

**County Superintendents, Eligibility Of. Salary, Payment Of
in Case of Contest.**

In the absence of proceedings to test the right to office, the salary shall be paid to the persons acting as such official until the institution of such proceedings.

Helena, Mont., Jan. 21, 1907.

Hon. W. L. Ford,
County Attorney,
White Sulphur Springs, Mont.

Dear Sir:—

We are in receipt of your letter of January 14th, in which you submit for consideration of this office a state of facts substantially as follows:

Miss Higgins was elected county superintendent of schools of Meagher County at the last general election, and Miss Harris, who was then superintendent, declined to surrender the office on demand to Miss Higgins, for the reason, as she claims, Miss Higgins is not a citizen of the United States, and is, therefore, ineligible to take and hold the office.

The only question which will arise in this matter, unless a criminal action is instituted, with which you can be officially connected, is the protection of the county in the payment of the salary. Sections 1040 and 1041 of the Political Code make provision for a case of this kind. If Miss Harris is permitted to continue in office without proceedings being instituted to oust her therefrom, then she is, at least, a de facto

officer and may draw the salary; and if proceedings are instituted, then no salary can be paid to either party until the question as to who is entitled to the office has been determined. If an action is instituted by Miss Higgins for possession of the office it would be, most probably, quo warranto proceedings under the provisions of section 1410, et seq., Code of Civil Procedure, and would be both prosecuted and defended by private counsel. In an action of this kind, the question of eligibility of the candidate or claimant may be enquired into as was done by the supreme court of this state in *State ex rel Chenewith v. Acton*, 31 Mont. 37. That case, brought in connection with the provisions of section 7, article 9, of the State Constitution, appears to settle this controversy.

Very truly yours,

ALBERT J. GALEN,

Attorney General.