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Fleckner v. U. S. Bank.

[Promissory Note. Usury. Local Law.]

Fleckner, *Plaintiff in Error*, v. The President, Directors, and Company of the Bank of the United States, *Defendants in Error*.

The Act of the 10th of April, 1816, c. 44. incorporating the Bank of the United States, does not, by the 9th rule of the fundamental articles, prohibit the Bank from discounting promissory notes, or receiving a transfer of notes in payment of a debt due the Bank.

The Bank of the U. S., and every other Bank, not restrained by its charter, and also private bankers, on discounting notes and bills, have a right to deduct the legal interest from the amount of the note or bill, at the time it is discounted.

The Bank of the U. S. is not restrained, by the 9th rule of the fundamental articles of its charter, from thus deducting interest, at the rate of 6 per cent., on notes or bills discounted by it.

Banks, and other commercial corporations, may bind themselves by the acts of their authorized officers and agents, without the corporate seal.

The negotiability of a promissory note, payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that State, and other countries governed by the Civil law.

The statutes of usury of England, and of the States of the Union, expressly provide, that usurious contracts shall be utterly void; but, without such a provision, they are not void as against parties who are strangers to the usury.

The statute incorporating the Bank of the U. S. does not avoid securities on which usurious interest may have been taken, and the usury cannot be set up as a defence to a note on which it is taken. It is merely a violation of the charter, for which a remedy may be applied by the Government.

ERROR to the District Court for the District of Louisiana. This was a suit brought by the

defendants in error against the plaintiff in error, in the Court below, upon a promissory note drawn by him, dated the 26th of March, 1818, for the sum of 10,000 dollars, payable to the order of one John Nelder, on the first of March, 1820. The plaintiffs below, in their petition, made title to the note through several mesne endorsements, the last of which was, that of the President, &c. of the Planters' Bank of New-Orleans, through their cashier, as agent. The answer of the defendant below set up several grounds of defence: (1.) That the Bank of the United States purchased the note in question from the Planters' Bank, which was a *trading* within the prohibitions of the charter of the Bank of the United States. (2.) That the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per centum per annum was taken by the Bank of the United States. (3.) That the cashier of the Planters' Bank had no authority to make the transfer. (4.) That the making the promissory note by the defendant below was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as the part consideration of the purchase by him of a plantation and slaves, from the said Nelder, and that the notary, before whom the contract of sale was executed and recorded, wrote on the note the words "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer pro-

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ceeded to state, that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid until the title was made good; and prayed, that the matters thus alleged and put in issue, might be inquired of by a jury.

The issue was joined, and it appeared in evidence on the trial, that the note in question was discounted for the Planters' Bank, by the Bank of the United States, and, after deducting for the time the note was to run a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which was at that time indebted to the Bank of the United States in a large sum of money. The counsel for the defendant below moved the Court to instruct the jury, upon this evidence, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." The Court refused to give the instruction prayed for, but did instruct the jury, "that the acceptance of an endorsed note, in payment of a debt due, is not a trading in things prohibited by the act."

The Court also instructed the jury, that the discount taken by the Bank of the United States was not usurious, and would not defeat their right to recover the amount of the note.

It also appeared in evidence, that the Board of Directors of the Planters' Bank, on the 21st of October, 1818, passed a resolution, "That the president and cashier be authorized to adopt the

most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city, [New-Orleans,] as well as all others presently due, and which may in the future become due to any banks of the city." The endorsement of the note was made to the Bank of the United States, on the 5th of September, 1819; and before the commencement of the present suit, to wit, on the 27th of June, 1820, the Board of Directors of the Planters' Bank passed another resolution, to which the corporate seal was annexed, declaring that the two notes of the defendant below, (of which the note now in question was one,) "were endorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank;" and that "the said board of directors do hereby ratify and confirm the said act of their said cashier, as the act of the President, Directors, and Company of the Planters' Bank." Upon this evidence, the Court instructed the jury, that the cashier had authority to endorse the note, and that his endorsement operated a valid transfer.

