

1203.

REFERENDUM PETITION—WHEN FILED WITH SECRETARY OF STATE—DUTY SAID SECRETARY TO ASCERTAIN VALIDITY—STATUS UPON EXAMINATION AS TO SIGNATURE: BLACK OR COLORED PENCIL; NOT SIGNED BY CIRCULATOR; FAILURE NOTARY TO PROPERLY SIGN; FAILURE CIRCULATOR TO SIGN AS TO MONEY, IF ANY, RECEIVED FOR CIRCULATION; DIFFERENT HANDWRITING; DATE; PARTY WHO EXECUTED CIRCULATOR'S AFFIDAVIT: CIRCULATOR NOT PRESENT: SIGNATURES THOSE WHO DENY THEY SIGNED—CONSTITUTIONAL REQUIREMENTS AS TO NUMBER OF SIGNATURES.

SYLLABUS:

1. *When a petition is filed with the Secretary of State within ninety days after any law shall have been filed by the Governor in the office of the Secretary of State, ordering that such law be submitted to the electors of the state for their approval or rejection, it is the duty of the Secretary of State to ascertain whether or not such petition contains the required number of signatures valid on the face thereof and in so doing he shall reject (a) the names of all signers written in black or colored lead pencil; (b) all signatures which appear on a part petition, where the affidavit attached to said part petition was not signed by the circulator thereof; (c) all signatures which appear on a part petition where the notary failed to sign his name on the circulator's affidavit; (d) all signatures which appear on a part petition, where the circulator failed to sign his name on the statement of "what money, if any, he received for circulating the petition."*

2. *With respect thereto, however, the Secretary of State may not reject and must consider valid (a) all signatures which appear on a part petition where the signature on the circulator's affidavit is in different handwriting than that on the statement with respect to moneys received by the circulator; (b) all signatures which are dated later in point of time than the date of the circulator's affidavit; (c) the signatures of persons signing, who claim that the part petition was not presented to them by the person who executed the circulator's affidavit; (d) the signatures of persons signing who claim that the circulator was not present when they signed the part petition; (e) the signatures of all persons who claim they did not sign any petition.*

3. *If the total number of signatures remaining, after such rejection, is less than the number required by the constitution, the Secretary of*

State shall not transmit to the various boards of elections such petition or any parts thereof.

COLUMBUS, OHIO, September 16, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter of September 15, which reads as follows:

"There has been filed in this office a referendum petition, in accordance with Section 1g of Article II of the Constitution and Sections 4785-175 et seq. of the General Code. There have been presented to this office on said petition 146,347 signatures on several part petitions. The required statutory number is 144,773. The required number of signatures in the statutory number of counties has been complied with.

In examining these part petitions, before transmittal to the several boards of elections, we have found some of the petitions wherein—

1. The signature of the petitioners are in black or other colored lead pencils.

2. The circulator failed to sign the required circulator's affidavit.

3. The notary public did not sign his name on the circulator's affidavit.

4. The circulator failed to sign his name on the statement of 'what money, if any, he received for circulating the petition.'

5. The signature of the circulator and statement, and the circulator's affidavit are obviously in different handwriting, although in some instances, the spelling of the circulator's name is the same in both cases.

6. The date of the circulator's affidavit is in some instances prior to the date that some persons signed the petition and entered the date of signing opposite their signature.

7. Statements have been filed with us wherein persons claim that the said part petition was not presented to them for signature by the person who executed the circulator's affidavit.

8. Statements have been presented to us wherein the petitioner claimed that the petition was left at some location and that the circulator was not present when the petitioners signed the part petition.

9. Statements have been submitted to us wherein a person claims that he did not sign any petition.

In view of the constitutional and statutory provisions and the language contained in *State ex rel. Gongwer v. Graves*, 90 Ohio State, 311, *State ex rel. McCrehan v. Brown*, 108 Ohio

State, 454, and the 1927 Opinions of the Attorney General, 856, does the Secretary of State have any power to pass upon the sufficiency or insufficiency of these petitions before transmittal to the boards of elections wherein the conditions enumerated above, are apparent on several part petitions?

