

**Banks and Banking—Sale of Bank Assets—Majority of Stockholders.**

Where a bank is insolvent and there are not sufficient assets to pay all creditors, the Superintendent of Banks should not permit a transfer of the bank assets.

December 24th, 1913.

Hon. H. S. Magraw,  
Superintendent of Banks,  
Helena, Montana.

Dear Sir:

Your letter of December 23rd, 1918, states that you have assumed charge of the affairs of the State Bank of Windham under Section 59 of Chapter 89 of the 1915 Session Laws, and you ask whether a majority of the stockholders of this bank may now sell all of the bank assets under an express agreement that the purchaser shall assume only the deposited liabilities. In answering your letter it will be necessary for me to make certain assumptions as follows:

First: If, after a careful audit of the banks affairs, you should ascertain that such a sale as the above would not give any undue preference to any creditor of the bank, and that there are sufficient assets to pay all the creditors of the bank, no objection could be made to such a sale being affected.

Second: Assuming that there are not sufficient assets of the bank to pay all of its creditors, such a transfer as you have suggested would manifestly give to one class of creditors a preference over another class, and I take it that such are the existing facts upon which my opinion is requested.

Assuming, therefore, that there are not sufficient assets of this bank to pay in full all of its creditors, the question involved becomes different. After insolvency of a commercial bank may a preferential transfer of its assets be made?

The Montana Bank Acts, Chapter 89 of the 1915 Session Laws and Chapter 148 of the 1917 Session Laws contain no specific legislation upon this question. It must therefore be decided by an examination of the powers and duties of the Superintendent of Banks. It is first to be observed that Section 59 of Chapter 89 Supra, directs that the Superintendent of Banks "shall forthwith take possession of its books, records and assets and shall be authorized and empowered, and is directed to take such action as in his judgment is best for the protection of the depositors and stockholders of such bank." The section also provides that such books, records, and assets, while in charge of the Superintendent of Banks, are not subject to any levies or attachments.

It is evident from the above that it was the intent of this act to clothe the Superintendent of Banks with full power to take possession of and manage the assets of the bank. The Act suspends the right of attachment after the Superintendent has taken over the affairs of the bank. Apparently the Bank Superintendent, when in charge of a bank, is an officer very similar in his powers and duties to the trustee for whose appointment provision is made by the next section of the Act. In my opinion, the Superintendent should deal with the assets of the bank in such a way that his act, if reviewed, would receive the approval of a Board of Equity. In *Michie on Banks and Banking*, Vol. 1, page 525, the following rule is laid down. "The capital stock and assets of an insolvent banking corporation constitute from the date of insolvency a trust fund for the payment of the debts of the bank in the order prescribed by law or other wise pro rata." On page 530 the same author further states: "A examination of the authorities indicate that the rule applicable to the distribution of an estate assigned for the benefit of the creditors of an insolvent, govern in the distribution of th estate of an insolvent corporation in the hands of a receiver." Likewise, quoting from the same work, page 598, "a general depositor is merely a general creditor of a bank and is not entitled to a preferred claim against the assets in the hands of the receiver unless equitable consideration justify it." Cite numerous cases under paragraph 3 of the Note accompanying the above statement.

Applying the above rules it seems to me apparent that a Bank Superintendent in possession of the assets of insolvent commercial banks ought not to do or consent to the doing of any act by which any creditor, not otherwise entitled thereto, would obtain an undue preference over any other creditor. He should, in my judgment, administer the assets of the bank under his jurisdiction in practically the same way as would be done by a receiver. For you to permit a transfer such as you have suggested to be made would clearly give a preference to the depositors over other creditors of the institution, (assuming of course, that there are not sufficient funds to pay all creditors). I therefore advise that you cannot legally permit such a transfer to be made under the existing facts. There can be no objection, as I have stated above, to your approving a transfer of this sort if you are con-

vinced that the assets are sufficient to pay all the creditors. Otherwise, you are advised that it is my judgment that you cannot legally sanction such a transfer.

Respectfully,

S. C. FORD,

Attorney General.