

1963

Walker Bank & Trust Company v. Spencer C. Taylor : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

Walker Bank & Trust Company,
a Utah corporation,

Plaintiff-Respondent.

v.

Spencer C. Taylor, Bank Commissioner
of the State of Utah, and State Bank
of Provo, a Utah corporation,

Defendants-Appellants.

No.
9947

APPELLANTS' BRIEF

Appeal from the judgment of the Third District Court of
Salt Lake County
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APPELLANTS' BRIEF

STATEMENT OF CASE

This is a declaratory judgment action brought by Walker Bank & Trust Company to have declared illegal the establishment by the State Bank of Provo of a branch bank on the Brigham Young University campus in Provo, Utah.

DISPOSITION IN LOWER COURT

The case was decided on the merits on facts stipulated by all of the parties. The trial court granted judgment in favor of plaintiff on the ground that under the provisions of section 7-3-6, Utah Code Annotated, 1953, the existence of the defendant bank in Provo precludes the establishment by it of a branch bank in that city. The court granted injunctive relief to the plaintiff, but, on stipulation of the parties, suspended the injunction during the time within which this appeal is taken, and until the final determination of the appeal.

RELIEF SOUGHT ON APPEAL

The defendants seek reversal of the judgment, and a judgment in their favor. They also seek dissolution of the injunctive relief granted by the lower court.

STATEMENT OF FACTS

Walker Bank & Trust Company, a Utah banking corporation, having its head office in Salt Lake City and some thirteen branches in the State of Utah, including a branch in Provo, Utah, seeks to have declared illegal a branch bank established on the Brigham Young University campus in Provo, Utah, by State Bank of Provo, a Utah banking corporation, having its only other and principal banking house in Provo, Utah.

Provo City is not a city of the first class. At all times material there were located and operating in

Provo the defendant, State Bank of Provo, a branch of plaintiff, Walker Bank & Trust Company, and a branch of First Security Bank of Utah, N.A. On October 15, 1962, defendant State Bank of Provo, as required by section 7-3-6, Utah Code Annotated 1953, filed an application with the defendant State Bank Commissioner to establish a branch on or near the Brigham Young University campus in Provo, Utah. On October 25, 1962, also in accordance with the provisions of section 7-3-6, the application was approved by the defendant Bank Commissioner and the Governor. The branch was opened for business on December 20, 1962. No protest to the application was filed by plaintiff, and no appeal to the State Board of Examiners, as required by section 7-1-26, Utah Code Annotated 1953, was taken by plaintiff. Instead, this action was filed in November 1962. Other pertinent facts as set forth in the Stipulation of Facts are referred to in the course of the argument.

This case presents the basic question of whether the applicable Utah statute—section 7-3-6, Utah Code Annotated 1953 — prohibits the establishment of a branch by a bank in the same city in which its principal banking house is located, particularly where, as here, the only other banking facilities in the city are branches of banks having their head offices elsewhere. Also presented is the ancillary question as to whether plaintiff has the necessary standing to raise the basic question.

ARGUMENT

I.

A. SECTION 7-3-6 UTAH CODE ANNOTATED 1953, DOES NOT PROHIBIT THE ESTABLISHMENT OF A BRANCH BANK IN A CITY OF THE SECOND CLASS WHERE THERE IS ALREADY LOCATED ONE OR MORE BRANCH BANKS.

The plaintiff's principal argument below was that the defendant bank could not establish a branch in Provo because plaintiff already had a branch there. It argued that a "branch" is a "bank" within the meaning of the first sentence of the fourth paragraph of section 7-3-6. That sentence reads as follows:

"Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a *bank or banks*, state or national regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank." (Emphasis supplied.)

It is defendants' position that the legislature carefully distinguished between "banks" — meaning unit banks or the principal offices of banking institutions — and "branch banks" — meaning branch offices of banking institutions. The distinction has been clearly understood by the Attorney General of the State of Utah

and has been followed by the Bank Commissioner of Utah and the Comptroller of the Currency in their administration of the law since it was enacted.

The defendants urge this court to rule that since defendant was the only *bank* regularly transacting a banking business in Provo at the time its application was made and its permit granted, the existence of plaintiff's branch in Provo did not preclude the establishment of defendant's branch there.

The cardinal principle of statutory construction is determination of the legislative intent. *Rogers v. Wagstaff*, 120 Utah 136, 232 P.2d 766, 768 (1951) and cases there cited. The intention of the Utah legislature in enacting the sentence above quoted can be discerned from well settled canons of construction which are imputed to have been within the knowledge of the legislature, which is presumed to be conversant with the established rules of statutory construction. *Chicago, Burlington & Quincy Railroad Co. v. Cram*, 85 Neb. 586, 123 N.W. 1045, aff'd 228 U.S. 70 (1912).

The sentence above quoted was intended to express a prohibition; it provides ". . . no branch bank shall be established . . ." in a particular place. If that particular place was where a branch bank was located, the term "branch bank" would have been used to describe that place. Instead, the legislature said "no branch bank shall be established in any city or town in which is located a *bank* . . ." obviously intending to distinguish the latter term, "bank," from the term "branch bank"

it previously used. Had the legislature intended to include within the prohibition a place where a branch bank was located, it would have inserted words to make that portion of the sentence read, “. . . no branch bank shall be established in any city or town in which is located a bank *or branch*, . . .” The legislature could have inserted those words, but did not.

In striving to ascertain the legislative intent, the court must look to the entire statute and its use of terms throughout. *Christensen v. Slawter*, 173 Cal. App. 2d 325, 343 P.2d 341 (1959). From a reading of the whole of section 7-3-6, it is clear that the term “bank” when used unconnected with the word “branch” means a unit bank. Thus in the first paragraph of the section the language “the business of every bank shall be conducted only at its banking house . . .” must refer to a unit bank and not to a branch. In the second paragraph the language “. . . any bank having a paid-in capital and surplus of not less than \$60,000 may establish and operate one branch . . .” must refer to a unit bank and not to a branch. In the third paragraph, where the intent was to include both unit banks and branches, the legislature used the language, “All banking houses and branches . . .” In the seventh paragraph, the term “branch” was used four times to distinguish a branch bank from a unit bank designated “bank.” In the eighth paragraph, the legislature said, “No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank *or branch* as to unreasonably interfere with

the business thereof.” If the legislature had not intended a distinction it would have needed only to use the word “bank.”

The conclusion is unavoidable that the legislature intended the word “bank” to mean unit bank.

