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Walker Bank & Trust Co. v. Spencer C. Taylor and State Bank of Provo : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

**WALKER BANK & TRUST COM-
PANY, 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

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No. 9947

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court of
Salt Lake County

Honorable A. H. Ellett, Presiding

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Commissioner of the State of Utah,
and STATE BANK OF PROVO,
a Utah corporation,
Defendants-Appellants

No. 9947

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff for a declaratory judgment that the defendant, Bank Commissioner of the State of Utah, in authorizing the establishment by the defendant, State Bank of Provo, of a branch bank in the City of Provo, Utah, and the establishment of such branch bank, violated the laws of this state, and for an injunction against the operation of such branch bank.

DISPOSITION IN LOWER COURT

The case was tried to the court upon a stipulation of facts. From a judgment for plaintiff, defendants have appealed.

RELIEF SOUGHT ON APPEAL

The judgment of the trial court should be affirmed.

STATEMENT OF FACTS

The parties have stipulated the facts in this case (R. 7-41). The following is a summary of the material facts contained in the stipulation.

On October 15, 1962, the defendant, State Bank of Provo (hereinafter referred to as the "defendant bank"), applied to the State Bank Commissioner for permission to establish a branch bank in the City of Provo, Utah, which is a city of the second class (R. 9). In seeking to establish said branch and in establishing the same, the defendant bank did not take over an existing bank (R. 9).

On October 25, 1962, the Bank Commissioner, without notice of or formal hearing on said application, authorized the defendant bank to establish and conduct a branch bank in Provo (R. 9), and on December 20, 1962, subsequent to the commencement of this action, the defendant bank commenced to regularly transact a customary banking business at said branch (R. 10). Unless the trial court's injunction is sustained by this court, the defendant bank will continue to operate the branch bank (R. 11).

At the times referred to herein, the plaintiff was regularly conducting a customary banking business at its branch banking house in Provo (R. 10), which it had acquired by a statutory merger of the Farmers' and Merchants' Bank, a state bank, with and into plaintiff

as the resulting bank (R. 8). Prior to and until said merger, the Farmers' and Merchants' Bank was regularly transacting a customary banking business in Provo at said banking house acquired by plaintiff as a result of said merger (R. 8). Also, at the times referred to herein, the First Security Bank of Utah, N. A., was regularly transacting a customary banking business at its branch bank located in Provo (R. 10).

ARGUMENT

POINT 1.

SECTION 7-3-6, UTAH CODE ANNOTATED 1953, IN CLEAR AND UNAMBIGUOUS LANGUAGE PROSCRIBED THE ESTABLISHMENT BY THE DEFENDANT BANK OF SAID BRANCH BANK IN THE CITY OF PROVO, UTAH.

Contrary to defendants' initial statement under Point 1 of their argument, plaintiff's principal point argued in the trial court and upon which it relies to sustain that court's judgment, is that Section 7-3-6 prohibits the operation of branches in any city not of the first class where a bank is already located, except only in the case where a branch results from a bank taking over an existing bank. Subject to exceptions not involved here, Section 7-3-6 is the same as originally enacted by the legislature in 1933. Said section provides in part, 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. . . .”

Provo is not a city of the first class. At the times involved herein, the defendant bank was, and now is, located in Provo, regularly transacting a customary banking business in said city (R. 8). In such cases, the statute unequivocally provides that “no branch shall be established . . . unless the bank seeking to establish such branch shall take over an existing bank,” and, Section 7-3-6.3, enacted in 1953, provides that from and after the effective date thereof “. . . no branch shall be established or authorized to conduct a banking business except as hereinbefore in Section 7-3-6 *expressly* provided.” (Italics added)

The location of the defendant bank in Provo operated under the statute to prohibit it and any other bank from establishing a branch bank in Provo, except only by taking over an existing bank. That such is the meaning and effect of the statute was declared by this court in *Union Trust Co. v. Simmons*, (1949) 116 Utah 422, 211 P.2d 190. In this case, Union Trust Company filed with the Bank Commissioner an application to establish a branch bank in Ogden, Utah. The Bank Commissioner refused to consider said application because Union Trust Company had not obtained the consent of the existing banks in Ogden as required by Section 7-3-6, Utah Code Annotated 1943, which, in the same language as the present statute, prohibited the establishment of a branch

bank in a city not of the first class, but contained alternate provisos reading “unless the bank seeking to establish such branch shall take over an existing bank *or obtain the consent of all banks therein located. . . .*” (Italics added) The Union Trust Company petitioned the court for an alternative writ of mandamus to compel the Bank Commissioner to act upon its application to establish a branch bank in Ogden.

