

**State Banks, Officers of. Dividends of State Banks, Power of Officers to Declare.**

Under the laws of this state officers of banks are prohibited from declaring dividends from any source except from the surplus profits arising from the business.

September 30, 1914.

Hon. H. S. Magraw,  
State Examiner,  
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date the 25th instant, asking me as to what means may be taken with certain bank officers who have disregarded the provisions of the statute in regard to the declaration of payment of dividends. It seems that these bank officers declared a dividend about the 22nd of last August by increasing the book value of certain real estate some \$2,500 and failed to report the declaration of payment of such dividends in compliance with Section 3998, Revised Codes of Montana, 1907.

The first offense of which these officers would seem to be guilty is that they have declared a dividend out of something besides net profits. Section 8713, Revised Codes of Montana, 1907, provides in part as follows:

"Every director of any stock corporation who concurs in any vote or act of the directors of such corporation, or any of them by which it is intended, either—1, to make any dividend except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law, is guilty of a misdemeanor.

This provision of the law is a part of the penal code, but is as applicable to a bank as to any other sort of corporation. In addition to this provision, Section 3997, provides:

"The directors of each bank may semi-annually, on the first Monday of January and July of each year, declare a dividend of so much of the net profits of the bank as they may deem expedient."

It is well to note here that dividends are to be paid out of the net profits, and not out of a fictitious value placed upon real estate by the officers of a bank. Furthermore, the law provides a specific time when such dividends may be declared. The first Monday of January and the first Monday of July of each year, are declared to be the times when such dividends may be declared. A dividend declared at any other time is without authority of law. Further than this, Section 3998, requires that every bank declaring any dividend shall report to the State Examiner within ten days after so doing, showing the amount of said dividend, and the amount of net earnings in excess of the dividend. According to your letter, no such report was made by this bank upon declaring the dividend mentioned. Section 4000 of the Code subjects any bank neglecting to make out or transmit the statements and

proof of publication thereof, required by this act, to a penalty of twenty dollars for each day in default after the periods respectively required by this act, that it shall neglect or delay to transmit any such statements. This includes the statement of the dividend as well as the quarterly statement or report provided for in Section 3996. The statute seems to name the penalty, but fails to say how it shall be enforced. It neither names the person by whom the action shall be brought, or to whom the penalty shall be paid. The general rule of statutory construction in such cases, is that:

“Where a penalty is given by statute and there is no specified mode of recovery, an action of debt will lie.”

30 Cyc. 1345; 13 Cyc. 411,

but the banking law itself, Section 4014, Revised Codes, seems to make any act which is unlawful a misdemeanor, even though no penalty is named.

“Whenever, under the provisions of this law, or of any law now in existence, relating to banks, it is unlawful to do or not to do anything, and the penalty is not prescribed, then such act shall be a misdemeanor, and shall be punishable as provided by law.”

Also, Section 8728 of the Revised Codes, provides:

“Every corporation which fails to comply with the provisions of law relating to corporations, as prescribed in the Civil Code, is guilty of a misdemeanor.”

Section 8729 provides:

“Every person who acts as an officer, agent or in any other capacity for a corporation which has not complied with the provisions of law as prescribed in the Civil Code, is guilty of a misdemeanor.”

Further than this, Section 8101 of the Revised Codes, specifically provides that penalties and forfeitures may be recovered.

“The omission to specify or affirm in this Code any liabilities to damages, penalty, forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.”

Section 9715 provides for the payment of fines and forfeitures into the treasury of the county where the same are collected, where no other disposition is named.

“All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held.”

As noted above, the general rule is that where a statute provides a penalty without naming a specific remedy, an action of debt will lie to recover the same. This rule is upheld in *re Seagraves*, 48 Pac. 274;

*Jacob vs. U. S.* 13 Fed. Cases, 276;

*Mapel vs. John*, 32 L. R. A. 800;

Sedgwick Statutory Construction, 2nd Ed. p. 77.

In view of the statutory provisions above cited, and the general rule in regard to penal statutes which are not made specifically criminal, I am of the opinion that the officers of this bank are liable for the penalty named in Section 4000 of the Revised Codes, and that if their declaring the dividend was contrary to Section 8713, Revised Codes, a prosecution as for a misdemeanor would lie.

Yours very truly,

D. M. KELLY,  
Attorney General.