This interpretation was adopted by the Attorney General in advising the Bank Commissioner in the administration of the statute. In 1956, he was asked by the Bank Commissioner, “May more than one branch bank be established in a city of the third class, when no unit bank is there in existence?” In an opinion dated December 20, 1956, No. 56-142, the Attorney General ruled:

“It is our opinion that the foregoing provision would not prevent the establishment of more than one branch bank in a city of the third class, if a unit bank is not there located. We base our result upon an interpretation of the word ‘bank’ or ‘banks’ as used in that section, concluding that such word is synonymous with a ‘unit bank’ and does not include a branch thereof.

“In addition to the provision noted, Section 7-3-6 in several instances, uses the term ‘bank’ to connote an institution, separate and distinct from, and not inclusive of, a ‘branch.’ For example:

‘With the consent of the bank commissioner and the approval of the governor, *any bank* having a paid-in capital and surplus of not less than \$60,000 *may establish and operate one branch* for the transaction of its business; provided, that for each additional branch estab-

lished there shall be paid in an additional \$60,000 (capital and surplus).

* * *

‘Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may require.

* * *

‘No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.’ (Emphasis added.)

“In addition to the foregoing use of the word bank and branch in the disjunctive, the very definition of the term ‘branch’ sustains our conclusion. Section 7-3-6 defines branch as follows:

‘The term ‘branch’ as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.’

“Certain policy considerations are also persuasive. First, there is no limitation on the number of unit banks that may be established in a third class city as long as the establishment does not unreasonably interfere with an established business, and the Banking Commissioner gives the necessary approval of the Articles of Incorporation pursuant to Section 7-1-26, U.C.A. 1953. Similarly, there is no legal limitation on the number of branches that might be established in the type municipality under consideration if an existing bank of five years’ operation is acquired by another banking institution for the purpose of

establishing a branch. See Section 7-3-6, U.C.A. 1953, as amended. It would therefore appear that the Legislature did not consider the presence of more than one branch in a city of the third class inherently against public interest, nor disadvantageous to the competing banking branch per se.

“Second, if Section 7-3-6, U.C.A. 1953, as amended, is so construed that only one branch will be permitted in an incorporated area other than a city of the first class, even though no unit bank has been established, then it is conceivable that such municipality might reach a population growth, which one branch could not efficiently handle, and adequate service could only result when a unit bank was established or the city became one of the first class and additional branches were permitted. Such a construction would seem contrary to legislative intent.

“Third, in our opinion the establishment of branch banks is justified on the theory that public advantage will be subserved if a banking institution creates additional offices or agencies for its *existing* customers, and thus provides more convenient and efficient service. When a unit bank has been established in a city of the third class, it presumably can service the needs of the municipal residents, and there would not be sufficient reason to permit a branch to compete with the established unit, the presence of the former interfering with the latter. Hence the statutory prohibition in Section 7-3-6. It is conceivable that two branches could under certain facts be justified in a third class city, sans a unit bank, on the theory that each was to service *existing* customers of the parent banks in other locations.”

The interpretation urged by the defendants is not only consistent with the statutory language and the legislative scheme of bank regulation, but it is the interpretation followed by the Bank Commissioner and the Comptroller of the Currency in their administration of the statute.

Administrative interpretation of a statute does not avail to overcome a statute so plain in its command as to leave nothing for construction, but consistent administrative practice continuing unchallenged for many years may not be overturned even if the scope of the statutory command is indefinite or doubtful. *Norwegian Nitrogen Prod. Co. v. U.S.*, 228 U.S. 294, 313 (1932).

Under the provision of Title 7 of the Utah Code, the Bank Commissioner is charged with the administration of the banking laws of the state. He is expressly vested with authority to administer the regulations as to branches in the granting of permits to establish them. Similarly, the Comptroller of the Currency is bound by the provisions of the Utah law in granting permits to national banks to establish branches in Utah. 12 U.S.C. § 36(c) provides in part:

“A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the laws of the State in question; and (2) at any point within the State in which said association is situated, if such estab-

lishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State of State banks.”

Both public officials have consistently followed the interpretation of 7-3-6 upon which defendant State Bank of Provo here relies. It is noted in paragraph 9 and 10 of the stipulation:

“ . . . On or about November 9, 1961, the Bank Commissioner authorized the establishment of a branch of the Beehive State Bank in the City of Tooele, not a city of the first class, at a time when a branch of First Security Bank of Utah, N.A., was regularly transacting a customary banking business in said city.

“10. The Comptroller of the Currency granted an application of First Security Bank of Utah, N.A., in the year 1955, for the establishment of a branch by it in Murray City, not a city of the first class, at a time when a branch of Walker Bank & Trust Company was regularly transacting a customary banking business in said City and said Comptroller of the Currency granted an application of First Security Bank of Utah, N.A., in the year 1957 for the establishment of a branch by it in South Ogden, not a city of the first class, at a time when a branch of Commercial Security Bank and a branch of Bank of Utah were regularly transacting a customary banking business in South Ogden. On January 21, 1963, the Comptroller of the Currency granted authority to the First National Bank of Logan to

establish a branch bank in Logan, not a city of the first class. At the time when said authority was granted, a branch of plaintiff Walker Bank & Trust Company and a branch of First Security Bank of Utah, N.A., were regularly transacting a customary banking business in Logan.”

We have already adverted to the opinion of the Attorney General supporting the interpretation followed by the Bank Commissioner and the Comptroller. This interpretation of the Attorney General adds weight to that of the administrative officers. In a similar situation, the Wyoming Supreme Court, in upholding the administrative interpretation of a sales tax provision against that of a taxpayer, stated:

“This construction of the law which has received the approval of at least two of the chief law officers of the state has been followed by the board as the department of the state government charged with the duty of administering the Act. . . . Four sessions of the legislature of the state have occurred since the construction of the law above announced was transmitted to and followed by the Board and no subsequent statute has been enacted which in anywise interferes with the views thus presented so far as we are informed.” *Walgren Co. v. State Board of Equalization*, 62 Wyo. 297, 166 P.2d 960, 963 (1946).

A California court recently took the same view:

“Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless

clearly erroneous.” *DiGiorgio Fruit Corp. v. Dept. of Employment*, 56 Cal. 2d 62, 362 P.2d 487, 491 (1961).

In *State Bank of Kenmore v. Bell*, 197 Misc. 97, 96 N.Y. 2d 851 (1950), the defendant, Banking Board, approved the application of Marine Trust Co. to open and occupy a branch bank in the town of Tonawanda, New York. The plaintiff, which had its principal place of business in that town brought an action to review the determination made by the defendant. Plaintiff cited numerous items of error and illegality in defendant’s action, among them that defendant had misinterpreted the law in that Tonawanda was unincorporated and the law did not permit branch banks to be established in such villages. In dismissing the plaintiff’s petition the court said that some fourteen branch banks had been authorized and opened in unincorporated villages in New York since the law was amended in 1934 to permit branch banking. The court held that if the law contained an ambiguity such practical construction of the statute by those charged with the duty of its application and enforcement over such an extended period of time could not be ignored.

