

1439.

SIGHT DRAFT—DRAWER DISCHARGED WHEN HOLDER FAILS TO PRESENT FOR PAYMENT WITHIN REASONABLE TIME—EFFECT OF LIQUIDATION OF BANK THEREON—DEPUTY COMMISSIONER OF MOTOR VEHICLES UNAUTHORIZED TO DEPOSIT MOTOR VEHICLE LICENSE FEES IN BANK AND PERSONALLY LIABLE THEREFOR—PUBLIC FUNDS ENTITLED TO PREFERENCE IN LIQUIDATION WHEN.

SYLLABUS:

1. *Under Section 8291, of the General Code, a sight draft drawn by a bank is a check and must be presented for payment within a reasonable time after issue, and upon the failure of the holder to make such timely presentment, the drawer is discharged to the extent of the loss occasioned by such failure.*

2. *Section 8291, General Code, is applicable to a draft forwarded to the Commissioner of Motor Vehicles by a deputy commissioner in payment of motor vehicle registration fees and held by the Commissioner.*

3. *What amount of time constitutes an unreasonable time for the presentment of a draft on an "out of city" bank is a question of fact to be determined from a consideration of all the facts and circumstances.*

4. *Where the loss occasioned by the failure to make timely presentment can not be ascertained for an extended period due to the liquidation of the insolvent drawee bank, and where the drawer is in the hands of the Superintendent of Building and Loan Associations for liquidation, the holder of a check should file a claim for the full amount of such instrument with the Superintendent of Building and Loan Associations.*

5. *Under Section 6294, General Code, a deputy commissioner of motor vehicles is not authorized to deposit funds collected from motor vehicle license fees in a bank.*

6. *Public funds deposited in a bank or building and loan association otherwise than as provided by statute, are special deposits and entitled to a preference upon liquidation where the depository has knowledge of the public character of such funds. The amount of such claim may properly include the amount of the check or withdrawal order drawn against such unlawful deposit in payment of the draft which remains unpaid at the time the institution is taken over for liquidation.*

7. *A cashier's check or treasurer's check merely constitutes the holder the debtor of the bank and does not entitle him to preference upon liquidation.*

8. *Where a deputy commissioner of motor vehicles or other public officer illegally deposits public funds in a bank, or other institution authorized to receive deposits, he becomes personally liable for any loss occasioned by such deposit. The sureties upon his official bond are likewise liable.*

COLUMBUS, OHIO, August 25, 1933.

HON. J. P. BRENNAN, *Commissioner of Motor Vehicles, Columbus, Ohio.*

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

"In connection with the liquidation of the First-Central Trust Co. of Akron, Ohio, this Bureau is holding two drafts drawn on the above bank by the Kenmore Savings and Loan Co. in amounts of \$344.30 and

\$1.00 respectively. These drafts were purchased February 20, 1933 by Deputy Commissioner W. V. Sterki and forwarded to the Bureau of Motor Vehicles in payment of Motor Vehicle registration fees collected by him. These drafts were received by the Bureau February 23rd and were deposited with other funds in the State Treasury. Due to the bank holiday they were returned, and since that time have been held in the Bureau together with other checks drawn on banks that have not yet been licensed to operate.

We are holding Treasurers Check No. 86041 in amount of \$39.00 purchased by Inspector D. W. Price and forwarded to the Bureau in payment of license fees collected by him.

Several other Deputy Commissioners in Summit County carried accounts in the First-Central Trust Co. and preferred claims have been filed with Mr. John R. Eckler, Special Deputy Superintendent of Banks in charge of the liquidation.

The question now arises as to what action can be taken by the Bureau to assure collection of these funds transmitted by drafts and treasurers checks, and your opinion is respectfully requested."

Your first question concerns certain drafts purchased by a deputy commissioner of motor vehicles and forwarded to the Bureau of Motor Vehicles in payment of motor vehicle registration fees collected by him. Section 6294 of the General Code provides that such deputy commissioner "shall forthwith, upon receipt of any application, for registration, together with the license fee, transmit such fee * *." In attempting to comply with this provision, the deputy commissioner sent to the Bureau of Motor Vehicles drafts drawn upon the First-Central Trust Company of Akron by The Kenmore Savings and Loan Company. These drafts remained unpaid at the time of the bank holiday. The drawee bank was not licensed to resume business and has since been taken over for liquidation by the Superintendent of Banks.

Section 8290 of the General Code, reads:

"A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this division applicable to a bill of exchange payable on demand apply to a check."

