NONCOMPULSORY MILITARY TRAINING BILL

PURPOSE: Providing that no student in state higher educational institutions be required to take or attend any course of military science, tactics, or drill to graduate.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OHIO:

Section 1. No student in attendance at any of the state institutions of higher education in the State of Ohio shall be compelled or required to take or attend any course or courses of military science and/or tactics, or to attend any military drill as a necessary requirement to obtain any degree or degrees or to be graduated from any of said institutions."

I am of the opinion that the attached summary is a fair and truthful statement of the proposed law and accordingly submit for uses provided by law the following certification:

"I, THOMAS J. HERBERT, Attorney General of the State of Ohio, pursuant to the duties imposed upon me under the provisions of Section 4785-175 of the General Code of Ohio, hereby certify that, in my opinion, the attached summary is a fair and truthful statement of the proposed law."

Respectfully,
THOMAS J. HERBERT,
Attorney General.

526.

BANK—MAY MAKE REASONABLE CHARGE FOR SERVICES TO COLLECT, REMIT OR CREDIT PROCEEDS, BONDS AND INTEREST—RIGHT NOT DEPENDENT UPON COLLECTION FOR PUBLIC OFFICIAL, PRIVATE INDIVIDUAL, WHERE ACCOUNT ON DEPOSIT IN SUCH BANK.

SYLLABUS:

When bonds and interest thereon are made payable at a certain bank, such bank upon receipt of such bonds and/or the interest coupons thereon for collection, from the holder thereof, may lawfully make a reasonable and proper charge for the services rendered in making the collection and remitting or crediting the proceeds thereof. The right to make such charge is not dependent upon whether or not the collection is made for a public official or a private individual or whether or not the public authority or private individual has an account at the same bank.

COLUMBUS, OHIO, May 2, 1939.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your request for my opinion, which reads as follows:

> "We are inclosing herewith copy of a letter received from our Examiner in charge of auditing the several State Retirement Systems, in which it is shown that the Retirement Boards are compelled to pay certain banks collection charges for the collection of bonds and interest made payable at such banks.
>
> It has always been our understanding that the taxing district may not impose the duty of paying its funded obligations without compensation, and it is customary for taxing districts to pay such banks a commission for handling these transactions, either directly or through a reduced rate of depository interest. However, it is not customary for the bondholder to pay a fee for the collection of an amount due him under the bond contract.
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> Will you kindly consider this correspondence and advise us in answer to the following question:
>
> Has a bank legal authority to charge a fee for collecting bond and interest receipts for state institutions, and to deduct the same from the said interest receipts?"

Enclosed with your inquiry is a communication from one of your Examiners, in which he states:

> "In some instances where bonds and interest coupons owned by the several state retirement systems, are payable at a local bank, the said bank charges a fee for collecting the bond and interest receipts and deducts the amount of the fee from the said interest receipts before remittance thereof to the said retirement systems; the retirement systems, therefore, bearing the expense of the collection charges for their respective collections."

A large part and perhaps the greater part of the funds of the several Retirement Boards in Ohio, is invested in bonds or other securities of political subdivisions of the State of Ohio or of Conservancy Districts or of sanitary districts of the State of Ohio. It is the general practice of the bond issuing authorities in these subdivisions or districts when in their judgment some advantage may be gained with respect to the marketing of these securities or for any other reason to provide that the securities and interest thereon shall be payable at some particular place or bank other than their own public treasury. Frequently the bank or

place where such securities are made payable is in some other city than the city where the securities are issued. Oftentimes the securities are payable at some bank outside the state and more often than not, perhaps, the securities and interest thereon are payable at some bank or trust company that is not a regular depository of the subdivision or district issuing the bonds and quite frequently not a regular depository of the State of Ohio. In fact, when bonds or securities are issued it is not known what bank or banks will be the public depository of the issuer or of the State of Ohio when the securities and interest thereon become due.

There is no constitutional or statutory inhibition in this state upon this practice. In Abbott on Public Securities, Section 357, it is said:

> "In the absence of statutory or constitutional provision to the contrary, it is the usual holding that the validity of bonds is not affected by the fact that they in terms are made payable either in principal or interest or both, at some designated place outside the geographical limits of the public corporation issuing them."

In suport of the text, there are cited a number of cases among which is the case of Meyer v. City of Muscatine, 68 U. S., 384, wherein it is held as stated in the second branch of the headnotes:

> "A city having power to borrow money may make the principal and interest payable where it pleases."

The several Retirement Boards, when purchasing bonds or other securities, clearly are charged with notice of the terms of the bonds or security with respect to the place of payment and of the necessity of taking such steps as are necessary to collect the principal of such security, and interest thereon as represented by coupons, when they become due. The only practicable method of doing this is to send the securities or coupons to the bank where they are payable for collection. In 8 American Jurisprudence, p. 732, it is said:

> "The designation of a place of payment in a bond imports a stipulation that its holder will have the instrument at such place when due, in order to receive payment, and that the obligors would there produce funds sufficient to pay the amount due. In the event the instrument is not available at the place designated for payment, and the obligor is there at maturity with the necessary funds to pay it, he cannot be made responsible for any future costs of suit or interest. Ward vs. Smith, 7 Wall. (U. S.), 447; 19 L. Ed., 207."

