Opinion No. 62-74

June 19, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General J. E. Gallegos, Assistant Attorney General

TO: Mr. Keith Moore, State Bank Examiner, State Banking Department, State Capitol Building, Santa Fe, New Mexico

QUESTION

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If a bank is seeking to organize pursuant to the Mercantile Act (Section 48-14-1), do the requirements of Sections 48-2-4 and 48-2-5, relative to capital stock and a determination by the bank examiner as to financial responsibility, etc., apply?

CONCLUSION

No.

OPINION

ANALYSIS

The inquiry here arises because a group in Ranchos de Albuquerque, population some 800, has obtained a charter under the Mercantile Act, with one proposed function of the corporation to be a general banking business. The organizers particularly question that the factual determination by the bank examiner as to financial responsibility, etc., which is called for under Section 48-2-5, N.M.S.A., 1953 Compilation, does not apply when the bank is organized under the procedures of the Mercantile Act, Sections 48-14-1, et seq., N.M.S.A., 1953 Compilation.

First Thrift and Loan Association v. State, 62 N.M. 61, 304 P. 2d 582, held that a bank, though organized under the Mercantile Act, is nonetheless subject to supervision by the State Bank Examiner. That decision does not, however, answer whether Sections 48-2-4 and 48-2-5, supra, of the Banking Act are applicable to a bank seeking to organize under the Mercantile Act.

It is clear that the Banking Act and the Mercantile Act provide separate and distinct procedures for setting up a bank. The Banking Act procedure is for corporations going solely into the banking business. The Mercantile Act, on the other hand, is an authorization for associations or corporations in the mercantile business to also engage in banking and limits the situation of such concerns to cities and towns of less than 1,500 population. The Mercantile Act qualifying particularly differs from the Banking Act

in its capital stock requirements and the absence of necessity for certain findings by the Bank Examiner.

Two distinct procedures to qualify for banking business plainly exist. This fact was recognized in the **Thrift Savings Case,** supra. To say that Sections 48-2-4 and 48-2-5, of the Banking Act govern the organizing of a mercantile bank is to say that there are not two procedures but only the one provided by the Banking Act. Should a fledgling bank meet the requirements of Sections 48-2-4 and 48-2-5 it has qualified to be a bank. It would be absurd for it to then qualify under the Mercantile Act. Applying Sections 48-2-4 and 48-2-5 supra, to a mercantile bank's organization would effectually nullify Section 48-14-1. It would, in fact, interpret the Mercantile Act as having been repealed by the Banking Act.

We certainly cannot construe the Banking Act as having repealed the Mercantile Act. It was stated in the **First Thrift Case,** supra, at 69 that there has been neither express nor implied repeal of the Mercantile Act. Of course, repeals by implication are not favored and if effect can reasonably be given to both laws, the presumption is that the earlier-the Mercantile Act-is to remain in force. **Mendoza v. Home Transfer & Storage Co.,** 66 N.M. 32, 340 P. 2d 1080, 75 ALR 2 1433; **Alvarez v. Board of Trustees,** 62 N.M. 319, 309 P. 2d 989; **Statutes key number** 158.

The analysis of this question should not proceed to conclusion without a discussion of the effect of Section 48-2-15 which provides:

"All persons, copartnerships 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 (48-2-14) 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, copartnership 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; Provided, that nothing herein contained shall be construed to authorize any such person, copartnership or corporation to commence the business of banking without first complying with the requirements of section 3 and section 4 of Chapter 120, New Mexico Session Laws 1919 (section 48 - 2 - 4 and section 48-2-5 New Mexico Statutes Annotated, 1953) by applying for and obtaining a certificate of authority from the state bank examiner."

It is obvious that the above statute only applies to banks organized under the Mercantile Act. At first reading, it seems that Section 48-2-15, indicates a repeal of Section 48-14-1 of the Mercantile Act. But it has been already stated that there has been no such repeal and the reasons why not.

Section 48-2-15 and 48-14-1, can be reconciled. Section 48 - 14 - 1 governs the birth of a mercantile bank. The general language of Section 48-2-15, subjecting mercantile banks to the Banking Act provisions, governs the mercantile bank once it is established. This construction gives the fullest effect to both provisions and fulfills the purpose of Section 48-2-15 as stated in the **First Thrift case,** supra, at 69:

". . . removing all doubt on the matter by placing the banking department of such corporation in towns of less than 1,500 population under the complete supervision of the State Bank Examiner."

It is our view that the legislature, because of the mercantile banks' unique character and to provide sparsely populated communities with banking facilities, established a qualifying procedure that corresponds to the circumstances under which such banks would naturally come into being. For the reasons previously stated we conclude that this procedure, found in Section 48-14-1, supra, is to be followed by a concern organizing under the Mercantile Act and the requirements of Sections 48-2-4 and 48-2-5 are not applicable during such organization.