

4272.

ELECTION LAW—FAILURE TO DATE SIGNING OF INITIATIVE PETITION INVALIDATES SUCH SIGNATURE—FAILURE TO STATE WARD AND PRECINCT INVALIDATES SUCH SIGNATURE—UNREGISTERED PERSON MAY NOT SIGN SUCH PETITION.

SYLLABUS:

1. *The failure to place the date of signing on an initiative petition for a constitutional amendment invalidates the signature of such petitioner.*
2. *Where the signer to such a petition resides in a municipality, the failure to state thereon any information as to the ward and precinct in which his residence is located invalidates the signature of such petitioner.*
3. *A signature to such a petition of an elector residing in a registration municipality or precinct who is not registered is violative of the provisions of sections 4785-34 and 4785-177, General Code, and is therefore invalid.*

COLUMBUS, OHIO, April 23, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"I wish to submit the following matter to you for consideration and will appreciate your opinion relative to same as soon as you find it convenient to favor us.

Article II, Section 1g of the Constitution, in part provides that,  
 \* \* \* \* \* Each signer of any initiative \* \* \* \* \* petition must be an elector of the state and shall place on such petition, after his name the date of signing and his place of residence. \* \* \* \* \* A resident of a municipality shall state \* \* \* \* \* the street and number, if any, of his residence and the ward and precinct in which the same is located. \* \* \* \* \*

The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.'

Section 4785-177 of the Ohio General Code provides in part as follows:

'Each signer of any such initiative \* \* \* \* \* petition must be a qualified elector of the county, and a registered voter if he resides in a registration city or precinct, and shall place on such petition after his name the date of signing and his place of residence stating the street and number, if any, and the ward and precinct in which same is located, if a resident of a municipality. \* \* \* \* \*'

In reference to the above, I wish to submit the following queries:

- (1). Does failure of a petitioner to place the date of signing on an initiative petition for a constitutional amendment, invalidate the signature of such petitioner?
- (2). Does failure of a petitioner, residing in a municipality, to state on an initiative petition for a constitutional amendment any information as to the ward and precinct in which his residence is located, invalidate the signature of such petitioner?

(3). In view of the constitutional provisions regarding limitations and restrictions, is a signature of an elector residing in a municipality, but who is not registered, invalid, when placed upon an initiative petition for a constitutional amendment?

Appreciating the consideration you will give this matter, let me remain,"

The requirements as to the placing of the date of signing and the residence of a signer of an initiative or referendum petition contained in section 4785-177, General Code, are identical with the requirements contained in article II, section 1g of the Constitution.

Statutory provisions are sometimes regarded as directory merely; especially is this true where they relate to an immaterial matter and where compliance is a matter of convenience rather than of substance. However, constitutional provisions are generally mandatory. In the case of *People vs. Lawrence*, 36 Barb. 177, it is said that:

"It will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative."

In Cooley's Constitutional Limitations, 8th ed., page 159, the following is said:

"But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. \* \* \* \* \*

There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application."

In the case of *State, ex rel., vs. Hildebrant*, 93 O. S. 1, our Supreme Court said:

"The language found in section 1g of Article II of the Constitution, is too plain, positive and direct to require construction by this or any other court."

In construing a section of a charter of the city of Columbus with reference to the requirements of nominating petitions for municipal offices, which section provided that "each signer to a petition shall sign his name in ink or indelible pencil," the court said in the case of *State, ex rel., vs. Lloyd*, 93 O. S. 20:

"Such provision controls and that requirement must be regarded as mandatory, and therefore signatures not in compliance therewith need not be and should not be considered or counted in determining the sufficiency of a nominating petition."

In the case of *Thraikill vs. Smith*, 106 O. S. 1, the court evidently regarded the provisions of section 1g of article II of the Constitution mandatory, for, in holding that signatures on an initiative petition written with indelible ink were valid, it said:

"The constitutional provision requiring construction is found in Section 1g, Article II, as follows: 'The names of all signers to such petitions shall be written in ink, each signer for himself.' The petition alleges the insufficiency of the petitions on the ground that the greater number of signatures was written in indelible pencil. The question therefore is squarely presented whether the use of indelible pencil is a compliance with the above-quoted provision of the constitution. The demurrer to the petition admits the truth of this allegation of the petition, and this court in order to find the petition sufficient must therefore not only determine that indelible pencil is ink but is also required to take judicial notice of that fact."

