

DEPARTMENT OF FINANCE:

Construing a sales contract as not
infringing upon banking business.

February 27, 1945

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Honorable D. R. Harrison
Commissioner of Finance of Missouri
Jefferson City, Missouri

Dear Commissioner Harrison:

Your letter of recent date to General Taylor, with which you enclosed copy of letter from your office to Mr. W. C. Rosenbaum, Manager, Investors Division, Better Business Bureau of St. Louis, under date of February 14, 1945, Mr. Rosenbaum's letter to you of date February 3, 1945, copy of letter of Mr. Mart Manley for the Electrolux Corporation to Mr. Lehman C. DeMoss, 3527 Fair St., St. Louis (15), Missouri, of date November 9, 1944, and photostat contract between the said Corporation and the said DeMoss, has been received and assigned to the writer for the opinion requested in your letter.

Without referring to the other documents enclosed with your letter, it is believed that reciting the body of the contract will clarify the situation to identify the subject matter upon which you desire an opinion. Omitting the signature, the contract referred to and exhibited in the photostat is as follows:

"Electrolux Preferential Post-War Cleaner
Contract

Print Date clearly as this Date will
be used for Preferential Delivery.

Dated: 8/18/44

Electrolux Corporation agrees that promptly after Governmental restrictions are removed and it is permitted to resume manufacture for civilian consumption, it will reserve and deliver to customer, and customer agrees to purchase, a Model XXX Electrolux Cleaner and Air Purifier at the standard purchase price at time of delivery and Customer has made an advance of \$25 against such price.

" At the time of delivery of the cleaner, customer may elect to pay the purchase price

in installments. In such event customer shall sign the standard form of Electrolux installment contract. Any balance of the down payment shall be paid at that time and installment payments shall mature in equal monthly amounts, all in accordance with applicable laws and regulations.

"Customer may cancel this contract only if (1) upon resumption of manufacturing for civilian purposes, the standard Electrolux price, exclusive of taxes, exceeds \$91, or (2) delivery is not made within six months after such manufacturing is commenced, in either of which events customer's sole remedy shall be the return, upon demand, of the \$25 advance.

"Present and future governmental laws and regulations, when applicable, shall be deemed to modify and form a part of this contract.

"This contract may be assigned."

The matter then resolves itself into the question whether the entering into the contract shown in the photostat and the doing of the acts therein contained, or therein promised to be performed later, shall be construed as doing a banking business.

Section 7998, Article 2, Chapter 39, R.S. Mo. 1939, under the general title of State Department of Finance, and under the particular title of Banks, is as follows:

"The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing."

One of the standard law text works on banks and banking and perhaps the text authority most generally used by the bench and bar is Corpus Juris. In 7 C. J., page 473, a "bank" is defined generally as follows:

"While the term 'bank' has received a number of definitions differing considerably in language, but all

expressing of course the same fundamental ideas, and the sense in which it is intended to be used is largely determined by its connection with other language, perhaps the most concise and at the same time complete definition to be found in the books is that a bank is 'an association or corporation, whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called "bank-notes" ! * * *"

The same volume of the same work at page 477, defines "banking" as follows:

"Banking is the business or employment of a bank or banker; and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making loans of money on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts deposited, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities issued by the national or state government, or by municipal or other corporations. * * *"

Further treating the subject of banks and banking, 7 C.J., page 641, in defining the relationship created between a bank and a depositor in the bank, states the rule as follows:

"H. Relationship between Bank and Depositor. The contract between a bank and a depositor is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds, and there is no trust relation between a bank and a general depositor. The relations between a bank and a depositor may be dual in character, the bank being the depositor's debtor with respect to one thing and his agent with respect to another, or his debtor at one

time and his agent at another; and while the relation between the bank and a depositor in respect to a general deposit is generally regarded as that of debtor and creditor, yet in another sense the depositor is the owner of the deposit, in that he can demand repayment at any time. * * *"

These rules of law under the facts disclosed by reading the body of the contract in question would seem to be conclusive that there is no act, nor is there any element of any act, recited therein as having been performed, or promised therein to be performed, which would in any degree partake of the acts necessary to constitute and be construed as doing a banking business.

The contract in question appears to be a conditional or executory sales contract of personal property.

This contract states that after government restrictions are removed and the Corporation is permitted to again resume civilian manufacture of its products, it will reserve and deliver to the customer one of its machines, and the customer agrees to purchase such machine at the standard purchase price at the time of delivery, and that the customer made an advance payment of \$25.00 on the purchase price. Then follow provisions respecting a deferred payment plan to be adopted at the time of the delivery of the machine, if the customer shall so elect.

