

OPINION
45-180

February 19, 1945 (OPINION)

LIEUTENANT GOVERNOR

RE: May Not Cast Deciding Vote on Legislative Bills

This is in reply to your inquiry as to whether or not the lieutenant governor may vote on the passage of a bill in case the vote in the senate is equally divided.

Section 77 of the state constitution provides that:

"The lieutenant governor shall be president of the senate, but shall have no vote unless they be equally divided."

Section 65 of the state constitution provides that:

"No bill shall become a law except by a vote of a majority of all the members-elect in each house, nor unless, on its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal."

In the case of State v. Schultz (N.D.) the court, in an opinion written by Judge Christianson, referred to section 65 of the state constitution and in its discussion said, among other things, that they (the legislature) have also said that these provisions are mandatory and prohibitory. When the legislature prescribed the conditions under which legislative power should be exercised, they intended that it should be exercised in the manner prescribed. (State v. Schultz, 174 N.W. 83).

In American Jurisprudence, Vol. 49, s. 32, we found the following statement:

"When the presiding officer is given the right to cast a deciding vote in case of a tie, the decisions vary as to whether his declaration that a measure has or has not been carried is equivalent to casting his vote for or against it. According to some of the authorities, the mere declaration that the measure has been carried is equivalent to casting a vote in its favor. Other courts, however, have taken a contrary view. The fact that a statute gives a certain official the right to cast the deciding vote in case of a tie does not of itself make him a member of the legislative assembly for the purposes of ascertaining a quorum or majority or for any other purpose."

There have been numerous decisions by the courts of last resort of several states on questions similar to the one for us. In the case of State v. Gray (Nebr.) 36 N.W. 577, it was held that the right of a mayor to cast a deciding vote did not apply to a tie vote on a measure which required the approval of a majority of the members of the council to pass.

In the case of Smiley v. Commissioners, 83 S.E. 406, it was held that

a county supervisor was given the right to cast the deciding vote in case of a tie in the county-road board, of which he was not a member, he had no such right when the balloting on a measure which needed the votes of a majority of the members of the board resulted in a tie. In that case, the court said:

"As we view the statute we are considering, it in express language requires the affirmative vote of a prescribed proportion of the members of the board of supervisors***to appoint a superintendent of roads***that where there is an equal division of the vote between two candidates for the office, as is this case, the provisions of***the code can have no application, it not being a case in which the tie breaker or referee, authorized to be designated by that statute, could act, but a case in which a majority of the entire board must, by an affirmative vote, concur to elect."

The senate consists of forty-nine members. Section 65 of the constitution, to which we have referred, provides specifically that no bill shall become law except by a vote of a majority would, therefore, be twenty-five. The lieutenant governor was elected as an officer of the executive branch of the government and not elected as a senator, and could not, therefore, be considered in determining a majority of the members-elect of the senate.

Section 77 of the constitution, to which we have referred, is a general provision, while section 65 deals with a specific subject and the general rule of construction would apply here, namely, that a statute or provision dealing with a specific subject takes precedence over a general statute or provision.

In view of the clear and mandatory language of section 65 of the constitution, and the decisions to which I have referred, it is my opinion that the lieutenant governor may not cast the deciding vote on the final passage of a bill, since said section provides that no bill shall become a law except by a vote of a majority of all the members-elect in each house. The lieutenant governor is not a member-elect of the senate. Of course, on all other questions in parliamentary procedure in the senate, the lieutenant governor would have the right to vote in case the vote should be equally divided.

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