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BANKS AND BANKING—WHEN OBLIGATION OF THE CITIZENS BANKING COMPANY OF NORWALK TO MAKE ANNUAL REPORTS TO TAX COMMISSION OF OHIO AND PAY ANNUAL FRANCHISE TAX AS AN OHIO CORPORATION, TERMINATED—CONVERTED INTO NATIONAL BANK.

The obligation of The Citizens Banking Company of Norwalk, Ohio, to make annual reports to the Tax Commission of Ohio, and to pay annual taxes on its franchise to be an Ohio corporation, under sections 5495 *et seq., G. C., terminated on December* 7, 1918, *when it effected its conversion into a national banking association and received a certificate from the Comptroller of the Currency authorizing it to commence and carry on business under the national banking act.*

COLUMBUS, OHIO, December 20, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date relative to the liability of The Citizens Banking Company, of Norwalk, Ohio, to make annual reports and pay franchise taxes as an Ohio corporation subsequent to its having received from the comptroller of the currency a certificate of conversion into a National Banking Association, was duly received.

The controlling facts, as I understand them, are as follows:

> "The Citizens Banking Company was incorporated under the laws of Ohio as a commercial and savings bank prior to the year 1918. During the latter part of that year the company began proceedings to convert itself into a national banking association under section 9694 U. S. Compiled Statutes (R. S. 5154), and secured from the comptroller of the currency a certificate dated December 7, 1918, authorizing it to commence and carry on business under the name of The Citizens National Bank of Norwalk, and ever since that date the company has been conducting business as a national bank. The Citizens Banking Company, however, has taken no formal action to surrender its charter or terminate its existence as an Ohio corporation; and, whether required or not, no certificate or other evidence of its retirement from business as a state institution, or of its conversion into a national banking association, has been filed with the secretary of state."

It is the contention of the commission, I understand, that The Citizens Banking Company, by reason of the laws of Ohio to which it owes its creation and under and by virtue of which it secured its franchise to be a corporation or banking institution in the first instance, continues liable to make annual reports and to pay franchise taxes under section 5495 et seq., G. C. until a certificate of its dissolution or retirement as an Ohio corporation shall have been filed with the secretary of state. Or, in other words, that, as an abstract proposition of law, an Ohio corporation cannot, without surrendering its franchise to the state in the mode and manner prescribed by Ohio laws, throw off its allegiance to the state, or disregard duties and obligations imposed upon it by those laws and accepted and agreed to by it when it secured its franchise to be a corporation; and further, that the applicability of this abstract proposition to the case now presented for opinion, is made manifest by the very section of the federal law under which the

state bank bases and claims, not only its authority to convert itself into a national banking association, but also its immunity from further obligation to the state after the conversion shall have taken place.

Section 5495 G. C. requires that domestic corporations for profit, with certain exceptions not involved herein, shall annually during the month of May make a report in writing to the tax commission of Ohio setting forth certain information called for in section 5497 G. C., and by section 5498 G. C. it is provided that the commission shall, on the first Monday of July, determine the amount of the company's subscribed or issued and outstanding stock, and on the first Monday of August certify the amount so determined to the auditor of state, which latter officer is required to charge on or before August 15th a fee of three-twentieths of one per cent upon the company's subscribed or issued and outstanding capital stock. The company is required to pay to the treasurer of state the fee so determined and charged on or before the first day of the following October.

It is then provided by section 5520 G. C. (see also section 11978 G. C.) that

> "The mere retirement from business or voluntary dissolution of a domestic or foreign corporation, without filing the certificate, provided for in sections eleven thousand nine hundred and seventy-four, eleven thousand nine hundred and seventy-five and eleven thousand nine hundred and seventy-six of the General Code, shall not exempt it from the requirements to make reports and pay fees or taxes in accordance with the provisions of this act."

Section 11974 G. C., one of the statutes mentioned in the preceding section reads as follows:

> "In case of dissolution or revocation of its charter, every domestic corporation shall file with the secretary of state a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation."

Section 11976 G. C., also mentioned in section 5520 G. C., is not quoted in this opinion, because it relates solely to foreign corporations.

The authority of a state bank to become a national banking association, and under and pursuant to which The Citizens Banking Company was converted, is contained in section 9694 U. S. compiled statutes, 1918. That section reads as follows:

> "Any bank incorporated by special law of any state or of the United States or organized under the general laws of any state or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the comptroller of the currency be converted into a national banking association, with any name approved by the comptroller of the currency;
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> Provided, however, that said conversion shall not be in contravention of the state law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of fifty-one per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after ex-

ecuting the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed in accordance with the provisions of the statutes of the United States. When the comptroller has given to such bank or banking institution a certificate that the provisions of this act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and by the national banking act for associations originally organized as national banking associations."

