

## Opinion No. 15-1705

December 31, 1915

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

**TO:** Mr. Thomas S. Snyder, County Commissioner, Clayton, New Mexico.

**As to the payment by county officers into the treasury of all surplus moneys received by them over what they are entitled to under the salary law.**

### OPINION

{\*276} I have received your letter of the 28th inst. in which you say that Mr. Whittier, the Traveling Auditor, has written your county officers that all surplus received by them over and above what they are entitled to under the new salary law, must be paid into the county treasury at once or otherwise I will bring suit against them.

I have seen Mr. Whittier and he says that he has not threatened anyone with a suit to be brought by me, as he would not undertake to say what I would do, but he is of opinion that any money which, upon the settlement made last spring, county officers were found owing to the county, ought to be paid at once or at least as rapidly as practicable. The language of the statute is not at all clear as you will see by referring to it. Section 9 of Chapter 12 of the Laws of 1915, which is the one for consideration, after directing that each county officer shall file with the county commissioners an account showing all amounts received by him as such officer, first directs in positive language that at the time of filing such account he shall pay into the county treasury all amounts received by him over and above the amounts for which he is entitled to credit; but the next sentence declares that if he fails so to pay over any surplus received by him, "the amount of such surplus remaining due shall thereafter be deducted pro rata by the county commissioners from future allowances made to such officer under the terms of this act, until such surplus shall have been paid."

The only difficulty as to the meaning of this provision is to be found in the words "pro rata." I will not venture to predict with great confidence what the courts would hold as to the meaning of this language, but I am of opinion that the only safe course for the board of county commissioners to take, is to deduct the whole of any future allowance made to the officer who is indebted to the county until the whole of the debt is paid, and to assume that "pro rata" means that the deductions are proportioned to the amounts of any future allowances. The debt to the county is an absolute one and ought to be collected as rapidly as possible. If this works such an amount of hardship upon any particular officer as to make it worth while for him to go to the trouble and expense of a suit in court, he can very quickly get a judicial decision as to the meaning of this somewhat uncertain provision.

If we adopt the construction which you suggest, which is, in effect, that there should be deducted at each time when any salary becomes due such an amount that at the end of the official's term {277} of office the deductions would cover the amount of his indebtedness, the county commissioners will be taking chances of not getting the whole amount of the money because an officer might die, or resign, or be removed from office, although any such happening would not extinguish the debt, and it would still be a claim on behalf of the county against the estate of the one who dies, or against the individual who retires from office.

The first duty of the board of county commissioners is to the public, and the interest of the county, as such must be cared for above everything else.

I would have referred you, as a county officer, to your district attorney on this subject had it not been for the fact that it involved the action of a state officer, and it seemed, therefore, not improper for me to answer your letter. I will send a copy of this letter to Mr. Remley, however, for his information.