Our statute here is not even ambiguous!

Other cases holding that administrative interpretation of a statute should be upheld or that legislative acquiescence for such interpretation may be inferred from its silence over a period of years are: *Oliver v. Spitz*, 76 Nev. 5, 348 P.2d 158 (1960); *State v. Dept.*

of *Transportation of Washington*, 33 Wash. 2d 448, 206 P.2d 456, 477 (1949); *State ex rel York v. Board of Commissioners*, 28 Wash. 2d 891, 184 P.2d 577, 590 (1947); *Guillot v. State Highway Comm. of Montana*, 102 Mont. 157, 56 P.2d 1072, 1075 (1936); *F.T.C. v. Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1940); *U.S. v. American Trucking Assoc.*, 310 U.S. 534, 549 (1939).

Section 7-3-6 has been amended and re-enacted in 1953, 1957 and 1963 without material change in the sentence under consideration. In light of its consistent and notorious administrative interpretation by both state and national supervisory agencies, it must be concluded that the legislature has, at the very least, acquiesced therein.

The doctrine of re-enactment has long been recognized by the courts. As early as 1908 the United States Supreme Court ruled that the re-enactment by Congress without change of a statute which had previously received long continued executive construction was an adoption by Congress of such a construction. *U.S. v. Cerecado Hermanos*, 209 U.S. 337 (1908).

The doctrine has been generally applied in state as well as federal courts to all fields of administrative action, whether formalized by regulations or merely recognized in an administrative function and decision. Thus the Supreme Court of Michigan said it was the well settled general rule that legislative re-enactment after such interpretation, "which must be presumed to have

been known to the legislature," carried with it the sanction of legislative approval of such conclusions, *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87, 135 A.L.R. 900, 907 (1941). Similarly, the Texas Supreme Court said it was a very well established rule that where a statute of doubtful construction has been construed by executive officers of the state charged with its execution, and it has subsequently been re-enacted without substantial change of language, it will continue to receive the same construction. *Stanford v. Butler*, 142 Texas 692, 181 SW2d 269, 153 A.L.R. 1054, 1063 (1944). Even while declaring void an administrative rule based upon a statute which had subsequently been re-enacted, the California Supreme Court took great care to point out that the administrative construction of long standing could only be overturned after a finding that the statute involved was clear, unambiguous and required no amplification in its original writing. *Whitcomb Hotel v. California Employment Commission*, 24 Cal.2d. 753, 151 P.2d 233, 236 (1944).

The defendants submit that the language in dispute, having been interpreted consistently by the official charged with its administration over a period of years, and having been enacted and re-enacted unchanged by the legislature with knowledge of that interpretation, should be construed by this court in accordance with that administrative interpretation.

The 1963 legislature had before it amendments to the banking laws, including 7-3-6, and re-enacted the

sentence under consideration without change. If there was any doubt as to the correctness of the interpretation of the Attorney General and the Bank Commissioner, of the State of Utah, as well as that of the Comptroller, particularly in view of the pendency of this action, corrective action could have been taken by the legislature. None was. Its action in re-enacting 7-3-6 without amending this sentence must be considered as a particular re-affirmation of the interpretation under which the administrative agencies have proceeded.

B. PLAINTIFF'S OFFICE IN PROVO IS A BRANCH AND PLAINTIFF'S METHOD OF ACQUISITION OF THAT BRANCH GIVES IT NO SPECIAL STANDING TO CONTEST DEFENDANT'S BRANCH.

Plaintiff argued below: (1) That a bank is a bank no matter how many offices it has and, alternatively, (2) that plaintiff's Provo branch, because it was acquired by a merger, has somehow retained some characteristics of a unit bank—at least sufficient characteristics to prevent defendant from establishing its Brigham Young University branch.

It is submitted that neither of these arguments is sound.

Section 7-3-6 provides at the outset:

“The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its

banking house *except as hereinafter provided.*"
(Emphasis supplied.)

The section then goes on to authorize the establishment of branches under certain circumstances and sets forth the procedure to be followed in obtaining authorization from the Bank Commissioner to do so.

In 1911 the predecessor to this section was enacted. Chapter 25, Section 32, Laws of Utah, 1911, provides:

"The business of every banking institution shall be conducted only at its banking house, and no bank in this State or any loan, trust or guaranty company or trust company conducting a banking business, or any officer, director or agent thereof, shall open, establish or maintain any branch bank or office, and shall receive deposits and pay checks only at its banking house."

In 1933, the section was amended so that the first sentence of the statute enacted in 1911 read as it does today. That brief history makes it clear that from 1911 to 1933 a bank could have only one office—at its banking house. Since the adoption in 1933 of the provision, "except as hereinafter provided" and the thereafter provision of section 7-3-6 authorizing the establishment of branches, a bank may establish other offices — branches — if the statutory conditions are met and the statutory procedures are followed.

One of the authorized statutory procedures to establish a branch is for a bank to acquire another bank by purchase or merger. That is the procedure followed by the plaintiff Walker Bank & Trust Company in

establishing its branch office in Provo. Walker Bank has only one banking house—Second South and Main Street in Salt Lake City, Utah. It has thirteen branches elsewhere. One of these is in Provo. But its branch there does not mean plaintiff is located in Provo. *Michigan National Bank v. Gidney*, 237 F.2d 762 (D.C. Cir. (1956)).

We do not contend that plaintiff's Provo branch is a different and separate entity in Provo. We do contend that its office in Provo is a "branch" as defined in the statute. Section 7-3-6 states:

"The term 'branch' as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent."

Inasmuch as Walker Bank & Trust Company's office in Provo and that of First Security are "branches" as distinguished from "banks" as the terms are used and defined in section 7-3-6, their existence does not preclude defendant State Bank of Provo from establishing its branch in Provo.