The issues before the court in the Union Trust Company case were whether the consent proviso contained in said section was unconstitutional and, if so, whether the consent proviso was severable from the alternative proviso with respect to taking over an existing bank. The court held that the consent proviso in said section was an unconstitutional delegation of legislative power, but that the consent proviso was severable. In reaching its decision as to the severability of the consent proviso, the court considered and resolved the question as to the meaning and effect to be given the statute upon the consent proviso being excluded therefrom. On this subject, the court said:

“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. Broken down, they are:

- (1) Take over an existing bank, or
- (2) Secure the consent of the existing banks.

The second method is unconstitutional for the reasons heretofore outlined.

* * *

There remains then *one method* whereby branch banks may be established, and that by taking over an existing bank. Petitioner has not complied with any of the requirements for establishment of a branch bank under this method; therefore, the petition for a writ of mandamus must be and is denied." (Italics added)

In the concurring opinion, it is stated:

"Under these circumstances we must construe the statute the same as though the unconstitutional provision had never been inserted. If we delete this provision then *it is clear and unambiguous that before a branch bank can be established in the cities in question an existing bank must be taken over.*" (Italics added)

WHEN THE LEGISLATIVE INTENT IS MANIFESTED BY CLEAR AND UNAMBIGUOUS LANGUAGE, THERE IS NO OCCASION FOR THE COURT TO RESORT TO THE RULES OF STATUTORY INTERPRETATION.

In order to persuade the court to reverse the trial court's decision giving effect to the plain and clear meaning of Section 7-3-6, the essence of defendants' argument is to the effect that the enactment of said section by the 1933 Legislature created a special antitrust act having as its purpose "... to protect unit banks in cities outside Salt Lake City from invasion by larger city banks ..." (defendants' Brief, p. 47). Consonant with this nebulous theory as to the legislative objective in the passage of Section 7-3-6, defendants would persuade the court (defendants' Brief, pp. 37-38) to conclude:

"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."

and to rewrite the pertinent part of Section 7-3-6 to read (defendants' proposed change indicated by brackets and italics) :

"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 [*or has its head office located in such city or town*]."

To so distort the language of Section 7-3-6 and the intention of the legislature expressed therein would abrogate the basic doctrine followed by the trial court and laid down in numerous decisions by this and other courts throughout the United States, which uniformly hold that when the intent of the legislature has been expressed in clear and unambiguous language, it is the duty of the courts to give effect to the statute in accordance with the language employed therein and in such cases here is no occasion to resort to rules in aid of statutory construction or search for the statute's meaning beyond the statute itself. This is but a corollary to the basic concept of our government that the courts have no constitutional authority to legislate. 82 C.J.S., Statutes, Sec. 322(2), pp. 577 et seq.; 50 Am. Jur., Statutes,

Sec. 225, pp. 204-209, citing numerous cases, states the doctrine as follows:

“A statute is not open to construction as a matter of course. It is open only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity. In accordance with these rules, frequent references may be found in judicial opinions to the clear, definite, distinct, evident, exact, explicit, express, obvious, plain, positive, simple, unambiguous, unequivocal, or unmistakable language of the statutes under consideration. However, where the language of a statute is ambiguous, and there is doubt as to the meaning intended to be expressed thereby, resort may be had to various rules and sources, hereinafter considered, for determining such meaning.”

In the case of *In Re Stevens Estate*, (1942) 102 Utah 255, 130 P.2d 85, a section of the probate code was involved which provided that "if the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the court . . ." It was contended in this case that the claim of a corporate creditor of the estate required the approval of the court under said statute, because the administrator of the estate was the president of the claimant corporation and owner of one-fourth of its stock. In answer to said contention, the court held:

"To this view we cannot subscribe. The wording of the statute is plain and unambiguous. Here the administrator as Frank J. Stevens, personally makes no claim as a 'creditor of the decedent'. It is not 'his' claim. It is the claim of a corporation of which he is a stockholder. This court will not read into this statute by judicial legislation the words 'or has some interest, direct or indirect.' The language of the statute is plain and its meaning is clear, in which case there is no occasion to search for its meaning beyond the statute itself. See in accord, *Salt Lake Union Stock Yards v. State Tax Commission*, 93 Utah 166, 71 P.2d 538; *Riches v. Hadlock*, 80 Utah 265, 15 P.2d 283, rehearing denied 80 Utah 298, 15 P.2d 295; *Evans v. Reiser*, 78 Utah 253, 2 P.2d 615, rehearing denied 78 Utah 307, 3 P.2d 253."

Mountain States Tel. & Tel. Co. v. Public Service Commission, (1945) 107 Utah 502, 155 P.2d 184, involved the provision of a statute relating to a stay or suspen-

sion of an order or decision of the Public Service Commission, and the Supreme Court said:

“We therefore address ourselves to its meaning, keeping in mind one of the cardinal rules of statutory construction, viz., that the interpretation must be based on the language used, and that the court has no power to rewrite a statute to make it conform to an intention not expressed. ‘The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. . . . If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.’ 2 Lewis’ Sutherland Statutory Construction (2nd Ed.) p. 701.”

