1969

Walker Bank & Trust Company v. W. S. Brimhall, Commissioner of Financial Institutions of Utah, Bank of Utah, Bank of Ben Lomond, Citizens National Bank, First Security Bank of Utah, N.A., and Commercial Security Bank : Reply Brief of Appellants

IN THE SUPREME COURT
of the
STATE OF UTAH

WALKER BANK & TRUST COMPANY,
a Utah corporation,
Plaintiff and Respondent,
vs.
W. S. BRIMHALL, Commissioner of Financial Institutions of Utah, BANK OF UTAH, BANK OF BEN LOMOND, CITIZENS NATIONAL BANK, FIRST SECURITY BANK OF UTAH, N. A., and COMMERCIAL SECURITY BANK,
Defendants and Appellants.

Case No. 11628

REPLY BRIEF OF APPELLANTS

Appeal from a Summary Judgment of the Third Judicial District, Salt Lake County, Honorable Stewart M. Hanson, Presiding.

VERNON ROMNEY, Attorney General
H. WRIGHT VOLKER, Asst. Atty, General
State Capitol Bldg. Salt Lake City
MAX D. LAMPH 2471 Grant Avenue, Ogden, Utah
DAVID S. KUNZ
33 Utah Bank Plaza
Ogden, Utah
DON B. ALLEN
Deseret Building
Salt Lake City, Utah
NEIL R. OLMSTEAD of
OLMSTEAD, STINE AND CAMPBELL,
2324 Adams Avenue
Ogden, Utah 84401
Attorney for Appellants

H. R. WALDO, JR., of
JONES, WALDO, HOLBROOK AND McDONOUGH
800 Walker Bank Building
Salt Lake City, Utah 84111
Attorney for Respondent

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PRELIMINARY STATEMENT

This reply brief is limited to a response by Appellants to new matter contained in Respondent's Brief, - namely, Respondent's reference to and discussion of an opinion of the Attorney General dated July 26, 1968, and its relation to the later opinion of August 15, 1968, which later opinion formed the basis for the Bank Commissioner's decision denying Respondent's application for the South Ogden branch. The opinion of July 26, 1968, is set out in the Appendix to Respond-

ent's brief, and the opinion of August 15, 1968, is set out in the Appendix to Appellants' brief.

Appellants did not discuss or refer to this earlier opinion in their initial brief for two reasons. First, because they did not consider it relevant, as it did not form the basis of the Commissioner's decision, nor was it even mentioned or referred to by him. And second, for the reason that it is not believed to be a part of the record before the lower court, nor a part of the record on this appeal. However, we certainly have no objection to this Court reviewing and considering the earlier opinion, and, since Respondent has now brought it before the court and argued its significance, we now make this brief response.

ARGUMENT

The Opinion of the Attorney General of July 26, 1968, confirms that the ultimate Decision of the Bank Commissioner in Denying the Application for the South Ogden Branch Was Not Contrary to Law.

The essence of Appellants' position on this appeal has been and is that the primary question before this court, as it was before the lower court, is whether the decision of the Bank Commissioner in denying Respondent's application for a South Ogden branch was a decision that was "contrary to law"; that is, a decis*ion the Commisioner could not lawfully make in the light of the evidence he had before him.*

As we have suggested in our initial brief, if the opinion of the Attorney General of August 15, 1968, is legally sound, that is an end of the matter and this case

of necessity concludes in Appellant's favor, as the Commissioner's decision then was obviously not contrary to law. On the other hand, if the Opinion of August 15, 1968, is determined to be not legally sound, the case is *not* thereby concluded in Respondent's favor, because such a determination in no wise reaches the ultimate question of whether the Commissioner's denial of the application was "contrary to law", i. e. whether it was a decision which, under the evidence before him, he could *not* lawfully make.

Now, how does the Attorney General's earlier opinion of July 26, 1968, bear upon this question? That is the point to which this reply brief is directed.