Plaintiff's alternative argument is that, somehow, because its Provo branch was acquired by merger with the Farmers' and Merchants' bank, the result is an hermaphrodite animal—a branch with a unit bank's special protections and requirements. It is submitted that Utah law recognizes no such species and that the merging parties cannot create one by contract. Nor did they. The stipulated record here shows:

(a) The merger agreement provides Walker Bank & Trust Company is the surviving corporation (Para. 2 of the merger agreement) ;

(b) Walker Bank & Trust Company's office in Provo is designated as "Walker Bank & Trust Company, Farmers' and Merchants' Branch" (Para. 7 and 9 of the merger agreement) ;

(c) The separate corporate existence of Farmers' and Merchants' Bank ceased with the effective date of the merger (Para. 10 of the merger agreement) ;

(d) The merger agreement provides the principal office of the surviving corporation shall be located in Salt Lake County (Para. 19 of the merger agreement) ;

(e) By letter dated October 24, 1955, the Board of Governors of the Federal Reserve System approved the establishment of a branch by Walker Bank & Trust Company at Nine North Third West Streets in Provo, Utah.

Plaintiff also argued that section 7-6-7, U.C.A. 1953 gives plaintiff Walker Bank & Trust Company "the right to protect its [Farmers and Merchants' Bank] status and competitive situation" inasmuch as "Such rights survive the statutory merger of Farmers' and Merchants' Bank with and into plaintiff." Plaintiff misconstrues the purpose of the section of the statute it cites. It is a part of chapter 6 of Title 7 dealing with mergers, consolidations, and conversions of banks. Conversion is a change of a bank from a state to a national

charter or vice versa (section 7-6-1 (3) U.C.A. 1953). In dealing both with the “resulting bank” from a merger and the “converting bank” from a conversion, the legislature provided that the surviving bank should have “all the rights, powers and duties” and the use of the name of its predecessor. See section 7-6-7, A, B and C and section 7-6-8, C and D. For both cases the statutory purpose is obvious. Banks hold a plethora of legal papers—negotiable instruments of every nature, mortgages, pledges, assignments, etc. The statutory provisions are to make clear that the surviving entity succeeds to all of these rights and powers without the necessity of execution of a multitude of documents of transfer or the recording of assignments of numerous mortgages; cf. 12 U.S.C. 214(b) dealing with the statute of a national bank converted to a state bank.

Plaintiff’s contention also does violence to the clear purpose of the provisions of section 7-3-6 dealing with the establishment of branches and the protection of unit banks, not branch banking systems. It would indeed be subverting the legislative intent to find that a unit bank disappears upon merger into a branch bank system, but sufficient memory lingers on with the survivor to make the branch a unit bank when it serves the system’s purpose.

Section 7-6-7 refers to “rights, powers and duties.” Can the protective provisions of 7-3-6 for unit banks be a “right” or “power” which Walker Bank may waive when First Security established a branch in Murray, but

which it may exercise in Provo when defendant State Bank of Provo does likewise? *Union Trust Co. v. Simmons*, 211 P.2d 190 would say not.

Far from being irrelevant, the facts in Murray and Provo are parallel and pertinent. Walker's branch there was acquired by merger. The Comptroller of the Currency, required by federal statute, 12 U.S.C. § 36 (c), to conform to state law in the granting of branches outside the home city, in 1955 granted a permit to First Security Bank of Utah, N.A., to establish a branch in Murray at a time when plaintiff's branch office in Murray was regularly transacting customary banking business in said City. If plaintiff had a "right" to exclude branches by virtue of the provision of section 7-6-7 U.C.A. 1953, it had one in Murray in 1955. It did nothing.

The statutory purpose is made clear by referring to another section in chapter 7, section 7-6-6. That section provides that when the merger becomes effective,

"The charters of the constituent banks, other than the resulting bank, shall thereupon be deemed surrendered."

Thus no charter exists for the Farmers' and Merchants' Bank. The only charter existent is to the Walker Bank & Trust Company, with its principal office in Salt Lake County and with the right to operate a branch in Provo. That surviving entity has the "right" and "power" to engage in the banking business through its Provo branch office and such other branches as it may be per-

mitted to establish or acquire, but it holds no charter to operate as a *unit bank* in Provo. That latter right expired with the surrender of the charter of Farmers' and Merchants' Bank.

Finally plaintiff's contention that the Farmers' and Merchants' Bank has some sort of special identity proceeds on the false premise that plaintiff transacts business as a different and separate entity in Provo and overlooks the difference between banks and branches. The Walker Bank & Trust Company is one legal entity. It has thirteen offices, one of which is in Provo. Its principal office is in Salt Lake City. It has but one Board of Directors. There is no Board of Directors assigned to the Farmers' and Merchants' Bank. Its loan limits as specified in section 7-3-39 of Utah Code Annotated are governed by its entire capital and surplus, not by any allocation of capital and surplus to each individual office. There are no stockholders in the Farmers' and Merchants' branch. There are only stockholders of the Walker Bank & Trust Company. There are no reserve requirements for the Farmers' and Merchants' branch. There are only reserve requirements for the Walker Bank & Trust Company.

When plaintiff merged with the Farmers' and Merchants' Bank, it acquired a branch in Provo. It did not acquire any special right to preclude its local competitor from better serving its customers.

II.

SECTION 7-3-6, UTAH CODE ANNOTATED 1953, DOES NOT PROHIBIT THE STATE BANK OF PROVO FROM ESTABLISHING A BRANCH BANK IN ITS OWN COMMUNITY.

Plaintiff's second argument is based, not on the fact that plaintiff has a branch in Provo and the presence of that branch precludes defendant from establishing a branch in Provo, but on the fact that *defendant itself* is there. This anomaly is based on a literal reading of the following sentence from section 7-3-6 Utah Code Annotated, 1953:

“Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank.”

Plaintiff's argument is that the defendant State Bank of Provo is regularly transacting a customary banking business in Provo. Since that is so, plaintiff contends, under the literal language of the statute, defendant cannot establish a branch in Provo because it is there itself.

Plaintiff's attempt to ride defendant's coat tails in order to limit defendant's efforts better to serve its customers in the very community defendant was chartered by the state to serve, raises two basic questions.

(1) Can the plaintiff assert defendant's presence in Provo as a basis for standing to sue when the statute on which it relies is obviously designed to protect local banks and not plaintiff? and (2) Is the absurd result of plaintiff's literal reading of one sentence of 7-3-6 in accord with the legislative intent in the regulation of branch banking in Utah? It is defendant's position that both questions must be answered in the negative.

A. The restriction expressed in section 7-3-6 as to the location of branch banks refers only to cities or towns other than one in which the principal banking house of the bank concerned is located.

From 1911, (Ch. 25, § 32, Laws of Utah, 1911), until 1933, branch banking was expressly prohibited in Utah. In 1933, the legislature expressly authorized banks possessing the requisite capital and surplus to establish, with the consent of the bank commissioner and the governor, one or more branches (Ch. 6, Laws of Utah, 1933). After making this general grant of authority, the 1933 enactment contained this restrictive provision:

“No branch bank shall be established in any city, town or village in which is located a bank or banks, state or national regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank or obtain the consent of all banks therein located, except that in cities of the first class, branches may be established without such consent.”

