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Receivers Pendente Lite in Foreclosure Actions

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"An action, civil or criminal, cannot be maintained against a reporter, editor, publisher or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative or other public and official proceedings, or for any heading of the report which is a fair and true head-note of the article published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceedings which was not a part thereof."

Several significant changes are to be noted in the amended statute. Of considerable moment is the elimination of the consideration of the malice that may have motivated the newspaper in making the report. In actions instituted against newspapers, under the old statute, there were two distinct questions to be answered by the jury: 1. Was the report fair and accurate? 2. Was the report, though fair and accurate, published maliciously?

Before it could render a verdict for the plaintiff, the jury was constrained to answer both questions in the affirmative. Today, however, it is a complete defense to prove that the publication complained of is a fair and true report of a judicial or legislative proceeding.

The Legislature also designedly extended the cloak of privilege to cover fair and true head-notes of the article published.

Newspaper publishers and reporters now enjoy what is tantamount to virtual immunity from civil liability when they publish a fair and true report of a judicial or legislative proceeding.[21] This is consistent with the trend of the decisions of our courts. If the proceedings in legislative bodies, and in courts of justice are ever to be subjected to the wholesome scrutiny of a reading public, then no one need have occasion to cavil with the granting of these privileges to newspaper publishers and reporters.

We need have no apprehension that the privilege thus accorded will lead to utter disregard for the personal security of the individual by the press. We may assume, and fairly so, that judicial interpretations of *fair* and *true* reports will temper the use of the privilege and keep it within the bounds of common sense and justice.

FRANK COMPOSTO.

RECEIVERS PENDENTE LITE IN FORECLOSURE ACTIONS.—A receiver *pendente lite* is an officer appointed by the court to take over the possession of property, and to receive the rents and profits pending the suit. His possession is that of the court, for he is

[21] The Legislature failed to make similar changes in sec. 1345 of the Penal Law, the corresponding criminal statute.

an indifferent person and represents neither party. Consequently, his possession has no effect whatever on the title of the parties to the controversy, and the benefit of his possession accrues to him who may be ultimately entitled to the property.[1]

This equitable remedy was obviously founded upon the lack of a remedy at the common law, and the courts have been careful to see that the circumstances of the case were such that an appointment was to be desired in order to accomplish justice between the parties.[2] The power of appointment, although not arbitrary, lies within the sound discretion of the court, and should be exercised only when there is imminent danger of waste, irreparable injury, or loss of security.[3] Indeed, the courts have decreed the subject to be one so wholly within their discretion and control that a covenant in a mortgage entitling the mortgagee, upon a foreclosure, to the appointment of a receiver has been held to be a circumstance worthy of consideration, only when taken in connection with the other attendant facts of the case.[4] Therein lies our subject, for, in this state, the laws governing the receivers of *pendente lite* in actions brought in the Supreme Court, or in a county court, are materially affected, so far as they pertain to foreclosure actions, by the adoption of chapter 166 of the Laws of 1930. This chapter provides as follows:

> "Section 1. Section 254 of chapter 52 of the Laws of 1909, entitled, 'An act relating to real property, constituting chapter 50 of the Consolidated Laws,' as amended by chapter 682 of the Laws of 1917, is hereby amended by adding, after subdivision 9, a new subdivision to be subdivision 10, to read as follows:
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> '10. Mortgagee entitled to appointment of receiver. A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver" must be construed as meaning that the mortgagee, his heirs, successors, or assigns, in any action to foreclose the mortgage, shall be entitled, without notice,

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[1] Pomeroy, Equity Jurisprudence (2nd ed., 1919), 3190; Bispham, Principles of Equity (10th ed., 1922), 868.

[2] 34 Cyc. 18.

[3] Tiffany, Real Property (2nd ed., 1920), 2441; Finch v. Flanagan, 208 App. Div. 251, 203 N. Y. Supp. 560 (3rd Dept., 1924), where a covenant providing for the appointing of a receiver upon foreclosure proceedings being instituted, and such appointment to be "without notice to the party of the first part, his heirs, executors or administrators" held not binding upon the successors or grantees of party of the first part. Receivership subjects person and property to considerable expense, and deprives him of the use of the property without justification unless a good cause is shown. "The duty is not assumed by the court upon the consent of, or for the accommodation of, a person."

