

**County Warrants Drawn in Payment of Salaries Pending Contest. Warrants, Illegality Of. County Treasurer, Duty as to Payment of Warrants. County Attorney, Duty Of With Regard to Restraining Payment of Warrants.**

1. County warrants drawn in payment of salary during a contest to determine rightful incumbent of office, when drawn in favor of claimant finally ousted, are issued without authority of law.

2. It is the duty of the county treasurer to refuse to pay such warrants, they being illegally drawn, even in the absence of a restraining order.

3. It is the duty of the county attorney to commence an action to restrain the payment of county warrants illegally drawn when he has notice that such warrants have been issued.

Helena, Montana, Feb. 7, 1908.

H. C. Schultz, Esq.,  
County Attorney,  
Thompson, Montana.

Dear Sir:

In reply to your letter of January 24th, submitting a statement of the facts concerning the double payment of the clerk of the District Court of Sanders County, in which you submit five questions for opinion of this office; the questions are here set forth and answered in their order.

1. "Was the claim of Livesay for salary as Clerk of the Court, during the time while the contest was pending final determination, legally chargeable to our county?"

The Supreme Court has held in the case of *State ex rel Livesay vs. Smith*, 35 Mont. p. 523, that Smith is entitled to the office and that Livesay had no legal claim thereto. He was therefore a de facto officer and not entitled to salary.

See: My opinion dated Jan. 26, 1905, addressed to Hon. Willis A. Hedges, Report and Official Opinions of Attorney General, 1905 - '06, page 14; also

*People vs. Potts*, 63 Cal. 127, therein cited.

2. "Were these warrants to Livesay illegal when issued, and if illegal did they acquire legality by assignment to an innocent purchaser for value?"

Under the provisions of Section 1040, Pol Code, the warrants drawn in payment of Livesay's salary were illegally issued and have not since been legalized.

3. "May the county treasurer challenge the legality of the claim of Livesay, by refusing to call or pay these warrants, in the absence of a restraining order?"

It is not ordinarily the province of the county treasurer to challenge the acts of the board of county commissioners in allowing claims and ordering warrants drawn to pay them, but Section 1041 Pol. Code confers that right in this particular case upon the county treasurer where the certification therein required is made. And as the only purpose of the statute is to give notice "to the officer whose duty it would otherwise be to draw such warrant and pay such salary," and the county treasurer in this case having actual notice and knowledge of the facts, I advise you that he is not justified in paying the warrants.

4. "If your decision is in the negative to question three and also in the negative to question one, does Sec. 4452 Pol. Code make it my official duty to begin action for the recovery from Livesay of the amount for which warrants were issued to him and which the county treasurer would be obliged to pay of the county's money, and 25% damage?"

Section 4452 of the Political Code clearly makes it the duty of the county attorney to begin an action to restrain the payments of warrants issued by order of the board of county commissioners for salary without authority of law. I advise you to follow the direction of this statute and not depend upon the voluntary refusal of the treasurer to pay these warrants.

5. "If Livesay is liable under Sec. 4452 Pol. Code is his bond equally holden?"

The liability of Livesay's bondsmen, while not eliminated by his failure to maintain himself in office, would not in my opinion enter at all into the question so presented until after the actual payment of the warrants, and a suit against Livesay commenced to recover the amount paid, which condition, from your statement of the case, cannot now arise.

I am enclosing a copy of my opinion in the matter of sheriffs' mileage, etc. as requested.

Very truly yours,

ALBERT J. GALLEN,

Attorney General.