If the Secretary of State is possessed with such power, may he refuse to transmit these apparent defective part petitions and deduct the signatures contained therein from the total originally filed."

"To the questions contained in my letter to you of even date, I desire to add the following:

If in your opinion the Secretary of State has the power to consider the conditions enumerated in my letter and reject part petitions or signatures thereon, would he then be required to transmit to the boards of elections the remaining part petitions, if the total number of signatures thereon is less than the required statutory number?"

I shall consider, first, the question contained in your supplemental request, which may be briefly stated as follows: Is the Secretary of State required to transmit to various boards of elections the parts of a referendum petition, upon the same being filed with him, if it is apparent from the face thereof that the number of signatures on said part petitions is less than the required number fixed by law?

Section 1c of Article II of the Constitution of Ohio, which deals with the filing of initiative and referendum petitions, reads as follows:

"The second aforesated power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law,

section or item, in the manner herein provided, at the next succeeding regular or general election in the year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect."

From the above, it is at once apparent that if a law is to be submitted to the voters, a petition signed by six per centum of the electors of the state and verified as provided by the constitution must be filed with the Secretary of State within ninety days after the law shall have been filed by the Governor in the office of the Secretary of State. Consequently, a petition bearing an insufficient number of signatures, or not properly verified, filed with the Secretary of State within ninety days after the law was filed in the office of the Secretary of State, would have no legal effect.

A referendum petition, therefore, as the term is used in the statutes, is one containing the signatures of six per centum of the electors of the state, verified as required by the constitution and filed with the Secretary of State within ninety days after the law upon which the referendum is sought to be had, was filed in the office of the Secretary of State. Section 4785-178 of the General Code reads as follows:

"Whenever any such petition shall have been filed with the secretary of state he shall forthwith separate the parts by counties and transmit such parts to the boards in the respective counties. The several boards shall proceed at once to ascertain whether or not such names are on the registration lists of a registration city, or on the polling lists of such county, or are eligible to vote in such county, and to determine any repetition or duplication of signatures, the number of illegal signatures and the omission of any necessary details required by law. The board shall make note opposite such signatures, submit a report to the secretary of state indicating the sufficiency or insufficiency of such signatures; and notify the committee having charge of the soliciting of such signatures in case the petitions are found insufficient."

A reading of the above section discloses at once that it is the duty of the Secretary of State, upon the filing of a referendum petition with him, to immediately transmit the parts thereof to the boards of elections of the various counties from which there appear names on the parts of said petition. (See also *State, ex rel., v. Brown, Secretary of State*, 108 O. S., 454; 1927 O. A. G., page 1523.)

It will be noted, however, that the above section provides "whenever any such petition shall have been filed with the Secretary of State." In other words, whenever a referendum (or initiative) petition meeting constitutional requirements is filed with the Secretary of State, such parts of the same shall be transmitted to the boards in the respective counties. Any other petition would, in so far as its effectiveness to secure a referendum is concerned, be nothing more than a scrap of paper. If such were not the case and the Secretary of State were required to transmit to the various boards of elections every petition purporting to be a referendum petition, filed within ninety days, regardless of the number of signatures thereon, the person or persons seeking a referendum could under the provisions of Section 1g of Article II of the Constitution of Ohio, and Section 4785-179, General Code of Ohio, receive additional time to file a proper petition, to-wit, up to thirty days before election.

This alone must lead to the conclusion that the Secretary of State is not required to transmit to boards of election any petitions, or parts thereof, unless the same on the face thereof meet the requirements of the constitution and the statutes of Ohio.

Further requirements with respect to an initiative and referendum petition are contained in section 1g of Article II of the Constitution of Ohio, which section, in so far as the same is pertinent hereto, reads as follows:

"Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. 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 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. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed

the same on the date stated opposite his name; and no other affidavit thereto shall be required. *The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition.*" (Italics the writer's.)

A reading of the above makes it at once apparent that unless a petition, or part thereof, meets all the requirements set out in said section and bears a proper verification, such petition, or part thereof, is not presumed to be sufficient. The foregoing constitutional provision clearly states that there shall be attached to each part petition the affidavit of the person soliciting signatures to the same, and clearly states what such affidavit shall contain. In view of these constitutional requirements, it would clearly follow that a part petition without such affidavit would be incomplete, or more exactly stated, would be no petition, or part thereof, at all.