It has been held that a draft upon a bank which is payable on demand, has, under the statute, the same legal effect as a check. *Semler vs. State*, 6 O. C. C. (N. S.) 393. I assume that the draft in question was payable at sight, and therefore that the instrument was a check as defined by Section 8290. Section 8291, provides:

"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."

If this section is applicable, it appears that the drawer, The Kenmore Savings and Loan Company, might be discharged from liability to the extent of any loss caused by an unreasonable delay on the part of the payee in presenting the draft for payment. However, it may be contended that the duty to make presentment within a reasonable time does not apply to the Commissioner or to the Treasurer of State since they are officers of the State.

In the case of *Manck and Bauer vs. Fratz, Treasurer*, 7 Dec. Rep. 705, the Court refused to enjoin a county treasurer from selling property to pay taxes even though the taxpayer had given a check for his taxes when due which was not paid by reason of it not being presented within a reasonable time, the bank having failed in the interim. The Court said:

"It was certain, if the defendant had received the check in his individual capacity, and failed to present it the next day, the bank being in the same town with the defendant, he would have to loose it, and not the person drawing it. But this action was not against the defendant individually. It was against him as a representative of the State of Ohio, and the relief asked was that the sovereign right of the State of Ohio to collect its taxes should be enjoined. The defendant, as the agent of the state, has no implied power. His duty is to collect in money, the taxes due the state. If the taxes are not paid, his duty is to proceed to sell the property. He had no right to receive the check, so as to bind the state if the check was not paid. If he received the check as a matter of accommodation, the state could not be bound. It is not subject to the ordinary rules in such cases. The taxes were assessed against the plaintiffs. The plaintiffs had never paid them. No money of theirs ever got into the treasury. It is against public policy to hold that in any way a person can be excused. Moreover, the evidence showed that by the course of business in that office at the time of the year the check was given, it is impossible to present all of the checks received the next day after they are, received, and that this check was presented at as early a day as practicable, considering the crowded state of business."

This case is cited among others to support the following proposition in 44 A. L. R., 1236:

"In the following cases it will be observed that the ordinary rule between business men, requiring presentation of checks for payment within a limited time after receiving them, failure to do so throwing the loss on the recipient of the check in case of the subsequent failure of the bank, is not applicable to county officers charged with collecting taxes."

In a former opinion of this office, recorded in Opinions of the Attorney General 1917, Vol. 1, page 966, it was held that county treasurers in accepting checks for taxes are not bound by the provision of Section 8291. The theory of these cases and of the former opinion, is that a public officer charged with the duty of collecting taxes, has the duty to collect the money and can receive checks only as conditional payment. Section 2646 of the General Code, describes the kinds of money which may be received for taxes.

If the draft involved in your question had been drawn by those paying the license fees, a somewhat analogous situation might have been presented. However, the draft was purchased by a deputy commissioner with funds actually received as fees, this being a convenient method of remitting to the commissioner. This draft was drawn by a building and loan association upon a bank and made payable to the commissioner. In this situation, I am of the view that Section 8291 applies to the commissioner. If the cases above referred to were based solely upon the fact that the checks were received by a public officer as the agent of

the State, they would be authority for a contrary conclusion here. However, that does not appear to be the basis of those decisions.

Was the draft presented within a reasonable time? In the case of *Werk and Co. vs. Mad River Valley Bank*, 8 O. S. 301, the Court discussed at some length the question of what constitutes a reasonable time. This language appears at pages 303 to 305:

"It is well settled that if the payee or other holder of the *check receives it immediately from the drawer, in the same town or city where it is payable, he is bound to present it for payment to the bank, at farthest, on the next succeeding secular day after it is received, before the close of the usual banking hours. But, under different circumstances, the rule is different. Where he receives the check from the drawer, in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next secular day after it is received; and the person to whom it is thus forwarded will not be bound to present it for payment until the day after it has reached him by the course of the post. Story on Prom. Notes, sec. 493.

The law merchant requires of the holder the exercise of *reasonable diligence* in the presentment of a check for payment, in order to charge the drawer; but what is reasonable diligence depends, says Justice Story, 'in many cases, upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises.'

The drawer has no right to complain of a delay, in presentment for payment, which was contemplated by the parties, and either expressly or impliedly assented to by himself at the time of drawing the check. In *Mohawk Bank vs. Broderick*, 10 Wend. 304, it was said by Chancellor Walworth: 'Bank checks are sometimes made and negotiated for the avowed purpose of a temporary circulation;' and by way of illustration, he adds: 'If I had purchased the check of the drawer for the purpose of being sent to New Orleans, and to be negotiated there, and with his knowledge, he would then have assumed the risk of the solvency of the drawee until the check was returned and presented for payment, according to the usual course of trade in such cases.' Hence, the circumstances of each case are necessary to be considered, as disclosing the intention and understanding of the parties, or as showing a *waiver by the drawer, of the right which he would otherwise have had, to require an early presentment."

