WALKER *v.* TAYLOR.

4—2567

Opinion delivered June 6, 1932.

1. RECEIVERS—LEAVE TO SUE.—The requirement of leave to sue a receiver is for the receiver's protection, and, if waived by him, no advantage can be taken of the omission by any one else.
2. RECEIVERS—LEAVE TO SUE—PRESUMPTION.—Where a receiver expressly consented to be sued, in the absence of evidence to the contrary, it will be presumed that he obtained leave of the court to do so.
3. RECEIVERS—LEAVE TO SUE.—Failure to obtain leave of court to sue a receiver does not affect the jurisdiction of the court.
4. BANKS AND BANKING—INSOLVENCY.—Where a bank accepting certain drafts for deposit gave credit to an associated bank for part of the amount of the drafts, and thereafter the drafts were unpaid and both banks became insolvent, *held* that the first-named bank was entitled to have a credit for the amount credited to the other bank transferred on its books to it.

Appeal from Independence Chancery Court; *A. S. Irby,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Walter E. Taylor, Bank Commissioner, in charge of the American Exchange Trust Company of Little Rock, Arkansas, brought this suit in equity against Elmo Walker, receiver, in charge of the Home Accident Insurance Company, defendant, and Walter E. Taylor, Bank Commissioner, of the North Arkansas Bank of Batesville, Arkansas, as garnishee. The prayer of the complaint is for judgment against the defendant in the sum of $3,000 or that the plaintiff and the garnishee be direct-

ed and authorized to change the entry on their books so as to show a credit of $3,000 to the plaintiff, instead of to the defendant.

According to the testimony of Beall Hempstead, he was vice president and treasurer of the American Exchange Trust Company, of Little Rock, Arkansas, before it closed its doors as an insolvent bank on the 17th day of November, 1930. Since that time he has been employed in the bank under Walter E. Taylor, State Bank Commissioner, who has been in charge of the affairs of said bank as liquidating agent under the statute. The Home Accident Insurance Company was a depositor in the bank. On the 15th day of November, 1930, said company made a deposit of $15,500, and was given a credit slip for that amount. The deposit consisted of a draft on the Home Accident Insurance Company in Los Angeles, California, for $13,000, and two checks on Little Rock banks respectively for $1,000 and for $1,500. The $13,000 draft was returned unpaid and has not since been paid. The return on that check was a week or more after the bank had closed its doors on account of insolvency. The draft for $13,000 was not charged back to the account of said insurance company because that company did not have sufficient funds to cover it.

When the deposit was first made, $3,000 of it was deposited as a credit to the North Arkansas Bank of Batesville, Arkansas. This was done on the strength of the deposit made with the plaintiff bank by said insurance company. The Batesville bank gave the insurance company credit on its books for $3,000. The Batesville bank became insolvent on account of its relation to the Little Rock bank, and it was taken charge by the State Bank Commissioner for liquidation as an insolvent bank. At the time the Little Rock bank gave the Batesville bank credit for the $3,000, it gave said bank credits for other insurance in the sum of $17,000 in addition to the $3,000. The Home Accident Insurance Company shortly afterwards became insolvent and was placed in

the hands of a receiver to wind up its affairs. The balance due by the plaintiff bank to said insurance company when it closed its doors was $6,490.96. Subsequently, when the $13,000 draft was returned unpaid, this left the insurance company indebted to the bank in the sum of more than $3,000.

The chancellor found the issues in favor of the plaintiff, and it was decreed that the plaintiff have judgment for the $3,000 credited to the Home Accident Insurance Company on the books of said North Arkansas Bank at Batesville, and that Walter E. Taylor, Bank Commissioner in charge of both insolvent banks, be directed to change the entry of $3,000 on the books of said North Arkansas Bank whereby it will show a credit to the plaintiff for $3,000, instead of to the defendant. The case is here on appeal.

Coleman & Reeder, for appellant.

J. Paul Ward, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted by counsel for appellant that the decree should be reversed because the failure of the plaintiff to secure leave to sue the receiver of the insurance company was a bar to the jurisdiction of the court. We do not agree to this contention. The decree recites that the plaintiff and defendant were both present and represented by their attorneys and agreed that the case should be presented for final determination in the Independence Chancery Court. The requirement that leave of court must be had before a receiver can be sued is for the receiver's protection; and, if waived by him, no advantage can be taken of the omission by any one else. This is certainly true in all cases like this where there is no attempt to interfere with the actual possession of the property placed in the hands of the receiver.

In a case note to 29 A. L. R. at page 1460, it is said that, although leave to sue a receiver is generally required, the great weight of authority is to the effect that failure to secure permission to sue a receiver appointed

by a State court does not affect the jurisdiction of the court in which the suit is brought. It is generally held that the defect is merely technical and may be remedied by order or may be waived.

Reliance, however, is placed by counsel for appellant on the case of *Ratcliff* v. *Adler,* 71 Ark. 269, 72 S. W. 896. It is true that the case note just referred to cites that case as following the minority rule that the failure to secure leave to sue a receiver is a bar to the jurisdiction of the action, but we do not think that such is the effect of the decision. The court expressly stated that it was unnecessary for it to determine whether failure to obtain permission to sue is a matter affecting the jurisdiction of the court in which the suit is brought, for, if it be conceded that the general rule is that the court will not entertain jurisdiction of a suit brought against a receiver appointed by another court until the appointing court has given its consent that he be sued, still there are exceptions to the rule. The case under consideration was held to fall within the exceptions because the same judge presided over the court that appointed the receiver who presided over the court in which the suit was brought. Hence it was said that there was an implied consent to the action on the part of the court which appointed the receiver. This case seems to recognize that the omission to obtain leave to sue the receiver is a matter which does not affect the jurisdiction of the court in which the suit is brought and may be waived by the receiver.

In the present case, the receiver expressly consented to the jurisdiction of the court which tried the case; and, as an arm of the court which appointed him receiver, in the absence of evidence to the contrary, it will be presumed that he obtained leave of the court to do so.

The court properly held with the plaintiff on the merits of the case. This is not a suit to recover the sum of $3,000, as argued by counsel for the defendant. The whole matter is one of bookkeeping. On the 15th day of November, 1930, before the Little Rock bank closed its

doors for insolvency on the 17th day of November, the insurance company made a deposit of drafts in said bank in the sum of $15,500. One of them was a draft on an insurance company in the State of California. The bank at once placed $3,000 of this amount to the credit of the Batesville bank. This bank became insolvent and was placed in the hands of the State Bank Commissioner for liquidation. No return was had on the draft of the insurance company which was sent to California for payment until more than a week after both banks had been taken charge of by the State Bank Commissioner as insolvent banks. The draft given by the defendant on the California insurance company was returned not paid and has never been paid. Therefore the chancery court, properly directed that the $3,000 which had been credited to the insurance company on the books of the Batesville bank was without consideration, and that the State Bank Commissioner, who was in charge of the Little Rock bank and the Batesville bank as insolvent banks, should be directed to charge the entry of $3,000 on the books of the Batesville bank, whereby it would show a credit to the Little Rock bank for $3,000, instead of to the defendant insurance company.

It follows that the decree of the chancery court was correct, and it must be affirmed.