

855.

APPROVAL, BONDS OF VILLAGE OF SOUTH EUCLID, CUYAHOGA COUNTY—\$51,000.00.

COLUMBUS, OHIO, August 11, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

856.

REFERENDUM PETITION — DUTY OF SECRETARY OF STATE —
AUTHORITY IN ELECTIONS.

SYLLABUS:

1. Under the provisions of Section 5175-29h, General Code, it is the mandatory duty of the Secretary of State immediately to transmit the parts of a referendum 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.

2. Where the Secretary of State has once complied with the provisions of the above mentioned section by having mailed to said boards of deputy state supervisors of elections of each county, from which there appear names of electors, on any part petitions filed with him, the said part petitions containing the signatures of electors from that county, and the same are returned to him by said boards, with a certificate of the total number of sufficient signatures thereon, he is without authority again to return said part petitions to said local boards.

3. Under the authority of State *ex rel.*, *McCrehen vs. Brown*, Secretary of State, 108 O. S. 454, and *Burke, ex rel.*, *State vs. Brown*, Secretary of State, 115 O. S. 721, The Secretary of State possesses no duties relating to elections, except those conferred upon him by statute.

COLUMBUS, OHIO, August 11, 1927.

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

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

“We are attaching hereto a letter received by this Department from the officers of the Ohio State Medical Association.

In view of the Opinion of the Supreme Court of Ohio in State *ex rel.*, *McCrehen v. Brown*, 108th Ohio State page 454, we desire your opinion as to whether or not the Secretary of State may legally comply with the request made in said letter and return the part petitions and the certificates executed

under Section 5175-29-i, General Code, and instruct said Board to proceed, in accordance with the decision of Judge Fritch of the Common Pleas Court of Summit County and Judge James S. Thomas of the Common Pleas Court of Scioto County as set forth in said letter.

And further whether or not the Secretary of State upon returning said part petitions may legally direct the County Boards that where:

'An affidavit intentionally and knowingly false, attached to any part of a petition, is not a compliance with the provisions of Section 1g of Article II of the Constitution of the State, and the part of a petition, to which such false affidavit is attached, must be rejected entirely, the same as a part to which no affidavit is attached, whether it contain genuine names or not, for the reason that it lacks the affidavit required by the constitution.' State ex rel., Gongwer vs. Graves, 90th O. S. page 311."

Accompanying your letter and to which you refer, is a letter from the Ohio State Medical Association which is as follows:

"Your attention is respectfully directed to certain facts in regard to the initiative and supplementary petitions seeking a vote of the people at the next general election, on an initiated proposal, to create a separate board of chiropractic examiners and otherwise extending the rights and privileges of those engaged in chiropractic practice.

An observance of petitions returned to your office by some of the deputy state supervisors of elections, indicates that there may have been only superficial and perfunctory compliance with your instructions issued to them. There appears to be on numerous petitions more than one signature in the same handwriting. This is, of course, a matter for judicial determination by the respective county boards of elections.

Your attention is directed especially to Article II, Section 1g of the Constitution of Ohio, which provides in part as follows:

'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 signed said petition 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.'

In conformity with the foregoing constitutional provisions, an initiative or supplementary part-petition is incomplete without such affidavit. And on the general principle that documents which require affidavits rest upon the validity of such affidavit, the presumption arises that a document is false and invalid when the required affidavit attached to it is fraudulent.

As you know, under Section 5175-29f of the General Code, a notice must be printed at the top of initiative and supplementary petitions reading as follows:

'Whoever knowingly signs this petition more than once, signs a name other than his own or signs when not a legal voter is liable to prosecution.'

According to information, Judge E. D. Fritch, of the Common Pleas Court of Summit County, on last Saturday, rejected 3,060 signatures on the initiative and supplementary petition from that County, out of a total of

7,019. From a news article in the Beacon Journal of last Saturday, August 6, Judge Fritch is quoted as follows:

'The validity of the petition depends entirely upon the affidavit attached of the person who circulated it.

