

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, ex rel.
KERN AND KIBBE, a corporation,

Plaintiff, Petitioner,

v.

CHARLES W. HINTON, as State
Treasurer of the State of
Washington,

Defendent, Respondent.

No. 23725

Department One

Filed May 11, 1932.

PER CURIAM: This is an original action in this court by which Kern & Kibbe, a corporation, by petition seeks a writ of mandate directing the state treasurer to pay to the plaintiff out of moneys in the state treasury to the credit of the motor vehicle fund \$20,587.48 in satisfaction of warrants issued to plaintiff by the state auditor drawn and directed to the state treasurer.

The facts in the case are presented by the pleadings and a written stipulation signed by the parties and filed in the cause, substantially as follows: The plaintiff is a corporation. Respondent, Charles W. Hinton, was and is treasurer of the state. During January, 1932, to and including the twenty-first day of the month, the Olympia National Bank was a national banking association, doing business in Olympia, Washington. That at the close of business on January 21, 1932, the Olympia National Bank closed its doors and discontinued the doing of business, and the next morning the bank and its assets were taken over for liquidation by the comptroller of the currency of the United States. That on January 13, 1932, on account of the completion by plaintiff of two contracts for the construction and improvement of certain highways, the state became indebted to plaintiff in the sum of \$20,578.48 for which,

upon claims and vouchers duly presented, the state auditor after settling and allowing the same signed and delivered, as such auditor, two state warrants on the state treasury to pay the respective amounts of \$8043.48 and \$12,535.00 out of any moneys in the motor vehicle find in the state treasury not otherwise appropriated. On January 15, 1932, the plaintiff endorsed and delivered both warrants to the First National Bank of Portland, Oregon, for collection and on the same day that bank forwarded the warrants, with others belonging to other persons, to the respondent as state treasurer for payment, all of which were accepted by the state treasurer and for which he issued checks to cover the respective amounts and forwarded the checks to the Portland bank, the checks being drawn by the state treasurer on the Olympia National Bank payable to the First National Bank of Portland, or order. The Portland bank, upon receipt of the checks on January 19, 1932, forwarded them by mail to the Seattle branch of the Federal Reserve Bank of San Francisco for collection and, on January 20, 1932, that bank forwarded the checks by mail to the Olympia National Bank for collection, and the latter named bank received the checks on January 21, 1932. At the time the checks were forwarded for collection and at the time they were received by the Olympia National Bank, it was a designated depository for the funds of the state and the state treasurer had therein to his credit, subject to check, an amount in excess of the checks involved. Upon receipt of the checks, the Olympia National Bank charged them to the account of the state treasurer on the bank's books and marked the checks "Paid", but the bank in no way set apart or segregated any of its money for transmission to either the Seattle branch of the Federal Reserve Bank of San Francisco or to the Portland bank in settlement or payment of the checks, but on January 21, 1932, drew its

draft in the sum of \$29,659.19 to cover the checks involved, and other items, on the First National Bank of Seattle, payable to the Seattle branch of the Federal Reserve Bank of San Francisco, and forwarded the draft by mail on that day to the Seattle branch of the Federal Reserve Bank.

The amount of cash in the Olympia National Bank available for the payment of checks at the close of business the last four days the bank was open amounted to the following sums: January 18, \$45,098.43; January 19, \$42,620.76; January 20, \$40,172.42, January 21, \$27,255.24. At the close of business on January 21, the bank had to its credit with banks other than the First National Bank of Seattle, \$44,679.00, based in part on items transmitted to such banks for collection, over and above the amount of all drafts drawn against such other banks, but there was no information available on January 21, or at the date of the stipulation of facts in the action, to show the amount of such collection items transmitted or the amount thereof not collected at that date.

It appears that on January 21, after the state treasurer gave a check on the Olympia National Bank, for which that bank issued its draft on the First National Bank of Seattle, the state treasurer gave to the Capital National Bank of Olympia a check on the Olympia National Bank in the sum of \$52,981.58 for the purpose of paying state warrants being collected through the agency of the Capital National Bank, which check was paid by means of telegraphic transfer of funds from the account of the Olympia National Bank with the Seattle branch of the Federal Reserve Bank to the account of the Capital National Bank. At that time the Federal Reserve Bank required a reserve to be kept with it by the Olympia National Bank in the sum of approximately \$120,000.00, and the payment of

the check just mentioned by telegraphic transfer reduced the balance of credit of the Olympia National Bank with the Seattle branch of the Federal Reserve Bank to the sum of \$29,090.00.

At the time the draft in question was forwarded to the bank in Seattle, the Olympia National Bank did not have, nor did it thereafter have, money or credit with the First National Bank of Seattle sufficient to meet it. The First National Bank of Seattle refused to honor the draft when presented and it has at all times since been dishonored.