With respect to a sales tax statute, this court said in *Salt Lake Union Stock Yards v. State Tax Commission*, (1937) 93 Utah 166, 71 P.2d 538:

“We are required to give the words used their natural and ordinary meaning. The rule is well expressed in 25 R.C.L. 962, as follows: ‘When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.’ ”

In *Evans v. Reiser*, (1931) 78 Utah 253, 2 P.2d 615, the controlling statute provided that “any ballot marked by the voter in any other manner than is author-

ized in this chapter shall be rejected." As pointed out in the opinion, it was contended:

"It is also earnestly urged on behalf of the respondent that the spirit and purpose of our election laws will not permit of following the letter thereof, that our statute should be given a liberal construction, so that ballots will not be rejected for slight or trivial causes.

* * *

"It is further urged that an adherence to the letter of the law will result in the rejection of numerous ballots, and the will of a majority of the voters may not be given effect."

In answer to said contentions, the court held:

"The provisions of our statute which directs that 'any ballot marked by the voter in any other manner than as authorized in this chapter shall be rejected' is plain, certain, and definite. It is not in conflict with or modified by any other provisions of the election law, and it is mandatory. Under such circumstances there is no room for construction, and it is our plain duty to give it effect. As illustrative of the duty of the courts under such circumstances, we quote the following language from Black on Interpretation of Laws, Hornbook Series (2nd Ed.) pp. 51-53:

'Where the language of a statute is plain and unambiguous, and conveys a definite and sensible meaning, it is the duty of the court to enforce it according to the obvious meaning of the words employed, without attempting to change it by adopting a different construction, based upon some supposed policy of the legislature with reference to the subject matter, or upon considerations of injustice or inconvenience resulting from the literal interpretation of the statute, or even

to give the law that efficiency and due effect which it will lack when taken literally as it stands.

‘In the case supposed, where the language of the statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they have doubts as to the wisdom or expediency of the enactment. In such a case, these are not pertinent inquiries for the judicial tribunals. If there be any unwisdom in the law, it is for the legislature to remedy it. For the courts the only rule is “*ita lex scripta est.*” Neither have the judges any authority, in such a case, to put upon the statute a construction different from its natural and obvious meaning in consideration of the consequences which may result from it. Any evil consequences to the public which may flow from the statute may be considered when its meaning is doubtful, in order to give it a more beneficial construction, but when the legislative intent is clearly expressed, such consequences can not at all be considered.’

“All of the text-writers and the adjudicated cases dealing with the subject recognize the general rule as stated by the able author from whose work we have just quoted.”

THE CLEAR MEANING OF THE STATUTE IS CONSISTENT WITH AND CONFIRMED BY ITS LEGISLATIVE HISTORY AND THE PUBLIC POLICY WITH RESPECT TO BRANCH BANKING.

In view of the doctrine established by the authorities hereinabove referred to, this phase of plaintiffs’ argument under Point 1 is pertinent only to rebut the inference that plaintiff may concur with defendants’ views as to the purpose of the statute by failing to respond thereto. It is in this respect, therefore, that we undertake

to demonstrate that defendants' argument relating to the legislative purpose of Section 7-3-6 is not supported by the legislative history of said section of the public policy reflected in the enactment thereof.

As might be supposed from defendants' selected quotations from the Congressional Record, there is an abundance of available literature containing a variety of views on branch banking, both by the advocates and opponents thereof. In the final analyses, however, it is the province of the legislature to resolve this controversial subject by prescribing the conditions and limitations on branch banking. The Utah Legislature has done so, and with respect to the issue in this case, has expressly prohibited the establishment of a branch bank ". . . in any city or town in which is located a bank. . ." This clear manifestation of legislative intent is, as hereinafter shown, consistent with the legislative history of Section 7-3-6 and the public policy underlying the legislative enactments of this and other states relating to branch banking.

The legislative prohibition contained in Section 7-3-6 with respect to the establishment of branch banks in cities and towns other than Salt Lake City, had its genesis in the Branch Banking Act of 1911 (Laws of Utah 1911, Chapter 25, Section 32), which prohibited the establishment of branch banks and required that all branch banks or offices then in operation throughout the state be closed and discontinued within one year from the effective date of the Act. This statewide prohibition against branch banking continued in effect until 1933

(Section 7-3-6, Revised Statutes of Utah, 1933) when said section was amended by Chapter 6, Sec. 1, Laws of Utah, 1933. The effect and purpose of said amendment were simply to relax the rigid statewide prohibition against branch banking by permitting the establishment of branch banks in Salt Lake City, but the amendment, with the provisos hereinbefore mentioned, continued in effect the restriction against the establishment of branches in cities or towns other than Salt Lake City, where a bank is already located. The pertinent provisions of Section 7-3-6 of the 1953 code, as amended, are identical to those contained in the 1933 Act. The proviso with respect to taking over an existing bank recognizes and resolves the question with respect to the status of a bank in a city or town other than in Salt Lake City, which consummates a merger or consolidation with another bank.

