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BANKS AND BANKING - PUBLIC MONEYS AS PREFERRED CLAIMS

BANKS AND BANKING — PUBLIC MONEYS AS PREFERRED CLAIMS — The State claims a preference in the assets of an insolvent bank on the basis of sovereign prerogative. *Held,* that the State has no preference now because the prerogative right has been abrogated: first, by the passing of a comprehensive state banking law; and second, by a constitutional provision giving bill holders of insolvent banks preference in payment over all other creditors. *Fry, State Treasurer v. Equitable Trust Co.,* 264 Mich. 165, 249 N. W. 619 (1933). (Potter and McDonald, JJ., dissenting).

A county treasurer and an ex officio tax collector deposited undistributed tax moneys with defendant bank. *Held,* that an insolvency of defendant, the State, by sovereign prerogative, is entitled to a preferred claim on all assets. *People v. West Englewood Trust & Sav. Bank,* (Ill. 1933) 187 N. E. 525.

In view of the recent banking debacle which has resulted in tying up millions of dollars in insolvent banks, the problem of preferential claims has become one of paramount importance. The trust concept has been used, perhaps overused,[1] in gaining preferential treatment. As to public moneys,[2] there is the possibility of preference by resort to the sovereign prerogative of prior claim on all assets of an insolvent debtor. It was well settled in England that such was an incident to

[1] Fulton v. Baker-Toledo Co., 125 Ohio St. 518, 182 N. E. 513 (1932), noted in 31 MICH. L. REV. 843 (1933); also see McQueen v. Randall, (Ill. 1933) 187 N. E. 286.

[2] The courts have refused to extend the prerogative to funds which are not strictly public property. Assets of bankrupts, etc., in hands of court officers are not public funds. Ghingher v. Pearson, (Md. 1933) 168 Atl. 105. Neither are such funds debts due the United States. Wilson v. Lyon County Bank, (D. C. Nev. 1933) 4 F. Supp. 608.

[3] The right belongs only to the State and does not extend to its political subdivisions as a general rule. Aetna Casualty & S. Co. v. Bramwell, (D. C. Ore. 1926) 12 F. (2d) 307; Cannon County v. McConnel, 152 Tenn. 555, 280 S. W. 24 (1925); Boone County v. Cantley, 330 Mo. 911, 51 S. W. (2d) 56 (1932). *Contra*: Leach v. United States Bank, 205 Iowa 987, 213 N. W. 528 (1927).

the sovereignty of the Crown. In this country it has generally been held that the State[3] succeeded to that sovereign right[4] but the tendency has been to deny that the prerogative is applicable to the case of public moneys in an insolvent bank. A number of courts have held that the passage of general banking statutes with provisions for bonding depositaries shows a legislative intent to abandon the protection of the prerogative in favor of other methods;[5] other courts have held that the State, in placing money on deposit at interest is not doing a sovereign act but is entering into business and cannot claim a sovereign's preference;[6] still other courts have held that when the state banking commissioner or re-receiver takes over the assets the debtor is divested of title and the prerogative cannot be exercised against property which no longer belongs to the debtor.[7] Although the force and wisdom of the reasons for so abrogating the common law have been questioned,[8] the fact remains that Nevada, Virginia, and Texas[9] declared such to be the law in those jurisdictions within four months prior to the decisions in the principal cases. It would seem that there might be a possible connection between the reluctance of the court to grant a preference to public funds and the trend toward greater protection of private bank deposits.

J. C. W.
T. A. P.

[4] Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 170 Pac. 760, L. R. A. 1918C 954 (1918); Marshal v. New York, 254 U. S. 380, 41 Sup. Ct. 143, 65 L. ed. 315 (1920); 81 UNIV. PA. L. REV. 441 at 442 (1933); see cases cited in 51 A. L. R. 1336 (1927). *Contra*: authorities denying the prerogative as repugnant to our system of government or as lost by non-user are collected in 51 A. L. R. 1355 at 1360 (1927); also Denny v. Thompson, 236 Ky. 714, 33 S. W. (2d) 670 (1930); Freeholders of Middlesex County v. State Bank, 29 N. J. Eq. 268 (1878); Board of County Com'rs of San Miguel v. McPherson, 90 Colo. 408, 9 Pac. (2d) 614 (1932).

[5] Shaw v. United States Fidelity & Guaranty Co., (Tex. App. Com. 1932) 48 S. W. (2d) 974; State v. Carson Valley Bank, (Nev. 1933) 23 Pac. (2d) 1105; 83 A. L. R. 1119 (1933). Cases holding that passage of a general banking statute is sufficient to abrogate the common law prerogative: Commonwealth v. Commissioner of Banks, 240 Mass. 244, 133 N. E. 625 (1921); Fimon v. South Dakota, (C. C. A. 8th, 1928) 29 F. (2d) 776 (certiorari denied, 279 U. S. 841, 49 Sup. Ct. 254, 73 L. ed. 787 (1929)). The last case cited held that a state statute enacting the prerogative preference was not applicable to national banks, the affairs of which are completely governed by the National Bank Act.

[6] Fidelity & Casualty Co. v. Union Savings Bank Co., 119 Ohio St. 124, 162 N. E. 420 (1928); United States Fidelity & Guaranty Co. v. Carter, (Va. 1933) 170 S. E. 764.

[7] Public Indemnity Co. v. Page, 161 Md. 239, 156 Atl. 791 (1931); Nat. Surety Co. v. Pixton, 60 Utah 289, 208 Pac. 878 (1922).

[8] The above reasons with a full collection of authorities are considered and criticized in 81 UNIV. PA. L. REV. 441 (1933).

[9] State v. Carson Valley Bank, (Nev. 1933) 23 Pac. (2d) 1105; United States Fidelity & Guaranty Co. v. Carter, (Va. 1933) 170 S. E. 764; Denson v. Shaw, (Tex. Civ. App. 1933) 62 S. W. (2d) 344.