Opinion No. 15-1700

December 20, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Mr. R. H. Carter, State Bank Examiner, Santa Fe, N. M.

Right of a bank to resume business whether bank examiner has actually taken charge of it or not.

OPINION

*{*269}* I have received your letter of the 18th inst. in which you refer to the matter of the bank at Melrose, as to which I wrote you on December 4 to the effect that I could see no reason why that bank might not, by amendment of its certificate of incorporation, change its place of business, and recommended at the same time that it should change its name in the same way, and that it could go on to do business, subject, of course, to examinations which might be made by you or your representatives. In that case the bank was never in the hands of the bank examiner nor was it actually closed, and you now ask whether that fact would preserve the rights of *{*270}* the bank which would not be preserved as to the banks which had been actually closed by the examiner.

Your letter does not indicate whether the question asked is limited to the law as it existed prior to the enactment of Chapter 67 of the Laws of 1915, or to the conditions under that chapter, or both. It seems necessary, therefore, first, to consider what was the condition of the former law and as to the power of the bank examiner. By reference to Section 462 of the codification, we find the method adopted for the winding up of the affairs of a bank which appears to be insolvent. If it appeared to the bank examiner that any bank was insolvent, it was his duty to report the fact to the Governor, and if it appeared to the Governor necessary, he was to direct the bank examiner to take charge of the bank and all of its property. It then became the duty of the bank examiner to ascertain the actual condition of the bank and make a report thereof to the Governor, and then if the Governor should be satisfied that the bank could not resume business or liquidate its indebtedness to the satisfaction of its creditors, it was made the duty of the Attorney General, upon advice from the Governor, to institute proceedings in court for the appointment of a receiver to take charge of the bank and to wind up its affairs. There is nothing in the statute to indicate that the court, in which proceedings might be instituted, should terminate the existence of the bank as a corporation. I believe that if all the liabilities of the bank were cleared off, it would be the duty of the court to turn back any remnant of assets there might be, to the stockholders, and I can see no reason why the stockholders might not then resume business, subject, of course, to the possibility of satisfying the bank examiner by its reports, and from any examination made that its capital was not impaired, and that it would be safe to permit it to resume business. Under this statute I do not see that the mere fact that the bank has been in the hands of a bank examiner, or even of a receiver appointed by the court, would, in

itself, be an obstacle to the resumption of business. There is nothing in the law expressly applicable to this question, and therefore it would be decided according to general principles applicable to corporations.

The new statute, which appears as Chapter 67 of the Laws of 1915, seems to be equally destitute of any direct provision as to the resumption of business by a bank which has suspended operations for a time, but indirectly this might be controlled by the state bank examiner through the exercise of the power contained in Section 24 of that act "to call for special reports from any particular bank whenever, in his judgment, the same are necessary to a full and complete understanding and knowledge of its condition." Also, under Section 25, the bank examiner is given very extensive authority as to the examination of banks and the enforcing of the production of evidence and information necessary. Based upon the information contained in such reports, or obtained by such examinations, the state bank examiner may take necessary action as he is authorized to do under Sections 82 et seq. of the same act. Among other things which will, in part, answer your question, by Section 83 there seems to be confided to the state bank examiner a discretion at any time *{*271}* after taking possession and before final liquidation, to permit the stockholders to place the bank in a sound condition and to allow the bank to resume business. By Section 82 it is provided that proceedings in court, based upon the report of the bank examiner, are to be governed by the provisions of the general incorporation laws for the winding up of insolvent corporations, and those provisions of law are to be found under the heading "Insolvency," beginning with Section 954 of the codification. By Section 960, it is left to the discretion of the court, through the receiver, to turn over to the corporation all of its property and assets, and to permit the corporation to go on the same as if the receiver had never been appointed, but the court may also, in its discretion, dissolve the corporation and declare its charter forfeited and void.

Upon the whole, I am satisfied that it can make no material difference as to the right of a bank to resume business whether the state bank examiner has actually closed the doors of the bank and take charge of it or not, provided that all liabilities have been met as was the case with the bank at Melrose hereinbefore referred to.