

Opinion No. 23-3710

June 9, 1923

BY: JOHN W. ARMSTRONG, Assistant Attorney General

TO: Requested by: Hon. L. B. Gregg, State Bank Examiner, Santa Fe, New Mexico.

Mercantile Firms Holding Themselves Out to the Public as Receiving Money on Deposit, Paying Interest Thereon, Carrying Promiscuous Checking Accounts are Doing a "Banking Business."

OPINION

{*61} Your request:

"1. A Mercantile Corporation with a place of business in New Mexico, have been in the habit of permitting their customers to check on them for running expenses, charging the checks as so drawn to the account of the customer and making settlement with the customer when the livestock is sold.

{*62} "2. In event the customer has more funds than is needed to pay his account, the customer deposits the same with the Mercantile Corporation and checks drawn on same are charged against this deposit.

"3. The form of check is a regular banking check.

"Would the above constitute a banking business, and would you please define clearly to us transactions relative to corporations doing a banking business in this manner."

Sec. 1 Chap. 67 S. L. 1915 provides:

"This Act shall be known as the Bank Act, and shall be applicable to all corporations, individuals and copartnerships specified in the next section except as hereinafter specifically excepted."

The word "bank" is defined by Sec. 2 Chap. 67 S. L. 1915 as follows:

"The word 'bank' as used in this section includes every person, firm, company, co-partnership or corporation except national banks, engaged in the business of banking in the State of New Mexico."

It now becomes important to define the term "business of banking." Sec. 1 Chap. 120, S. L. 1919, amending Sec. 3, Chap. 67 S. L. 1915, contains the following provision:

"Only such individuals, firms or corporations as shall advertise and hold themselves out of (to) the public, as receiving money on deposit, whether on certificate or subject to check, shall be considered as doing a banking business within the meaning of this act."

This latter provision was not incorporated in the banking act of 1915, and has been eliminated by an amendment of said section 3, such amendment to be found at Section 1, Chapter 149 Session Laws, 1923. The object of this elimination seems rather apparent and we are now left to a consideration of what is the usual and ordinary construction placed upon the term "banking business."

A rather well reasoned case on the subject under consideration is *MacLaren v. State* (Wis) Ann Cas 826. From this case, and notes thereto, we take the following excerpts:

"The following additional authorities hold, correctly, we think, that any person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation, is doing a banking business although but one of these functions may be exercised. *Curtis v. Leavitt*, 15 N. Y. 9, 56; *Reed v. People*, 125 Ill. 592, 596, 18 N. E. 295, 1. L. R. A. 324; *People v. Bartow*, 6 Cow. (N. Y.) 290; *Hamilton Nat. Bank v. American L. & T. Co.*, 66 Neb. 67, 92 N. W. 189."

"The main purpose of regulating the banking business, as the business is now carried on, is to insure a safety of deposits. The calamities that befall individuals and communities as a result of bank failures are well known. The necessity for the regulation for establishments carrying on the business that *Gimbel Bros.* carries on is just as apparent as it is in the case of the regular banking institutions.

"Originally the business of banking consisted only in receiving deposits, such as bullion, plate and the like, for safe keeping, {*63} until the depositor should see fit to draw it out for use; but the business, in the progress of events, was extended and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security and at a still later period to issue notes of their own intended as a circulating currency in the medium of exchange instead of gold and silver. Modern bankers frequently exercise any two, or even all three, of these functions but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense." The *MacLaren* case concludes with this expression:

"However, we do not wish to be understood as holding that *Gimbel Brothers* might not receive money on deposit from its patrons where such money is deposited for the purpose of enabling the depositor to purchase goods from its store and where the money is used for that purpose."

In the strictest sense, the example you offer probably presents a case falling within the regulations provided by the New Mexico banking act.

It would seem that Sections 456, 457 and 458, New Mexico Statutes, Ann. Codification 1915, and Sections 9 and 47, Chapter 67 Session Laws 1915, provide a convenient

means for a banking business in sparsely settled communities. In a way, however, even these institutions are subject to the general State Bank Law. Said Section 9 provides:

"All persons, co-partnerships and corporations engaged in business, a portion only of which is banking, shall set apart and keep separate so much capital for banking as may be necessary for conducting a bank under section 8 hereof. The capital so set apart and the assets of said bank or banking department shall be first applicable to the payment of the creditors thereof, as distinguished from the general creditors of the persons, copartnerships or corporations conducting the same. Every person, co-partnership and corporation so carrying on a banking business in connection with any other business shall keep separate books of account for each banking business, and shall be governed as to all deposits, reserves, investments and transactions relating to such banking business, by the provisions of this act provided for the control of such banking business, and with respect to said banking business or banking department shall be subject to all of the provisions of this act."

Every case, of course, would necessarily fall within or without the regulations governing banks, according to the precise nature of the business transacted by such institution. The question you have presented, without further explanation, in our opinion, falls within the scope of banking and should be governed and regulated by the banking laws of this state.

We do not undertake to say that concerns of this character may not receive such deposits from their customers to be checked on by the depositor for purchases from that particular mercantile establishment.