The only restriction or limitation upon the power or authority of a state bank to take advantage of the federal statute above quoted, is that "said conversion shall not be in contravention of the state law." We have no Ohio statute on the subject of the conversion of state banks into national banking associations,—that is statutes authorizing or attempting to deny or restrict the right of state banks to take advantage of the federal law on the subject,—and hence no claim can be successfully made that the conversion of The Citizens Banking Company into a national banking association was in contravention of our law.

It must not be overlooked that the power or authority of a state bank to convert itself into a national banking association is not derived from state law, but arises solely from the federal act, and it has been expressly so held by the supreme court of the United States in Casey vs. Galli, 94 U. S. 673. In that case the court said:

"No authority from the state was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the banking act of congress. 13 Stat. at L. 112. The power there conferred was ample and its validity cannot be doubted. The act is silent as to any assent or permission by the state. It was as competent for congress to authorize the transmutation as to create such institutions originally."

The act of congress referred to in the above quotation is now embodied in section 9694 U. S. Compiled Statutes, 1918, supra. See history contained in 4 U. S. Compiled Statutes, 1913, p. 4421.

Coming now to a special consideration of section 5520 G. C. (see also section 11978 G. C.) above quoted, it will be observed that the section, according to its letter, applies only to companies that have either retired from business or voluntarily dissolved, and that section 11974 G. C., above quoted, according to its letter, relates only to the dissolution or revocation of the charter of a domestic corporation. The Citizens Banking Company has neither retired from business nor been dissolved, neither has its charter been revoked. It has, on the contrary, been *converted* into a national banking association in the manner authorized and provided by section 9694 U. S. Compiled Statutes, 1918, and has assumed and ever since December 7, 1918, has been exercising the powers of such an association under the federal law.

There having been no dissolution of The Citizens Banking Company, of course the laws of this state governing the dissolution of corporations, and the filing of a certificate to that effect with the secretary of state, such for example, as sections

8740 and 8741 G. C., and the other Ohio statutes hereinbefore mentioned, have no application.

The remaining question is whether or not the state, in view of the conversion of The Citizens Banking Company into a national banking association under and pursuant to the federal law, has the power and authority to continue to assess and collect the franchise tax provided for in section 5495 et seq. G. C. This question must be answered in the negative under authority of Owensboro National Bank vs. Owensboro, 173 U. S. 664. In that case the court, after referring to its previous decisions holding that national banks are instrumentalities of the national government, and that any attempt by the states to define their duties or control the conduct of their affairs would be absolutely void, etc., said:

> "It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises,"

without permissive legislation of congress. And it was also said in that case that the power of the states to tax national banks is confined solely to a taxation of the shares of stock in the names of shareholders, and to an assessment of the real estate of the bank, as provided for in the section then designated as section 5219 R. S., and now known as section 9784 U. S. Compiled Statutes, 1918. Applying the law to the facts in the case, the holding was that the Kentucky act imposing a tax upon the franchise of a national bank was beyond the statutory authority conferred by congress, and void.

As hereinabove stated, there is no Ohio law which attempts to deny the right of a state bank to take advantage of the federal act authorizing the conversion of state banks into national banking associations, nor is there any local statute which attempts to prescribe the conditions under which the privilege conferred by the federal law shall be exercised. And furthermore, there is no statute requiring notice of the state bank's election to become a national bank, or of its conversion into such association, to be filed with any state officer, such as was involved in Manufacturers' and Mechanics' Bank vs. Commonwealth, 72 Pa. St. 70, and for that reason the decision in that case that a state bank continues liable to the state for taxes accruing after its conversion, until notice thereof is filed with the state auditor general as required by the Pennsylvania law, is of no controlling effect in the case now under consideration. Other cases touching more or less upon the question involved have been considered, but upon close analysis have not been found to be determinative authority.

Before closing this opinion it may not be improper to state that the question under consideration was heretofore submitted by the bank to the comptroller of the currency, and an opinion rendered under date of November 22, 1919, in which the conclusion was reached that "the power to assess it (the Citizens Banking Company or the Citizens National Bank) with a franchise tax has not been granted and cannot be exercised," and that this opinion was adhered to by the federal department on September 25, 1920.

After careful consideration the conclusion is reached, and you are therefore advised, that The Citizens Banking Company is not liable to assessment under section 5495 et seq. G. C. on account of franchise taxes accruing after its conversion into a national banking association on December 7, 1918.

Respectfully,
JOHN G. PRICE,
Attorney-General.