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Ellis B. Merry
Member, Detroit Bar

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Ellis B. Merry†

ON January 2, 1933, 420 state and 68 national banks were operating in Michigan. On February 13, the Governor of Michigan proclaimed a banking holiday for eight days which was extended in effect on February 22. On March 4, the President proclaimed a national banking holiday until March 9. Under the provisions of the President's proclamation lifting the national banking holiday,[1] 198 state and approximately 30 national banks were reopened by the appropriate authorities as "sound" banks. State bank conservators assumed the management and custody of 215 state banks which did not open, on appointment by the Commissioner of the State Banking Department, with the approval of the Governor, under Act 32, Public Acts of 1933.[2]

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This article is reportorial; the material contained therein represents the accumulated experience of many parties interested in bank reorganizations and bank recapitalizations.

† Member, Detroit Bar. Associate, Bulkley, Ledyard, Dickinson & Wright. A.B., J.D., Michigan.—*Ed.*

[1] Under such order made on March 9th, 1933, the Secretary of the Treasury was authorized to permit any member bank of the federal reserve system to perform its usual banking functions, except as otherwise prohibited. The various federal reserve banks acted as agents of the Secretary of the Treasury in receiving applications to reopen and in issuing licenses. The Commissioner of the Banking Department, as the authority having the immediate supervision of the banking institution in Michigan, was authorized to allow non-member state banks to reopen.

[2] Section 4 of Act 32 provides that the Commissioner of the State Banking Department shall, upon application of the directors of any state bank, or when any new bank or its officers have failed to comply with the rules made by the Commissioner under Act 32, or upon being satisfied that the conditions permitting the appointment of a receiver for the bank exists and when it shall appear to him to be expedient in the interests of depositors and other parties, have the power with the consent of the Governor to take over as conservator the custody and management of any such bank and the assets

National bank conservators were appointed by the Comptroller of the Currency, under the provisions of the Emergency Banking Act, signed March 9, 1933,[3] to take charge of the national banks remaining closed. The deposits in the banks for which conservators were appointed approximated $665,000,000.[4] Some of the assets representing such deposits were "sound and liquid," others were "sound but slow," some were possibly "doubtful," others possibly "loss." The available cash balances in such banks, moreover, generally amounted to but a small percentage of the total deposits, and the aggregate value of their assets apparently did not, in the opinion of the authorities, justify their resumption of business.

Liquidation of so many closed banks, merely by way of the usual bank receivership, would result in the "dumping" of marketable securities and the crash of at least local security prices, pressure on bank creditors, the prolonged impounding of bank deposits, and the deprivation of necessary banking facilities in most of the communities of the State. Instead, reorganization of these closed banks is imperative so that banking facilities can be furnished, the wholesale dumping of securities can be prevented and substantial percentages of deposits can be made immediately available.

As to the opened banks, no readjustment of the rights of depositors and other creditors is necessary. But, adjustments in capital structure may nevertheless be desirable to restore capital impairments and increase liquidity. And such adjustments may be widespread in connection with admission of opened banks to membership in the Federal Deposit Insurance Corporation.

National and state legislation was enacted in March to add to and improve the then available methods of recapitalizing open banks and reorganizing closed banks. The power and activities of the Reconstruction Finance Corporation were broadened so that it might assist financially.

belonging to or in the custody or control of such bank. The Commissioner is further authorized to manage such a bank either by its officers or by any suitable person or persons he may select for that purpose. For the 215 banks of which he assumed custody and management, the Commissioner appointed conservators.

[3] Title II of the Emergency Banking Act (Mar. 9, 1933), under which the conservators were appointed, is known as the "Bank Conservation Act."

[4] It is reported by the State Banking Department that the deposit liability in the 215 state banks and 7 industrial banks, for which conservators were appointed after the presidential holiday, aggregated $163,419,950.10; that on November 1, 1933, 154 state banks were still in charge of conservators and that the deposits in such banks aggregated approximately $64,000,000.00.

Three methods have been used in dealing with the financial difficulties of banks in the present crisis:

(1) Recapitalizing open, going banks.
(2) Restoring solvency of closed banks by scaling down deposit and other liabilities.
(3) Creation of *new banks* to take over partially the assets and liabilities of *closed banks* and gradual liquidation of closed banks.

These methods will be taken up in turn, showing the elements and procedure in each. Each method will be considered with reference to national banks and state banks in Michigan.

I

RECAPITALIZATION OF OPEN, GOING BANKS

Depending upon the condition of the open bank, recapitalization or, in a broader sense, rehabilitation, may involve merely the issuance of additional stock, generally preferred stock to be purchased by the Reconstruction Finance Corporation; it may also involve a further contribution by present stockholders or others to restore any capital impairment or to strengthen the bank; it may also involve borrowing upon assets of the bank to increase further its liquidity.

If the recapitalization involves merely the issuance of preferred stock, the existing corporation will undoubtedly be continued. If present stockholders are to contribute further, or if the liquidity of the open bank is to be increased by borrowing upon its assets, it may be desirable to form a new bank in which shareholders of the present, open bank will purchase stock; to transfer certain assets of the present bank to the new bank; and to liquidate the present bank.

1. *Issuance of Preferred Stock*

The Reconstruction Finance Corporation is authorized to buy preferred stock or to make loans secured by such stock by Section 304 of the Emergency Banking Act.[5]

> "If in the opinion of the Secretary of the Treasury any national banking association, or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust

[5] The Reconstruction Finance Corporation does not buy assessable preferred stock.

company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request."

Existing national banks were authorized by the Emergency Banking Act of last March to issue preferred stock. The statute[6] sets forth the procedure by which the preferred stock may be issued:

"Notwithstanding any other provision of law, any national banking association may, with the approval of the Comptroller of the Currency and by vote of shareholders owning a majority of the stock of such association, upon not less than five days' notice, given by registered mail pursuant to action taken by its board of directors, issue preferred stock of one or more classes, in such amount and with such par value as shall be approved by said Comptroller, and make such amendments to its articles of association as may be necessary for this purpose; but, in the case of any newly organized national banking association which has not yet issued common stock, the requirement of notice to and vote of shareholders shall not apply. No issue of preferred stock shall be valid until the par value of all stock so issued shall be paid in."

The articles of association must be amended to provide for the rights, preferences and privileges of the preferred stock and the common stock. The statute[7] requires certain rights, preferences and privileges for the preferred stock:

"Notwithstanding any other provision of law, whether relating to restriction upon the payment of dividends upon capital stock or otherwise, the holders of such preferred stock shall be entitled to receive such cumulative dividends at a rate not exceeding 6 per centum per annum and shall have such voting and conversion rights and such control of management, and such stock shall be subject to retirement in such manner and upon such conditions, as may be provided in the articles of association with the approval of the Comptroller of the Currency. The holders of such preferred stock shall not be held individually responsible as such holders for any debts, contracts, or engagements of such association, and shall not be liable for assessments to restore impairments

[6] Section 301, Emergency Banking Act (Mar. 9, 1933), as amended by act of June 15, 1933.

[7] Section 302, Emergency Banking Act (Mar. 9, 1933), as amended.

in the capital of such association as now provided by law with reference to holders of common stock.

"No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and, if the association is placed in voluntary liquidation or a conservator or a receiver is appointed therefor, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock plus all accumulated dividends."

If the Reconstruction Finance Corporation is to buy the preferred stock, the amended articles of association will, as a practical matter, probably be drafted by the Reconstruction Finance Corporation and, upon approval by the Comptroller, will be submitted to the bank for adoption by its shareholders. Thereafter and pursuant to the shareholders' action, the board of directors will, at a duly called meeting, approve a form of preferred stock certificate and authorize the officers to issue the stock upon payment therefor in cash. The amendments to articles of association must be filed with the Comptroller, and when the preferred stock is paid for the officers and directors should so certify to the Comptroller.

The authority of an open Michigan state bank to issue preferred stock is not free from doubt. It is not expressly contained in the Michigan Banking Act.[8] However, the better view would allow an open state bank to issue such stock upon the unanimous approval of stockholders;[9] if not prohibited by statute, a corporation, upon unanimous consent of its stockholders, may issue more than one class of stock.[10]

The provisions of the Michigan Banking Act relative to increase of

[8] House bill No. 677, authorizing state banks to issue preferred stock, was passed by the House of Representatives at the 1933 session, but was reported by the Senate back to committee on the last day of the session. The Michigan legislature, at its special session to begin November 23, will, it is anticipated, promptly authorize the issuance of preferred stock by state banks, trust companies and industrial banks. The proposed bills are practically identical with the statutes quoted above.

(Senate acts authorizing state banks and trust companies to issue preferred stock have just been passed by the legislature in special session.—*Ed.*)

[9] Opinion of the Attorney General to Rudolph E. Reichert, dated September 7, 1933. Act 32, Mich. Pub. Acts (1933), provides that, for banks under conservators, preferred stock may under certain terms and conditions be issued. No prior statute dealt with preferred stock for Michigan banks. It may be argued that the limited authority to issue preferred stock granted in Act 32 impliedly excludes any other action.

