OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Jno. Q. McAdams,
Commissioner,
Department of Banking
Austin, Texas

Dear Mr. McAdams: Opinion No. O-5368

Re: Authority of State banks to engage in branch banking in Military Reservations and Navy Yards.

We beg to acknowledge receipt of your letter requesting a ruling from this department, as follows:

"Major Schooley of the War Department, Washington, D. C., has just telephoned to us to know whether State-chartered banks of Texas may provide banking facilities in Military Reservations and Navy Yards. House Bill S. 1603 of the 77th Congress, Second Session, authorizes National banks to provide such facilities, even in States where State chartered institutions are prohibited by the Constitution in establishing such stations.

"Our State Constitution, as well as Article 530 Revised Statutes, seems to prohibit our State banks from establishing facilities of this kind even under war conditions and in emergencies created thereby.

"Major Schooley said the Governors of some of our States were over-riding the mandates of the Constitutions in regard to branches for State banks and he just wondered if our own government was clothed with such authority.

"What we would like to know is may Texas State chartered banks provide check paying, deposit taking and exchange issuing stations in Military Reservations and Navy Yards."

As we construe your letter, it requests our opinion upon the broad question stated in the captioned subject matter -- that is, the authority of a State banking corporation to establish a branch bank. As thus construed, the question should be answered in the negative.

Section 16 of Article XVI of the Constitution reads as follows:

"The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

"No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter. * * *." (Emphasis supplied).

The phrasing of your specific question quoted in the last paragraph of your letter with respect to the particular service of the "stations" contemplated does not call for a different answer. Maintaining such "stations" would constitute engaging "in business at more than one place", within the meaning of Section 16 of the Constitution.

Under all of the decisions throughout the United States, the business of accepting deposits of money for repayment upon the order of the depositor constitutes the business of banking. It is perhaps the only never-failing indicium of the banking functions now that the authority to issue circulating notes has been taken away from the National associations.

The ordinary essential features of the banking business are, the power to accept deposits of money repayable to the order of the depositor, the discounting of commercial paper, and the governmental authority to issue circulating notes, which last-named power, as above stated, has been abrogated.

Any bank may, of course, perform other business transactions, and even carry on to a degree other businesses, not essentially banking functions, when reasonably necessary as an incidental power to perform their essential functions as banking institutions.

The general rule is stated in 9 C.J.S., Title -- BANKS AND BANKING, p. 31, Sec. 3, as follows:

> "As has been indicated in Section 1, the principal attributes to the bank are the right to issue negotiable notes, to discount notes, and to receive deposits; and while as a matter of modern practice banks usually exercise any two or even all three of these functions, it is not necessary that they exercise them all, but an institution exercising any one or more of these functions is a bank in the strictest commercial sense."

Later in the same section that text declares:

> "Originally, the business of banking consisted only of receiving deposits for safe keeping, and even at the present time a bank is primarily a place for the deposit of money, and the receiving of the money of others on deposit is a distinctive feature of the business of banking."

Zollman on Banks and Banking, Vol. 1, Sec. 67, declares:

> "The very business of the bank is to have a place where deposits are received and paid out and where money is loaned on security. Not all these functions, however, need be exercised in order to constitute an institution a bank. The exercise of a single

function of banking, such as louning money, selling bonds, or issuing currency may be sufficient to bring the institution within the regulations passed by the State relative to banks."

"Banks, in the commercial sense, are of three kinds, to-wit: 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate and the like, for safe keeping 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 and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those 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, and unless such a bank is brought within the proviso under consideration, is equally subject to taxation as if authorized to make discounts and issue circulation as well as to receive deposits." -- George Oulton, Collector, v. The San Francisco Savings Union, 21 Law Ed. (U.S.) 618.

In Kaliski v. Gossett, Banking Commissioner, 109 S. W. (2) 340, it is said:

"In the case of In re Prudence Company, (C.C.A.) 79 F.(2) 77,79, we find the following definition of a bank: 'Strictly speaking, the term bank implies a place for the deposit of money, as that is the most obvious purpose or such an institution.' The opinion continues: 'And all of the cases so far as we are advised, which have construed the words "bank-

> ing corporations," as used in the Bankruptcy Act, have regarded the legal power to receive deposits as the essential thing.'" (Many authorities here cited).

The Maliski case held that a stockholder in a Morris Plan Bank was not subject to the super-added liability of the Constitution and statutes, because such so-called Morris Plan Bankswere not then authorized to accept deposits. The very things which your suggestion contemplates -- the depositing of money and cashing of checks -- was not present in the Maliski case, for which reason it appears the court held as it did with respect to the stockholders' liability. The Supreme Court refused a writ of error in that case.

Your quoted suggestion from Major Schooley and his implied request that we adopt it, to the effect that the Governors of some of the states were overriding the mandates of the Constitution in regard to branches for State banks, is not in keeping with constitutional mandates.

> "Texas is a free and independent state, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self government, unimpaired to all the states." --Bill of Rights, Constitution, Article 1, Section I.
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> "The military shall at times be subordinate to the civil authorities." --Section 24, Article I, Constitution.
>
> "No power of suspending laws in this State shall be exercised except by the Legislature." --Section 18, Article I, Constitution.

Of course, the power of the Legislature itself to suspend law pertains only to legislative acts and not to constitutional provisions. The enthusiastic suggestion that any officer, or even department of the Government, may suspend the Constitution finds no support in law.

In Ex parte Milligan (U.S.) 18 Law Ed. p. 298, it is said:

> "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."

The court upheld the right of Milligan to the constitutional writ of habeas corpus upon the principle announced by it.

Your question, therefore, is answered as above indicated.

Very truly yours

ATTORNEY GENERAL OF TEXAS

Ocie Speer
Assistant

APPROVED JUN 12, 1943

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

OS-MR

APPROVED JUN 12, 1943

ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY BWB
CHAIRMAN