Banks and Banking—National Banks—Taxation—Special Session—Competition—Discrimination.

In view of the decision of the United States Supreme Court national banks cannot be taxed at a greater rate than 7% of the value of their shares of stock.

A special session of the legislature recommended in order to effect a remedy.

December 23, 1927.

State Board of Equalization,
Helena, Montana.

Gentlemen:

You have requested my opinion regarding the taxation of national banks. You desire to know whether you should cancel your communication to the treasurer of Lewis and Clark County wherein you directed that officer to tax national banks operating in Lewis and Clark County on the basis of 40% of the value of its shares of stock instead of at 7% as fixed by the county treasurer.

You also desire to know the effect of the decision of the United States Supreme Court in the case of Commercial National Bank of Miles City vs. Custer County regarding the question whether the shares of stock in national banks should be taxed at 7% or 40% of their full and true value.

This office has not received the opinion of the supreme court in the Miles City case. We understand, however, from newspaper reports that it simply reverses the decision of the supreme court of Montana upon the authority of the case of the First National Bank v. Hartford, and State of Minnesota v. First National Bank of St. Paul reported in the advance opinions of the United States Supreme Court of April 15, 1927.

In order, therefore, to determine the effect of the decision in the Miles City case it is necessary to examine closely the two decisions above referred to. It should be noted at the outset that the United States Supreme Court in the Hartford and Minnesota cases did not hold that the statutes involved in those cases were invalid but simply held that the tax was invalid. It laid down the principle that in order to invalidate the tax it is not sufficient to show that there is discrimination against the shares of stock of a national bank and in favor of other moneyed capital but it must also be shown that the other moneyed capital thus favored is employed in substantial competition with the business of national banks. This rule was enunciated in the Hartford case where the court said:

> "It is not sufficient to show this discrimination alone. The validity of the tax complained of depends upon whether or not the monied capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks."

In order to show that moneyed capital of individuals or corporations comes into competition with the business of national banks under the decisions of the Supreme Court of the United States it is important to ascertain the nature of the employment of such moneyed capital. It is necessary to show that the favored moneyed capital is employed in making investments substantially identical with those made by national banks and in the vicinity where the bank is engaged in business. That this is so is apparent from the two decisions above referred to. In the Hartford case the court said:

> "There are real estate firms engaged in lending money to individuals **in the vicinity of plaintiff's banking house**, the amount thus loaned amounting annually from $250,000 to $3,000,000. According to the testimony, the making of these loans affords the same competition to plaintiff as loans made by banks. And similar conditions obtain throughout the state."

It also says:

> "Others, having their place of business in Milwaukee and in Chicago, are engaged within the state in the business of buying and selling securities **both in the vicinity of plaintiff's banking house** and elsewhere, and employ capital for that purpose."

It further said:

> "In 1921, one company alone, having its place of business in Milwaukee but doing business throughout the state, **including the vicinity of plaintiff's bank**, sold approximately $25,000,000 of bonds and other securities."

After a discussion of this evidence the court summarized its conclusion as follows:

> "Our conclusion is that Section 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and **in the same locality in which they do business.**"

And again the court said:

> "It is enough as stated if both engage in seeking and securing **in the same locality** capital investments of the class now under consideration which are substantial in amount."

It will be noted also that in the Hartford case there was direct testimony that the favored moneyed capital involved in that action afforded competition to the national bank in question.

The Minnesota case likewise discloses that in showing that moneyed capital favored under the taxing statute came into competition with national banks the evidence was directed not only to the conditions prevailing throughout the state but more particularly to the locality wherein the bank was engaged in business. The court in that case said:

> "The evidence shows that there were money and credits

> listed for taxation in the entire state during each of the years in question in excess of $400,000,000, exclusive of municipal bonds and recorded real estate mortgages, **and in Ramsey county alone, where respondent conducts its banking business,** there were like money and credits in excess of $83,000,000, all of which were subject to the 3-mill tax. The evidence shows that in Ramsey county there were listed for taxation for 1921 in the hands of individuals, promissory notes amounting to $2,481,446, and bonds, exclusive of tax exempt bonds and real estate mortgages to $7,595,975; for 1922, notes to $1,648,810, bonds to $9,931,955."

As further evidence that the court was concerned about the capital employed in the vicinity of the bank in question the court observed:

> "Two such corporations in Ramsey county had a capital aggregating $2,250,000."

In that case, furthermore, it should be noted that there was evidence regarding competition. The court said:

> "There is direct evidence, also, that the investments of individuals in this type of security aggregating large amounts lessens the opportunity for the investment of capital by national banks. The only witness called by petitioner admitted that to some extent such competition existed."

From these two opinions of the Supreme Court of the United States I conclude that the validity of our statute was not decided in the Miles City cases. The result of the decision, as I view it, is to hold that the assessment under the facts appearing in the Miles City case was invalid because the favored capital taxed at 7% of its value in that case was held by the court to be in competition with the national bank there involved. In my opinion each case depends upon its own facts and circumstances and in each case before a national bank may be heard to assert that it is unlawfully discriminated against by our taxing statutes it must be able to show that moneyed capital taxed at only 7% of its value comes into substantial competition with its business. In order to make such a showing it is also my opinion that the evidence must be directed to the conditions prevailing in the locality in which the complainant bank is doing business. In other words, and by way of example, I do not believe that a bank in Sheridan county can invalidate an assessment on the basis of 40% of the value of its shares of stock upon the grounds that moneyed capital of individuals in Butte is taxed at only 7% of its value without being able to show that the moneyed capital of individuals in Butte comes into competition with the business of the bank located in Sheridan county.

Hence, in answer to your specific inquiries, it is my opinion that shares of stock of all national banks should be assessed on the basis of 40% of their value as heretofore but that each bank has the right to pay under protest all of its taxes in excess of what it would have been if taxed on the basis of 7% of the value of its shares. If it is able to show that other moneyed capital "substantial in amount when compared with the capitalization of the national bank" is employed in competition with

the bank in the same locality in which the bank does business that then it will be able to recover such excess but otherwise not.

In my opinion, it will not be difficult for most, if not all, of the national banks in this state to make as strong a showing of competition as was presented to the court in the Miles City case. This is especially true of those in this county.

Furthermore, while you have not specifically asked my opinion regarding state banks, it seems to me that if national banks cannot be taxed in excess of 7% of the value of their shares of stock, that it is questionable whether state banks will not be entitled to the same consideration as regards their moneyed capital.

In my opinion, the situation is sufficiently grave to justify the calling of a special session of the legislature to effect a remedy.

A simple and effective remedy would be to provide that all moneys and credits of individuals and corporations that are employed in competition with banks be taxed on the same basis as the moneyed capital or shares of stock of banks.

Very truly yours,

L. A. FOOT,

Attorney General.