

Opinion No. 21-2849

March 4, 1921

BY: HARRY S. BOWMAN, Attorney General

TO: Mr. V. I. Alarid, Santa Fe, New Mexico.

Salary of Ousted County Assessor.

OPINION

{*29} Replying to your letter of the 7th instant, requesting an opinion as to the salary of the county assessor of Santa Fe county, in view of the holding of the district court ousting Mr. Jose Ignacio Madrid from such office and seating Mr. Marcelino A. Ortiz therein, I have to advise as follows:

At the outset, I understand that Mr. Madrid has not drawn any salary as assessor during the period that he was in office, since salaries of county officials are payable quarterly, and the first quarter for the first year of Mr. Madrid's incumbency had not yet been completed.

It is with this assumption in mind, therefore, that no salary has been paid Mr. Madrid, that this opinion is rendered; otherwise, a different holding might be necessary.

The general rule regarding the payment of officials in those cases where a contest exists regarding the title to the office appears in 22 Ruling Case Law, Section 241, p. 544, and is as follows:

"A **de jure** officer may recover so much of the salary of the office for the time during which it has been filled by a **de facto** officer, as has not been paid to such officer. Furthermore, a payment of salary to an officer after the judgment has been rendered in **quo warranto** ousting him from the office, is unauthorized and constitutes no defense to an action against the municipality for the same salary drawn by the person found to be entitled to the office."

In the case of *People vs. Brennan*, 30 Howard's Practice (N.Y.) 424, it was held that after a judgment ousting a **de facto** officer payment of salary to him by a municipal corporation was unwarranted, and was no protection against the claim of the **de jure** officer to the salary, no matter whether the salary so paid had accrued at the time of payment or not.

To like effect see:

Flypaas vs. Brown County, 6 S.D. 634.

McVeany vs. New York, 80 N.Y. 185;

From the foregoing, and many other authorities which I have examined, I am satisfied that the salary of the office of assessor, since Mr. Madrid has been ousted by a court order, cannot be paid to him.

The facts in the case presented by you are entirely different from those in the case of Wilkerson vs. Albuquerque, 25 N.M. 599, 185 Pac. 547, for in that case the salary had already been paid by the municipality to the **de facto** officer and in that case the Supreme Court of this state held that such payment was a complete defense to a suit against the municipality for the same salary by the **de jure** officer.