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NOTES

THE POWER OF NATIONAL BANKS TO ESTABLISH BRANCHES

An inquiry into the power of national banking associations to establish branch banking houses without the express authorization of Congress by legislative enactment resolves itself into little more than a review of the case of First National Bank in St. Louis v. State of

Missouri at inf. Barrett, 263 U. S. 640, 68 L. Ed. 486, 44 Sup. Ct. 213, affirming the decision of the Supreme Court of Missouri *sub nomine* State ex rel. Barrett v. First National Bank of St. Louis, 297 Mo. 397, 249 S. W. 619, 3 A. L. R. 918. The action was instituted as a quo warranto proceeding to enforce a Missouri statute (R. S. Mo. 1919, Sec. 11737), prohibiting any bank, without specifying state or national, from maintaining a branch bank within the state; but the question whether, in the absence of such a statute, a branch bank could legally be established by a national bank was involved in the decision indirectly, as the basis for determining the state's jurisdiction over the national bank.

The briefs of counsel for the bank and of the Solicitor General for the United States as *amicus curiæ*, and the dissenting opinion of Mr. Justice Van Devanter, concurred in by Taft, C. J., and Butler, J., emphasized the familiar doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, that a state cannot interfere with any agency authorized by Congress as a means of carrying into execution the powers vested in it by the Constitution, which, it was contended, precluded the State from asserting jurisdiction over the banks established under the National Banking Act, regardless of whether that or any other act authorized them to maintain branches. If establishing branch banks was in excess of the authority given them by Congress, only the federal government had the right to call a halt to such excess, it was said; and if the national banks did have the right to establish branches, under the law creating them, then the state had no power to pass a statute prohibiting the exercise of this right.

Among the cases cited to support this theory were *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204, which, like *McCulloch v. Maryland*, applied the principle to the Bank of the United States, and the following cases applying it to national banks: *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 Sup. Ct. 288; *Van Reed v. People's National Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 Sup. Ct. 775, 3 Anne. Cas. 1154; *First National Bank v. California*, 262 U. S. 366, 67 L. Ed. 1030, 43 Sup. Ct. 602; *First National Bank v. Fellows*, 244 U. S. 416, 61 L. Ed. 1233, L. R. A. 1918C 283, 37 Sup. Ct. 734, Anno. Cas. 1918D 1169. The dissenting opinion of Justice Van Devanter quoted from *Farmers' & Mechanics' National Bank v. Dearing*, *supra* (pp. 33-34), the following passage: "The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of

the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'"* And, from *Easton v. Iowa*, supra (p. 229): "That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." It was admitted that the general laws of a state in regard to methods of doing business and dealing with property apply to national banks as to others, where Congress has not enacted inconsistent legislation; but not that a state can enlarge or limit the corporate powers expressly or impliedly conferred on national banks by the law creating them.

If this view had prevailed, the legality of branch national banks under the federal law would have been immaterial to the issue, which was the constitutionality of the state statute. But to the foregoing theory of the case was opposed an argument to this effect: if a state cannot by statute exercise control over a national bank, because that is the exclusive province of Congress, at least it must be admitted that a state may regulate or prohibit the exercise of the functions of a bank by private individuals having no authority from either state or national government; if the maintenance of branch national banks is not authorized by federal law nor by state law, then the persons who carry on the business of such a branch bank are acting as mere private individuals; therefore, the state may prevent the exercise of such functions by such persons, unless some federal law expressly or impliedly authorizes branch national banks. In this view of the case, which was adopted by the majority of the supreme courts of both Missouri and the United States, the question whether Congress had conferred on national banks the power to establish and maintain branches became the determining one.

Except in certain particular cases, to be referred to hereafter, the power to establish branches has neither been conferred on, nor denied to, national banks by the express terms of any statute. Nor has the question of the existence of such power come before any court of record for determination prior to this case (unless in *Armstrong v.*

*Note—The clause in single quotation marks is from *McCulloch v. Maryland*, supra, p. 430.

Second National Bank, *infra*, the granting by a national bank to an independent banking institution of authority to cash checks on the national bank be regarded as equivalent to establishing a branch). But the Supreme Court gave some weight to the fact that establishing or maintaining branch national banks has been expressly authorized by Congress in a few special instances, which were regarded as legislative interpretations of the statute defining the general powers of national banks, adverse to the existence of such power when not expressly granted. The statutes expressly sanctioning branch national banks in certain cases are: (1) Act of Congress Mar. 3, 1865, Rev. Stat. 5155, Comp. Stat. 9695, 6 Fed. Stat. Anno. 2d ed., p. 715, authorizing "any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each"; (2) Federal Reserve Act, Dec. 23, 1913, c. 6, sec. 25, Comp. Stat. 9745, 6 Fed. Stat. Anno. 2d ed., p. 842 (not referred to by the court), authorizing national banks, with the consent of the Federal Reserve Board, to establish branches in foreign countries or United States dependencies; (3) Act of May 12, 1892, chap. 71, 27 Stat. at Large 33, and Act of Mar. 3, 1901, chap. 864, 31 Stat. at Large 1444, sec. 21, authorizing temporary branch national banks at the Chicago Exposition and the St. Louis Exposition, respectively, to be operative in each instance for no longer than two years.

