

No. 70

**ELECTIONS, Clerks of—OFFICERS,
Compensation of De Facto**

Held: Where irregularities or deficiencies in connection with the appointment or qualifications of election clerks occur, such persons are, if acting under color of authority, entitled to compensation.

April 4, 1941.

Mr. R. F. Hibbs
County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Hibbs:

In your letter of March 25 you inquire as to the right of compensation of general election clerks, who actually worked at such election, did not have the oath of office administered to them, signed the poll book, and cannot furnish a statement their services were at the pleasure of the election judges.

I assume no adverse claimants entitled to the position of election clerks in the particular precinct were involved and the two clerks did not forcibly or fraudulently exercise the duties of election clerks.

Section 591 of the Revised Codes of Montana, 1935, fixes the compensation of election clerks at forty cents per hour for the time actually on duty. Section 596 requires clerks to take official oath previous to votes being taken. Section 593 prescribes a method of choosing clerks and is as follows:

"593. Judges to Choose Clerks and to Serve Until Others Appointed. The judges must elect two persons having the same qualifications as themselves to act as clerks of the election. The judges continue judges of all elections to be held in their respective precincts until other judges are appointed; and the clerks of election continue to act as such during the pleasure of the judges of election, and the Board of County Commissioners must from time to time fill vacancies which may occur in the offices of judges of election in any precinct within their respective counties."

And this provision is mandatory.

It is generally held mere irregularities or deficiencies in the appointment or qualification of election officers do not render the election invalid.

Wells v. Taylor, 5 Mont. 202, 3 Pac. 255;

Hefron v. Mahoney, 9 Mont. 497, 24 Pac. 93;

Clark v. Manhattan Beach, 175 Cal. 637, 166 Pac. 806;

Webb v. Bowden, 124 Ark. 244, 187 N. W. 461;

Loop v. McCracken, 151 Wash. 19, 274 Pac. 793.

There is respectable authority to the effect that, where an election is conducted by less than the required number of officers and such deficiency was completed by the selection of others acting under color of authority, who might be considered officers de facto, the election is valid.

18 Amer. Jur. 206.

Under the facts previously set forth, it appears the two election clerks were de facto officers, acting under color of authority.

While mere intruders are not entitled to the salary, fees or perquisites of officers, yet where one who becomes an election officer de facto without fraud or force and performs the duties of the office, the compensation provided by law for such services may be recovered.

22 R. C. L., Section 321, p. 599.

It follows, therefore, the two election clerks may recover compensation at the rate provided by law for the time actually spent on duty at the election.

Sincerely yours,

JOHN W. BONNER
Attorney General