

**Banks and Banking — Deposits — Preferred Claims —
Claims—State Treasurer—Waiver.**

Where at the time a bank closed its doors the state had on deposit a sum in excess of the amount secured by the depository bond such excess is a trust fund to which the state has a preferred claim.

The preferred claim of the state is not waived by an acceptance of a dividend check from the receiver of the bank for a less sum than the amount of the preferred claim.

O. H. Junod, Esq.,
State Treasurer,
Helena, Montana.

My dear Mr. Junod:

You have requested my opinion whether the acceptance by you of a dividend check from the receiver of the Banking Corporation of Montana, which is less than the full amount of the state's preferred claim against that institution, will waive any of the state's rights to a preference.

At the time the Banking Corporation of Montana closed its doors, the state had on deposit the sum of \$2,109.46 in excess of the amount secured by the depository bond, and for this sum has filed a claim to a preference.

The receiver has tendered to you, as State Treasurer, a dividend check in the sum of \$208.71. This sum, it is explained, is a part of the money collected by the receiver from an assessment levied upon the stockholders and not from the assets of the bank, and the receiver takes the position that such funds must be divided pro rata among all depositors.

The State Treasurer is an agent or servant of the state and, as such, has only the powers that are conferred upon him by the constitution or statute.

His duties are fixed and enumerated by Section 174, Revised Codes of 1921 and, as regards the receipt of money, are as follows:

"To receive and keep all moneys belonging to the state, and not required to be received and kept by some other person."

Nowhere is he given authority to compromise or waive any obligation due the state, and, in fact, he could not be invested with such authority by the Legislature because of Section 39, Article V of the Constitution, which reads as follows:

"No obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the Legislative Assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury."

Under this constitutional prohibition, the Legislature itself could not waive the rights of the state as a preferred creditor, and consequently could not confer upon a state officer that power, and, if such state officer attempted to waive such rights, his act would be without legality and not binding upon the state.

The deposit in the sum of \$2,109.46 of state funds in the Banking Corporation of Montana, over and above the amount lawfully deposited there and secured by the depository bond, was an unlawful deposit, and the bank, being chargeable with knowledge of the wrongful deposit and a participant in the wrong, became a trustee ex maleficio for the use and benefit of the state, and the state was entitled to a preference in that amount in the distribution of the bank's assets in the hands of the receiver.

Yellowstone County v. First Trust & Savings Bk., 46 Mont. 439;
Aetna Acc. & Liability Co. v. Miller, 54 Mont. 377.

In the case of First National Bank of Pocatello vs. C. Bunting & Co., 59 Pac. 929, where county funds were unlawfully deposited in a bank, the Court said:

"But it is contended by the receiver that inasmuch as the Treasurer of Bingham county received a dividend or pro rata payment, the same as an ordinary creditor, from the receiver, it is estopped to claim that the public money which it has in said bank is a trust fund. To this we say that such act of the Treasurer does not estop the county from claiming such money as a trust fund. By receiving such pro rata payment, the Treasurer does not affect the rights of the county to any greater extent than he does by assuming to make a general deposit for the purpose of transferring the title of the fund from his principal without its consent, and in violation

of law. By neither of said acts can a county official create the relation of debtor and creditor between the public and the bank. Hence the public money of Bingham county deposited in said bank was a trust fund, and so remained after the receivership."

In the case of *Reg. vs. The Bank of Nova Scotia*, 11 Can. Sup. Ct. 1, the government accepted the payment of two dividends of 15 per cent each from the receiver of the insolvent bank, but the court held that this was not a waiver of the right of the crown to priority of payment of its claim in full.

Since Section 182, Revised Codes of Montana of 1921, prohibits the deposit of state funds in a bank until the bank has filed a sufficient bond therefor, it follows that any money deposited over and above the amount authorized by the law by reason of the filing of such bond, would be an unlawful deposit, coming within the rule of the case of *Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, and the said surplus deposit is therefore a trust fund, the priority of which, in case of insolvency of the bank, the state has not waived its right.

State ex rel. Rankin v. Madison County State Bank (Mont.)
218 Pac. 652.

It is, therefore, my opinion that neither the state nor the Treasurer thereof has the power to waive a preferred claim due the state from an insolvent bank, and that the Treasurer, by accepting a dividend or pro rata payment on such claim from the receiver of such insolvent bank, does not waive the state's preference right and is not estopped from collecting the balance of the state's preferred claim in full.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.