TRUST COMPANIES: No power to purchase the majority of the Stock of a National Bank

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Hon. O.H. Moberly,
Commissioner of Finance,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your request for an opinion as to the following state of facts:

> "A trust company organized under the laws of the State of Missouri purchased stock of a national bank. Both the trust company and the national bank are now insolvent.
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> 1 - Does a trust company organized under the laws of the State of Missouri have the power and authority to purchase stock of a national bank?
>
> 2 - Is the liability of a trust company as a stockholder in the national bank entitled to a preference in the distribution of the assets of the trust company?"

In the case of Allen v. McFerson, 235 Pac. 346, the court held:

> "A stockholder of a bank assumes a contractual liability when he becomes a stockholder and the terms of his contract are legally statutory."

In the case of Saussy v. Liggett, Sup. Ct. of Florida, 78 South. 534, the court held:

> "****The liability of a stockholder of a banking company arises ex contractu (McNeill v. Pace, 69 Fla. 349, 68 South. 177; Whitman v. Oxford Nat. Bank, 176 U.S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587) and even if the additional obligations and liability of the stockholder which is insisted upon here may

> be imposed by the statute, such obligations and liability depend upon the statute creating it, and as it is in derogation of the common law, the statute cannot be extended beyond the words used. 1 Michie on Banks and Banking, p. 162; Brunswick Terminal Co. v. National Bank of Baltimore, 192 U.S. 386, 24 Sup. Ct. 314, 48 L. Ed. 491; Smathers v. Western California Bank, 135 N.C. 410, 47 S.E. 893. ****"

Therefore, the trust company's liability as a stockholder in the national bank is contractual and dependent entirely for validity upon the provisions of the national banking act. Being a mere contractual obligation the creditors of the national bank have no priority over other contract creditors of the trust company unless there be a priority specifically given by statute.

Section 5151 of the National Banking Act, insofar as it is pertinent, provides as follows:

> "The stockholders of every national banking association shall be individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. ****"

Section 5238 of the National Banking Act provides as follows:

> "That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the share-holders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The above sections of the National Banking Act merely provide for the amount of the stockholders' liability and the creditors' procedure for establishing their claim. However, when the claim has become adjudicated, it becomes subject to the laws of the State of

Missouri insofar as the question of whether or not the claim is entitled to a preference. Section 5333 R.S. of Mo. 1929 provides as follows:

> "When the commissioner shall have taken possession of such corporation or private banker, and shall have determined to liquidate its affairs, he shall notify all persons who may have claims against such corporations or banker to present the same to him and make proper proof thereof within four months from the date of said notice and at a place specified therein and shall specify in said notice the last date for presenting said proofs. ****"

Section 5336 R.S. of Mo. 1929 provides as follows:

> "The commissioner shall, not later than thirty days after the time has expired to file objections to claims duly presented, approve or reject every duly filed claim except claims as to which objections are still pending undetermined by the court or judge. Every claim approved by him, he shall indorse 'approved' and file so indorsed in his office. If he doubts the justice or validity of any claim, he shall reject such claim and shall indorse the same 'rejected' and file said claim so indorsed in his office. He shall cause notice of such rejection to be served upon the claimant either personally or by mail. The commissioner shall not determine priorities in approving or rejecting claims; but approved claims shall be presented to the circuit court pursuant to Section 5339 for determination as to their priority of payment. Within thirty days after the commissioner has approved or rejected all claims duly filed, he shall list all claims approved and all rejected by him and file one copy of said list in his office and one copy in the office of the recorder of the county or city in which the principal office of such corporation or private banker is located."

Under Chapter 34 R.S. of Mo. 1929, the Circuit Court must determine whether or not a claim against an insolvent bank or trust company is to be preferred over the claims of other creditors. It is the opinion of this department that the obligation of a stockholder in a national bank, being purely a contract obligation and there being no statute providing for its priority over other contract creditors, that the creditors of a national bank should not be entitled to a preference with respect to the assets of an insolvent trust company in Missouri purely for the reason that said trust company was a stockholder in the national bank.

However, under the facts as furnished this department by Mr. Moberly, the trust company purchased practically all of the stock of the national bank. This action of the trust company was null, void, and of no legal effect whatsoever, and the trust company is not now and has never been in point of law a stockholder in the National bank.

Section 5421 R.S. of Mo. 1929, relating to the powers of trust companies in the State of Missouri, provides as follows:

> "To buy, invest in and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, stocks or other investment securities."

Section 5429, R.S. of Mo. 1929, sub-section 9 provides as follows:

> "Shall not invest or keep invested in the stock of any private corporation an amount in excess of fifteen per centum of the capital and surplus fund of such trust company; nor shall it purchase or continue to hold stock of another bank or trust company if by such purchase or continued investment the total stock of such other bank or trust company owned and held by it as collateral will exceed fifteen per centum of the stock of such other bank or trust company: Provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company, the vaults of which are connected with or adjacent to an office of such trust company, nor to the ownership by such trust company or its stockholders of a part or all of the capital stock of one bank organized under the laws of the United States or of this state, nor to the ownership of a part or all of the capital of one corporation, organized under the laws of this state, for the principal purpose of receiving savings deposits or issuing debentures or loaning money on real estate or dealing in

> or guaranteeing the payment of real estate securities, or investing in other securities in which trust companies may invest under this chapter, nor to the continued ownership of stocks lawfully acquired prior to the first day of January, A.D. 1915."

