaintiff had a full, complete, and ample remedy by attachment or garnishment, and that a receiver should have been appointed . . . .
>
> The statutory remedy of attachment is a legal remedy, available without notice, upon giving bond, which would furnish all of the protection that was here sought by a receivership. There is no bond to protect the defendants where a receiver is appointed. The principles here referred to have been long well settled and repeatedly announced by this court from the earliest times.

211 Ind. at 342, 7 N.E.2d at 38-39.

The reader should, however, note that there are repercussions from wrongful use of these remedies. *See* Bick v. Long, 15 Ind. App. 503, 505, 44 N.E. 555, 556 (1896).

The procedural aspects of the *Johann* rule as they relate to the form and sufficiency of the pleadings have also evolved from cases prior to *Johann.*[101] Like the requisite substantive elements, the form and sufficiency of the pleadings reflect the court's awareness of the constitutional problems in the dispossession of an individual of property without notice and hearing. The discussion which follows considers the way in which the procedural elements of the rule attempt to guarantee the constitutional rights of the party in possession.

Condition two of the rule[102] reflects the statutory mandate of "sufficient cause shown by affidavit" and requires that all evidence submitted to the court be in the form of affidavit or verified complaint.[103] Like the first condition of the rule, the second condition is not a unique interpretation, but rather a long held requirement of the procedure for obtaining the appointment of a receiver without notice.[104] The importance of this rule is two-fold. First, such procedure enables the supreme court to review the precise evidence upon which the trial court determined that the appointment without notice was proper.[105] The transcript of the trial court proceedings in and of itself is insufficient because in an ex parte proceeding the adverse party is not present to challenge the testimony of the moving party.[106] The courts therefore will only consider evidence in the form of verified complaints and affidavits based upon personal belief

---

[101]*E.g.*, Second Real Estate Invs., Inc. v. Johann, 232 Ind. 24, 29, 111 N.E.2d 467, 470 (1953); Hampton v. Massey, 215 Ind. 247, 248, 19 N.E.2d 464, 464 (1939); Hizer v. Hizer, 201 Ind. 406, 414, 169 N.E. 47, 50 (1929).

[102]*See* note 80 *supra.*

[103]IND. CODE § 34-1-12-9 (1976).

[104]Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 104 N.E. 579 (1914), wherein the court explained:

> This court, in actions at law, cannot weigh evidence, oral or written. . . . In equity causes, it will not determine where the preponderance lies in conflicting oral testimony. . . . But in such cases, where the evidence is wholly documentary or written, it weighs the evidence adduced. . . . The appointment of a receiver is purely of equitable cognizance.

Id. at 345-46, 104 N.E. at 580 (citations omitted).

Furthermore, according to the court in Rotan v. Cummins, 236 Ind. 394, 140 N.E.2d 505 (1957): "This court has never questioned or deviated from the proposition that a receiver without notice can not be appointed unless the moving party *shows by verified complaint or affidavit* that neither the ordinary procedure for appointment, which requires notice to be given . . . ." *Id.* at 397, 140 N.E.2d at 506 (citations omitted) (emphasis added).

[105]Appeals from the appointment of a receiver with or without notice are made directly to the Indiana Supreme Court. IND. CODE § 34-1-12-10 (1976).

[106]*See* Indiana Merchants' Protective Ass'n v. Little, 202 Ind. 193, 195, 172 N.E. 905, 906 (1930); Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 345, 104 N.E. 579, 580 (1914).

as vehicles for introducing all of the relevant facts into evidence.[107] Thus, for the purpose of reviewing the propriety of a trial court's ruling, the exact facts which generated the decision must be preserved.

Aside from the interests of the supreme court in having a precise record for appeal, such a record serves the related purpose of informing the adverse party of the grounds for the confiscation of its property: "'Thus the adverse party may know the exact facts upon which the judge acted in appointing a receiver in his absence and wrestling from him the control of his property without a hearing or an opportunity for such hearing . . . .'"[108] The courts place great emphasis on the form of the pleadings and will not relax the requirement of a verified complaint or affidavit.[109]

The final element of the *Johann* rule is that the affidavits or verified complaint must be based on personal knowledge, in positive terms,[110] and stated as facts rather than conclusions.[111] The unsupported statement that directors could commit certain wrongful acts has been held insufficient cause for dispensing with notice; instead a verified statement was required that the adverse party "had done or attempted or threatened to do" the wrongful acts.[112] Furthermore, the mere apprehension or fears of the moving party are insufficient

---

[107]Second Real Estate Invs. v. Johann, 232 Ind. 24, 30, 111 N.E.2d 467, 470 (1953); Indiana Merchants' Protective Ass'n v. Little, 202 Ind. 193, 196, 172 N.E. 905, 906 (1930).