In the case of *State, ex rel. v. Graves*, 90 O. S., 321, 323, the court, in discussing the application of the provisions of section 1g of Article II of the constitution, to a referendum petition, stated:

"It must be conceded that any part of a petition to which no affidavit whatever is attached would have to be rejected *in toto*. The constitution requires an affidavit to each part of a petition, and without that affidavit it would be as worthless as blank paper, no matter if every signature thereon were genuine."

An affidavit is defined as "any voluntary *ex parte* statement reduced to writing, and sworn to or affirmed before some person legally entitled to administer an oath or affirmation." The term is likewise defined in section 11522 of the General Code, as follows:

"An affidavit is a written declaration under oath, made without notice to the adverse party."

With respect to the formal requisites of an affidavit, it has been held that:

"A paper purporting to be an affidavit, but which is not sworn to before an officer, is not an affidavit."

(See *Benedict v. Peters*, 58 O. S., 527.)

It has likewise been held that if an affidavit upon its face shows that it is not sworn to before a person authorized by law to administer oaths, it has no legal force. (See *State v. Lanser*, 111 O. S., 23.)

In light of the above, I therefore have no hesitancy in stating that in a case where the circulator and/or the notary failed to sign the affidavit, there was in fact no affidavit attached to the part petition and it would therefore follow that such part petition could not under the constitutional provisions above quoted be regarded as a petition or part thereof which the Secretary of State would, under the provisions of section 4785-178, supra, be required to transmit to the board of elections. And it would likewise follow that the same should, under the authority of the Graves case, supra, be rejected by him and the signatures appearing thereon should not be considered in determining whether or not such petition contains the signatures required under section 1c of Article II of the Constitution.

You also inquire as to signatures in black or colored lead pencil. As pointed out above, section 1g of Article II of the Constitution provides that "the names of all signers to such petition shall be written in ink, each signer for himself." In the case of *Thraikill v. Smith*, 106 O. S., 1, it was held that this provision is complied with if the same is written in indelible pencil. In said case it was stated by Marshall, C. J., at pages 4 and 5:

"By reference to Funk & Wagnalls' Standard Dictionary we find the only information which seems to have any direct bearing upon this subject, where ink-pencil is defined as 'a pencil in which a solid indelible pigment takes the place of the usual lead.' It is not denied that the pencil which was in fact used by the signers to these petitions is indelible and that it therefore contains the pigment which distinguishes an ink-pencil from the ordinary lead pencil. We cannot therefore say as a matter of law that an indelible pencil is not ink."

From the above, it will be noted that a black or colored lead pencil is to be distinguished from an indelible pencil. (See also *State, ex rel. Patton v. Myers*, 127 O. S. 95.)

Therefore, the Constitution requiring, as it does, that a signature be written in ink, it would appear, and it is accordingly my opinion, that any name on such petitions written in black or colored lead pencil cannot be regarded as a signature and should be rejected by the Secretary of State.

I come now to your fourth question. Pertinent thereto is section 4785-176, General Code, which provides for the form of initiative and referendum petition. Said section reads in part as follows:

"The text of the proposed amendment shall be printed in full, immediately following the place for signatures, and shall be prefaced by the words, 'Be it resolved by the people of the

State of Ohio.’ Immediately following the text of the proposed amendment must appear the following statement, properly filled out, and which shall include the signature and address of the solicitor.

In consideration of my services in soliciting signatures to this petition I have received or expect to receive from of (Address) (Insert whatever of value has been or is expected to be received).”

It is significant to note that said section provides that “immediately following * * * *must* appear the following statement.” In considering the construction to be placed on the word “must” in a statute, it was stated in 37 O. Jur., 326:

“‘Must’ is a stronger word to indicate an intention that the provision is mandatory than the word ‘shall,’ and it is accordingly so interpreted, except where the intention of the legislature, as gathered by the entire act, appears to be otherwise. But even the use of the word ‘shall’ is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.”

