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PETITION, LOCAL OPTION—§4301.33 RC—SIGNATURE MAY BE REMOVED BY ELECTOR—PRIOR TO THE ACTION OF THE BOARD OF ELECTIONS ORDERING AN ELECTION ON SUCH PETITION.

SYLLABUS:

A person who has pursuant to Section 4301.33, Revised Code, signed a petition for local option relative to the sale of intoxicating liquors in a district therein described, may withdraw his signature from such petition at any time prior to the action of the board of elections ordering an election on such petition.

Columbus, Ohio, October 18, 1957

Hon. Randall Metcalf, Prosecuting Attorney
Washington County, Marietta, Ohio

Dear Sir:

I have before me your letter requesting my opinion and reading as follows:

> "Would you please informally advise whether names may be withdrawn from a petition for local option elections after the same has been filed with the board of elections but before the board has approved such petition.
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> "I am aware of the election statute which says no names may be withdrawn from petitions after filing with the board or Secretary of State, but have felt that since the local option proceedings stem from the liquor laws and not from the election laws the distinction might be made."

The right of a petitioner to withdraw his name from a petition has been established as a general proposition for many years. In State, *ex rel.* Kahle, v. Rupert, 99 Ohio St., 17, the court had before it the right of a person who had signed a petition for referendum on a municipal ordinance, to withdraw his name. It was said in the per curiam opinion:

> "In the absence of statutory provisions to the contrary an elector signing a petition authorized by the statutes of this state, invoking either official or judicial action, has a right to withdraw his name from such petition, or, if he be the sole petitioner, to dismiss the same *at any time before judgment has been pro-*

nounced, or before official action has been taken thereon. Dutten v. Village of Hanover, 42 Ohio St., 215; Hayes *et al.* v. Jones *et al.* 27 Ohio St., 218, and McGonnigle *et al.* v. Arthur *et al.*, 27 Ohio St., 251, 256.

"The general assembly of Ohio, in the enactment of Section 4227-2, General Code, evidently recognized this right, and afforded the signers of a referendum petition an opportunity for its exercise by providing in this section that the clerk or city auditor shall not certify such petition to the board of deputy supervisors of election until after the expiration of ten days from the date of filing the same." (Emphasis added.)

Of the cases cited and relied upon by the court, two in 27 Ohio State Reports had reference to petitions filed with the county commissioners for road improvement, and the third, Dutten v. Hanover, relates to petitions to a village council to take action surrendering the corporate powers of the village.

In a case also involving a referendum on a municipal ordinance, to-wit, Nichol v. Miller, 127 Ohio St., 103, the same ruling was made, based on the case of State, *ex rel.* v. Rupert, *supra.*

The same rule was applied in a like case, State *ex rel.* McLain v. Bailey, 132 Ohio St., 1. In Opinion No. 2934, Opinions of the Attorney General for 1953, page 358, the question of the right of withdrawal was presented to my predecessor in a case involving a petition under Section 3577 of the General Code, to the county commissioners for the detachment of territory of a municipality, and it was held:

"The jurisdiction of a board of county commissioners, under Section 3577, General Code, is special and is conditioned upon the consent at the time of the board's order of detachment, of a majority of the freeholder electors concerned; such freeholders must be electors of the municipality concerned; and such freeholder electors have the right, at any time prior to the board's order of detachment, to withdraw such consent."

Upon examination of the statutes relating to local option I find no provision which would forbid the withdrawal of a petitioner's name. It would seem quite possible that after the circulation of a petition, the sponsors might conclude that an election would be futile; or their sentiments might change. If such were the case, it would seem the height of folly to force on the community a special election. Is it conceivable that if all of the signers of such a petition should advise the board of elections that

they desired the petition withdrawn, the board should refuse such request? If all could withdraw, why not any one or more?

Section 4301.33, Revised Code, provides in part as follows:

> "Upon the presentation of a petition, not later than four p. m. of the ninetieth day before the day of a general election, to the board of elections of the county wherein the district or any part thereof, as defined in section 4301.32 of the Revised Code, is located, signed by the qualified electors of the district concerned, equal in number to fifteen per cent of the total number of votes cast for governor at the next preceding regular state election in such district, the board shall proceed as follows:
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> "(A) Such board shall, not later than the eighty-fourth day before the day of a general election, examine and determine the sufficiency of the signatures, determine the validity of such petition and, in case of overlapping residence district petitions presented within said period, determine which of such petitions shall govern the further proceedings of such board. * * *
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> "(B) If the petition is sufficient, and, in case of overlapping residence district petitions, after the governing petition has been determined, the board to which the petition has been presented shall order the holding of a special election in the district for the submission of the questions specified in section 4301.35 of the Revised Code, on the day of the next general election, * * *"

That the rule stated in Kahle v. Ruppert, *supra,* is still the general rule, is manifest from an examination of two cases quite recently decided by the Supreme Court. It was applied in Lynn v. Sipple, 166 Ohio St., 154, decided February 13, 1957, to a case involving the right of a signer of a municipal referendum petition. It was held that he had such right at any time before official action has been taken thereon, and Kahl v. Ruppert, *supra,* was relied upon as authority for such decision.