It further appeared in evidence, that the said note was originally given as a part consideration for the purchase money of a plantation and slaves, purchased by the defendant below, of Nelder, with a covenant to warrant and defend. The contract of sale was drawn up, executed, and recorded, before a notary, according to the laws

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and usages of the State of Louisiana. The notary, upon the giving of this note, and other notes, for the purchase money, by the defendant below, wrote on each note the words "*ne varietur.*" The Court instructed the jury, that the writing of these words did not affect the negotiability of the note.

The defendant below excepted to these several instructions, and the jury found a verdict for the plaintiffs, on which judgment was rendered by the Court below; and the cause was brought by writ of error to this Court.

Feb. 20th. Mr. *Harper*, for the plaintiff in error, argued, (1.) That the purchase of the note in question, by the Bank of the United States, from the Planters' Bank, was a *dealing or trading* within the 9th rule of the fundamental articles of the charter of the Bank of the United States, which provides, "that the said corporation shall not directly or indirectly deal or trade in any thing, except bills of exchange, gold or silver bullion, or in the sale of goods, really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands." (2.) He insisted that the transfer of the note was usurious, as it was made in consideration of a discount, on which the interest was deducted at the time of making the discount, contrary to the provision of the same 9th rule, which declares, that the Bank shall not "take more than at the rate of 6 per centum per annum, for or upon its loans or discounts." He admitted that this practice of deducting the interest from the sum advanced, at the

time the discount was made, was according to the general usage of banks and private bankers. But he denied that this usage was lawful, since it was plain, that by this means more than at the rate of 6 per cent. per annum was received by the bank upon the sums actually advanced. (3.) The cashier of the Planters' Bank had no authority to transfer the note. The transfer must have been made by the corporation, either under its common seal, which is the appropriate legal mode in which these artificial persons are to act; or under the resolution of the 21st of October, 1818, which was supposed to constitute a special authority to the cashier to make the transfer. Upon this resolution there were two questions: 1st. Whether it empowered the cashier to transfer the note by endorsement; and, if not, 2dly. Whether the vote of the 27th of June, 1820, ratified the act so as to give it validity. Upon the first question, it should be observed, that the power, whatever its extent might be, was *joint* to the president and cashier, and could not be exercised by either of these officers separately. But the power itself was merely to *liquidate* the debts due to the bank, which imports no more than an authority to ascertain and settle the amount of the debts. As to the supposed ratification; that which is void in its inception, cannot be made good by a subsequent act. If an attorney, not duly appointed, exceeds his authority, his acts cannot receive validity from a subsequent confirmation. The confirmation cannot relate back to, and connect itself with, an act absolutely void. The Planters' Bank could make

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no contract respecting its corporate property but under its corporate seal, or through the instrumentality of an agent or attorney appointed under that seal. And a contract otherwise made, cannot be confirmed by a subsequent act, which is itself not under seal. (4.) The note, in its inception, was not a commercial transaction; it was given for the purchase of real property, and connected by the form of the contract, as executed before the notary, with the sale itself. So that its negotiability was partially restrained by this circumstance, and the title of the vendor to the property, having failed, that fact affords a sufficient defence to the maker of the note, into whose hands soever it may have come. And the inscription made by the notary upon the note itself, was intended to give notice to all the world, of the origin and nature of the transaction, by which its negotiability was restrained.

Mr. *Cheves*, and Mr. *Sergeant*, contra, contended, (1.) That this note was either discounted for the Planters' Bank, or taken as security for, or in payment of a debt, deducting the discount, which is the same thing. The Bank of the United States is not prohibited from buying notes, nor from taking any thing whatever in payment, or as security for debts *bona fide* due.[a] And the great object of the trade of banking, as it is carried on by the private bankers and incorporated companies, is to discount bills and notes. (2.) Even if

[a] Act of 1816, incorporating the Bank, c. 44. s. 7. 9. 11.

