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# Walker Bank & Trust Co. v. Spencer C. Taylor and State Bank of Provo : Appellants' Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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UN THE SUPREME COURT

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of the  
STATE OF UTAH

APR 13 1964

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' PETITION FOR  
REHEARING AND BRIEF IN SUPPORT  
THEREOF

Appeal from the judgment of the Third District Court of  
Salt Lake County  
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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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Walker Bank & Trust Company,  
a Utah corporation,

*Plaintiff-Respondent,*

v.

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

*Defendants-Appellants.*

No.  
9947

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PETITION FOR REHEARING AND BRIEF  
IN SUPPORT THEREOF

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Defendants-appellants respectfully move the court, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, to reconsider its opinion in this case, grant a rehearing, and, upon said reconsideration and rehearing, to vacate its prior decision, reverse the judgment of the District Court of Salt Lake County, and remit the case with directions to dismiss the action with prejudice.

The decision should be reconsidered and a rehearing granted for the following reasons:

1. In construing the language of 7-3-6 Utah Code Annotated 1953, the court overlooked the rule of statutory construction prescribed in 68-3-6 Utah Code Annotated 1953.

2. The spirit of the statute should prevail over its letter whether or not the letter leads to an "absurd" result.

3. Applying the holding of the court to specific fact situations will lead to absurd results.

4. The result reached by the court raises serious questions as to the constitutionality of the branch banking statute under both the State and Federal Constitutions.

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# BRIEF OF DEFENDANTS-APPELLANTS IN SUPPORT OF PETITION FOR REHEARING

## PRELIMINARY STATEMENT

This was a declaratory judgment action brought by Walker Bank and Trust Company for construction of 7-3-6 Utah Code Annotated 1953, particularly insofar as it governs establishment of branch banks in cities and towns other than Salt Lake City. The trial court and this court held that 7-3-6 Utah Code Annotated 1953 prohibits a unit bank in such a city from having a branch in the city in which it is located, even though there may be no other banks or branches there, and even though the Bank Commissioner has found that "the public convenience and advantage will be subserved by such a branch."

## ARGUMENT

### I.

IN CONSTRUING THE LANGUAGE OF 7-3-6 UTAH CODE ANNOTATED 1953 THE COURT OVERLOOKED THE RULE OF STATUTORY CONSTRUCTION PRESCRIBED IN 68-3-6 UTAH CODE ANNOTATED 1953.

In its decision this court looked generally at the history of branch banking, noting that it had been pro-

hibited by Utah law between 1911 and 1933, but failed to analyze the meaning of 7-3-6 as of its first enactment (Chapter 6, Laws of Utah 1933); and a construction of the original statute was necessary because the pertinent part of present 7-3-6 Utah Code Annotated 1953 contains language identical with that in the original act. The court is required therefore, to apply 68-3-6 Utah Code Annotated 1953:

“The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment.”

The 7-3-6 enacted by Chapter 6, Laws of Utah 1933, contained the following language:

“ \* \* \* 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; \* \* \*” (Emphasis added.)

The 1933 Legislature could not have meant that a unit bank located in a second or third class city in which it was the only banking facility could not establish a branch bank there, for all the bank would have had to do was obtain its own consent—a senseless formality. It follows that under the 1933 statute (before the consent provision was declared unconstitutional in *Union Trust Company v. Simmons*, 116 Utah 422, 211 P.2d



190) a unit bank in a second or third class city was authorized to establish a branch in that city. The phrase "in which is located a bank or banks" could only have referred to "a bank or banks" other than the applying bank.

The pertinent provisions of 7-3-6 Utah Code Annotated 1953, presently before the court, are as follows:

"Except in cities of the first class, 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*; \* \* \*" (Emphasis added.)

The emphasized language is identical with the language in the 1933 version of 7-3-6. Indeed, except for deletion of the unconstitutional consent, the entire provision is substantially the same as the original enactment.

Inasmuch as the legislature in 68-3-6 specifically declared its intention to be that identical language will will be deemed to be a continuation of the previous language and not a new enactment, the present 7-3-6 must not be construed to prohibit a unit bank from establishing a branch in its own community unless there is another unit bank there—the kind of bank from which the unconstitutional consent once was to be sought.

## II.

### THE SPIRIT OF THE STATUTE SHOULD PREVAIL OVER THE LETTER WHETHER OR NOT THE LETTER LEADS TO AN "AB-SURD" RESULT.

Perhaps defendants-appellants were over-zealous in emphasizing the idea of "absurdity" while advancing their construction of 7-3-6; and this advocacy may have diverted the court's attention from its own decisions that the spirit of the statute prevails over the letter even though the letter might not lead to an "absurdity."