Where one of the Retirement Boards holds bonds the principal and interest on which as represented by coupons, are payable at a certain

bank and the Treasurer of State as custodian thereof charged by law with the duty of collecting the interest and principal of said bonds, sends the bond or interest coupons to the bank where payable, he impliedly makes the bank his agent to make the collection and remit or credit the proceeds thereof as it may be directed.

It is well settled that the relationship between the payee or the holder of commercial paper and the bank to which it is sent for collection is that of principal and agent, regardless of whether or not the paper is payable at the bank. American Jurisprudence, Volume 7, p. 475; Dakin vs. Bailey, 290 U. S., 143, 78 Law Edition, 229, and this is true even though the fact that the bond is made payable at a particular bank impliedly makes the bank the agent also of the obligor on the bond if funds are on deposit in the bank to meet the demands of the holder of the bond or if such funds are made available by the obligor to meet the payment. This has been definitely held by the Supreme Court of Massachusetts, in the case of Cosmopolitan Trust Company vs. Leonard Watch Company, 249 Mass., 14, 143 N. E., 827, where it is held:

> "Where note is payable at given bank, and there is a deposit of the maker there sufficient to pay the note at maturity, bank is agent to pay note at maturity, but if note is not sent for collection, it is not the agent of the holder to accept payment, and if note is sent for collection, bank becomes agent of both maker and person entitled to payment."

In Corpus Juris Secundum, Volume 9, p. 463, it is stated:

> "A bank may act as the collecting agent of a creditor and as the paying agent of the debtor when there is no conflicting interest."

In the case of In re. Canal Bank & Trust Company, 182 La., 45, 161 So., 15, it is held:

> "A bank may act in dual capacity as paying agent for corporation issuing bonds and as collecting agent for holder of interest coupons detached therefrom, there being no conflicting interest."

Speaking generally, a bank is a moneyed institution to facilitate the borrowing, loaning and caring for money. In commercial circles a bank is regarded as a quasi-public institution, subject to strict regulation by law. At common law the business of banking was not a franchise but a common law right of an individual. Michie on Banks and Banking, Volume 1, p. 3; American Jurisprudence, Volume 7, p. 27. Although now in

most, if not all jurisdictions, the business of banking can not be engaged in without a license in some form or other, it has not by reason thereof, lost all its characteristics of a private enterprise. Banks and banking corporations have the right to make rules and regulations for the government of their business and with respect to its contacts with its customers and the commercial world if such regulations are reasonable and not contrary to law. Unless restricted by law, the right of a banking institution to charge its customers in some form or other for services it may render has never been questioned, and such charges by way of fees and commissions have become more common and cover a wider field during the past several years, even extending to the making of service charges against its general depositors who furnish the materials in the use of which banks have heretofore depended almost entirely for the making of money to meet their expenses and earn dividends for their stockholders. This is noted by Zollman, in his work on Banks and Banking, Volume 5, Supp., Section 3566, where it is said:

> "A service charge against general depositors has been one of the results of the recent depression. Banks in consequence of strict regulations and the inability or unwillingness of their customers to meet them in borrowing money from them have temporarily become warehouses of money rather than clearing houses for money. In consequence they have been forced to adopt a service charge against depositors. Of the validity of such charge there can be no doubt."

In support of the text there is cited Pugh vs. Polk Co., 220 Iowa, 794, 263 N. W., 315.

The collection of commercial paper is a power incident to the banking business and an important part thereof. A bank's authority to collect commercial paper need not be expressed in its charter; it is necessarily implied from the character of a general banking business. Tyson vs. State Bank, 6 Blackf. (Ind.), 225, Annot. 52 L. R. A., 612. The collection of commercial paper, being one of the services which a bank renders to its customers, there can be little doubt but that the bank has a right to charge for the said services. In fact the law contemplates and good sense dictates that a bank is not presumed to render service of this kind without compensation in some form or other. In American Jurisprudence, Volume 7, p. 474, it is said:

> "The obligation of a bank to undertake the collection of commercial paper is not gratuitous but is an ordinary contract of agency based upon a sufficient consideration. Generally speaking, the fact that the bank makes no direct charge for its services in collecting makes no difference. The benefits which it ordinarily

> and usually derives from the use of the funds while in its custody and the advantages which may arise from business associates are deemed to be adequate consideration for the undertaking and quite sufficient upon which to predicate the liability incident thereto."

While no doubt the advantages accruing to a bank from business associations, etc., may be adequate consideration upon which to predicate the liability incident to making collections for customers, it does not necessarily follow that the bank may not make direct charges for that service and, as a matter of fact, in some instances such charges have been made for years for certain classes of service, and at the present time it is a pretty well known fact that practically all banks make direct charges by way of fees or commissions for almost all service rendered by the bank, and especially where no incidental advantage by way of business associations and the like, accrue to the bank rendering the service.

