Opinion No. 263

Banks and Banking—Closed Banks, Reorganization of—Depositor's Agreements—Superintendent of Banks.

HELD: The superintendent of banks may fix the terms of reorganization agreements to be signed by depositors, but may not restrict withdrawals by depositors not signing the agreement. Such power would be legislative, not administrative, in character and cannot be implied from a statute giving him power to impose conditions upon the re-opening of a closed bank.

July 1, 1933.

It is my understanding that upon the closing of the Larabie Brothers bank, your department (the Superintendent of Banks), consented to the re-opening of a bank on the condition which you named, that 95% of the depositors consent to, and sign an agreement by which 50% of such deposits should be paid when certain assets were liquidated and the other 50% should be paid over a period of years as specified in said agreement. The question is whether you may prohibit the other 5% who do not sign the agreement from withdrawing their deposits and whether you may make an order that they may be bound by the same restriction as to withdrawals as the other 95% who have signed in the event the bank is re-opened according to said reorganization plan.

Attention is called to Section 126, Chapter 89, Laws of 1927, providing:

"After the Superintendent has taken possession of any bank, he may permit such bank to resume business upon such conditions as may be approved by him."

And Section 127 id., reading:

"Upon taking the assets and business of any bank into his possession, the Superintendent is authorized to collect all moneys due to such bank, and to do such other acts as are necessary to conserve its assets and business, and he shall proceed to liquidate the affairs thereof. He **shall have general and inclusive power and authority,** except as otherwise limited by the terms of this act, **to do any and all acts, to take any and all steps necessary, or, in his discretion,** desirable for the protection of the property and assets of such bank and the speedy and economical liquidation of the assets and affairs of such bank and the payment of its creditors, or for the re-opening and resumption of business by said bank, where that is practical or desirable."

The statutes of Montana do not expressly nor impliedly give to any number of depositors or percentage of deposits upon their consent and agreement being obtained, the right to bind the remaining depositors or deposits to any reorganization agreement without their consent or agreement. Whether such legislation, if enacted, would be constitutional, we need not consider.

The statutes do not expressly grant to the Superintendent of Banks such power or the power to compel any number of depositors or percentage of deposits to submit to any restriction of payment of their deposits in the event they do not consent or agree to any reorganization agreement.

The reorganization committee places reliance upon the sections quoted as giving the Superintendent of Banks implied power. If the Superintendent of Banks has such implied power, then by virtue of the same legislation he would have power to compel all of the depositors to submit to any reorganization plan he may propose without first obtaining the consent or agreement of any of them. A mere statement of such extreme power residing in the Superin-

tendent of Banks carries its own refutation.

The Superintendent of Banks is an administrative officer of the executive branch of our state government. He possesses such reasonable administrative powers as may be expressly or impliedly granted to him by the legislature. (Bank of Italy v. Johnson (Cal.) 251 Pac. 784.) The legislature could not, if it would, grant to him legislative powers. An attempt to delegate legislative power would be unconstitutional. (State v. Holland, 37 Mont. 393, 96 Pac. 719; O'Neil v. Yellowstone Irrigation District, 44 Mont. 492, 121 Pac. 283; 12 C. J. 839, Section 323.)

By virtue of the sections of the code above referred to, the Superintendent of Banks may undoubtedly make any reasonable rules or regulations of an administrative character. To illustrate: He may impose certain reasonable conditions under which an insolvent bank may be reorganized and reopened on a solvent basis. The stockholders and depositors must submit and agree to such conditions if they choose to reopen the bank. In other words, the Superintendent of Banks may properly exercise reasonable discretion in the adoption of administrative rules. He may prescribe the method of procedure and impose the conditions upon which he will permit the bank to re-open. (St. Charles State Bank v. Wisgfield, 36 S. D. 493, 155 N. W. 776.)

But naming the terms of a reorganization agreement is far different from compelling acceptance of such terms by the stockholders and depositors. The latter is in the nature of legislation which is perhaps beyond the constitutional power of the legislature itself. Certainly such power is not administrative in character and cannot be implied.

While it is not always easily determined at what point the exercise of the legislative will cease and the executive or administrative will become operative, I am of the opinion that an order of the Superintendent of Banks requiring 5% of the depositors to submit to a restricted withdrawal upon the reopening of a closed bank without obtaining their consent and agreement thereto, would be legislative in character and therefore cannot be implied from the above named sections.