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the transfer were usurious, it would not follow that the contract was void. If usurious between the endorser and endorsee, it would not avoid the contract of the drawer, or any previous endorser.[a] The State law, whatever it may be, does not affect the Bank of the United States, or its contracts, which are to be governed by the act of Congress alone. That expressly authorizes the taking discounts on loans, and does not avoid the securities given even for usury. Nor is this contract usurious by the State law, by which the legal rate of interest is 8 per cent., where the parties have not contracted for a greater rate. Not only is it the universal practice of the commercial world, to take discount in advance, but the law has constantly sanctioned this practice, both in England and in this country.[b] (3.) As to the endorsement by the cashier, it was within the scope of his general authority.[c] A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal.[d] So, the authority may be implied from certain relations proved to exist between the person who acts as agent, and the party for whom he undertakes; and it may sometimes be inferred from the subsequent ratification or acquiescence of the party who is to be

a *Chitty on Bills*, 105, 106.

b *Chitty*, 107, 108. 4 *Yates' Rep.* 223.

c Mechanics' Bank v. Bank of Columbia, 5 *Wheat. Rep.* 327.

d Stackpole v. Arnold, 11 *Mass. Rep.* 27. Long v. Colburn, *Id.* 97. Northampton Bank v. Pepoon, *Id.* 288.

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charged by the writing.[a] But, even supposing the general official character and authority of the cashier were not sufficient, the resolution of the 21st of October, 1818, delegated a sufficient special authority, and was fully ratified and confirmed by the subsequent resolution. The notion that such acts of commercial corporations must be under seal, is exploded in this Court.[b] (4.) The note being negotiable on the face of it, some circumstance must be shown to restrain its negotiability. The character of the instrument does not depend upon the particular transaction out of which it arises, but upon the general nature of the instrument itself. If that be in itself a negotiable paper, it is equally so in whatever service it may be employed; and if connected with a sale of lands, has all the same incidents as if given upon a purchase of a ship or goods. One of these incidents is, to pass freely by endorsement, transferring the legal and equitable right; and another is, that the endorsee, without notice, takes it free from every equity. But here the circumstances relied on would not constitute a legal defence even in a suit brought by the payee. Here was a mere covenant to warrant and defend, and no actual eviction.[c] Where the purchaser has a covenant in his deed, equity will not relieve him from the payment of a bond given for the purchase money,

[a] Long v. Colburn, 11 *Mass. Rep.* 97. Emerson v. The Providence Hat Manufact. Comp. *Id.* 237. Erick v. Johnson, 6 *Mass. Rep.* 193.

[b] Bank of Columbia v. Patterson, 7 *Cranch*, 299.

[c] See Bender v. Fromberger, 4 *Dall. Rep.* 441.

there being no eviction, but will leave him to his remedy at law upon the covenant.[a] And, at law, the damages will be according to the injury actually sustained.[b] There was, therefore, no defence, either at law or in equity. And if the covenant were actually broken, the recovery would be in *damages*, which could not be settled in an action on the note. Consequently, the breach of covenant, as to part, at all events, would be no defence.[c] So, if there be a partial failure of consideration, it will not constitute a defence.[d] The words "*ne varietur*," inscribed by the notary, were merely intended to identify the notes, as being those given on the contract of sale.

Feb. 28th.

Mr. Justice STORY delivered the opinion of the Court. The Bank of the United States brought an action in the District Court for Louisiana District, against William Fleckner, (the plaintiff in error,) upon a promissory note of Fleckner, dated the 26th of March, 1818, for the sum of 10,000 dollars, payable to one John Nelder, or order, on the first of March, 1820, for value received; and the bank, in their declaration by petition, made title to the same note through several mesne en-

a Abbott v. Allen, 2 *Johns. Ch. Rep.* 519. See also 1 *Johns. Ch. Rep.* 213.

b 7 *Johns. Rep.* 358. 2 *Wheat. Rep.* 62. note *c*.

c *Sugd. Vend.* 214, 215. *Chitty on Bills*, 92, 93. Moggridge v. Jones, 3 *Camp. Rep.* 38. 14 *East's Rep.* 486.

d Cook v. Greenleaf, 2 *Wheat. Rep.* 13. Morgan v. Richardson, 1 *Camp. Rep.* 40. Note. Tye v. Gwynne, 2 *Camp. Rep.* 346. Solomon v. Turner, 1 *Starkie's Rep.* 51.