It had been a practice between the Olympia National Bank and the First National Bank of Seattle to give credit for cash letters when received and to charge back items not collected, but on January 20, 1932, and at all times thereafter the First National Bank of Seattle refused to give the Olympia National Bank credit for such cash letters until and as the items were actually collected, but notwithstanding such refusal the Olympia National Bank, upon issuing the draft on January 21, 1932 and at the close of business that day, had outstanding drafts on the First National Bank of Seattle in the total sum of \$98,647.29, which was \$5,054.72 in excess of all cash items transmitted by the Olympia National Bank to the First National Bank of Seattle for collection, whether collected or not at the time, as was known to the Olympia National Bank, as that amount, in that account, was entered as an overdraft in the books of the Olympia National Bank that day.

Upon dishonor of the draft and notice thereof to interested parties, the Seattle branch of the Federal Reserve Bank, upon demand, received from the receiver of the Olympia National Bank the checks in question which were returned to the First National Bank of Portland and by that bank returned to the state treasurer upon his request and demand.

At all times mentioned and now there was and is in the motor vehicle fund in the state treasury sufficient available funds, not otherwise appropriated, for the payment of the warrants in favor of plaintiff.

The defendant rests his case on the general well settled rule that a collecting agent is without authority to accept for the debt of his principal anything but that which the law declares to be legal tender, or as stated by the defendant to be the rule so far as this case is concerned if the payee of a check, or his agent, accepts from the drawee bank something else in place of cash, as a draft on another bank, or a deposit slip or credit, where the drawee bank holds funds of the drawer sufficient to pay the check and would pay it in cash if demand therefore were made, the transaction will be regarded as a payment of the check and the drawer discharged. Counsel rely on *First National Bank v. Commercial Bank & Trust Co.*, 137 Wash, 335, and cases cited, and also the cases listed, commencing on page 994, in the annotation to the case of *Berg v. Federal Reserve Bank*, 52 A.L.R. 980.

The plaintiff, while contesting the common law rule, relied on by the defendant and hence its applicability as such to this case, contends that the case is controlled in favor of plaintiff by certain provisions of Chapter 203, Laws of 1929, declared to be "The Bank Collection Code", the title of the act being "An act to expedite and simplify the collection and payment by banks of checks and other instruments for the payment of money."

It contains a number of interrelated provisions as is usual in such a code, regulating collections by mail and defining the relation and powers of each bank taking part in collections as agent or sub-agent of the original depositor. The particular portion of the act upon which the

plaintiff relies, as controlling the present case, is a part of section 11, as follows:

"Where an item is duly presented by mail to the drawee or payor, whether or not the same has been charged to the account of the maker or drawer thereof or returned to such maker or drawer, the agent collecting bank so presenting may, at its election, exercised with reasonable diligence, treat such item as dishonored by non-payment, and recourse may be had upon prior parties thereto in any of the following cases:

"(1) Where the check or draft of the drawee or payor bank upon another bank received in payment therefor shall not be paid in due course;"

On the other hand, the defendant contends that if it be admitted that the bank collection code would otherwise apply or control, it affords no relief to the plaintiff in this case because of section 7, which provides:

"Where the item is received by mail by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer."

The condition, however, upon which the item received by mail by the drawee or payor bank shall be deemed paid when finally charged to the account of the maker or drawer is that such bank shall be solvent. In this respect, on account of the facts hereinbefore stated, to which the parties have agreed by their pleadings and written stipulation filed in the action, we think it must be held, for the purposes of this case, that the drawee or payor bank on which the defendant's checks were drawn was not solvent at the time the bank received the checks and stamped them "Paid", within the purview of section 7 of the bank collection code. Still further we are of the opinion, upon the facts as the parties have stipulated them to be, that the portion of section 11 of the bank collection code above mentioned, on which the plaintiff relies, is applicable and controlling in this case, from which the conclusion follows that the

plaintiff is entitled to the relief prayed for.

IT IS ORDERED AND ADJUDGED that a writ of mandate issue directing the defendant Charles W. Hinton, as state treasurer, to pay to the plaintiff, Kern & Kibbe, a corporation, out of moneys in the state treasury to the credit of the motor vehicle fund, the sum of \$20,587.48 in satisfaction of the two warrants issued to the plaintiff by the state auditor.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, ex rel.
UNION IRON WORKS, a corporation,

Plaintiff,

v.

CHARLES W. HINTON, as State
Treasurer of the State of
Washington

Defendant.

No. 23726

Department One

Filed May 11, 1932.