It is clear that the surrounding facts and circumstances and the understanding of the parties must be considered in determining what is a reasonable time. Keeping in mind that the so-called "banking holiday" began on February 29, 1933, five days after the utterance of the draft and also the fact that Section 24, General Code, requires only that the drafts received by a public officer be deposited with the Treasurer of State on Monday following their receipt, it is quite probable that a court would hold that it would be a useless act to require presentment during the banking holiday, when it was generally known that such draft would not be honored. Not having before me facts as to the ordinary business usages of presentment of a draft on "out of city" drafts, I am unable to state that the draft was not presented within a reasonable time. If it was presented within a reasonable

time, and dishonored, then the draft was of no effect as a transfer of the funds represented thereby. If not presented within a reasonable time, the loss occasioned thereby must be borne by the holder.

Since receiving your request, the drawer of the two drafts in question, The Kenmore Savings and Loan Company, has been taken over by the Superintendent of Building and Loan Associations for liquidation under Section 687, of the General Code. Even assuming that the drawer has been discharged because of the holder's failure to present the two drafts for payment within a reasonable time, in so far as such delay produced loss, it appears that the loss will not be ascertained for some time. It is therefore my advice that a claim for the full amount of the two drafts be presented to the Superintendent of Building and Loan Associations in charge of the liquidation of The Kenmore Savings and Loan Company.

It has come to my attention that it is the common practice of your deputy commissioners to deposit funds collected as license fees in a deputy commissioner's account in a bank or other institution authorized to receive deposits. The commissioner is notified as to such deposits and the funds therein are transmitted to him at stated intervals. If the two drafts in question were obtained by the deputy commissioner by giving a check upon such an account, in my opinion, you are entitled to a preferred claim.

If The Kenmore Savings and Loan Company were a bank, it would seem that such preference might be allowed under Section 713 of the General Code, as construed by the Supreme Court in *Fulton vs. Baker-Toledo Co.*, 125 O. S. 518. However, Section 713 is applicable only to "banks" as defined by Section 710-2 which specifically excludes building and loan companies.

Under the provisions of Section 6294, above referred to, a deputy commissioner who has received an application for a license shall "forthwith" transmit the fees collected by him. It seems clear from the language of this section, that the deputy commissioners are not authorized to deposit funds collected, in a bank. Public funds lawfully deposited in a bank are not entitled to priority upon liquidation as against general creditors. *Fidelity and Casualty Company vs. Bank*, 119 O. S. 124; *Ward vs. Fulton*, 125 O. S. 382. However, the Legislature alone can authorize an officer to deposit public funds. *Fidelity and Casualty Company vs. Bank, supra*. Funds deposited by public officers otherwise than as provided by statute are special deposits, and entitled to a preference upon liquidation, where the bank knows the public character of such funds. In re Osborn Bank, 1 O. A. 140. These principles are applicable alike to banks and building and loan associations.

If my assumption is correct that the two drafts were drawn in payment of a check or withdrawal voucher made against a deposit of the deputy commissioner, the drafts never having been paid, the entire amount on deposit has augmented the assets taken over by the Superintendent of Building and Loan Associations. In this situation, the State's right to a preferred claim as to the amount on deposit, has not been altered by the drawing of the unpaid draft.

If I am correctly informed as to the facts, the building and loan association had knowledge of the public character of the funds deposited. I understand that it is the practice for deputies to carry an account for deposit of license fees as "John Doe, Deputy Commissioner of Motor Vehicles." If the account in question so appeared on the books of the bank, it presumably had knowledge of the character of the funds. I am also informed that the deputy commissioner was secretary of the building and loan association. The knowledge of an officer obtained while he is engaged in the corporation's business, may be imputed to the corporation. *Scioto Valley R. Co. vs. McCoy*, 42 O. S. 251; *Quigley vs. Cleveland Electric*

Illuminating Company, 34 O. App. 233. It thus appears that if the facts assumed by me are true, the building and loan company had knowledge of the public character of the funds. If the facts comport with my assumption, it is my advice that a claim for preferences in the amount of the deposit, including the sum represented by the two drafts, be filed with the Superintendent of Building and Loan Associations in charge of the liquidation of The Kenmore Savings and Loan Company. See O. A. G. 1930, V. II, p. 1301.

