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National Banks as Trustees under the Federal Reserve Act

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NATIONAL BANKS AS TRUSTEES UNDER THE FEDERAL RESERVE ACT.

May National Banks act as trustees, executors, administrators, and registrars of stocks and bonds under the Federal Reserve Act? Section 11 confers various powers on the Federal Reserve Board, one of which is found in clause K in this language:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to be trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

To ascertain how far the present functions of national banks may be extended under this enactment, two inquiries become necessary: First, what power has Congress to authorize corporations to engage in the business named? Secondly, what has Congress intended with the restrictive phrase, "when not in contravention of state or local law"?

One of the first controversies concerning the power conferred on Congress by the constitution grew out of the act adopted in 1791 to incorporate the Bank of the United States. Washington was urged to veto the bill as unconstitutional and called for the opinion of the members of his cabinet. Jefferson and Hamilton responded, each with a lengthy opinion. Jefferson quoted what Congress had then proposed as the twelfth amendment and which was soon after ratified as the tenth; "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people;" and he proceeded to show that authority to charter a national bank was not to be found in the constitution among the delegated powers. Hamilton, on the other hand, while conceding that Congress had only such powers as the constitution gave it, pointed out that the constitution gave Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States, or in any department or officer thereof," and

from this, and because the national government must be considered completely sovereign within its sphere, he argued that Congress was the judge of the means necessary for carrying out the enumerated powers; that it had implied powers to select and adopt such means, and could do so by chartering corporations; that by a national bank the government could conduct affairs coming plainly within the scope of its enumerated or express powers, and that the proposed charter would, therefore, be valid. He conceded that the implied powers could not be carried beyond the limits of the powers expressly named. He said:

"The principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to incorporate within the sphere of the specified powers."[1]

Washington adopted Hamilton's views and approved the act, but its constitutionality continued to be the subject of bitter controversy and the bank was unable to procure an extension of the charter and was compelled to go out of existence in 1811.

But the broad constructionists were gaining ground. Another bank of the United States was chartered in 1816. This bank the state of Maryland undertook to tax and that brought the right of Congress to charter the bank and the power of a state to tax it before the Supreme Court in 1819 in the noted case of *McCulloch v. Maryland*.[2] The Court held in favor of the power of Congress to charter the bank and against the power of the state to tax it in an opinion by Marshall, which defined the scope and limit of federal authority under the constitution in a manner that has not been improved upon since.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In spite of this decision, the power to charter a national bank was still questioned. The state of Ohio also undertook to tax the bank and that brought the question before the Court

1. Bank Controversies (In U. S. History), Alexander Johnstone, Cyc. Political Science, etc., Vol. 1, p. 199.

2. (1819) 4 Wheat. 316, 4 L. Ed., 579.

again in 1824 in the case of *Osborn v. Bank of United States.*[3] The opinion was again by Marshall, who reviewed and explained the opinion in *McCulloch v. Maryland,* as follows:

"The whole opinion of the court in the case, is founded on and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the Government of the United States.' . . . It is 'necessary and proper' for carrying on the fiscal operations of the government."

The question was now put at rest in the courts, but the controversy continued in and out of Congress for many years, notably during Jackson's administration. It is probably no exaggeration to say it took almost half a century after the adoption of the constitution before the right of Congress to create national banks was generally conceded. The conflict runs through our history in one form or other almost down to the time of the Civil War. One cannot follow it and study the cases cited without becoming impressed to the point of conviction that when Congress in 1864 adopted the present national bank act, it went to the limit of its implied powers; and that to invest these corporations with powers and functions of the character designated in the clause under consideration (except as hereafter noted) would exceed its constitutional authority. For if Congress can create a corporation, or endow a corporation which it has previously created, with the power to act as executor or administrator of the estate of a deceased person, or to hold property in trust for widows and minors, it is impossible to name any property or business so private and so disconnected with the affairs of the national government as *not* to be subject to the authority and control of that government.

The two decisions, which have been cited in support of the power of Congress to create corporations for banking purposes, furnish a strong argument against the authority of Congress to extend the franchise of national banks to common private business. The banks cannot be taxed by the states, says the Supreme Court, for the power to tax is the power to destroy, and under the constitution there cannot be conceded to a state the power to destroy an instrumentality of the national government. Our national banks are accordingly

3. (1824) 9 Wheat. 738, 6 L. Ed. 204.

held subject to state taxation only to the extent permitted by Congress, and they are exempt from state usury laws, no permission to have such laws apply having been given. Now suppose it could be held that by the Federal Reserve Act the government makes the national banks its instrumentalities in the ownership and management of all sorts of real and personal property and of all sorts of business, and that the government should also insist upon its right not to have its instrumentalities taxed by the states, what would there be left *to* the states? And if that principle were carried to its logical limit, what would there eventually be left *of* the states?

Federal legislation cannot be carried to that extent without disregarding the fact that the states are as sovereign within their sphere as the national government is within its sphere. This is aptly expressed by the Supreme Court in *Collector v. Day.*[4]

"The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting, separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment 'reserved' are as independent of the general government as that government within its sphere is independent of the States."