In 1953, the legislature amended Section 7-3-6 so as to permit the establishment of a branch bank not only in Salt Lake City, but also within unincorporated areas of Salt Lake County, but retained the prohibition against establishing branches in cities other than Salt Lake City. The same legislature recognized that branch banks may have been established and were being operated without statutory authority (Section 7-3-6.1) and validated the same (Section 7-3-6.2). In so doing, the legislature reaffirmed its policy with respect to branch banking in providing under Section 7-3-6.3 that no branch should be established or authorized to conduct a banking business except as expressly provided by Section 7-3-6.

The branch banking statutes of the various states reflect a public policy of either prohibiting or placing substantial restrictions upon the establishment of branch banks. 7 Am. Jur., Banks, Sec. 23, pp. 39-40. Patton's Digest Supplement, Banks and Banking, Appendix, Section 11, pp. 10-38, which contains a current digest of state banking statutes affecting the establishment of branches, shows that states having large populations and metropolitan areas, such as Florida, Illinois, Minnesota, Oklahoma, Texas and West Virginia, nevertheless prohibit any branch banking. National banks are subject to the same restrictions in the establishment of branches as are imposed by the laws of the state in which they are located with respect to state banks. 12 U.S.C.A., Sec. 36(c).

The branch banking prohibition contained in the Branch Banking Act of 1911, the predecessor of Section 7-3-6 of the 1953 Code, and as carried forward in said section with respect to cities and towns other than Salt Lake City, reflects the prevailing public policy declared by the courts with respect to this subject, even in states in which the statutes are silent regarding the establishment of branch banks. In an annotation on branch banks, 50 A.L.R. 1340, at p. 1342, it is stated:

“The view has been taken that public policy does not favor the establishment of branches by state banks, and that they should not be permitted to establish branches in the absence of express statutory authority, banks standing on a different basis in this regard from private corporations generally. Thus, in *Morehead Bkg. Co. v. Tate* (1898) 122 N.C. 313, 30 S.E. 341, the court says

that it would not be willing to sanction the practice of establishing branch banks or agencies to do a banking business, unless they are expressly authorized by legislative authority obtained in the charter; that the matter of allowing banks to establish branch banks or agencies is at least of doubtful, if not bad, policy.

“And it is held in *Bruner v. Citizens’ Bank* (1909) 134 Ky. 283, 120 S.W. 345, that, in the absence of express legislative authority, the power of a state bank to establish a branch does not follow by implication as a reasonable or necessary incident to the right to do a banking business, and that such an institution has no right to establish a branch bank.”

POINT 2.

SECTION 7-3-6, UTAH CODE ANNOTATED 1953, PROHIBITS THE ESTABLISHMENT OF A BRANCH BANK IN A CITY OF THE SECOND CLASS WHERE THERE IS ALREADY LOCATED ONE OR MORE BRANCH BANKS.

The trial court based its decision upon Point 1 of our argument (R. 43). In so doing it followed the established policy of this and other courts of enforcing the law in accordance with the legislative intent clearly manifested by the language of the statute in question. With respect to the question of where a bank is located and transacting business within the meaning of Section 7-3-6, the trial court expressed the opinion that “I think this Commissioner (State Bank Commissioner) has erroneously ruled for six years, where he said there is a difference between a branch and a bank” (R. 43). As we

will endeavor to demonstrate, the trial court's opinion in this respect, even though the decision of the court was not based thereon, is supported by sound principals of law and statutory construction.

The two premises on which defendants base their argument under this point are: First, that plaintiff is not transacting a banking business at its Provo branch, and second, that a bank is a separate and distinct institution from its branch.

With respect to the first premise, defendants state at p. 6 of their Brief, "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." This argument is most readily disposed of by the stipulation of facts which states "the plaintiff was regularly transacting a customary banking business at its branch in said City of Provo; . . ." (R. 10).

With respect to said second premise, defendants rely upon and quote from the Attorney General's opinion, as follows: "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'." However, further on in defendants' Brief at p. 18 thereof, the defendants recognize the infirmity of the proposition that a bank is a separate institution from a branch, wherein defendants state "We do not contend that plaintiff's Provo branch is a differ-

ent and separate entity in Provo." The last statement is correct and sustained by the authorities hereinafter cited.