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dorsements, the last of which was that of the President, &c. of the Planters' Bank of New-Orleans, through their cashier, as agent. The answer of Fleckner sets up several grounds of defence: first, that the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading within the prohibitions of its charter; secondly, that the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per cent. per annum was taken by the Bank of the United States; thirdly, that the cashier of the Planters' Bank had no authority to make the transfer; fourthly, that the making of the promissory note was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as a part consideration for the purchase by Fleckner of a plantation and slaves from Nelder, and that the notary before whom the sale was executed and recorded, wrote on the note, "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer proceeds to state, that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid until the title was made good; and it then prays, that the matters thus alleged and put in issue may be inquired of by a jury. The issue was joined, and on trial the jury found a verdict for the Bank of the United States; and the cause now comes be-

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fore us upon a writ of error, and a bill of exceptions taken at the trial.

The various grounds assumed by the answer, which are substantially the same as taken by the exceptions, will be considered by the Court in the order in which they have been mentioned.

The bank of the U. S. is not prohibited by its charter from discounting notes, or receiving a transfer of notes in payment of debts due the bank.

And, first, as to the alleged violation of the charter by the Bank of the United States, in purchasing the note in question. The act of Congress of the 10th of April, 1816, ch. 44. incorporating the bank, in the ninth rule of the fundamental articles, declares, (s. 11. art. 9.) that "the said corporation shall not, directly or indirectly, *deal or trade* in any thing except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to *purchase* any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It certainly cannot be a just interpretation of this clause, that it prohibits the bank from purchasing any thing but the enumerated articles, for that would defeat the powers given in other parts of the act. The 7th section declares, that the bank shall have capacity to *purchase*, receive, &c. lands, &c. goods, chattels, and effects, of whatsoever kind, nature, and quality, to an amount not exceeding fifty-five millions of dollars, and the same to sell, grant, demise, alien, and dispose of. And where the act means to prohibit *purchases* of any particular thing, it uses the very term, as in the prohibition

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of purchasing any public debt, in this very clause. And certainly there is no pretence to say, that if discounting promissory notes be a purchase in point of law, it could have been the legislative intention to include such an act in the prohibition. It is notorious, that banking operations are always carried on in our country by discounting notes. The late Bank of the United States conducted, and all the State banks now conduct, their business in this way. The principal profits of banks, and, indeed, the only thing which makes them more valuable than private stock, arises from this source. The Legislature cannot be presumed ignorant of these facts; and it would be absurd to suppose, that it meant to create a bank without any powers to carry on the usual business of a bank. The act contemplates throughout, an authority to make loans and discounts. It provides expressly for the establishment of offices of discount and deposit; and the very clause now under consideration, recognises the power of the bank to make loans and discounts, and restricts it from taking more than six per cent. on such loans or discounts. But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some chose in action, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer, than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or draw-

back made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. We must suppose that the Legislature used the language in this its appropriate sense; and if we depart from this settled construction, there is none other which can be adopted, which would not defeat the great objects for which the charter was granted, and make it, as to the stockholders, a mere mockery. If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase, within the meaning of the 9th rule above stated, (upon which serious doubts may well be entertained,) it is a purchase by way of discount, and permitted, by necessary inference, from the last clause in that rule.

The true interpretation, however, of that rule is, not that it prohibits purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the bank from doing the ordinary business of a trader or merchant, in buying and selling goods, &c. for profit, and uses the words "deal" and "trade," in contradistinction to purchases, made for the accommodation or use of the bank, or resulting from its ordinary banking operations. And that this is the true sense of the rule, is strongly evinced by the 12th section of the act, which enforces a penalty for the violation of this very rule. It enacts, that if the bank, "or any person or persons for, or to the use of the same, shall deal or trade in buying or selling goods, wares, merchandise, or commodities what-

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soever, contrary to the provisions of this act, all and every person, &c. shall forfeit, &c. treble the value of the goods, &c. in which such dealing *and* trading shall have been." The words *dealing and trading* are used as equivalent in meaning, and they are connected with "goods, wares, merchandises, and commodities," which words, in mercantile language, are always used with reference to corporeal substances, and never to mere choses in action. And as there is no reason to suppose that the penalty was not intended to be co-extensive with the prohibitions of the 9th rule, the exception of bills of exchange in that rule, was either inserted *ex majori cautela*, or designed to authorize the purchase and sale of bills of exchange, at a price above their par value. At all events, doubtful phraseology of this sort cannot be admitted to overrule a clear legislative intention of authorizing discounts; and if so, as there are no words restricting the discounts to any particular kind of paper, the right must equally apply to all kinds.

