

June 2014

# Banks--Corporations--Construction of Statutes Prohibiting Corporations from Exercising Banking Powers (Meserole Securities Co. v. Cosman, 253 N.Y. 130 (1930))

St. John's Law Review

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### Recommended Citation

St. John's Law Review (2014) "Banks--Corporations--Construction of Statutes Prohibiting Corporations from Exercising Banking Powers (Meserole Securities Co. v. Cosman, 253 N.Y. 130 (1930))," *St. John's Law Review*: Vol. 4: Iss. 2, Article 14.  
Available at: <http://scholarship.law.stjohns.edu/lawreview/vol4/iss2/14>

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by another Justice.<sup>2</sup> But see *Ansorge v. Kane*,<sup>3</sup> wherein an intermediate order was made denying defendant's motion for judgment on the pleadings. The motion was on the ground that the complaint failed to allege a cause of action. Such order was not mentioned in the notice of appeal as being brought on for review to the Court of Appeals. Pound, *J.*, writing the opinion for the Court, found no merit in respondent's contention that by virtue of these facts the Court of Appeals was foreclosed from considering the sufficiency of the complaint. The decision was followed by the Court of Appeals in the later case of *Vogeler v. Alwyn Improvement Corp.*,<sup>4</sup> where the opinion of Lehman, *J.*, states the following on this subject: "It is urged at the outset that the decision in favor of the plaintiff upon the motion to dismiss the complaint stands as the law of the case, since the notice of appeal from the subsequent judgment does not bring up the earlier order for review. In the case of *Ansorge v. Kane* (244 N. Y. 395) we have held otherwise. We may consider the pleadings as if no motion for judgment dismissing the complaint had been made and denied before the answer was interposed."<sup>5</sup> It is interesting to observe that *Kidder v. Hesselman*,<sup>6</sup> referred to by the Court in the principal case, was cited by counsel in their brief to the Court of Appeals in the *Vogeler* case, *supra*,<sup>7</sup> in support of the contention which Judge Lehman refused to uphold. The holding in the principal case merely reaffirms the general rule that an order by a Justice at Special Term may not be reviewed upon a renewal of the same motion.

R. L.

BANKS—CORPORATIONS—CONSTRUCTION OF STATUTES PROHIBITING CORPORATIONS FROM EXERCISING BANKING POWERS.—Plaintiff is a corporation organized under the Business Corporation Law. By its charter it was given the power "to hold, own, sell, assign, deal in, pledge and otherwise dispose of \* \* \* notes and other securities, obligations, contracts and evidences of indebtedness of corporations of the state of New York or any other state of the Union." It did not engage in the business of loaning or advancing money to its customers, deducting interest in advance, and maintained no office for that purpose. In the regular course of its business, plaintiff purchased, before maturity, at less than their face value, two

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<sup>2</sup> *Aldrich v. Newburgh News Printing & Publishing Co.*, 70 Misc. 126, 128 N. Y. Supp. 51 (1910); *Kidder v. Hesselman*, 119 Misc. 410, 196 N. Y. Supp. 837 (1922); *Rieser v. L. Prager, Inc.*, 157 N. Y. Supp. 118 (1916); *Rawll v. Baker-Vawter Co.*, 167 N. Y. Supp. 931 (1917).

<sup>3</sup> 244 N. Y. 395, 155 N. E. 683 (1927).

<sup>4</sup> 247 N. Y. 131, 159 N. E. 886 (1928).

<sup>5</sup> *Ibid.* at pp. 134-35.

<sup>6</sup> 119 Misc. 410, 196 N. Y. Supp. 837 (1922).

<sup>7</sup> *Supra* Note 4.

promissory notes bearing interest at six per cent per annum; plaintiff was to receive the interest at the date the notes were payable. In an action brought to recover the amount thereof, the defense interposed was that the purchase of the notes constituted a discount thereof in violation of the corporation and banking laws of this state, and in consequence they were void and unenforceable. On appeal, *held*, judgment for plaintiff affirmed. While business corporations may not encroach upon the field of banking occupied by banks of discount by "making discounts," even though they perform no other banking function, yet they are not restrained or prohibited from purchasing notes at a discount where such purchase is not a mere device for carrying on the business of advancing or loaning money at interest. The mere purchasing or discounting of promissory notes is not of itself banking, but is in fact, as well as in form, a commercial transaction of bargain and sale. *Meserole Securities Co. v. Cosman*, 253 N. Y. 130, — N. E. — (1930).