Additionally, according to the court in Sullivan Elec. Light & Power Co. v. Blue, 142 Ind. 407, 41 N.E. 805 (1895):

> Without such facts being spread upon the record on appeal to a higher court from such an interlocutory order allowed by another section of the same statute, the appeal might prove to be fruitless and unavailing. So that we must look to the facts stated on paper, at the time the application . . . was made, exclusively to find the cause, if any there was, to justify the appointment without notice.

Id. at 417, 41 N.E. at 808.

[108]Environmental Control Syss., Inc. v. Allison, 314 N.E.2d 820, 823 (Ind. Ct. App. 1974).

[109]Hizer v. Hizer, 201 Ind. 406, 414, 169 N.E. 47, 50 (1929); Environmental Control Syss., Inc. v. Allison, 314 N.E.2d 820, 823 (Ind. Ct. App. 1974).

[110]Ledger Publishing Co. v. Scott, 193 Ind. 683, 685, 141 N.E. 609, 609 (1923); Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 347, 104 N.E. 579, 580 (1914); Henderson v. Reynolds, 168 Ind. 522, 524, 81 N.E. 494, 495 (1907).

[111]Inter-City Contractors Serv., Inc. v. Jolley, 257 Ind. 593, 277 N.E.2d 158 (1972); Meek v. Steele, 368 N.E.2d 257, 258 (Ind. Ct. App. 1977).

[112]Welfare Loan Soc'y of Anderson v. Seward, 193 Ind. 541, 542, 141 N.E. 221, 221 (1923). *See also* Environmental Control Syss., Inc. v. Allison, 314 N.E.2d 820 (Ind. Ct. App. 1974) (citing Indianapolis Mach. v. Curd, 247 Ind. 657, 664, 221 N.E.2d 340, 345 (1966)), wherein the court held:

> Property may not be taken from persons acting as legally appointed trustees, arbitrarily and without notice, unless it is *clearly first shown by facts specifically alleged* (not conclusions) *that they threaten* to and that they plan

grounds for the appointment of a receiver without notice.[113] An affidavit sworn "to the best of knowledge and belief" has uniformly been held inadequate.[114] For the reasons which follow, the phraseology is too equivocal to safeguard the constitutional rights of the adverse party. The court is left without means of determining which part of the affidavit is based on belief and which part on the knowledge of the affiant.[115] An affiant's belief may be based upon hearsay evidence which he, in good faith, believes to be true,[116] but where a prima facie owner is about to be dispossessed of his property, the courts require more than good faith.[117] The strict requirements outlined in *Johann* strive toward that goal, for if a court knew that the moving party's position and allegation were absolutely correct the prima facie owner would not, in fact, be entitled to the property and therefore his constitutional rights would not be violated by taking the property from him.

Not only do the courts require a great degree of certainty in the correctness of the affiant's statements, but furthermore, the affiant must state its position in terms of evidentiary facts, rather than conclusions.[118] An analogous situation is the factual showing required of an affiant before a court in a criminal proceeding will issue a search warrant.[119] The courts in such cases also strictly apply the rule[120] in

---

to, unless restrained and stopped, dissipate, conceal or embezzle such assets *before notice can be given.*

314 N.E.2d at 824.

[113]Hizer v. Hizer, 201 Ind. 406, 414, 169 N.E. 47, 50 (1929); Spurgeon v. Rhodes, 167 Ind. 1, 7, 78 N.E. 228, 230 (1906).

[114]Ledger Publishing Co. v. Scott, 193 Ind. 683, 685, 141 N.E. 609, 609 (1923); Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 347, 104 N.E. 579, 580 (1914).

[115]Henderson v. Reynolds, 168 Ind. 522, 525, 81 N.E. 494, 495 (1907).