At the outset the form of the question submitted by the Commissioner, and to which the opinion of July 26 is directed, should be noted (Page 26, Respondent's brief):

> *"May a branch bank be lawfully prohibited within the corporate limits of South Ogden, Utah,* a city of the second class in which no unit bank is located, but which is immediately adjacent to Ogden City, another city of the second class in which are presently located five unit banks, *where it is shown by the evidence that the primary objective of the branch bank is not to serve South Ogden, in which it is physically to be located, but rather to serve Ogden?* (*Emphasis added*)

It is to be noted that the matter of public convenience and advantage was not injected into the question as submitted, but that the Commissioner's only concern

at that point was whether the branch could be denied upon the showing that the objective of the application was not to serve South Ogden, but rather to serve Ogden where it was prohibited by law from locating. The answer of the Attorney General was "yes", the application could be denied under the circumstances suggested by the question, and in the last paragraph of his opinion (Page 29, Respondent's brief) the Attorney General gave one basis upon which the denial might rest:

> "In Utah, a restrictive policy with respect to branch banking has been enunciated. In the instant situation, it would not be unreasonable for the Bank Commissioner to conclude that the subject bank is attempting to invade indirectly an area from which it is specifically excluded by statute. If such a determination were made, it would be entirely appropriate for the commissioner to thwart the attempted subversion of the legislative policy against branch banking in second class cities where unit banks exist. He need not subscribe to the geographical sophistry practiced by the applicant, and he may deny the application on the simple ground that the public convenience and advantage will be subverted rather than subserved."

However, neither this opinion of the Attorney General, or the question upon which it was predicated, provided the guide lines essential to a decision by the Commissioner upon the ultimate objections raised by the protestant banks, so a few days later the Commissioner submitted a second question to the Attorney General

which resulted in the Opinion of August 15. (Appendix, Appellants ' brief, Page VI.) By this second question the query was directly put as to whether the Commissioner could grant the application upon a finding that public convenience and advantage would be served, where it was also "shown by the evidence" that the primary objective of the proposed branch was not to serve South Ogden, where it was to be located, but rather to serve Ogden.

The negative response of the Attorney General to this second query has been fully covered in the earlier briefs, so we do not further argue it here. The first opinion does, however, fully support the thesis of the second point of Appellants' argument as set out in their initial brief, namely, that the Commissioner has an ultimate discretion in granting or denying branch applications, and that in the exercise of this discretion he is entitled to and should take into account the factual question of whether the proposed application would further or would frustrate legislative policy as it relates to branch banking.

This inquiry may have nothing to do with the question of public convenience and advantage. The Commissioner may find that an area such as Ogden needs additional banking facilities, and that those needs could be met and the public convenience be served by the establishment by Respondent of a branch bank located just across the Ogden boundary in South Ogden. However, the legislature has said that if Ogden needs additional banking facilities, such needs are to be served by the establishment of independent unit banks, *and not by branch banks.* Accordingly, it would be entirely

proper and in accordance with law for the Commissioner, notwithstanding his having determined that public convenience and advantage would be served through the establishment of the proposed branch, to nevertheless deny the application upon the ground that serving the needs through the establishment of a *branch* bank would not be in accord with legislative policy. Such a decision, rather than being "not in accordance with law", would be entirely lawful and proper.

Such is the thrust of the Attorney General's opinion of July 26, 1968, as we interpret it.

We reiterate, accordingly, that such opinion does not militate in any way against the lawfulness of the Commissioner's decision denying tthe application, or support Respondent's contention that the Commissioner's denial of the branch was contrary to law. On the contrary it confirms the position Appellants have previously taken under point II of their argument, namely, that even if the patent attempt by the Appellant to "invade indirectly an area from which it is specifically excluded by statute" is not grounds for denying the application as a matter of law (as ruled by the Attorney General in his second opinion), the Bank Commissioner may nevertheless, and should, take that circumstance into account in the exercise of his discretionary powers, and may thus deny the branch upon the ground that to do otherwise would frustrate and negate legislative policy.

True, the Commissioner has not based his decision of denial on that ground, as the August 15 opinion of the Attorney General foreclosed that opportunity, but we may not rule out the possibility that such would be

his decision if the opinion of August 15 is determined to be without validity, and the Commissioner is permitted to grant or deny the application upon its merits, rather than pass upon it as a matter of law.

At any rate, and in any event, this Court, if it holds the opinion of the Attorney General to be without validity, should not itself foreclose the Commissioner of his right to decide the case upon its merits, as the lower court has done by its peremptory order to the Commissioner to grant the application.

CONCLUSION

We submit that the decision of the lower court should be reversed for the several reasons set out in our initial brief.

Respectfully submitted,
VERNON ROMNEY
Attorney General
H. WRIGHT VOLKER
Assistant Attorney General
For W. S. Brimhall
Commissioner of Financial Institutions
DAVID S. KUNZ
For Bank of Utah and
Bank of Ben Lomond
NEIL R. OLMSTEAD of
OLMSTEAD, STINE AND CAMPBELL
For Commercial Security Bank
MAX D. LAMPH
For Citizens National Bank
DON B. ALLEN
For First Security Bank of Utah, N.A.