The court also took into consideration executive constructions of the statutes, particularly that of the Department of Justice, entitled *Re Lowry National Bank—Establishment of Branches*, 29 Ops. Atty. Gen. 81 (May 11, 1911). Because it brings out a distinction between a branch bank and a mere agency, a distinction not adverted to in the Supreme Court's decision, it may be advantageous to quote from the Attorney General's opinion: "In the absence of express legislative authority, the power to establish branch banks does not follow by implication as a reasonable or necessary incident to the right to do a banking business. This construction does not mean that banks may not have agents. There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking, and the

right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it." A later opinion of the Department of Justice, dated Oct. 3, 1923, was referred to by the Supreme Court in a footnote to the case as modifying the opinion cited, but was disapproved in so far as it contravened the earlier opinion.

These legislative and executive interpretations, though, of course, not conclusive on the Supreme Court, were substantiated by the court's construction of the statute defining the powers of national banks. The only part of the statute which might be construed as authorizing branch banks is Rev. Stat. 5136, Comp. Stat. 9661, 6 Fed. Stat. Anno. 2d ed. 654, which includes a clause giving national banks "all such incidental power as shall be necessary to carry on the business of banking." This provision was construed strictly, as conferring only such power as was actually essential to the existence and functioning of the banks, and the fact that national banks have existed and carried on the banking business for more than half a century without branches was accepted as conclusively showing the absence of any necessity for branches. In the words of the court, "If the nonexistence of such branches, or the absence of power to create them, has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as Federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission." (p. 659) This strict construction of the statute defining the powers of the banks was justified by the following cases: *Bullard v. National Eagle Bank*, 18 Wall. 589, 21 L. Ed. 923; *California National Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 Sup. Ct. 831; *Logan County National Bank v. Townshend*, 139 U. S. 67, 35 L. Ed. 107, 11 Sup. Ct. 496. These cases are clear authority for the general proposition that the powers of national banks are to be strictly construed, though the powers involved in the cases are not sufficiently similar to that of establishing branches to make the decisions of any value in the determination of this point, beyond the confirmation of the general proposition. The following, from the *Logan County National Bank* case, is typical of all: "It is undoubtedly true, as contended by the defendant, that the National Banking Act is an enabling Act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those ex-

pressly granted by that Act, or such incidental powers as are necessary to carry on the business of banking for which it was established.”

It is to be noted that two of the three cases just referred to were also cited with approval in the dissenting opinion, together with *First National Bank v. National Exchange Bank*, 92 U. S. 122, 23 L. Ed. 679, to the same effect; from which it may be presumed that, had the question come up simply as involving the right of the bank to establish branches under the federal law, there would have been no disagreement in the court. Justice Van Devanter states in no uncertain terms that powers not expressly nor by necessary implication conferred on national banks are in effect denied.

Not only did the Court find no authority for branch banks in the provision defining the powers of national banks, but it construed two other sections of the statutes as tending very strongly to a positive denial of the right in question. Rev. Stat. 5190, Comp. Stat. 9744, 6 Fed. Stat. Anno. 2d ed. p. 740, requires that “the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.” If strictly construed, this provision would confine the business of a national bank to “an office or banking house,” that is, a single one; and the court held that this was not a case where words importing the singular should be extended and applied to the plural, according to the rule of statutory construction invoked when the intent of the statute requires. A similar construction was put upon the section in question in the case of *Armstrong v. Second National Bank* (1889), 38 Fed. 883 (not mentioned by the court), holding that a national bank may not provide for the cashing of checks on it at any other place than at its office or banking house (in this case at an independent bank). It may well be inquired to what extent this case is inconsistent with the statement in the opinion of the Attorney General, *supra*, that a national bank may have agents, though not branches. The other statutory provision bearing on the case is Rev. Stat. 5138, Comp. Stat. 9675, 6 Fed. Stat. Anno. 2d ed. p. 687, fixing the minimum amount of capital required for a national bank in proportion to the population of the city in which the bank is located. An attempt to apply this section to a national bank having one or more branches would involve such obvious difficulties that it would be strange, to say the least, that Congress made no provision for adjusting the capital to such a situation, if it had contemplated the possibility of the existence of a national bank with branches.

Thus, though the case of *First National Bank v. Missouri* does not, strictly speaking, directly decide that national banks have, in general, no power to maintain branches, yet it does decide it collaterally as the only basis on which the decision regarding the state statute can be upheld.

F. WARNER FISCHER, '27.

EXTRATERRITORIAL EFFECT OF THE STATUTE OF FRAUDS

There is perhaps no branch of Conflict of Laws which is in as utter confusion as the extraterritorial interpretation of the Statute of Frauds. Story lays down the following rule: "If such contracts made by parol in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void, exactly as they are held void in the place where they are made. And the like rule applies vice versa where such contracts are good by the law of the place where they are made; but would be void if originally made in another place where they are sought to be enforced, for want of certain solemnities, or for want of being in unity, as required by the local law."¹

However, Story's rule can no longer be said to be the general law on this subject. There are at present four different rules that are followed by the courts of this country.

The first rule is that the 4th section of the Statute of Frauds applies only to the remedy and procedure and therefore the law of the *lex fori* governs.

*Barbour v. Campbell*² is an example of this rule and probably cited more by courts than any other American case on this subject. Plaintiff, the divorced wife of Webster Barbour, brought suit against his daughter upon an oral promise by which the defendant promised to compensate her for services rendered by her to defendant's father during his last sickness. This suit was brought in Kansas, while the contract sued on was made in Idaho. By the Kansas statute, such an oral agreement was declared unenforcable; by the Idaho statute, the oral contract was valid. The Kansas Court refused to follow the

1. Story on Conflict of Laws, p. 349.
2. 101 Kan. 617, 168 Pac. 879.