[10] Continental Trust Co. v. Toledo, St. L. & K. C. R. R., (C. C. N. D. Ohio W. D. 1898) 86 Fed. 929, aff'd, (C. C. A. 6th, 1899) 95 Fed. 497; Ernst v. Elmira Municipal Improvement Co., 24 Misc. 583, 54 N. Y. S. 116 (1898); Knoxville, C. G. & L. R. Rd. v. City of Knoxville, 98 Tenn. 1, 37 S. W. 883 (1896); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

capital stock is applicable to the issuance of preferred stock by an open state bank:[11]

> "The amount of capital stock and the number of shares of every Corporation organized and existing under this act may be increased . . . at any annual meeting of the stockholders, or at a special meeting expressly called for that purpose, by a vote of two-thirds of the capital stock of the Corporation. In voting upon the increase of capital stock, the shareholders shall have power, by the same statutory majority, to fix the value of, and the price at which the increase of the capital stock shall be subscribed and paid for by shareholders, but not less than par, as well as the time and manner of the subscription and payment, and by the same vote to authorize the directors of the corporation to sell at not less than the price so fixed, any part of such increase not subscribed by the shareholders, after they have had a reasonable opportunity to make subscription of their proportionate shares therefor; and to make provisions for calling in and cancelling the old and issuing new certificates of stock. No increase of capital stock shall be valid until the amount thereof has been subscribed and actually paid in and a certificate so stating furnished the Commissioner of the banking department."

If such stock is to be issued, the special meeting of the shareholders may be called in the manner provided in the bank's by-laws; thirty days' notice of the meeting, however, is usually required. To expedite the procedure, the meeting may be called by the Commissioner, as provided in the Michigan Banking Act,[12] by sending notices to the shareholders at their last known addresses at least three days prior to meeting.

At their meeting, the shareholders should amend the articles of incorporation to provide for rights, preferences and privileges of the holders of the preferred stock and the common stock. A certificate of amendment of the articles should be executed in triplicate by the officers, including a majority of the directors, and delivered to the Commissioner who will file one copy with the clerk of the county in which the bank is located and one with the secretary of state.[13]

As is indicated by the above-quoted provisions of the Michigan

[11] Mich. Comp. Laws (1929), sec. 11908.

[12] Mich. Comp. Laws (1929), sec. 11943.

[13] Mich. Comp. Laws (1929), sec. 11908 provides:

> "Any bank organized or existing under the provisions of this act may, with the approval of the commissioner of the banking department, and by vote of shareholders owning two-thirds of the stock of such bank, amend its articles of association in any manner not inconsistent with the provisions of this act. A certificate

Banking Act, the shareholders have pre-emptive rights with respect to the newly-issued preferred stock. Shareholders may waive these pre-emptive rights,[14] and, as a practical matter, the resolution to be unanimously adopted by the shareholders to authorize issuance of the preferred stock should include a waiver by all shareholders of their pre-emptive rights so that the newly-authorized stock may be immediately made available for purchase by the Reconstruction Finance Corporation.

When the shareholders have acted, the board of directors should adopt a form of preferred stock certificate and authorize the officers to issue the stock on receipt of cash. The payment for the newly-issued preferred stock should be certified to the Commissioner.

2. *Contribution to Common Capital*

Further contribution to common capital by stockholders of an open bank may be necessary to restore capital impairment. If necessary to restore an impairment, such contribution is now generally a condition precedent to the purchase of preferred stock by the Reconstruction Finance Corporation. The contribution may take the form of a voluntary payment by all the shareholders or by those to whom the present shareholders transfer their stock. It may also be secured if the necessary conditions exist under the appropriate provisions of law regarding an impairment of capital.[15] These two methods of obtaining a contribution are, however, not entirely satisfactory. It will frequently be impossible to procure voluntary payment by all the present shareholders or to secure transfer of the shares owned by persons who do not wish to invest further to those who do. With respect to the statutory procedure, several months are required; and, if a total impairment of capital does not exist, the Commissioner will not be able to demand that stockholders make a 100% contribution, although such contribution may be desirable in order to write off any doubtful items.

of the fact shall be executed by its officers, including a majority of its directors, and filed as required for articles of incorporation . . . "

and Sec. 11900 provides:

"Such articles of incorporation shall be executed in triplicate, one of which shall be recorded in the office of the county clerk for the county in which the bank is located, one filed in the office of the commissioner of the banking department, and shall be recorded in the office of the commissioner of the banking department, and one filed in the office of the secretary of state. Such articles of incorporation, or copies thereof, duly certified by either of said officers, may be used as evidence in all courts for and against such bank."

[14] 11 FLETCHER, CYCLOPEDIA OF CORPORATIONS, perm. ed., sec. 5139 (1932).

[15] Mich. Comp. Laws (1929), sec. 11941.

These difficulties may be avoided by the creation of a new bank — a device to be presently discussed.

3. *Borrowing as a Means of Rehabilitating a Going Bank*

If, in the recapitalization or rehabilitation of a going bank it is desired that its liquidity be increased, the bank, upon action of its board of directors, may borrow such sums as are necessary and pledge or mortgage any of its assets to secure the loans.[16] This method might be disapproved by some bankers because the statement of the bank will then show these loans as "Bills Payable." This disadvantage may be avoided by organizing a mortgage loan company and selling to it the assets which would by the other method be pledged to secure the borrowings. The mortgage loan company will be eligible under Section 5 of the Reconstruction Finance Corporation Act to borrow from the Reconstruction Finance Corporation;[17] it will pay the bank for assets purchased, with cash derived from the Reconstruction Finance Corporation loan upon the security of the purchased assets and with a note for the balance. The note to the bank will, of course, represent the margin of security corresponding to the excess value of the assets over and above the amount of the loan by the Reconstruction Finance Corporation.[18] By this method, the open bank will acquire cash with which to increase its liquidity and will not show "Bills Payable" in its statement. This method is unavailable, however, if the margin of security which is represented by the mortgage loan company's note to the bank exceeds the amount which the bank may loan to one borrower.[19]

The disadvantages of both the foregoing methods may be obviated by the formation of a new bank to which may be transferred the liability and assets of the present open bank — a device to be now discussed.

[16] Michigan state banks "may borrow money for temporary purposes, and may pledge assets of the bank not exceeding fifty per-cent in excess of the amount borrowed as collateral security thereof." Mich. Comp. Laws (1929), sec. 11932, as amended. National banks, while not specifically authorized by the National Banking Act to borrow money, may do so in the exercise of an incidental power necessary in the carrying on of the business of banking. Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. ed. 611 (1900). See also, U. S. C., tit. 12, sec. 24, n. 108 (1927).

[17] The mortgage loan company must be bona fide engaged in a mortgage loan business.

[18] The mortgage loan company may be organized as a Michigan corporation with a minimum capital of $1,000. In the organization of the company, the Banking Act of 1933 should be considered.

[19] For state banks, see Mich. Comp. Laws (1929), sec. 11922, as amended; for national banks, see U. S. C., tit. 12, sec. 84 (1927), as amended.

4. *Recapitalization by Forming New Bank*

The new bank is to be formed in order to take over (broadly speaking) both assets and liabilities of the existing bank. The stockholders of the existing bank who would be prepared to contribute further capital to the existing bank will, instead, make their contribution by purchasing stock in the new bank.

The consideration for the assumption of the liabilities of the old bank may be a transfer (sale) to the new bank of an equivalent amount of acceptable assets of the old bank. The amount of assets acceptable to the new bank may be increased if the old bank borrows cash upon the security of its unacceptable assets and turns over this cash to the new bank. This borrowing of cash will at the same time have the effect of increasing the liquidity of the new bank.

The sale method, however, is not always satisfactory. It requires the directors of the new bank to determine upon the acceptability of assets of the old bank en masse. It also generally requires that the old bank borrow upon acceptable assets in order to increase with cash the amount of the acceptable assets so that it will equal the amount of the assumed liabilities. Such cash, however, may not be necessary for the proper liquidity of the new bank.

These disadvantages are avoided if, instead of transferring its assets, the old bank gives to the new bank its note or notes secured by all its assets. The directors of the new bank may then proceed in a more leisurely fashion to select for purchase the acceptable assets of the old bank; and the old bank need not borrow merely in order to effect the transfer of assets to the new bank. No difference exists between the two methods with respect to earnings of the new bank. If the new bank buys assets from the old bank it will receive the income on such assets; if it receives the note or notes of the old bank secured by all of its assets, it will receive income upon the note or notes of the present bank.

In recapitalizing a going bank by the device of forming a new institution, the following steps should be taken on behalf of the going bank:

First, the directors of the old (going) bank should meet and authorize the various notes, loans, pledges and mortgages to be made by the old bank. The board of directors of either a national or a Michigan state bank may authorize the borrowing and the pledging and mortgaging of assets to secure such borrowings by a going bank.[20] Likewise,

[20] American Nat. Bank v. Commercial Nat. Bank, (C. C. A. 5th, 1918) 254 Fed. 249.

if it is intended that the old (going) bank give a note to the new bank secured by all its assets, the board of directors should and can authorize the execution of the note or notes and the pledge agreement.

Second, the shareholders should ratify the acts of the directors just mentioned. This should be done in order to preserve more certainly the statutory liability of shareholders of the old bank for the benefit of either the new bank or of any concern which may be lending to the old bank. Then, the shareholders should adopt a resolution providing for the liquidation of the old bank. For this purpose, a two-thirds affirmative vote of the shareholders is requisite.[21] In voting for liquidation the shareholders will, as a matter of recognized practice, appoint a liquidating agent or committee to exercise such powers as may be determined by the board of directors.[22] The shareholders should then by resolution authorize the sale of the assets of the old bank to the new bank. The directors have as a general rule no power to dispose of assets to the new bank in consideration of the latter's assumption of the liabilities of the old bank unless such sale is necessary in order to pay the debts of the bank. Although proof of this necessity may be possible under present circumstances, good practice demands that the approval of the sale by the stockholders of the old bank be obtained. In order to avoid the necessity of a unanimous approval by stockholders which would be necessary if the bank were still a going concern, the stockholders of the old bank should authorize the sale of its assets to the new bank *after* their vote for liquidation. When the bank is in process of liquidation, the shareholders may authorize a sale by a two-thirds vote.

