

**Election Contest, Payment of Salary to De Facto Officer.
De Facto Officer, Payment of Salary to During Pendency of
Election Contest.**

Until the final determination of an election contest, the salary incident to the office should not be paid to the present incumbent.

February 20th, 1913.

Hon. Joseph J. McCaffery,
County Attorney,
Butte, Montana.

Dear Sir:

I beg to acknowledge receipt of your communication under date of the 17th inst., requesting my opinion as to whether or not the salaries of yourself, Dan Drew and Barney McGrade should be paid by the County of Silver Bow pending the final determination of the election contest regarding the respective offices occupied by these gentlemen.

Sec. 375 of the Revised Codes provides that no part of the salary shall be paid "until such proceedings have been finally determined."

Sec. 375, Revised Codes.

"The contest is not finally determined until the appeal is disposed of.

Sec. 7188, Revised Codes.

Our supreme court has held that the actual payment of the salary, even in good faith, to the de facto officer, pending an appeal from a judgment of a district court confirming the title of the de facto officer in a proceeding contesting such title will not relieve the municipality from liability for salary to the de jure officer during the same period.

Wynne v. City of Butte, 45 Mont. 417, 123 Pac. 531.

It therefore follows that if the claims of the various contestants to these respective offices should be eventually sustained, that these contestants could collect from the county the salaries which are incident to the office.

Wynne v. City of Butte, Supra.

People v. Potter, 63 Cal. 127.

And if the county should make payment to the de facto officers pending this appeal it would do so at peril of being compelled to pay twice.

Wynne v. City of Butte, Supra.

People v. Potter, 63 Cal. 127.

The salary is an incident to the de jure title and it should not be paid until the question of the de jure title is finally determined.

29 Cyc. 1393, .et seq.

Wynne v. City of Butte, Supra.

People v. Potter, Supra.

Sec. 375, Revised Codes.

Sec. 7248, Revised Codes, to which you make reference in your

communication, and which provides that the "appeal must not stay execution," does not, in my opinion, in any manner affect the question of the right to salary. The intention of this provision, in my opinion, is merely that the party adjudged to be entitled to the office by the district court shall be placed in possession of the office, notwithstanding the taking of the appeal.

You are therefore advised that until the final determination of these election contests, the salaries should not be paid to the present incumbents of the respective offices.

Very truly yours,

D. M. KELLY,
Attorney General.