

**Fire Department Relief—Associations—Banks and Banking—Deposits—Funds—Claims.**

A general deposit of moneys by the treasurer of a Fire Department Relief Association in a bank if accompanied with such circumstances as to render the bank chargeable with knowledge of the trust character of the funds so deposited, constitutes a preferred claim or demand against the assets of the bank in the hands of a receiver.

George P. Porter, Esq.,  
State Auditor,  
Helena, Montana.

My dear Mr. Porter:

You have submitted to me the following statement of facts:

“The treasurer of a fire department relief association, organized as provided by Section 5129 of the Revised Codes of Montana, made a general deposit of the funds in his custody as such treasurer in a bank without taking security therefor, and subsequently the bank failed, said funds being on deposit therein at the time of the failure.”

Upon this statement of facts you inquire if the funds so deposited constitute a preferred claim against the assets of the bank.

The funds which come into the hands of a treasurer of such an association are derived from the following sources:

1. From interest, rents, gifts, or money from other sources.
2. From funds received from the State of Montana.
3. From moneys raised by taxation under Section 5119 of the R. C. M. 1921. (Section 5137, R. C. M. 1921.)

The said fund must be set aside as a special fund and used for the following purposes only:

1. For the use of sick, injured, or disabled firemen of any fire department of said city, and their widows and orphans.

2. For the payment of pensions, pursuant to the provisions of Section 5132, R. C. M. 1921.

3. Any money remaining in said fund unexpended may be invested by said association or by said trustees as provided by law. (Section 5135, R. C. M. 1921.)

That the fund so created and the purposes for which it is created are public in their nature cannot be seriously doubted; otherwise the levying of a tax to raise moneys to be so expended would be without legal authority. This is further apparent because of the fact that unless such an association is formed, the said moneys, although applied to the same purpose, are a part of the city treasury. (Section 5122, R. C. M. 1921.)

Chapter 89 of the Session Laws of the Eighteenth Legislative Assembly of Montana, relating to the deposit of public funds in banks, authorizes only the deposit of public moneys in the possession and control of county, city and town treasurers, and then only in the manner therein prescribed. It does not include the treasurer of a fire department relief association. There is no provision of law of which I am aware that authorizes the treasurer of such an association to make a general deposit of the funds under his control in banks.

Such deposit could not be justified under that part of Section 5135 which permits any unexpended moneys in said fund to be invested by the association, "as provided by law," for the reason that the law provides (Section 5121) what kind of investments may be made, namely, investments in bonds of the United States or of the State of Montana, or of the particular city or town in which said fund exists.

Public moneys in the hands of an officer entrusted with their custody and control constitute a trust fund in his hands and he may not use them for any other purpose than that attached to the trust.

A general deposit of money in a bank divests the depositor of his title to the money and gives title thereto to the bank. The relationship of debtor and creditor is created by such a transaction. The depositor loses all control over the funds so deposited, and he can look only to the bank and its assets (in the absence of security) for the repayment to him of a similar amount of money.

An officer who has public moneys in his hands as a trust fund, by virtue of his office, may not, in the absence of a permissive law, give the title thereto to any other person or corporation. He may not, unless authorized by law, substitute the liability or promise of another to pay for the public moneys of which he is by virtue of his office the custodian. It has been held that a general deposit in a bank is a loan (*Bank of Blackwell vs. Dean*, (Okla.), 60 Pac. 226; *Watts vs. Board of Comr's of Cleveland County* (Okla.), 95 Pac. 771),

which is indicative of the character of the transaction and the resulting effect upon the depositor's title to the deposit.

The treasurer of the association had no authority to part with the title to the moneys in the trust fund; he could not deliver the possession thereof to the bank to use as its own, and substitute the promise of the bank to pay and its liability to do so, in lieu of the moneys intrusted to his care; he could not loan the money to it. But as above stated, this would result if he were permitted to make a general deposit of the moneys in his possession as such treasurer.

Having made a general deposit of the moneys, without legal authority to do so, the question then arises as to the legal status of the deposit. The rule is that where a public officer having the custody of public money makes a general deposit thereof in a bank unlawfully, and the bank has or is chargeable with notice of the character of such funds, the bank becomes a trustee ex maleficio of the money so deposited and upon the insolvency of the bank its estate is chargeable with the full amount of the deposit to the prejudice of non-preferred and unsecured creditors.

Yellowstone Co. vs. First Etc. Sav. Bank, 46 Mont. 439.  
State vs. Midland State Bank (Neb.), 71 N. W. 1011.  
Thompson vs. Territory (Okla.), 62 Pac. 355.  
First National Bank vs. Bunting (Ida.), 59 Pac. 929.  
Myer vs. Board of Ed. (Kan.), 32 Pac. 658.  
Ind. Dist. vs. King (Ia.), 45 N. W. 908.

It is, therefore, my opinion that if the general deposit of the aforesaid moneys by the treasurer of the association was accompanied with such circumstances as to render the bank chargeable with knowledge of their trust character, that they constitute a preferred claim or demand against the assets of the bank in the hands of the receiver.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.