Third, pursuant to the action of the shareholders, the board of directors of the old bank should authorize the execution of such contracts with the new bank as are required for the purchase and sale of assets, should order the discontinuance of the banking business, and should define the duties of the liquidating agent or committee.

II

RESTORING SOLVENCY OF CLOSED BANKS BY SCALING DOWN DEPOSIT AND OTHER LIABILITIES

This method of reorganizing a closed bank involves the continued operation of the existing institution after its restoration to solvency by

[21] For national banks, U. S. C., tit. 12, sec. 181 (1927); for state banks, Mich. Comp. Laws (1929), sec. 11953.

[22] See Instructions of the Comptroller of the Currency on the Organization and Powers of National Banks (1928).

reduction in its deposit and other liability. The restoration to solvency can be accomplished through execution of waivers by depositors and other creditors. Waivers by all depositors can, however, rarely be obtained. But under the legislation hereinafter discussed, the waiver by a certain percentage in amount of the depositors (plus certain other steps) is deemed to bind all depositors to a reduction in deposit liability.

If the reduction in deposit liability were sufficient in amount, no stockholders' assessment would be necessary. However, supervisory authorities, as a condition of approving any such reorganization plan, generally require a 100% contribution by the stockholders as new common capital; and, where the usual assessment would be substantially collectible, they may even require a further contribution.

Under this plan, the undesirable assets of the closed bank are transferred to trustees or to a depositors corporation. The existing capital structure of the closed bank will be entirely written off. The deposit liability, except the secured or preferred deposit liability which must be paid in full, will be reduced by the amount of the eliminated assets less the amount of the capital structure. The bank will reopen with reduced liabilities, with a new capital structure and with an equal amount of sound assets.

The trustees or the depositors corporation will issue certificates to depositors evidencing interests in such eliminated assets to the extent of the waived or reduced portion of their respective deposits. The equity in the eliminated assets over and above such interests is most often held for the benefit of the stockholders of the bank as they existed prior to the reorganization.

The amount of assets acceptable to the reorganized bank may be increased by the transfer to it by the depositors corporation of cash obtained by the depositors corporation by borrowing upon the security of all or a part of the eliminated assets. The cash may also be procured through the depositors corporation in order to increase the liquidity of the reorganized bank.

To increase its liquidity and otherwise to strengthen itself, the reorganized bank may issue preferred stock to be purchased by the Reconstruction Finance Corporation. The preferred stock should be issued only after the present bank is otherwise completely reorganized.[28] As a practical matter, of course, all arrangements for the issuance of the pre-

[28] The steps, heretofore outlined, by which preferred stock may be issued by a going bank apply.

ferred stock may be made before the bank is turned back to its board of directors so that the reorganized bank may reopen with preferred stock.

The stock of the reorganized bank, with respect to which stockholders make a voluntary contribution, will perhaps continue to be assessable because the payment of an assessment does not prevent a future assessment. The stock is probably not newly-issued within the meaning of the Banking Act of 1933 and of Michigan Public Acts (1933), No. 270 which provide for national and state banks respectively that newly-issued stock shall be non-assessable.

To avoid the future assessability of the stock for which the contribution is paid, the plan may be modified in the following particulars: The existing closed institution will be restored to solvency by a waiver or reduction in deposit liability; cash will be transferred by the depositors corporation to the reorganized bank as above outlined; but no contribution will be made to capital by the stockholders. Then the reorganized bank, immediately upon return of its management to its board of directors, will sell all of its assets to a newly-formed bank [24] in consideration of an assumption by said bank of the liabilities, as reduced, of the reorganized bank. The stockholders of the closed bank will buy the stock in the new bank. This stock will be non-assessable. This modification of the plan might be termed the "Headless Bank" plan because the present closed bank when reorganized will show on its balance sheet neither capital nor assets corresponding thereto.

The practical success of the general method of restoring closed banks to solvency by scaling down their deposit and other liabilities depends upon the constitutional possibility of binding depositors, creditors and stockholders even though the consent of all is not obtainable. It may be urged that statutes which authorize reorganization of banks so as to cut down the full claims of depositors and other creditors without their consent are violative of the "due process" and "contracts" clauses of the federal Constitution.[25] The validity of statutes which have this effect have not been widely considered by the courts and the decisions rendered thus far by the state courts are conflicting.[26] Never-

[24] The formation of a new bank is discussed in the appendices.

[25] For Michigan legislation the "due process" and "contract clauses" of the state constitution are also involved.

[26] McConnville v. Fort Pierce Bank and Trust Co., 101 Fla. 727, 135 So. 392 (1931); Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932); Dorman v. Dell, 245 Ky. 34, 52 S. W. (2d) 892 (1932); Milner v. Gibson, (Ky. 1933) 61 S. W. (2d) 273; Engelcke v. Bank, (S. D. 1932) 246 N. W. 288.

theless, the Reconstruction Finance Corporation and federal and state officers charged with the work of reorganizing banks have proceeded on the assumption that this type of legislation, if fairly drawn, is valid.[27] The methods which have been used for restoring solvency of banks through scaling down deposit and other liabilities will now be considered — first as to national and then as to state banks.

1. *National Banks*

For national banks, the Bank Conservation Act[28] provides in Section 207 that such a plan for reorganization, which under heretofore existing law requires the unanimous consent of depositors, creditors and/or stockholders, may become effective upon approval by the Comptroller of the Currency and by 75% of the depositors and other creditors and/or 66⅔% of the stockholders.

(*a*) As a practical matter, the plan of reorganization is generally set up by a national bank examiner after his examination of the bank's assets and a schedule of its liabilities. The plan must be approved by the Comptroller of the Currency as "fair and equitable to all depositors, other creditors and stockholders and in the public interest" subject to such conditions, restrictions and limitations as he may prescribe.[29] Obviously, the assets retained by the bank and equal in amount to the reduced liabilities must be sound; the organizing bank must have sufficient liquidity to meet expected withdrawals; the depositors and creditors must be given an interest prior to any interest of the stockholders in the eliminated assets to the extent of the reduction in their claims. Stockholders are usually required to contribute a 100% assessment because under a receivership of the closed bank a 100% assessment would probably be levied. In fact, if such assessment were substantially collectible, the Comptroller could properly refuse to approve a plan which merely provides for a 100% capital contribution, because such contribution would be merely a further investment belonging to the stockholders, whereas under a receivership the proceeds of the assessment collected by the receiver would be paid to the depositors and other creditors.

(*b*) When the plan of reorganization has been formulated a printed copy thereof should be mailed by the conservator of the closed bank

[27] For a further discussion of these constitutional questions, see comment in this issue of the MICHIGAN LAW REVIEW entitled, "Constitutional Law — Bank Reorganization Legislation — Composition with Depositors and Other Creditors."

[28] Title II of the Emergency Banking Act, passed by the federal Congress and signed by the President on March 9, 1933.

[29] Bank Conservation Act, sec. 207.

or other interested parties to depositors and other creditors and/or stockholders, whose consent to the plan of reorganization is required. This notice of the plan of reorganization should be given at least fifteen days prior to its effective date. This procedure is regarded as compliance with the statutory provision that reasonable notice of the plan must be given.[30]

The consent of depositors and other creditors is, of course, required because the bank's liability to them is reduced. The execution of the plan interferes, if not with their contract rights against the bank to receive the amount of their deposits, at least with their rights to have the insolvent bank wound up as provided in the National Banking Act. The consent of secured and preferred creditors whose claims will be recognized in full by the reorganized bank is not required because their rights will not in any way be infringed.

The consent of stockholders should also be obtained in the "Headless Bank" plan, in which the organizers will sell assets to a new bank in consideration of the latter's assumption of certain reduced liabilities of the old bank, so that the board of directors may properly sell all of the bank's assets. The directors have no power to sell all or substantially all of the assets of the bank unless an emergency exists.[31] Good practice demands that the consent of stockholders be obtained. Any necessity for an unanimous vote by the shareholders, however, can be avoided by proceeding under Section 207 with consent to the plan of reorganization of two-thirds of the stockholders.

(*c*) With the printed copies of the plan of reorganization, the conservator or other parties interested in the closed national bank should send a form of waiver or consent agreement to each depositor and other creditor and a similar agreement to each stockholder. Executed agreements should be obtained from depositors and other creditors of the bank representing 75% in amount of its total deposit and other liabilities as shown on its books.[32] "Claims of depositors and other creditors which will be satisfied in full under the provisions of plan of reorganization shall not be included among the total deposit and other liabili-

[30] Bank Conservation Act, sec. 207.

[31] The directors of a private corporation have no power to sell out all the property of the corporation without the prior consent of the stockholders, except in the case of an imperative necessity. 2 FLETCHER, CYCLOPEDIA OF CORPORATIONS, perm. ed., sec. 545 (1931). For exceptions, see City Nat. Bank of Huron, S.D. v. Fuller, (C. C. A. 8th, 1931) 52 F. (2d) 870, and Richter v. Laredo Nat. Bank, (C. C. A. 5th, 1932) 62 F. (2d) 289, 290.

