Indiana Law Journal

Volume 4 | Issue 9 Article 1

6-1929

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INDIANA LAW JOURNAL

Vol. IV JUNE, 1929 No. 9

BANKS AND BANKING UNDER THE INDIANA CONSTITUTION AND STATUTES

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The authorities are not agreed as to the origin of the term "Bank." Some trace it to "Banc" or "Bench", where the early money-changers kept their coins and plied their trade. Others claim that it is derived from "Banck," the German name for a joint stock fund, which was converted by the Italians into "Banco," meaning "a heap or accumulation of money or stock."[1] By whatever name known, whether as lenders, money-changers or bankers, the modern banker is primarily a dealer in credit. Originally, he dealt in money, his business being to exchange one form of coin for another, both domestic and foreign. However, Athenian and Roman bankers received deposits of money and made loans, sometimes based on valuables, and even to transfer money and credits.[2]

Traces of credit by compensation and by transfer orders are found in Assyria, Phoenicia and Egypt, before the system attained full development in Greece and Rome.[3] The forerunners of modern banking were the private bankers of the Italian cities and because of the prejudice of the Church, at that time, against money lending at interest, on the ground that it was usury, the Jews had a monopoly of the business, and several times they were expelled from the countries of Western Europe and the business was taken up by the merchants of Lombardy, who extended their operations to England.

* See p. 608 for biographical note.

1 McLead, Theory of Credit, Book 1, p. 315.

2 The Banker's Practical Library, Vol. 2, p. 127.

3 Conant: Principles of Money and Banking, Book 2, p. 168.

Public banks have been in existence for many centuries. The Bank of Venice, founded in the Twelfth Century, is regarded as the first public bank. The Bank of Amsterdam was established in 1609, and the Bank of England, in 1694. The latter bank differed from the earlier banks, in that it was an incorporated company and a bank of issue. With that institution, modern banking may be said to have begun.

The reports of the decided cases are replete with decisions bearing upon the methods adopted and the development of the bank and its practices as we know it today. From the earliest time, owing to the difficulties caused by the concentration of wealth in the hands of a few, or in corporations, there grew up as a common understanding, a prejudice against banks and corporations, and particularly was this prejudice manifest in the Convention for the Revision of the Constitution of the State of Indiana in 1850. As was said by one of the delegates to the Convention: "I am opposed to all banks—to use a vulgar phrase 'They are of the same breed of dogs.' They are all evils; and perhaps at the present time we cannot say which system of banking will be the most productive of benefit or injury to the people. But let us place proper restrictions on all kinds of banks; if we are to have any. It is the proper course."[4]

The present Constitution was adopted in 1851, and Article 11, Section 10 (Section 216 Burns' Statutes 1926) is as follows: "Every bank or banking company shall be required to cease all banking operations within 20 years from the time of its organization and promptly thereafter to close its business." In 1893, the State Legislature of Indiana authorized the organization of loan, trust and safe-deposit companies, which Act went into force March 4, 1893, and Section 13 of which provides a limit as to the business that could be carried on by such companies. Said Section 4956, Burns' Indiana Statutes 1914 is partly as follows:

> "No such corporation shall engage in any banking, mercantile, manufacturing or other business,, except such as is expressly authorized, etc."

And this Act did not limit the corporate existence of the corporation to any specified time, nor did the constitutional provision in reference to termination of charter apply, for the obvious reason that there was an express provision against the engaging in any banking business.

[4] Debates in Indiana Convention, Vol. 2, p. 1546.

Loan, trust and safe-deposit companies were organized under the Acts of 1893, and although there was a specific prohibition against engaging in the banking business, nevertheless the great majority of loan, trust and safe-deposit companies engaged in the general banking business, and up to 1921, most of such companies were carrying on a general banking business in direct violation of law. To remedy this situation, the State Legislature in 1921 amended Section 13 of the Acts of 1893 by eliminating therefrom, the words, "in any banking," thereby removing the prohibition against engaging in the general banking business. (Acts 1921, Chapter 20, page 42; approved February 24, 1921.)

The Acts 1921 of the Legislature of the State of Indiana, Subdivision 9, Section 3, Chapter 20, page 42, provided among other things, as follows:

"Such corporation shall exercise the powers and possess the privileges conferred on banks by the laws of this state, and all powers properly incidental thereto, or which may be necessary or usual in carrying on the general business of banking, subject to the restrictions imposed by the laws of this state relative to a general banking business."

Section 8 of the Acts of 1875 (Burns' Indiana Statutes 1926), Section 13469, is as follows:

"If any trustee of any trust now existing shall be dead, or any trustee of a trust now or hereafter to be created shall die, or for any reason refuse to act, the Circuit Court or the Superior Court of the proper county may fill the vacancy by the appointment of some suitable person, who shall execute bond for the faithful performance of the duties of his trust as hereinbefore provided."

