

Representatives—Members—Contests — Speaker Signing Pay Roll.

Where a contest has been instituted against certain persons as members of the House of Representatives, the Speaker should not sign a pay roll including such names, until the contest has been concluded and determined.

Jan. 11th, 1919.

Hon. O. W. Belden, Speaker,
House of Representatives,
Helena, Montana.

Dear Sir:

You have requested my opinion with reference to the following:

"The Canvassing Board of Silver Bow County issued certificates of election to twelve persons as having been elected at the general election held in November, 1918, as members of the House of Representatives from Silver Bow County; on January 6th all twelve of the persons holding such certificates presented such certificates on the organization of the House of Representatives and were sworn in as members of the House, and since said date have been sitting as members thereof, and discharging the duties of such offices; nine persons, who were candidates at such election for members of the House of Representatives from Silver Bow County, have initiated contests in the House of Representatives against nine of the persons to whom such certificates were issued and who were sworn in and are now acting as members of the House from Silver Bow County. The question is whether the Speaker of the House of Representatives should include in the pay roll of the members of the House, which is required to be certified by him, the names of the nine persons against whom such contests have been initiated, and such nine persons be permitted to receive mileage and per diem as members of the House of Representatives from Silver Bow County?"

The only case I am able to find in this state which even touches the question is that of *State ex rel Thompson vs. Kenney*, 9 Mont. 223, 23 Pac. 733. In that case, the State Auditor refused to draw his warrant in favor of the relator for mileage and per diem as a member of the House of Representatives, the relator holding a certificate of election, and no contest having been initiated against him. The Court there said:

"It is proper to observe here that under well-established rules of law, if it was shown that a contest of the election of the relator was pending in the house of which he claims to be a member, and to which he holds a certificate of election, then this court would withhold judgment until the case was determined; but no such fact appears."

Here, however, contests have been initiated, and in an action by mandamus to compel the State Auditor to draw a warrant in favor of one of the contestants for per diem and mileage, unquestionably the court would withhold judgment until the contest was determined.

In the case of Rasmussen vs. Board of Commissioners, 56 Pac. 1098, and Blydenburgh vs. Board of Commissioners, 56 Pac. 1106, the Supreme Court of Wyoming, after exhaustively reviewing the whole question, and quoting from and citing a large number of decisions, held that where, by reason of illegal votes having been received and counted for him, one who receives a minority of the legal votes cast is, by the canvassing board, declared elected and receives his certificate of election and qualifies and discharges the duties and receives the salary of the office pending a contest against him by the candidate who receives a majority of the legal votes cast, the latter, upon being adjudged entitled to the office, is entitled to receive the salary from the beginning of the term for which he was elected.

If our court should take the same view of the question as the Wyoming court did in the cases referred to, the result would be that if the names of these contestees should be certified as members of the House entitled to mileage and per diem, and warrants should be issued to them for the same, and thereafter the contests should be finally determined in favor of the contestants, such contestants would be entitled to their mileage and per diem for the whole sixty days of the session, the state thus paying mileage to both the contestee and contestants, and per diem to both for the days for which the contestants receive per diem, while, on the other hand, if the names of the contestees are not included in the pay roll they will suffer no loss or injury as, if the contests be finally determined in their favor and they retain their seats, they will then be entitled to their mileage and per diem for the whole of the sixty days of the session, and if the contests be finally determined in favor of the contestees, the state will not be required to pay out any funds which it should not have paid out.

It is, therefore, my opinion that the Speaker should not include in the pay roll of members of the House the names of the nine persons from Silver Bow County whose seats are being contested while such contests are pending and undetermined.

Very truly yours,

S. C. FORD,
Attorney General.