

BANKS AND BANKING. (1) A corporation has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly given; (2) A bank incorporated in Missouri has no power to engage in the business of writing insurance; (3) Trust companies incorporated under the laws of the State of Missouri may engage in the business of writing insurance as agent or as broker; (4) Remedies.

April 9, 1936.



Honorable R. E. O'Malley,
Superintendent of Insurance Dep't.,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an official opinion relative to banks and trust companies engaging in the business of insurance by acting as agents or brokers.

Necessarily, in answering this request, we limit ourselves to a discussion of such powers of banks and trust companies incorporated under the laws of the State of Missouri.

I.

A Corporation has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly given.

A corporation, whether it be a corporation formed for conducting a banking business or otherwise, has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly granted. This much is axiomatic.

Section 7, Article XII, of our Constitution provides:

"No corporation shall engage in business other than that expressly authorized in its charter of the law under which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business.

Section 4555, Revised Statutes of Missouri, is merely declaratory of the Constitution:

" * * * No corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized."

As early as 450 B.C., the laws of the Twelve Tables (Table VIII) recognized this theory inherent in the law of corporations. Gaius, l. IV ad XII Tab. (D. 47, 22, 4):

"His (sodalibus) potestatem facit lex (XII Tab.), pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant; sed haec lex videtur ex lege Solonis translata esse."

While this law was obviously taken from a law of Solon, the Romans were even more modern in thought than this basic law declared for they ordained all corporations to be illegal if they did not owe their conception to either the Senate or the Emperor. (Kent's Comm., Vol. 2)

The modern reasons underlying this principle are two: First, because a corporation, being a creature of law, created by law, must, of necessity, have only those powers expressly or impliedly granted by the creator; and secondly, because the stockholders of the corporation have only contracted to make themselves liable for the authorized acts of the corporation, and have not assumed liability for acts ultra vires the corporation. It is, of course true that a corporation is capable of exceeding its charter powers (though not in the sense of right), and it cannot always set up its want of power to escape liability either ex delicto or ex contractu. Fletcher "Cyclopedia Corporations".

II

A bank incorporated in Missouri
has no power to engage in the
business of writing insurance

Disraeli once said, "A precedent embalms a principle". That this is so is nowhere more clearly demonstrated than in this discussion, for the principle of corporate law referred to in the first part of this opinion is as well preserved today as it was

when it sprang with full vigor from the minds of the ancient Greeks.

"The settled rule is that a corporation possesses only such powers as are expressly or fairly implied in the statute by or under which it is created; that the enumeration of these powers implies the exclusion of all others; and that any ambiguity or doubt respecting the possession of any particular power arising out of the terms used in the statute is to be resolved against its possession. This rule is fully recognized in the State of Missouri. See *Ex rel. v. Lincoln Trust*, 4 Mo. 562, 46 S.W. 593; *Hotel Company v. Lowe Furniture Co.*, 73 Mo. App. 135."

Richard Hanlon Millinery Co. v. Mississippi Valley Trust Company, 158 S.W. 359, 1.c. 363.

At this juncture, it may be well to call attention to the statutes to which banking corporations owe their origin. Section 5354, Laws of Missouri, Extra Session 1933-34, page 137, defines the rights and powers of banks incorporated in this state. It would be useless in this discussion to set out the entire statute. Suffice it to say that only in sub-section 7 is there any mention of the power of a bank to act as agent for a corporation. This provides:

"Every corporation shall be authorized and empowered:

* * * *

(7) To act as fiscal agent of the United States, of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money and receive and deliver certificates of stocks, bonds, and other evidences of indebtedness."

By no conceivable stretch of the imagination can this be construed as authority for a bank to engage in the business of writing insurance as an agent or broker. If, therefore, a bank be permitted this right, it must be by reason of implied powers possessed by banking corporations generally.

" * * * ' a power is implied when reasonably necessary to enable the corporation to accomplish the objects of its creation', provided always, of course, that those objects are such as are recognized and permitted by the charter granting power. Furthermore, any particular act, to be justified under implied power, must be 'directly and immediately appropriate to the execution of the specific powers granted by the charter and not bear a slight or remote relation to them.'
2 Fletcher Cyc. Corp., pp. 1768 and 1770, pars. 793 and 795."

State ex rel. Barrett
v. First Nat'l. Bank,
297 Mo. 397.

