

Opinion No. 94.

**Legislature, Members of—Salaries—
Public Officers—Statutes—
Construction.**

HELD: Under the provisions of Section 74, R. C. M. 1935, a state senator, who is a holdover, and who is too ill to attend the sessions, is nevertheless entitled to his salary.

April 27, 1937.

Hon. John J. Holmes
State Auditor and Ex-officio
Insurance Commissioner
The Capitol

Dear Mr. Holmes:

You have submitted the following:

"I am in receipt of a wire from the Honorable Ernest T. Eaton, wherein he has requested that his legislative warrants be mailed to him, addressed to 565 Prescott Street, Pasadena, California.

"Senator Eaton's name appeared on each and every pay roll executed by the Senate of the twenty-fifth legislative assembly. The pay rolls were received in the State Auditor's office, and, in due course, warrants were drawn in conformity with the pay rolls as filed. Senator Eaton never called for his warrants and the same accumulated in the State Auditor's office.

"After the legislature had adjourned, the State Auditor was put on notice to the effect that though Senator Eaton was duly elected to the

office of State Senator, he had never officiated as a member of the twenty-fifth legislative assembly, that he had never taken the oath of office at the beginning of the legislative assembly, nor had he, at any time, actually served as a member of the twenty-fifth legislative assembly, and that, therefore, he was not entitled to per diem allowance as a member of the twenty-fifth legislative assembly.

"The State Auditor has information to the effect that the Senate of the twenty-fifth legislative assembly, in its official journal, has noted that it excused Senator Eaton from attendance."

In addition to the foregoing facts submitted by you, it is undisputed that Senator Eaton was ill during the entire legislative session and was physically unable to attend. I believe it is also true that Senator Eaton has never abandoned or relinquished his office and has done no act from which an inference could be drawn that he has waived his right to the salary of a state senator. Whether or not Senator Eaton is entitled to the salary of a state senator during the Twenty-fifth Legislative Assembly, depends upon the wording of the statute, Section 74, which reads as follows: "Members of the legislative assembly hereafter elected shall receive ten dollars per day, payable weekly, during the session of the legislative assembly, * * *"

The words of the statute are plain and unambiguous. The statute speaks for itself and there is nothing to construe. Our Supreme Court, speaking by Chief Justice Callaway, in *Chmielewska v. Butte & Superior Mining Co.*, 81 Mont. 36, 260 Pac. 616, said (p. 42):

"Our duty is not to enact but to expound the law, not to legislate but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a co-ordinate branch of the state government.' (*Cooke v. Holland Furnace Co.*, 200 Mich. 192, L. R. A. 1918E, 552, 166 N. W. 1013.) When the terms of a statute are plain, unambiguous, direct and certain, the statute speaks for itself; there is naught for the court to construe. So it is here; * * *"

We are not at liberty to insert in the statute the words "actually spent in the performance of official duties," so that the statute would read: "Members of the legislative assembly hereafter elected shall receive ten dollars per day, actually spent in the performance of official duties, payable weekly, during the session of the legislative assembly."

In *Maki v. Anaconda Copper Mining Co.*, 87 Mont. 314, 287 Pac. 170, our court, speaking by Mr. Justice Matthews, said (p. 324):

"No rule of construction can justify the disregard of the plain mandate of the law. In the construction of a statute the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. (Sec. 10519, Rev. Codes 1921).' (*Chmielewska v. Butte & Superior Min. Co.*, above.)"

See also our opinion given to the Board of Examiners in Accountancy, dated April 1, opinion No. 79, Volume 17, Opinions of the Attorney General, and the cases therein cited.

In *State ex rel. Cutts v. Hart*, 56 Mont. 571, 185 Pac. 769, our Supreme Court said (p. 574):

"The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incidental to the right to hold office. (*McGillic v. Corby*, 37 Mont. 249, 17 L. R. A. (n.s.) 1263, 95 Pac. 1063; 22 R. C. L., p. 525 et seq.)"

This is in accord with the general rule of law stated in 22 R. C. L. 525, cited by our court. It is expressed as follows by the textwriter:

"It is a well established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office."

It is our understanding that it has been the practice for years to pay the salaries of the members of the legisla-

tive assembly although they have been unable to attend the sessions. During the Twentieth Session, (1927) Senator John L. Scofield of Powder River County, was too ill to attend that session, and died March 9, 1927. He was paid his salary regularly during the session. Many other instances might be given of the payment of salaries although the members of the legislative assembly were too ill, or otherwise unable to attend. According to my understanding this has been the practice for years. The legislature has never seen fit to disturb it by amending the law.

You state that Senator Eaton did not take the oath of office at the beginning of the legislative assembly. Senator Eaton was a holdover and took his oath of office in 1935. We believe that there can be no question as to his having qualified by taking the oath of office.

It is therefore my opinion that Senator Eaton is entitled, under the provisions of said Section 74, R. C. M. 1935, to his salary for the full legislative assembly and that you should release to him the warrants drawn to his order.