

**Elections—Primary Nominating Elections — Nominations
—Vacancies—Candidates.**

At a primary nominating election the Democratic party had no candidates for nomination for certain county offices. The members of that party, however, wrote in the names of various persons for said offices and said persons received the highest number of votes therefor on that ticket but did not accept the nominations thus tendered them.

Held: That the county central committee of the Democratic party had no power to make nominations of persons for said offices on its ticket on the theory that vacancies exist among the candidates, said persons by failing to accept the nominations never having been the candidates of the party for election to said offices.

Lloyd I. Wallace, Esq.,
Deputy County Attorney,
Polson, Montana.

September 26, 1930.

My dear Mr. Wallace:

You state that at the last primary nominating election there were a number of county offices for which no persons filed as candidates on the Democratic ticket; that at said election some of the voters wrote in the names of various people for these respective offices on the Democratic ticket; that such persons received the highest number of votes for said offices but that none of them accepted the nominations with the exception of the person who received the highest number of votes for the office of county treasurer; that the Democratic county central committee has nominated certain persons as the candidates of that party for these various offices, except county treasurer, upon the theory that vacancies exist.

You inquire if the committee has such power under the law and whether the persons so nominated by it are entitled to have their names printed upon the official ballot for the ensuing general election as candidates of the Democratic party for the respective offices.

The power of the county central committee to fill vacancies is found in chapter 34 of the laws of 1929, amending existing laws on the subject, and it is there provided:

“Said County and City Central Committees shall have the power to make nominations to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election when such vacancy is caused by death or removal from the electoral district, or otherwise.”

It will be observed that the power of the committee to fill vacancies arises only when a vacancy occurs among the candidates of the party, who were nominated by the primary nominating election. Therefore, three conditions must exist at the time the committee seeks to exercise its power in order to authorize its use, namely:

(a) A person must have been a candidate of the party for election to a county office at the ensuing general election as distinguished from a past candidacy for nomination by the party at the primary nominating election.

(b) Such candidacy for election to the office must have been pursuant to a nomination by the party at the primary nominating election.

(c) After the person has become a candidate of the party for election to the office something must have occurred which in contemplation of law precludes him from continuing his candidacy for the election to the office, thereby creating a vacancy in his candidacy.

At the primary nominating election a person is, and can only be, a candidate of a political party for nomination by it as its candidate for an office to be filled at the following general election. Prior to his nomi-

nation he cannot in any sense be said to be a candidate of the party for election to the office. If, prior to the nominating election, he has filed as a candidate of his party for the nomination and if he is nominated at said primary nominating election as a candidate of the party he thereupon, without any further action on his part, becomes the candidate of the party for election to the office at the ensuing general election. This is so because his act of filing and the oath taken by him at that time amount to a declaration that if nominated he will thereby become the candidate of the party nominating him for election to the office. However, a person cannot be compelled to become a candidate of a political party for an office against his wishes and consent.

Therefore, the law has provided that when a person who has not filed as a candidate of a political party for nomination but has received the highest number of votes cast by the members of a party at the primary nominating election by the "writing in" process, before he can become the candidate of the party for the office at the ensuing election he must accept the nomination in the manner provided by law, thereby in effect declaring his willingness to become the candidate of said party for election to the office pursuant to such nomination, and the fact that he does by such acceptance become such candidate. On the other hand, if he fails to accept the nomination he thereby declines to become the candidate of his party for election to the office. Obviously, the same act which prevents a candidacy for election to office from ever arising cannot be said to create a vacancy in that candidacy. There can be no vacancy in a candidacy that has never existed. The act of declining, instead of creating a vacancy in an existing candidacy, prevents the candidacy from coming into existence in the first instance.

Under the facts stated by you the Democratic party had no candidates for election to the offices in question to be filled at the ensuing general election, due to the failure of the persons to accept the nominations. There can be no vacancy among candidates where there have never been any candidates. The action of the committee amounts to making original nominations of persons as the candidates of the party for election to these offices instead of nominations of persons in substitution of original candidates of the party for the offices. As the statute prescribing the powers of the committee to fill vacancies is both a grant of, and a limitation upon, their powers, it follows that the committee exceeded its authority and said attempted nominations are invalid and the persons so selected by the committee have no right to have their names printed upon the ballot to be used at the general election as the candidates of the Democratic party.

Very truly yours,

L. A. Foot,
Attorney General.