[116]*Id.* at 525-26, 81 N.E. at 496 (citing City of Atchison v. Bartholow, 4 Kan. 124, 139-40 (1866)).

[117]The court in Indianapolis Mach. v. Curd, 247 Ind. 657, 221 N.E. 340 (1966), held:

> Receivers may not be appointed *without notice* merely because a party "believes" that there is danger of loss of assets or merely because parties holding the assets "could" dissipate them or conceal them. The mere possibility or potentiality of doing injury or violating the law cannot be made the basis alone for equitable interference by a court. If such were the law, every person and every business would be subject to being taken over by a court, and even a court and a judge has such possibility and "could" violate the law.

Id. at 665, 221 N.E.2d at 345.

[118]State *ex rel.* Red Dragon Diner v. Superior Court, 239 Ind. 384, 386-87, 158 N.E.2d 164, 165-66 (1959).

[119]*E.g.*, Gwinn v. State, 201 Ind. 420, 423, 166 N.E. 769, 770 (1929); Wallace v. State, 199 Ind. 317, 326, 157 N.E. 657, 660 (1927). The Wallace court held: "The affidavit or the statement under oath or affirmation, in support of probable cause, must bear the countenance of truth, which is so infallible that either an action for damages, or a criminal charge of perjury may be legally predicated thereon, if such statement is untrue." *Id.* at 326, 157 N.E. at 660.

[120]*E.g.*, Wallace v. State, 199 Ind. 317, 157 N.E. 657 (1927) wherein the court held:

order to protect the constitutional rights of the person to be searched. The appointment of a receiver without notice conceptually represents a more serious intrusion upon the constitutional rights of the party in possession than does granting of a search warrant.[121]

As in the case of the issuance of a search warrant, the court when considering the appointment of a receiver without notice demands specific facts from which it can determine whether or not appointment is justified. The court in *Inter-City Contractors v. Jolley*[122] reversed the ex parte appointment of a receiver on the grounds that the verified complaint was deficient.[123] The concern of the court was the correctness of the appointment of a receiver without notice. In order to guarantee the constitutional rights of the party in possession, courts rely upon their own discretion in determining the justifiability of appointment in any particular case,[124] and therefore, independently review the facts.

Courts on a number of occasions have stated the specific facts required in order to justify the appointment of a receiver without notice.[125] Such facts include a showing that delay resulting from notice would defeat the object of the suit[126] and that a temporary restraining order or other alternate relief would be inadequate.[127] Additionally, the moving party must demonstrate to the court either that the party in possession: (1) Is about to waste or misappropriate the assets;[128] (2) is insolvent;[129] (3) is incapable of managing the

---

"Statutes which relate to search and seizure must be strictly construed in favor of the constitutional right of the people." *Id.* at 327, 157 N.E. at 660.

[121]Where a receiver is appointed without notice, the receiver enters the adverse party's business unannounced and literally takes away all control of it from him. A search warrant, on the other hand, only authorizes the search and seizure of particularly described articles. Marron v. United States, 275 U.S. 192 (1927). Thus, the appointment of a receiver without notice is the more drastic action.

[122]257 Ind. 593, 277 N.E.2d 158 (1972).

[123]The court held:

> These conclusions are not supported by specific statements of facts sufficient to authorize the appointment of a receiver without notice under the authority of the above cited cases. The complaint of the appellee [party moving for appointment] does nothing more than allege conclusions which may or may not be supported by evidentiary facts.

Id. at 596-97, 277 N.E.2d at 160.

[124]Meek v. Steele, 368 N.E.2d 257, 258 (Ind. Ct. App. 1977).

[125]*E.g,* Ledger Publishing Co. v. Scott, 193 Ind. 683, 685, 141 N.E. 609, 609 (1923).

[126]*Id.* at 685, 141 N.E. at 609.

[127]*Id.* at 686, 141 N.E. at 609.

[128]Bookout v. Foreman, 198 Ind. 543, 547, 154 N.E. 387, 388 (1926); Henderson v. Reynolds, 168 Ind. 522, 527, 81 N.E. 494, 496 (1907); Mead v. Burk, 156 Ind. 577, 580, 60 N.E. 338, 340 (1901); Chicago & S.E. Ry. v. Cason, 133 Ind. 49, 51, 32 N.E. 827, 828 (1892).