In *Norville v. State Tax Commission*, 98 Utah 170, 97 P.2d 937, the court quoted with approval the following statement from *Sutherland on Statutory Construction*, §241, page 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."

And the following from *Ozawa v. United States*, 260 U.S. 178, 43 Sup. Ct. 65, 67 L. Ed. 199:

"We may then look to the reason of the enactment and inquire into its antecedent history and give its effect in accordance with its design and

purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

The court not only approved the proposition that words may be modified, altered, or supplied, but did in fact supply words to give effect to the legislative intention.

In *Rowley v. Public Service Commission*, 112 Utah 116, 185 P.2d 514, the court refused to adopt a literal interpretation of a statute because it refused to believe that the legislature intended to accomplish "an unreasonable if not absurd result."

Today's courts, says Sutherland in his work on statutory construction (2 *Sutherland Statutory Construction* [3rd Ed.] §4702) usually consider the legislative purpose "from the start," rather than "beginning their inquiry with the formal words of the act." He points out that:

"The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intent. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act." (Id., §4706.)

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1. **Quaere**, whether the letter requires the result even if the letter is followed. In the phrase "in which is located a bank or banks," it is not clear whether "a" means "any," "all" or "another." The article "a" is a word of uncertain reference. 1 Words and Phrases (Perm. Ed.) 4 & 5. Likewise, "any." *Kountzer v. City of Omaha*, 88 N.W. 117, 118. 63 Neb. 52. The significance of the words must be found in their context. cf. *Benat v. Mutual Benefit Health & Accident Association*, 191 Pa. Super. 97, 159 A.2d 23, 25.

We also submit that the court was incorrect in stating that what the statute doesn't permit it prohibits. The second paragraph of 7-3-6 contains the following language:

"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 \$60,000.00 may establish and operate one branch for the transaction of its business within this state; provided, that for each additional branch established there shall be in an additional \$60,000.00 (capital and surplus)."

The later language limiting establishment of branches is a proviso which takes away from the bank commissioner some of the authority granted by the above quoted paragraph. And, as said in *Dunn v. Bryan*, 77 Utah 604, 299 Pac. 255:

"A proviso which operates to limit the application of the provisions of a statute, general in their terms, should be strictly construed to include no case not within the letter of the proviso."

The court pointed out that a statute must be considered with reference to the object sought to be accomplished by it, and that a proviso should not be so construed so as to destroy the general language.

The object of the statute as enacted in Chapter 6, Law of Utah 1933, was to grant banks in Utah the right to establish branches, but with a limitation upon the right of unit banks to establishing branches in areas in which other unit banks were located: The consent of

any other local unit bank had to be obtained. The statute was not intended to prohibit branches outside Salt Lake County except where they would infringe upon the territory or draw from the customers of existing unit banks.

The statute expressly grants to banks with the requisite capital the right to operate branches, and the proviso should not be construed to take that right away from every unit bank located outside Salt Lake County.

### III.

#### APPLYING THE HOLDING OF THE COURT TO SPECIFIC FACT SITUATIONS WILL LEAD TO ABSURD RESULTS.

In its opinion the court pointed out that since the legislature has the power to prohibit branch banking, it is not absurd for it to put restrictions upon branch banking. We agree. What is absurd (or at least "unreasonable") is an interpretation under which like things are treated differently, and in which the distinctions in application of the statute have no relationship to what the legislature obviously was attempting to accomplish.

The means adopted by the legislature to restrict some branch banking must have some relation to a legitimate legislative purpose; and in the instant case the court sees a legitimate purpose in restricting branches because unrestricted establishment of branches

“might impair the stability of existing banks.” But the manner in which 7-3-6 would operate as interpreted by the court has no rational relationship to the above (or any conceivable) legislative purpose.

The decision does not affect the ability of State Bank of Provo to have branches, to over-extend itself, to engage in harmful competition, or to move toward monopoly, so long as it branches abroad rather than at home. It would be possible for the State Bank of Provo to obtain branches in Heber and Tooele—both on the periphery of the Provo trading area — because neither of these cities has a unit bank (though both have branch banks). But the court holds the State Bank of Provo cannot have a branch in Provo because the State Bank, itself, is already there, notwithstanding its presence has no relationship to the stability of any other unit bank in Provo; and the effect of branching on its own operations and stability would depend on other factors than whether the branches were within or without its home city.

