FIRST NAT. BANK OF MANHATTAN v. CITIZENS BANK OF TOPEKA.

Case No. 4,802.

{2 Cent. Law J. 757:[1] 21 Int. Rev. Rec. 382; 1 N. Y. Wkly. Dig. 511.}

Circuit Court, D. Kansas. Oct., 1875.

CONSTRUCTION OF BANK CHARTER—POWER TO RECEIVE SPECIAL DEPOSITS—CASE IN JUDGMENT.

1. The Citizens' Bank of Topeka, Kansas, was chartered, with power, among other things, "to carry on the business of receiving money on deposit, and to allow interest thereon, giving

to the person depositing credit therefor." *Held,* that this language did not confer upon the bank the power to receive special deposits.

2. The plaintiff caused an attachment to be levied upon the cattle of a debtor, and subsequently agreed to permit him to drive them to the Indian Territory, the plaintiff assuming the risk of any other creditor attaching the cattle, before they should arrive at their destination, not later than November 27; in consideration of which the debtor executed, with others, a note, which, together with a sum of money, he deposited with the defendant bank, subject to the condition that if the cattle should be attached before they reached the Indian country, by other creditors of the debtor, and before November 27, then the note and money were to be handed back to Johnson, one of the makers. If, however, the cattle were not so attached, then the note and money were to be delivered to the plaintiff. A sham attachment was sued out and levied on the cattle while en route for the Indian country; and thereupon the cashier of the defendant bank was induced to deliver the note and money to Johnson. *Held,* that the cashier acted in a position analogous to that of a stakeholder; that in so doing he was not acting within the scope of his implied authority; that the bank could not legally undertake such a transaction; it was ultra vires, and therefore the bank was not bound.

Motion for a new trial. In the month of November, 1874, the First National Bank of Manhattan levied an attachment on a lot of cattle belonging to Andrew Wilson, taken for a debt owing by Wilson to the bank. Thereupon Wilson and the Manhattan Bank made an arrangement in substance as follows: The bank was to release its attachment on the cattle, and Wilson was to be permitted to drive them to the Indian country, and the bank to take the risk of any other creditor of Wilson attaching said stock before it arrived at its destination, not later than November 27, and in consideration thereof Wilson was to make a note for the sum of 86,424, with certain other names to it, and this note, together with $750 in money, was to be placed, and was placed, in the hands of J. Thomas, cashier of the Citizens Bank of Topeka, to be held under certain instructions, and to be paid over to either the Manhattan Bank or to E. Johnson, one of the signers on the note, as the following contingency might determine, to-wit: If the cattle should be attached before they reached the Indian country by Wilson's creditors, and before November 27th, then said cashier was to deliver the note and money back to Johnson. If, however, the cattle were not so attached, then the note and money were to be delivered to the said First National Bank. Under this arrangement the cattle were turned over to Wilson and Johnson; and those parties, in order to cheat and defraud the said First National Bank, while said cattle were en route for the Indian country, got up a sham attachment, and pretended to have the sheriff of Sumner county seize said cattle, and thereon induced Mr. Thomas, cashier of the Citizens' Bank, on the strength of said attachment, to deliver back to them the said note and money. The evidence showed that the attachment was a mere sham; that the cattle were all the time held by Wilson and Johnson, and were safely got into the Indian country; and that Mr. Thomas was warned by the attorney of the Manhattan Bank before delivering the deposit, that such was the case, and was cautioned not to pay the deposit to Johnson or Wilson. The agreement was not in writing, nor did the cashier give day receipt for said deposit, nor was any consideration to be paid the said cashier or the Ci-

tizens' Bank. After the delivery of the note and money as aforesaid, and in March, 1875, the plaintiff, the First National Bank of Manhattan, brought this suit against the Citizens' Bank to recover the value of the note and money; and at the April term of this court the case was tried before a jury, and plaintiff obtained a verdict against defendant for $7,200.

G. C. Clemens, for plaintiff.

W. P. Douthitt, for defendant

FOSTER, District Judge (after stating the facts as above). The question presented by this motion is briefly this: Did Mr. Thomas, the cashier of the defendant bank, act within the scope of his authority as such cashier in this transaction? In other words, did the Citizens' Bank become liable to the Manhattan Bank by reason of the action of said cashier? The defendant bank was organized under an act of the legislature of the state of Kansas. Gen. St p. 225, § 127. The law gives the power to the bank, among other things, to "carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefore"

The question resolves itself into two points: 1. Had the bank the power under its charter to receive special deposits? 2. Was this a special deposit?

1. The law is well and definitely settled that a corporation is a creature of the law, and possesses only such powers as the charter of its creation confers upon it either expressly or incidentally thereto. Trustees of Dartmouth College v. Woodward, 4 Wheat {17 U. S.} 636; Perrine v. Canal Co., 9 How. {50 U. S.} 172. The act of incorporation is to them an enabling act; it gives them all the power they possess. Head v. Insurance Co., 2 Cranch {6 U. S.} 169. The power to receive special deposits is not expressly given by the law; is it incidental to the powers given? Perhaps I need go no further on this question than to say it is extremely doubtful. There is a line of decision starting with the Essex Bank Case, 17 Mass. 497, which holds it to be one of the incidental powers of a bank to receive special deposits. However, by several late and well reasoned cases of the highest courts of different states, this doctrine is

denied or questioned. In Wiley v. First Nat Bank {47 Vt. 546}, it was decided that national banks created under the act of congress have no power to bind themselves by receiving special deposits, and no action can be maintained against the bank for any such deposit left with the cashier and not returned. In First Nat Bank of Lyons v. Ocean Nat. Bank, the court of appeals of New York very clearly foreshadows its views, and refers to the Vermont decisions approvingly. 60 N. Y. 278. In Weekler v. First Nat. Bank {42 aid. 581}, the court of appeals of Maryland held that national banks cannot, under the powers conferred by the act of congress, engage in the business of selling railway bonds on commission. By the act of congress {Act Tune 3, 1864 (13 Stat 101)} the powers conferred on national banks are fully as comprehensive as the powers given by the act of the legislature under which that defendant bank is incorporated. The act of congress uses the words "receiving deposits." The act of the legislature uses the words "receiving money on deposit" It would seem that if the former words would not comprehend a special deposit, the latter certainly could not.

2. But was this transaction a special deposit with the defendant bank, within a fair construction of those terms? The object of depositing money, papers, or other valuables in a bank, is safety from loss by theft, fire, or other means. The cashier receives the deposit and undertakes to deliver it on demand to the person making the deposit or his order. There is no risk assumed of delivering it to the wrong person, and no controversy as to who is to receive it. How was it in this case? The purpose of placing this deposit in Mr. Thomas' hands, was not safety alone, but to place it in the possession of a person in whom both parties had confidence and in whose judgment and integrity both parties could rely, judgment sufficient to determine and decide when the contingency should arise which was named in the agreement and to deliver it to the person entitled thereto. The property was beyond the reach of either party, until an uncertain event should occur which was to decide which party was entitled to it, and in determining which party was entitled to the deposit, the cashier was called upon to decide which party was the owner of it—a question about which the parties might and did actually disagree. The cashier occupied very closely the position of a stake-holder, and was compelled to decide who was the winner; and he assumed the liabilities of one occupying that position. It seems to me impossible to hold that in assuming such responsibility he was acting for the bank of which he was cashier, or within the scope of his implied authority, or that by any fair construction of the law the defendant bank could legally undertake such a transaction. It was ultra vires, and the motion to set aside the verdict must be sustained.

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