For a discussion of this case in the Appellate Division, see (1929) *St. John's L. Rev.* 126.

In the prevailing opinion, *Lehman, J.*, indicates that the Legislature did not intend that the habitual exercise of one of the powers confided to a bank should constitute illegally engaging in a form of banking. The mere power to purchase notes at a price determined by the deduction of interest in advance from the face value of the note does not lead to the conclusion that such purchase by a business corporation constitutes an exercise of a banking power or engaging in a form of banking. The Court distinguishes the two uses of the word "discount." In discounting a note, a bank employs its funds in making a loan or advance to its customer, the discount being the deduction of interest from the face amount of the loan as compensation for money advanced to the customer. Such loans or advances are made upon the note of the customer or of a third party, payable to the customer. The transaction is in fact a loan and usually designated a "discount." The plaintiff in the principal case was engaged in the business of merely purchasing notes at less than their face value as a speculation. It did not maintain an office at which customers might obtain a loan or advance of moneys at banking interest, and did not accept deposits or otherwise carry on any form of banking business.

*Kellogg, J.*, in his dissenting opinion, in which *Crane, J.* concurs, urges that the exercise of any one of the powers enumerated in Section 18 (formerly Section 22) of the General Corporation Law,<sup>1</sup> is denied to a corporation unless organized under the Banking Laws; that in order to come within the prohibition of that section it is not

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<sup>1</sup>This section provides that no corporation, "other than a corporation formed under or subject to the banking laws of this state or of the United States," shall "by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking."

necessary for a business corporation to exercise all the powers thereby conferred, and that such corporation may infringe upon the prohibition against exercising banking functions by only exercising one of the several prohibited functions.

As the statute stood at the time of the decision, it was difficult to reconcile the views of the majority with the language of the Legislature; but an amendment to the Stock Corporation Law makes it plain that the view of the majority had at least the sanction of the inarticulate legislative intent.<sup>2</sup>

R. L.

**BANKS—ENFORCEABILITY OF CONTRACT BY BANK TO PURCHASE STOCK.**—Plaintiffs are stockbrokers engaged in business in New York City. The defendant is a banking corporation organized under the laws of this state. The plaintiffs purchased certain stocks for the defendant at its request and promised to pay therefor immediately upon delivery. Defendant paid for part of the stocks which had been delivered but refused to pay for the balance, for which this action is brought. On motion, before answer, the complaint was dismissed on the ground that on its face it stated an illegal and void transaction. On appeal, *held*, the dismissal of the complaint was erroneous. Whether a contract by a bank to purchase stocks is enforceable must depend upon the facts and circumstances under which the contract is made and the question cannot be determined upon a motion to dismiss a complaint. *Dyer v. Broadway Central Bank*, 252 N. Y. 430, 169 N. E. 635 (1930).

The question at issue is, may a bank in this state, under any circumstances, order the purchase of common stock from a stock exchange house, rendering itself liable as principal to its brokers for the purchase price. By statute,<sup>1</sup> banks cannot lawfully speculate for themselves and risk capital and deposits in stock gambling. They are confined to the purchase of the particular stocks specified in the statute in an endeavor to make and keep them financially sound. It is, however, common practice for customers to deal directly with

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<sup>2</sup> Sec. 18 (L. 1929, Ch. 326), which now provides that "any stock corporation, domestic or foreign, other than a moneyed corporation, may purchase, acquire, hold and dispose of bonds, notes or choses in action of any person or persons, partnership or corporation, domestic or foreign, and may pledge them to secure the payment of collateral trust bonds or notes, may sell or otherwise negotiate such collateral trust bonds or notes \* \* \*."

<sup>1</sup> In addition to the powers conferred by the General and Stock Corporation Law, Section 106 of the Banking Law (Cons. L., Ch. 2) grants to a bank the power of loaning "money on real or personal security"; also "all such *incidental powers* as shall be necessary to carry on the business of banking." Subdivision 7 of that section grants the power "to receive \* \* \* upon deposit for safe-keeping stocks" and other valuable securities. Section 13, Subdivision 1 of the General Corporation Law (Cons. L., Ch. 23) provides: "A corporation shall not possess or exercise any powers unless given by law, or *necessary to the powers so given.*" (Italics ours.)