PER CURIAM: This is an original application in this court for a writ of mandate directing Charles W. Hinton, as state treasurer, to pay to the plaintiff out of moneys in the state treasury to the credit of the motor vehicle fund No. 15 the sum of \$325.00 in payment of a warrant dated January 15, 1932, issued to the plaintiff by the state auditor for material and supplies furnished and delivered by the plaintiff to and for the use of the department of highways of the state between the second and tenth days of December, 1931.

The case is a companion of the case of State, ex rel. Kern & Kibbe v. Hinton, ante, p. _____, the two cases being presented in the same briefs and argued together by respective counsel. The facts are agreed to by the pleadings and a signed stipulation of facts, the latter being included in and a part of the stipulation covering the facts in the other case. Here, too, the Olympia National Bank, through which collection was attempted by mail, issued a draft on January 21, 1932, the last day the bank was open for business, drawn on the First National Bank of Seattle, which draft was dishonored and never paid.

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The case is, in all material respects, like that of the companion one just referred to and upon the authority of that case and the facts in this one;

IT IS ORDERED AND ADJUDGED that a writ of mandate issue directing the defendant Charles W. Hinton, as state treasurer, to pay to the plaintiff Union Iron Works, a corporation, out of moneys in the state treasury to the credit of the motor vehicle fund No. 15, the sum of \$325.00 in satisfaction of the warrant issued to the plaintiff by the state auditor.

C O P Y

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, ex rel.)	
UNION IRON WORKS, a corporation,)	No. 23726
)	
Plaintiff)	
)	
v.)	PETITION FOR REHEARING
)	
CHARLES W. HINTON, as State)	
Treasurer of the State of)	
Washington,)	
Defendant.)	

Comes now the defendant, Chas. W. Hinton, and respectfully petitions the court for a rehearing in the above entitled matter for the following reasons;

the PER CURIAM opinion filed May 11, 1932, does not state the facts involved in this case but the conclusion reached is based entirely upon the authority of the case of State ex rel. Kern and Kibbe v. Hinton, No. 23725. This case was instituted as a test case. While the amount involved in this particular case is small, the total amount of warrants in the same position as the warrant in this case is approximately \$100,000.00.

Under the facts as clearly appear in the pleadings and stipulation, these warrants were presented by the Olympia National Bank to the state treasurer, the state treasurer gave the Olympia National Bank his check drawn against his account in the Olympia National Bank, which check was charged to the treasurer's account, marked "paid" and cancelled and his account thereby reduced by the total amount of such checks. The state treasurer is now compelled under this decision to pay all of these warrants again. The

receiver of the Olympia National Bank has intimated that he will not allow the state treasurer's claim for these items for the reason that, if claims on these warrants are allowed to the treasurer, he can hold his security for the same, while, if they are allowed to the persons forwarding the warrants for collection, they would be unsecured and therefore the amount available to unsecured creditors increased. It probably will be necessary for the state treasurer to bring an action against the receiver in order to establish a claim for the amount of these warrants, approximately \$100,000.00, since, of course, this decision is not binding upon the receiver of the Olympia National Bank. This suit would have to be instituted in Federal court, since the bank is a national bank and the receiver a Federal officer, liquidating the bank under the authority of the comptroller of the currency. The Federal court is not bound by this decision. The rule, is, however, that the construction of a state statute by a state court is binding on a Federal court. Counsel and the court, knowing the facts in this case, understand, of course, that the court has held that section 11 of the collection code (chap. 203, L. 1929) controls in this case the same as in the Kern and Kibbe case. However, the facts not being stated in the opinion, the opinion is of little value as authority for use in the Federal court. Any person reading the two opinions would naturally assume that the facts were the same in both cases; however, there is a vital distinction in the facts. In the Kern and Kibbe case, the state treasurer's check was payable to the First National Bank of Portland and by that bank sent for collection to the Olympia National

Bank and by the Olympia National Bank charged to the treasurer's account and marked "paid." In this case, the state treasurer's check was payable to the Olympia National Bank and accepted by that bank in payment of warrants, which warrants were delivered to the state treasurer and cancelled. In citing this case as authority in the Federal court, the court would not know from the opinion these facts.

The court can readily appreciate the precarious position of the state treasurer. It is entirely possible that the Federal court would not follow this court on the merits. However, the construction placed by this court on section 11, chapter 203, Laws of 1929, would be binding on the Federal court. It is therefore essential from the standpoint of the state treasurer that the facts be stated in the opinion in this case, so that it will clearly appear that section 11 of the collection code controls.

