

There is nothing in your communication to suggest any limitation of the right of the corporation at the time here in question, to declare and pay these dividends under the authority of the section of the General Code above noted.

As pointed out by the court in the case of *Mente, Trustee, vs. Groff*, 10 N. P. (n. s.), 148, "the restriction upon the authority of directors to declare dividends out of surplus alone, even in the absence of a specific statute, such as herein, is recognized by practically all of the textbook writers upon corporations and stockholders, and is supported by numerous decisions in other states."

In the opinion of the court in the case above cited, it is further said:

"It is not intended, however, that all of the surplus profits of any year shall be distributed as dividends, that being a matter of discretion with the directors having full knowledge of the condition of the business and its future necessities, nor, on the other hand, are the directors prohibited from declaring dividends out of accumulated surplus profits of previous years, even when there has been no surplus profits for the particular year in which the dividend was declared."

The court in this connection, quoting from Section 546 of Cook on Stock and Stockholder, said:

"Profits earned and accumulative in times of prosperity may properly be paid out of dividends subsequently at a time when no dividends have been earned."

There is nothing in the facts stated in your communication to lead to the view that the business of this corporation has at any time been other than prosperous. However this may be, the fact remains that the dividends here in question were legal dividends paid out of the profits of the company which had been accumulated as a surplus; and such dividends are, accordingly, to be considered as "income yield" for the purpose of assessing for taxes the shares of stock of this company upon which such dividends were paid.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3048.

COUNTY—MAY NOT PAY COLLECTION FEE TO DEPOSITORY ON CHECKS DRAWN ON OTHER BANKS WHEN—PLEDGING OF SECURITIES BY SAID DEPOSITORY.

SYLLABUS:

1. *A county may not legally pay to a depository bank a collection fee on checks drawn upon other banks and received by the county treasurer for taxes, where the depository bank accepts such checks for collection only.*
2. *There is no authority for the pledging of securities by a depository bank with the county to cover such checks during the process of collection.*

COLUMBUS, OHIO, August 15, 1934.

HON. FREDERIC V. CUFF, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I have your request for my opinion, which reads as follows:

“A county treasurer is receiving checks in payment of taxes which checks are deposited in the active account in a county depository. Owing to the fact that there are many conservators for banks in the state of Ohio, the depository will receive these checks for collection only. The depository is ready, able and willing to post the proper collateral to cover these checks during the process of collection. The depository also desires a collection fee on such checks because it is charged a collection fee on such checks. I desire your opinion as follows:

1. Can the county legally pay to the depository a collection fee on these foreign checks?

2. May the depository properly post the collateral covering these checks during the process of collection?”

Sections 2715, et seq., General Code, contain the provisions applicable to county depositories. 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.”

This section has been considered in several former opinions of this office. In an opinion, reported in *Opinions of the Attorney General for 1928, Vol I, p. 566*, it was held, as disclosed by the syllabus:

“Under the provisions of Section 2744, General Code, a county treasurer may receive checks from taxpayers, but such receipt shall in no manner be regarded as payment until the money is received on said checks. If payment on said check is refused by the bank on which it is drawn, the tax will remain in force even though the tax is marked paid and a receipt is given, in reliance upon which a person has bought the land. Said tax is a lien paramount to all other liens and claims.”

In another opinion, reported in *Opinions of the Attorney General, 1933, Vol. II, p. 1403, I* held, as appears from the first paragraph of the syllabus:

“Where a county treasurer pursuant to the authority conferred upon him by section 2744, General Code, receives checks in the collection of taxes on real property, the receipt of such checks does not constitute payment of the taxes for which they are given although the county treasurer upon receipt of the checks marks such taxes as ‘paid’, as required by section 2594, General Code; and in such case where the checks given

for such taxes are dishonored by non-payment thereof, the taxes for which the checks were given persist as a lien on the property in all cases where there has been no change in the title of the property, or where the property was thereafter conveyed with knowledge on the part of the grantee that the taxes represented by such checks were unpaid; and in such cases the delinquent taxes and penalties thereon should be restored to the duplicate."

The first two branches of the syllabus of an opinion reported in Opinions of the Attorney General for 1917, Vol. I, p. 966, read:

"1. Ordinarily, the receipt by a county treasurer of a check in payment of the liquor tax under Section 6071, G. C., is not payment of such assessment, even if the officer, on receiving the check, marks the duplicate 'paid' and issues a receipt therefor, if the check is not honored by payment.

2. County treasurers accepting checks in payment of taxes are not bound by the provisions of Section 8291, G. C., providing that a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon, to the extent of the loss caused by the delay."

It is clear from section 2744, General Code, that a check given for taxes does not constitute payment until the money is received by the depository, regardless of whether the check is credited to the public depositor's account as cash, with the right reserved by the bank to debit the account in the event of non-payment, or whether the check is received by the bank for collection only. 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, enumerates the types of money which may be received and disbursed by the county treasurer. Opinions of the Attorney General, 1933, Vol. I, p. 285, 287.

The evident purpose of the legislature in enacting section 2744, supra, was to grant authority to the treasurer to accept checks for the accommodation of taxpayers. The only authority of the treasurer in regard to such checks is to be found in that section. As I stated in the 1933 opinion, last cited above, "There is nothing in the language of such section that purports to regulate the relation between the depository and the county treasurer."

Although the legislature authorized the use of checks in payment of taxes, it is clear from the wording of section 2744, supra, that there was no intention to place additional burdens or risks arising from such practice upon the county. All such risks are to be assumed by the taxpayers who choose to take advantage of the privilege.

Public officers have only those powers expressly granted by statute, together with such implied powers as are reasonably necessary to effectuate those express powers. *Peter vs. Parkinson*, 83 O. S., 36; *State, ex rel, vs. Pierce*, 96 O. S., 44; *Frisbie Co. vs. East Cleveland*, 98 O. S., 266. Furthermore, public funds may be expended only in compliance with constitutional and statutory authority. I find no statutory authority for the county treasurer, or any other officer of the county, to pay to depository banks from public funds a collection fee on checks drawn upon other banks and accepted in payment of taxes.

Your second question concerns the pledging of collateral covering uncollected checks. The undertaking given by a bank under section 2723, General Code, covers