

**Election Contest, Right to Salary Pending Contest.**

A person contesting the right of another to a seat in the Legislature, and who has been declared the duly elected member, is entitled to the salary and emoluments of the office from the beginning of the session, and the person who has been unseated is a **de facto** member only and is not entitled to any salary or emoluments for the time he served as a member, under sections 1040 and 1041 of the Political Code.

January 26, 1905.

Hon. Wyllys A. Hedges, Speaker, House of Representatives, Helena, Montana.

Dear Sir:—In reply to your inquiry, regarding the right of the Honorable M. A. Wellman to receive salary for the time he served as a member of the Ninth Legislative Assembly pending the contest of the Honorable T. W. Richardson, and also as to the period of time for which the Honorable T. W. Richardson shall receive salary as a member of such assembly, I respectfully submit the following opinion:

Section 1040, of the Political Code of the State of Montana, provides that when the title of the incumbent of any office in this State is contested

by proceedings instituted in any court, that no warrant can be drawn or paid for any part of his salary until such proceedings have been determined. The supreme court of California, in the case of *People v. Potter*, 63 Cal. 127, construing a statute identical with the above, used the following language:

"An officer *de facto*, acting even in good faith under a claim of right to an office, is not entitled to recover from a county the compensation provided by law for such services to the exclusion of the officer *de jure*. It will be remembered that one exercising the power of an office without lawful authority is regarded as an officer *de facto*, not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to the possession of the office is to be determined he cannot be declared an officer *de jure*, on the ground that he has been an officer *de facto*. It is therefore a rule of law that when an officer seeks to recover the emoluments of an office he must show his right to the possession of the office. The rule is based upon the ground that the officer *de jure* who has been ousted from his place by an intruder has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled.

Appellant, however, claims that the rule has been changed by the Political Code of this State. In this he is mistaken. Section 936 of that Code declares that pending a contest for an office no warrant for any part of the salary of the office must be drawn or paid. From this it results that after the contest has been finally decided the officer *de jure* is the only person entitled to the salary."

As Sections 936 and 937, of the Political Code of California, are the same as Sections 1040 and 1041, of the Political Code of Montana, and had been thus construed in 1883 by the supreme court of California prior to the adoption of such sections into our statutes, I must hold that as the Honorable T. W. Richardson has been declared elected by the House that as a member of the Ninth Legislative Assembly *de jure* he is entitled to the salary and emoluments from the beginning of the session of the Ninth Legislative Assembly, and that the Honorable M. A. Wellman was a *de facto* member of such Assembly during the time that he served therein and is not entitled to any salary or emoluments for such service.

Yours respectfully,

ALBERT J. GALEN,

Attorney General.