Defendants also rely upon the fact that Section 7-3-6 in several instances uses the term "bank" as distinguished from the term "branch bank." An examination of the language of said section discloses that the distinction therein made between banks and branch banks has no significance in resolving the question of where a banking institution is located and transacting business. When the legislature in 1933 relaxed its statewide prohibition against a bank having more than a single banking house in which to transact business, it was required to differentiate between the single banking house to which a bank had theretofore been restricted and the additional banking house in which a bank could transact business if authorized under the 1933 amendment.

However, that portion of the statute referring to a city or town in which is located a bank transacting a banking business is directed at the place where a banking corporation transacts business. As concurred in by defendants, a bank is and is required by the laws of this state to be, a single corporate entity. (Section 7-3-5, Utah Code Annotated 1953). Branch banks are not regarded as separate entities. (7 Am. Jur., Banks, Sec. 25, p. 41). Traditionally, the term "bank" connotes the place at which a banking business is transacted. (7 Am. Jur., Banks, Sec. 2, p. 24). The business of a bank must be conducted only at a banking house established pursuant to law. (Section 7-3-6).

It would be inconsistent with the foregoing and in conflict with well settled law applicable generally to a

corporate entity, to hold that a banking corporation regularly transacting a customary banking business at its authorized banking house in Provo is nevertheless not located there, but its situs is only at such banking house as has been designated as its head office. To give Section 7-3-6 the effect urged by defendants would have the grotesque result that First Security Bank of Utah, N.A., which is the largest bank in Utah and transacts a larger volume of business in Salt Lake County than in any other county in this state, is nevertheless not located in Salt Lake County because its head office is in Ogden.

In order to justify the establishment of the branch in question and accommodate the position taken by defendants under Points 1 and 2 of their argument, the court would be required to judicially amend the pertinent provisions of Section 7-3-6 so as to read (defendants' proposed amendments indicated by brackets and italics), as follows:

"The business of every bank shall be conducted only at its [*main*] banking house. . . .

* * *

"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 [*the head office of*] 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 has its head office located in such city or town*]."

To so judicially amend Section 7-3-6 would have an effect which the legislature obviously did not intend:

First Security Bank of Utah, N.A., the largest bank in the State of Utah, could saturate Ogden City with branches because its head office is located in that city. Also assume for illustration, that two or more banks having their head offices in different cities or towns, effect a merger or consolidation. Nothing in the statutes prevent the designation of the head office of the resulting banking corporation in any town in which one of the constituent banks is located. According to defendants' interpretation of the statute, the legislature delegated to the participants in such merger or consolidation the power to determine in which of such cities it could establish branch banks without statutory restriction, because, as argued by defendants, the controlling factor in the establishment of branch banks is the place designated as the head office of a bank.

THE ADMISTRATIVE INTERPRETATION RELIED UPON
BY DEFENDANTS AFFORDS NO AID IN THE CONSTRUCTION OF SECTION 7-3-6.

In support of Point 1 of defendants' argument, defendants cite cases in which the courts as an aid in the construction of an ambiguous statute, have given weight to contemporaneous administrative construction of such statute where such construction has been placed thereon by the public official charged with its administration and has been consistent, observed and acted upon for a long period of time. 82 C.J.S., Statutes, Sec. 359, p. 761, et seq. In this connection it should be pointed out, that the Bank Commissioner, prior to the authorization of the branch bank in question, had never construed Section 7-3-6 as authorizing the establishment of a branch bank

in a case such as that before this court where, as covered by Point 1 of our argument, the legislature has by unambiguous language expressly prohibited the establishment of branch banks.

In only one instance, approximately 28 years after the enactment of Section 7-3-6 in 1933, has the Bank Commissioner by official action taken the position under said section that a bank has no situs in a city in which it has a branch bank regularly transacting a customary banking business. The instance referred to is when the Bank Commissioner on November 9, 1961 authorized the establishment of a branch in Tooele City where a branch bank of First Security Bank of Utah, N.A. was transacting a banking business (R. 12). In such a case, the courts hold that an administrative interpretation of a statute is not entitled to any weight. In *Allen v. Commissioner of Corporations and Taxation*, 272 Mass. 502, 172 N.E. 643, 70 A.L.R. 1299, it was urged that the departmental construction of an income tax statute was entitled to weight in determining its meaning, and the court held:

“The departmental construction of St. 1928, c. 217, § 2, the statute at present governing the subject, has not been long continued, and the rule as to weight to be attributed to such construction when long continued and sanctioned by the acquiescence of the Legislature, illustrated by *Burrage v. County of Briston*, 210 Mass. 299, 301, 96 N.E. 719, is not applicable. Moreover, that rule cannot be invoked against the plain words of the statute.”

