5659.

CHECKS—SERVICE CHARGES—PUBLIC FUNDS OF PROBATE JUDGE AND CLERK OF COURTS—COUNTY MAY NOT PAY BANK SUCH CHARGES.

SYLLABUS:

A county is without authority to pay service charges imposed by banks for the handling of checking accounts of probate judges and clerks of courts, although the only funds deposited in such accounts are those coming into the custody of such officers in their official capacity.

COLUMBUS, OHIO, June 1, 1936.

HON. GLENN P. BRACY, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR: I have your letter of recent date which reads as follows:

> "I have been requested to submit the following question for an official ruling:
>
> The banks of this county have adopted a rule providing for service charge upon checking accounts. Various county officials have checking accounts but particularly the probate judge and clerk of courts draw quite a large number of checks monthly and this service charge amounts to a considerable sum.
>
> May this service charge be paid by the various officials as an expense for operating their offices, or must it be paid by the various officials personally? In other words, is there any way in which the county can legally pay such service charges?"

It has become a general practice for banks to charge depositors a service fee to handle bookkeeping and other expense in connection with deposit accounts.

In an opinion of this office, reported in Opinions of the Attorney General for 1929, Vol. 1, p. 606, this practice was held not to be in violation of the federal or state anti-trust laws.

It has become the practice of probate judges, clerks of courts and sheriffs, for purposes of convenience, to carry checking accounts for the handling of funds coming into their possession in their official capacity pending distribution. It is my understanding that the funds deposited in such accounts are not those entitled to be deposited in the county treasury under the county depository statutes. The practice of carrying accounts such as those mentioned in your inquiry was sanctioned by the Supreme

Court in the cases of *State ex rel.* v. *Main,* 128 O. S., 457, and *Busher* v. *Fulton,* 128 O. S., 485. In these cases it was held, however, that such deposits are not entitled to be paid as preferred claims in the event of the closing of the bank.

Section 12875, General Code, in so far as material, provides:

> "* * * Nor shall the provisions of section twelve thousand, eight hundred and seventy-three, make it unlawful for a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, to deposit fees and trust funds coming into their custody as such officers as above, until such time as said aforesaid officers are required to make payment of the official earnings of their offices, so deposited, into their respective fee funds as required by section twenty-nine hundred and eighty-three, and until such time as the trust funds, so held by them in their official capacities, may be paid to the person, persons, firms, or corporations, entitled to same, and any interest earned and paid upon said deposits shall be apportioned to, and become a part of said fees or trust funds, and shall in no instance accrue to, and be received by, the official making said deposits, for his own use."

In the Main case the court said at page 461 that "this statute creates no depository for the sheriff."

In the Busher case, which involves the deposit by a clerk of courts, the court said, in the course of its opinion, at page 496:

> "Other authorities sustain the general proposition that where public funds or other trust funds come into the hands of a public official, and the law makes no specific provision as to what shall be done with them, such official has the right to place such funds on deposit in a reputable bank. Such deposit is not illegal or wrongful, the deposit is general in the absence of any sufficient agreement making it otherwise, the relation of debtor and creditor is created between the bank and the official, and upon the insolvency of the bank the deposit is not entitled to preference."

After the decisions in the Main and Busher cases, and probably to safeguard deposits there held not to constitute preferred claims in event of liquidation, the legislature enacted Sections 2288-1c to 2288-1j, General Code (116 O. L., 409), which became effective September 2, 1935.

Section 2288-1c, General Code, provides:

> "No money held or controlled by any probate court, juvenile court, clerk of courts, sheriff, county recorder, clerk or bailiff of municipal court, prosecuting attorney, or resident division or district deputy directors of the state highway department, in excess of that covered by federal deposit insurance as hereinafter prescribed shall be deposited in any bank, banks, trust company or trust companies until the hypothecation of the securities hereinafter provided, or until there is executed by the bank, banks, trust company or trust companies selected, a good and sufficient undertaking, payable to the depositor, in such sum as said depositor directs, but not less than the excess of the sum that shall be deposited in such depository or depositories at any one time over and above such portion or amount of such sum as shall at any time be insured by the federal deposit insurance corporation created pursuant to the act of congress known as the banking act of 1933, or by any other agency or instrumentality of the federal government, pursuant to said act or any acts of congress amendatory thereof."

