

**Members of State Boards, Election of to Legislature. Legislature, Election to of Members of State Boards. State Boards, Members of Elected to Legislature.**

Under the provisions of Sec. 7, Article V. of the State Constitution, members of state boards who, during their terms of office as such members, have been elected to the Legislature, are no longer members of said boards, and have no right or title to places or seats thereon, for the reason that their election to the legislature created, Ipso Facto, vacancies upon said boards.

April 12th, 1913.

Hon. S. V. Stewart,  
Governor of Montana,  
Helena, Montana.

Dear Sir:

I beg to acknowledge receipt of your letter of the 2nd instant, making inquiry as to the status of some of the members of the different boards of the state, who were elected to the Legislature last fall:

"As to whether or not they will need to resign by reason of such election and membership in the Legislature."

Art. 5, Sec. 7, of the Constitution of the State of Montana reads as follows:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office."

It will be noticed that the said section of the constitution contains two provisions, one prohibiting the appointment of members of the Legislature to various offices, the other prohibiting the holding of a seat in the Legislature by persons holding office under the United States or this state.

Two questions are raised by the language of the constitution:

First, does the holding of any prior office prohibit the person holding it from becoming a member of either house of the Legislature, absolutely; second, or does his election and qualification as a member of one house or the other vacate the office previously held by him, or act as a resignation of the previous office by him? In connection with these questions, it will be interesting to note that the various state constitutions differ quite a little in their language concerning the holding of incompatible offices. A great many of the state constitutions, such as those of Alabama, California, Florida, Iowa, Kansas, Maryland, Michigan, Nevada, etc., use such language as:

“No person holding a lucrative office under the United States or any other power, shall be eligible to any civil office of profit under this state,”

some of them, as Michigan, going so far as to put in both forms of prohibition, as “shall not hold” and “shall not be eligible.” Others, including Delaware, Illinois, Maine, Massachusetts, New Hampshire and others, use language identical with or nearly the same as that used in the Constitution of Montana, that is:

“No person shall be a member of the Legislature,” “No person shall have a seat,” “No person shall continue to hold,” etc.

Some of them make the acceptance of a second office a resignation of the first or prior office by the language in their constitution.

The differing expressions used in the various constitutional provisions are capable of and are intended to have different constructions. Those statutes using the expression, “No person shall be eligible,” are quite generally construed to mean ineligible for election as well as for holding the office; the ineligibility relating to the time of election; those using language similar to ours, namely,—

“No person shall have a seat,” “Shall be a member,” “Shall at the same time have a seat,” etc.,

are construed to mean that the person shall not hold the two at the same time, and that the disqualification relates to the time of assuming the functions of the second office.

Cushing, Law and Practice of Legislative Assemblies, Sec. 78.

It is also quite generally held that the common law rule in regard to the acceptance of a second and incompatible office by an officer applies; that is, that the acceptance of a second and incompatible office by one already an officer, ipso facto, terminates his right to the first, and that the first becomes vacant.

McCrary Elections, Second Edition, Sec. 239.

Shell's Judge v. Cousins et al., 77 Virginia, 328.

39 L. R. A. 280.

5 L. R. A. 853, Dictum.

In construing Art. 4 of Sec. 11 of the Constitution of the State of Maine, which reads:

“No person,” etc., “shall have a seat in either house during his continuance in such office,”

The supreme court of that state upon the submission of a question by the Legislature said:

Art. 4, Sec. 1, of the constitution does not declare that the holder of an office of profit under the state shall not be elected to the Legislature—shall not be eligible to election—but simply declares that he shall not have a seat in either house during his continuance in such office. Hence he need not resign his office before his election to the Legislature. It is enough if he resigns it at the time of taking his seat in the Legislature, and such resignation may only be by taking his oath or seat.”

This is put upon the ground that electors have a right to elect whom they will to any elective office and that such right must not be abridged except by express provisions of the constitution or statute and never by implication.

95 Maine, 585.

It is my opinion, therefore, that under the provisions of Art. 5, Sec. 7, of the Constitution of the State of Montana, those persons referred to in your letter, who being members of certain boards of the state, were subsequently elected to the legislature, no longer are members of the said boards or have any right or title to places or seats thereon, for the reason that by their election to the Legislature the said places upon the boards were ipso facto vacated; the definition of a civil office being assumed to be “an employment or duty which is a continuing one, which is defined by rules prescribed by law and not by contract.”

Very truly yours,

D. M. KELLY,  
Attorney General.