To take, own and manage property as trustee, or as executor or administrator, cannot be treated as an incident to banking, and furnish a reasonable ground for claiming that the right of a national bank to act in these capacities would only be part of their banking franchise. Banking is to do business with money and papers representing money.[5] The Supreme Court says:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and deal-

4. (1870) 11 Wall. 113, 124, 20 L. Ed. 122; Tenth Amendment; Munn v. Illinois, (1876) 94 U. S. 113, 24 L. Ed. 77; Calder v. Bull, (1709) 3 Dall. 386, 1 L. Ed. 648; Martin v. Hunter's Lessee, (1816) 1 Wheat. 304, 4 L. Ed. 97.

5. Banks, Cyc. Political Science, etc., Vol. 1, p. 227.

ing in negotiable securities issued by the government, state and national, and municipal and other corporations."

The language quoted was used in a case in which a state tax on a national bank, consented to by Congress on condition that it should not be higher than the tax imposed on the banks of the state, was claimed to be illegal because the trust companies and savings banks in the state were taxed at a lower rate. The Court held the tax valid because those state trust companies and savings banks were not *banks*.[6]

The conclusion seems inevitable that under the Federal Reserve Act a national bank cannot be authorized to act as executor or administrator, or as trustee of an ordinary express trust. But it does not follow that it may not be made trustee of *some* trusts. It can undoubtedly be authorized to act as trustee in bankruptcy for that is a matter which is entirely under federal authority, and the bankruptcy act provides that a corporation, as well as an individual may be trustee.[7] Many other trusteeships may occur in matters under federal authority in which national banks may doubtless be authorized to act as trustee. It is possible that such trusts may be created in connection with various strictly federal affairs, but to enumerate them by way of anticipation would be impossible. In such matters it could not be said that the trusteeship would be in contravention of state or local law. Contravention means, "violates", "conflicts", "obstructs", "defeats"; and in a domain wherein state or local laws have no application, or where they are subordinate to the laws of the United States, there is no place for conflict or contravention.

What is said of trusts must also be said about acting as registrars of stocks and bonds. The registration may be so connected with federal securities as to make it perfectly constitutional for Congress to make a national bank the registrar and it may be so entirely and exclusively a matter of state concern, as to place the authorization beyond the scope of federal legislation.

When a statute is open for interpretation all its provisions must be considered, and each, if possible, be given such effect as to make the whole consistent. The object is to ascertain the legislative intent. If a statute is susceptible of two meanings, one of which would make it unconstitutional and the

6. Mercantile Bank v. New York, (1887) 121 U. S. 138, 156, 30 L. Ed. 895.
7. Bankruptcy Act of July 1, 1898, Sec. 45.

other constitutional the courts always adopt the latter. In the light of these rules, what must be said to have been the intention of Congress with the phrase, "When not in contravention of state or local law"? State laws having no application, the subject matter being always out of their reach, and state laws which cease to apply as soon as the subject matter is taken up for federal legislation cannot be the laws contemplated by the clause, for, as already stated, such laws could not properly be said to contravene. Yet Congress has meant something by the phrase, there can be no doubt about that. The language shows plainly that it has recognized the right to act as trustee, executor, administrator and registrar of stocks and bonds to be a subject matter for past and future state legislation—a legislation with which it does not wish the Federal Reserve Act to conflict. It has recognized the constitutional limitations upon its own legislative authority in that field. It has realized that if national banks should, on the authority of a federal statute, exercise functions which Congress has not the power to grant, it would be in contravention of the law of the state in which the functions were so exercised, even though there was no specific state law forbidding it. When the clause is examined from this point of view the consistent, harmonious, and constitutional meaning of it, and the meaning which Congress must have actually intended for it, is this: National banks may have their charters enlarged under the Federal Reserve Act so as to be competent trustees, executors, administrators and registrars of stocks and bonds, except in matters beyond the scope of federal legislation. In such state matters they may also under the act obtain the *consent* of Congress to the exercise of these functions. But in state matters the *power* must come from the state legislatures.

It follows that except in the federal affairs referred to, national banks cannot lawfully act as trustees, executors, administrators and registrars of stocks and bonds, unless there is state legislation expressly conferring upon them the power so to do. At present there is no such legislation in any of the six states comprising the Ninth Federal Reserve District, except South Dakota.

But suppose the legislature in any of these states enacts a statute which provides that a national bank may be trustee, executor, administrator, or registrar of stocks and bonds, and

a special permit is obtained from the Federal Reserve Board under Section 11, Clause K, can it be said that a national bank is nevertheless unable to act in that state in the prescribed capacity because the authority does not come from the United States under its charter? The answer must be no. A state can designate the agencies through which the business within its border may be lawfully done, and what is done through such agencies is valid, although the agent is a foreign or federal corporation acting ultra vires. The ultra vires acts may subject the corporation to discipline from the government of its creation, but the act done in the state authorizing it is valid.[8] In the supposed instance, the permission from the Federal Reserve Board would be a consent on the part of Congress sufficient to make the bank immune against attack for usurpation of franchise.

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MINNEAPOLIS.

8. The American Bible Society v. Marshall, (1864) 15 Ohio St. 537; White v. Howard, (1871) 38 Conn. 342.