Establishment of any branch in Provo by any bank is now prohibited; but if an outside bank were to acquire the State Bank of Provo and make a branch of it, the acquiring bank could establish another branch or other branches in Provo, provided only that the bank commissioner were to make the appropriate findings. But the stability of banks, the healthiness or unhealthiness of competition, and the trend toward monopoly would be the same whether a local unit bank branches or a branch branches.

Under the decision of the court some localities will be virtually prohibited from obtaining adequate banking services because the decision freezes the status quo. The single unit bank must continue to exist alone. No further services can be provided unless a new unit bank is approved and the necessary capital can be raised.

Under the decision—as shown by developments in Layton since argument of this case—a local bank cannot protect its competitive position by branching to meet the increased need for services. In that growing community the Comptroller of the Currency approved two new branches for a national bank and eliminated the need for a new unit bank; but under this court's reading of section 7-3-6, the branches will now be illegal, and the existing Layton bank will be unable to grow with its own community. It will have to grow elsewhere.

The Layton situation brings into focus another factor under the court's reading of the statute which will tend to "impair the stability of existing banks"—a result directly contrary to the legislative purpose assigned to the statute by this court's decision.

If an existing local bank cannot provide additional services to its community through the medium of a branch because it is already there, the only solution to the need for additional banking services is the chartering of new unit banks. The Comptroller of the Currency has been quick to exploit this situation. The press is filled with comments on his liberality in granting new national bank charters throughout the country. In this



state alone since 1962, he has granted seven new bank charters in Moab, Provo, Draper, Salt Lake City, Sugar House, Bountiful and Murray. These new unit banks are under no state regulation and are exempt from all state and local taxation other than the 4 per cent income tax imposed by Section 59-13-2 U.C.A. 1953 under the authority of Section 5219 of the Revised Statutes of the United States.

It takes no specialized knowledge of the economics of banking to discern that the financial stability of two small unit banks competing for business in one small town is much less than that of one unit bank with a supplementary branch in that same small town. This court's ruling opens the door to economic attrition of the state banking system from wide-open chartering of national banks.<sup>2</sup>

#### IV.

### THE RESULT REACHED BY THE COURT RAISES SERIOUS QUESTIONS AS TO THE CONSTITUTIONALITY OF THE BRANCH BANKING STATUTE UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

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2. And perhaps to wide-open branching of previously chartered national banks. In a newspaper article published since the court's decision in this case, reporting an application by Utah National Bank of Provo for approval of a BYU branch the national bank's attorney is quoted as saying that the national bank was probably the only institution in Provo that could operate a branch on the Y campus, in view of the holding of this court (Salt Lake Tribune, April 9, 1964, page B-9, column 1).



The provisions of 7-3-6 Utah Code Annotated 1953, as interpreted in the court's opinion, permit unit banks in Salt Lake City and Salt Lake County to have "local" branches but do not permit unit banks in other cities and towns to have "local" branches nor to have branches in their own counties outside their city limits. There is serious question whether in this case the "population" or "location" system of classification is a reasonable one within the meaning of the equal protection clause of the United States Constitution and the uniform legislation clause of the Utah Constitution (Amendment XIV, Section 1, Constitution of the United States; Article I, Section 24, Constitution of Utah). Without regard to federal decisions, this court has struck down laws as containing unreasonable classifications in situations where the relationships between the classifications and the legitimate legislative purposes were more clearly discernible than they are here.

This is not to suggest that defendants-appellants contended in the original argument, or now, that the court should declare the branch banking law unconstitutional. But the possibility that the question will be raised in a future case, at a proper time, by the proper parties, should be anticipated and the court should not adopt a construction of the statute which might leave it no choice but to declare invalid the entire statute relating to branch banking. Such a holding might lead to a situation in which either all branches are held to be illegal, or there is held to be no limitation whatever

upon the rights of banks to establish branches in any cities and at any times they may choose.

“When \* \* \* [a statute] is susceptible of two interpretations one of which would render it unconstitutional and the other bring it within constitutional sanctions, the court is bound to choose that interpretation which would uphold the statute \* \* \*.” *Norville v. State Tax Commission, supra*, 98 Utah 170, 97 P.2d 937.

## CONCLUSION

The opinion as written disregards the meaning of 7-3-6 as originally enacted in 1933, and provisions of 68-3-6 U.C.A. 1953 declaring a general legislative policy as to the rules to be followed in determining its intentions in a specific context. Application of 68-3-6 should be enough to justify rehearing and reversal. But if spirit is to prevail over letter, if unreasonable or absurd results are to be avoided, and if a construction is to be adopted which will render the statute constitutional, the case must be reheard, reversed, and remanded to the District Court for dismissal with prejudice.

Respectfully submitted,

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