

BANKS AND BANKING:

Commissioner of Finance has right to  
fix fees of attorneys of failed banks.

2-16

February 10, 1934.



Honorable O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

We are in receipt of your letter of January 29th, enclosing two letters - one from Mr. R. P. Murrell, Attorney at Law, of January 27th, and the other from Mr. E. C. Hilbert, Attorney at Law, of January 26th. We are setting forth your request for an opinion and the two letters from Mr. Murrell and Mr. Hilbert respectively, so that we may have a full explanation of the matter and the answer of both letters in one opinion:

"I am inclosing herein two letters, from attorneys representing this Department in liquidations of closed banks, and request that you furnish us with an interpretation of Sections 5323 and 5324, R. S. Mo., 1929, relative to those portions which have to do with attorney's fees.

O. H. MOBERLY,  
Commissioner of Finance."

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"RE: NOVINGER BANK, NOVINGER, MO.

Mr. Alex Nimmo, formerly attorney representing the department in connection with the liquidation of the above named bank, has filed a petition in the Circuit Court of Adair County asking that his attorney fees be fixed by the court in the amount of \$500.

"You will recall that Mr. Nimmo has heretofore submitted his statement to the department setting out various items of services performed for which he claimed fees amounting to that sum. You, as Commissioner, did not approve the same, but fixed his fees at the total of \$250.00. Mr. Nimmo resigned as attorney for the department sometime in December.

The question is now presented as to whether the court under the authority of Sections 5323-24 of Revised Statutes of Missouri, 1929, can increase the compensation of such attorney. I think there is no question but that under the law the court could refuse to approve any salary or attorney fees that he might deem to be exorbitant, and could set a less fee or salary, but there is no provision as to increasing fees approved by the department. I am not able to find any cases on this proposition, and I believe that the matter should be presented to the Attorney-General for an opinion. It may be that the Attorney-General has heretofore given you an opinion on this matter. If not, I shall appreciate it if you will ask for one. I am making this request at the instance of Hon. H. S. Rouse, Judge of the First Judicial Circuit to whom the matter will be presented.

W. F. MURRELL."

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"Charles E. Rendlen, formerly attorney representing the Commissioner of Finance in charge of the liquidation of the Bank of Canton, Canton, Missouri, has filed his petition in the Circuit Court of Lewis County, at Monticello, Missouri, setting out therein that he has performed many and divers matters for the commissioner and Special Deputy Commissioner in charge of said bank; that he has heretofore been paid the sum of \$1,000.00; that his services were reasonably worth \$1,500.00 and asks for an additional allowance of \$500.00.

"This petition for an additional allowance does not bear your approval, neither does it appear to have been presented to you for approval, and I have and am taking the position the court can not in the first instance fix fees of counsel etc., but it is the duty of the Commissioner to fix the fees in the first instance and must be approved by the court before the payment thereof; that the court may reduce the amount so fixed by the commissioner, but is without authority to increase the fees fixed by the commissioner or allow fees without first being fixed by the commissioner, however, Sections 5323 and 5324 do not appear to have been construed by our court on this particular point and in as much as our Court would like to be advised in the matter before this matter comes on for hearing on February 19th., I would appreciate very much if you would request an opinion on this matter from the office of the Attorney General that I may have same prior to Feb. 19th.

W. A. Mussetter, has filed a like petition, asking for an additional allowance of \$600.00 as attorney fees in connection with the liquidation of the same bank.

E. C. HILBERT."

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I.

The question is whether or not the circuit court, or judge thereof in vacation, may increase the fee of an attorney for a failed bank in liquidation over that fixed by the Commissioner of Finance.

Section 5323, R. S. Mo. 1929, provides that the Commissioner of Finance may appoint one or more special deputy commissioners of finance to assist in liquidating the affairs of failed banks, in the following language:

"He may employ such expert assistants and counsel, \* \* \* \* as he may deem necessary in the liquidation and distribution of the assets of such corporation or banker."

And it is further provided by said section:

"Provided, however, that no salaries or attorney's fees shall be paid unless approved by the circuit court, or judge thereof in vacation, which circuit court, or judge thereof in vacation, may refuse to approve any salaries or attorney's fees that he may deem exorbitant, and set a less fee or salary, which less fee or salary shall be the amount paid."

