

Opinion No. 361

**Governor — Vancancy in Office of
Governor — Lieutenant Governor,
No Vancancy Upon Succession
to Office of Governor**

HELD: Upon the resignation of the Governor the powers, duties and emoluments of the office devolve upon the Lieutenant Governor who discharges such duties in his original capacity. There is no vancancy in the office of Lieutenant Governor.

October 16, 1933.

You have submitted the following

question for my opinion: "Will you kindly advise whether the vacancy now existing in the office of Lieutenant Governor should be filled at the general election to be held in 1934?"

On the 13th day of March, the Honorable J. E. Erickson resigned as Governor of the State of Montana, and thereupon the powers, duties and emoluments of the office devolved upon the Lieutenant Governor, the Honorable Frank H. Cooney for the residue of the term, in accordance with Section 14, Article VII of the Constitution, which reads: "In case of the failure to qualify, the impeachment or conviction of felony or infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office, for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant-governor."

While your question assumes that a vacancy now exists in the office of Lieutenant Governor, it will be necessary to determine first whether a vacancy in fact does exist in that office. If no vacancy exists, the question of an appointment or an election to fill a vacancy does not arise. This question does not appear to have been presented at any time to our Supreme Court for its ruling thereon. A number of other courts in states having similar constitutional provisions have had occasion to pass upon it. An examination of these cases compels the conclusion that the Lieutenant Governor discharges the duties of Governor in his original capacity and that there is no vacancy in the office of Lieutenant Governor. This conclusion must be reached regardless of whether the Lieutenant Governor is invested with the title to the office of Governor or only with the powers, duties and emoluments of the office.

In an early California case, *People v. Budd*, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46, where the court was required to interpret a similar constitutional provision, it was said: "It will be seen that in case of a vacancy in the office of governor the vacancy is not to be filled, but the powers and duties devolve upon the lieutenant governor, who does not cease to be

lieutenant governor. Under such circumstances it would hardly be contended that when the powers and duties of the governor devolve upon the lieutenant governor the latter thereby becomes governor, and can appoint a lieutenant governor. Nor do I think it could be contended that when the president pro tempore of the senate acts as governor he could appoint a person to fill the vacancy in the office of lieutenant governor. If he could, he would then appoint himself out of office, and it would be his duty to do so."

It may be interesting to note in passing (although the question is eliminated by our holding) that the California Court, in interpreting Section 8, Article V of that State's Constitution, which is almost identical to our Section 514, R. C. M. 1921, (which reads: "When any office becomes vacant, and no mode is provided by law for filling such vacancy, the governor must fill such vacancy by granting a commission, to expire at the end of the next legislative assembly or at the next election by the people.") held that the phrase "the next election by the people" means the next election which the Constitution has provided for filling that particular office. A number of cases are cited in support of the conclusion which the court reached. See also *State v. Smith*, 35 Mont. 523, 90 Pac. 750. It may be observed further, in passing, that except for the statute quoted above, we find no other provision for filling a vacancy in the office of Lieutenant Governor or for an election for that purpose. In the absence of some law authorizing the election of a Lieutenant Governor, we doubt if an election can be held. See dissenting opinion *People v. Budd*, supra.

In Nevada, where the constitutional provision is almost the same as ours, it was held in *State v. Sadler*, 47 Pac. 450: "The gubernatorial succession is covered by the foregoing provisions. If a vacancy occurs in the office of governor, the powers and duties of the office devolve upon the lieutenant governor, but there is no vacancy created thereby in the office of lieutenant governor. The officer remains lieutenant governor, but invested with the powers and duties of governor."

In Colorado the constitutional provision is practically identical with ours. The court, in *People v. Cornforth*, 81 Pac. 871, 34 Colo. 107, the case where Governor Peabody resigned and the duties of the office devolved upon Lieutenant Governor McDonald, held the president pro tem., of the Senate could not discharge the duties of Lieutenant Governor after his term as Senator expired and another elected in his place as president pro tem., as such, discharged the duties of Lieutenant Governor.