[129]In the application for the appointment of a receiver to take over the assets of a corporation, insolvency is one of two statutory grounds. Although some courts have

assets;[130] (4) is without a right to the property;[131] (5) is about to commit or has already committed a fraud upon the creditors or other parties petitioning for the appointment of the receiver;[132] or (6) is about to remove the assets from the jurisdiction of the court.[133] In short there must be a showing of irreparable, unforeseeable injury to the moving party, if the receiver is not appointed.[134]

The petitioning party not only must allege these facts as conclusions, but, based upon personal belief, swear to the facts which support such conclusions. If the moving party is able to demonstrate by a fair preponderance of the evidence that it will ultimately prevail on the merits when the case is finally adjudicated and the court is convinced that no other adequate remedy exists, then the court may, within the bounds of the constitutional guarantee of due process, appoint a receiver without notice to the adverse party. The statute requires sufficient cause to be shown before the notice re-

---

held that insolvency is not a required condition precedent to the appointment of a receiver without notice, Mead v. Burk, 156 Ind. 577, 581, 60 N.E. 338, 340 (1901), as a practical matter the absence of such an allegation makes the legal remedy appear available and thus defeats the application. *See* Mannos v. Bishop-Babcock-Becker Co., 181 Ind. 343, 348, 104 N.E. 579, 581 (1914); Goshen Woolen-Mills v. City Nat'l Bank, 150 Ind. 279, 285, 49 N.E. 154, 156 (1898).

[130]Lafayette Realty Corp. v. Moller, 247 Ind. 433, 438, 215 N.E.2d 859, 862 (1966). *But see* North Am. Land & Timber Co. v. Watkins, 109 F. 101, 105 (5th Cir. 1901) wherein the court considered the mismanagement issue:

> Even where the management of the majority appears to be unwise and injurious, equity will not interfere if such management be not dishonest or ultra vires, but will require the complaining stockholder to seek relief within the corporation. When the management is not shown to be fraudulent or dishonest, and when it is a matter of opinion whether it is wise or unwise, advantageous, or disadvantageous, if the acts complained of be intra vires, there is no authority for equity to interfere. To do so would be to place control indirectly in the hands of the minority whenever interference removes from control the officers selected by the majority.

Id. at 105. *See* Indianapolis Dairymen's Co-op. v. Bottema, 226 Ind. 237, 247, 79 N.E.2d 401, 402 (1948). *See also* 2 R. TOWNSEND, SECURITIES AND CREDITOR'S RIGHTS 553 (1976).

[131]Mead v. Burk, 156 Ind. 577, 580, 60 N.E. 338, 339-40 (1901).

[132]The application for the appointment of a receiver is an in rem proceeding; therefore, the moving party must have an interest in the property which is the subject matter of the action. *See* Mead v. Burk, 156 Ind. 577, 580, 60 N.E. 338, 339 (1901). *See also* 2 R. TOWNSEND, SECURITIES AND CREDITOR'S RIGHTS 556 (1976).

[133]Bookout v. Foreman, 198 Ind. 543, 546, 154 N.E. 387, 388 (1926), Chicago & S.E. Ry. v. Cason, 133 Ind. 49, 51, 32 N.E. 827, 828 (1892). *See* 2 R. TOWNSEND, SECURITIES AND CREDITOR'S RIGHTS 555 (1976), for a listing of many additional grounds to justify the appointment of a receiver. *See also* Henderson v. Reynolds, 168 Ind. 522, 527-28, 81 N.E. 494, 495 (1907).

[134]Lafayette Realty Corp. v. Moller, 247 Ind. 433, 439, 215 N.E.2d 859, 862 (1966); Meyering v. Petroleum Holdings, 227 Ind. 313, 325, 86 N.E.2d 78, 82 (1949); Largura Constr. Co. v. Super-Steel Prods. Co., 216 Ind. 58, 61, 22 N.E.2d 990, 992 (1939); Bookout v. Foreman, 198 Ind. 543, 546-47, 154 N.E. 387, 388 (1926).

quirement can be obviated. The statute, however, does not define sufficient cause.[135]

The court in *Johann* for the first time compiled all of the conditions and requisite showings that Indiana courts, for years, had independently demanded, into a single cohesive rule. Again, the uniqueness of the *Johann* holding is not the elements of the holding, but rather that all of the elements were gathered together in a concise, logical order.