If the court has construed the facts in this case to be similar in all essentials to the facts in the Kern and Kibbe case, then we respectfully submit that the court has misconstrued the pleadings and the stipulation, for it clearly appears that the check involved in this case was not received by mail by the Olympia National Bank but was delivered directly to the Olympia National Bank payable to the Olympia National Bank and by it accepted and charged to the treasurer's account. These facts are materially different from the facts in the Kern and Kibbe case, and, as we pointed out in our briefs, the provisions of the collection code do not apply under this state of facts, and it is respectfully requested that a rehearing be granted in this case before the court en banc.

If, however, the court should overrule our petition for rehearing, it is respectfully requested that the opinion filed herein be modified to clearly state the facts. If this is done, then the opinion can be used as authority in an action by the state treasurer against the receiver of the Olympia National Bank in the Federal court.

Respectfully submitted,

JOHN H. DUNBAR
Attorney General

LESTER T. PARKER
Assistant Attorney General

Attorneys for Defendant
Chas. W. Hinton, as State
Treasurer.

COPY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, ex rel.
UNION IRON WORKS, a corporation,

Plaintiff,

v.

CHARLES W. HINTON, as state
Treasurer of the State of
Washington,

Defendant.

No. 23726

Department One

Filed May 20, 1932.

PER CURIAM: Upon further consideration of this case we are of the opinion that the second paragraph of the opinion filed in this case on May 11, 1932, which second paragraph commences with the words "The case is a companion of the case of State, ex rel. Kern & Kibbe v. Hinton", and ending with the words "which draft was dishonored and never paid" should be stricken and in its stead the following should be and is directed to be inserted, to-wit:

"The case is a companion of State ex. rel. Kern & Kibbe v. Hinton, ante. p.____, the two cases being presented in the same briefs and argued together. The facts are agreed to by the pleadings and a signed stipulation of facts filed in the case, the latter being included in and a part of the stipulation covering the facts in the other case. In this case, on account of material and supplies furnished the state for its department of highways, the warrant referred to in the sum of \$325.00 payable to the plaintiff 'or order' was, on January 15, 1932, issued by the state auditor and delivered to the plaintiff. On January 19, 1932, plaintiff endorsed and delivered the warrant to the Old National Bank & Union Trust Company of Spokane for collection. That bank on that day forwarded the warrant, with other items, by United States mail to the

Olympia National Bank at Olympia to collect and remit the proceeds to the First National Bank of Seattle for the credit of the Old National Bank & Union Trust Company. The items, including the warrant, were received by the Olympia National Bank through the mail on January 20, 1932, and, on January 21, 1932, with divers other state warrants received by the Olympia National Bank through the mail from other persons, aggregating altogether \$33,118.69, were presented by the Olympia National Bank to the state treasurer for acceptance and payment. The defendant, as state treasurer, accepted and received all such items, including the particular warrant involved in this action, and issued and delivered therefor his check in the sum of \$33,118.69 drawn on the Olympia National Bank, a depository for state funds, and in which bank there was at that time on its books to the credit of the respondent an amount in excess of the amount of the check, together with all other outstanding checks drawn thereon by the state treasurer. The Olympia National Bank on that day charged the check to the respondent on its books and marked the check 'paid', but withdrew or set apart no money whatever to pay the same or to remit to the Old National Bank & Union Trust Company of Spokane or to the First National Bank of Seattle for the credit of the Spokane bank or the plaintiff, nor did it make any purported payment other than on January 21, 1932, the Olympia National Bank drew and forwarded by mail to the First National Bank of Seattle its draft on and payable to the First National Bank of Seattle, for the credit of the Old National Bank & Union Trust Company in an amount sufficient to cover the items forwarded for collection by the Old National Bank & Union Trust Company, including the particular warrant involved in this suit. The Olympia National Bank did not at that time, nor thereafter, have credit with the First National Bank of Seattle nor funds in that bank upon which it had a right to draw sufficient to meet the

draft whereupon the First National Bank of Seattle refused to accept and pay the draft or to give the Old National Bank & Union Trust Company credit on account thereof, which draft has at all times since been dishonored according to notice thereof given by the bank upon which it was drawn. The Olympia National Bank ceased to do business on January 21, 1932. At all times mentioned herein and now there were and are in the motor vehicle fund No. 15 in the state treasury sufficient available funds, not otherwise appropriated, for the payment of the warrant in favor of plaintiff, that is involved in this action. Other pertinent facts applicable to the case, according to the pleadings and according to the stipulated facts filed herein are referred to in the opinion in the companion case of Kern & Kibbe just filed. In our opinion, on all the facts, as between these parties and for the purposes of this case the Olympia National Bank was insolvent at all times on January 21, 1932, and that the first part of and the first subdivision of section eleven of the bank collection code are applicable to and governing in this case."

And that the opinion, as thus changed and amended, constitutes the decision of the court and as such is to be recorded in the permanent records and reports of the court.