In view of the risks involved and the bookkeeping and accounting expenses, together with the expenses of correspondence in many cases, to say nothing of overhead incident to the making of collections by a bank at the instance of the holder of commercial paper, it seems clear and entirely consistent with general business practice that the bank as agent for collection is entitled to some remuneration for its services, and it has never been the general understanding in commercial circles that a bank in rendering this service did so gratuitously. In former times the incidental benefit accruing to a bank was such that in the aggregate it constituted quite a lucrative branch of the banking business and was in fact so desirable that payment of a small premium for the privilege of making collections of certain classes of commercial paper was not unusual. See Ohio Jurisprudence, Volume 5, p. 461; Reeves vs. State Bank, 8 O. S., 465.

Conditions as they existed when a distinct incidental benefit accrued to a bank making collections of commercial paper as agent for the holder thereof, as pointed out in the Reeves case, supra, do not now exist, and it is doubtful if they ever did exist so far as collections of bonds and interest coupons were concerned. There has grown up in recent years the practice of making direct charges for this service, and that fact is well known in commercial circles and among business men generally. The mere fact that such a direct charge is not always made as when circumstances are such that the bank may feel that the incidental benefit is sufficient compensation does not affect the right of a bank to make such a charge nor does the fact that the bank may be acting in a dual capacity as agent for the payee and the payor and one of them compensates the bank prevent the bank from charging the other for the services rendered to him. The services rendered to each and the risks involved are

separate and somewhat different and in rendering such separate service expense to the bank may be separately allocated to each party.

In an opinion of this office rendered under date of October 24, 1929 and published in the Opinions of the Attorney General for that year at page 1646, the question of compensating a bank by municipal authorities for services of the bank in paying their bonds and interest due thereon when the bonds in terms are made payable at the bank was considered. It was there held:

> "3. When municipal bonds are made payable at a specified bank the board of sinking fund trustees of the municipality lawfully may enter into an agreement with the bank to pay for its services made necessary for the redemption of the bonds or interest coupons thereon whether the said bank is located in the municipality or outside the municipality and whether the said bank is the regularly designated depository of the municipality or not.
>
> 4. Unless an agreement is entered into between the board of sinking fund trustees of a municipality and a bank providing for the payment to the bank for services rendered by it in connection with the redemption of bonds or interest coupons thereon any services rendered by the bank with reference thereto will be presumed to be gratuitous and it is unlawful for the bank to deduct from moneys in its custody belonging to or accruing to the municipality any charge for such services."

It will be observed from the foregoing that the payment for the services considered in that opinion is predicated entirely on the agreement made with the bank and it is held that when no such agreement is made the services cannot lawfully be paid for. The collection of paper made payable at a certain bank and remitting or crediting the proceeds of the collection is not entirely analogous with the paying of an obligation made payable at the bank.

It is a well settled principle of banking law and practice that where a debtor makes paper payable at a certain bank and he has an account at that bank when the paper is presented for payment it is the right and duty of the bank to pay the amount due and charge it against the account of the debtor in the bank. Section 8192, General Code, provides as follows:

> "When the instrument is made payable at a bank, it is equivalent to an order to the bank to pay it for the account of the principal debtor thereon."

See also Francis vs. Bank, 1 Q. N. P., 281.

Unless some agreement existed either express or implied as between the bank and a debtor whose note or other instrument was honored by a bank and payment made thereon in accordance with the statute, the services of the bank in connection with the matter would no doubt be regarded as having been done gratuitously.

However, the situation is quite different with respect to the holder of commercial paper which by its terms is made payable at a particular bank and he sends it to the bank for collection. Even though he may have an account at this particular bank which, in many instances at least, would not be the case with respect to the State Treasurer sending bonds of the several Retirement Boards or interest coupons thereon for collection, his act of sending the paper for collection impliedly, in my opinion, imports his solicitation of the services of the bank to make the collection and remit or credit the proceeds thereof according to instructions and to pay a reasonable charge for the services of the bank in doing so. An express contract to pay for such services is not a necessary prerequisite to the making of the charge by the bank for the services especially in view of the well known practice incident to present day banking to make direct charges for most any and all services rendered by the bank. The charge, of course, must be reasonable and proportionate to the services rendered.

I am therefore of the opinion that when bonds and interest thereon are made payable at a certain bank, such bank upon receipt of such bonds and/or the interest coupons thereon for collection, from the holder thereof, may lawfully make a reasonable and proper charge for the services rendered in making the collection and remitting or crediting the proceeds thereof. The right to make such charge is not dependent upon whether or not the collection is made for a public official or a private individual or whether or not the public authority or private individual has an account at the same bank.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

527.

LEASE—CANAL LAND, STATE TO E. P. ROBY, MIAMI AND ERIE CANAL, DESIGNATED PORTION, NOBLE TOWNSHIP, AUGLAIZE COUNTY, OHIO, BUSINESS AND FISH HATCHERY.

COLUMBUS, OHIO, May 2, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You recently submitted for my examination and approval a canal land lease in triplicate executed by you as Superintendent