Again, in State *ex rel.* Wilson v. Board of Education, 166 Ohio St., 260, decided March 27, 1957, the same ruling was made and upon the same authority, as to a petition of electors to a board of education filed pursuant to Section 3311.23, Revised Code, praying for a transfer of school territory.

The General Assembly had more than three years prior to the decisions just noted enacted Section 3513.291, Revised Code, reading as follows:

> "Any elector signing a petition shall not withdraw his name therefrom after the petition has been filed with a board or with

the secretary of state. This section shall apply to *all types of petitions* except those specified in section 3519.11 of the Revised Code." (Emphasis added.)

Section 3519.11, Revised Code, there referred to, relates to petitions for initiative and referendum on acts of the legislature, and the legislature evidently did not want the new Section 3513.291, Revised Code, to be construed as repealing the provision of Section 3519.11, Revised Code, which reserved to signers of such petition the right of withdrawal. But how are we to interpret the words "all types of petitions?" Manifestly, the supreme court did not consider that these words included the petitions with which it was dealing in the two cases above cited. The act of which said Section 3513.291, Revised Code, was a part, is found in 125 Ohio Laws, page 713. While it amends a large number of statutes, the amendments appear largely to have some relation to elections, in many cases fixing the time for filing proposals for submission. The principal purpose of the act as stated in the title was "to correct technical errors and inconsistencies in the election laws." Section 3513.291, *supra,* it will be noted, does not specifically refer to "nomination by petition," but it appears as a part of a sub-title in those words, as a part of Chapter 3513, Revised Code, entitled "Primary Nominations." The section in question is immediately preceded and followed by sections dealing expressly with nominations by petition. That the section in question was intended to relate to nominating petitions only is further indicated by the use of the words "a board or the secretary of state." This unquestionably refers to the fact that nominating petitions for state offices are filed with the Secretary of State, while all others are filed with the boards of elections

The statutes dealing with local option for sale of intoxicating liquor are completely removed from those relating to elections and if it was intended to include petitions for local option in the provisions of Section 3513.291, *supra,* the legislature could hardly have devised a more awkward procedure.

Upon what theory petitions for local option are within the scope of Section 3513.291, *supra,* and petitions for changes in the territory of a school district or for a referendum on a municipal ordinance are not, certainly presents an unanswerable question. It is true that the proposal to change the boundaries of a school district does not result in an election, but a referendum on a municipal ordinance certainly does. "All types of

petitions" as used in this section can mean only petitions relating to nomination of candidates.

Even though it could be shown by extraneous evidence that the legislators intended to include within the purview of Section 3513.291, *supra,* petitions for local option elections, while excluding petitions for referendum on municipal ordinances, such evidence would hardly be admitted by any court even if every member of the legislature appeared and offered so to testify. In the famous case of Slingluff v. Weaver, 66 Ohio St., 621, it was shown that an act had been passed which appeared to take away from the Supreme Court practically all of its appellate jurisdiction. In the hearing it was proposed to show the court that not a single member of either house intended that result. The court rejected that proposal and sustained the act in spite of its grevious effect, saying on the point of the intent of the legislature:

> "It seems well settled, as expressed by Story, J. in Gardner v. Collins, 2 Pet., 58:
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> " 'What the legislative intent was can be derived only from the words they have used; we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjecture *aliunde.*' " (Emphasis added.)

It is my conclusion, therefore, that signers of a petition for a local option election pursuant to Section 4301.33, Revised Code, may withdraw their names from such petition at any time before the board of elections has taken final action on the same.

It would appear from that section that the action of the board taken pursuant to law, ordering a special local option election would conclude the period within which a petitioner might withdraw his name; up until that time the general rule as above stated, should, in my opinion prevail.

You are accordingly advised that a person who has pursuant to Section 4301.33, Revised Code, signed a petition for local option relative to the sale of intoxicating liquors in a district therein described, may withdraw his signature from such petition at any time prior to the action of the board of elections ordering an election on such petition.

Respectfully,
WILLIAM SAXBE
Attorney General