In *Land O'Lakes Creameries, Inc. v. Commodity Credit Corp.* (8th Circuit, 1959), 265 F.2d 163, the court states:

"It is contended by Land O'Lakes that the promulgation of Department Announcement 112 was tantamount to an administrative interpretation of the Agricultural Act of 1949 which is entitled to controlling weight. The argument is not convincing. The rule cannot be here invoked because the statute is not ambiguous, nor has the so-called interpretation been continuous nor contemporaneous with the enactment of the statute. In any event, the interpretation must be reasonable, and it cannot confer rights inconsistent with the express terms of the statute. At best the administrative interpretation is not controlling on the courts. *Woods v. Benson Hotel Corp.*, 8 Cir., 177 F.2d 543."

When the meaning of the statute is ascertainable from the language expressed therein, there is no occasion to resort to the administrative interpretation which may have been placed thereon by an administrative official. An administrative interpretation contrary to the legislative intent must be set aside as a violation of the statute. A case in point is *Utah Hotel Company v. Industrial Commission* (1944), 107 Utah 24, 151 P.2d 467, which involved a review of an order of the Industrial Commission holding the petitioner liable under certain provisions of the Employment Security Act. The opinion of the court, citing Alvord's Article in 40 Columbia Law Review 252, reads, in part, as follows:

"Alvord states that the courts will not and should not substitute their opinions for that of the administrative officials in determining the policy of legislative regulations. On the other

hand, where an interpretive regulation is involved, the ultimate question before the court is: What does the statute mean?

* * *

“The various sections of Title 42, U.C.A. 1943 imposed liability upon the hotel company to make a contribution for the fund. This liability was created by statute. It existed even though the tribunal charged with the administration of the Act erroneously thought that Act did not apply in the case of ‘name bands.’ Such an erroneous construction could not have the effect of amending the statute or of cancelling the statutory liability of the employer. To hold otherwise would permit the administrative tribunal to, in effect, amend a statute by the adoption of erroneous interpretative regulation. Construction is not legislative and should not be given that effect.”

Defendants cite the instance when the Comptroller of the Currency, who is not entrusted with the administration of Section 7-3-6, approved an application of the First National Bank of Logan to establish a branch bank in the City of Logan in reliance upon the action of the Bank Commissioner in this case (R. 12). The facts are similar to those in the present case and an action has been filed by plaintiff against the Comptroller of the Currency and the First National Bank of Logan (Civil No. C-137-63), contesting the validity of the establishment of such branch in Logan. In view of the branch banking statute applicable to national banks (12 U.S.C.A. Sec. 36(c), the decision of this court in this case will be determinative of said Federal suit.

Finally, defendants argue that the 1963 amendment of Section 7-3-6 which retained the provisions thereof

under consideration in this case, supports the Bank Commissioner's interpretation in the single instance above referred to. In this respect, 82 C.J.S., Statutes, Sec. 370(2) at p. 857, states :

"At best the reenactment of statutes is a nebulous foundation for statutory construction, since it is merely one factor in the total effort to give fair meaning to language, and the rule that administrative construction receives legislative approval by reenactment of a statutory provision without material change is no more than an aid in statutory construction, useful at times in resolving statutory ambiguities."

Point 2 of our argument is consistent with Section 7-6-7, Utah Code Annotated 1953. This court has declared that in cities other than Salt Lake City there is only "one method whereby branch banks may be established, and that by taking over an existing bank." *Union Trust Co. v. Simmons* (supra). Consistent with the proviso referred to by the court and resolving the question as to the status, rights and powers of the resulting bank with respect to a branch bank established through a merger or consolidation, Section 7-6-7 provides :

"7-6-7. Status of resulting state bank — Rights, powers, duties—Reference in writings. —A. The resulting state bank shall be considered the same business and corporate entity as each constituent bank with all the rights, powers, and duties of each constituent bank except as limited by the charter and by-laws of the resulting state bank."

Contrary to defendants' contention, the rights acquired by the resulting corporation are not limited to

contractual rights. 15 Fletcher Cyclopedia Corporations (1961 Revision), Sec. 7089, p. 118. Sections 16-10-100 and 16-10-101, Utah Code Annotated 1953, are further illustrations of statutory provisions which continue the corporate entity in existence for various purposes, although in a general sense the corporate life has expired.

POINT 3.

PLAINTIFF HAS A RIGHT OF ACTION PREDICATED UPON DEFENDANTS' VIOLATION OF SECTION 7-3-6, UTAH CODE ANNOTATED 1953.

The trial court held that the Bank Commissioner's authorization for the establishment of said branch bank and the establishment thereof by the defendant bank were in violation of Section 7-3-6. Defendants seek to nullify the judgment of the trial court on the grounds that (1) no statute expressly authorizes a right of action for such violation and (2) the administrative review provided for under Section 7-1-26, Utah Code Annotated 1953, with respect to action taken by the Bank Commissioner in the exercise of his discretionary powers, coupled with the penal enforcement provided for under Section 7-1-23, Utah Code Annotated 1953, provide the exclusive and an adequate remedy for such violation.