In the case entitled *In re Referendum Petition*, 18 N. P. (N. 5) 140, it is held that it is essential to the validity of a signature that the date of signing and the residence of the signer be placed opposite the signature. Whether the failure to give the ward and precinct in which the residence of the signer to such a petition is located would be fatal is not definitely decided by this case, but the opinion does say this:

"If the residence of the person purporting to sign said petition, and the date of the signing, do not appear upon the parts of said petition filed, and is not complete in the sense that his residence as set out in the petition can not be definitely ascertained, then I am of the opinion that this objection should be sustained, and that the 569 names should be taken from the parts of the petition upon which they appear. I am inclined to think, however, that if the residence is not set out in complete detail, yet if from the information set out opposite the signature the residence of the signer can be reasonably gathered and ascertained, the objection would not be well taken."

Section 4227-4, General Code, with reference to municipal initiative and referendum petitions, contains practically the same requirements. In the case of *Hocking Power Company vs. Harrison*, 20 O. A. 135, the signers of a referendum petition stated in the body of the petition that they were electors of the city of Wellston, Ohio, and after their names complied with all the requirements as to street number, ward and precinct, but they did not place the name of the city after their names. The court held the petition valid because it appeared on its face that the signers were electors of the city. As to the other requirements, the court said:

“The legislative purpose as appears by Section 4227-4 is to require the persons signing petitions to place upon the same their residences, including street and number, ward and precinct, to make it convenient as well as possible to investigate whether such persons are electors of the municipality at the time of signing. All this information appears upon the petition here in controversy. \* \* \* It is apparent why the legislature should require the residence, including street and number, ward and precinct, to appear on the referendum petition, \* \* \*.”

Some states regard provisions with reference to the giving of the residence of a signer of an initiative or referendum petition directory. In the case of *Osborn vs. Board of Supervision*, 27 Cal. App. 85, the following is held:

“The requirement that the signers of a referendum petition shall give after their signatures the places of their residences by street and number is for the convenience and aid of the clerk in finding the names in the great register, and such a petition is not insufficient by reason of the failure of some of the petitioners to give the places of their residences by street number where it is sufficient for the clerk's information, as the omission in such case is a mere irregularity and could result in no prejudices.”

And in the case of *Iey vs. Dominguez*, 299 Pac. 713 (Cal), the failure of signers of a petition for referendum of an ordinance to add precinct numbers opposite their names was held not to invalidate the signatures. The court in this case recognized the fact that some states hold such provisions mandatory and names Ohio as one of such states, citing the case of *Ohio Valley Electric Railroad Company vs. Hagerty*, 14 O. A. 398, which holds that the provisions of section 4227-4, General Code, with reference to municipal referendum petitions, are mandatory.

In the case entitled, *In re. Referendum Petition No. 3*, 85 Okla. 117, the law required the post office address and residence opposite each signature on the referendum petition, and it was held that if the procedure followed was such that the signers could be traced to determine their qualification to sign the petition, it was a substantial compliance with the law. However, in the case of *In re. Referendum Petition No. 35*, 75 Okla. 47, names on a referendum petition which did not give the residence of the signers and those which gave the street address and not the city were disregarded. Moreover, in Oklahoma the statute contains this provision:

“The procedure herein prescribed is not mandatory, but if substantially followed will be sufficient.”

Oregon seems to hold such provisions directory but there the statute provides that:

"The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors." See *State, ex rel., vs. Olcott*, 67 Ore. 214.

In the case of *Buhol vs. Beverly*, 89 N. J. L. 378, the following is held:

"Where in cities governed by a commission form of government \* \* \* it is sought to have an ordinance passed under the provisions of the statute relative to the initiative, the procedure provided by the statute for petitioning for such ordinance must be strictly followed. \* \* \* Each signer must add to his signature his place of residence, giving the street and number."

In *Morford vs. Pyle* 53 S. D. 356, it was held that the insertion of a signer's residence, business, post office address and date of signing are equally as important as the names of the signers themselves. The court said:

"These various acts \* \* \* are all placed on the same footing by the legislature; so that the insertion of these dates by the signer \* \* \* are just as important and as much required by the law as the names of the signers themselves."

To the same effect is the case of *O'Brien vs. Pyle*, 214 N. W. 623 (S. D.).

In the case of *Brooks, et al., vs. Secretary of Commonwealth*, 153 N. W. 322 (Mass.), it is held that the provisions of the Constitution with reference to initiative petitions are mandatory.

In *Thompson, et al., vs. Vaughan*, 192 Mich. 512, it was held that:

"Every provision of the Constitution as to initiative and referendum is mandatory, and requires that every safeguard against irregular and fraudulent exercise be carefully maintained."

