

ranty deed, encumbrance estimate No. 794, controlling board certificate and other files submitted to me, which relate to the purchase of said property.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2679.

ELECTION—DEMAND FOR RECHECK—SECRETARY OF STATE AS CHIEF ELECTION OFFICER MAY REQUIRE SUCH RECHECK BY COUNTY BOARDS OF ELECTION WHEN.

SYLLABUS:

When, under the provisions of Section 4785-155, General Code, the Secretary of State has opened the abstracts submitted to him in accordance with the provisions of Section 4785-153, General Code, showing the votes cast for the offices included in the abstract, submitted to the president of the senate under the provisions of Section 4785-154, General Code, and publicly canvassed these returns,—in the event he has reason to believe that material errors may exist in some or all of the abstracts received by him from the various counties, it is his duty as chief election officer charged with the enforcement of the election laws, to require the boards of elections of such counties to recheck the abstracts submitted to him or resubmit new abstracts of the precinct vote for any office included in such abstracts, in order that any county boards of elections which might have made errors in the preparation of their abstracts may have an opportunity to correct such errors, thus enabling the president of the senate, during the first week of the session of the General Assembly in January next following the election, to have correct abstracts to canvass as provided in Section 3, Article III of the Constitution and Section 4785-154 of the General Code.

COLUMBUS, OHIO, December 15, 1930.

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

DEAR SIR:—Your letter of recent date is as follows:

“A matter has arisen upon which as Secretary of State I have been directed to obtain your official opinion.

Sections 4785-154 and 4785-155 provide for the canvassing of the abstracts of the votes cast at the general election for various officials, including the elective state offices of Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State and Attorney General.

Section 4785-155 provides that after the Secretary of State receives the abstracts of the votes from all of the counties he shall fix a day and hour and place for publicly canvassing the returns and notify the Governor, Auditor of State, and Attorney General who shall attend. He shall also notify the Chairman of the State Central Committee of each political party who may have the right to be present or designate a witness to attend such canvass. Publicly and in their presence the Secretary of State shall open the returns of abstracts one, two and three herein provided for and when they are opened cause them to be read aloud. As they are read aloud the Secretary of State shall cause the figures to be compiled showing the number of votes given for

each person for each such office. Acting under this provision of the statute the Secretary of State notified the proper officials and officially opened the returns of abstracts, reading the results aloud and compiling the figures for each person for each such office, etc., on the day officially set, November 17, 1930.

The tabulation of the votes for Lieutenant Governor showed a very close contest with one candidate on the face of the returns receiving a total of 271 votes more than the other. The other officials present at the canvass then agreed with and instructed the Secretary of State to tabulate all of the votes cast for the office of Lieutenant Governor by precincts according to the votes shown on the abstracts so as to check the abstracts and to be certain that the precinct figures set thereon were added correctly and made the totals for these two candidates, as shown by the certification on each abstract.

The precinct figures for all counties were then added, carefully checked and it was ascertained that in 21 of the 88 counties of the state that the results shown for Lieutenant Governor on the certificates attached thereto did not coincide with the totals given when the precinct figures were actually added. On November 19th, the Governor, Auditor of State, Attorney General and the Chairman of the State Central Committee of each representative party were notified and attended a meeting to ascertain the result of the check made by the Secretary of State and a report was made showing the errors found in the count of the 21 counties, whereupon it was agreed and ordered that the Secretary of State was to request a certification of a new abstract of the vote for Lieutenant Governor given by precincts for comparison with the former abstracts and in order that the errors appearing on the face of the original abstracts might be corrected.

During the following week these new abstracts, properly certified, were received by the Secretary of State and on November 28th the same officials were again in session to continue the canvass and to check the new certifications with the old. In a number of cases the new certification and new abstracts cared for the discrepancies in the first abstracts and showed where and how errors had occurred—either in addition or in transcribing the precinct vote from the poll books to the original abstracts. However, in a few counties neither the totals nor the precinct figures coincided with those given on the original abstracts. The net result shows one of the candidates winning by the margin of 216 votes. In the meantime because of the errors found in the 21 counties one of these candidates has requested that either the Secretary of State or the officials in charge of the canvass request a new certification and new abstracts from the precinct poll books from each county in the state which had not shown any discrepancy on the face of the original abstracts and from which counties no recertification had yet been requested.

Later the other candidate for the office filed an objection to any action by the Secretary of State or the officials in charge of the canvass asking for a recheck or recertification of the vote from the counties in which no error or discrepancies had been found on the face of the original abstracts.