[4] Finch v. Flanagan, *supra* Note 3; Dazian v. Meyer, 66 App. Div. 575, 73 N. Y. Supp. 328 (1st Dept., 1901); W. I. M. Corporation v. Cipulo, 216 App. Div. 46, 214 N. Y. Supp. 718 (1st Dept., 1926).

and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits, in the event of any default, or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.'

2. This article shall take effect September 1, 1930."

By subdivision 1 of section 974 of the Civil Practice Act, it is provided that a receiver in a foreclosure action may be appointed "before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed." It is under section 974, which regulates the appointment of receivers *pendente lite,* that the courts, in the past, have refused to allow enforcement of a covenant providing for the appointment of a receiver, if, from the facts, it appeared that the security for the mortgage had not been impaired. The new law, it will be noted, provides that the parties may contract that such receiver may be appointed regardless of the value of the security.

Let us now consider the effect of the new subdivision upon section 975 of the Civil Practice Act. This section reads:

"Notice of an application for the appointment of a receiver in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action and the time limited for his appearance has expired. But where an order has been made directing the service of the summons upon a defendant by publication, the court, in its discretion, may appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as may be proper. But where the action is for the foreclosure of a mortgage, which mortgage provides that a receiver may be appointed without notice, notice shall not be required."

Our interest in this section deals with the matter of notice. The words of the last sentence are clear, and no case attracts our attention wherein the court has not applied their true meaning. But a reference to the new legislation shows that the words "without notice" in the last sentence of section 975 of the Civil Practice Act are now without significance, for the new enactment states that the covenant in the mortgage consenting to the appointment of a receiver is to be so construed that such receiver may be appointed without notice.

The case of Jarmulowsky v. Rosenbloom [5] seems to contain all the facts necessary for a determination of the exact changes effected by the addition to section 254 of the Real Property Law. In that case, an action had been brought to foreclose a mortgage which contained the following clause: "That the holder of this mortgage in any action to foreclose it shall be entitled, without regard to the adequacy of any security for the debt, to the appointment of a receiver of the rents and profits of said premises; and said rents and profits are hereby, in the event of any default or defaults in paying said principal, installment or interest, assigned to the holder of this mortgage as further security for the payment of said indebtedness." The Court had appointed a receiver *pendente lite,* and the defendant appealed from an order denying a motion to vacate the order appointing the receiver. The Appellate Division, in reversing the judgment, held that "the mortgage at bar did not provide that a receiver might be appointed without notice. Furthermore, this record does not disclose any affidavit among the papers upon which the order was granted showing the value of the property, or that there was any likelihood that it did not furnish sufficient security for the mortgage debt." Today, the covenant providing for the appointment of the receiver would be enforced regardless of the fact that nothing was said as to notice, and also regardless of the fact that the security for the mortgage debt was not in danger of being impaired or destroyed.

The result of this legislation is, no doubt, eagerly awaited. Most of the mortgages up to the present time have contained agreements providing for the appointment of a receiver without notice in case of default, and, consequently, practically all of the cases in the books have dealt with appeals from *ex parte* orders appointing such custodians under the authority given by the last sentence of section 975 of the Civil Practice Act. Many of the orders have been reversed on the ground that the supporting affidavits did not furnish requisite proof that the security was in danger; but this result was obtained only after much waste of time and expense to both parties. The contentions of both parties have usually been supported by the opinions of property experts, which, needless to say, varied greatly, and did not form a very good basis upon which to render a just decision.

The new law will not affect those mortgages which do not contain a receivership clause, but it will abolish appeals such as those mentioned above, in cases where there is such a provision. Where the agreement exists, the appointment of the receiver may be made *ex parte.* The order will not be reviewable on the ground that there has been no failure of security, for the court has been deposed of its discretion. What the result will be may not have been anticipated by the mortgagor; and, yet, it will be merely the consequence of the enforcement of a contract to which he was a party. Litigation, un-

[5] Jarmulowsky v. Rosenbloom, 125 App. Div. 542, 109 N. Y. Supp. 968 (1st Dept., 1908).

questionably, will be diminished, but, on the other hand, property, the value of which is many times greater than the mortgage debt, may find its way into the hands of a receiver, to be held by him until the foreclosure sale is had, provided the parties before that time do not reach an agreement. The rights of tenants may become involved, and the credit of the mortgagor seriously, although perhaps unduly, affected.

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