The argument upon even a cursory analysis refutes itself: The issue in this case is not whether the Bank Commissioner abused the discretionary power vested in him under the statute. Moreover, the legislature could not reasonably expect that pursuant to Section 7-1-23, the Bank Commissioner would inform the County At-

torney that the defendant bank had violated the law in the establishment of said branch bank, when the Bank Commissioner himself authorized the defendant to establish the branch.

In a variety of cases, including decisions of this and other courts involving branch banking, the courts have recognized that a private right of action may be predicated upon the violation of a statute prohibiting the doing of an act, although no such cause of action is expressly provided by such statute. The rule is recognized by the Restatement cited by defendants (Restatement, Torts, Sec. 710) and is illustrated by the cases hereinafter referred to.

Plaintiff is not seeking a judicial review of an administrative decision of the Bank Commissioner made within the orbit of the discretionary powers vested in him by the legislature. It is plaintiff's contention and the trial court held that the establishment and operation of said branch bank violated the statute in question. As a remedy for the enforcement of its right of action, plaintiff has invoked the Declaratory Judgment Act (Chapter 33, Title 78, Utah Code Annotated 1953) and sought injunctive relief on the basis that the defendant will continue its violation of the law unless restrained from so doing (R. 11). The Declaratory Judgment Act (Section 78-33-2) expressly provides for judicial relief in such cases:

“Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may

have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

In *Union Trust Co. v. Simmons* (supra), this court recognized a bank's right to seek judicial review of the Bank Commissioner's administrative decision in refusing to consider an application to establish a branch bank, even though the Bank Commissioner's action was in accordance with the consent proviso of Section 7-3-6, held unconstitutional, and, as the court finally resolved the issues, the petitioner would not have been entitled to relief irrespective of the constitutionality of said proviso.

The right to invoke the judicial power to review the application of the law by an administrative officer has been recognized in other branch banking cases. *National Bank of Detroit v. Wayne Oakland Bank* (6th Cir., 1958), 252 F.2d 537, cert. denied 1958, 358 U.S. 830, 79 S. Ct. 50, 3 L. Ed. 2d 69; *Commercial State Bank of Roseville v. Gidney* (D.C.D.C. 1959), 174 F. Supp. 770, affd. 1960, 108 U.S. Ap. D.C. 37, 278 F.2d 871; *Suburban Trust Company v. National Bank of Westfield* (D.C.N.J. 1962), 211 F. Supp. 694.

In the *Suburban Trust Company* case (supra) the plaintiff, a state bank, had been authorized by the state Bank Commissioner to establish a branch banking office in the Borough of Mountainside, New Jersey, but no branch had been constructed or placed in operation under such authorization. Before plaintiff's branch was constructed and placed in operation, the defendant, a na-

tional bank, pursuant to permission obtained from the Comptroller of the Currency established and opened a branch in the same Borough. Plaintiff sought injunctive relief against the operation of defendant's branch, and a declaratory judgment that such operation was improper and that the Comptroller's approval thereof invalid on the ground that the state law, which controls the establishment of branches by national banks, prohibited such branch. A dismissal of the action was sought by the defendant on the ground that plaintiff lacked standing to sue. Defendant took the position that Congress had entrusted the administration of the National Banking Act to the Comptroller and his determinations in such administration were immune from collateral attack by third parties in the absence of fraud. In answer to this argument, the court said:

"We agree with defendant that the courts may not review discretionary action of the Comptroller. *Smith v. Witherow*, *supra*. However, it is not true that he may act contrary to the law as the complaints in the cases at bar assert, and not have such action reviewable by the courts."

Further on in the opinion the court states:

"Here the plaintiffs are proceeding against National, not against the Comptroller upon the theory that National may not operate its branch, despite the Comptroller's approval. Although the situation here differs from that in *Commercial State Bank of Roseville v. Gidney*, *supra*, in which the plaintiff State bank sought to enjoin the Comptroller's (not already issued) approval of a National bank's branch, nevertheless the court there held (p. 780 of 174 F. Supp.) that because

'any new branch in (the municipality) would have to draw its business from the surrounding communities which these plaintiffs already service,' the plaintiffs had standing to prosecute the action. In the present instance the plaintiff bank is not actually in operation, but it has sufficient property interest in the certificate of authorization granted to it, to entitle it to seek relief in this Court."

In *Stark v. Wickard*, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733, Justice Reed Stark speaking for the Supreme Court of the United States states the principle as follows:

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf *United States v. Morgan*, 307 U.S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S. Ct. 795."

