Opinion No. 571

Banks and Banking—Liquidation of Banks—Fees—Clerk of Court —County Clerk and Recorder —Superintendent of Banks.

HELD: Superintendent of banks and his liquidating agents, in liquidating closed banks, are not acting for the state but for the banks and their creditors, and Section 4893, R. C. M., 1921, does not authorize them to receive the services of public officers without paying the statutory fees.

July 9, 1934.

You have requested an opinion on the question whether the state superintendent of banks, or his liquidating agents, while liquidating closed banks are required to pay the statutory fees for filing and recording instruments in

the office of the clerk and recorder. In your opinion to Mr. Cox, Clerk and Recorder of Toole County, you have advised that you see no reason why a distinction should be made between the services of clerks of court and clerks and recorders, and why the latter should charge for their services, as appears to have been the practice, while the former are not permitted to do so.

We are inclined to agree with you that no distinction can be made between the two and that the reason for charging or not charging for such services appears to be the same, regardless of the office. Either the door must be closed to all or open to all. It cannot be half open so as to favor clerks and recorders only, shutting out clerks of the court and other officers. In 1932 Attorney General Foot held that under the provisions of Section 4893 clerks of the district court are not permitted to charge the superintendent of banks when liquidating insolvent banks, for filing complaints in civil actions and for filing a petition for the purpose of securing the order of the court in connection with the liquidation of a bank. (14 Opinions of the Attorney General 221, 247.) In considering whether this rule should be extended to include clerks and recorders it becomes necessary to re-examine the question whether clerks of the court should be permitted to make a charge. During the course of a year no doubt many instruments are filed and recorded by liquidating agents in connection with the affairs of closed banks. In many instances it is necessary for these banks to continue in liquidation for a number of years. Consequently a considerable amount of revenue is involved.

The Attorney General in his opinions, cited no cases and so far as we can determine our court has not had occasion to consider the question. Before the enactment of Section 121, Chapter 89, Laws of 1927, upon complaint of the Attorney General filed in the District Court, receivers were appointed to liquidate insolvent banks. In such cases the Attorney General was undoubtedly acting for the state and it was not proper for the clerk of the district court to charge a filing fee, as Section 4893 R. C. M. 1921 provides: "No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees."

Since the passage of said new banking act, the superintendent of banks may take charge of insolvent banks without such procedure. Possibly the practice of clerks of court not charging fees grew out of the old practice which no doubt was proper.

The question is this: Is the superintendent of banks, (or his liquidating agents) in filing applications or petitions to procure orders of the court authorizing him (or them) to sell, compromise or compound any bad or doubtful debts or claim, or in filing complaints to foreclose mortgages, to obtain judgments on notes, to quiet title, or in any other proceeding, acting for the "state or any county, or any subdivision thereof," within the meaning and purpose of Section 4893 above quoted?

Where the state or county, or any legal subdivision thereof, or any public officer acting therefor, has occasion to employ the services of any public officer, obviously no fee should be exacted for such services. The state should have the benefit of the service of its own public officers without payment of statutory fees. Besides, no purpose would be served in paying money to itself. It is my opinion, however, that it was the intention of the legislature that the fees referred to in Section 4893 should be limited to strictly governmental functions and should not be extended to the liquidation of banks, in which case the superintendent of banks and his liquidating agents, although he, and possibly they, are public officers, act upon statutory authority in the sole interest and for the sole benefit of the insolvent bank and its creditors. There is no reason why such bank and its creditors should have the benefit of the services of all public officers without charge, or why such bank should not bear all cost of liquidation under the supervision of the superintendent of banks. In fact, such seems to have been the intention of the legislature as expressed in the new banking act. Section 130 of said Chapter 89 provides:

"The compensation of the agents,

appointed by the Superintendent, and of attorneys, expert accountants and other assistants, **and all expenses of liquidation** and distribution of a bank whose assets and business shall be taken possession of by the Superintendent, shall be fixed by the Superintendent, * * *. When the compensation shall have been so fixed and approved and the services rendered, the same shall be paid out of the funds of such bank in the hands of the Superintendent, and shall be a proper charge and lien on the assets of such bank as herein provided."

Section 129, Id., authorizes the superintendent of banks to employ agents to assist him, or act for him and to employ attorneys, etc. He is also authorized to employ a general liquidating agent whose salary and necessary clerical assistance and other expenses incurred "shall be borne equally and ratably by the bank or banks in process of liquidation under agent's charge in proportion to the total amount of resources of each of such banks." Section 134, Id., as amended by Chapter 145, Laws of 1931, makes the expense of liquidation, including compensation of agents, employees and attorneys, a proper claim against the assets of the bank.

The superintendent of banks may institute, in his own name as superintendent, or in the name of the bank, such suits and actions and other legal proceedings as he deems expedient. (Section 127, Id.)

It is apparent from a reading of the banking act that it was the evident intention of the legislature that while the superintendent of banks and his agents had charge of the liquidation of insolvent banks that each bank should pay all costs and expenses of liquidation. Since such liquidation is for the benefit of the bank and its creditors, we see no reason why it should be otherwise. Moreover, in actions to foreclose mortgages to secure judgments upon notes and other legal obligations, as well as any other actions and suits in which the superintendent of banks may appear as plaintiff or defendant, (or the name of the bank may so appear) (Section 127, supra) we see no reason why the costs, including clerk's fees should not be taxed against the losing party, or as the court may order.

It is my opinion, therefore, in the absence of a clear and unmistakable provision in the statutes to the contrary, that the superintendent of banks and his liquidating agents in liquidating closed banks, are not acting for the state within the meaning of Section 4893 but, in fact, are acting for the banks and their creditors and that they should be required to pay out of the assets of insolvent banks all statutory fees for services rendered to them by public officers.