

deposit and the date of closing for liquidation is equal to or in excess of the amount of the trust deposit.

Respectfully,
JOHN W. BRICKER,
Attorney General.

971.

CHECK—DEPOSITED BY COUNTY IN DEPOSITORY BANK—INTEREST PAYABLE ACCORDING TO DEPOSITORY CONTRACT—CUSTOM PREVAILS IN ABSENCE OF EXPRESS PROVISION.

SYLLABUS:

1. *Whether or not a check deposited by the county in a depository bank becomes, prior to collection, part of the "average daily balance", upon which interest is payable under section 2716 of the General Code, depends upon the construction of the depository contract.*

2. *In the absence of an express provision in such contract as to the manner of handling checks, the definite, long established custom between the parties is deemed to be part of their contract.*

3. *Where such custom has been to treat checks deposited as for collection only, the "average daily balance" does not include the amount of checks not yet collected and credited.*

4. *Where such custom has been to credit checks when deposited to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such account in the event such checks are not paid in due course, the amount of such checks so credited is included within the term "average daily balance", and this principle applies whether or not there is a clearing house in the city wherein the depository is located.*

COLUMBUS, OHIO, June 19, 1933.

HON. RAY B. WATERS, *Prosecuting Attorney, Akron, Ohio.*

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

"A problem has arisen in Akron in connection with a temporary depository designated by the County Commissioners for county funds. Inasmuch as the banks in Akron do not have a clearing house, it is necessary for them to individually send checks out of town to the various banks on which the checks are drawn. This means that the account is not credited with the amount of the check for some two or three days.

We are familiar with your opinion stating that the various political subdivisions are entitled to interest on daily balances, and that these daily balances should represent the deposits as made on these particular days. The bank, however, is quite insistent that it could not afford at this time to carry our account if it is necessary to credit our account with the deposits as they are received.

Would you kindly give us your opinion as to whether or not, under the circumstances as they exist today, without the facilities of a clearing

house, the bank is authorized to pay interest only on daily balances made up of the items actually credited to the bank?"

The county depository law is contained in sections 2715 et seq. of the General Code. Section 2716 provides:

"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."

Under this section interest is payable "on the average daily balance". This phrase is not defined anywhere in the statute. You state that because of the absence of a clearing house in Akron, when a check is deposited in the depository "the account is not credited with the amount of the check for some two or three days." From this statement I might infer that the depository bank accepts checks for collection only, and that the public depositor's account is not credited until the checks are actually collected. If this is the situation, the bank acts only as a collecting agent and the check does not become such a deposit as to create the relationship of debtor and creditor between the bank and the county until it has been collected. Such a check in the process of collection would not increase the average daily balance on deposit, upon which interest is payable.

Section 2744, General Code, reads as follows:

"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."

Since receipt of a check by the treasurer does not constitute payment until the money therefor has been received by the depository, I see no objection to a depository contract under which the depository accepts the checks for collection only. If this is the contract, it is my opinion that the average daily balance upon which interest is payable does not include the amount of checks not yet collected and credited.

Ordinarily, depository contracts do not clearly provide the manner in which checks which may be deposited in the account are to be handled. In the absence of such express provision, it is necessary to resort to the established usage and custom between the parties to the contract in order to ascertain what they intend by the language used. In an opinion of this office—No. 204, rendered March 11, 1933, it was stated:

"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*, 2 Disney, 482, O. Dec. Rep., 295; *Pullan vs. Cochran*, 6 Bull. 390, 6 O. Dec. Rept, 1070; *Wayne vs. The General Pike*, 16 O. 342; *Coal & Iron Co. vs. Tucker*, 48 O.S. 41, 60."

It was held in that opinion as disclosed by the 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."

The facts then presented showed that it was the custom between the county and the depository banks that checks should be credited to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such account in the event such checks were not paid in due course.

I am informed that this is the custom and usage in most counties. If your depository contract is ambiguous in regard to the method of handling checks, and if this is the established custom and usage in your county, it is my opinion that the term "average daily balance" includes the amount of checks credited.

It is also my opinion that delay in making collections, due to the lack of clearing house facilities, does not alter the result. If, however, the established custom and usage in your county is for the depository bank to accept checks for collection only, checks so deposited and in the process of collection are not included within the term "average daily balance" as used in section 2716.

Summarizing, and in specific answer to your question, it is my opinion that:

1. Whether or not a check deposited by the county in a depository bank becomes, prior to collection, part of the "average daily balance", upon which interest is payable under section 2716 of the General Code, depends upon the construction of the depository contract.

2. In the absence of an express provision in such contract as to the manner of handling checks, the definite, long established custom between the parties is deemed to be part of their contract.

3. Where such custom has been to treat checks deposited as for collection only, the "average daily balance" does not include the amount of checks not yet collected and credited.

4. Where such custom has been to credit checks when deposited to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such account in the event such checks are not paid in due course, the amount of such checks so credited is included within the term "average daily balance", and this principle applies whether or not there is a clearing house in the city wherein the depository is located.

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