The words "banking powers" were, in the case of Reed v. People, 125 Ill. 592, construed to mean such powers as are ordinarily conferred upon and used by the various banks doing business in the country. "The words 'general banking powers' are to be used in their common and ordinary sense. The ordinary and usual powers exercised by banks in doing general banking business are to loan money, to discount notes, receive deposits, and deal in commercial exchange." Knass v. Madison and Kedzie Bank, 354 Ill. 554. In that case the Court also said anent the powers of a banking corporation:

"Enumeration of powers granted implies exclusion of all others, and any ambiguity in the terms of the grant of power must operate against the corporation and in favor of the public. If a power claimed is withheld, the withholding of such power is to be regarded as a prohibition against its exercise.
(Calumet Dock Co. v. Conkling,

273 Ill. 318; Fritze v. Equitable Building & Loan Society, 186 Id. 183; American Loan & Trust Co. v. Minnesota & Northwestern R.R. Co., 157 Id. 641; Fridley v. Bowen, 87 Id. 151). Other courts hold the same view. California Bank v. Kennedy, 167 U.S. 362; Weckler v. First National Bank, 42 Md. 581."

In the case of Weckler v. First National Bank, 42 Md. 581, the question was before the court as to the power of a bank to sell bonds for third parties on commission. The words of the court are so appropriate to this opinion that we set them out in extenso:

"The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking, thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, this law adds the special power to buy and sell exchange, coin and bullion, but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to 'discount and negotiate' promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the terms 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power 'to negotiate' a bill or note is the power to endorse and deliver it to another so that the right of action thereon shall pass to the endorsee or holder. No construction can be given to these terms as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission or engage in business of that character. The appropriate place

for the grant of such a power would be in the clause conferring authority to 'buy and sell', but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, expressio unius est exclusio alteris, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is in anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking, as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that, they will best accommodate the commercial community, as well as protect their shareholders.

* * *

"We are therefore clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of ultra vires is open to the appellee." (Emphasis ours).

It is apparent that a corporation of this kind is created for a more limited and special purpose than is a corporation organized under the general statutory charter for the purpose of conducting ordinary business. *Divide County v. Baird*, 212 N.W. 236. The nature of the business and its relation to the fiscal affairs of the State and Nation make it a business especially subject to regulation. "These regulations and limitations are intended primarily to safeguard the rights of depositors, but also rest upon the broader basis that the public welfare and the stability of public business and commercial regulations depend to a great extent upon honesty and soundness in the banking business. They should, therefore, be construed with reference to such purposes." *Fletcher Cyclopedia Corporations*, Vol. VI, p. 274.

It has been represented that, in most instances, an executive officer of a bank holds the license to carry on the business of writing insurance either as agent or as a broker. However, banking corporations, like all others, can act and do business only through their officers and agents. "Officers of a bank have authority to act in accordance with the general usage, practice and course of their business, and when thus acting, they bind their bank in favor of third persons, who have no knowledge of any narrower limitations of their power." Fletcher Cyclopaedia Corporations, Vol. II, page 233.

We have shown that a corporation may become liable to third parties, either ex contractu or ex delicto, especially where the authority on the part of officers or agents to engage in ultra vires transactions in the name of the corporation has emanated from the stock-holders or directors. While we do not intend, in this opinion, to extend our remarks to the question of the extent of liability involved in undertaking the business of writing insurance either as agent or as a broker, nevertheless, some liability is attached thereto.

✓ For a particular undertaking to be against public policy, actual injury need not be shown. "It is enough if the potentialities for harm are present." Porter v. Trustees of Cinn. Southern Ry., 97 Ohio St. 29,33, 117 N.E. 20. Ulman v. Fulton, 97 A.L.R. 1170, 1.c. 1178.

In concluding the discussion of this question, we respectfully refer to the case of Downing v. Lane County State & Savings Bank, 290 P. 236:

"It was not within the scope of Bergman's authority, as executive officer of the banking corporation, to invest and loan money for the bank's depositors with their consent so as to make the bank liable for the acts of its executive officer. The bank's executive officer represents the bank in transacting its business. The scope of his duties does not include that of acting as broker for others. In investing and reinvesting the funds of plaintiff, Bergman was acting for her and not for the bank. There is no pretense that Bergman charged any commission, fee or remuneration in favor of the bank for his services. That it was not within the scope of his authority as executive officer to act for the depositors of the bank as a broker is well established by the following

authorities: In re Assignment of Bank of Oregon, 32 Or. 84, 88, 89, 51 P. 87; Shute v. Hinman, 34 Or. 578, 56 P. 412, 58 P. 882, 47 L.R.A. 265; Byron v. First Nat. Bank, 75 Or. 296, 299, 146 P. 516; Verrell v. First Nat. Bank, 80 Or. 550, 555, 157 P. 813; Deerstler v. First Natl. Bank, 82 Or. 92, 100, 161 P. 386; Haines v. First Natl. Bank, 89 Or. 42, 48, 172 P. 505; Portland Bldg. Co. v. State Bank of Portland, 110 Or. 61, 66, 67, 222 P. 740; Miller v. Viola State Bank, 121 Kan. 193, 246 P. 517, 48 A.L.R. 373."

