

## Opinion No. 14-1318

September 5, 1914

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. W. C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

**GOVERNOR.**

As to power of governor to accept resignation of a member of the legislature.

### OPINION

{\*175} In your letter to me of the 29th ult., you say that sometime ago you had a conversation with me in regard to your power to accept the resignation of a member of the legislature, in which I gave you an informal opinion that you had no such power and you say you will be glad now to have my written opinion covering such a case fully.

At the time that we talked about this matter, I made a rather hasty examination of a few standard authorities, like Mechem on Public Officers, and reached the conclusion that there was nothing in your official position which authorized you to accept such a resignation. I have now given the matter more attention and will state, as briefly as possible, the result of my examination.

There is nothing in our statutes or constitution on the subject of the resignation of a member of the legislature. There was a statute originally adopted in February, 1854, one section of which (which reappears as Section 1685 of the Compiled Laws of 1897) provided that if any vacancy in the office of the members of the legislative assembly should occur within five months subsequent to the annual election, the county commissioners of the county in which the vacancy occurred should immediately notify the governor, or the presiding officer of the House should the assembly be in session, and thereupon the governor was to issue his proclamation ordering an election to be held to fill the vacancy, but if the vacancy should occur at any other time, it was to be filled at the next annual election. At that time legislative elections were held annually as the above mentioned section indicates. As far as I am aware, there is nothing else on the subject of filling vacancies in the statutes and this section does not refer to resignations. Still, it is entitled to some consideration in the attempt to answer your question as will hereinafter appear.

The constitution is equally silent as to any authority to accept a resignation, the only thing on the subject being the last sentence of Section 4 of Article IV, which reads:

"Vacancies in either House shall be filled by an election at a time to be designated by the governor."

There are some states in which the courts have held that any civil officer has an absolute right to resign his office and nothing more is necessary to create a vacancy than his own act of resigning, but the great weight of authority is against this position, and {\*176} the Supreme Court of the United States in *Edwards vs. U. S.*, 103 U.S. 471, unanimously held that in states where the common law obtains, and in the absence of express statute, acceptance is necessary to perfect a resignation. In the case of *Hoke vs. Henderson*, 4 Dev. L. 1, the chief justice of the Supreme Court of North Carolina, speaking for the court, used the following language:

"An officer may certainly resign, but without acceptance his resignation is nothing and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military; hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he cannot lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."

I am thoroughly convinced that this is a correct view of the law and that an acceptance of a resignation is necessary to create a vacancy. I will not encumber this letter by citation of authorities which are numerous.

There are authorities which hold that in the absence of any special rule prescribing to what authority a resignation should be presented, the proper authority to accept a resignation is that which has power to fill the vacancy. This is stated and approved with citation of other cases in *Fryer vs. Norton*, 67 N. J. L. 538, but this does not furnish us any satisfactory solution. The power to fill a vacancy in the office of a member of the legislature is vested in the voters of the district which would otherwise be unrepresented. It is, however, obviously impossible for the member to submit his resignation with a whole body of voters, but we might go a step farther and say that the official authority empowered to call the election may be considered as the proper one to which the resignation should be addressed and by which it should be accepted. It is the duty of the governor, under the constitution, to designate the time of the election to fill the vacancy and there would be some reason in the contention that therefore the governor should accept the resignation and designate the time for the election. The time having been lawfully designated, it would seem to be the duty of the county commissioners of the proper county, to issue a proclamation stating the object of the election and proceed with it as in the case of other elections. If the people should then elect a successor, that might be considered as equivalent on their part to an acceptance of the resignation if any such acceptance can be made by the people. This would harmonize with authorities which hold that upon presentation of a resignation to the appointing power, the appointment of a successor is equivalent to an acceptance of the resignation. As {\*177} to whether a successor so elected would be received by the

House in which the alleged vacancy had occurred, is a matter which would rest entirely with the House itself, free from any interference or control by any other department of the government.

The old statute of 1854, hereinbefore referred to, while changed conditions, would not make all of its language now applicable, yet evinces a legislative intent that the governor shall order an election through the county commissioners and is not to be entirely disregarded.

The conclusion which I reach is that the law is at best in a doubtful condition and ought to be amended by our next legislature, the attention of which should be called to the subject but my advice would be, if any such resignation is presented to you so as to indicate danger that some county or district would not be represented at the next session of the legislature, that you should assume the responsibility of accepting the resignation and fixing the day of the general election in November next as the time for an election to fill the vacancy and issue a proclamation as provided in the old statute to the county commissioners of the county or counties of the district in which the vacancy may occur, ordering an election to be held to fill the vacancy. By pursuing this course, all danger of lack of representation in the legislature will be avoided unless the House to which the new man is elected should choose to disregard the election, and without this action on your part there would probably be no election held.