It is clear, from a review of the language of the

entire section as a whole and the statutory history and purpose of the regulation of branch banking, that this limitation was not intended to restrict branching activities of banks in the city in which their principal office is located. The legislature did intend to protect banks in the smaller cities and towns, other than Salt Lake City, from the undue competition of branches of larger banks whose principal banking house was located elsewhere.

This court has held that the restriction was not intended to apply to Salt Lake City. Mr. Justice Wade in a concurring opinion in *Union Trust Company v. Simmons*, 116 Utah 422, 211 P.2d 190 (1949), after quoting the above sentence from the 1933 enactment, stated:

“By the above emphasized provision [Mr. Justice Wade referred to the words “except that in cities of the first class, branches may be established without such consent”] the legislature intended to allow the establishment of a branch bank in cities of the first class not only as expressly therein provided, without obtaining the consent of all banks therein located, but also without taking over an existing bank. Otherwise, that provision would not alter the meaning of that section at all, for under the provision which applies to cities, towns and villages other than cities of the first class, without the aid of such an exception a branch bank may be established without the consent of the local banks by taking over an existing bank.” 211 P.2d 190, 194.

Chief Justice Pratt in the opinion of the court in the same case reached the same conclusion. He stated:

“The part of the statute first quoted above, establishes two methods of establishing a branch bank, compliance with either of which will make it possible for the bank commissioner to determine the issue of convenience and advantage *in other than cities of the first class*. (Emphasis supplied.) 211 P.2d 190, 193.

This court's interpretation that the restriction did not apply to branches established in Salt Lake City was ratified by the legislature in 1951 (Ch. 10, Laws of Utah, 1951), when it amended the sentence to delete the consent provision found unconstitutional by this court in *Union Trust Company v. Simmons*, *supra*, and moved the “except” clause from the end to the beginning of the sentence. There is nothing in the 1951 amendment or the 1953 amendment (Ch. 8, § 4, Laws of Utah, 1953), which added unincorporated areas of Salt Lake County to the exception, to indicate that the legislature intended any greater restriction on cities and towns other than Salt Lake City than was originally provided in the 1933 enactment.

The same principles of statutory interpretation and the same reasoning used by this court in arriving at the legislative intent in *Union Trust Company v. Simmons*, *supra*, make it equally clear that the “take-over” restriction on the general grant of authority to establish branch banks does not apply to a bank having its principal banking house located in the same city, town or village where it proposes to establish a branch office in order to better serve the credit needs of the community for which it was originally chartered.

A page of history from the parallel development of national banking legislation establishes the genesis of the distinction between branches located in the same city, town or village in which the head office is located and branches located elsewhere. Following the financial panic of 1907 a number of states, led by California, began to authorize branch banking. By 1927 branch banking was permitted, with minor modifications, in seventeen states. No authority was given to national banks to establish branches, but in 1922, the Comptroller of the Currency ruled that national banks could open additional "teller windows" in their home cities. These additional intracity offices in some instances became "great tall buildings, expensive structures", 68 Cong. Rec. 2179. This device was thwarted by the Supreme Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1923), which held that such offices were unlawful in states where branch banking was prohibited by state law.

This ruling intensified a battle in Congress between advocates of branching and its opponents over legislation to authorize branches for national banks and state chartered banks which were members of the Federal Reserve System. Typical of the opponent's position was the statement by Representative Cannon:

"The principle of branch banking when allowed to develop unhampered establishes a monopoly. It creates a gigantic banking octopus, with branches extending like tentacles from the larger cities out to the smaller towns, throttling local banks and sucking out of the country and

into the city the deposits and resources which should be available for local enterprises. . . .

“There can be no comparison of the relative merits of the branch bank and the home-owned bank in their influence upon a community and its prosperity. The home bank, owned by local businessmen, has at heart the interest of the town and seeks to build up the community and contribute to its prosperity. The branch bank is owned by outsiders, who have no pride in local affairs and who seek only profits and dividends. The home bank pays its taxes at home and contributes to home institutions and enterprises and its stockholders spend their earnings at home. The branch bank pays the bulk of its taxes in other States and municipalities. It makes little or no contribution for local purposes, and its dividends are drawn from the town in which they are made and spent in distant cities. The home bank is controlled and managed by local boards of directors, the purest form of local self-government, while the branch banks are controlled by professional financiers, with little understanding and less sympathy for the needs and problems of their customers, and is, in short, a species of carpetbag government. The home bank means home control, independent and cooperative. The branch bank typifies the overlordship of great money monopolies centered in alien territory, to which the patrons of every branch bank pay tribute as truly as the countrymen of the Nazarene paid tribute to Caesar in the golden age of the Roman Empire.” 67 Cong. Rec. 3248.

It is obvious, from his remarks, and that of others, of similar tenor, that what Congress was worried about was the invasion by large banking chains from outside

cities into the smaller communities. The resulting legislation was a compromise known as the McFadden Act (Act of February 25, 1927, c. 191 §7, 44 Stat. 1228). This act authorized branches of national banks "within the limits of the city, town or village" in which the bank was located. The reasoning behind this measure was expressed by the Comptroller of the Currency, H. M. Dawes, in his testimony before the House Banking and Currency Committee reproduced at 65 Cong. Rec. 11297.

"At the outset it should be stated that while the question of extending outside facilities in the form of offices or branches beyond the limits of the parent institution but confined to municipal limits is one that might be properly controversial, it does not, to my mind, involve the fundamental principle of branch banking. So long as such an operation is confined strictly to municipal limits, it remains in its essence a community operation conducted for the benefit of residents by residents.

"I will not discuss the necessity or develop the arguments which have induced State legislatures to permit this form of operation. It seems to me it is sufficient to say that these intracity activities do not run parallel at all to the operations which are involved in the extension of banking influence by direct control in the form of branches covering a whole State or limits beyond the municipality. If the principle of local control over banking facilities within city limits is recognized and such an operation is forbidden in one and permitted in another State, it would not be a real concession to any branch banking principle, since intracity banking is, after all, community banking as dis-

tinguished from State, district or national branch banking." 65 Cong. Rec. 11297.