You next refer to a "Treasurers Check", purchased by Inspector D. W. Price. Since the making of your request, I have been informed that the Inspector obtained this check with cash collected as chauffeur's registration fees. I understand that the check was drawn by The First-Central Trust Company, payable to you, and that it has the same legal incidents as a cashier's check. It has been held that a draft purchased with cash creates merely the relationship of debtor and creditor and that upon the insolvency of the drawer bank, the holder is not entitled to a preference. *Fulton vs. Hankey*, 41 O. App. 577. The giving of a cashier's check was held not to amount to an assignment of funds in *Amos vs. Baird*, 96 Fla. 181; 117 S. 789. The mere giving of a check does not operate as an assignment of funds. Section 8294 of the General Code; *Railway vs. Bank*, 54 O. S. 60; *Covert vs. Rhodes*, 48 O. S. 66.

I am of the view that the giving of the treasurers check merely constituted the bank a debtor and did not impress a trust upon any specific funds of the bank. It follows that in my opinion the holder of such a check is not entitled to a preference. The only remaining course of action is to present the claim to the Superintendent of Banks in charge of the liquidation of The First-Central Trust Company.

You state that several deputy commissioners "carried accounts" in The First-Central Trust Company and that claims for preference have been filed. I understand you to mean that deputy commissioners had funds collected as license fees on deposit in the bank at the time withdrawals were restricted. It follows that such funds were in the bank when it was taken over for liquidation by the Superintendent of Banks. I assume that the claims for preference are based upon the theory that the deposits in question were illegal deposits. As pointed out above, public funds can only be legally deposited under statutory authority and I find no statute which would permit the deposit of these funds. It is therefore my opinion that the funds in question are entitled to preference, if the bank knew of their nature.

Under Section 710-92 of the General Code, the Superintendent of Banks may reject a claim for preference in which case he is required to serve written notice upon the claimant. The claimant then has three (3) months within which to bring an action against the Superintendent of Banks. If the Superintendent should reject these claims, you should again consult me as your statutory legal counsel, in regard to the advisability of bringing action. Whether or not such action should be brought will depend upon whether the actual facts are as I have assumed them to be.

Since you desire to know what action may be taken, to collect the funds in question, I must point out that in my opinion, in addition to the liability of the bank, the deputy commissioners are personally liable when they deposit collections from license fees in a bank where there is a clear statutory duty to transmit such funds forthwith to another public officer. See *Crane Township vs. Secoy*, 103 O. S. 258. Section 6291-1 requires the deputy commissioners to give a bond for the faithful performance of their duties and it is my opinion that the sureties on such bond would likewise be liable.

In the light of the foregoing, it is my opinion that:

1. Under Section 8291, of the General Code, a sight draft drawn by a bank is a check and must be presented for payment within a reasonable time after issue, and upon the failure of the holder to make such timely presentment, the drawer is discharged to the extent of the loss occasioned by such failure.

2. Section 8291, General Code, is applicable to a draft forwarded to the Commissioner of Motor Vehicles by a deputy commissioner in payment of motor vehicle registration fees and held by the Commissioner.

3. What amount of time constitutes an unreasonable time for the presentment of a draft drawn on an "out of city" bank is a question of fact to be determined from a consideration of all the facts and circumstances.

4. Where the loss occasioned by the failure to make timely presentment can not be ascertained for an extended period due to the liquidation of the insolvent drawee bank, and where the drawer is in the hands of the Superintendent of Building and Loan Associations for liquidation, the holder of a check should file a claim for the full amount of such instrument with the Superintendent of Building and Loan Associations.

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7. A cashier's check or treasurer's check merely constitutes the holder the debtor of the bank and does not entitle him to preference upon liquidation.

8. Where a deputy commissioner of motor vehicles or other public officer illegally deposits public funds in a bank, or other institution authorized to receive deposits, he becomes personally liable for any loss occasioned by such deposit. The sureties upon his official bond are likewise liable.

Respectfully,

JOHN W. BRICKER,

Attorney General.

1440.

APPROVAL, TWO RESERVOIR LAND LEASES IN COVENTRY TOWNSHIP, SUMMIT COUNTY, OHIO, FOR THE RIGHT AND PRIVILEGE OF USING FOR COTTAGE SITE, DOCKLANDING AND BOATHOUSE PURPOSES—WILLIAM J. ZOUL AND ROBERT H. ZOUL.

COLUMBUS, OHIO, August 26, 1933.

HON. EARL H. HANEFELD, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am this day in receipt of a communication over the signature of the Chief of the Bureau of Inland Lakes and Parks, submitting for my