**Funds—Banks and Banking—Counties — County Treasurer—Deposit—Depository Bond—County Commissioners—Sureties—Claims.**

Where the County Treasurer deposits county funds in a bank without taking security therefor, as provided by law, such County Treasurer is not entitled to claim a preference right for the benefit of the county where the bank becomes insolvent.

County Commissioners are entitled to make such claim of preference on behalf of the county.

Where the sureties on the official bond of the County Treasurer pay such claim they are entitled to be subrogated to all rights of the county.

L. Q. Skelton, Esq.,
Superintendent of Banks,
Helena, Montana.

My dear Mr. Skelton:

You have submitted to this office the letter of Judge James M. Self, together with the claims of Gladys Brown, as County Treasurer of Sanders county, against The Thompson State Bank, claiming a preference for the excess of county funds deposited in this bank over and above the amount for which the bank gave security. The excess, amounting to $4,921.58, was deposited as stated in the claim "in violation of law, and it, therefore, constitutes a trust fund in the hands of the receiver for the undersigned."

Judge Self in his letter states the following in regard to this claim:

> "Upon a reading of the claim you will observe that the theory upon which she expects to recover is that the money was deposited in the bank in violation of law. In other words, she bases her preference upon her own dereliction of official duty and a violation of the penal statutes of the state. * * * I cannot help but feel that the general creditors of the bank ought not to be made to suffer by reason of her own failure to perform her official duties, that the county has recourse upon her official bond, whereas the general creditors cannot resort to that bond."

In the case of Brown v. Sheldon State Bank (Ia.), 117 N. W. 289, it was held that a County Treasurer who deposits county funds in a bank in violation of the code forbidding such deposit without an order of the Board of Supervisors and the execution of a bond by the bank, is not, after being compelled by the county to make good the loss of deposits by the failure of the bank, subrogated to the rights of the county in respect to its right of preference over other general depositors, arising from the fact that deposits, unlawfully made, create a trust relation between the county and the bank. The Court said:

> "To our minds it is plain that there was no error in the decree of which claimant can complain. Code, Section 1457, in effect, forbids the deposit of public funds by a County Treasurer in a bank, except when authorized thereto by a recorded resolution, adopted by the Board of Supervisors, and a bond has been given, etc. Here claimant does not pretend to have had any such authority. Not only were the deposits made by him on his own motion, but the evidence makes it clear that they were so made with the understanding that the moneys would be commingled with the general funds of the bank, and dealt with in all respects as a general deposit. A deposit of public moneys thus wrongfully made by a County

Treasurer does not give rise to any contract rights—as a depositor, or otherwise—in favor of the county. As between the county and its Treasurer, the transaction amounted, in contemplation of law, to a conversion. As between the county and the bank, the relation, at best, is that of trustor and trustee under a resulting trust; this assuming, of course, that the bank had notice, at the time of the deposit, of the character of the moneys deposited. That out of such relation there arises a right of preference, in favor of the county, over ordinary depositors we conclude to be true under the authorities. Page Co. v. Rose, 130 Iowa, 296, 106 N. W. 744, 5 L. R. A. (N. S.) 886, and cases cited. As between the Treasurer and the bank, however, no trust arises. There is no more than the simple relation of depositor and depository. Counsel for appellant do not dispute these propositions, but they insist, as we have seen, that as claimant was compelled, at the close of his term of office, to pay over to the county the amount shown by the deposit account, he became entitled to be subrogated to all the rights of the county. And, as bearing upon this, counsel point out that, at the time of making settlement with the county, he was told by the Board of Supervisors that, upon payment, 'I would have the same right to go ahead with the collection of the money for myself, the same as the county might do. They told me to go ahead and enforce the collection.' To the situation, as thus presented, it is manifest to our minds that the doctrine of subrogation can have no application. Subrogation is allowable in equity, only in favor of a person who has advanced money to pay the debt of another, to whom he stood in the position of surety, or where he has been compelled to pay the debt of another to protect his own rights. 27 Am. & Eng. Ency., p. 202. It is never allowed in favor of a person who is himself personally liable for the debt he discharges by payment. Bolton v. Lambert, 72 Iowa 483, 34 N. W. 294; Bank v. Bank, 124 Cal. 147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36. Nor in favor of one who would thereby reap advantage in any way from his own wrongdoing."