Mr. McFadden, the sponsor of the 1927 enactment, in support of the measure in the House stated:

"Both sections enunciate the same policy and set up within the Federal reserve system the same standard of banking. They are based upon the assumption that state-wide branch banking is unsound and puts our whole banking system in danger. To those who believe as I do, state-wide branch banking will eventually lead to monopolistic control over the credit facilities of an entire State and will, in the course of time, run out of business all of the rural unit banks, both state and national. When a branch banking system becomes fully developed in any given State the business and industrial activities outside of the large cities will be at the mercy of a few large city banks. This is what former Comptroller Dawes called 'absentee banking'." 67 Cong. Rec. 2832.

Then came the banking crisis of the early thirties which prompted the Banking Act of 1933 in the Congress and 1933 amendments to the Utah Banking Laws by the Utah legislature. Both looked to statewide branching as a means of ameliorating the distress in communities where the only bank had failed or acquisition by a larger bank with substantial capital and resources was the only means of saving the smaller banks in financial difficulties.¹

¹Comptroller Dawes reported in 1930 that 88 per cent of bank failures were in banks having less than \$100,000 capital and 80 per cent were in towns having a population of 2,500 or less. 130 Commercial and Financial Chronicle, 3981.

The Congress had two alternative suggestions before it in considering limitations on branch banking outside the home community. Senator Vandenburg proposed to limit branches outside the home community of the bank with this proviso:

“Except in a city, town, or village where there is no National or State bank regularly transacting customary banking business, no such association shall establish a branch except by taking over a unit bank existing at the time of the enactment hereof or an affiliate of such association.”
76 Cong. Rec. 2026.

The other alternative, proposed by Senator Bratton, was adopted by the Congress and limited branches outside the home community to:

“. . . the restrictions as to location imposed by the law of the state on state banks.” Section 23 of Banking Act of 1933, 12 U.S.C. 36(c).

The 1933 Utah legislature did in one enactment what Congress had done, in 1927 and 1933, in two. It authorized statewide branch banking. In so doing it recognized the need to permit branching in the communities which had never been able to support a unit bank or into a community where a unit bank had failed, leaving a void. But it also saw the need to protect unit banks from the undue competition of large banking chains. It sought to protect the state from additional unit bank failures in the smaller towns which might very well be caused by destructive competition from outside banking chain operations. It did so by pro-

hibiting branching by outside banks if there were a bank already in the community, unless the existing bank or banks consented. It had no need to insert a special authorization for intracity branches, as Congress had done in 1927 because in the very same act the legislature authorized branch banking generally. Thus the thrust of the restriction adopted in 1933 was directed at the perils which Congressman Cannon outlined to the Congress as far back as 1927—the invasion of the smaller communities by the large banking chains and absentee ownership. The legislature was not concerned with intracity branching as such and considered it amply covered by the blanket authorization of branch banking contained in the first paragraph of the 1933 enactment.

The reason for this distinction between outside branches and intracity banking, recognized by both the Congress and the Utah legislature is obvious. Establishing another office or branch in the same city, town or village where the principal banking house is located is merely an effort to meet more effectively the needs of existing customers. It is not an effort by the bank to expand its operation to a different area or to enter into competition with others. Bank regulators had found that one of the principal causes of failures of rural banks in particular was the existence of too many banks. Hearings before House Committee on Banks and Commerce, 71 Cong. 2d Sess., p. 141.

Such problems are not applicable to branches or additional offices of a bank in its home town. Take for

example, the very situation in Provo. Obviously the Bank Commissioner in approving the defendant State Bank of Provo's application for a branch found a need for additional banking services on or near the Brigham Young University campus which has grown substantially in recent years in the number of students, faculty and employees. One need only look at the branch of plaintiff Walker Bank & Trust Company, located near the University of Utah campus in the same city as its principal office, to recognize the need for banks better to serve its community where the demands of expanding population evidence such a need. Yet plaintiff would contend that the only banking facility that the legislature would permit Brigham Young University to have would be a new unit bank. One needs but a rudimentary acquaintance with banking economics to recognize that banking needs sufficient to support a branch might fall far short of supporting a unit bank. The legislature recognized this in its statutory scheme by allowing branch offices to be established. What plaintiff really contends is that since it cannot have a Brigham Young University branch, as it has a University of Utah branch, no one else should be permitted to have one.

The situation in Davis County also illustrates the reason for the distinction between branches of outside banks and branches of banks located in the community. Davis County has enjoyed a phenomenal growth in the past decade. In each city and town in Davis County there exists an independent unit bank. Would the legislature have intended that these existing banks could

not expand their facilities to meet the needs of their communities created by that growth? The interpretation of the statute followed by the Bank Commissioner, the Comptroller of the Currency and the Attorney General would allow such flexibility to meet the change in economic conditions without the necessity of chartering new unit banks. It is only by reading with blinders just one sentence extracted from the entire banking code that one reaches the literal restriction upon which plaintiff here relies. One would seriously doubt that the legislature would have intended its regulatory scheme to be so subverted, when by the very framework of the regulation of branch banking, it was seeking to protect the integrity of existing unit banks.

Let us turn to the language of the sentence on which plaintiff relies. Under the alternative methods provided by the 1933 wording of the restrictive language, the defendant State Bank of Provo, as the only bank in Provo, could not take over itself, and to ask itself for permission would be equally absurd. Quite clearly, these methods have no application to the only bank in a locality. However, applied to a bank located outside of Provo, which sought to establish a branch in Provo, the statutory restriction has meaning and purpose—the protection of small local banks from the competitive advantages of a large chain, such as is plaintiff. Applied literally, as plaintiff would have it, to a bank located in Provo or any of the other smaller communities, the statute would have the anomalous result that no branches could be established in smaller

communities, unless an established independent unit bank were taken over by a larger bank. That result is diametrically opposed to the whole scheme of the regulation of branch banking — protection against the monopolistic tendency of large chain operations.

This court has never been so wedded to the literal reading of a statute as to reach a construction as plaintiff here contends. As this court noted in *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P.2d 98 (1944):

“By so holding we are cognizant of the fact that we are not following the literal wording of the statute, but such is not required when to do so would defeat legislative intent and make the statute absurd.” p. 108.

