Marquette Law Review

Volume 22
Issue 3 *April 1938*

Article 9

1938

Banks and Banking: Subrogation: Right of FDIC to Share in Assets of Insured Insolvent Bank

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debtor's property already affected by foreclosures as long as the property was still in the "constructive" possession of the debtor. The section provided originally that, "The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer . . . is filed." Section 74(*m*), 47 STAT. 1470 (1933). The courts held immediately that mortgaged property in the possession of foreclosure receivers was no longer within the constructive possession of the debtor unless the actions had been started within four months of the filing of the debtor's petition. *In re Landquist,* 70 F. (2d) 929 (C.C.A. 7th, 1934); *Molina* v. *Murphy,* 71 F. (2d) 605 (C.C.A. 1st, 1934). Section 74 (*m*) was amended to include specifically as property of the debtor within the jurisdiction of the bankruptcy court any property in the possession of a trustee under a trust deed or a mortgage, or a receiver, custodian or other officer of any court in a pending cause, "irrespective of the date of the appointment of such receiver or other officer, or the date of the institution of such proceedings: Provided, that it shall not affect any proceeding in any court in which a final decree has been entered." 48 STAT. 923 (1934), 11 U.S.C.A. § 202 (*m*) (1937). See *In re Monsen,* 74 F. (2d) 411 (C.C.A. 7th, 1935). In the instant case the court pointed out that seizure on process after judgment by confession put the mortgagee into a position similar to that where a receiver is appointed in ordinary foreclosures. The court held that judgment by confession was not a final decree. A final decree within the meaning of Section 74(*m*) under the law of the particular local jurisdiction is a decree confirming a sale. In Wisconsin the equities of the mortgagor-debtor are not cut off in foreclosure proceedings until the sale has been confirmed. *Gerhardt* v. *Ellis,* 134 Wis. 191, 114 N.W. 495 (1908). If the sale is by advertisement, as was proposed in the instant case according to the local statutes, and if there is to be no decree of confirmation ever entered, the property is probably within the "constructive" possession of the debtor until the debtor's statutory period of redemption has expired.

BANKS AND BANKING—SUBROGATION—RIGHT OF FDIC TO SHARE IN ASSETS OF INSURED INSOLVENT BANK.—The bank was insolvent. Liquidation was begun under the direction of the Commissioner of Banking. Each of the bank's depositors was insured by the Federal Deposit Insurance Corporation to the extent of $5,000. There were some depositors whose deposits exceeded that amount. In accordance with the Act of Congress creating the FDIC [48 STAT. 168 (1934), 12 U.S.C.A. § 264 (*l*) (7) (1937)] upon payment by the FDIC each depositor executed an assignment to the corporation that it might be subrograted to all the claimant's rights against the closed bank. The claim of the FDIC based upon the assignments was recognized by the Commissioner. The present proceeding before the Court of Chancery was upon a petition by the Commissioner to determine the method of distribution to be used in making the first cash dividend. Three methods of distribution were possible: (1) The FDIC might be paid in full before the "excess" depositors could be paid upon their "excess" deposits; (2) the "excess" depositors and the FDIC might share *pro rata* on the respective amounts of their claims for the amount up to and the amount in excess of $5,000; (3) the "excess" depositors might receive full payment for the amount of the excess prior to any payment being made to the FDIC. The provision of the Act providing for sugrogation includes the right to receive the same dividends from the proceeds of the assets of the closed bank as would be pay-

able to the depositor on his claim for the insured deposit with the depositor's retaining his claim for the uninsured portion and requiring that the rights of the depositors and other creditors be determined in accordance with the applicable provisions of the state law. *Held,* the "excess" depositors and the FDIC are to share *pro rata* in the dividend to be paid by the closed bank for the amounts up to and the amounts in excess of $5,000. *Withers* v. *D'Auria Bank & Trust Co.,* (N.J. Chanc. 1937) 195 Atl. 298.