And Section 13458, Burns Indiana Statutes 1926, is as follows:

"Upon the death of a sole or surviving trustee of an express trust, the same shall vest in the court having jurisdiction thereof, and such court shall forthwith appoint successors in whom the trust shall vest."

In view of the Constitutional provision above referred to, many practical questions of more or less difficulty have been presented in connection with banking and the carrying on of trust business. No attempt is made to enumerate or suggest a possible solution for all of the situations that have arisen or may arise under these laws, and only an attempt will be made in reference to a number of such questions, as follows:

1. Are corporations organized under the loan, trust and safe-deposit Act of 1893 subject to the Constitutional provision imposed on State Banks?

2. If subject to the constitutional provision, when does the period of the 20-year limitation begin to run?

(a) From the time of incorporation; or

(b) From time of the taking effect of the Acts of 1921.

From mere reading of the Constitutional provision and the subsequent Acts of the Legislature giving banking powers to loan, trust and safe-deposit companies, it is quite apparent that the latter Acts have placed them squarely within the terms of the Constitutional provision imposed on state banks, relative to the charter limitation, and that they had no banking powers until 1921, and until they came within the terms of the Constitutional provision, the same was not applicable to them, and the period from which the charter limitation would begin to run would, as to existing companies, be operative from February 24, 1921, and as to all subsequently organized companies be operative from the date of their incorporation;[5] and such has been the ruling of the Attorney General of the State of Indiana; otherwise the anomalous situation would have been apparent that a company organized in 1893, would in 1921, have been declared to have terminated in 1903.

3. In case of re-incorporation by the same stockholders, and the securing of a new charter from the State, if no change in management or officers, and no interruption of business and the issuance of stock in the new corporation in place of stock in the old corporation, is the value of the new stock taxable in the hands of stockholders, as income?

4. If, upon re-incorporation, stock is issued to the stockholders of the old corporation, share for share, and the surplus and undivided profits are carried over to the new corporation without actual disbursement, is the proportionate amount of each stockholder's share thereof taxable as income?

The answer to the above questions are dependent upon the Revenue laws of the United States and the decisions of the Treasury Department in reference to their interpretation and applicability as to the particular state of facts as presented under our Constitutional provision. The Treasury Department of the United States had decided that in case of re-incorporation of a bank in accordance with the provisions of the section of the Constitution of the State of Indiana (Article 11, Section 10),

[5] Reports and Opinions Attorney General, Indiana, 1923 and 1924, p. 111.

upon such reincorporation, if stock in the new corporation is issued to the stockholders of the old corporation in exchange for stock held by them, such issue being made upon the basis of one share of new stock for one share of old stock, no gain or loss is recognized for Federal Income Tax purposes, until the subsequent sale of the stock received in exchange by each stockholder. The stock so received in exchange, upon its subsequent sale, will be treated for Federal Income Tax purposes, as taking the place of the property exchanged therefor.[6]

And the Treasury Department under Office Decision 930 held:

"WHERE under the laws of the State, a charter granted to a corporation is limited to a period of years, the renewal of such charter merely prolongs the existence of the organized corporation and does not itself constitute a re-organization within the meaning of the Excess Profits Law."

Adopting the view of the Treasury Department of the United States in reference to the question of possible liability of the subjection of the stockholders to the payment of income tax on their respective portions of the surplus and undivided profits of any loan, trust and safe-deposit company, whose charter is about to expire, upon the theory that at the time of termination, it is a technical distribution of the assets to the stockholders, it would seem that the only method in which the payment of such tax could be avoided would be that prior to the expiration of the charter, the company re-incorporate under another name, or by adding the word "the" to its present name, or the dropping of the article from its present corporate name, and exchange stock of the old corporation for stock in the new corporation. However, if such exchange of stock did not take place prior to the expiration of the charter, the strict construction of the ruling of the Treasury Department would subject the proportionate share of the stockholders' interest in the surplus and undivided profits, to income tax.

5. In case of the expiration of the charter of a loan, trust and safe-deposit company, do the trusts, of which the company is trustee, vest in the Circuit Court, or Superior Court, in the county where located, or do they vest in the re-incorporated company?

6. Where a loan, trust and safe-deposit company is named as executor in a Will, and the charter expires and is re-incor-

[6] Sections 202 (e) (2) and (d) (1) of the Revenue Act of 1921 and Articles 1561, 1562, 1563, 1566 (b), 1567 and 1568 of Regulations No. 62.

porated, does the new corporation become the Executor under the Will and entitled to Letters Testamentary, or has the Court power to appoint another Administrator with the Will annexed?