This affidavit is to the effect that all signatures on the petition are genuine and were signed by that person in the presence of the circulator. Seventeen of the petitions show invalid signatures, and this makes the affidavit worthless. Therefore the valid signatures on that sheet cannot be counted.'

According to our contention, substantiated by the court decision in Summit County, initiative or supplementary part-petitions are not complete nor 'sufficient' without the required affidavit of the circulator and if the affidavit is false or incomplete in any particular, that entire part-petition should be rejected.

On this same point, we quote the following from a recent Journal Entry in the Court of Common Pleas in Scioto County, decided by Judge James S. Thomas, on July 9, 1927. (Pertaining to the initiative and supplementary chiropractic petitions in that county.)

'Thereupon the evidence being submitted and the court being fully advised, find that all matters set forth in said Petition are true and find the issues in favor of the Petitioners in said cause, and find that said signatures in said Petitions described, are insufficient, because said names are not in the handwriting of those persons whose names they purport to be and are not the signatures of the persons whose names they purport to be and that said signatures are illegal and contrary to the provisions of the Constitution of the State of Ohio, and said court further find that each and every one of *said parts of said Petitions have not been verified according to law* and in compliance with the provisions of the Constitution of the State of Ohio, *and are invalid in their entirety.*' (Parts italicized for emphasis on this point.)

While we are aware of the fact that the statutes of Ohio pertaining to procedure under the initiative and referendum have been amended and supreme court decisions have limited the authority of the Secretary of State to hear and determine the validity of petitions filed with him, certain vital parts of the decision in the case of State, ex rel., Gongwer vs. Graves, Secretary of State, decided on June 25, 1914, and recorded in 90 O. S. 311, have NOT been reversed by decisions nor modified by statutory enactment.

In that case, part of which is still the law in Ohio, paragraph 6, of the syllabus reads as follows:

'An affidavit intentionally and knowingly false attached to any part of a petition, is not a compliance with the provisions of Section 1g of Article II of the Constitution of the State, and the part of a petition, to which such false affidavit is attached, must be rejected entirely, the same as a part to which no affidavit is attached, whether it contains genuine names or not, for the reason that it lacks the affidavit required by the constitution.'

To summarize, an affidavit of an initiative or supplementary petition is invalid and incomplete and the entire part-petition to which such affidavit is attached should be rejected unless each signature on that part-petition was made by the individual for himself only and in the presence of the affiant. If more than one signature appears on any such petition in the same handwriting, the affidavit of the circulator thereto attached, is ipso facto, incomplete and fraudulent.

Of course, if the circulator of a petition in good faith accepts the signature of an individual even though that particular signature be a forgery without the knowledge of the affiant, that entire part-petition cannot be rejected; but when the circulator of a petition makes affidavit according to the provisions of the constitution, set forth above, which he knows to be false in any particular, the presumption of fraud must arise against that entire part-petition.

In such case, the presumption is reasonable that the circulator of a petition may have attached his affidavit to a petition where the signatures were not all actually written in his presence, by each qualified elector, for himself, and as required by the constitution.

It may also be reasonably presumed that the contents of such petitions were 'willfully misrepresented' to the signers by the circulator, which is defined as 'corrupt practice' under Section 5175-29m, and the burden is clearly on the circulator of the petition to prove otherwise in case fraudulent affidavit is established.

In view of the foregoing, you are respectfully requested, in order to safeguard and insure the regularity of procedure in compliance with the constitution and statutes, to return to the respective boards of elections, with instructions conforming to the foregoing court decision, the part-petitions, all petitions and reports which indicate inadequate, superficial or perfunctory compliance with the law. This should include the reports and the petitions from the attached list of counties as well as any others which you have received and which do not definitely show full compliance with all requirements."

Section 1g of Article II of the Ohio Constitution provides 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, of 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 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. 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 the 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 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. * * * "

Section 5175-29h providing for the transmittal of part-petitions to deputy state supervisors of elections of each county is as follows:

"* * * When any supplementary or referendum petition is filed with the secretary of state, the latter shall at once transmit to the board of deputy state supervisors of elections of each county, from which there appear names of electors on any part petition filed with him, the part petitions containing the signatures of electors from that county."

