

Opinion No. 14-1152

January 18, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Honorable Howell Earnest, Traveling Auditor and Bank Examiner, Santa Fe, New Mexico.

BANKS -- SAVINGS, DISCOUNT.

As to differences between banks of discount and deposit and savings banks.

OPINION

{*3} I have received your letter of the 16th inst. enclosing copy of certain articles of incorporation of a bank as to which you ask the following two questions:

"1st. Is this bank incorporated under the Bank of Discount and Deposit Act, the Savings Bank Act or the Trust Company Act?

"2nd. If incorporated under any one of the above mentioned acts, can this bank change the nature of its business as defined in the act incorporated under, by amendment to its articles of incorporation, so as to permit it to do business of a different class than that which it was incorporated under?"

{*4} As to the first question, I think the examination must be limited to the ascertainment of whether the bank is incorporated as a bank of discount and deposit, or as a savings bank, as I find nothing in the articles of incorporation showing any attempt at any conformity to the requirements of the act as to the incorporation of trust companies.

The difficulty which arises is due to the fact that the incorporators did not, at the beginning of their certificate, distinctly declare what kind of a corporation they were seeking to create. They stated merely that they had associated themselves "together for the purpose of forming a corporation under the laws of the Territory of New Mexico." They should have stated at this point, either that they had associated to establish a bank of discount and deposit, or to establish a savings bank, and that statement would have governed throughout, no matter what they might have put in as to the purposes or objects or powers of their proposed corporation. With such a statement at the beginning nothing more would have been necessary to indicate the nature of the bank. The first to the sixth numbered paragraphs of these articles contain substantially all that is required by Section 245 of the Compiled Laws of 1897 as to banks of discount and deposit, and also substantially all that is required by Section 261 of the same Compiled Laws, which relates to the certificate of incorporation of a savings bank. For either kind of banks, nothing more would be required and all that is contained in the seventh, eighth and ninth paragraphs, as to the powers of the corporation, are superfluous, because the

statutes declare its powers without any need of setting them out in the certificate of incorporation.

It is, however, proper to resort to what is contained in these paragraphs, in the absence of a distinct designation of the nature of the proposed bank anywhere in the certificate, in order to ascertain what was the intention of the incorporators. When examined for this purpose, it will be found that the person who drew these paragraphs probably had before him both acts, the one relating to banks of discount and deposit, and the other relating to savings banks, but the greater part of what is set out in these paragraphs is taken from the savings bank act. This would seem to indicate an intention to incorporate a savings bank, but in the ninth paragraph, there is a clause which is quite inconsistent with this assumed intention, as in that paragraph it is stated that the purpose of the corporation "is the carrying on of a general banking business upon such securities as the directors shall deem expedient." It cannot properly be said that savings banks can be incorporated to do a general banking business, while it is, at the same time, true that almost, if not quite all, of the statutory powers given to savings banks may be exercised by banks doing a general banking business. Savings banks are, however, distinctly authorized to lend money on real estate security, while banks of discount and deposit are probably not so authorized. It is my opinion that they are not, but there is some room for dispute and argument about this and I do not think it is necessary to pass on that question at the present time.

On the face of the certificate of incorporation, it does not appear to me to be entirely clear as to which kind of bank was intended to {*5} be created. The enumeration of the powers of savings banks would incline one, at first glance, to say that the certificate means a bank of that kind, but the inconsistent statement of a purpose to do a general banking business, which might include nearly all of the specially enumerated powers, raises at least a doubt.

My attention has been called to some other matters which I think worthy of consideration, and which do not appear on the face of the certificate of incorporation. They seem to me to throw light upon the intention of the makers of the certificate, and it is their intention which we are seeking to find from the certificate itself. Where there is a doubt arising upon the face of the certificate, resort may be had to other matters to clear up that doubt.

It appears from the official record that a little more than a month after the filing of the certificate and, presumably before the bank began business, the president and cashier filed, in the office of the Secretary of the then Territory of New Mexico, a certificate that fifty per cent of the authorized capital stock had been fully paid in and in that statement distinct reference is made to its being in accordance with the provisions of Section 244 of the Compiled Laws of 1897. That section refers only to banks of discount and deposit and requires the payment of only fifty per cent before the bank shall transact any business, while the statute as to savings banks requires the payment of the whole of the capital stock before the bank can transact any business. It must have been the

understanding of the Secretary of the Territory that it was their intention to create a bank of discount and deposit, or he would not have accepted this certificate.

In addition to this, the record also shows that the other half of the capital stock was paid in at the expiration of one year after the payment of the first half, which authorized the bank to begin business, and this was evidently in accordance with a requirement of said Section 244.

These facts, coupled with the additional fact, as we are informed, that this bank has never, since its organization, attempted to do any savings bank business, leads me to the conclusion that the bank should be considered as a bank of discount and deposit, notwithstanding the superfluous and unnecessary enumeration of powers contained in the seventh, eighth and ninth clauses of the certificate of incorporation.

It must be obvious, from a variety of considerations, which it is unnecessary here to set out, that we should hold in this way, unless absolutely impossible to do so. The interests of the public or of that part of the public doing business with the bank, as well as the interests of the stockholders, require that there should be no unnecessary interference with the operations and business of the bank.

This seems to make it unnecessary to answer your second question, but that question suggests to me that it would be advisable that this bank should file an amendment to its certificate of incorporation, reciting that the amendment is made merely for the purpose of conforming to the requirements of the statute and to free its incorporation from any possible doubt and declaring the intention to organize a bank of discount and deposit and, after that declaration of intention, setting out just what is required in Section 245 of the Compiled {*6} Laws and no more. As already stated, the statute declares the powers and purposes of such a bank and no attempt to set them out in the certificate of incorporation ought to be made.

I return to you herewith the copy of articles of incorporation which you enclosed with your letter.