It then provides that the customer may cancel this contract only if:

"(1) upon resumption of manufacturing for civilian purposes, the standard Electrolux price, exclusive of taxes, exceeds \$91, or (2) delivery is not made within six months after such manufacturing is commenced, in either of which events customer's sole remedy shall be the return, upon demand, of the \$25 advance."

It will be observed in reading the contract that this is in effect a conditional or executory contract where the seller does not part with the title to the machine mentioned nor with the possession thereof since the same is to be conditionally delivered at a future date.

Referring again to Corpus Juris, that work in volume 55 at page 1194 states as follows:

"As already indicated, it is an indispensable element of a conditional sale and the distinguishing feature thereof that the title to the goods remain in the seller until payment of the price. * * * * A conditional sale contemplates the relation of seller and buyer, and does not create the relation of debtor and creditor. * * *"

It will thus be observed, under the last authority quoted, 55 C.J. 1194, that in a sales contract the relation of seller and buyer is created by a contract such as the one in question, and that under the rule stated in 7 C.J., 641, the relation created between a bank and a depositor is that of debtor and creditor.

It is the acts which are performed in the one case or the other from which must be determined the effect of those acts in creating the status of whether such acts amount to banking on the one hand, or merely a case of barter and sale on the other hand. The buyer here makes a down payment on the purchase price of the article conditionally sold to him, but this is not a "deposit" such as is termed a "deposit" in banking business.

7 C.J., page 628 defines bank deposit as follows:

"A general deposit which is the ordinary form is the payment of money into the bank to be repaid on demand, in whole or in part, as called for in any current money. * ** "

The sum advanced by the buyer, according to the terms of the contract under consideration, is a part of his obligation as a party to a sales contract as distinguished from a "deposit" as an incident to banking business. Volume 48, C.J., page 585, under the subject of "Payment", defines "payment" as follows:

"The term 'payment', in its more restricted legal sense, may be defined as the discharge in money of a sum due, or the performance of a pecuniary obligation. In its more general acceptation, however, the term may mean the fulfillment of a promise, the performance of an agreement, the satisfaction

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of a claim, the discharge of a liability, or the accomplishment of an obligation, whether by giving or by doing. * * * "

Under the terms of this contract the sum paid by the buyer is not to be repaid on demand as would be the case if it were a deposit in banking business, but it is only to be repaid if certain conditions therein named are not complied with later, and then only to be returned as an "advance" payment, and it is so named therein as the expression of the mutual intention of the parties at the time, and it cannot now be converted into an act resembling a bank deposit.

The definition of payment given by the St. Louis Court of Appeals in the case of Clay vs. Lakenan, 101 Mo. App. 563, l.c. 568, very well expresses the law on this transaction as showing a barter and sale business between these parties instead of banking business. That decision at the local citation given, states:

"*V* * The term or expression, 'payment,' is now applied in a dual sense: in the restricted or common use, it signifies a discharge in money of a sum due, and in such sense would not embrace a satisfaction of an indebtedness otherwise than by the transfer of money from the payor to the payee. But in a broader and more general sense, it is defined to be the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing, and in the latter application would include the discharge of a contract or obligation in money or its equivalent by the assent of the parties. * * * "

From the terms of this contract it is apparent that both parties intended the transaction to be one of purchase and sale, with no intention of doing a banking business. The intention of the parties to a contract is the basic rule upon which contracts are construed. Volume 13, C.J., page 521, 523, says on this subject:

"The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may

be done without contravention of legal principles. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. No matter how broad or how general the terms of the contract may be it will extend only to those matters with reference to which the parties intended to contract.
* * * "

Here it would seem that there is no difficulty, when this contract is carefully read, in arriving at the conclusion that neither the making of the contract nor the performance of its conditions are acts of banking, but on the contrary, it is an executory, conditional sales contract. This contract does not provide for the performance of any act nor the promise to perform any act which would make them acts of banking as defined by Section 7998, R. S. Mo. 1939, nor as coming under the definitions of banking in the text authority herein cited and quoted.

CONCLUSION.

It is, therefore, the opinion of this department, considering the agreements and conditions set out in the photostat of this contract, and under the rules of law above cited as applicable thereto, that transactions of this sort cannot be construed as doing a banking business.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

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