The evidence in the case shows, that the note in question was discounted for the Planters' Bank, by the Bank of the United States, and after deducting, for the time the note was to run, a sum equal to the rate of 6 per cent. per annum, the residue was carried to the credit of the Planters' Bank, which it seems was then indebted to the Bank of the United States in a large sum of money. It is immaterial to the decision of the point now under consideration, whether the discount was for this purpose or not, for whether the

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proceeds were to be paid over, or carried to the general credit of the party, or applied to the payment of a pre-existing debt, the transaction was still in substance a discount, and, therefore, not within the prohibitions of the 9th rule of the charter. The District Judge, therefore, who sat at the trial, was perfectly correct in refusing to charge the jury as the counsel for Fleckner requested, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." And he was equally correct in charging the jury, "that the acceptance of an endorsed note, in payment of a debt due, is not a trading in things prohibited by the act." And this was the whole of his charge on this point brought up by the exceptions.

It may be added upon this point, that even if the bank had violated the rule above stated, by this particular transaction, it is not easy to perceive how that objection could be available in favour of Fleckner. The act has not pronounced that such a violation makes the transaction or contract *ipso facto* void; but has punished it by a specific penalty of treble the value. It would therefore remain to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself, could, on this account, be avoided by a party to the original contract, who was not a party to the subsequent transfer.

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It is not usury for the bank to deduct the interest from the amount of a note, at the time of its being discounted.

The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended, that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is, the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and, probably, few, if any, charters, contain an express provision, authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed, that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious.

If, indeed, the law were otherwise, it would not follow, that the transfer to the bank of the present

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note would be void, so that the maker of the note could set it up in his defence. The statutes of usury of the States, as well as of England, contain an express provision, that usurious contracts shall be utterly void; and without such an enactment, the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter, would, doubtless, be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare, that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery. The opinion of the District Judge, that the discount taken in this case was not usurious, and would not defeat the right of recovery of the plaintiffs, was, therefore, unexceptionable in point of law.

Endorsement by the cashier of the Planters' Bank sufficient to transfer the note.

The next point is, whether the endorsement of the note, by the cashier of the Planters' Bank, was sufficient to transfer the property to the original plaintiffs. The evidence on this point was, that the Board of Directors of the Planters' Bank, on the 21st of October, 1818, passed a resolution, "that the president and cashier be authorized to adopt the most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city, [New-Orleans,] as well as all others presently due, and which may in the future become due to any banks of the city." The endorsement was made to the Bank of the United States on the 5th of September,

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1819; and before the commencement of this suit, viz. on the 27th of June, 1820, the Board of Directors of the Planters' Bank passed a resolution, to which the corporate seal was annexed, declaring, that the two notes of the defendant (of which the present note was one) "were endorsed by the late cashier of the Planters' Bank; by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank, and that the said board of directors do hereby ratify and confirm said act of their said cashier, as the act of the President, Directors and Company of the Planters' Bank." The act incorporating the Planters' Bank has been examined by the Court; and as to the appointment of the cashier, and the authority of the board of directors, it does not differ materially from acts incorporating other banks.

It authorizes the president and directors to appoint a cashier, and other officers of the bank, and gives the president and directors, or a majority of them, "full power and authority to make all such rules and regulations, for the government of the affairs, and conducting the business of the said bank, as shall not be contrary to this act of incorporation."[a] It contains no regulations as to the duties of the cashier, nor any express authority for the corporation to make by-laws. The whole business of the bank is confided entirely to

[a] Act of 15th April, 1811. 1 *Martin's Dig.* 568. et seq.

