

position in the classified service of a city from being taken from such status by the operation of law through the reversion of a city to a village form of government. The fact that a person is in the classified service does not mean that he will forever continue in that status, since there is no provision in the law which prevents the abolishment of a position in the classified service either by the operation of law, by an act of law or by the appointing authority when done in good faith. The protection given by the tenure of office provisions of section 486-17a to an employe in the classified service of a city disappears when a city reverts to a village form of government and the employes of such a village are not subject to the provisions of the civil service law since there is no provision in that law which permits or requires the employes of a village to be appointed or retained as provided by the civil service law.

Specifically answering your inquiry, I am of the opinion that:

1. The civil service commission of a city ceases to exist and function after a city reverts to a village form of government by operation of law.
2. The employes in the classified service of a city which reverts to a village form of government cease to be subject to and protected by the civil service laws of this state on the transition from one form of government to another.
3. The protection given by the tenure of office provisions of section 486-17a to an employe in the classified service of a city disappears when a city reverts to a village form of government.

Respectfully,

JOHN W. BRICKER,

Attorney General.

204.

CHECKS—INTEREST—DEPOSIT OF CHECKS BY PUBLIC AUTHORITIES—LONG ESTABLISHED CUSTOM OF COMPUTING INTEREST CONSIDERED PART OF DEPOSITORY CONTRACT.

SYLLABUS:

When there is a definite, long established custom of treating as cash checks deposited either alone, or with cash, in a depository bank by public authorities, and crediting them to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such accounts in the event such checks are not paid in due course such custom or usage is a part of the contract between the bank and the public depositor and the term "average daily balance" as used in Section 2716, General Code, includes the amount of such checks so credited.

COLUMBUS, OHIO, March 11, 1933.

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

GENTLEMEN:—Your recent request for opinion reads:

"Under date of April 23rd, 1927, former Attorney General Edward C. Turner held that when banks had duly entered into depository contracts with a municipality for the deposit of public funds, with full knowl-

edge of the fact that interest on daily balances was to be paid under the terms of the contract, such banks were liable for interest from the time of deposit on checks, drafts, coin or currency.

This department has been applying this opinion to depository banks not only for cities, but of counties. The question is now raised that, by reason of the provisions of Section 2744 of the General Code, this ruling would not apply to counties.

Please advise this department whether in your opinion, the ruling above referred to would apply as well to depository banks of counties."

The opinion of the former Attorney General to which you refer is reported in Opinions of the Attorney General for 1927, Volume 1, page 645. The syllabus of such opinion reads:

"1. Where the ordinances of a municipality providing for public depositories, specifically requires that interest shall be computed on daily balances, and where banks have duly entered into depository contracts with such municipality for the use of public moneys, with full knowledge that interest on daily balances to be paid under the terms of said contracts had theretofore been interpreted to mean daily balances as shown on the books of the bank at the end of each day, whether such balances arose from deposits of checks, drafts, coin or currency, and where after entering into such contracts the interest due the municipality was in fact computed and paid by the banks upon such daily balances for a long period of time, such banks are liable for interest computed upon the daily balances shown by the record of the bank, regardless of whether or not the deposits of the public funds were made up of checks, drafts, coin or currency.

2. In the event of the depository's failure to compute and pay interest upon such daily balances, findings for the amounts due may be made against such depository."

In that case the Attorney General had before him for construction the language of a contract entered into by a municipality with a depository and certain provisions of the municipal ordinances of that city. For a long period it had been the custom of the banks and the city that checks deposited were considered as cash and credited as such on the pass-book as of the date of deposit. Such opinion is based upon the principle that established usages and customs between the parties to the contract entered into may aid in showing what the parties meant by the language used.

The courts have repeatedly held that when a usage of a particular trade or place or of the parties to the contract is proven to exist, the law implies on the part of those who contract upon a matter to which such custom or usage has reference, a promise in conformity with such usage, provided there is no express stipulation to the contrary. *Tatman vs. Thompson*, 3 Disney 482, 13 O. Dec. Rep't. 295; *Pullan vs. Cochran*, 6 Bull. 390, 6 O. Dec. Rep't. 1070; *Wayne vs. The General Pike*, 16 Oh. 342; *Coal & Iron Co. vs. Tucker*, 48 O. S. 41, 60.

The reasoning and conclusion in such opinion is in accord with the authorities. I therefore see no reason to attempt to depart therefrom.

