Opinion No. 15-1664

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BY: FRANK W. CLANCY, Attorney General

TO: Mr. W. R. Reber, Las Cruces, New Mexico.

Garnishment of a state or county official.

OPINION

*{*236}* I have before me your letter asking my opinion on two questions of law, the first of which is as to whether a state or county official can make a legal and enforceable hypothecation or assignment of his salary when the same is not yet earned, and in event of an assignment being filed with the county commissioners, would they have the legal right to pay the salary assigned to the assignee, and if so, would the filing of a garnishment present a legal obstacle to such payment.

I believe there is no doubt that an assignment by a public officer of salary not yet earned is not lawful and could not be enforced if disputed in any way. A leading case on this subject seems to be that of Bliss v. Lawrence, 58 N.Y., 442, which is also reported in 17 American Reports beginning at page 273. You will find this quite an interesting case, and my recollection is that you have, or someone in the same building with you has, a set of American Reports. In the third line at page 279, the word "within" is erroneous as I found by reference to the original English case and if changed to "after," it will make sense and conform to what the law was. There is but little conflict of authority on this question and I have no hesitation in saying that a public officer cannot make a legal and enforceable assignment of his unearned salary. If the county commissioners, however, should pay the assignee, in all human probability there never would be any question raised about it, but it would be safer to draw the warrant in favor of the officer and then let the assignee struggle with him to get him to endorse it.

*{*237}* As to the effect of the service of a garnishment upon the payment either to the assignee or to the officer himself, I am of opinion that the salary of such an officer is not subject to garnishment at all. This depends upon what meaning we are to give to Chapter 26 of the Laws of 1915. I have no doubt that the man who drew that act had in mind the garnishment of salaries due to public officers, but the language used does not appear to have accomplished the intended result. It is hardly necessary to cite any authorities in support of the general proposition that the compensation of public officers is not subject to attachment in the hands of the paying authority. The doctrine is broadly stated in 12 A. and E. Ency. of Law at pages 69-70. That portion of said Chapter 25 to be considered is as follows:

"Excepting in all cases where the plaintiff has a judgment against the defendant in some court of this State, no public officer shall be summoned as a garnishee in his official

capacity. In all cases where the plaintiff has a judgment in some court of the state against the defendant any public officer may be summoned as garnishee, and the return of such public officer shall be by a statement over his official signature of the amount due the defendant, which said statement shall be filed by such public officer without costs in the action."

This clearly makes it possible to serve a garnishment upon a public officer in his official capacity, but it does not extend to the garnishment in his hands of a salary due to another public officer. It would reach money due to another person than public officers, such as that which might be due to a contractor for building a court house or to one who furnishes coal or other material to the county. I believe that it leaves the salaries due to public officers untouched and that the law as to them has not been changed. I say this without giving any consideration to the question of the power of the legislature, as to which I believe there may be some room for argument, but whether it has the power or not, it has not quite covered the garnishment of salaries due to public officers. As this statute is one which is designed to abrogate a general preexisting rule of law, it must be strictly construed and not extended beyond the clear and definite import of the language used.

Your second question is as to whether or not the county commissioners have the legal right to pay a county officer for extra work resulting from a change in the methods of conducting the business of his office, when such change was made by order of the county commissioners, entailing upon the incumbent in office a greater expense than the methods theretofore in vogue in that office, and upon the promise by the commissioners to compensate the officer for such extra expense, the order of the commissioners having been made and the work done prior to the passage of the salary bill.

I am unable to see how the county commissioners can properly pay anything to any county officer beyond the salaries and allowances fixed in Chapter 12 of the Laws of 1915, which is the salary bill. Section 1 of Article X of the constitution imposed upon the legislature the duty of classifying the counties and fixing salaries *{*238}* for all county officers, and at the same time prohibited the receipt by any county officer to his own use of any fees or emoluments other than the annual salary provided by law. Section 9 of the salary bill provides very liberally for all the time prior to the passage of the act, and after the qualification of county officers. If the county commissioners had authority to make a change in the method of conducting an office, the officer must be considered as having taken the office subject to the possibility of such change requiring additional labor, and in view of the constitutional provision, he must also be held to have taken the office with a right only to such compensation as the legislature might thereafter fix. Whatever room there might be for contention as to his rights to compensation, was settled by the supreme court in the case of Delgado v. Romero, 17 N.M., 81.