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the directors; and of course with them it would rest to fix the duties of the cashier, or other officers. Whether they have in fact made any regulations on this subject, does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence, that they fell within the scope of his duty.

The first objection urged against this evidence is, that the corporation could not authorize any act to be done by an agent, by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law, that a corporation can only act through the instrumentality of its common seal, has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. And if

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a general authority for such purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise, is to suppose, that the common law is superior to the legislative authority; and that the Legislature cannot dispense with forms, or confer authorities, which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common law mode of acting may be properly inferred; but every corporation created by statute, may act as the statute prescribes, and the common law cannot control by implication that which the Legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this Court; and in the case of *The Bank of Columbia* v. *Patterson*, (7 *Cranch's Rep.* 299.) and the *Mechanics' Bank of Alexandria* v. *The Bank of Columbia*, (5 *Wheat. Rep.* 326.) principles were established which settle the point, that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers. We have no doubt, therefore, upon the principles of the common law, that a vote of the Board of Directors of the Planters' Bank, was as full authority

for any act of this nature, to bind the corporation, as if it had passed under the common seal.

But it is to be recollected, that the rights and authorities, and mode of transacting business, of the Planters' Bank, depend, not upon the common law, but upon the charter of incorporation, and, where that is silent, upon the principles of interpretation, and doctrines of the civil law, which has been adopted in Louisiana. The civil code of that State declares, that as corporations cannot personally transact all that they have a right legally to do, wherefore it becomes necessary for every corporation to appoint some of their members, to whom they may intrust the direction and care of their affairs, under the name of mayor, president, syndics, directors, or others, according to the statutes and qualities of such corporations: it further declares, that the attorneys in fact, or officers thus appointed, have their respective duties pointed out by their nomination, and exercise them according to the general regulations and particular statutes of the corporation: that these officers, by contracting, bind the communities to which they belong, in such things as do not exceed the limits of the administration which is intrusted to them: and that if the powers of such officers have not been expressly fixed, they are regulated in the same manner as those of other mandatories.[a] This is all that is contained upon the subject now under consideration in the title of the code professing to treat of corporations, and

[a] *Civil Code Louisa. tit.* 10. *ch.* 2. *art.* 13. and 14.

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their rights, powers, and privileges. There is nothing which, in the slightest degree, points to the necessity of using a corporate seal in appointing agents, or authorizing corporate acts; and the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official acts done by the officers of the corporation; and gives such acts a binding authority if evidenced by a vote. We may, then, dismiss this point, as to the necessity of the corporate seal, and proceed to consider another objection stated by the counsel for the original defendant. It is, that the cashier had no authority to make this transfer; that the resolution of the 21st of October, 1818, did not confer it originally, and that the subsequent ratification, by the resolution of the 27th of June, 1820, does not give any validity to an ineffectual and unauthorized transfer. We are very much inclined to think that the endorsement of notes, like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least if his office be like that of similar institutions, and his rights and duties are not otherwise restricted. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, &c. to be used, from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes, and other property, when payments have been duly made. He draws checks, from time to time,

for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds as the moneyed capital of the bank, to discharge its debts and obligations. And under these circumstances, the provision of the civil code, already cited, may be justly applied, that where his powers are not otherwise fixed, they are to be regulated as other mandatories, or rather, as other agents and factors. In point of practice, it is understood, and was so stated by one of the learned counsel, whose knowledge and experience upon this subject entitle his statement to the highest credit, that these duties are ordinarily performed by the cashiers of banks. And general convenience and policy would dictate this arrangement as most salutary to the interests of the banks. And it may be added, that the very act done by the cashier, in this case, with the approbation of the bank, affords some presumption that it was not a usurped authority.