[32] Emergency Banking Act, sec. 207.

ties . . . in determining the 75% thereof. . . . " [33] Executed agreements should also be obtained from the stockholders of the bank owning two-thirds of its outstanding stock as shown by its books.[34]

When the plan becomes effective by the foregoing procedure, ". . . all depositors and other creditors and stockholders of such national banking association, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization." [35]

As soon as the plan becomes effective, the management of the bank is returned to its board of directors in the manner provided in the plan, and subject to the conditions, restrictions and limitations which may be prescribed by the Comptroller of the Currency. Likewise, "all the books, records, and assets of the national banking association shall be disposed of in accordance with the provisions of the plan." [36] In the above-outlined scheme, the board of directors authorize the transfer of the poorer assets of the bank in an amount equal to the reduction in liabilities and capital structure to the trustees or to a depositors corporation. If a loan is to be obtained upon the eliminated assets, the amount of such eliminated assets would be increased by the amount of such loan; and the depositors corporation would transfer to the reorganized bank proceeds of the loan obtained upon all or a portion of the eliminated assets.

Provisions must be made for unknown and unlisted liabilities. The reorganized bank will, of course, be liable for the same percentage of such liabilities as it will for known liabilities. In its agreement with the trustees, provisions should be made for indemnity of the reorganized bank against payment of any such liabilities because it will probably retain only assets of a face value equal to the known liabilities.[37]

2. *State Banks*

Three general statutory procedures exist and have been or are being used for restoring to solvency Michigan state banks: (*a*) Court receiv-

[33] Emergency Banking Act, sec. 207.
[34] Emergency Banking Act, sec. 207.
[35] Emergency Banking Act, sec. 207.
[36] Emergency Banking Act, sec. 207.
[37] In the "Headless Bank" plan, the new bank may assume unknown and unlisted liabilities upon the condition that before it is required to pay such liabilities it may select assets from the eliminated assets of a face value equal to the amount of liabilities which it is required to pay. Preferably, however, the new bank will only assume known liabilities and other provision will be made whereby the eliminated assets will be held to pay any unknown liabilities.

ership or custodianship and composition with depositors, (*b*) Formulation and imposition of a plan by the Commissioner of the Banking Department, (*c*) Conservatorship and composition with depositors.

(*a*) *Court Receivership or Custodianship and Composition with Depositors*

The Michigan legislature provided, in Public Acts (1932), No. 8, that a plan of reorganization would become effective upon approval by depositors representing 85% in amount of the deposit liability, by the Commissioner of the Banking Department, and by the court, if any, having jurisdiction of the receiver or custodian of the bank or by a court of competent jurisdiction. These provisions, while superseded in part by a statute in 1933, may nevertheless be applicable as they stand to banks in the hands of a receiver or custodian appointed by a court. And numerous banks have in fact been reorganized under the original provisions of Act 8.[38]

For reopening a closed bank which is in the hands of a court receiver, the first step under Act 8 [39] is to secure the written approval of the plan of reorganization by the Commissioner of the Banking Department and by depositors representing not less than 85% in amount of the deposit liability of the bank.[40] The plan of reorganization to which the depositors agree may provide for a committee of not more than twelve depositors to represent those approving the plan in carrying it into effect.[41] The depositors committee or the Attorney General on behalf of the Commissioner may then, by a petition setting forth the details of the plan, request the court in which the receivership is pending to set a day for hearing upon the plan.[42] The court will then by

[38] See In the matter of the application of Paul W. Voorhies ex rel. Rudolph E. Reichert, State Banking Commissioner, for the appointment of custodian of State Bank of Cedar, a Michigan banking corporation of Cedar, Michigan, Circuit Court for Leelanau County, in chancery; In the matter of the application of Paul W. Voorhies ex rel. Rudolph E. Reichert, State Banking Commissioner, for appointment of custodian for Mt. Clemens Savings Bank, a Michigan banking corporation, Case No. 8652 Circuit Court for County of Macomb, in chancery; and In the matter of the application of Paul W. Voorhies ex rel. Rudolph E. Reichert, State Banking Commissioner, for the appointment of custodian for Plymouth United Savings Bank, a Michigan banking corporation, Circuit Court for County of Washtenaw, in chancery.

[39] Mich. Pub. Acts (1929), No. 66, sec. 65(a), being first paragraph of Mich. Pub. Acts (1932), No. 8.

[40] The statute does not provide that the required 85% shall not include the deposits of any depositors which will not be affected by the plan. Good practice, however, demands that such deposits should not be included in the total deposits in determining the 85%.

[41] Mich. Pub. Acts (1929), No. 66, sec. 65(a).

[42] Mich. Pub. Acts (1929), No. 66, sec. 65(a).

order fix the date for hearing. Notice of the hearing should be given to depositors by (*a*) publishing a copy of the order once in each week for not less than two successive weeks immediately preceding the date of hearing in a newspaper published in the county where the petition is made, and (*b*) posting a copy of the order upon the front door of the bank.[43] At the hearing, the court will take testimony, and, if the plan appears to be for the best interest of the depositors, it will make an order approving the plan and fixing the terms and conditions upon which the receivership will be terminated and the bank reopened.

The court may, if any depositor files written objections to the approval of the plan and refuses to consent thereto, direct the receiver to set aside assets of each class involved in the receivership (commercial assets and savings assets)[44] in such amounts and of such character as the court shall find to be just and equitable. As to such assets and as to the objecting depositors, the court will continue the receivership. The remainder of the assets the court will direct the receiver to turn over to the reorganized bank as soon as he is directed to do so by the Commissioner, and will discharge the receiver with respect thereto.[45]

For a bank not in receivership, a similar procedure may, under Act 8, be employed. If the conditions authorizing application for a receiver exist, a custodian will, pending the reorganization, usually be appointed for the bank by a court of competent jurisdiction upon application by the Attorney General on behalf of the Commissioner.[46] The

[43] Mich. Pub. Acts (1929), No. 66, sec. 65(a).

[44] Saving and commercial assets are separately treated in a Michigan state bank. See Mich. Comp. Laws (1929), sec. 11928; Reichert v. Savings Bank, 257 Mich. 500, 242 N. W. 239 (1932).

[45] Mich. Pub. Acts (1929), No. 66, sec. 65(a).

[46] Mich. Pub. Acts (1929), No. 66, sec. 65(b), being second paragraph of Mich. Pub. Acts (1932), No. 8. The statute provides:

> "If the state banking commissioner shall have knowledge that such a plan of reorganization is in process, and if any or all of the conditions set forth in section sixty-two of this act, authorizing the application for the appointment of a receiver, exist, the state banking commissioner shall communicate such facts to the attorney general, and, with his concurrence, application may be made by the attorney general, in behalf of the commissioner, to a court of competent jurisdiction for the appointment of a custodian of such bank. Upon presentation of said application to said court, and upon its being made satisfied that any or all of the conditions set forth in section sixty-two of this act, authorizing the appointment of a receiver, exist, and that such reorganization plan is in process, the said court shall immediately appoint the banking commissioner, his deputy, or one of the banking examiners in the banking department, or some other competent person who shall have the recommendation of the banking commissioner, as custodian and shall determine his bond and prescribe his duties, and may make such further order as shall seem proper."

custodian, if appointed, will take charge as would a receiver, but will not liquidate the bank by payment of dividends.[47]

When the reorganization plan has been approved by 85% of the depositors, the Commissioner will, if a custodian has been appointed by a court, petition that court to set a day for a hearing on the plan. If no custodian has been appointed, the Attorney General, on behalf of the Commissioner, will petition a court of competent jurisdiction for approval of the plan and, if the Commissioner desires, for the appointment of a custodian.[48] The remaining steps will be the same as above outlined, except that any assets segregated for objecting depositors will be continued in the hands of the custodian who, upon petition of the Commissioner, will be appointed a receiver of such assets.[49]

(b) Formulation and Imposition of Plan by Banking Commissioner

The Michigan Public Acts (1933), No. 32, Section 7, provide a particular method by which closed banks might be restored to solvency. More than 40 banks of the 215 institutions for which conservators were appointed have been reorganized under this procedure.

The Commissioner, with the approval of the Governor, may formulate the plan, put it in operation and reopen the bank. The Commissioner is given broad powers in formulating the plan.[50] No consent by any depositor or other creditor or stockholder is necessary; no application to any court need be made.

[47] Mich. Pub. Acts (1929), No. 66, sec. 65(b), being second paragraph of Mich. Pub. Acts (1932), No. 8. The statute provides: "The custodian, if any be appointed, shall, under the direction of the court, take possession of the books, records, and assets of every description, of such bank, collect all debts, dues and claims belonging to it."

[48] Apparently, the appointment of a custodian at this time does not require the conditions authorizing the appointment of a receiver.

[49] Mich. Pub. Acts (1929), No. 66, sec. 65(b).

[50] Section 7 of Act 32, Mich. Pub. Acts (1933), provides that:

"If in the opinion of the commissioner of the state banking department it is deemed advisable to reorganize any bank or trust company coming under the provisions of this act, he shall, with the approval of the governor, have power so to do on such terms and conditions as he may prescribe, including the right to make such provisions for adjustments, transfers, segregations and other dispositions of the assets, deposits and capital stock of such bank or trust company, and such trusts as he may create hereunder, as may be deemed necessary or advisable, and to create such trusts relating to and concerning the whole or any part of the assets of such bank or trust company on such terms and conditions as he may deem advisable and to provide for the continuation and/or liquidation of the same, and also including the right to cancel, increase or decrease, and to issue or re-issue the whole or any part of said stock of said bank or trust company, and allot said stock among the depositors and/or stockholders, and/or the reconstruction finance corporation or any other governmental agency organized and designated to assist or subscribe for

Upon reopening the bank or putting the plan in operation, the Commissioner is required to post upon the front door of the bank a notice setting forth in full the details of such plan and to publish the notice for two successive weeks in a newspaper printed and circulated in the county where the bank is located.

