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SYLLABUS:

In the absence of an actual relinquishment of office prior to the effective date stated in a prospective resignation, no vacancy occurs in the office of clerk of courts by reason of the presentation of a prospective resignation prior to the effective date thereof.

Columbus, Ohio, October 15, 1963

Hon. John D. Starn  
Prosecuting Attorney  
Sandusky County  
Fremont, Ohio

Dear Sir:

Your letter of September 19, 1963 recites the fact that the clerk of courts of Sandusky County recently announced his resignation from that office, effective January 1, 1964, and makes reference to Section 305.02, Revised Code, which provides for the filling of vacancies in certain offices including the office of the clerk of courts. You then request my opinion on the following question:

“When does the vacancy occur? Does it occur on January 1, its announced effective date, or is there now a vacancy in the limited, technical sense that the County Central Committee can meet, select the successor in office, and thereby accomplish a smooth transition from one office holder to the next.”

The question of the effect of a resignation of a public officer was considered by the Supreme Court in *Reiter v. State ex rel.*, 51 Ohio St., 74. That case involved a resignation presented on February 21, 1893, to be effective March 1, but not accepted until March 7, 1893. In that case the court determined that the common law doctrine that a resignation of an office does not take effect, so as to create a vacancy, until accepted by the proper authority was inconsistent with our statutes and our practical treatment of official positions. This case established the principle that, in the absence of a specific statute controlling resignation from an office, acceptance is not necessary to the validity of a resignation, and a resignation may be prospective in nature.

The rule in Ohio seems fairly summarized at 82 A.L.R. (2d), 753, to the effect that two elements are necessary to create a vacancy in office by resignation. These are an intention on the part of an office holder to relinquish a portion of the term of office and an actual relinquishment thereof. A prospective resignation may be withdrawn before its stated effective date providing no act of actual relinquishment has preceded the withdrawal. Such a withdrawal is not precluded by a prior acceptance of the resignation where no act of relinquishment has occurred.

Based upon the foregoing it is my opinion and you are advised that, in the absence of an actual relinquishment of office prior to the effective date stated in a prospective resignation, no vacancy occurs in the office of clerk of courts by reason of the presentation of a prospective resignation prior to the effective date thereof.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General