

## Opinion No. 15-1627

August 25, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. H. B. Hamilton, Las Cruces, N. M.

**Five per cent commission on collections by district attorneys must be paid into county treasury.**

### OPINION

{\*200} I have your letter of yesterday relative to the Alamogordo Improvement Company tax case, as to which you say defendants claim "that the five per cent which is collected under the 1909 district attorney bill should not be paid", and you further say {\*201} that it has been the practice to collect the five per cent and turn it into the salary fund, and you ask my opinion about it.

The five per cent to which you refer I assume is that which is provided in the third subdivision of Section 12 of Chapter 22 of the Laws of 1909, which, in effect, declares that the district attorney is entitled to, "For all collections made after suit brought as provided by law for delinquent taxes, five per cent of the amount collected." At the time that this statute was enacted, this commission or allowance of five per cent inured to the personal benefit of the district attorney, but under the decision of the supreme court of the state in Ward v. Romero, 17 N.M. 88, the district attorney could receive no compensation of any kind after the organization of the state government until a salary should be provided by the legislature. Near the end of the opinion in that case, the court said that the district attorney "is not entitled to accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office; that he is an officer serving without salary, and that it remains for the legislature to determine the amount of salary he shall receive".

I believe that the court did not intend to go further than to hold that the district attorney could receive nothing "to his own use" beyond the salary which the legislature would at sometime determine, and that he must serve without salary until the legislature fixed the amount he should receive. The language used seems to indicate an intention on the part of the court thus to limit its decision, but I am not at all clear that it did away with the collection of all fees which, when provided by the statute of 1909, were to be for the compensation of the district attorney. For instance, in Section 9 of that act various fees are provided for appearance and for convictions in criminal cases. Can we properly say that these fees are entirely done away with and that a defendant convicted of a misdemeanor, for instance, shall not be taxed with the \$ 10 provided as a fee for the district attorney? Clearly the district attorney cannot appropriate any money to his own use and, therefore, it must be paid into the public treasury if it is charged against the defendant and collected. I am not informed as to what has been the practice with regard

to such fees in the district courts since the organization of the state, but my impression is that the courts have continued to tax them as part of the costs. If this practice is correct, it would be equally reasonable to tax the five per cent upon collections as a part of the costs.

While there may be room for argument that as the fees provided in the act of 1909 were only for compensation to the district attorney, when we consider nothing more than that act, together with the decision of the supreme court in the Ward case, yet there is one clause in Section 6 of Chapter 54 of the Laws of 1913 which seems to indicate that the legislature contemplated the continuance of the earning and collection of fees and commissions as you will see by reference to that section which requires that all fees and commissions theretofore earned and collected by the district attorneys shall be paid over to county treasurers, and that all such fees and commissions theretofore earned and thereafter collected or thereafter {\*202} earned and collected by the district attorneys, shall be paid over to the county treasurers. There is no meaning to the language about fees and commissions which might be thereafter earned and collected unless we take the view that all of the fees and commissions which had been previously provided as a part of the compensation of district attorneys could still continue to be earned and collected and must be paid over to the county treasurer.

With this in view, I am compelled to reach the conclusion that this five per cent commission on collections by the district attorney still continues but must be paid into the county treasury.