In the case of the *State, ex rel., McCrehen vs. Brown*, 108 O. S. 454, it was held:

"When the different parts of a referendum petition are filed with the secretary of state, it is his duty to transmit them at once to the boards of deputy state supervisors of elections in the respective counties from which appear names of electors on the different parts of such a petition."

From the information contained in the above mentioned correspondence it appears that the secretary of state has complied with the requirements of law by having transmitted all part petitions to the deputy state supervisors of elections of each county from which there appeared names of electors on said part petitions filed with him. Your inquiry involves the question whether or not the secretary of state having once complied with that provision of law and the part petitions having been returned to him by the said boards with a certification of the total number of sufficient signatures thereon, may again return said part petitions to said local boards.

The concluding provisions of Section 5175-29i is:

"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."

A similar question was before the Supreme Court of Ohio in the case of *Burke, ex rel., State vs. Brown, secretary of state*, 115 O. S. 721, decided September 30, 1926. In that case the petition recites that the part petitions had been transmitted by the secretary of state to the respective counties and returned by the local boards of deputy state supervisors of elections to the secretary of state. Thereupon some fourteen grounds of protest were filed by the relator with the secretary of state against the placing of said referendum petition upon the ballot.

The petition in that case alleged among other things the failure of the boards of deputy state supervisors of elections to examine said part petitions and strike off illegal signatures and otherwise determine the legal sufficiency of the petitions as required by Section 5175-29i of the General Code. This protest was made to the secretary of state after the return was made to him of the part petitions by the local boards of deputy state supervisors of elections. The petition further contained this recital:

"The relator further says that the defendant, the secretary of state, has refused to hear said protest or any of the allegations contained therein, and that he is proceeding to put said referendum amendment on the ballot to be voted on November 2, 1926, unless restrained by this court from so doing."

The Supreme Court disposed of the case in the following language:

"It is ordered and adjudged that the demurrer to the petition be, and the same hereby is, sustained, on authority of *State, ex rel., McCrehen, v. Brown, Secretary of State*, 108 Ohio St. 454, 141 N. E. 69; and relator not desiring to plead further it is therefore ordered and adjudged that the writ of prohibition prayed for be, and the same hereby is, denied."

It is therefore my opinion that where the Secretary of State has once complied with the provisions of the last paragraph of Section 5175-29h of the General Code by having mailed to the board of deputy state supervisors of election of each county, from which there appears names of electors on any part petition filed with him, the part petitions containing the signatures of electors from that county, and the same are returned to him by said boards, with a certificate of the total number of sufficient signatures thereon, he is without authority again to return said part petitions to said local boards, and your first question should therefore be answered in the negative. This answer to your first question renders unnecessary an answer to your second question.

The Legislature having by law provided for the examination of initiative and referendum petitions by local boards and for testing the form and other constitutional requirements of such petitions through the local Common Pleas Courts, ample opportunity was afforded by law for the enforcement and protection of all rights existing under the constitutional provisions above referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

857.

DISAPPROVAL, BONDS OF MEAD TOWNSHIP, BELMONT COUNTY,
\$18,000.00.

COLUMBUS, OHIO, August 11, 1927.

In re: Bonds of Mead Township, Belmont County, Ohio, \$18,000.00.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

GENTLEMEN:—I have examined the transcript of the proceedings of the Board of Township Trustees and other officers of the above township relative to the above bond issue, and find that among the bids submitted for the purchase of said bonds was that of W. L. Slayton & Company of Toledo, Ohio, of par, accrued interest to date of delivery and a premium in the sum of \$291.00, which was the highest bid. At a special meeting of the Board of Trustees held on July 16, 1927, the bid of Slayton & Company was rejected because the same contained the following language:

"If the bonds are awarded to us you are to furnish us promptly with a certified transcript of proceedings showing a legal issuance, sale and delivery of these bonds to us in accordance with law in the opinion of Messrs. Squire, Sanders & Dempsey, Attorneys, at Cleveland, Ohio, or the Attorney General of the State of Ohio."