

**County Attorney—Absent from Office by Illness—
Salary of County Attorney When Absent from Office.
County Commissioners—Power to Employ Additional Counsel—Deputy County Attorney, Employment of, When.**

The board of county commissioners are without authority to employ additional counsel, and continue the county attorney in office when he is unable to discharge the duties imposed upon him by law.

A deputy may be employed, when in the opinion of the county commissioners such action on their part is deemed necessary.

Sept. 20, 1920.

Board of Commissioners, Fallon County,
C. J. Russell, County Clerk,
Baker, Montana.

Gentlemen:

I have your letter of September 10, 1920, in which you say that your present county attorney has been ill for two or three months last past, unable to attend to the business of his office, and from present indications he will continue to be unable to resume his duties for the balance of this year. You wish to know whether you may retain the services of another lawyer and pay him for such services out of the county contingent fund.

The employment of services for and on behalf of a county is a matter regulated entirely by statutory procedure. The courts hold that such procedure must be strictly followed. The law contemplates that every duly elected, qualified, and acting public official must discharge the duties of his office. It has been well said "The State has no heart". The State or political subdivisions thereof cannot extend the same considerations of sympathy or beneficence as can be done by private individuals unless there is an express law permitting it.

Section 2971 provides that no county official must absent himself from the State for a period of more than sixty days, and for no period without the consent of the county commissioners. If he does so absent himself he forfeits his office.

Section 2988 provides that the county attorney must keep his office open for the transaction of business from nine o'clock A. M. until five o'clock P. M. continuously, every day in the year except holidays, and at any other time when business requires it.

Section 2894 of the Revised Code, as amended by Chapter 15, 1919, defines the powers of the county commissioners. By subdivision 1 it gives the county commissioners the supervision of all the county officials. It requires them to see that such officials faithfully perform their duties, direct prosecutions for delinquencies, and inspecting and

examining their reports. By subdivision 15 it requires the county commissioners to direct and control the prosecution and defense of all suits to which the county is a party. Subdivision 22 provides that the commissioners have the care of county property and the management of the business and concerns of the county in all cases where no other provision is made by law.

I do not find in the law an express provision authorizing the county commissioners to retain an attorney to discharge the work of the county and pay such attorney from the funds of the county when in fact the county has a county attorney pretending to act as such attorney and receiving the compensation provided for that office.

I am doubtful whether such expenditure of the county's funds is legal.

It occurs to me that the best manner in which this affair can be handled is by the appointment of a deputy county attorney, leaving your present county attorney in office.

Section 2963 of the Code provides: "Every county and township officer, etc., may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office, etc."

Section 3123 of the Code provides that the board of county commissioners in each county is authorized to allow the several county officers to appoint a greater number of deputies than the maximum number allowed by law, when, in the judgment of the board of county commissioners, such greater number of deputies is needed for the faithful and prompt discharge of the duties of such county officer.

Section 3128 provides the number of deputies allowed in counties of the first and second classes, and in counties of other classes such number as the commissioners may allow.

Sections 3131 and 3132 of the Code specify the amount of compensation to be allowed deputy county attorneys. These sections are amended by Chapter 222, Laws of 1919, where the compensation of deputies to the county attorney are expressly provided for in counties of the first, second and third classes. Under Section 3135 of the Code the county commissioners have the power and authority to "fix and determine the compensation allowed assistant and deputy county attorneys in their respective counties not to exceed, however, the maximum sums allowed by this act. Section 3136 of the Code provides that such salaries must be paid out of the contingent fund.

Under the circumstances, therefore, if your board is so inclined, I believe it to be the better course to appoint a deputy county attorney at such salary as the board may determine upon not to exceed the maximum allowed by Chapter 222, Laws of 1919.

Respectfully,

S. C. FORD,

Attorney General.