And Section 5324, R. S. Mo. 1929, provides as follows:

"The commissioner shall pay out of the funds in his hands, of such corporation or private banker, all expenses of liquidation, subject to the approval of the circuit court, or judge thereof in vacation, in the county or city in which the principal office of such corporation or banker is located, and upon notice of the application for such approval to such corporation or banker. He shall, in like manner, fix and pay the compensation of special deputy commissioners, assistants, counsel and other employees appointed to assist him in such liquidation pursuant to the provisions of this article. But a special deputy who, as examiner acting under commission from the commissioner, has previously examined the books, papers and affairs of such corporation, or banker, shall not receive compensation as such special deputy which exceeds by more than five (\$5.00) dollars a day the per diem compensation received by him as examiner at the time of making such examination."

The Banking Laws of the State of Missouri were revised and almost completely changed at the 1915 Session of the Legislature and found at pages 102 to 193, inclusive, in Session Acts of 1915; and we find that Section 36 thereof is exactly the same as Section 5324, R. S. Mo. 1929, with the exception that at page 213, Acts of 1927, this section was amended by adding thereto "or judge thereof in vacation." Since 1915, the statute has provided that the Commissioner of Finance shall fix and pay the compensation of special deputy commissioners, assistants, counsel and other employees appointed, etc.

For a long period of time, it has been the custom and policy of the Commissioner of Finance to fix the compensation of special deputy commissioners, assistants, counsel and other employees appointed to assist in the liquidation of failed banks, and pay same out of the funds in his hands of the corporation, or private banker, in liquidation.

It was said in the case of State ex rel. Barrett v. First National Bank of St. Louis, 249 S. W. 619, l. c. 623:

"\* \* it is a well-established rule of construction that a long-continued interpretation of a statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration. McAllister v. Cupples Station, 283 Mo. 115, 223 S. W. 75; State ex rel. Chick v. Davis, 273 Mo. 660, 201 S. W. 529; State ex rel. Kinloch Tel. Co. v. Roach, 269 Mo. 437, 190 S. W. 862; Ewing v. Vernon Co., 216 Mo. loc. cit. 689, 116 S. W. 518."

And further, in the case of State ex rel. v. Baker, 316 Mo. 853, l. c. 863; 293 S. W. 399, l. c. 404:

"The executive construction thus placed on this statute is also entitled to great consideration. The doctrine is thus stated in 36 Cyc., pages 1140, 1141:

'The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration,

especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."

## II.

In the case of *Farmers and Merchants Bank v. Coleman*, 9 S. W. (2d) 549, in the Springfield Court of Appeals, it was said in construing Section 11707, R. S. Mo. 1919 (now Section 5324 R. S. Mo. 1929):

"Section 11707, R. S. 1919, before change in 1927 (Laws 1927, p. 213), relating to expenses of liquidation of a failed bank, provided that the bank commissioner 'shall pay out of the funds in his hands \* \* \* all expenses of liquidation, subject to the approval of the circuit court,' etc. This section further provided that, in case of a special deputy commissioner appointed to assist in the liquidation of a failed bank, the commissioner 'shall fix the pay or compensation' of such special deputy. By the only change made in section 11707 by the act of 1927, the words 'or judge thereof in vacation' were added after the words 'circuit court.'

Appellant in the first instance did not have his compensation fixed by the commissioner of finance, as the statute requires, but asked the court to fix it. Appellant's able counsel concedes that the circuit court was without jurisdiction to fix the compensation in the first instance. There can be no doubt that such is the case. If the circuit court had no jurisdiction to fix the compensation in the first instance, certainly we have no jurisdiction to review the matter on appeal."

Webster's Dictionary defines "fix":

"To give a permanent form to; to make definite and settled; to make firm;"

And in "Words and Phrases" (3d ed.), at page 692, "fixed" means:

"of established, unchanged, permanent character; settled; lasting."

II.

It is, therefore, our opinion that under Section 5324, R. S. Mo. 1929, the Commissioner of Finance has the right to fix the compensation of the special deputy commissioner of finance in charge of failed bank, and has the right to fix the compensation of the attorneys for failed banks, subject to the approval of the circuit court, or the judge thereof in vacation, having jurisdiction over the failed bank; and the Circuit Court, or the judge thereof in vacation, may refuse to approve any salaries or attorney's fees he may deem exorbitant and set a less fee or salary, which less fee or salary shall be the amount paid; but the circuit court, or the judge thereof in vacation, may not set a higher fee for the special deputy commissioner of finance and the attorneys, than that fixed or approved by the Commissioner of Finance.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG