Opinion No. 15-1492

March 31, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Hon. Edward A. Mann, Albuquerque, New Mex.

As to the resignation of a member of the house of representatives.

OPINION

*{*73}* I have your letter of the 29th inst. and I wish very much that I could agree with you that the fact that your resignation as a member of the House of Representatives has been filed with the Secretary of State by the Governor without either accepting or refusing to accept it, has the effect of a completed resignation. There are several cases which hold that the presentation of a resignation to the authority empowered by law to fill a vacancy, has the effect of creating a vacancy, although there has been no formal acceptance. Our difficulty here is that there is no power to fill the vacancy except that lodged in the people, and there has been no legislation on the subject as there might properly have been to provide when a resignation shall become complete or by whom it should be accepted. I doubt very much if any similar condition can be found in any other state. There are cases which hold that the appointing power is the one to which a resignation should be addressed and might properly be accepted by that authority, even in the absence of any statutory provision on the subject.

I have re-examined the cases which you cited in your previous letter and I believe that they are practically all that can be found which tend at all to support the idea that an officer may terminate his official existence without any aid from an acceptance of the resignation. The most recent of any of those decisions is the case of State vs. Beck, 24 Nev. 92, decided in 1897, which, while following the earlier Nevada case of State vs. Clark, 3 Nev. 566, decided in 1867, really decides nothing more than that a resignation could be withdrawn before acceptance. The earlier Nevada case did distinctly hold as to the office of a United States district attorney that the officer could resign at will without any regard to the will or convenience of the appointing power. In that case, however, there was a power which could accept the resignation and the resignation was sent to the proper place, -- that is to the President of the United States.

In the case of State v. Fitts, 49 Ala. 402, decided in 1873, all that was really decided was that a resignation when transmitted to the proper authority to receive it, could not be withdrawn, although the court says, obiter, that nobody is compelled to hold office and that anyone "may retire at his mere will." There is no discussion of reasons for this, nor is there in the case in 3 Nevada.

In Leech v. State, 78 Ind. 570, decided in 1881, the resignation was presented to the Common Council and was actually accepted.

In Gates v. Delaware County, 12 Ia. 405, decided in 1861, while the court indicated that an officer might resign at will, yet in that case the resignation was submitted to the officer authorized to receive it, and what happened was held to be a virtual acceptance.

*{*74}* In State v. Lincoln, 4 Neb. 260, decided in 1876, it was held that by a resignation in May, the resigning person then ceased to be state engineer although the resignation was not accepted until December.

The case of Olmstead v. Dennis, 77 N.Y. 378, decided in 1879, follows the earlier case of Gilbert v. Luce, 11 Barb. 94, and those cases show that they were based entirely upon statutory authority which made explicit provision about resignations.

The foregoing are all of the cases to which you invited my attention except one, and that one is the only one which has any reasoning to support the proposition that the changed conditions in the state where it was rendered made a resignation self executing. That case is Reiter v. State, 51 Ohio State, 74, which was decided in 1894. The reasoning of that case, however, was based upon a consideration of the question, "Whether the common law rule as to resignations shall govern in this state, or whether that rule has been abrogated by our legislation, or is inconsistent with our institutions." The court held that the common law doctrine seemed inconsistent with the statutes as well as with the practical treatment of official positions. The opinion goes on to consider a variety of statutory provisions which it urges indicate that the common law rule had been really abrogated, although there was no statute expressly changing the common law in this respect. Those provisions will be found set out at pages 79 to 81 of the report. One was a statute imposing a fine of $ 2.00 on a person for neglecting or refusing to serve in an office to which he had been elected or appointed, and the court says that this recognizes the power if not the right of a citizen to refuse to hold such office. It does not appear what kind of an office it was. The next, of a more general character, provided that a person elected or appointed to an office who failed to give bond, should be deemed to have refused to accept the office and the same should be considered vacant. Another provided that a judge failing to transmit a certificate of his having taken the oath of office, should be deemed to have refused the office and it should be considered vacant. The next is as to judges removing residence out of the state, circuit or county, which should be considered a resignation, creating a vacancy to be filled according to law. Another provided that the absence of a county commissioner from his county for six months should be deemed a resignation of his office, and there is cited a like statutory provision as to the removal of a municipal officer beyond the limits of the corporation. The effect of these statutes appear to be that a failure to observe the law or some default, would create a vacancy in the office and the fact that the statutes speak of these things as being considered as resignations, does not appear to my mind to be at all convincing. The Ohio court, however, reached the conclusion from these statutes that a clear intention was evinced that acceptance should not be necessary to the validity of a resignation except as to members of the general assembly and persons appointed to certain positions of trust.

I believe that there are some similar statutory provisions in New Mexico, but I am unable to see much force in the suggestion that there is thereby created a general abrogation of the common *{*75}* law rule that resignations, to be effectual, must be accepted by some duly authorized power.

On the other hand, we have the strong and distinct opinion of the supreme court of the United States in the case of Edwards v. U. S., 103 U.S. 471. With most courts and the great majority of the profession, the authority of the supreme court of the United States would outweigh a great number of state authorities unless we found one in our own state. The few that can be found opposed to the view of the supreme court of the United States do not appear to me to be at all satisfactorily reasoned or based upon any principle of law. In the Ohio case above referred to, at page 78, a number of cases are cited in support of the same position, some of which I have not examined. The first one there cited of Hoke v. Henderson, 4 Devereux, 29, contains a remarkably clear and strong statement of the general rule and its reasons. Some more recent cases which seem to me to be instructive and convincing are: People v. Williams (Ill.), 24 L.R.A. 496; Clark v. Board, 112 Mich. 657; Fry v. Norton, 67 N.J.L. 565; State v. Kitsap County (Wash.), 12 L.R.A.N.S. 1010.

With the authorities in this condition, I cannot believe that our courts would hold that the resignation of an office can be made final and effective by the mere act of resigning. The language of the court in the North Carolina case (pages 29-30) is an admirable statement of the direct rule applicable to the holding of public office and resignations from it, and in effect, is a refutation of the specious argument in the Ohio case as the court cites the existence of several statutes similar to some of those referred to in the Ohio opinion in support of a conclusion exactly the opposite from that which the Ohio court reached.