(See Devine v. State, 105 O. S., 288; Perkins vs. Bright, 109 O. S., 14; Board of Education v. Briggs, 114 O. S., 415.)

It has been held that a mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void. (See Spice v. Steinruck, 14 O. S., 213; Vinton v. James, 108 O. S., 140.)

It would consequently appear that the provisions of the above section are therefore mandatory and if such is the case it would likewise appear that the failure of the circulator to state over his signature what, if any, money he received for circulating the part petition, would render such part petition invalid and, as stated above, in the case of failure to attach an affidavit such purported part petition would not be a part of a referendum petition as contemplated by the Constitution and statutes and the signatures appearing thereon may therefore not be considered and must be rejected by the Secretary of State.

I might state at this point that up until now I have considered only such matters as are apparent on the face of the part petition. Whether or not the name of a signer is written in black or colored lead pencil; or the circulator or notary failed to sign the affidavit; or whether or not a circulator failed to sign the statement with reference to money he re-

ceived, are all facts which can be established only by an examination of the part petitions themselves.

In the fifth question you state that the signature of the circulator on the statement with respect to money received by him and his signature on the affidavit are in different handwriting. Obviously, if the name of the circulator on the statement is in different handwriting from that on the affidavit, either the statement, the affidavit, or both, were not signed by the circulator and in such case, for the reasons above stated, the part petition and the signatures appearing thereon would be invalid.

The question, however, is, may such determination be made by the Secretary of State? In regard thereto, I feel that the question of whether or not a signature is genuine can, in most cases, be determined only by a person who has sufficient experience and skill to enable him to distinguish the peculiar characteristics of individual handwriting. It would, therefore, appear to me and it is consequently my opinion thereon, that such determination must, under the provisions of Section 4785-178, supra, be made by the boards of elections. The various boards of elections as provided in said section are required to ascertain whether or not such names are on the registration lists of a registered city, or on the polling lists of such county, or eligible to vote in such county, and to determine any repetition or duplication of signatures and the number of illegal signatures. All of these matters can only be definitely determined by the consideration of outside evidence.

I shall now consider your sixth question. Obviously, if the affidavit bears the correct date, that is, the date on which it was in fact executed, the signatures bearing dates later in point of time, would, if correctly dated, be invalid. Of course, if such signatures are incorrectly dated, they would likewise be invalid. It is, however, conceivable that the signatures in question are correctly dated and the affidavit incorrectly dated. If such is the case, it is my opinion that the signatures may not be rejected for the reason that an affidavit incorrectly dated will not render such affidavit invalid. The determination, therefore, as to the correctness of the date on either the affidavit or the signatures, or both, is a fact which can only be established by the consideration of evidence other than the part petition itself. In other words, the invalidity of the signatures in question, if the same are in fact, invalid, is not apparent on the face of the part petition, and it is therefore my opinion with respect thereto, that such signatures should be considered valid on the face by the Secretary of State and the matter of ascertaining their actual validity be left to the proper boards of elections.

Your seventh, eighth and ninth questions concern signatures which are valid upon the face; that is, it does not show on the face of the part petition that there has been a non-compliance with the law. In each of said cases, obviously evidence independent of the part petitions themselves upon which such names appear must be introduced to determine

the validity of the signatures in question. It would, therefore, appear that such determination must be left to the boards of elections.

At the outset, it was pointed out that it is the duty of the Secretary of State, upon the filing of a referendum petition valid on the face and containing the required number of signatures, to immediately transmit the parts thereof to the various boards of elections. It would follow, therefore, that if the signatures in question are valid upon the face and a determination of their validity in fact requires the consideration of additional evidence, the Secretary of State is without power to inquire into the validity of such signatures.

In arriving at the conclusions reached herein, I am not unmindful of the case of *State ex rel. v. Brown*, supra, wherein it was held:

“Section 1g, Article II of the Constitution, and the laws which have been ‘passed to facilitate their operation’ by the General Assembly, confer no power upon the secretary of state to determine the sufficiency of the referendum petition or any of its parts at the time such petition is filed with the secretary of state. The secretary of state has neither express nor implied power to make any determination relative to such petition until after the parts thereof have been transmitted to the boards of deputy state supervisors of elections of the counties from which there appear names of electors on the parts of such petition, and after the same have been returned to the secretary of state with certification of the numbers of signatures thereto.”