The court said:

"It is required by the constitution that: 'Each section of the petition shall bear the name of the county or city in which it is circulated' and also that: 'Each signer thereto shall add to his signature his place of residence, street and number in cities having street numbers, and his election precinct.' The evident purpose of these provisions is to prevent duplication of signatures, and the fraudulent use of the referendum by persons who are not electors. And to make these results more certain it is required that the sections circulated in any county or city shall be signed only by electors residing in such county or city. To secure the results aimed at by the Constitution each of these requirements must be strictly observed. It cannot be inferred that a section was circulated in a certain county or city from the fact that a majority, or all, of the signers gave their residence as in that county or city. Nor can it be inferred that the signers resided in a certain county or city from the fact that the section was circulated in such county or city. To permit either inference would defeat the object of the constitutional

provisions. The place of circulation and the place of residence must each be shown by itself on every section. And the signatures cannot be counted on a section which does not show where it was circulated, nor can a signature be counted on any section unless it is followed by the signer's residence and voting precinct."

In Vol. II, page 1748, of the Attorney General's Opinion 1915, the following is said:

"The further information as to place of residence is just as essential to certainty of identity as is the name of a signer and in every case indispensable in determining the qualification of persons, whose names appear upon the petition, to sign the same.

In reference to the ward or precinct of those voters who reside in cities, it might be said that if the street and number be stated, the board of elections would thereby have knowledge of the ward and precinct. To this it may be said that this information is not intended solely for the use of the deputy state supervisor of elections, and in the adoption of this provision of the constitution, the people have chosen to place upon the signer the obligation of the responsibility of setting forth the required information correctly, and it is no part of the duty of the board of deputy state supervisors of elections to make any correction or alteration, or to undertake to harmonize any inconsistencies therein. It is not sufficient that as a matter of fact a signer lives at a certain number, street, ward and precinct of a given city, but that his signature upon a petition be sufficient and valid, each and all of these matters must there correctly appear in the prescribed form.

The authority for initiation and referendum is founded solely upon the petition and upon the face of the same must that authority correctly and regularly appear without correction or alteration by a party other than the signer."

The pertinent part of section 1g of article II of the Constitution provides

"Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself."

As was said by the Supreme Court, this language is clear and positive. These provisions are as mandatory as language can make them. The requirement that the names of the signers to such petition shall be in ink has been held by the Supreme Court to be mandatory, and I do not know by what rule of construction the other requirements, the language of which is just as mandatory, could be held directory merely. The constitution clearly requires to be placed on such petitions the date of signing, and in case of a resident of a municipality the

street and number, if any, of his residence and the ward and precinct in which the same is located. Section 4785-177, General Code, is equally clear. It might also be noted that the form of such petitions prescribed by section 4785-176, General Code, provides separate places for the street and number and ward and precinct after the signature of each signer.

Answering your first two questions, I am of the opinion that:

1. The failure to place the date of signing on an initiative petition for a constitutional amendment invalidates the signature of such petitioner.

2. Where the signer to such a petition resides in a municipality, the failure to state thereon any information as to the ward and precinct in which his residence is located invalidates the signature of such petitioner.

I assume that by these inquiries you do not mean to raise the question as to whether these matters may be placed upon such petitions by one other than the signer himself. In the case entitled *In re Referendum Petition*, 18 N. P. (N.S.) 140, Judge Estep of the Common Pleas Court of Cuyahoga County has held that such information need not be placed thereon by the signer himself. The opposite conclusion, I am informed, was reached by Judge H. W. Coultrap of the Court of Common Pleas of Vinton County in an unreported case. This office has previously held that this information must be placed on the petition by each signer. Attorney General's Opinions for 1913, Vol. II, page 1356; 1915, Vol. II, page 1749; 1915, Vol. II, page 1817.

Of course, where the board of elections of a county has determined signatures of a petition to be sufficient and a protest against such findings of the board has been filed with it, the duty of determining the sufficiency or insufficiency of such signatures is imposed by section 4785-179, General Code, upon the Court of Common Pleas of that county, and the law as to what constitutes a sufficient signature may vary in different counties in the absence of a decision thereon by the Supreme Court.

As to your third inquiry, section 4785-177, General Code, specifically provides that each signer of such petition who resides in a registration city or precinct must be a registered voter. Section 4785-34, General Code, also provides in part:

"No person residing in any registration precinct shall be entitled to vote at any election, or to sign any declaration of candidacy, nominating, initiative, referendum or recall petition, unless he is duly registered as an elector in the manner provided herein."

Therefore, if a signer of such a petition who resides in a registration city or precinct is not a registered voter, his signature would not be valid.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*