

Opinion No. 14-1392

November 28, 1914

BY: IRA L. GRIMSHAW, Assistant Attorney General

TO: Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

COUNTY TREASURER.

County treasurers not entitled to indirect benefit by interest on public moneys.

OPINION

{*252} In the conversation I had with you recently, I understood you to say that a certain unnamed county treasurer of this State has deposited county funds which came into his hands by virtue of his office, in a bank in which he is a stockholder, and that he has not demanded nor received any interest thereon, although other banks, located at convenient places, were willing and able to pay interest on such deposits. My understanding was that you desired to know whether or not such action on the part of the treasurer, in our judgment and opinion, warranted the institution of removal proceedings against that officer.

Our laws are silent as to whether or not the treasurer shall receive interest on public moneys deposited in banks. The Constitution, however, provides that all public moneys not invested in interest-bearing securities, shall be deposited in national or state banks or trust companies. Section 10, Article VIII. It is, therefore, incumbent upon county treasurers to deposit county moneys in banks or trust companies, except where that money is invested in interest-bearing securities. The same provision of the Constitution provides that interest derived from such deposits shall be applied in the manner prescribed by law. By some, it is contended that this provision impliedly requires the payment of interest on deposited moneys, and that county treasurers, as well as the state treasurer, is obliged to obtain interest on public moneys deposited in banks. Such an argument {*253} is quite plausible, but in the writer's judgment, is not warranted by that section of the Constitution. There can be no doubt but that interest earned on public moneys belongs to the public, and cannot lawfully be converted by the public official who has the control thereof. Nor would the courts tolerate any subterfuge on the part of the person charged with such funds which would indirectly allow that person to convert any of such interest.

Public policy, it seems, would demand that if the treasurer can secure interest on public moneys, he ought to do so, but we are not prepared to say that because he prefers to deposit the money in a certain bank without interest when he could obtain interest from convenient sources elsewhere, he thereby is derelict in his duty -- because the law does not make it his duty to obtain any interest. If sub-section 6 of Section 2 of Chapter 36 of the Laws of 1909 were valid, a public officer could properly be charged with failing

to obtain interest on money when it was obtainable, but that section would likely be declared invalid by our courts, in a proper case, because it fails to "prescribe a rule of action," but leaves to the court and jury to determine when an act is corrupt.

Thus far, we have eliminated all consideration of the fact that the treasurer is interested financially in the bank in which he deposits county funds.

Section 1 of Article X of our Constitution provides that no county officer shall receive to his own use any fees or emoluments, other than his salary provided by law.

Section 10 of Article VIII, provides that "any public officer making any profit out of public moneys" shall be deemed guilty of a felony, and shall be punished as provided by law.

The word "emoluments" has been judicially construed to mean "a perquisite, advantage, profit or gain arising from the office." The word is very comprehensive and as you see by its definition, might include almost anything of value, whether tangible or intangible.

Constitutional provisions much like Section 10, Id., exist in Arkansas, California, Colorado, Idaho, Missouri, Montana, Pennsylvania, South Dakota and Wyoming, but so far as we can ascertain, the courts have not construed them. In Colorado it is held that the provision is not self-executing, and that, therefore, the provision has no effect until brought into operation by statute. This construction would not be followed in this jurisdiction, we believe, because plainly the provision is self-executing. The practical effect of a different construction may have influenced the Colorado court. The several decisions referring to this constitutional provision had to do, in the main, with cases wherein a state treasurer was charged with having received interest on public moneys, by subterfuge.

It is evident that the constitutional provisions, supra, entirely do away with all forms of remuneration of public officials, except by way of salary provided by law. It is also evident that the provisions prohibit public officers receiving any "perquisite, advantage, profit or gain arising from their offices." It is, therefore, the undoubted policy of this state that public officials shall receive nothing by virtue {*254} of their offices except their salaries. No profit, tangible or intangible, directly or indirectly, therefore, can be acquired by virtue of a public office. Logically then, it is the **duty** of all public officials to abstain from receiving profit by reason of their public and official offices. In the instance to which you refer, the treasurer is a stockholder of the bank in which he deposits non-interest-bearing public funds. We assume that the deposit earns interest for the bank. We assume that there is some sort of an income from the deposit and use of such money by the bank. As the treasurer is a stock-holder of the bank, indirectly, he receives some advantage, perquisite, profit or gain. We were first under the impression that this profit came to him by reason of his relation to the bank as a stock-holder, and therefore, there was no connection between the profits he received from the bank and the fact that he was treasurer. But we have no such impression now. He can not do indirectly that which he cannot do directly. The profit he obtains from dividends is derived, presumably, to a greater or less extent, from the money deposited by him with the bank as treasurer. For

illustrative purposes, assume that a county treasurer operated a large mercantile store. Assume that he used public funds in the purchase of stock for his store. No one would deny that the profits from the sale of that stock were indirectly produced from public funds, and still no one would contend that he was not making profit out of public moneys. Suppose that the treasurer, in this instance, was the sole stockholder of this bank. A portion of the profits of the bank, without doubt, is produced from the use and custody of that deposit. In that event, the treasurer would be making a profit from public funds -- which is prohibited, and the result is the same even though the treasurer is the holder of but one share of stock. The treasurer cannot hide behind the cloak of the corporate existence of the bank. Nor can he indirectly receive profit from public moneys. Ultimately, a portion of the money earned on the deposit of public funds in the hands of this preferred bank reaches the pocket of the treasurer. We are of the opinion that the constitutional provision, supra, was intended to prohibit just such an act.

If the deposit earned no interest and the bank obtained no tangible asset thereon, still the facts would present a case of improper action on the part of the treasurer, if the deposit was the cause of the treasurer procuring any benefit from the bank which he would not otherwise receive. For instance, if it could be shown that he received accommodation as a borrower more freely than he otherwise would.

If the deposit does earn interest or money for the bank the treasurer benefits by that profit to the bank, and the return he obtains therefrom is in the nature of a profit on public moneys, which clearly violates Section 10 of Article VIII of the Constitution.

If proceedings against any county treasurer is begun on the theory outlined in this letter, great care ought to be exercised in presenting facts showing that in reality the deposited money earns an income for the bank, which is eventually pro rated and paid unto {*255} the treasurer. Or facts should be clearly presented showing a direct benefit or advantage to the treasurer received from the bank on account of such deposit. Manifestly, the former instance makes the stronger case.