County Surveyor—Duty to Keep Records Mandatory—Must Obtain the Approval of the Board—Compensation Considered in Computing Indebtedness.

The duty of the County Surveyor to keep the records provided for by Section 4837 of the Revised Codes of 1921 is mandatory. The County Surveyor must obtain the approval and direction of the Board of County Commissioners before performing such duties.

The salary of a County Surveyor must be considered as an indebtedness on the part of the county in determining whether the county has exceeded the constitutional limitation of indebtedness.

L. Q. Skelton, Esq.,
State Examiner,
Helena, Montana.

My dear Mr. Skelton:

You have requested my opinion on the following questions:

1. Are the duties prescribed for the County Surveyor in Section 4837, Revised Codes of 1921, mandatory?

2. Must the County Surveyor obtain the approval of the Board of County Commissioners before he can perform such duties.

3. Can the compensation paid the County Surveyor for performing his duties be considered as incurring an indebtedness on the part of the county?

1. Section 4837, above referred to, reads as follows:

"The county surveyor shall keep in his office a record of all surveys and plats made or caused to be made by him, to be recorded in proper books provided for that purpose; and shall also keep on file and for record, in suitable plat books provided therefor, copies of all plats made or caused to be made by him, and have recorded therein a description of every public highway within the county; provided, further, that all such books of record, together with original drawings and original book or books of field notes, calculations, and computations shall be, are, and shall remain the property of the county, and preserved as such."

Thus, it will be seen that the duties prescribed are those providing for the making of the permanent records of the Surveyor's office, and are therefore permanent records of the county. The purpose of making such records is for the future information of the public, and there is no doubt but that the Legislature intended that the making of such records should be a part of the duty of the Surveyor, and therefore mandatory.

2. Under Section 4836, Revised Codes of 1921, the County Surveyor is required to work under the direction of the Board of County Commissioners. This work includes the making of all surveys, establishment of grades, preparing plans, specifications and estimates. The County Surveyor has no authority to proceed with any such work without the approval and direction of the Board of County Commissioners.

When he is directed by the Board of County Commissioners to perform any of the services prescribed in said Section 4836, he is further required by Section 4837 to prepare and make a permanent record of such work, and the making of such record is as much a part of the work as is the work in the field. Therefore, no further direction on the part of the Board of County Commissioners is necessary to enable him to make the permanent records in his office provided for by said Section 4837. The authorization and direction for him to do the field work is likewise his authority and direction to make the records.

3. Your third question is whether the payment of the compensation of the County Surveyor may be considered as incurring an indebtedness on the part of the county.

This is a question which offers some difficulty of solution, as there is considerable conflict in the authorities. It is generally recognized that legitimate county debts or obligations are of two classes: (1) Those which are prescribed and imposed by law, and are purely involuntary as to the county; (2) Those which are merely authorized by law, and are assumed by the county with some measure of discretion, at least as to time and amount.

Brown v. Gay-Padgett Hardware Co., 66 So. 161;
Bank v. Clearwater Co., 235 Fed. 746;
15 C. J. 577, Sec. 280.

Under the first class would naturally come such obligations as salaries of county officers. The County Surveyor is an officer provided for by the Constitution (Sec. 5, Art. XVI), and his salary or compensation is fixed by Section 4291, Revised Codes of 1921. The payment of this compensation is not a matter of discretion on the part of the Board of County Commissioners, any more than is the payment of the salary of any other county officer. That discretion ends when the Board determines what field work the Surveyor shall be called upon to perform. If he performs the work as directed by the Board, he is entitled to the compensation fixed by law.

The question for determination is, therefore, whether compulsory or involuntary obligations are to be considered when determining the limit of indebtedness of a county under the Constitution.

Section 5, Article XIII of our Constitution reads in part, as follows:

> "No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such county shall be void."

While our court has never passed upon this identical question, the language used in the case of State v. City of Helena, 24 Mont. 521, on page 530, which is quoted from City of Springfield v. Edwards, 84 Ill. 626, and adopted, is of considerable interest. The Montana court was considering the constitutional limitation of indebtedness as applied to cities, which is phrased almost identically with the section above quoted, and the opinion reproduces the following language from the Illinois decision:

> "The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay,—'*in any manner or for any purpose*,' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute,—the debts exists,—and it differs from a present, unqualified promise to pay only in the *manner* by which the indebtedness was incurred. And, since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else." * * *

Our Supreme Court, after reviewing other cases upon the subject, says:

> "In view of these holdings, we can conceive of no possible grounds for the supposed distinction between an indebtedness for current expenses, payable out of the current revenues, and one for the payment of which no provision has been made, and for which the city is generally liable."

In the case of Panchot v. Leet, 50 Mont. 314, on page 318, the court says:

> "The distinction between voluntary and compulsory indebtedness has been commonly invoked in cases where an excess of the constitutional limit is claimed, and it is the settled rule that liabilities arising from tort, being compulsory, are not to be considered in computing the public indebtedness in such cases. The same principle has likewise been applied in Washington and elsewhere to obligations and expenditures commanded by the Constitution itself. (Ranch v. Chapman, 16 Wash. 568, 58 Am. St. Rep. 52, 36 L. R. A. 407, 48 Pac. 253.) Neither consideration, however, compels the view that a thing forbidden by the Constitution can be made compulsory by mere legislation, or that the legislature can absolve any public agency from the restrictions of the Constitution."

While there are to be found cases holding that the incurring of indebtedness for a purpose not within the discretion of the particular board, such as salaries of officers, is not to be considered as a violation of the constitutional limit of indebtedness (Farquharson v. Yeargin (Wash.) 64 Pac. 717; Farish-Stafford Co. v. Lexington Co. (N. C.) 84 S. E. 1002; and State v. Weir (Nebr.) 19 N. W 785), the weight of authority holds that the phrase "created in any manner or for any purpose" comprehends debt in any form, whether voluntary or compulsory.

Board of Comm'rs of Craig Co. v. Smartt (Okla.) 158 Pac. 601;
Nelson Co. Fiscal Court v. McCrockin (Ky.) 194 S. W. 523;
People v. May (Colo.) 12 Pac. 839;
Board of Comm'rs of Lake Co. v. Graham, 130 U. S. 662, 32 L. Ed. 1060;
Fritsch v. Board of Comm'rs of Salt Lake Co. (Utah) 47 Pac. 1026;
State v. Stanfield (Okla.) 126 Pac. 239;
15 C. J. 578.

Under the rule of the authorities above cited, it follows that, should a condition exist in which the issuing of warrants by a county in payment of salaries of its officers would produce an aggregate indebtedness in excess of the constitutional limitation, such warrants would be void, and this applies to the salary of a County Surveyor as well as to any other county officer.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.