Opinion No. 17-1929

February 5, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. A. G. Whittier, State Traveling Auditor, Santa Fe, New Mexico.

A Bank Is Bound by Its Contract To Pay 3 Per Cent Interest on Public Funds Before Public Money Act was Effective.

OPINION

Reply to your letter of January 15th, has been delayed on account of the volume of work which this office had on hand. In addition to the information contained in your letter, I have procured copies of the minutes of the Board of County Commissioners of Luna County relating to the subject in hand. Together with the application of the Deming National Bank and the Bank of Deming, asking to be made depositories of public funds.

From everything submitted I find that on July 19, 1915, the Board of County Commissioners of Luna County, assuming to act under the provisions of Chapter 57, Laws 1915, organized a County Board of Finance. It was resolved in the minutes of the board of that date that any bank in the county desiring to receive public moneys on deposit should submit its written proposal to receive such moneys together with its agreement to pay interest on daily balances as required by said act.

Thereupon the two banks named, each made written application to be designated as depositories under the provisions of said act and each in such application agreed to pay interest upon such funds so deposited at the rate of three per cent per annum upon daily balances. Said banks were designated as public depositories and each executed the bond required under said act.

The Deming National Bank, pursuant to such agreement, paid into the county treasury as interest the sum of $ 749.64, and the Bank of Deming paid into the treasury the sum of $ 669.88. Subsequently each of these banks charged the account of the County Treasurer with the respective amounts which they had paid as interest as aforesaid.

In the recent case of State v. Montoya, 160 Pac. 359, our Supreme Court held that said Chapter 57, Laws 1915, did not go into effect until January first, 1917. The question presented is as to the validity of the contracts of the two banks wherein they agreed to pay interest on these public funds, and their consequent right to charge the treasurer's account with the amounts that they had paid. As I am advised the banks justify their action in charging the treasurer's account and taking this money back upon the theory that the act under which the contract was made had not gone into effect, and that since all parties acted under the mistaken belief that the law was in force and effect, they should not be held under their agreement. I do not think such theory is tenable. While

there was no law in effect which authorized the charging of interest upon deposit of public funds, and though the designation of a bank as a county depository was ineffectual, the bank voluntarily entered into an agreement to pay three per cent interest. Its bid was accepted, funds were deposited, and the bank was presumably benefitted. The agreement to pay interest was not illegal and was not immoral, and no public policy forbade it. After deriving this benefit in this manner, in my opinion, these two banks should comply with the terms of their contract, and should they not voluntarily repay these amounts, appropriate actions should be brought against each of them to recover the same.

In my investigations upon the subject I find the following authority which sustains my position:

Mayor v. National Broadway Bank, 10 N. Y., Sup. 555;

State v. Citizens Bank & Trust Co., 178 S. W. 929;

Union National Bank v. Mathews, 98, U.S. 621;

Mayor v. Sonnerborn, 21, N. E. 121.