

694.

REFERENDUM—INSUFFICIENCY OF SIGNATURES TO INITIATIVE  
AND REFERENDUM PETITION.

SYLLABUS:

*Under the provisions of Section 5175-29i, General Code, a board of deputy state supervisors of elections of a county, in order to establish the insufficiency of signatures to an initiative or referendum petition is required to file a petition therefor in an action before the court of common pleas of such county which action must be brought within three days after serving the notice to the person or persons mentioned in the statute and said board may not proceed to establish the insufficiency of signatures independently of bringing such action.*

COLUMBUS, OHIO, July 6, 1927.

HON. GEO. E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

“The supervisor of elections of this county tells me that the chiropractors have submitted to the Board of Elections their petition for a State Board of Chiropractors and says that a number of the signatures are insufficient, which insufficiency of signatures the chiropractors do not deny. Now the supervisor of elections does not know whether it will be necessary to go before the Court of Common Pleas of this county to test the sufficiency of these signatures as is required by the statutes, since the chiropractors are not denying the insufficiency of said signatures. At your convenience, if you can throw a little light on this matter, I would appreciate it very much.”

Section 5175-29i, General Code, provides as follows:

“Petitions open to public inspection. As soon as the board of deputy state supervisors of elections of a county receives the parts of the petitions transmitted by the secretary of state, it shall keep the same open to public inspection until the time it is required to return the same to the secretary of state.

Comparison of signatures and report to secretary of state; procedure by board when signatures insufficient.—In any county containing a city or cities wherein a general registration of voters is required by law, the board of deputy state supervisors of elections of such county shall carefully compare the names of the electors who signed the parts of the petition and who reside in such city, or cities, with the registration lists. If any names appear on the parts of the petition which are not upon the registration lists, such board shall, unless satisfied that the petitioner in question is an elector of said county and qualified to sign the petition, make a note thereof in its report to the secretary of state. It shall also scrutinize all parts of the petition whether from a city or other political subdivision within the county, for repetition of signatures, illegal signatures and for the omission of any of the formal or other requisites set forth in the constitution. If said board shall find any signature or signatures insufficient, it shall make a note opposite such signature or signatures and to that effect notify the person or persons who solicited such signatures, or other person or persons interested in the circulation of

the part of the petition containing such signatures, of the insufficiency of the same.

Hearing to establish insufficiency of signatures.—The board of deputy state supervisors of election of said county shall proceed to establish the insufficiency of such signatures in an action before the court of common pleas of such county, which must be brought within three days after the aforesaid notice is served and heard forthwith by the judge of said court, whose decision in the case shall be final. In counties having more than one judge of the court of common pleas, it shall be the duty of the presiding judge to designate the judge before whom such action shall be brought. If the signatures are adjudged sufficient they must be included with the others by the board of deputy state supervisors of election of the county; if they are found insufficient they shall not be so included.

Time within which insufficiency shall be proved and additional signatures filed.—The petition and signatures upon the parts of the petition, properly verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election their insufficiency shall be proved, as herein provided, and in such event ten additional days shall be allowed by the secretary of state, after such petition or parts of petition have been returned, for the filing of additional signatures to such petition.

When petition must be returned to secretary of state; certification.—Within twenty-five days after the date when the parts of the petition were transmitted to it by the secretary of state, but not less than fifty days before the election, said board shall return the parts of the petition to the secretary of state, with a certification of the total number of sufficient signatures thereon. The number so certified shall be used by the secretary of state in determining the total number of signatures to the petition, which he shall record and announce. The signatures to the petition and parts of the petition, when so certified, shall be in all respects sufficient."

The above mentioned section was passed in its present form in 1915 (106 v. 296), following the decision of the Supreme Court in the case of *State vs. Graves*, 90 O. S. 311. The legislature also in 1915 repealed Sections 5175-29j and 5175-29l which sections gave to the secretary of state authority to examine into and determine the sufficiency of petitions.

Since the decision of *State vs. Graves*, supra, and the enactment of Section 5175-29i, supra, the secretary of state as state supervisor of elections has been without power to determine the sufficiency or insufficiency of a referendum petition. The above mentioned section clearly outlines a course of procedure to establish the insufficiency of signatures to petitions.

In the case of *State ex rel., McCrehen vs. Brown, Secretary of State*,<sup>1</sup> 108 O. S. 454, the second branch of the syllabus reads as follows:

"By virtue of the provisions of Section 5175-29h, General Code, it is the duty of the secretary of state immediately to transmit the parts of such petition, upon the same being filed in his office, to the boards of deputy state supervisors of elections in the various counties from which there appear names of electors on the parts of said petition, and such duty is mandatory."

