SUPREME COURT OF UNITED STATES

Morris Engel,

Vs.

Edward R. O'malley, Frank Moss, Clark Williams, and William F. Baker.

No. 703.

Argued December 15, 16, 1910.

Decided January 3, 1911.

Mr. Charles Dushkind for appellant.

[Argument of Counsel from pages 129-131 intentionally omitted]

Messrs. Louis Marshall, Edward H. Letchworth, Robert C. Taylor, Archibald R. Watson, and Theodore Connoly for appellees.

[Argument of Counsel from pages 131-134 intentionally omitted]

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to prevent the carrying out of chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, without a

license from the comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit $10,000 with the comptroller, and present a bond with a penalty of not more than $50,000 or less than $10,000, to be fixed by the comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks, the comptroller may approve or disapprove the application, in his discretion, and licensees are to pay a fee of $50. § 25. The license is revocable at all times by the comptroller for cause shown. § 26. Carrying on the business specified, or using the word 'banking' or 'banker' on signs, letter heads, or advertisements in connection with any business, without a license, is made a misdemeanor. § 27. The foregoing provisions do not apply to any corporation or 'individual banker' authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a guest; to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than $500 during the fiscal year preceding an affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the comptroller for $100,000 when the business is in a city having a million inhabitants, or, if elsewhere, for $50,000; or money or securities that the comptroller approves. § 29d.

The plaintiff alleges that he is a citizen of the United States, and has been engaged in the business specified in the statute for twenty years; that by good reputation and considerable expenditure he has made his business of great value, and that it chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other states and mainly to foreign countries. The plaintiff further alleges that he has not the means that would enable him to make the deposit and give the bond required, and that the enforcement of the law against him will compel him to close. He avers that the statute is unconstitutional as against him under the 14th Amendment and under the commerce clause of the Constitution of the United States. Article 1, § 8. The bill was demurred to and the demurrer was sustained by the circuit court.

The first objection urged by the plaintiff in argument is to a requirement that we have not mentioned,—that the applicant must have been continuously for five years immediately preceding his application a resident of the United States. As the plaintiff alleges that he satisfies this requirement, he has nothing to complain of. And therefore, without intimating any doubt as to the validity of the clause, we pass at once to the matters in which he is concerned. Southern R. Co. v. King, [1910] USSC 139; 217 U. S. 524, 534, 54 L. ed. 868, 871[1910] USSC 139; , 30 Sup. Ct. Rep. 594. As a preliminary to his argument, the plaintiff denies that he is in any sense a banker, and even goes so far as to treat the receipt of money for safe-keeping or transmission within the meaning of the act as a case of bailment, in which the very coins received must be returned or sent on. Of course, this is not a true construction of the statute, as is sufficiently indicated by the title 'Private Banking.' The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe-keeping, since the depositor can draw it out again at such time and in such sums as he chooses. It is safe to assume that the transmission of money contemplated very generally is accomplished by a draft, and practically never by sending on the identical currency received. One form, at least, of the business aimed at, and, on the face of the bill, that carried on by the plaintiff, is a branch of the banking business. Furthermore, it is a business largely done with poor and ignorant immigrants, especially on their first arrival here.

We presume that the money deposited with the plaintiff is not drawn upon by checks, so that a part of the argument in Noble State Bank v. Haskell, just decided [1911] USSC 10; [219 U. S. 104, 55 L. ed. ——[1911] USSC 10; , 31 Sup. Ct. Rep. 186], may not apply. On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the state may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert.

This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the 14th Amendment, the state could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, the comptroller might refuse a license upon his arbitrary whim. No guides are given in § 25 for the discretion that he is to exercise, and a provision in § 29e that nothing in the article shall be construed to require the comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as the test, and to leave the matter at sea. We do not so understand the purpose and purport of § 29e, and should suppose that the discretion to be exercised in the refusal to grant the license under § 25 was similar to that exercised under § 26 in revoking one; and that in each case the comptroller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See Gundling v. Chicago, [1900] USSC 87; 177 U. S. 183, 44 L. ed. 725[1900] USSC 87; , 20 Sup. Ct. Rep. 633; New York ex rel. Lieberman v. Van de Carr. [1905] USSC 187; 199 U. S. 552, 50 L. ed. 305[1905] USSC 187; , 26 Sup. Ct. Rep. 144.

Again, it is argued that the statute makes unconstitutional discriminations by excepting the classes mentioned in § 29d above, especially those in whose business the average amount of each sum received is not less than $500, and those who give a bond of $100,000 or $50,000. But the former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the legislature to need protection, and the latter merely substitutes a different form of security, as it well may. 'Legislation which regulates business may well make distinctions depend upon the degree of evil.' Heath & M. Mfg. Co. v. Worst, [1907] USSC 177; 207 U. S. 338, 355, 356, 52 L. ed. 236, 244[1907] USSC 177; , 28 Sup. Ct. Rep. 114. It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and small. But in this case size is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the

law seeks to protect. See Musco v. United Surety Co. 196 N. Y. 459, 465, 134 Am. St. Rep. 851, 90 N. E. 171; McLean v. Arkansas, [1909] USSC 11; 211 U. S. 539, 551, 53 L. ed. 315, 321[1909] USSC 11; , 29 Sup. Ct. Rep. 206.

We come to the final objection, that this statute is an attempt to regulate commerce with other states. When, as in this matter, the Constitution takes from the states only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of the specific case must be weighed. In doing so we recur to what we have said above,—that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other states. Neither do we regard the law as having has such bailments primarily in mind. Under the statement in the bill and the words of the law, we must take it that the money received, even when received for transmission, becomes the money of the depositary, and his obligation that of a debtor under contract to pay as may be directed. Presumably the depositor retains the right to call for his money himself, or to change any direction that may have been given, until the money has left the 'private banker's' hands. The law, as was said of a similar one by the New York court of appeals, was passed for the purpose of regulating and safeguarding the business of receiving deposits which precedes and is not to be confounded with the later transmission of money, although leading to it. Musco v. United Surety Co. 196 N. Y. 459, 466, 467, 134 Am. St. Rep. 851, 90 N. E. 171. The fact that it is very likely to lead to it does not change the result. Diamond Glue Co. v. United States Glue Co. [1903] USSC 5; 187 U. S. 611, 616, 47 L. ed. 328, 332[1903] USSC 5; , 23 Sup. Ct. Rep. 206. The case is similar in principle to Ware v. Mobile County, [1908] USSC 98; 209 U. S. 405, 52 L. ed. 855[1908] USSC 98; , 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031, where the nearest cases on the other side are distinguished. See further Williams v. Fears, [1900] USSC 216; 179 U. S. 270, 45 L. ed. 186[1900] USSC 216; , 21 Sup. Ct. Rep. 128. We are of opinion that the commerce clause of the Constitution is not infringed, and, on the whole case, that the decree of the Circuit Court was right.

Decree affirmed.