

Opinion No. 13-1114

September 30, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Honorable W. G. Sargent, State Auditor, Santa Fe, N. M.

SALARY OF ADDITIONAL JUDGE, 5TH DISTRICT.

Salary of additional judge of 5th judicial district should be paid by Auditor.

OPINION

{*289} Your letter of the 22nd inst. in which you ask me to advise you if you have authority, in law, for the payment of the salary at this time of the Honorable Granville Richardson, District Judge of the Fifth Judicial District, was duly received, and has not been sooner answered because I have found it necessary to make some examination of the law and to give careful consideration to the questions involved.

The doubt which has arisen in your mind must have been caused by the fact that, in Chapter 83 of the Laws of 1912, making appropriations for the first fiscal year, which will end on the 30th of next November, there was "appropriated to pay the salary of district judges" {*290} the sum of \$ 36,000.00, an amount sufficient to pay only eight judges at the constitutional salary of \$ 4,500.00. It might, therefore, be argued that the legislature intended the payment of salaries of only the eight judges then in existence and that, without specific appropriation for the ninth judge, who was added at the second session of the legislature, there is no authority to pay him at the present time. This argument would be based upon the provisions of Section 30 of Article IV of the Constitution, which is as follows:

"Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied."

This section of the constitution is applicable and controlling generally as to the payment of state funds from the state treasury, arising from taxation for general state purposes, and would limit you as to the drawing of money from the treasury unless, possibly, there might be funds which, on account of their origin, are devoted to some particular purpose, beyond the control of the legislature, or unless there can be found some other equally controlling constitutional provision inconsistent with the universal application of said Section 30.

The above mentioned appropriation is one of many made in the same general appropriation bill to meet, which taxes are levied by you in accordance with the requirements of Section 25 of the same act, and the first impression, which one would naturally have, is that you cannot pay out for the salaries of district judges more than \$ 36,000.00. If this were correct, I am of opinion that it would be your duty to pay the salary of all district judges in full as long as the appropriation lasted, and of the last quarter of the fiscal year to apportion what might remain to the nine judges, so that you should, undoubtedly, pay the salary of Judge Richardson at the present time.

Going more deeply into the subject, however, I have reached a conclusion which it may be well for me to express at this time, as it will undoubtedly be applicable to future payments on account of such salaries, not only for the last quarter of the current fiscal year but for other later fiscal years.

The constitution provides, in Section 17 of Article VI that "each judge of the District Court shall receive an annual salary of four thousand five hundred dollars, payable quarterly by the state." There are similar provisions as to the compensation of members of the legislative and executive departments of the state, to be found in Section 10 of Article IV and in Section 12 of Article V. In order that the state governmental operations shall go on, it is essential that these salaries should be paid, and it is inconceivable that the legislature, by inadvertence or intention, can be allowed to paralyze the state government and suspend its operations through failure to make appropriations. I am of opinion that this legislative provision as to salaries must be considered as the superior controlling authority which will justify you in drawing warrants for the salaries of all such constitutional officers as long as there is any money available in the state treasury. Let us assume that a legislature might appropriate \$ 1,000.00 for the salary of the Governor. It could not reasonably be {*291} contended that he would be thereby deprived of a right to payment from the state treasury of the full amount which the constitution gives him.

I have found, in a carefully considered case decided by the court of appeals of the State of Maryland, as far back as 1853, reasoning which strongly supports the position which I take and from which I make the following quotation:

"In assigning the powers of government to three different departments, the constitution intended to secure to each its independency of action, and the more certainly and effectually to ensure this, it has ascertained and appropriated the salary they are severally to receive; and it has inhibited the legislature from diminishing it. Were it not for such a provision, the whole government would exist only by the permission of the legislature. It can only be carried on through the instrumentality of individuals, and their services can only be obtained by being paid for. The framers of the constitution, and the people who adopted it, aware of this, determined not to submit the durability of their work to the caprice, passion or prejudice, which possibly might, at times of great excitement, triumphantly rule the action of the legislature; and, therefore, wisely did they work themselves by engrafting in the organic law a provision for the protection of those who should be charged with its execution; in other words, they made the appropriation.

"An opposite interpretation would countenance this paradox, that a co-ordinate branch of the government could stop its whole machinery, by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches; and this too when the constitution expressly declares that these officers "shall receive" their salaries, and that they "shall not be diminished." "It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure." 1 Cranch., 178.

"Now, it is presumed, it would not be contended by any one, however hazardous, that if the legislature were to pass an act diminishing the salary of the governor, or of any other officer whose salary is fixed by the constitution, that such an exercise of power would be rightful and constitutional. If it be not competent to the legislature to take away a part, by what process of reasoning can it be maintained that they can take away the whole? And yet this is the extent to which the argument addressed to us goes. It seems to us to be but necessary to state the proposition, to cause its instantaneous rejection.

"We hold, for the reasons we have assigned, the people have given their consent to the payment of the salaries fixed in the constitution, by declaring the amount 'shall' be 'received' by the particular officer; and that this is an appropriation by law -- by the supreme law of the state."

Thomas vs. Owens, 4 Md. 227-8.

I do not overlook the difference between the language of the Maryland Constitution, which declared that "No money shall be drawn {^{*292}} from the treasury of the state, except in accordance with an appropriation made by law," and that used in our own constitution which is that "money shall be paid out of the treasury only upon appropriations made by the legislature," nor have I failed to notice that the Maryland court says that the fixing of salaries in the constitution "is an appropriation by law," thus meeting the exact language of the Maryland constitution. Notwithstanding the difference between the two constitutions, I am still of the opinion, for the reasons so well expressed in the above quotation from the Maryland opinion, that the fixing of salaries in the constitution, to be paid quarterly by the state, is a mandate to the state officers charged with the duty of drawing and paying money from the state treasury, to pay those salaries, whether appropriation is made therefor by the legislature or not.

Therefore, I conclude that you should pay the salary of Judge Richardson, not only at the present time but for the future as long as he remains in office and as long as there is any money available in the state treasury for the payment of salaries of district judges, and that this is true of the salaries of all other district judges, whether the legislature has made any specific appropriation for such salaries or not.