There is a significant line of cases on this point involving Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78(j)), implemented by Regulation X-10B-5 of the Securities Exchange Commission, in which the Federal courts have held that the failure of the said regulatory statute to provide for a civil right of action does not preclude such an action nor confine

its enforcement to the Securities Exchange Commission. In *Fratt v. Robinson* (9 Cir., 1959), 203 F.2d 627, an action was brought under said section and regulation implementing the same, which prohibits any manipulative or deceptive device or contrivance in connection with the purchase or sale of securities by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange. Speaking to a motion to dismiss on the ground that there is no provision in the Securities Exchange Act of 1934 for a civil cause of action for damages in the United States District Court under said Statute, the court said (p. 631):

“One of the grounds upon which the motions to dismiss were based, was that there is no provision in the Securities Exchange Act of 1934 for a civil cause of action for damages in the United States District Court under § 10. That there is no such express provision is admitted. While the district court specifically denied the motion to dismiss on this ground, appellees here claim that the dismissal should be affirmed for lack of jurisdiction, and the point was briefed and orally argued by the parties.

“It is argued by appellees that Congress intended to confine any enforcement of benefits secured to private parties by the section, to action by the Securities and Exchange Commission by way of injunction or criminal prosecution. It is true that there are several sections of the Securities Exchange Act specifically making a civil cause of action available, and it is argued by application of the rule ‘expressio unius est exclusio alterius’ that no civil remedy exists where not expressly provided for.

“However, the weight of authority and the best reasoning, as we see it, bring us to the conclusion that a civil cause of action may be brought to enforce § 10 as implemented by Securities Exchange Commission Regulation X-10B-5, C.F.R. Section 240.10b-5.”

In concluding their argument with respect to this point, defendants contend that Sections 7-1-26 and 7-1-23, Utah Code Annotated 1953, provide a “complete, self-contained system of enforcement” for violation of the banking laws, which “negatives the existance of an additional private right of action.”

Section 7-1-26 contained under the chapter dealing with the organization and functions of the State Banking Department, vests in the Bank Commissioner “. . . discretionary power in the approval of articles of incorporation of institutions subject to the supervision of the Banking Department and applications for licenses to transact in this state any business subject to such supervision . . .” The section further provides the basis upon which the Bank Commissioner may refuse his approval in such cases, and then states “any person feeling aggrieved by the action, decision or ruling of the Bank Commissioner *under this section* may have the same reviewed by the State Board of Examiners, whose decision shall be final.” (Emphasis added) In this connection Section 7-1-27 supplements the discretionary power of the Bank Commissioner and indicates the scope thereof under Section 7-1-26, said Section 7-1-27 providing that “The bank commissioner may for cause at any time revoke the certificate of approval and authorization of any foreign

corporation authorized to transact any business in this state and subject to the supervision of the banking department."

Section 7-1-26 means in substance what it states: that the Bank Commissioner is vested with discretionary power in authorizing the establishment of domestic institutions subject to the supervision of the Banking Department and in authorizing foreign corporations to transact in this state any business subject to such supervision; and a person aggrieved by the Bank Commissioner's refusal to grant such authority may have the same reviewed by the State Board of Examiners. In this connection it should be pointed out that Section 7-1-26, prior to its amendment in 1963, provided no time limitation within which such review must be sought and prescribed no notice, procedure or hearing for such review. Moreover, the section makes no mention of branch banks which, within the limitations provided in Section 7-3-6, may be established with the consent of the Bank Commissioner and approval of the Governor without notice or hearing.

If defendants' proposition with respect to the effect of Sections 7-1-26 and 7-1-23 were sustained, it would mean that the Bank Commissioner with the approval of the Governor could violate the Branch Banking Act with absolute immunity from judicial review. An application for a branch bank could be filed, approved and a branch bank established in a single day, without notice or hearing, and according to defendants, the sole remedy available if the law were violated in such case, is that provided for under Section 7-1-23 which reads:

"7-1-23. Commissioner to notify county attorney of violations.—It shall be the duty of the bank commissioner to inform the county attorney of the county in which the bank or other institution is located of any violation of any of the provisions of law which constitutes a misdemeanor or felony by any officer, director or employee of any institution under the supervision of the banking department which shall come to his notice, and upon receipt of such information the county attorney shall institute proceedings to enforce the provisions of law."

It is submitted that this proposition advanced by defendants is not only contrary to the law enunciated in the authorities hereinabove cited, but violates the rudimentary requirements of due process. In this connection it is interesting to note that two of the three members constituting the Board of Examiners, which according to defendants would have the final decision in this case, are the Governor who approved the action of the Bank Commissioner, and the Attorney General under whose advice he acted and who has the duty to defend his official acts.

CONCLUSION

It is submitted that the judgment of the trial court should be affirmed because the establishment of the branch bank by the defendant bank in Provo was in violation of the law, for which plaintiff has a right of action and has invoked a proper remedy to enforce the same.

Respectfully submitted,

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