

234.

CHECK — PAYMENT REFUSED — WHERE TENDERED TO COUNTY TREASURER IN PAYMENT OF TAXES—RECEIPT GIVEN—INVALID—VALID ONLY WHEN LAWFUL MONEYS RECEIVED INTO COUNTY TREASURY OR DEPOSITORY—STATUS, DUTY OF COUNTY AUDITOR AND TREASURER TO RESTORE UNPAID BALANCES TO TAX DUPLICATE.

*SYLLABUS:*

1. *Where a check was tendered as payment for taxes and the county treasurer issued an official receipt therefor, such receipt was invalid unless and until the lawful moneys represented by such payment were received into the county treasury or a county depository.*
2. *When payment was refused on a check given to a county treasurer in payment of taxes, it was the duty of the auditor and treasurer to restore the unpaid balances to the tax duplicate.*

COLUMBUS, OHIO, March 2, 1939.

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

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

“During the tax collection period in a certain county, it was an established practice for the county treasurer to furnish banks outside the county seat with lists of the amounts of taxes due from taxpayer residents of the immediate vicinity served by the banks. The taxpayers would then have the privilege of paying their taxes at these banks, and the banks would issue to each taxpayer a memorandum receipt for such payment. The banks made no charge for such service.

At the close of the collection period, the treasurer would call upon these banks with the tax bills of the residents of the community, and would leave with the banks receipted tax bills for all taxpayers who had paid their taxes to the banks.

It was also customary for the treasurer to accept a cashier's check from the bank to cover all receipts issued by the treasurer for the taxes so paid to the banks.

In accordance with this procedure, on February 24th, 1933, the treasurer accepted from one bank two such checks in the sum of \$2,297.01, which represented the amount of taxes paid at that bank by the taxpayers, and for which the treasurer issued and left with the bank official receipts showing these taxes to be paid.

Before the cashier's checks cleared, the bank holiday was declared, and this one bank never re-opened for business.

The treasurer filed a claim with the liquidator of the bank for the amount of the two checks, and during liquidation he received certain dividends. The bank has been completely liquidated, and there still remains approximately \$1,000 of the original claim unpaid.

The taxes represented by these checks were removed from the duplicate, and a record compiled showing the amount of taxes which individuals had paid to the bank. On this record, each individual has been credited with the proportionate part of the dividends received, and since the final liquidation, the balance remaining on each account is shown.

We respectfully request your opinion upon the following:

1. Are these taxes to be considered as paid in full; and if so, may the treasurer be held accountable for the balances remaining due on these accounts?
2. Or, would it be the duty of the auditor to restore such unpaid balances to the tax duplicate as delinquent taxes, even though the taxpayer had paid the taxes to the bank and holds the treasurer's official receipt as evidence of payment thereof?"

One of the duties with which county treasurers are charged is the collection of public moneys due to their respective counties. To assist them in the performance of their duties, county treasurers are permitted to appoint deputies for whose proceedings and misconduct in office the appointing county treasurers are made liable and accountable. A deputy, when duly qualified, may perform all and singular the duties of his principal.

In the case of *State, ex rel. Essinger, v. Holzemer*, 54 O. App. 477, it was held:

"1. By reason of Sections 9 and 2637, General Code, a deputy county treasurer has authority to perform any duties the county treasurer is required to perform, including receiving and crediting payment of taxes.

2. When in the office of the county treasurer money is received by a deputy county treasurer in payment of taxes on real estate and is not credited on the tax records in the office of the county treasurer and county auditor, by an action in mandamus such officers may be compelled to correct their records to show proper credit for the money so paid."

If, then, the treasurer in the county referred to in your letter, had appointed some person in the closed bank as a deputy and if such deputy

had made the collections in question, the rule established in the case of *State, ex rel. Essinger, v. Holzemer, supra*, would probably apply requiring the treasurer and auditor to show appropriate credits on duplicates.

A further examination of the General Code shows that the duties and powers of county treasurers have been set forth in considerable detail. As noted above, one of the treasurer's duties is the collection of public moneys and taxes. As also noted, this duty may be delegated to his deputies. A corporation or bank would not be able to qualify as a deputy, however, and there is no statutory authority for the appointment of a bank as an agent by a county treasurer for the purpose of assisting him in collecting taxes. From the facts outlined in your letter, it appears that the treasurer as a matter of accommodation to the tax payers in outlying districts furnished tax lists to local banks. The taxpayer was at all times privileged to go to the treasurer, pay his taxes and receive an official receipted tax bill. But if he chose, he might turn his tax money over to his bank, receive a *memorandum receipt* therefor from the bank until the bank had made the payment to the treasurer, then receive from the treasurer through the agency of the bank his receipted tax bill.

The fact that in this particular case the treasurer had accepted cashier's checks and given the bank receipted tax bills therefor, affords the taxpayer but little satisfaction, for until honored, a check does not constitute payment. In 31 O. Jur., page 186, section 87, it is said :

“In the absence of circumstances indicating a contrary intention, a cashier's check accepted from a debtor is not an absolute, but merely a conditional, payment, defeasible on nonpayment or dishonor.”

Furthermore, the treasurer is restricted as to the medium of payment he may receive. Section 2646, General Code, provides :

“Notes of the United States, notes of solvent national banks organized under act of congress, notes of federal reserve banks, silver certificates of the United States, and gold certificates of the United States, shall be received by county treasurers and the treasurer of state, and by them disbursed in payment of legal demands on the state and county treasuries.”

Unless the treasurer has been paid in such notes, or in lawful money, any receipt given by the treasurer therefor is invalid, as provided in section 2650, General Code :

“When any tax is paid at the office of the county treasurer or at any tax receiving office, the county treasurer shall give to the person paying it a receipt therefor. If any tax be paid to the

county treasurer by mail, and if the person so paying such tax enclose with such payment an addressed envelope, the county treasurer shall enclose a receipt for such taxes in such envelope with sufficient postage and deposit it in the mail. No receipt given by the county treasurer for payments made otherwise than in lawful money or in the notes specified in section 2646 of the General Code shall be valid unless and until the lawful monies represented by such payment are received into the county treasury or a county depository."

Section 2744, General Code, was repealed by Amended House Bill No. 326, effective April 16, 1937. The repealing act was designated "an act for the purpose of enacting a uniform law governing the deposit of public funds in financial institutions." Section 2744 was in full force at the time of the events set out in your letter, and provided 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."

Reading sections 2650, 2646 and 2744 in conjunction, it is evident that checks were not mediums for payment of taxes on February 24, 1933. The county treasurer was authorized to receive checks as conditional payment of taxes, but the receipt issued therefor should in no manner be regarded as payment until the money therefor was received by the treasurer or a depository.

To this same effect, your attention is directed to the opinion of a former Attorney General, Opinions of the Attorney General for 1928, Vol. I, page 566, the syllabus of which reads as follows:

"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 checks 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."

Therefore, in answer to your questions, it is my opinion that these taxes cannot be considered as having been paid in full. The collecting bank

was not the deputy or agent of the treasurer and the treasurer cannot be held accountable for the balance remaining due on these taxes. Under the provisions of section 2650, General Code, the official receipts held by the taxpayers are invalid, and it is the duty of the auditor and treasurer to restore such unpaid balances to the tax duplicate as delinquent taxes.

Respectfully,

THOMAS J. HERBERT,

*Attorney General.*