However, in the case of In re Stinger's Estate, 201 Pac. 693, it was held that a guardian, who uses his own funds to satisfy an obligation to his wards arising from his having loaned their funds to individuals without an order of the court, is subrogated to their rights against others primarily liable.

While it is possible that our Supreme Court might hold in this case that the County Treasurer is not entitled to present a claim against the bank based upon her own misconduct, yet I believe that the sureties on her official bond would be subrogated to all rights of the county in the event that the county should compel restitution of this amount by resort to her official bond.

Pomeroy's Equity Jurisprudence, Section 2351, states the following rule:

> "A subrogee may be entitled to enforce the creditor's rights against third persons, other than the principal debtor. It extends to rights against a third party liable ex delicto, as a purchaser of converted goods, or one participating in or assisting a breach of trust or other wrong on the part of the subrogee's principal." (Citing the cases of American Bonding Co. v. National Mechanics' Bank (Md.) 99 Am. St. Rep. 466, 55 Atl. 395; Browne v. Fidelity & D. Co. (Tex.) 80 S. W. 593; American Nat. Bank v. Fidelity & Deposit Co. (Ga.) 12 Ann. Cas. 666, 58 S. E. 265.)

In the case of American Bonding Co. v. National etc. Bank, the Court said:

> "It remains to be determined whether the appellant, having as surety paid to the state the amount of its money thus converted by Vansant to his own use, is entitled to be subrogated to the rights of the state and recover from the appellee the $3,774.70 of that money which consisted of interest paid by it to him on the state's deposits.
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> "The general equitable doctrine of subrogation, by which a surety who has paid the debt of his principal becomes entitled to all of the rights of the creditor against the principal debtor and to the benefit of all securities for the debt held by the former against the latter, is universally recognized. We are, however, in this case asked to go a step further, and hold that under such circumstances the right of subrogation is not restricted to the rights and remedies to which the creditor was entitled against the principal, but extends to his rights and remedies against other persons who were liable for the debt which has been satisfied by the surety. We are not aware that this court has ever been called upon to pass on that precise proposition, but the expressions which it has used in defining the right of subrogation are broad enough to include the principle upon which the proposition rests. In Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286, the Court says of the doctrine of subrogation: 'It is not founded on contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien and security to which the creditor could have resorted for the payment of his debt.' In Ghiselin v. Ferguson, 4 Har. & J. 521, it is said that, if a surety paying the debt of his principal shall be considered to stand in the place of the creditor 'for any one purpose to answer the ends

of justice, the Court cannot understand why he may not be so considered for every purpose, where the same ends are in view.'

"That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and remedies of the creditor against all persons who were liable for the debt, is both asserted by textwriters and sustained by the authority of many decided cases: Baylies on Sureties and Guarantors, 358; Rooker v. Benson, 83 Ind. 250; McCormick v. Irwin, 35 Pa. St. 111; Blake v. Traders' Bank, 145 Mass. 13, 12 N. E. 414. This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act: Sheldon on Subrogation, Sec. 89; 24 Am. & Eng. Ency. of Law, 216 et seq., and cases there cited; Wilson v. Doster, 42 N. C. 231; Edmunds v. Venable, 1 Pat. & H. 121; Boone Co. Bank v. Byrum, 68 Ark. 71, 56 S. W. 532; Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414.

"The facts of the present case in our opinion bring it within the class of cases last referred to, and we think, both upon principle and authority, the appellant should be subrogated to the right of the state to recover from the appellee as a participant in Vansant's breach of trust in receiving to his personal credit and converting to his own use the $3,-774.70 allowed to him by the appellee in return for the use of the state's money deposited to his credit as clerk of the court of common pleas."

It is, therefore, my opinion that the County Treasurer is not entitled to claim a preference right for the benefit of the county by reason of her wrongful act in depositing the county funds without security, as this would permit her to profit by her wrongful act, but that the County Commissioners are entitled to make such claim on behalf of the county, and that the County Treasurer's bondsmen, should they pay the claim, are entitled to be subrogated to all the rights of the county.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.