But waiving this consideration, let us attend to the actual features of this case upon the evidence. It is true, that the resolution of the 21st of October, does not directly, and in terms, authorize this transfer. It is not a resolution conferring a joint authority to the president and cashier, to endorse any note for the bank. It simply requires them to

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take measures to liquidate the balance due to the original plaintiffs, and other banks. It is merely directory to them, and leaves them to decide as to the time, the mode, and the means. As they were not restricted in these respects, they had a resulting right to employ any of the funds of the bank for this purpose, and the negotiable paper of the bank was equally within the scope of the authority as the cash funds, if they should deem it proper to use them. They were at liberty to raise money for this purpose, from the general funds, in any way which the ordinary course of business would justify, and which they should deem the most effectual measures. They might, therefore, agree that the cashier should endorse the note in question, and should procure it to be discounted at the Bank of the United States, and the proceeds to be carried to their credit. The presumption that this was an exercise of authority sanctioned by the president, as well as contemplated by the directors, is almost irresistibly proved by the fact, that the Planters' Bank has never complained of, but ratified and approved the whole transaction. Some criticism has been employed on the meaning of the word "liquidate," in the resolution above stated. It is said to mean, not a payment, but an ascertainment of the debts of the bank. We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away, to lessen debts. And in common parlance, especially among merchants, to liquidate a balance, means, to pay it; and this, we are satisfied, was the sense in which the words were used in this re-

solution; and, consequently, that the appropriation of this note to the payment of the debt, was within the scope of the authority given to the president and cashier.

But if this were susceptible of doubt, we think that the subsequent resolution of the directors, of the 27th of June, 1820, is conclusive. That resolution is not a mere ratification of the transfer, but declares that the endorsement was made by the cashier, on the 4th of September, 1819, by authority of the president and directors. It is therefore a direct and positive acknowledgment of its original validity, binding on the bank; and if so, it is binding upon all other persons who have not an adverse interest. But if it were only a ratification, it would be equally decisive. No maxim is better settled in reason and law, than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur;* at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject.[a]

We think, then, that the transfer in this case was made upon sufficient authority; and that, therefore, the opinion of the District Judge, affirming the same doctrine, was perfectly correct.

The next point made by the counsel for the original defendant, is, that the writing of the words "*ne varietur*" upon the note, restricted its negotiability. It appeared in evidence, that the note in question was given as a part consideration for

a See *Civil Code of Louisiana, tit.* 3. *ch.* 6. *s.* 4.

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the purchase money of a plantation and slaves, purchased by Fleckner of Nelder. The instrument of conveyance was drawn, executed, and recorded, before a notary public, according to the usage in countries governed by the civil law. The notary, upon the giving of this and other notes, for the purchase money, by Fleckner, wrote on each note the words in question. There is not the slightest evidence that, by the law or custom of Louisiana, the introduction of these words affects the negotiability of these notes; and, without proof of such law or usage, this Court certainly cannot infer the existence of such an extraordinary and inconvenient doctrine. Upon the face of the transaction, we should suppose that the words were written merely for the purpose of ascertaining the identity of the notes; and the statement at the bar, that this is the explanation given by a very learned notary, confirms this supposition. The opinion of the District Judge upon this point also, asserting that the words did not create any restriction upon the negotiability of the note, is, as far as we have any knowledge, a true exposition of the law.

It is unnecessary to pursue this subject farther. The judgment of the Court below is affirmed, with interest and costs.

JUDGMENT. This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is ADJUDGED and ORDERED, that the

judgment of the said District Court for the District of Lousiana, in this case, be, and the same is hereby affirmed, with costs and damages, at the rate of eight per centum per annum, including interest on the amount of the judgment of the said District Court.

[CHANCERY. LOCAL LAW.]

PHILIP NORBORNE NICHOLAS, Attorney General of Virginia, v. RICHARD C. ANDERSON, Surveyor, &c.

Under the act of Assembly of Virginia, of October, 1783, for the better locating and surveying the lands given to the officers and soldiers on Continental and State establishments, the State of Virginia has no right to call upon the person who was appointed one of the principal surveyors, to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the Attorney General of the State, to compel an account, not sufficiently averring the want of any proper private parties *in esse* to claim it.

Quære, Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, could maintain a suit in equity for an account?

APPEAL from the Circuit Court of Kentucky. This was a bill in equity, filed by, and in the name of the Attorney General of Virginia, under the authority of a special act of the Legislature of that State, passed on the 15th of February, 1813.