

**Banks and Banking—Counties—County Commissioners
—Deposits—County Treasurer—Security—Funds.**

County Commissioners cannot authorize the County Treasurer to deposit county funds in the bank, either in or out of the county, without taking proper security.

Security taken must be of the kind mentioned by statute and in such an amount as the County Commissioners deem sufficient and necessary to secure the prompt payment of all of the deposits together with the interest thereon.

Deposit of county funds without security is illegal and the bank becomes a trustee ex maleficio of all unsecured deposits, and in case of insolvency of the bank the county is a preferred creditor to the extent of the public funds on deposit not covered by security.

W. S. Towner, Esq.,
County Attorney,
Fort Benton, Montana.

My dear Mr. Towner:

You have submitted to this office for my opinion the following questions:

1. May County Commissioners authorize the County Treasurer to deposit funds in bank or banks outside of the county without security?
2. If not, how much security must be required; and if less than full amount where may the line be drawn?
3. If the bank or banks failed, would the county be a preferred creditor for deposit in excess of security, and if no security, would the claim be preferred as to the entire deposit?

As to your first and second questions, Chapter 89 of the Session Laws of the Eighteenth Legislative Assembly of Montana requires the County Treasurer to deposit all public moneys in his possession and under his control in any solvent bank or banks located in the county of which such Treasurer is an officer, which are subject to

national supervision or state examination, and which have been designated by the Board of County Commissioners as depositories of said funds. Said chapter also requires the County Treasurer to take from such banks such security as the Board of County Commissioners may prescribe, approve and deem fully sufficient and necessary to insure the safety and prompt payment of all such deposits on demand, together with the interest thereon. The kind of security to be taken is also described in said chapter. In case there is more than one bank in the county available for the deposit of said funds the deposits must be distributed ratably among all such banks qualifying therefor substantially in proportion to the paid-in capital and surplus of each such bank willing to receive such deposits under the terms of the act. Said chapter further provides:

“If no such bank exists in the county, city or town, or if any bank or banks existing therein fails or refuses to qualify under the terms of this act to receive such deposits, then and in such case, or in either of such cases, such moneys, or any portion thereof, shall be deposited under the terms of this act in the bank or banks most convenient to such county, city or town, willing to accept such deposits under the terms of this act, and qualified as above provided.”

The above provisions of the law I think fully answer your first and second questions. The right to deposit funds in a bank or banks outside of the county is dependent upon the non-existence of a bank or banks in the county, or the existence of a bank or banks and their failure or refusal to qualify **under the terms of the act** to receive such deposits. When the right accrues to deposit the funds outside of the county, the deposit must be in the bank or banks most convenient to such county willing to accept the deposit “under the terms of this act, and qualified as above provided,” and the funds “shall be deposited under the terms of this act.” Clearly, these expressions mean that deposits in a bank or banks outside of the county shall be under the same terms and conditions as when the deposits are made in a bank or banks within the county, and the qualifications of the bank or banks so receiving the deposit or deposits must be as provided in the chapter whether they be located without or within the county, and one of those qualifications is that the bank or banks shall furnish the security required by the statute. A failure to meet this qualification by the banks within the county is what brings into existence the very right to deposit the funds in a bank or banks outside of the county.

As to the amount of security required, this is fixed by the chapter which requires the security taken to be such as the Board of County Commissioners deem **fully sufficient and necessary to insure the safety and prompt payment of all such deposits on demand, together with interest.** The security must, therefore, be sufficient to secure the prompt payment of **all** the deposits and interest, and, in

my opinion, the amount of the bond must be equal to or greater than the deposits and interest and may not be less than the deposits and interest.

Your third question has been determined by the Supreme Court of Montana in the case of Yellowstone County v. First Trust and Savings Bank et al., 46 Mont. 439, wherein it was held that the deposit of county funds in a bank in excess of the security taken from the bank to secure said funds was illegal, and the bank was a trustee ex maleficio of the excess for the use and benefit of the county, and that the county has, as against the unsecured creditors of the bank, a preferred claim upon the assets of the bank to the extent of the funds on deposit therein in excess of the security furnished to the county by the bank. I can see no reason why this rule should not apply where no security is taken, as in that case the whole of the deposit is illegal instead of only the excess.

It is, therefore, my opinion that when the County Commissioners of a county are authorized to designate a bank outside of the county as a depository of county funds, the County Treasurer must take security of the kind mentioned in Chapter 89 in such an amount as the County Commissioners deem sufficient and necessary to secure the prompt payment of all of the deposits which he makes, together with the interest thereon as provided in said chapter; that any deposit so made without security, or sufficient security, is illegal, and if the bank fails, it is a trustee ex maleficio of the funds unsecured, and that as to unsecured creditors of the bank, the county has a preference claim upon the assets of the bank to the extent of the amount of county funds on deposit not covered by security given to the County Treasurer as required by law.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.