Sections 2288-1d and 2288-1e relate to the form of the undertaking. The latter section also provides for increasing or decreasing the security in the event of fluctuating deposits or a change in the amount insured by the federal deposit insurance corporation. Section 2288-1f authorizes the acceptance of securities in lieu of an undertaking. Sections 2288-1h and 2288-1i relate to the hypothecation of such securities.

Section 2288-1j, General Code, reads:

> "When any depositor enumerated herein shall have fully complied with the provisions of this act, and is not guilty of malfeasance or nonfeasance in the matters enumerated, and any depository selected by a depositor shall have defaulted, such depositor shall not be liable for loss resulting therefrom.
>
> In the event that all banks in the county of such officer refuse to take any or all of such deposits, the officer or officers named herein shall be authorized to rent safety deposit boxes for the safe keeping of all or a portion of their funds, particularly the excess funds not covered by federal deposit insurance. Charges for such safety deposit boxes shall be paid by the respective officer or officers out of their fee funds."

It will be noted that the bank selected is herein referred to as a "depository" although there is no provision for the execution of the usual

depository contract. As above noted, it had been held in the Main case that Section 12785, *supra,* relieving the officer from liability for embezzlement if he makes a deposit, creates no depository. Sections 2288-1c, et seq., General Code, do not impose a mandatory duty upon the officers in question to deposit the funds in their custody.

In Opinion No. 4424, rendered July 16, 1935, I held that the Municipal Court of Ashtabula could not enter into a depository contract with a bank covering funds in the hands of the clerk of such court and agree to pay the usual service charge made by such bank. This conclusion was reached in spite of the fact that Section 1579-851, General Code, imposed a mandatory duty upon the clerk of such court to deposit all moneys paid into the court in the banks designated by the judge thereof.

In the course of this opinion the following language appears:

> "With reference to the present inquiry, a still further question presents itself; namely, may a municipality expend public funds for such service charges? While a private individual may expend money for any purpose not expressly prohibited by law, it is necessary to find statutory authority for the expenditure of public money. Public officers have only those powers expressly granted by statute, together with such implied powers as are reasonably necessary to effectuate those expressed powers.
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> Peter v. Parkinson, 83 O. S., 36;
> State ex rel. v. Pierce, 96 O. S., 44;
> Frisbie Co. v. East Cleveland, 98 O. S., 266.

Furthermore, the right to expend public funds is strictly construed. The third branch of the syllabus in the Pierce case, supra, reads as follows:

> '3. In case of doubt as to the right of any administrative board to expend public money under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.'

A somewhat analogous question to the one presented by you was passed upon by me in an opinion to be found in the Opinions of the Attorney General for 1934, Volume 2, page 1206. The first branch of the syllabus of that opinion reads as follows:

> '1. A county may not legally pay to a depository bank a collection fee on checks drawn upon other banks and re-

ceived by the county treasurer for taxes, where the depository bank accepts such checks for collection only.'

The following statement appears at page 1208:

'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.'

The conclusion and reasoning of this opinion would seem to be applicable to the present inquiry, inasmuch as there exists no statutory authority for the payment of these service fees."

If an officer is without authority to pay a service charge from public funds under a depository statute imposing a mandatory duty upon such officer to make the deposit, as was held in that opinion, *a fortiori* statutes merely permissive in terms, such as Section 12875 or Sections 2288-1c to 2288-1j, General Code, do not imply such authority.

It should be noted that Section 2288-1j, General Code, which authorizes the rental of safety deposit boxes in the event all banks in the county refuse to accept such deposits, specifically provides that "charges for such safety deposit boxes shall be paid by the respective officer or officers out of their fee funds." The presence of this specific provision impliedly excludes payment of other expenses such as the service charge in question. *Expressio unius est exclusio alterius.* If the legislature had intended to authorize payment of the latter expenses from county funds, they could easily have employed apt language as they did with reference to safety deposit box rentals.

In the light of the foregoing, it is my opinion that a county is without authority to pay service charges imposed by banks for the handling of checking accounts of probate judges and clerks of courts, although the only funds deposited in such accounts are those coming into the custody of such officers in their official capacity.

Respectfully,

JOHN W. BRICKER,

Attorney General.