Further remarks are unnecessary, it being our opinion that the business of writing insurance contracts, either as agent or as broker, is entirely foreign to the general banking business, and that banking corporations incorporated in Missouri are without the power to engage in said business. The several factual situations outlined in your letter as to the methods of compensating the officer (of the bank holding the license to write insurance create, in point of law, in our opinion, distinctions without a difference, and our conclusion is the same as to all such situations: It may not be legally accomplished in Missouri.

III

Trust Companies incorporated under the laws of the State of Missouri may engage in the business of writing insurance as agent or as broker

A totally different question is presented in the discussion of the powers of trust companies and banks authorized to carry on the business of trust companies through separate trust departments. The reason underlying this distinction is, of course, to be found in the statutes supplying the life blood to these corporations. Whether it is a wise policy to grant this power to trust companies is, of course, a matter with which we do not and indeed, could not concern ourselves, as the wisdom, propriety and expediency of legislation is purely a matter for the Legislature.

Section 5421, Revised Statutes of Missouri, as amended by Laws of Missouri, Extra Session 1933-34, page 140, provides in part as follows:

"Corporations may be created under this article for any one or more of the following purposes:

* * *

7. To act as the fiscal or transfer agent of the United States, of any state, municipality, body politic or corporation and in such capacity to receive and disburse money, to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness; and to act as attorney in fact or agent of any person or corporation, foreign or domestic, for any lawful purpose."

Sub-section 8 of Section 5354, heretofore referred to, grants to certain banking corporations the power to indulge in the added rights (to say nothing of liabilities) of trust companies. Our conclusions, therefore, with respect to trust companies, apply with equiparate force to these banks so qualified.

The State of Kentucky has a statute similar to Section 5421 of our laws. This section (606) provides in part that "any trust company * * * may act as agent or attorney for the transaction of any business or the management of estates * * *" The Court of Appeals of Kentucky, in construing this statute (*Saufley v. Botts*, 272 S.W. 408) said:

"The words, 'and may act as agent or attorney for the transaction of any business,' are comprehensive. While followed by the words, 'or the management of estates,' etc., their use indicates that it was intended to give such corporations general authority to act as agent or attorney in matters aside from those specifically mentioned.

* * *

"However, the authority to act as agent is a mere delegation of power and may be conferred upon trust companies generally under the section quoted, and also upon other corporations organized under the general provisions of the act, and, when similar language is used in each, the same construction applies to both."

The somewhat more recent case of Saufley v. Lincoln Bank & Trust Company, 275 S.W. 802, completely affirms this decision.

Our statute is even more comprehensive in terms than the Kentucky Statute. The power "to act as * * * agent of any person or corporation * * * for any lawful purpose" would seem to be a plenary grant, and to include all activities short of criminal ventures. The business of writing insurance as agent or broker could hardly be construed as being an unlawful purpose even though the quarterly premium does seem to be payable monthly. While it is true that a venture is not necessarily within the powers of a corporation merely because it is profitable, nevertheless, as respects a trust company writing insurance as agent or as broker, we must conclude that it is both,

IV

The Remedies

It would serve no useful purpose to set out at length the statutory provisions relating to agents or brokers violating the insurance laws. You, no doubt, are entirely familiar with these sections of our law. We content ourselves, therefore, with the observation that your powers are broad and comprehensive with respect to these licensees of your department. Sections 5892 and 5904, Revised Statutes of Missouri, 1929. The possibility of criminal prosecution as set out in Section 5730, Revised Statutes of Missouri 1929 is, of itself, sufficient, in our opinion, to cause agents and brokers to comply with our laws.

As to any banking corporation assuming powers unto itself that are without the scope of its charter, a certain, swift and expedient remedy, full and complete in effect, is to be found in Section 1618, Revised Statutes of Missouri:

"In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney General of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at

the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into, or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the Attorney General of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

Respectfully submitted,

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APPROVED:

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