The inequities resulting from a distribution under either plan (1) or (3) are evident. In the one case the depositors would be penalized; in the other case they would be getting more than they had bargained for. Subrogation exists entirely independent of contractual relations and is wholly a creature of equity, a means whereby justice may be done. *Van Valkenburg* v. *Jantz,* 161 Wis. 336, 154 N.W. 373 (1915). The right of subrogation is a mere inchoate right and cannot be enforced until the surety has paid the debt; *Defiance Machine Works* v. *Gill,* 170 Wis. 477, 175 N.W. 940 (1920); *Waukesha S. B. & L. A.* v. *Hamill,* 203 Wis. 414, 232 N.W. 877 (1930). (*Cf.* Section 220.082 of the Wisconsin Statutes on closed insured banks where the mere making of funds available is sufficient to create subrogation.) The person seeking subrogation must have paid the debt under grave necessity to save himself a loss, and the right is never accorded to a volunteer. *Aetna Life Ins. Co.* v. *Middleport,* 124 U.S. 534, 8 Sup. Ct. 625, 31 L.ed. 537 (1888). A volunteer is not entitled to subrogation even though his advance served to discharge a mortgage and was intended for that purpose. *Bank of Baraboo* v. *Prothero,* 215 Wis. 552, 255 N.W. 126 (1934). In the same case the rules for subrogation by reason of advances made were stated as being dependent upon (1) the subrogee's being secondarily liable, (2) the necessity for action to protect his own interest, and (3) an agreement that he is to have security. An early case, *Downer* v. *Miller,* 15 Wis. 612 (1862), held that no case ever carried the doctrine of subrogation so far as to state that mere loss of money advanced for the purpose of enabling the borrower to pay a debt entitled the lender to be subrogated to the rights of the creditor. In *Levy* v. *Martin,* 48 Wis. 198, 4 N.W. 35 (1879), the express intent of subrogation saved an otherwise invalid mortgage. However, the right to subrogation may be waived. *Defiance Machine Works* v. *Gill,* 170 Wis. 477, 175 N.W. 940 (1920). In the same case it was stated that the action to enforce the right was an equitable action. Where the rights of a third person have not intervened a delay short of the statutory period of limitations will not bar the right of subrogation. *Hughes* v. *Theres,* 131 Wis. 315, 111 N.W. 474 (1907). Under the common law the sovereign was entitled to a secured position as to other creditors. *Rex* v. *Cotton,* Park. 112, 145 Eng. Rep. 729 (1751). Upon the adoption of the common law by a state, the right of the sovereign to preference in payment of debts owing the sovereign becomes a power of the people of the state. *People* v. *Oregon State Savings Bank,* 357 Ill. 545, 192 N.E. 580 (1934); *State* v. *Soo Oil Co.,* 62 S.D. 199, 252 N.W. 494 (1934). The purpose of the state's sovereign prerogative of preference over other creditors in insolvency proceedings is to protect the state's reserve, insure against loss of governmental money, meet the government's expenses and discharge public debts and obligations. *In re General Indemnity Co. of America,* 292 N.Y. Supp. 981, 251 App. Div. 236 (1937). In that case, however, the court stated that the power was one which was incident to the state and to the state alone and did not extend to any of its lesser divisions such as towns or cities, or especially as was the point of the case to a board which was functioning as a state department. A surety on a clerk's bond, which had paid the loss sustained by reason of the bank's permitting a large amount of funds

to be withdrawn for private purposes, is subrogated to the rights of the one secured against risk. *U. S. Fidelity & Guar. Co.* v. *Union Bank & T. Co.*, 228 Fed. 448 (C.C.A. 6th, 1915). The provisions for subrogation in a bank's bond to repay the commonwealth's deposits and a stipulation in the application giving the surety rights and remedies of individual sureties refers only to the bank's rights and remedies, and does not put the surety upon paying in the position of the commonwealth as a preferred creditor. *South Philadelphia State Bank* v. *National Surety Co.*, 228 Pa. 300, 135 Atl. 748 (1927). In opposition to this view the Wisconsin court has held that the county treasurer's surety upon paying to the county the amount of a judgment against him could be subrogated to the rights of the county as against third persons. *Forest County* v. *Poppy*, 193 Wis. 274, 213 N.W. 676 (1927). In 1923 the legislature in Wisconsin passed a statute providing that upon the insolvency of any bank or trust company which had deposits of the state or any political subdivision thereof, such claim for payment should not be a preferred claim with the exception of claims arising prior to the passage of the act, and for any claim for taxes. WIS. STAT. (1937) § 224.05. In conformity with the spirit of the act creating the FDIC the Wisconsin legislature has by statute provided that the FDIC be given the same right which the depositor would have up to the extent of the subrogation. WIS. STAT. (1937) § 220.082.

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CARRIERS—NEGLIGENCE—DUTY TO PASSENGER WHO SLIPS ON REFUSE LEFT ON FLOOR OF PUBLIC CONVEYANCE.—The defendant was a common carrier operating a number of motor busses. The plaintiff had been a passenger on one of these busses. She had been injured when she slipped on a banana peel as she was getting out of her seat on the bus. It was brought out by the plaintiff's witnesses at the trial that a number of children had been on the bus when the accident occurred, and that these children were returning from a picnic and had been eating bananas and throwing refuse on the floor. The company's driver said that he had not seen the children doing any of these acts. The trial court let the case go to the jury and the judge instructed the jury that the defendant company owed the passenger only ordinary care in making inspection of the bus but that in all other respects it owed the plaintiff the highest degree of care for her safety. Judgment was entered on a verdict for the plaintiff. On appeal, *held*, judgment affirmed; a bus company is a common carrier and owes its passengers the highest degree of care for their safety. *Jones* v. *Youngston Municipal Ry. Co.*, (Ohio, 1937) 12 N.E. (2d) 279.

Whenever a patron has sustained injuries after slipping on refuse left on the floor of a public conveyance, or about a carrier's station premises, he must show more than the mere happening of the accident to make out a case against the carrier. *Sisson* v. *Boston Elevated Ry. Co.*, 277 Mass. 139, 178 N.E. 733 (1931); *Thomas* v. *J. Samuels & Bros., Inc.*, 47 R.I. 206, 132 Atl. 8 (1926); *Windham* v. *Atlantic Coast Line Co.*, 71 F. (2d) 115 (C.C.A. 5th, 1934). The burden is on the plaintiff to show how, when and by whom the refuse was placed on the floor of the conveyance or station. *Devine* v. *Empire State R. R. Corp'n.*, 220 App. Div. 466, 221 N.Y. Supp. 623 (1927); see also *Taylor* v. *Kansas City Terminal Ry. Co.*, (Mo. App. 1922) 240 S.W. 512. He must have assumed this burden although the court on appeal is satisfied that he is entitled to an instruction on highest degree of care if he does get his case to the jury. *Davis* v. *South Side Elevated R. R. Co.*, 292 Ill. 378, 127 N.E. 66, 10 A.L.R. 254 (1920).