C. The Development Of Indiana Case Law Since The Johann Decision

The cases which followed *Johann* either explicitly or implicitly applied the *Johann* rule without significant modification. The Indiana Supreme Court, in *Indianapolis Machinery Co. v. Curd*,[136] considered two additional elements to be satisfied before a court should appoint a receiver without notice: (1) An ex parte receivership should be temporary until notice and hearing,[137] and (2) the moving party should post a surety bond as in the case of a temporary restraining order.[138]

The court did not, however, reverse the appointment of an ex parte receiver on those grounds.[139] Nor did the court state the elements in the form of a general rule.[140] Furthermore, the court decisions since *Indianapolis Machinery* have not made these elements part of the *Johann* rule.[141]

There is no reason for the courts not to require the same guarantees of protection in the appointment of a receiver without notice as required for the granting of a temporary restraining order

---

[135]Henderson v. Reynolds, 168 Ind. 522, 526, 81 N.E. 494, 496 (1907); Wabash Ry. v. Dykeman, 133 Ind. 56, 65, 32 N.E. 823, 826 (1892).

[136]247 Ind. 657, 221 N.E.2d 340 (1966).

[137]*Id.* at 660, 221 N.E.2d at 342.

[138]*Id.* at 667, 221 N.E.2d at 346.

[139]*Id.* at 668, 221 N.E.2d at 346.

[140]Instead, the court in dicta suggested:

> The failure . . . , to require a bond under the circumstances, is a factor which weighs in the consideration of the propriety of the appointment without notice. The posting of a bond by the appellees could have minimized and reduced the severity of any likely injury to the appellants upon the appointment of a receiver, and such a fact cannot be eliminated in the consideration of the drastic remedy asked by the appellees for the appointment of a receiver without a notice and hearing.

Id. at 667, 221 N.E.2d at 346. Thus, although the court does not require the posting of a bond, whether or not a bond is posted does weigh in the court's determination.

[141]*See, e.g.*, Meek v. Steele, 368 N.E.2d 257 (Ind. 1977); Inter-City Contractors Serv., Inc. v. Jolley, 257 Ind. 593, 277 N.E.2d 158 (1972); Environmental Control Syss. v. Allison, 314 N.E.2d 820 (Ind. Ct. App. 1974).

before notice. Although the effectiveness and expedient nature of the remedy would not in any way be impaired, and the moving party could still effect protection of the assets, yet the adverse party's rights would be greatly enhanced. The appointment would still be of an extraordinary nature and require satisfaction of the *Johann* conditions, but the chance of violating the constitutional rights of dispossessed parties would be greatly reduced.

V. Conclusion

The appointment of a state court receiver in Indiana is an anomaly. The statute specifically provides for the appointment of a receiver, and in certain limited situations justice between the parties can be served in no other way. Yet historically Indiana courts have only rarely affirmed an ex parte appointment. Furthermore, when compared to other extraordinary remedies such as a temporary restraining order there arises a serious question as to whether the *Johann* decision goes far enough in protecting the rights of the adverse party.

This leaves the practitioner in a predicament. Even if a factual situation arises which appears to fall within the allowable parameters for appointment without notice, he should carefully consider the alternatives even if such alternatives do not accord his client a full measure of relief. If a practitioner must seek the appointment of a receiver without notice, he is well advised to ask for a receiver to temporarily take control of the assets until notice can be given and a hearing held.[142] In any event, the practitioner should scrupulously avoid the dangers inherent in the appointment of a receiver without notice.

Steven M. Kirsh

---

[142]Fagan v. Clark, 238 Ind. 22, 148 N.E.2d 407 (1958) wherein the court suggested:

> The better practice, where the trial court finds it necessary to appoint a receiver without notice, is to provide in its order that the appointment should continue only so long as is necessary to give notice of a hearing to all interested parties. A prompt date for a hearing should be fixed and all interested parties should be given their day in court.

Id. at 31, 148 N.E.2d at 411.