Subsequent to your request, you inform me that it is now, and has been for a considerable period of time, the custom among bank depositories and

counties, and especially in that one prompting your inquiry, to treat checks deposited as cash and to allow interest thereon from the day of deposit. The statute with reference to deposits of county funds in depository banks is almost identical with the ordinance under consideration in the opinion of my predecessor above referred to. Such applicable sections read:

"Sec. 2716. When the commissioners of a county provide such depository or depositories, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent per annum on the average daily balance, on inactive deposits, and not less than one per cent per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

Sec. 2723. "Such undertaking shall be signed by at least six resident free-holders as sureties or by a fidelity or indemnity insurance company, authorized to do business within the state and having not less than two hundred and fifty thousand dollars capital to the satisfaction of the commissioners, conditioned for the receipt, safe keeping and payment over of all money with interest thereon at the rate specified in the proposal, which may come under its custody under and by virtue of this chapter and under and by virtue of its proposal and the award of the commissioners, and conditioned for the faithful performances by such bank or banks or trust companies of all the duties imposed by law upon the depository or depositories of the money of the county."

While custom or usage of the parties may not be permitted to abrogate or change a positive rule of law (*Tillyer vs. Glass Co.* 13 O. C. C. 99) yet evidence of it is competent to show the meaning of the technical terms and conditions of a contract and to show what the parties meant by the use of such words. *Guardian Savings & Trust vs. Akron Scrap Metal Co.* 26 O. L. R. 589.

It appears to me that the opinion of my predecessor above referred to, would be equally applicable to county depositories, unless the provision of the statute to which you refer (Section 2744, General Code) renders it inapplicable.

Section 2744, General Code, reads:

"A county treasurer may receive checks, but such receipt shall in no manner be regarded as payment. No sum shall be considered paid until the money therefor has been received by the treasurer or a depository. No responsibility shall attach in any manner directly or indirectly to a treasurer, his sureties or the county by reason of the receipt of a check and collection of checks shall be entirely at the risk of the person turning them into the treasury."

Such section purports to describe the effect of the receipt of a check by the county treasurer in payment of an obligation to the state or county. If it were not for the provisions of Section 2744, supra, the county treasurer would have no

authority to accept checks in payment of taxes, since Section 2646, General Code, specifically sets forth the types of money that may be received and disbursed by the county treasurer. Such Section 2744, General Code, was enacted at a later time than was Section 2646, General Code (61 O. L. 38). It would appear that the intent or purpose of such enactment of Section 2744, General Code, was to grant new authority to the county treasurer which he did not then have. There is nothing in the language of such section that purports to regulate the relation between the depository and the county treasurer.

It should be noted that there is no definition of the term "daily balance" in the act authorizing the establishment of county depositories (91 O. L. 403) nor in the amendment of such sections in the act contained in 98 O. L. 274. In 108 O. L. 465, the legislature further defined and limited the liability of the county treasurer by:

1. Providing that the county treasurer should not be personally liable for any loss of public funds intrusted to him while they remained on deposit in a duly designated depository. (Now Sections 2738 to 2741, General Code.)
2. Authorizing him to receive checks in payment of taxes and defining his liability in case of such receipt. (Now Section 2744, General Code.)
3. Providing a penalty for failure to deposit moneys in depository. (Now Section 2743, General Code.)

In other words, the entire new matter in such act in 108 O. L. 465 was with reference to the duties and liability of the county treasurer and did not purport to define the relation between the county and the depository.

To extend the language of Section 2744, General Code, to make it define the term "daily balance" in spite of the established usage and custom between bank depositories and county depositories appears to me to be extending the language of the act beyond the legislative purpose and intent, which neither the Attorney General nor the court has the authority to do. As is stated in the first paragraph of the syllabus of *State ex rel. Harners vs. Roney*, 82 O. S. 376:

"* * The province of construction is to ascertain and give effect to the intention of the legislature, but its intention must be derived from the legislation and may not be invested by the court. To supply the intention and then give the statute effect according to such intention would not be construction but legislation."

See also *Matson Navigation Co. vs. U. S.*, 284 U. S. 352, 356, 76 L. Ed. 336; *Savings & Trust Co. vs. Schneider*, 25 O. App. 259; *D. T. Woodburry Co. vs. Berry*, 18 O. S. 456, Syllabus 1; *Elmwood Place vs. Schnangle*, 91 O. S. 354, 357. The language of Section 2744, supra, does not purport to define such term "daily balance" and could hardly be said to affect it.

I am therefore of the opinion that when there is a definite, long established custom of treating as cash, checks deposited either alone, or with cash, in a depository bank by public authorities, and crediting them to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such accounts in the event such checks are not paid in due course, such custom or usage is a part of the contract between the bank and the public depositor and the term "average daily balance" as used in Section 2716, General Code, includes the amount of such checks so credited.

Respectfully,
JOHN W. BRICKER,
Attorney General.