

3. When the owner to whom an apportionment of a ditch is allotted neglects or refuses, within the time set by the ditch supervisor, to clean out or repair such ditch, and the work is done by the ditch supervisor by contract or by force account in a proper case, upon the completion of the work the surveyor should certify the cost thereof to the county commissioners for their examination and correction, after which the latter officers should order the auditor to place the correct amount upon the duplicate against the lands of the person to whom the section cleaned or repaired had been apportioned, to be collected as other taxes and assessments, and credited to the ditch improvement fund.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1088.

COMMISSIONER OF INSOLVENTS—APPOINTMENT BY PROBATE COURT, MANDATORY—DEPUTY CLERK MAY QUALIFY—FEES.

SYLLABUS:

1. *By the terms of Section 11146, General Code, it is mandatory that each probate court of the several counties of the state appoint a commissioner of insolvents.*
2. *A probate court may designate a deputy clerk or an employe of his office to act as commissioner of insolvents, providing such deputy or employe possesses the necessary qualifications to hold such office and provided the probate court determines that it is possible for such appointee physically to perform the duties of both positions.*
3. *By the terms of Section 11179, General Code, a commissioner of insolvents shall be entitled to the fees therein enumerated, such fees to be collected from the applicant seeking the benefits of the insolvent debtors statutes and not from the appropriation fixed by the county commissioner for the probate court.*

COLUMBUS, OHIO, September 30, 1927.

HON. O. A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

“Section 11146, et seq., of the General Code, headed generally ‘Assignments to Avoid Arrest,’ pertain to the appointment of a Commissioner of Insolvents and seem to place a mandatory duty upon the Probate Court to appoint a Commissioner of Insolvents, this never having been done in Summit County. Section 11179 of the General Code governs the payment of fees and the compensation which the commissioner shall receive.

One of the attorneys in Summit County has lately filed an application for the appointment of Commissioner of Insolvents with the Probate Judge of Summit County, Honorable L. D. Slusser, whom I understand called your office concerning your ruling on these sections. Judge Slusser requests that I ask your opinion concerning his duty in appointing such commissioner, as to

whether or not he must appoint a commissioner when the application is filed, and the manner of payment of fees. Sections 2983 et seq., say, in effect, that no county officer shall receive fees but that the same shall be paid into the county treasury. Does the compensation that would be paid to this commissioner, if one were appointed, come out of the salary fund of the Probate Court or can the compensation be charged to the applicant for insolvency? Will it be possible to have one of the deputies in the office named as Commissioner of Insolvents and a sufficient amount of costs be collected to cover the expense of running that particular department of the work?

My opinion, based however upon only a very rapid examination of the statutes, leads me to believe that the appointment of such commissioner is mandatory, that a deputy in the office of the Probate Court may be appointed, and that sufficient costs may be demanded to cover the costs and expense of conducting the work in each case."

The legislature on March 12, 1831, (29 O. L. 329) passed an act entitled :

"An Act—For the relief of insolvent debtors."

which act now appears as Sections 11146, et seq., General Code.

Section 11146, General Code, provides :

"The Probate Court in each county shall appoint a commissioner of insolvents, who shall give bond to the state in a sum fixed by the court, not less than one thousand dollars, with sureties to be approved by it, conditioned for the faithful discharge of his duties, and hold his office for three years, unless sooner removed by the court."

By the provisions of this section it is mandatory that the Probate Court appoint a Commissioner of Insolvents whose term of office shall be three years unless sooner removed by the court. The appointment of such a commissioner by the Probate Court is an act which the law specially enjoins as a duty resulting from such office and mandamus would lie to compel such court so to act.

As provided in Section 11147, General Code :

"The commissioner shall keep his office at the county seat. The court appointing him, at any time may remove him, or accept his resignation. On a vacancy occurring by death, resignation, removal, expiration of term or otherwise, the court shall appoint a successor, who upon qualifying, shall be entitled to demand and receive all books, papers and assets of every kind appertaining to the office, or in the possession of his predecessor, as commissioner, and who shall proceed with the business of the office, as if no change had been made."

Section 11180, General Code, provides :

"When the office of commissioner of insolvency is vacant, or in case of the death, absence, or inability of such commissioner, the duties of commissioner temporarily shall be discharged by a master commissioner, but as soon as there is a commissioner to act, all unfinished business must be turned over to him."

The powers and duties of such commissioner, together with the procedure incident thereto, are enumerated in sections 11148 to 11180, General Code, both inclusive.

Section 11179, General Code, enumerates the fees which such commissioner may charge for his services and provides :

“The commissioner shall be entitled to the following fees: For writing the application and bond, each, twenty-five cents; for the inventories, schedules, and assignments, and for the examination at the time of application, and for copies thereof, ten cents per hundred words; for publishing notice, twenty-five cents, in addition to the amount paid to the printer; all of which he shall have a right to receive before he may be required to give a certificate to the applicant. For all other services he shall be entitled to receive a reasonable compensation, to be fixed by the court.”

This section provides the sole means whereby such commissioner may receive compensation for services rendered, the amount thereof being paid to such commissioner by the applicant seeking the benefit of the provisions of these sections. For a certain class of services the statute fixes the fees to be charged and for all other services performed within the scope of his duties he shall be entitled to receive a reasonable compensation to be fixed by the Probate Court.

In your letter you refer to Section 2983, General Code, which so far as pertinent provides :

“On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county.
* * * ”

The officers therein referred to and to which Section 2983, supra, is applicable, are those officers enumerated in Section 2977, General Code, viz., county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor and recorder. Section 2983, supra, has no application to fees received by a commissioner of insolvents. The fees that such commissioner earns and collects are the sole means whereby he may be compensated for his services and when paid by the applicant become his property.

Section 2981, General Code, authorizes the Probate Court to appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for the proper conduct of his office. I know of no legal objection to appointing a deputy clerk, an assistant or employe in the office of the Probate Judge to act as Commissioner of Insolvents providing such person possesses the other necessary qualifications.

Summarizing and answering your questions specifically it is my opinion :

1. By the terms of Section 11146, General Code, it is mandatory that each Probate Court of the several counties of the state appoint a Commissioner of Insolvents.

2. A Probate Court may designate a deputy clerk or an employe of his office to act as Commissioner of Insolvents, providing such deputy or employe possesses the necessary qualifications to hold such office and provided the Probate Court determines that it is possible for such appointee physically to perform the duties of both positions.

3. By the terms of Section 11179, General Code, a Commissioner of Insolvents shall be entitled to the fees therein enumerated, such fees to be collected from the applicant seeking the benefits of the insolvent debtors statutes and not from the appropriation fixed by the county commissioners for the Probate Court.

Respectfully,

EDWARD C. TURNER,

Attorney General.