The depositors, creditors and stockholders may, under Section 7, and as required to be stated in the notice,[51] upon application within thirty days after the last publication of the notice to "a court of chancery in the county wherein the bank is located," review the plan and have the value of their claims determined. The court may, in its discretion, decree the payment of such claims in cash or assets, decree acceptance of the plan or make such other or further order as shall be fair and equitable under the circumstances. Failure to make application within the thirty-day period is deemed to be consent to the plan.

Of course the formulation of the particular plan under Section 7 must be within the powers granted therein to the Commissioner. Further, so that depositors, other creditors and stockholders may determine whether to object, the plan must be definitely formulated; and, as specifically required by the statute, it must be set forth in detail in the notice to be posted and published.

capital stock of banks and/or trust companies, in such an amount and on such terms and conditions as he may prescribe for such stock, which stock may be non-assessable, and including the right to issue certificates of indebtedness in varying denominations and/or preferred stock, which certificates of indebtedness and/or preferred stock may bear interest and be redeemable upon such terms and conditions as the said commissioner may prescribe. Such preferred stock shall be redeemable on or before five years from the issuance thereof and if not so redeemed may thereupon become the common capital structure of said bank or trust company or may become such part thereof as may be determined by the commissioner. The commissioner may provide that deposits in said bank or trust company may be used to purchase stock and any authorized withdrawals therefrom or dividends may be used to liquidate the stockholders' liability in the reorganized bank or trust company upon such terms and conditions as he may prescribe. Upon the formulation of such plan the commissioner may put said plan into operation and re-open said bank or trust company in case the bank or trust company has been closed."

[51] Section 7 of Act 32 provides that:

"Upon the reopening of such bank or trust company or upon putting such plan into operation, the commissioner shall forthwith post a notice on the front door of such bank or trust company setting forth in full the details of such plan, and publish the same in a newspaper printed and circulated in the county, for two successive weeks; and shall state in said notice that upon application within thirty days next following the last publication of such notice to a court of chancery, of the county wherein the bank or trust company is located, such creditor or creditors, stockholder or stockholders, or depositor or depositors shall have the right to review said plan of reorganization; to have a determination made of the value of

The procedure under Section 7 is obviously less safe than that provided by the first method of restoring a closed Michigan bank to solvency or by the third method to be hereinafter discussed, because the consent of depositors and other interested parties is not essential under Section 7 and because the burden of securing a judicial hearing upon the plan is placed upon such parties as may wish to object.

In reorganizations under Section 7, the majority of the interested parties will, by accepting benefits, of course, estop themselves from objecting to the plan. Indeed, the depositors may be required upon receipt of funds from the reorganized bank to sign a consent to the plan and the certificate of participation in the eliminated assets may recite that the acceptance thereof shall be deemed to show consent to the plan.[52]

(c) Conservatorship and Composition with Depositors

For the Michigan state banks in the hands of conservators, Act 32 also provides another method of restoration to solvency. In Section 7a thereof the procedure set forth in Act 8, Public Acts (1932), and hereinbefore discussed is made applicable to state banks in the hands of conservators. Moreover, the percentage of deposit liability required to be represented by depositors consenting to the particular plan of reorganization was reduced from 85% to 65%.

To be carried out under this statutory authority, a particular variation of the "Restoration to Solvency" plan, known as the "Michigan 54 Bank Plan," has been formulated for closed Michigan banks in the hands of conservators. The persons in this particular type of reorgani-

his or their claims against the bank or trust company, and the court in its discretion may order and decree the payment thereof in cash or by the allocation of assets to said claimant or claimants of their claims as so determined or said court may order and decree that said creditor or creditors, stockholder or stockholders, depositor or depositors shall accept and abide by such plan of reorganization, or make such other, or further order or decree, in the premises as shall be fair and equitable under all of the circumstances of the case."

[52] To remove any doubt of the binding force and validity of this form of reorganization as against those who do not estop themselves, the Michigan legislature might enact a remedial statute. The statute would provide substantially that in any bank reorganization which was consummated with approval of the Commissioner but without the concurrent written approval of depositors, creditors and stockholders, the Attorney General upon behalf of the Commissioner, or the reorganized bank, or any other interested party might by petition setting forth the plan, its consummation and subsequent approval by the depositors representing 75% of the original deposit liability as evidenced in writing, acceptance of benefits or otherwise, request that a date be set for hearing upon the plan. The statute would further provide for notice of the hearing, the taking of testimony, and the making of an order (in a manner similar to that set forth in Act 8, Pub. Acts (1932) confirming the plan adopted and wholly or partially carried out.

zation are the stockholders, the depositors, a depositors corporation, the conservator, a depositors committee, the Commissioner of the Banking Department, the Attorney General and the Reconstruction Finance Corporation.

The plan calls for the organization of a depositors corporation and the transfer to it of the "slow" and charged-off assets of the closed bank. Upon the security of such assets, the depositors corporation will borrow from the Reconstruction Finance Corporation. The proceeds of the loans will be first used to retire any bills payable of the closed bank, and the balance thereof will be transferred to the bank. The deposit and other liabilities of the bank will be scaled down so as to equal the amount of the "good" assets retained by the bank plus cash received from the depositors corporation. The depositors corporation as part of the consideration for the assets will issue to the depositors, whose deposits are reduced, certificates of indebtedness for the amount of the reductions in their respective claims. Such certificates are payable only out of the assets of the depositors corporation after retirement of the borrowings from the Reconstruction Finance Corporation. The reorganized bank will have, under the terms of the transfer of assets to the depositors corporation, for a period of two years after the retirement of the Reconstruction Finance Corporation loan, the right to substitute assets retained by it for assets transferred to the depositors corporation, or the proceeds thereof including cash.

A 100% stockholders' assessment will be levied under Michigan Public Acts (1933), No. 32, as amended.[58] The proceeds of the assessment, or such part thereof as may be determined by the Commissioner, which are collected before the opening of the reorganized bank or within such time thereafter as may be determined by the Commissioner, will constitute the capital of the reorganized bank. The remainder will be transferred to the depositors corporation. Shareholders who contribute within the time set by the Commissioner may retain their stock; the stock of other shareholders will be cancelled, but their liability will not be deemed to be released.

The depositors corporation will be a Michigan corporation with ten shares of no par value stock having a declared value of $100.00 a share. The stock will be purchased by three trustees with funds supplied from the existing institution. When, as and if the depositors corporation has retired its borrowings and the certificates of indebtedness,

[58] Act 32 was amended by Mich. Pub. Acts (1933), No. 95.

the trustees who hold its stock for the benefit of the stockholders of the bank as of the date of its suspension may liquidate the corporation.[54]

The articles of incorporation of the depositors corporation will provide that, at the end of the period of substitution, the holders of the certificates of indebtedness may at a meeting called by 25% in amount of such holders vote on the dissolution of the corporation and/or the sale of all or substantially all of the assets of the corporation in the manner determined by them.

The first procedural step, after selection of the eliminated assets, the formulation of the plan and the approval thereof by the Commissioner, and the approval by the Reconstruction Finance Corporation of a *pro forma* loan application by the depositors corporation, is to provide each depositor with a copy of the plan and to secure written waivers or consents to the plan from 75% in amount of both savings and commercial depositors (by classes).[55] The Attorney General on behalf of the Commissioner will then petition a court of competent jurisdiction for a date for hearing; the date will be set by order of the court; notice thereof will be given and the hearing will be held substantially as outlined in the discussion of Act 8. The petition should ask for the appointment of a receiver in the event that the court decides assets should be segregated and liquidated for the benefit of dissenting depositors.[56]

The depositors corporation will then be formed [57] and the contract

[54] Unless, of course, it has been previously liquidated by vote of the certificate holders.

[55] Although the statute requires consent by merely 65% in amount of the depositors, the consent of 75% in amount should be obtained as a matter of general equity. The requisite consent should be obtained from both savings and commercial depositors by classes because a Michigan state bank doing both a savings and a commercial business is in effect two banks. See Mich. Comp. Laws (1929), sec. 11928; Reichert v. Savings Bank, 257 Mich. 500, 242 N. W. 239 (1932). Under the so-called "Michigan 54 Bank Plan," the requisite consents will be obtained by a depositors committee consisting of three members.

[56] It is clearly the intent of Act 8 that the court may decree that assets be segregated and liquidated for the benefit of dissenting depositors. In dealing with a bank under a court receivership, Act 8 provides that the incumbent receiver continue with respect to the segregated assets and be discharged with respect to other assets. In dealing with a bank under a custodian, Act 8 provides that the custodian to whom the segregated assets are entrusted may upon petition of the Commissioner be appointed a receiver. Consequently, when section 7(a) of Act 32 provides that a bank under a conservator may be reorganized in accordance with the provisions of Act 8, it may be fairly assumed that a court may appoint a receiver to liquidate any segregated assets.

[57] The articles of incorporation should be executed in triplicate by incorporators and filed with the Secretary of State. The shareholders should meet to authorize execution of the contract with the bank and the issuance of certificates of indebtedness and to pass upon other matters. The directors named in the articles should then meet to

between the bank and the depositors corporation will be executed. The necessary instruments for transfer will be executed by the conservator and the banks; the eliminated assets will be delivered to the depositors corporation. The latter will apply for and procure a loan on the eliminated assets,[58] use the proceeds to pay the bills payable and rediscounts of the bank, transfer the balance of the loan to the reorganized bank, and then issue the certificates of indebtedness to the depositors.

The bank will reopen on a date selected by the Commissioner and thereupon the conservator will be discharged. The plan of reorganization should be approved by the stockholders and directors of the bank at their first meetings.

III

CREATION OF NEW BANK TO TAKE OVER PARTIALLY THE ASSETS AND LIABILITIES OF CLOSED BANK, AND GRADUAL LIQUIDATION OF CLOSED BANK

Closed banks may also be reorganized in the sense of making impounded deposits at least partially available and providing sound banking facilities by a method generally known as the "Spokane Sale" plan. This method involves in effect the partial transfer of the assets and liabilities of the closed bank to a new institution and the orderly liquidation of the assets remaining in the closed bank for the purpose of paying off its remaining liabilities.

adopt by-laws, elect officers, authorize execution of the contract with the bank, authorize a loan application to the Reconstruction Finance Corporation, authorize issuance of stock certificates and certificates of indebtedness, appoint a resident agent and pass upon other matters.

The fee for filing the articles of incorporation is $5.00. The franchise fee is $25.00. Federal revenue stamps must be affixed to the stock book in connection with the original issuance of stock. The federal stamp tax on the three-share certificates will be 30c per certificate, and on the four-share certificates it will be 40c. These stamps must be affixed to the stub of the certificate and canceled. (The stock of the corporation will consist of ten shares and be issued to three incorporators on a 3-3-4 share basis.) The federal revenue stamps must be affixed to the stock certificates in connection with any stock transfers. The stamps should be affixed to the stub and canceled. The certificates of indebtedness must have affixed to them federal revenue stamps as follows: 10c for each $100 face value of the certificate or fraction thereof. These stamps must then be canceled. The corporation must purchase a minute book, seal, and stock certificates. The certificates of indebtedness to be issued by the corporation must be qualified by the Michigan Securities Commission. The filing fee is 1/10 of 1% of the face of the securities to be issued. The maximum fee is $250 for securities having a face of $1,000,000 or less, and $300 in case of securities having a face of more than $1,000,000.

[58] The pledge and mortgage of assets of the bank is hereinafter discussed in connection with loans to conservators of national banks.

The plan always involves three phases: First, the conservator, receiver or other agent appointed by the supervisory authorities to take charge of the existing closed bank, sells the sound and liquid assets of the closed bank to a new institution in consideration of a deposit credit in the new bank. Second, the liquidating agent pays a dividend to the depositors of the closed bank with checks or orders upon the deposit credit.[59] Third, the liquidating agent reduces to cash the assets of the closed bank remaining in his hands in order to pay further dividends to the depositors of the closed bank. The plan may, and generally does, involve as a fourth phase the borrowing by the liquidating agent upon the unacceptable assets remaining in his hands. By such borrowing, he may increase the amount of the first dividend and may supply the new bank with sufficient cash to meet all demands for payment in cash by the depositors of the closed bank when they present their dividend checks to the new bank.

The new bank, by reason of the payment of the liquidating dividend through it, generally acquires as depositors practically all of the depositors of the old bank; and it retains as deposits a substantial proportion of the deposit made by the liquidating agent. Anticipating that result, the new bank may safely buy from the liquidating agent acceptable assets aggregating in value a substantial proportion of the total pay-off. The sale of the assets of the old bank to the new bank is mutually beneficial to the new bank and to the liquidating agent and depositors of the old bank. By the sale, the new bank acquires earning power which it would not receive if the pay-off were made merely against a cash deposit by the liquidating agent of the old bank. The liquidating agent, on the other hand, could probably not otherwise sell without sacrifice the acceptable assets of the closed bank; and by the sale of the acceptable assets to the new bank he will acquire a deposit credit larger in amount than the cash which he might obtain by borrowing upon such assets.

[59] The conservator of a national bank may pay a dividend to depositors and other creditors without proof or other adjudication of claims against the bank as would be required by U. S. C., tit. 12, sec. 194 (1927), if the bank were in the hands of a receiver. Section 206 of the Bank Conservation Act provides that: "While such bank is in the hands of the conservator appointed by the Comptroller of the Currency, the Comptroller may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the Comptroller may be safely used for this purpose. . . ."

The receiver of a state bank must secure proofs of claim executed by depositors and creditors, except with respect to claims adjudicated in a court of competent jurisdiction, prior to a distribution to them upon their claims. Mich. Comp. Laws (1929), sec. 11961.

The sale of assets of the old bank to the new bank may be merely an outright transfer without warranty or representation by the liquidating agent of the closed bank. Such a sale, however, requires the new bank to determine finally upon the purchase of a large aggregate amount of assets in a very short time. The sale and purchase agreement, therefore, should contain provision that for a specified period of time the new bank may return to the liquidating agent of the old bank any assets purchased from him and receive in exchange therefor assets of an equivalent face value which remain in the hands of the liquidating agent.

The sale of assets is also complicated by the possibility of set-offs against the assets which are purchased by the new bank. It is contemplated that all proper set-offs will have been made against assets to be acquired by the new bank prior to the sale. However, additional set-offs may have to be allowed because all the facts may not have been previously discovered or asserted and because the liquidating agent customarily adopts a conservative attitude in recognizing set-offs. The purchase and sale agreement should, therefore, provide that if the new bank is required to recognize any additional set-offs against assets acquired by it, it shall have the right to select from the assets retained by the liquidating agent assets of a face value equivalent to the amount of the additional set-offs.

The disposition by the liquidating agent of bonds held by the closed bank may require special treatment in the sale agreement because of the depressed bond market. The new bank cannot afford to buy the bonds at face value, and the sale by the liquidating agent of the bonds to the new bank at market value would preclude the liquidating agent and the depositors of the closed bank from receiving any appreciation on such bonds; in fact it would in many instances result in the immediate resale by the new bank of such bonds with a corresponding depressing influence upon the bond market. The bonds which he retains may, of course, be used by the liquidating agent to obtain additional cash by borrowing. If this alternative is used, the sale of assets by the liquidating agent to the new bank will very likely be principally a transfer of cash. This will reduce the earning power of the new bank; it may thereby be rendered unable to meet operating costs and to pay a reasonable return upon capital.

To avoid the disadvantages of these alternatives, the bonds of the closed bank may be disposed of in the following manner: The liquidating agent will sell the bonds to the new bank at an agreed value with

the understanding that the bonds are to be disposed of by the new bank during a specified period and that any proceeds thereof in excess of the investment of the new bank with interest thereon will be returned to the liquidating agent. The liquidating agent will agree to pay the new bank any difference between its investment with interest thereon and the proceeds of the sale of the bonds; and as security for such agreement, he will pledge to the new bank all of the assets remaining in his hands. The borrowings by the liquidating agent upon such remaining assets will be made subject to the lien of the new bank to secure the guaranty on the bonds.

Another method of handling the bond account which has the advantages of the foregoing procedure but which is less complicated is this: The conservator will, as part of the consideration for the deposit credit to be given to him by the new bank, give to the new bank his note secured by a pledge of the bond account of the closed bank.[60] The new bank will acquire earning power because the note of the liquidating agent will be interest-bearing; as the bonds are liquidated, the note of the liquidating agent will be reduced; and any appreciation in the bonds will be preserved for the liquidating agent and the depositors of the closed bank.

The legal and procedural problems in carrying out the "Spokane Sale" plan of reorganization of a closed bank will now be taken up with reference to both national and state banks.

1. *National Banks*

The new bank may be formed under either national or state law. The proper steps in forming a new national bank are set forth in Appendix I, the steps in forming a state bank of Michigan in Appendix II.

The conservator of the old bank is authorized to sell or transfer assets in his hands, including cash, to the new bank upon the order of a court of record of competent jurisdiction upon such terms as the court shall direct.[61] The approval or direction of the Comptroller, while not

[60] The receiver of a Michigan state bank, with the approval of the Governor and the Commissioner, is authorized, under Mich. Pub. Acts (1933), No. 212, to execute and deliver to the new bank his note and to pledge as security therefor the bond account of the bank in his charge. The conservator of the national bank should execute and deliver his note, secured by the bonds, to the Reconstruction Finance Corporation which may then sell the conservator's note to the new bank.

[61] The National Banking Act gives a receiver power to sell. U. S. C., tit. 12, sec. 192 (1927). And a conservator has the powers granted to a receiver. Bank Conservation Act, sec. 203.

essential to a valid sale of the real and personal property of the bank,[62] is obtained as a matter of practice. A federal district court is, of course, competent to make such an order.[63] And a state court of record is also competent to grant an order for the sale of real and personal property of the bank.[64] *Ex parte* application may be made for the order; the matter is not a judicial controversy.[65] Creditors have no right to be heard, and the order approving the sale is not reviewable on appeal by the Circuit Court of Appeals.[66]

The conservator of a national bank is authorized to borrow from, and pledge assets in his hands to, the Reconstruction Finance Corporation.[67] The conservator is subject to the direction of the Comptroller of the Currency, and applications to the Reconstruction Finance Corporation for loans must be approved by him. As a practical matter, the application is prepared by the conservator in conjunction with the Loan Agency of the Reconstruction Finance Corporation and is then sent to the Comptroller of the Currency for his approval and transmission to the Reconstruction Finance Corporation. And when the loans are arranged the funds are disbursed by the Reconstruction Finance Corporation to the Comptroller, and by him disbursed to the conservator.

The pledge by the conservator to the Reconstruction Finance Corporation of stocks, bonds, secured and unsecured notes, and mortgages involves no peculiar questions. But the mortgage of real property interests is not so simple. The Michigan problem is complicated by the local mortgage tax statute. If the conservator mortgages real estate, whether owned outright, subject to redemption or sold on land contract, to the Reconstruction Finance Corporation to secure his entire borrowings, the mortgage tax must be paid upon his total obligation secured. Usually, however, the real estate constitutes a small fraction of the total collateral and has a value far below the total amount of the loan. To minimize the mortgage tax, the conservator may execute and

[62] Richardson v. Turner, 52 La. Ann. 1613, 28 So. 158 (1900), aff'd 180 U. S. 87, 21 Sup. Ct. 295, 45 L. ed. 438 (1901).

[63] Held, under U. S. C., tit. 12, sec. 192, in In re Platt, (D. C. S. D. N. Y. 1867) 19 Fed. Cas. 815, Case No. 11,211, regarding compromise of doubtful claim.

[64] Richardson v. Turner, 52 La. Ann, 1613, 28 So. 158 (1900), aff'd 180 U. S. 87, 21 Sup. Ct. 295, 45 L. ed. 438 (1901).

[65] Ex parte Moore, (D. C. E. D. S. C. 1925) 6 F. (2d) 905.

[66] Fifer v. Williams, (C. C. A. 9th, 1925) 5 F. (2d) 286.

[67] National bank receivers are authorized to borrow from and to pledge to the Reconstruction Finance Corporation. Reconstruction Finance Corporation Act, U. S. C., tit. 15, sec. 605 (1927). And conservators have all the powers granted to receivers of insolvent national banks. Bank Conservation Act, sec. 203 (Mar. 9, 1933).

pledge to the Reconstruction Finance Corporation, as security for his total indebtedness, his note for 1½ times the loan value assigned to the real estate, and execute a trust mortgage on the real estate to secure this note. The mortgage tax need then be paid only upon the amount of the note, because the mortgage is subject to discharge upon the payment of such note.[68]

If mortgages are in process of foreclosure, the conservator should not assign the mortgages and endorse the notes secured thereby to the Reconstruction Finance Corporation, but should rather execute a declaration of trust of such mortgages and notes. The outright assignment of the mortgages being foreclosed by advertisement might terminate the foreclosure.[69] For mortgages being foreclosed in chancery, the use of the declaration of trust is a convenient form of transfer because it allows the conservator to retain physical possession of the note and mortgage. The declaration of trust should, among other things, provide that the conservator, if he acquires the mortgaged premises in the foreclosure sale, will execute a declaration of trust or other instrument to evidence the interest of the Reconstruction Finance Corporation in the mortgaged premises.

2. *State Banks*

The sale of assets by the receiver to the new bank may be made upon the order of a court of record of competent jurisdiction upon such terms as the court shall direct.[70] Either a state court or a federal district court is competent to grant an order for the sale of real or personal property of the bank;[71] *ex parte* application may be made for

[68] The obligation of the conservator is not increased because several promises to pay the same debt do not increase the liability of the obligor. Third Nat. Bank v. Eastern R. R. Co., 122 Mass. 240 (1877); People v. Remington, 54 Hun. (N. Y.) 480 (1889). This procedure is similar to the pledge by railroads or business corporations of their own bonds to secure short-time borrowings.

[69] Niles v. Ransford, 1 Mich. 338 (1849), wherein the Supreme Court held that the power of sale is a power coupled with an interest and that when the interest passes the power of sale also passes. If the mortgage is assigned outright during foreclosure by advertisement, the foreclosure clearly is terminated. Where the assignment is, however, made as a pledge, the pledgor retains an interest. The Supreme Court has not decided whether such interest is sufficient to support the power of sale. On principle, however, it would seem to be sufficient, because a pledgor may, at least with the consent of the pledgee, enforce pledged obligations.

[70] Mich. Pub. Acts (1933), No. 32, sec. 6. The language therein is identical with the language in Section 194 of the National Banking Act authorizing a receiver of the national bank association to sell real and personal property upon a like order.

[71] Held under National Banking Act which is identical with state statute. In re Platt, (D. C. S. D. N. Y. 1867) 19 Fed. Cas. 816, Case No. 11,211; Richardson v.

the order; the matter is not a judicial controversy;[72] creditors have no right to be heard and the order approving the sale is not reviewable upon appeal.[73]

The "Spokane Sale" plan generally involves, as stated, borrowing upon the unacceptable assets of the closed bank. The conservators, which were appointed for the 215 state banks, are authorized to borrow and pledge assets of the closed state banks in their hands.[74] However, the Reconstruction Finance Corporation, from which such loans are now almost exclusively obtained, is authorized by the Reconstruction Finance Corporation Act to loan to certain borrowers only.[75] The conservators of state banks, as now constituted, are hardly eligible borrowers.[76] The discharge of the conservator and the appointment of a receiver, who is eligible under the Reconstruction Finance Corporation Act, is therefore necessary. Michigan Public Acts (1933), No. 32, Sec. 6, provides that such appointment may be made by the banking commissioner rather than by a court as previously provided in the Michigan Banking Act.[77] Such receiver is authorized under Michigan Public Acts (1933), No. 212, Sec. 1, to borrow and pledge, upon approval by the Banking Commissioner and Governor.[78] The pledging of personal property and the mortgaging of real estate may be made in the same manner as by a national bank conservator.

Turner, 52 La. Ann. 1613, 28 So. 158 (1900), aff'd 180 U. S. 87, 21 Sup. Ct. 295, 45 L. ed. 438 (1901).

[72] Held under National Banking Act which is identical with state statute. Ex parte Moore, (D. C. E. D. S. C. 1925) 6 F. (2d) 905.

[73] Held under National Banking Act which is identical with state statute. Fifer v. Williams, (C. C. A. 9th, 1925) 5 F. (2d) 286.

[74] Mich. Pub. Acts (1933), Nos. 32 and 212.

[75] See Reconstruction Finance Corporation Act, U. S. C., tit. 15, sec. 605 (1927), as amended.

[76] The only possibilities with respect to a conservator are "bank" and "liquidating agent." The term "bank" must be deemed to be an open going institution; and under the authority given to a conservator by the banking commissioner the conservator cannot be deemed to be such, although under Mich. Pub. Acts (1933), No. 32, sec. 5, a conservator may, if so authorized by the banking commissioner, continue the operations of the bank. The conservator under the instructions given to him by the banking commissioner is rather a custodian than a "liquidating agent," although by an appropriate grant of authority he probably could be constituted a "liquidating agent."

[77] Such receiver is apparently very similar to a national bank receiver and is not under the jurisdiction of any court.

[78] Mich. Pub. Acts (1932), No. 1, authorizing a receiver appointed by a court to borrow and pledge is not applicable to a receiver appointed by a banking commissioner. In Mich. Pub. Acts (1933), No. 32, no provision was made for the borrowing and pledging by such a receiver; but the legislature subsequently, in the same session, enacted Act 212.

APPENDIX I

Formation of National Bank

The essential steps in forming a national bank are as follows:

1. Application to the Comptroller of the Currency for permission to organize a national bank stating the intention to organize and requesting that the corporate title be reserved. The application should be executed by at least five natural persons and forwarded to the Comptroller.

2. When the Comptroller has upon investigation determined that conditions justify approval of the application, and after he has so informed the applicants, the articles of association and the organization certificate, forms of which will be supplied by the Comptroller, should be executed by at least five persons including a majority of the applicants and forwarded to the Comptroller or delivered to his accredited representative. *U. S. C., tit.* 12, *secs.* 21 *and* 22 (1927). When the articles and certificates are so delivered and accepted, the national banking association becomes, as of the date of the execution of its organization certificate, a body corporate. *U. S. C., tit.* 12, *sec.* 24 (1927). The association is, however, not entitled to transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller to commence the business of banking, and this authority cannot be obtained until its organization is complete. *U. S. C., tit.* 12, *sec.* 24 (1927).

The following further steps should subsequently be taken to complete its organization:

3. A meeting of the organizers upon due notice, while not essential if the directors are named in the articles of association, may be held to provide a record of the acts which have been done in the organization of the bank, such as the filing of the articles and organization certificate with the Comptroller, the appointment of directors in the articles of association and the receipt of subscriptions for stock of the association.

4. The directors named in the articles of association must qualify. Each director must pay for his qualifying shares of stock of the association and take the oath required by law. *U. S. C., tit.* 12, *sec.* 73 (1927). The form of oath will be furnished by the Comptroller.

5. The board of directors, upon waiver of notice signed by each director, should adopt by-laws and elect officers; should adopt a form of stock certificate and authorize the officers to issue stock of the association upon receipt of cash therefor from the subscribers; should authorize the officers to apply for and purchase stock in the federal reserve bank as required by law; and, if as we are assuming the new bank is to replace an existing bank, the directors should authorize the execution of the contract with the conservator of the existing bank for the purchase of assets.