In Indiana, there is no law providing for fiduciary succession upon the consolidation, merger or re-incorporation of corporations, and as the trust business of loan, trust and safe-deposit companies is developing at a great rate, and with the increase in the size of estates and advantages obtained through the action of corporate trustees, it will be necessary, in order to administer advantageously living trusts, insurance trusts, real estate trusts and trusts created under Wills, that some provision be made so that upon the termination of the charter of the corporation administering such trust, that it will not be deprived of its right upon the expiration of its corporate charter, in case of its re-organization, by either legislation, or the insertion in the instruments creating the trusts, the right of such fiduciary succession.

In the case of *Petition of Commonwealth v. Atlantic National Bank,* 249 Mass. 440, 144 N. E. 443, the question involved was where a trust company organized under the laws of the Commonwealth of Massachusetts was named as executor by a man in executing his Will. That trust company became converted into a national bank organized under the laws of the United States, and then that national bank consolidated into another national bank under other laws of the United States. That last bank petitioned for appointment of executor of the Will of the man, who in the meantime had died, which Petition was resisted, and the Court in its opinion, among other things, held: that in the absence of any statute providing for fiduciary succession, that the naming of a person or corporation in the Will as executors, was not a property right which passed by transfer; that the petitioner was not entitled to Letters Testamentary upon the Will. To meet this situation, the 69th Congress of the United States passed an Act known as the Bank Act of 1927, amending the national banking laws of the Federal Reserve Act, popularly called the McFadden Bill, in providing that upon the consolidation of any State bank with national bank, which, of course, includes trust companies, that "the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, including the right of succession, as Trustee, Executor, or in any other fiduciary capacity, in the same manner and to the same extent as was

held and enjoyed by such State or District bank so consolidated with such national banking association.

Without such a provision, either stautory or incorporated into the instrument creating trusts, in view of the above decision, upon the expiration of corporate charter and its re-incorporation, there would be no succession to the trusts being administered, and the same would vest in the Circuit or Superior Court, subject to the appointment of a successor trustee.

No doubt, it would be a wise precaution, until such legislation has been enacted providing for fiduciary succession in the case of preparation and drawing of instruments creating the trusts, wherein corporations having banking powers are named as Executor or Trustee, that a provision be incorporated, substantially embodying the following:

"I hereby nominate and appoint _____ Bank, a corporation of the State of Indiana, with its principal office in the City of _____, _____ County, Indiana, Executor and Trustee under this, my last Will and Testament, and further appoint any company into which the corporate Trustee may be merged, or with which it may be consolidated, or any company resulting from any merger, consolidation or conversion into which it may enter, or company for which its stock may be exchanged, provided that the corporation shall have power to act as Executor or Trustee, and having an office in the City of _____, County of _____ and State of Indiana, etc."

Such a provision could not apply to a court trust, as Receiver, Guardian, Administrator, etc. and upon the expiration of the corporate charter, application should be made for re-appointment to the court in the name of the successor or re-incorporated bank or trust company, so that no question would arise as to the right to administer such trust. Neither would such a provision in all cases be acceptable to the settlor of the trust, as no doubt, banks and trust companies are selected by the settlor or testator the same as an individual would be selected, based principally on reliance by the settlor or testator upon the trust and confidence that he may have in a certain institution or persons directing its business affairs.

As a fitting climax to the situations presented under the foregoing Constitutional provision and statutes, the Legislature of the State of Indiana in 1915,[7] created a Charter Board, consisting of the Governor, Secretary of State and the Auditor of State,

[7] Acts 1915, p. 550, Burns' Revised Statutes 1926, Section 3844 et seq.

to pass on all applications for the organization and incorporation of banks and trust companies, with authority either to grant or refuse the issuance of a charter—the entire matter being discretionary after an investigation as to the financial standing and character of the incorporators, and the public necessity of the business in the community in which it is sought to establish a bank or trust company. In view of the usual high standing of the personnel of the Charter Board, no doubt, it would not arbitrarily abuse the discretion vested in it, and no grave difficulty is anticipated from this source. However, in boom times, the public necessity for banks or trust companies might be considerably different from slack or hard times, and during good times, the Charter Board might authorize the issuance of a number of charters, and during slack times, might refuse an established bank a renewal of its charter on such grounds, leaving the established bank or trust company in the position of being compelled to seek redress in court with all its consequent continuances and delays, until such time as the charter would have expired, leaving the stockholders subject to the payment of income tax and the termination of the trusts as herein set forth, thereby giving the advantage to newly organized banks over established institutions.