Public Officers, Disqualification of by Interest. County Funds, Deposit of in Banks. County Commissioners, Power to Designate Banks for Deposit of County Funds.

The Board of County Commissioners is not disqualified from designating a bank as a depository of county funds by reason of the fact that one of their members is a stockholder and officer in such bank.

February 3, 1915.

Hon. Frank Arnold,
County Attorney,
Livingston, Montana.

Dear Sir:

I am in receipt of your communication under date the 28th ultimo, enclosing an opinion rendered by you to the Board of County Commissioners of your county upon the following question:

> "Can a Board of County Commissioners, one member of which is president of a private bank, designate such a bank as a depository of county funds?"

You have given the matter careful and extensive examination, and have reached the conclusion that because of the interest of one of the members of the Board of County Commissioners in the bank in question, the county commissioners cannot designate such bank as a depository.

There is no doubt about the general principle that a man cannot be interested either directly or indirectly in a contract which he makes in the performance of official duties, and this rule goes to the extent of making invalid the act of any board of which such interested officer may be a member, upon the principle that a board can only act as a whole, and the participation of each member thereof in the act, is necessary to the validity of any act of the board. If the interested member, or one whose disqualification is in question, voluntarily absents himself from the consideration of the question, or is prevented from influencing the official determination of the board by his vote the act of the board will be invalid. Hence, any action of the board must be by such participation of such a member, and consequently amounts to his contract with himself, if the act in question is within the prohibition of the rule.

An examination of the cases upon this question discloses a wide divergence of view. An example of the very strict application of it is found in an early New York case, in which the court used the following language:

> "Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal is absent—the watchful and effective self-interest of the director or trustee seeking the bargain is not counteracted by the equally watchful and effective self-interest of the other party, who is there only by his representatives, a wise policy of the law treats all such cases as that of a trustee dealing with himself. The number of directors or trustees does not lessen the danger or insure security that the interests of a cetuique trust will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self-control. If five directors permit the sixth to purchase the property entrusted to their care, the same thing must be done with the others if they desire it."
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> Cumberland Co. vs. Sherman, 30 Barber, 553, at p. 573.

This case follows the doctrine of the English cases upon this subject quite closely. It is to be noted that no distinction is made in the language of the court between acts merely ministerial, and those involving discretion, and in this regard it stands practically alone among the American cases. On the other hand we find a great many cases among the decisions of this country holding to the rule that where the act being performed by the board is one involving no discretion or quasi judicial powers, but simply ministerial acts, that the general rule is not applicable.

> "The rule excluding an interested officer does not apply to the exercise of purely ministerial power, with some excep-

> tions, chiefly relating to cases where an officer or his deputy or his principal is a party. But even in such a case if the duty is purely ministerial, the officer is not disqualified."
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> Throop Public Officers, Section 614, citing Evans vs. Ethridge, 1 S. E. 633.

The case of Evans vs. Ethridge, supra, involved the question of the validity of a writ of attachment issued by the Clerk of a Court, he being the plaintiff in the action, and the court held that the Clerk was not disqualified, or the writ invalid because of his interest in the action, since his act in issuing the writ involved no adjudication of rights, and was of a purely ministerial character. This rule, I think is supported by the weight of American authority.

It remains to inquire than as to the nature of the act to be performed by the county commissioners, under the provisions of Chapter 88 of the Session Laws of the Thirteenth Legislative Assembly. The extent of the authority of the board of county commissioners under this act, may be stated to be: designating banks within the county subject to national supervision or state examination as depositories for county funds; prescribing and approving the bonds to be given to the county treasurer as security for the deposits made by him. In construing this law and the powers of the county commissioners thereunder, it is well to consider the evils sought to be remedied thereby. There can be no doubt that the object of the legislature in passing the laws was to prevent the deposit of all the funds of the county in one or two banks, to their private advantage. This construction is strengthened when we note that:

> "When more than one such bank be available in any county, such deposits shall be distributed ratably among all such banks qualified therefor, substantially in proportion to the paid in capital of each such bank willing to receive such deposits."

In other words, after finding what banks in the county are solvent, the county commissioners have no further authority in regard to the deposit of funds made therein. Their duties are merely ministerial.

Another argument against the conclusion that the board is without power in this case, is that the contract between the bank, arising from the deposit of moneys, is not between the county commissioners and the bank, but between the county treasurer and the bank. It is true that the county treasurer is not given much discretion after the banks are designated, but nevertheless he is the officer from whom the money is obtained, and who is responsible for the deposit, and the accounting therefor.

I am therefore of the opinion, for the reasons stated above, that the Board of County Commissioners is not prohibited from designating a bank of which one of their members is President as a depository for county funds.

Yours very truly,

D. M. KELLY,

Attorney General.