The National Banking Act requires that before the association may commence business at least 50% of its capital stock be duly paid in and that the remainder of the capital stock must be paid in installments of at least 10% each of the whole amount of the capital as frequently as one installment at the end of each month after the bank is authorized to commence business *U. S. C., tit.* 12, *sec* 26 (1927). As a practical matter, all the stock is usually paid for before the bank commences business.

The Federal Reserve Act requires that each national banking association within each federal reserve district shall subscribe to capital stock of the federal reserve bank for that district in a sum equal to 6% of the paid up capital stock and surplus of such banking association. *U. S. C., tit.* 12, *sec.* 282 (1927). In order that the stock may be paid for it is, of course, first necessary that the board of directors be duly constituted, that directors elect officers who may issue the stock, that a form of stock certificate be adopted by the directors and that the officers be authorized by the directors to issue the stock upon payment therefor in cash. Such steps are likewise necessary for the subscription for and purchase of federal reserve bank stock.

6. The subscription for stock in the federal reserve bank should be executed by the officers and delivered to the federal reserve bank for the district in which the association is located, with a draft for one-half of the par value of the stock subscribed for. This reserve bank stock may be paid for out of the cash derived from the sale of the stock of the association.

7. The cash received in payment of the stock of the association should be deposited in a bank. Disbursement against such cash for federal reserve bank stock should then be made. The depositary bank should notify the Comptroller that it holds the amount received less the amount used for the purchase of federal reserve bank stock on credit for the account of the organizing bank. *Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks* (1928).

In the reorganization of a closed bank on the "Spokane Sale" plan, the depositors of the old bank often subscribe for stock in the new institution. Subscriptions may be more readily procured from the depositors if they may pay for the stock in the new bank with the funds to be made available to them by the liquidating agent of the old bank. However, the stock in the new bank must be paid for before it may commence business; but the liquidating agent of the old bank will not commence his distribution until after the new bank opens. This difficulty may be avoided by procuring an "overnight loan" upon the security of assignment of dividends to be paid to the depositors of the old bank who subscribe for stock in the new bank. For convenience, the depositors of the old bank who wish to subscribe for stock in the new bank may, when they subscribe for such stock, execute assignments of their anticipated dividends to a trustee or trustees. In their assignments, the depositors will authorize the trustees to borrow from any bank and to pledge the assignments of dividends as security for such borrowings; and they will also authorize the liquidating agent of the old bank to pay the assigned portion of their dividends directly to the lending bank.

8. When the stock of the association has been paid for, the president or cashier of the association and a majority of the directors should execute a sworn statement that the stock has been paid for, and that all legal requirements for the issuance of a "Certificate of Authority to Commence Business" have been complied with. Such sworn statement should be filed with the Comptroller or delivered to his accredited representative. The form of the statement is supplied by the Comptroller.

9. The Comptroller should also be furnished with the specimen signatures of the officers of the organizing bank and, when the organizing bank is acquiring assets by a Spokane sale, with a certificate that the assets acquired do not include any assets prohibited to a national bank by law.

10. When the Comptroller has received the required documents and when he has been notified that the federal reserve bank stock has been subscribed for and payment thereon has been made, and that the capital stock has been paid for, he will issue, if otherwise satisfied with the organization of the bank, a "Certificate of Authority to Commence Business," generally known as the Charter.

11. The authority of a national bank to issue preferred stock and of the Reconstruction Finance Corporation to buy such stock has been previously discussed. The issuance of such preferred stock by a newly-organized national bank is quite often desirable in raising funds for the new bank because such preferred stock may be included in determining the minimum amount of capital. *Emergency Banking Act, sec.* 303 (Mar. 9, 1933), *amending U. S. C., tit.* 12, *sec.* 51 (1927).

If preferred stock is to be issued, the articles of association must be drafted so as to provide for the rights, preferences and privileges of such stock and of the common stock. As a practical matter, all such articles of association are prepared by the Reconstruction Finance Corporation, and after approval thereof by the Comptroller of the Currency are submitted to the organizers of the particular bank.

The board of directors at its first meeting should adopt a form of stock certificate for preferred shares. As a matter of sound corporate practice, the form of certificate adopted for common stock should include on the reverse side thereof the excerpt from the articles of association which sets forth the rights, preferences and privileges of the holders of the preferred and the common shares so that such holders of common stock will be unquestionably informed thereof.

If preferred stock is to be purchased by the Reconstruction Finance Corporation, the president or cashier, and a majority of the directors, will be required, before the preferred stock is paid for, to complete all requirements for the organization of the bank except payment of the preferred stock. They will be required to execute and deliver to the Comptroller or his representative a certificate (referred to as a temporary certificate) that the common stock has been paid for and that all legal requirements have been complied with. Upon receipt of such certificate, the Comptroller will notify the Reconstruction Finance Corporation that all steps for the issuance of a charter to the organizing bank have been taken, except the payment of preferred stock. When the preferred stock has been paid for by the Reconstruction Finance Corporation, the president or cashier and a majority of the directors of the bank may then execute and deliver to the Comptroller or his representative a certificate that all of the capital stock has been paid for and that all legal requirements have been met. The Comptroller will then, if otherwise satisfied, execute and forward to the organizing bank a "Certificate of Authority to Commence a Banking Business."

APPENDIX II

Formation of State Bank

The following procedure is involved in the formation of a new state bank:

1. The incorporators of the state bank, at least five in number, *Mich. Comp. Laws* (1929), *sec.* 11898, should first cause to be published for two consecutive weeks in a newspaper printed in the county where the bank is to be located a notice that application to organize a state bank is to be made to the Commissioner

of the Banking Department. This notice should include the names and addresses of the incorporators and the proposed location of the bank. *Mich. Comp. Laws* (1929), *sec.* 11905.

2. The incorporators may then apply to the Commissioner for permission to organize. *Mich. Comp. Laws* (1929), *sec.* 11905. With the application, the incorporators should deliver to the Commissioner proof of publication of the notice of intention to organize.

3. Upon approval of the application, the incorporators should execute and deliver to the Commissioner in triplicate articles of incorporation. *Mich. Comp. Laws* (1929), *sec.* 11904. One copy of the articles will be sent by the Commissioner to the office of the county clerk in the county in which the bank is located and one to the office of the secretary of state. *Mich. Comp. Laws* (1929), *sec.* 11900.

When the articles of incorporation are executed and filed, the bank becomes a body corporate. *Mich. Comp. Laws* (1929), *sec.* 11901. The bank, however, is not allowed to commence business until it receives from the Commissioner a "Certificate of Authority to Commence Business." *Mich. Comp. Laws* (1929), *sec.* 11904.

The following further steps are required by statute or are necessary incidents in the procedure required by the statute; they must be taken subsequently to those already mentioned.

4. The shareholders should meet upon call or upon a waiver of notice of the meeting, to elect directors, at least five in number. *Mich. Comp. Laws* (1929), *sec.* 11911.

5. Each director must pay for qualifying shares and take the oath of office. *Mich. Comp. Laws* (1929), *sec.* 11911. The oaths of directors should be transmitted to the Commissioner for filing in his office. *Mich Comp. Laws* (1929), *sec.* 11911.

6. The board of directors, at a meeting called upon waiver of notice executed by all members, should adopt by-laws for the corporation; elect from their membership a president and appoint a cashier; adopt for the bank a form of stock certificate and corporate seal; authorize the officers of the corporation to issue its stock upon payment therefor by the subscribers in cash; and authorize the officers to enter into a contract with the receiver of the existing institution for the purpose of sale of assets of said institution. As a matter of convenience, the board of directors should also at their first meeting authorize the officers to draw upon the correspondent accounts, which will be established; and, if the bank is to become a member of the federal reserve bank system, authorize the officers to subscribe for and pay for federal bank stock.

7. The capital of the bank should be paid for in cash. The Michigan Banking Act requires that at least 50% of each share of capital stock and its proportionate share of surplus must be paid in before the bank is authorized to commence business, and the remainder of the capital and surplus must be paid in in monthly installments of at least 10% of the whole of the capital and surplus payable at the end of each succeeding month from the time the bank is authorized by the Commissioner of the Banking Department to commence business. As a practical matter, the stock is usually all paid for before the bank commences business.

The method of raising capital of the new bank out of the deposits in the old bank by the making of an "overnight loan" is described in paragraph 7 of appendix I.

8. When the stock is paid for, the officers of the bank should so notify the Commissioner and should certify to him that the bank has complied with all the provisions of law required for the issuance of a "Certificate of Authority to Commence Business."

9. The Commissioner should also be furnished with the specimen signatures of the officers of the organized bank.

10. When the Commissioner has received the required documents, he will issue, if otherwise satisfied with the organization of the bank, a "Certificate of Authority to Commence Business" generally known as a Charter.

11. When the bank is chartered, it should cause a copy of its certificate of authority to be published in a newspaper printed in the city, village, or county where the bank is located at least once each week for six consecutive weeks beginning within ten days after the receipt of the certificate.

12. The authority of the state bank to issue preferred stock and of the Reconstruction Finance Corporation to purchase such stock has been previously discussed. The preferred stock, if it is issued, may be included in determining the minimum amount of capital required for the bank. If preferred stock is to be issued, the articles of association must be drafted so as to provide for the rights, preferences, and privileges of such stock and of the common stock. As a practical matter, the articles of association will be prepared by the Reconstruction Finance Corporation, if it purchases the stock, and after approval thereof by the Commissioner will be submitted to the organizers of a particular bank. The procedure for the issuance of the preferred stock, including requisite action by the directors and officers of the bank, will be similar to that discussed in Appendix I with respect to national banks.