

OFFICERS) Payment to incumbent, ^{county judge} who holds over under action brought
) by himself in circuit court relieves county of liability
) for further payment after Supreme Court holds incumbent
) not entitled to office.

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Honorable E. W. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The following question has arisen in this office in relation to the following set of facts:

"In the election of 1948, A. W. Chilcutt was elected Judge of the Second District of the County Court of Greene County, Missouri. At a later time, there was a suit filed in which Judge Chilcutt was kept from being seated as Judge and Judge Denny Pickel continued to draw his pay even though he had not been elected. Judge Chilcutt was kept out of office for five months and three days for which he did not get paid.

"In the case of State ex rel. Chilcutt v. Thatch 221 S.W. (2) 172, it was decided that Judge Chilcutt had the right to hold this seat and that Judge Pickel never had any such right. Judge Chilcutt has never been paid for the time which he was kept out of office, and the question now is whether or not the County Court of Greene County can pay him for that salary which is due him. It appears that a judgment against Pickel is no good and Judge Chilcutt

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will never collect the unpaid salary unless paid by the County Court."

Examination of the opinion of the Supreme Court in the case of State ex rel. v. Thatch, referred to in your opinion request, reveals that Judge Pickel on November 23, 1948, after Judge Chilcutt had received the larger number of votes at the November election filed an action for declaratory judgment against Chilcutt and the county clerk praying for an injunction prohibiting the issuance of a certificate of election to Chilcutt on the ground that Chilcutt's nomination had not been in accordance with law. The trial court issued a temporary injunction enjoining the county clerk from certifying Chilcutt's name as the person elected. The Supreme Court held that the circuit court had no jurisdiction to enter any order enjoining the issuance of the certificate of election and dissolved the injunction. The court held that any objection to Judge Chilcutt's nomination must have been taken in accordance with Section 11599, Missouri R.S.A., and that in the absence of any action under said section no action could be maintained in the circuit court.

In the case of State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S.W. (2d) 357, the Missouri Supreme Court adopted the majority rule in this country to the effect that payment to a de facto officer is a defense to an action brought against the governmental agency paying the salary by a de jure officer who has been held entitled to the office. In that case the Missouri Supreme Court stated at 7 S.W. (2d) 1. c. 366:

" * * * The overwhelming weight of authority elsewhere is to the effect that payment of salary, or fees, to a de facto officer, holding under color of title, discharges the municipality from further liability for the money so paid, when suit is brought by the de jure officer. We have read every opinion on both sides of this question (a long and tedious work), and have no hesitancy in saying that such rule has support of all the well-reasoned cases. The rule is well grounded, not only on the great number

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of cases asserting it, but on the reasons assigned. Relator cannot recover the salary sought in this case under this rule."

Missouri cases have likewise held that persons holding over after the expiration of their terms pursuant to a constitutional provision such as that found in Missouri (Article VII, Section 12, Constitution of Missouri, 1945) are de facto officers. (State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S.W. (2d) 929.) Of course, in the present case Judge Pickel held over by virtue of the injunction issued by the circuit court which the Supreme Court held the circuit court had no authority to issue. However, we find no cases which distinguish between holding over in the absence of qualification of a successor for reasons not within the control of the holder of the office, and cases in which qualification is prevented by action of the holder which was the case here. The circuit court had enjoined the issuance of the certificate of election and under the rule laid down by the Supreme Court in the Gallagher case, supra, we feel that payment to Pickel discharged the obligation of the county.

The Missouri courts have recognized an exception to the rule laid down in the Gallagher case in cases where payment to the de facto officer is not made in good faith. In the case of Luth v. Kansas City, 203 Mo. App. 110, 218 S.W. 901, the Kansas City Court of Appeals held that under the facts of the case payment to the de facto officer had not been made in good faith, and, therefore, the de jure officer was entitled to recover from the city. The court in this case discussed the matter as follows at 218 S.W., l. c. 902:

"Now did the city act in good faith when it paid the salary to Folk the de facto clerk? Undoubtedly it did not. It is enough to condemn the city that, knowing the question which of the two claimants was the legal one was then pending in the Supreme Court, it undertook, on the 11th of May, 1912, to have the appeal dismissed, and succeeded in doing so; but that court on the 21st of May had its attention called to probable injustice, and reinstated

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the case. Plaintiff notified the city on May 16th that he would file a motion in the Supreme Court to set aside the dismissal, and this motion was in fact filed on May 21st, and the court shortly thereafter decided that plaintiff was the legal claimant. We find that, with this action of the city and plaintiff's objections, it, on the next day after plaintiff filed his application in the Supreme Court, paid Folk the back salary of \$1,185 in a lump sum. * * *

The court concluded at 218 S.W. 1. c. 903:

"When it is said that the city did not act in good faith when it paid Folk, it is not meant that the municipal officers took such action with evil or dishonest intent, but that with knowledge of the situation, as we have explained, after having protected itself by withholding the salary from both claimants, it withdrew that protection by assuming to decide in favor of the wrongful claimant, pending a settlement of the controversy by the court."

Of course, we have no knowledge of the facts of the present matter other than as set out in the report of the case of State ex rel. Chilcutt v. Thatch, supra. Whether or not there was any bad faith involved in the payment to Pickel would be a matter of fact.

CONCLUSION

Therefore, it is the opinion of this department that Greene County by paying salary to Judge Pickel of the Greene County Court is relieved from any obligation to make payment to Judge Chilcutt when Judge Pickel had retained the office by holding over after the expiration of his term by virtue

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of an action which he originated in the circuit court, although the Supreme Court of Missouri subsequently held that Judge Pickel was not entitled to the relief granted in the circuit court, and that Judge Chilcutt was entitled to the office of county judge.

Respectfully submitted,

APPROVED:

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RRW/feh