It is submitted that the literal wording of the statute on which plaintiff here relies would defeat the legislative intent and make the statute absurd by holding that the only way a branch bank could be established in a city other than Salt Lake City would be for a larger outside bank to take over the existing independent unit bank, rather than allowing the existing independent unit bank, as here contended, itself to establish a branch better to serve the needs of the community for which it was first chartered by the State Banking Department. As Mr. Justice Wolfe in *Norville v. State Tax Commission*, 98 Utah 120, 97 P.2d 937 at 939 (1940), quoted with approval Sutherland on Statutory Construction, section 241 at 320:

“In the exposition of a statute the intention of

the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

The interpretation, which defendants here submit is consonant with the legislative intent and with reason and good discretion, does not require this court to add words to the statute or to overlook words in the statute, but merely to construe the restriction which the legislature originally adopted in 1933 to apply only to branches established in a city, town or village other than in the city, town or village in which the bank seeking to establish such a branch is located. In other words, whenever a small independent unit bank in Provo, Logan, Clearfield, Brigham City, etc., can demonstrate to the Bank Commissioner that the public convenience and advantage will be subserved and promoted by the establishment of an additional office to serve its customers in its own community, that is all that is required. If Walker Bank and Trust Company or some other larger bank desires to invade one of these smaller communities to acquire for itself some of the business which an existing bank or banks enjoy in the regular transaction of their customary banking business in such community, such outside bank may not do so unless it takes over the existing bank. Thus the existing bank

is protected from the undue competition which the substantially greater resources of the invading bank could employ. At the same time, under this interpretation, the public in these smaller communities are guaranteed that their banking needs and conveniences will be subserved and promoted in that their existing banking facilities may be expanded by the addition of drive-ins and other offices in convenient locations as their own community expands.

That the legislature intended to protect local banking from outside competition is further evidenced by the language which first appeared in the 1933 provision to the effect that no unit bank may be permitted to be acquired by another bank for the purpose of establishing a branch unless such bank shall be in operation for a period of five years. The purpose of this is obvious—to prevent the large banks from establishing nominally independent unit banks in the towns where they cannot establish branches and then to acquire them and to make them branches by merger.

Under the interpretation which the Bank Commissioner has adopted in the granting of defendant its branch in Provo, and the Comptroller of the Currency has followed in granting a branch to the First National Bank in Logan, the regulation of branch banking by the legislature, since 1933 and through all the subsequent amendments of section 7-3-6, is consistent and evidences a definite legislative policy.

1. Branches may be established if the applicant

possesses requisite capital and surplus and the bank commissioner finds that the public convenience and advantage will be subserved and promoted.

2. There are no restrictions on branching in Salt Lake City, and, since 1953, unincorporated areas of Salt Lake County.

3. There are no restrictions on banks establishing branches in their own communities.

4. In cities and towns other than Salt Lake City, outside banks may not invade such communities with branches unless an existing independent unit bank desires to sell out.

In considering the interpretation to be given to section 7-3-6, Utah Code Annotated, 1953, one further thought should be given to the construction claimed by plaintiff that intracity branches are prohibited, except in Salt Lake City.

Within the requirements of the Fourteenth Amendment of the Constitution of the United States and article I, section 25 of the Utah constitution, is there a valid reason for the legislature allowing Walker Bank to establish a branch near the University of Utah in Salt Lake City, but denying the only unit bank in Provo from similarly serving its customers at Brigham Young University or prohibiting the only unit bank in Logan from establishing a branch to serve Utah State University? Under the construction urged by plaintiff, the ability of a bank to establish another branch in its

own city—the community it was originally chartered to serve—depends solely on the size of the city in which it is located.

The statistics as to bank failures in the small towns and the desire to restrain the tendency toward monopoly which was feared might result from unrestricted state-wide branch banking might be a legitimate basis for excluding outside banks from branching in the smaller cities and towns where unit banks are established, but these factors hardly form a legitimate basis for precluding existing unit banks in those communities from improving their services to their customers by opening another, more convenient office in the same community.

It is an axiom of statutory interpretation that the court should construe a statute in such a way as to avoid doubts as to its constitutionality. The interpretation followed by the Bank Commissioner and urged here by the defendants is not only consistent with the legislative history and purpose of branch banking regulation, not only avoids an absurd result, but also clearly avoids that constitutional question. The interpretation urged by plaintiff meets none of these tests.

B. Plaintiff does not have the standing to assert that defendant's presence in Provo precludes defendant from establishing a bank there.

The action of the Bank Commissioner, of which the plaintiff complains, is a public act done in the course of the Bank Commissioner's official duties. Unless

plaintiff can demonstrate that it has standing to bring a private lawsuit challenging that action, it should be denied relief forthwith on that basis. Plaintiff could acquire standing either under general principles of common law, or by a specific statutory grant. However, there is no express provision in the banking laws of the State of Utah, or elsewhere in the Utah Code, granting plaintiff the right to bring a private suit to attack the action of the Bank Commissioner. At the time this suit was filed, section 7-1-26 of the Utah Code required persons aggrieved by any decision or ruling of the Bank Commissioner to appeal such decision to the State Board of Examiners, whose decision was to be final. Plaintiff did not do so. The 1963 Legislature amended that law to eliminate review by the Board of Examiners and added the following language to Section 7-1-26:

“(4) Any applicant for an approval of articles of incorporation, a permit to establish a branch, or a license to transact any business subject to the supervision of the Banking Department or any protestant to such application, feeling aggrieved by the act, decision or ruling of the Bank Commissioner with respect thereto, shall be entitled to judicial review thereof by filing, within thirty days after the decision or ruling of the Bank Commissioner is issued, any applicable form of action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction), in the District Court of the district in which the office of the Bank Commissioner is located. The reviewing court shall have power to hold unlawful and set aside any act, decision or ruling of the Bank Commissioner found to be

arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” Chapter 7, Section 6, Laws of Utah, 1963.

This provision is of no aid to plaintiff for two reasons: (1) It was not in effect when the action was filed, and is prospective in effect only. (2) It grants judicial review only to a “protestant” to an “application.” No protest to the application of defendant State Bank of Provo was filed by plaintiff. Thus, plaintiff can hardly qualify as a “protestant.”

Common law rules of standing are expressed in the *Restatement, Torts*, Section 710, as follows:

“710. One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

“(a) One of the purposes of the enactment is to protect the other against unauthorized competition, and

“(b) The enactment does not negative such liability.”

Plaintiff does not qualify under the principles set forth in section 710 of the *Restatement* because (1) section 7-3-6 of the banking law does not have as one of its purposes the protection of the plaintiff, (2) the scheme of enforcement implicit in the act must be held to negative plaintiff’s standing, and (3) the principle of section

710 is not applicable where the defendant is operating under a permit duly granted by the proper regulatory authority. These points will be discussed in order:

(1) Section 7-3-6 was passed to permit branch banking, subject to certain restrictions. Those restrictions, as we have shown, were inserted to protect banks in small cities or towns from the harmful competition of outside large banking chains attempting to establish a branch in their city. The statute upon which plaintiff relies refers to a *bank* located in the city where the branch is to be established. Plaintiff is located in Salt Lake City and only has a branch in Provo. *Michigan National Bank v. Gidney*, 237 F.2d 762 (D.C. Cir. 1956). Plaintiff is one of the class which may establish a branch in Provo only by taking over an established bank. It is not one of the class protected by the statute. Not being within that class, it has no standing to question the establishment by defendant, a bank located in Provo, of its branch in Provo. *State ex rel Louisiana Trust & Savings Bank v. Board of Liquidation*, 136 La. 571, 67 So. 370 (1915). As the court in *Strong v. Campbell*, 11 Barb. (N.Y.) 135 (1851) noted:

“Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute,

no such right is created as forms the subject of an action.”