At the time such case was decided (September 28, 1923), the provisions of section 5175-29i, General Code, which has since been repealed and superseded by section 4785-179, General Code, were in effect. Said section provided in part as follows:

“It (the board of elections) 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.*” (Parenthetical matter and italics the writer’s.)

The court in said case held that under the statute it was the duty of the board of elections to determine whether there was “an omission of any of the formal or other requisites set forth in the Constitution”, and therefore the Secretary of State had no power to make such determination.

Notwithstanding the fact that the statute, as it then existed, seemed clearly to place the duty of determining whether or not the constitutional requirements were complied with, upon the boards of elections, neverthe-

less, two of the members of the court dissented, stating that they could not concur in the conclusion :

“I cannot concur in the conclusion that the secretary of state is a mere automaton, and must accept and transmit as a valid referendum petition every paper so designated which is filed in his office, and immediately put into motion the election machinery of the state, no matter what the form of the petition, or how deficient it may be, or lacking in the requirements designated and prescribed by the Constitution, even though the legislative act in question be subject to the referendum.”

When the election laws were recodified in 1929 (113 O. L., 307) the power of the boards of election “to scrutinize for the omission of any of the formal or other requirements set forth in the Constitution” was taken away and now, under the provisions of section 4785-178, supra, the boards of elections have no power to so scrutinize and make such determination. The power to determine whether the constitutional requirements have been complied with is vested in the Secretary of State under the terms of section 4785-7, General Code, which section provides :

“It shall be the duty of the Secretary of State * * * to receive and to determine the sufficiency of all initiative and referendum petitions on said questions and issues as hereinbefore provided.”

Likewise, the power to determine the validity of an entire part petition, where such determination can be made from the face of the petition, must be vested in the Secretary of State, since such officer is required to submit to the various boards of elections only initiative and referendum petitions, and, as pointed out above, if all the mandatory constitutional and statutory requirements are not met, a purported referendum petition would be in fact no referendum petition.

It might seem that the invalidating of an entire part petition by the Secretary of State, for the reasons above stated, would deny to an elector whose genuine signature appears on such part petition, his constitutional right to sign a referendum petition. This, of course, can be answered by the single statement, that in order to invoke the power to submit a law to referendum, the procedure set forth in the Constitution must be strictly complied with. If any of the steps required by the Constitution or statutes are not taken, then the petition would be invalid and the persons whose names appear on such petition are not denied any constitutional rights for the reason that such persons did not in fact sign a referendum petition.

Summarizing, it is therefore my opinion that :

1. When a petition is filed with the Secretary of State within ninety days after any law shall have been filed by the Governor in the office of the Secretary of State, ordering that such law be submitted to the electors of the state for their approval or rejection, it is the duty of the Secretary of State to ascertain whether or not such petition contains the required number of signatures valid on the face thereof and in so doing he shall reject (a) the names of all signers written in black or colored lead pencil ; (b) all signatures which appear on a part petition, where the affidavit attached to said part petition was not signed by the circulator thereof ; (c) all signatures which appear on a part petition where the notary failed to sign his name on the circulator's affidavit ; (d) all signatures which appear on a part petition, where the circulator failed to sign his name on the statement of "what money, if any, he received for circulating the petition."

2. With respect thereto, however, the Secretary of State may not reject and must consider valid (a) all signatures which appear on a part petition where the signature on the circulator's affidavit is in different handwriting than that on the statement with respect to moneys received by the circulator ; (b) all signatures which are dated later in point of time than the date of the circulator's affidavit ; (c) the signatures of persons signing, who claim that the part petition was not presented to them by the person who executed the circulator's affidavit ; (d) the signatures of persons signing who claim that the circulator was not present when they signed the part petition ; (e) the signatures of all persons who claim they did not sign any petition.

3. If the total number of signatures remaining, after such rejection, is less than the number required by the Constitution, the Secretary of State shall not transmit to the various boards of elections such petition or any parts thereof.

Respectfully,

THOMAS J. HERBERT,
Attorney General.