The principal case which we find in Missouri bearing directly on this point is "State of Missouri ex rel Herbert L. Hadley, Plaintiff, v. Bankers Trust Company, Defendant, and H.A. Lee, Receiver, Garland State Bank, Plaintiff in Error v. Bankers Trust Company and Ira M. Cobe, Purchaser of the Assets of the Bankers Trust Company, Defendant in Error, 157 Mo.App. 557. Judge Johnson held:

> "'The facts alleged in the petition show beyond dispute that the Bankers Trust Company purchased seventy-three per cent of the stock of the Kansas bank for the purpose of controlling and managing its business and affairs and that while the bank apparently continued to do business in its corporate name and in the guise of a separate and independent corporate entity, in reality its identity was merged into that of a trust company which absorbed its business and assets and managed and controlled them as though they constituted a mere branch or department of the business of the Trust Company. In short, the latter corporation swallowed the bank and used its name and corporate machinery for its own purposes.
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> The Bankers Trust Company had no power or authority to engage in the banking business either directly or indirectly. The powers of such corporations are defined in Section 1124 Revised Statutes 1909, and under that definition, are exclusive of all others under the rule that 'the enumeration of the powers conferred upon trust companies by the statute must be held to exclude all others'. See State ex inf. v. Lincoln Trust Co., 144 Mo., l.c. 588, where it was expressly held that a trust company has no authority to engage in the banking business.
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> The ninth clause of Sec. 1124, Revised Statutes 1909, authorizes trust companies 'to buy and sell all kinds of government, state, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities.'

> The grant of authority to buy and sell stocks and other investment securities as commercial commodities carries with it neither the express nor implied authority to purchase the stock of other corporations for the purpose of controlling their management. (DeLavergne Co. v. Germain Savings Inst., 175 U.S. 40). Nor to use the power conferred by law for the purpose of indirectly engaging in business activities forbidden to the corporation by the express provisions of the statute. The act of the Bankers Trust Company in controlling the management of the Kansas Bank through ownership of a large majority of the stock of the stock of the bank was not buying and selling stocks within the meaning of the statute, but was a clear and flagrant evasion and violation of the law. But it is argued by plaintiff in error that since the trust company received the benefits of the contract of purchase and the contract should be regarded as fully executed, the respondents are estopped from interposing the defense of ultra vires ****."

In the case of Anglo-American Land Co. v. Lombard, 132 Fed. Rep., l.c. 736, Judge Van Deventer said:

> '"The only authority of the Missouri company to purchase stock in another corporation is found in sub-division 9, Sec. 2839 R.S. of Mo. 1889, which reads: 'To buy and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities'. The context shows very clearly that the purpose was not to authorize the purchase of all of the stock of another company for the purpose of controlling its management, but to authorize the buying and selling of stocks as investment securities, in like manner as government bonds and other securities named are bought and sold.
>
> Controlling the management of a corporation of another state to the ownership of its entire stock is not buying or selling investment securities, nor is it fairly incidental thereto. The hazards of such venture are altogether repugnant to the purposes for which the Missouri company was formed, which included the handling and investing of the moneys of others, executing trusts under deeds and wills,

acting as guardian of infants and insane persons, and guaranteeing the fidelity of persons holding places of public or private trust; all requiring the maintenance of high standard of credit and stability on the part of that company. It is impossible to escape the conclusion that the purchaser of the Kansas Company's stock was beyond the power of the Missouri Company.

In the absence of any established rule of decision in the State of Missouri in respect of the effect of corporate acts which are ultra vires (and no local rule of decision has been called to our attention by counsel), we must apply to this case the rule recognized in the Supreme Court of the United States. That rule, as stated in Central Transportation Company v. Pullman's Car Co., 139 U.S. 24, 59, 11 Sup Ct. 478, 35 L. Ed. 55, and as applied in many subsequent cases is: 'A contract of a corporation which is ultra vires in the proper sense--that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon them by the Legislature--is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws.'"

It may be contended that the Trust Company, having received the benefit of the contract, should not be allowed to repudiate it. However, this theory of law rests upon the principle that the contract

was an innocent and lawful one and in this respect differs from the case where the act was illegal and expressly prohibited by law. This principle is well brought out in the case of State ex rel Hadley v. Bankers Trust Co., 157 Mo. App. 557, 138 S.W. 669, wherein the court held:

> "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void but only voidable; not wrong per se or against public policy and good morals, but wrong merely because the act is not within the scope of the powers conferred by law on the corporation. We know of no case in this state where the rules under consideration have been applied where the corporation has become a party to a contract void for the reason that it was wrong in itself and a violation of sound public policy and good morals. ***."

Therefore, it is the opinion of this department that the creditors of the National Bank have no claim, preferred or otherwise, upon the assets of the Trust Company, the Trust Company not being in law a stockholder of the National Bank.

Respectfully submitted,

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APPROVED:

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