(2) The scheme of law enforcement in the banking laws negatives plaintiff’s standing to enforce its alleged rights through a private action.

In section 7-1-1 provision is made for a state banking department, headed by a Commissioner. Section 7-1-26 gives the Commissioner discretionary power to grant applications for licenses for the transaction of any business subject to the provision of the banking department. “Licenses” include the permit to establish a branch office because:

(a) There is no provision in Title 7 giving the Commissioner power to award “licenses” for anything in particular—with one exception: The Commissioner may grant a license to engage in the small loan business; and such a license is required by anyone wishing to enter the small loan business. But Chapter 10 of Title 7 specified the process for obtaining a license, including the procedure for a review of the Commissioner’s decision. It is a different procedure entirely than that specified in 7-1-26. Therefore, the term “license” in 7-1-26 cannot refer to a license to engage in the small loan business.

(b) It is necessary for a bank to apply to the Bank Commissioner for permission to establish a branch; without such permission, the bank may not legally establish such branch.

(c) The word “license” must have some meaning

in the statute. A dictionary definition of license is “a formal permission from the authorities to carry on a business otherwise illegal.” Therefore, it should here be construed to include as “formal permission” to carry on the branch banking business, otherwise illegal without such permission.

(d) If the term “license” is not construed to encompass the concept here advanced, the term is entirely meaningless, as there is no place in the banking laws where a “license” is expressly provided for—at least there is no such instance which can possibly be governed by section 7-1-26.

Section 7-1-26 provides for a reasonable method of review for a decision of the Bank Commissioner. It specifies that “any person feeling aggrieved by the action, decision or ruling by the Bank Commissioner under this section may have the same reviewed by the State Board of Examiners whose decision shall be final.”¹

(e) As to the violations of law by banks, not acting pursuant to the Commissioner’s permits or orders regulating them, Section 7-1-23 makes it the duty of the Commissioner to report their actions to the county attorney of the county in which they are located, who shall institute proper proceedings for the enforcement of the law. The last paragraph of Section 7-3-6 speci-

¹The legislature apparently concurs in this analysis. Section 7-1-26 was the section amended in 1963 to provide expressly for judicial review of branch permits or licenses at the behest of applicants or protestants, ch. 7, Sec. 6, 1963 Session Laws.

fically makes violation of that section a misdemeanor, indicating that the legislature considered the police power of the state as being the agency through which this section would be enforced.

The statutory scheme of enforcement may be summarized as follows:

The Commissioner has discretion to regulate the banking business in the granting of charters and licenses or permits. His decisions in this area can be reviewed by the State Board of Examiners, another administrative body. Only when the Board acts outside its legislative grant of authority can its decisions be challenged, otherwise its decision is final. But if banks violate the laws when not acting pursuant to the Commissioner's regulation, the Bank Commissioner has a duty to report them, and the county attorney may institute the proper proceedings.

This scheme has adequate protections built into it to insure that no one's interest is infringed beyond the limit to which the legislature gave the Bank Commissioner the power to regulate those interests. But there is no place in this scheme for private judicial action to enforce alleged "rights," except possibly a court review of the Board of Examiner's decision to determine whether the Board acted pursuant to law.

Since this is a complete, self-contained system of enforcement, it negatives the existence of an additional private right of action — particularly where, as here,

defendant State Bank of Provo is acting pursuant to the authority granted by the Bank Commissioner pursuant to the statutory procedure.

In *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 330 P.2d 522 (1958), the Supreme Court of Oregon held that the Motor Carrier Act, *because it implied such a self-contained scheme of enforcement*, vested in the ICC the sole authority for enforcement, and plaintiff was held to have no standing to sue to seek private relief under the act. We contend that that situation is substantially parallel to this case, and that the result should be the same.

(3) The principle of *Restatement, Torts* § 710 is not applicable when defendant is operating under a permit from the proper regulating authority.

The situation in which the principle of Section 710 applies is a situation where the defendant has acted without securing the statutorily prescribed permit from regulatory authority. That situation is significantly different from the situation in the case at bar where defendant State Bank of Provo has only done that which the state regulatory authority has given it permission to do. There is no basis for allowing a third party to maintain a private action on the theory the Bank Commissioner has acted contrary to law in granting such permit. The statutory scheme is clear that the legislature intended the legal offices of the state and review by participants in the administrative procedure themselves to control the action of its administrative agencies.

Otherwise, the courts will be cluttered with litigation by third parties who took no part in the administrative proceedings, but who later seek to claim some "right" has been invaded by administrative action in which they voiced no interest. Similar procedure is set forth in section 54-7-16 Utah Code Annotated 1953, in dealing with orders of the Public Utilities Commission where only "applicants" or a "party to the proceeding" may seek judicial review.

CONCLUSION

In summary, as we have shown in discussing the interpretation of section 7-3-6, the pertinent provisions of that statute are designed to protect unit banks in cities outside Salt Lake City from invasion by larger city banks with branch systems, i.e. the defendant State Bank of Provo from the vast economic resources and competitive strength of institutions with branch systems such as plaintiff Walker Bank & Trust Company. This case, strangely enough, presents the converse situation. The second largest bank in the State of Utah with thirteen branches and resources in excess of \$240,000,000 and a member of a multi-state chain having nearly \$6,000,000,000 in deposits and some 447 banking houses located throughout the eleven Western states seeks here to turn the legislative shield designed to protect the smaller banks into a sword to cut off any attempt by a small unit bank to better meet its customers' banking needs in its own community. Instead of restricting the

monopolistic tendencies of large chain systems, plaintiff would have this court interpret the statute so as to strangle the competitive efforts of a small independent bank.

It is submitted that such an interpretation of the statute would do violence to the legislative language as well as to the legislative purpose in enacting its regulatory scheme of branch banking. The Supreme Court in *Union Trust Co. v. Simmons*, *supra*, struck down one dog in the manger. Plaintiff would here ask this court to sanction another.

Respectfully submitted,

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