On page 457 the court in its opinion said:

"After the decision of the *Graves case*, the next succeeding session of the General Assembly repealed both those sections, thereby taking away from the secretary of state the power to hear and determine such matters, and also the

power to subpoena and administer oaths to witnesses. The force and effect of the *Graves case* is entirely lost by reason of the statute upon which it was based having been repealed. The Legislature, acting under the power expressly conferred by the Constitution, having repealed those sections so soon after the decision of the *Graves case*, it must be presumed that it was thereby intended to counteract the force and effect of that case.\* \* \*

At the same time the General Assembly amended Section 5175-29i. The amendment to that section required that the boards of deputy state supervisors of elections, in the several counties from which parts of such petitions were obtained, should examine the same, and that if any signatures were found insufficient a notation should be made to that effect and notice given to the person who solicited such signature, or other person or persons interested in the circulation of that part of the petition, and that the board of deputy state supervisors of elections of that county should proceed to establish the insufficiency of such signatures in an action before the court of common pleas of such county. That section contained this further provision, defining the duties of the board of deputy state supervisors of elections in the various counties:

*'It shall also scrutinize all parts of the petition, whether from a city or other political subdivision within the county, for repetition of signatures, illegal signatures and for the omission of any of the formal or other requisites set forth in the constitution.'*

That section further provided that after action by the board of elections, and after a hearing, if any, before the court of common pleas, 'said board shall return the parts of the petition to the secretary of state, with a certification of the total number of sufficient signatures thereon. The number so certified shall be used by the secretary of state in determining the total number of signatures to the petition, which he shall record and announce. The signatures to the petition and parts of the petition, when so certified, shall be in all respects sufficient.'

The amendments made in 1915 (106 Ohio Laws, p. 295), to Section 5175-29i must be considered in conjunction with the fact of the repeal of Sections 5175-29j and 5175-29l, and the conclusion is thereby further supported that it was the legislative intent that the secretary of state should no longer have any power to hear and determine the sufficiency of referendum petitions until after such petitions are returned to him from the counties. Even then the statutory power conferred in the last paragraph of the foregoing amended section lies 'in determining the total number of signatures to the petition, which he shall record and announce.'

It may be admitted that the statutory power conferred upon the courts of common pleas does not specifically reach to an inquiry into the sufficiency of the affidavits to the parts of the petitions, but inasmuch as all inquiries into the sufficiency of the petitions must be made in the several counties, leaving to the secretary of state only the power of mathematically determining the totals, and inasmuch as all such inquiries are judicial in their nature, it is evident that the legislature intended that such determination should be made by the court of common pleas. In deciding this controversy the court should look to the substance rather than the form, and surely the substantial element of a referendum petition consists in the signatures. The affidavits of the solicitors are formal. These 'formal and other requisites set forth in the Constitution' are important and must be observed, but we are of the opinion that the determination of the formal and other requisites must be made in conjunction with the determination of the substantial elements, to wit, the signatures."

Specifically answering your question, it is therefore my opinion that after the board of deputy state supervisors of elections has made the preliminary investigation contemplated by the statute above mentioned "it shall make a notation opposite such signature or signatures and to that effect notify the person or persons who solicited such signatures, or other person or persons interested in the circulation of the part of the petition containing such signatures, of the insufficiency of the same" and that the board of deputy state supervisors of elections of said county shall then "proceed to establish the insufficiency of such signatures *in an action before the court of common pleas of such county*" which action must be brought within three days after the notice above mentioned has been served.

It is also my opinion that the board of deputy state supervisors of elections is without authority to proceed to establish the insufficiency of such signatures without bringing the action therefor in the common pleas court of such county, as provided in said Section 5175-29i, General Code.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

695.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE SAMUEL A. ESSWEIN HEATING & PLUMBING COMPANY, COLUMBUS, OHIO, TO CONSTRUCT PLUMBING, HEATING AND VENTILATING IN AUDITORIUM BUILDING, OHIO UNIVERSITY, ATHENS, OHIO, AT AN EXPENDITURE OF \$26,679.00.

COLUMBUS, OHIO, July 6, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways & Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, for and on behalf of the Board of Trustees of Ohio University, Athens, Ohio, and the Samuel A. Esswein Heating and Plumbing Company, Columbus, Ohio. This contract covers the construction and completion of the Plumbing, Heating and Ventilating of the Auditorium Building on the campus of Ohio University, and calls for an expenditure of twenty-six thousand six hundred and seventy-nine dollars (\$26,679.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated sufficient to cover the obligations of the contract. You have also submitted a personal contract bond in a sum sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans and specifications were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,  
EDWARD C. TURNER,  
*Attorney-General.*