In *State v. Heller*, 63 N. J. Law, 105, 42 Atl. 155, 57 L.R.A. 312, where Governor Griggs resigned and the president of the Senate Vorhees qualified as his successor but afterwards and before the expiration of the term for which Griggs was elected, resigned as Senator and thereupon Watkins, the Speaker of the House, qualified as Governor, it was held that the powers, duties and emoluments of the office of Governor devolved upon the latter as he was the de jure Speaker of the House, and of right as such speaker exercises the executive powers; that Vorhees, upon the resignation of Griggs, continued to be Senator and president of the Senate and that when he resigned and vacated the office of Senator, he ceased to be president of the Senate and could no longer exercise the functions pertaining to the executive department.

In Arkansas, where the court had under consideration similar constitutional provisions, the question was whether on the resignation of the Governor, the then incumbent of the office of president of the Senate succeeded to the vacated office, or whether merely as such president of the Senate the powers, duties and emoluments of the office of Governor devolved upon him while he remained president. The court in *Futrell v. Oldham*, 155 S. W. 502, said: "The result of our construction of the Constitution is that the duties of the office of Governor during a vacancy in that office, devolve upon the incumbent of the office of president of the Senate, and that a change in the incumbency of that office works a change in the performance of the duties of the office of Governor. When another president of the Senate is elected, during

a vacancy in the office of Governor, the duties of the latter office devolve upon him from the time of his election and qualification as president."

In the State of Washington, where the constitutional provision was practically the same as ours, it was held in *State v. McBride*, 70 Pac. 25, that upon the death of Governor Rogers, the Lieutenant Governor assumed the duties of Governor, that office of Lieutenant Governor did not thereby become vacant and that McBride remained Lieutenant Governor, intrusted with the powers and duties of Governor.

In Oregon, in *Olcott v. Hoff*, 181 Pac. 446, the court held that the Secretary of State Olcott, who succeeded Governor Withycombe, upon the latter's death, was not only entitled to hold both offices but also had the right to draw pay for both. The court sustained an earlier case, *Chadwick v. Earhart*, 11 Ore. 389, 4 Pac. 1180, where it was further held that after the term of Secretary of State had expired he continued to hold the office of Governor for two days before the new Governor qualified and was entitled to such pay. This ruling, however, was based upon the peculiar wording of the Constitution, which the court construed as vesting the title to the office in the individual who was the Secretary of State when the Governor died. In other words, the individual having been invested with the title of the office could not be divested of such title even though his term as Secretary of State had expired but in Oregon, in both the cases cited, it was held that the Secretary of State, during his term as such, continued to be Secretary of State, as well as Governor. The constitution of Oregon as construed by the court is in effect the same as the provision of the Constitution of the United States with reference to the succession of the Vice President to the office of President of the United States. The Vice-President upon the death of the President, holds the office of president until a successor to deceased President comes to assume the office. (*Merriam v. Clinch*, 6 Blatchf. 5, Fed. Cas. No. 9460.)

In another Washington case (*State v. Grant*, 73 Pac. 470), it was also held that where the Secretary of State suc-

ceded the Governor upon the latter's death, the office of Governor and Secretary of State were not inconsistent and that the Secretary of State was entitled to receive the salaries of both. The conclusion we have reached is the same as stated by the text-writer in 59 C. J. p. 132, Section 197: "Under constitutional provisions to the effect that, on the death of the governor, the powers and duties of such office shall devolve on the lieutenant governor, on the death of the governor and the devolution of his duties on the lieutenant governor, the latter performs the duties of governor in his original capacity, and there is no vacancy in the office of lieutenant governor."

Section 511 R. C. M. 1921 specifies in what manner an office becomes vacant before the expiration of the term of the incumbent. None of the happenings as specified in said section have occurred to cause a vacancy in the office of Lieutenant Governor, and, as we have concluded, the office does not become vacant upon the powers, duties and emoluments of the office of Governor devolving upon him upon the resignation of the Governor.

Note: See State ex rel. Lamey v. Mitchell, 97 Mont. 252.