Whereupon, in the meeting on November 28th the question arose as to the right or duty of the Secretary of State or the officials in charge of such canvass to make such an additional recheck in the said 67 counties in which no errors or discrepancies appeared on the face of the original abstracts.

The question is, therefore, submitted to you as to whether or not the Secretary of State or the officials participating in such canvass of the returns have the right to accede to the request and ask for a recheck and recertification of the returns in said 67 counties.

A specific answer to this question as speedily as possible is believed to be necessary and I would also appreciate your advice as to just what the rights and duties of the Secretary of State or the officials canvassing the votes are in connection with such a request and also your general advice as to the rights and duties of the Secretary of State and other officials in conducting such a canvass of the returns as is provided in Section 4785-155 and in compiling and announcing the vote as provided in said section.

I hope that you will give this matter your usual prompt attention and that you will fully and completely advise for the guidance of the Secretary of State and the other officials in connection with such canvass in this and coming elections."

The provisions of the "Election Laws of Ohio" which are directly pertinent to a consideration of your inquiries, are contained in Sections 4785-152, et seq. of the General Code. These sections provide in part as follows:

Sec. 4785-152:

"After each general or special election the board of each county, within five days or sooner if all returns from election precincts have been made, shall meet at their usual place of meeting to canvass or supervise the canvassing of the returns and prepare the several abstracts required to be made. * * * ."

Sec. 4785-153:

"When the canvass has been completed the board shall cause to be prepared statements of the results showing:

* * * * *

2. Upon another sheet an abstract of votes for Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, Attorney General, Chief Justice of the Supreme Court, judge of the Supreme Court, United States senator and for representatives to congress and all other state offices.

* * * * *

Such statements shall be posted on the bulletin board in the board's office and furnished to the local newspapers. Certified copies of the abstracts of the votes shall be prepared on forms to be prescribed and furnished by the Secretary of State. One copy of each of such abstracts shall be forwarded by registered mail to the Secretary of State at Columbus. Duplicate copies of all such abstracts shall be filed in the office of the board."

Section 4785-154:

"The board shall also prepare a separate abstract of the returns of the election for the offices of Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, and Attorney General, which shall be sealed and sent by registered mail directed to the president of the senate, in accordance with Article III, Section 3 of the constitution. During the first week of the session of the General Assembly, the president of the senate shall open the abstracts of votes and declare the results in the presence of a majority of the members of each house of the General Assembly. If the abstract from any county has not been received by him, recourse shall be had to the abstracts in the office of the Secretary of State. If the General Assembly is not in session in January next after such election for any of the executive officers of the state, the Governor and Secretary of State, within five days after the first Monday in January after such election, shall, in the office of the Secretary of State, in the presence of at least two of the judges of

the Supreme Court, open the returns of the abstracts made to the Secretary of State for such offices. They shall forthwith proceed to ascertain the number of votes given for the different persons for the several offices of Governor, Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State and Attorney General, as the case may be. The person having the highest number of votes for each of such offices shall be considered duly elected and shall be so declared by the Governor. If it appears from the returns of such abstracts that two or more persons have the highest and an equal number of votes for any of such offices, the Governor shall then determine by lot, in the presence of at least two judges of the Supreme Court, which of such persons is duly elected."

Sec. 4785-155:

"If such abstracts have not been received from all counties within ten days after the election, the Secretary of State shall call upon the boards in such delinquent counties for such returns, or dispatch a messenger to such counties to secure such abstracts. When the abstracts from all of the counties have been received by the Secretary of State and not later than December 15, he shall fix a day and hour and place for publicly canvassing the returns and notify the Governor, Auditor of State, and Attorney General who shall attend. The chairman of the state central committee of each political party shall also be notified by the Secretary of State of the day and hour of such canvass and may attend or appoint one witness to attend such canvass. Publicly and in their presence the Secretary of State shall open the returns of abstracts one, two and three herein provided for, and when they are opened cause them to be read aloud. As they are read aloud the Secretary of State shall cause the figures to be compiled showing the number of votes given for each person for each such office. The abstracts of the votes on all state issues shall likewise be publicly canvassed and announced."

Sec. 4785-156:

"Except in the case of offices included in the abstract submitted to the president of the senate, the person receiving the highest number of votes for each office so canvassed in the abstracts shall be considered duly elected, and shall be declared so elected by the governor. * * * ."

The pertinent provisions of the state constitution relative to the subject matter of your inquiries are contained in Sections 2 and 3 of Article III. These sections provide:

Section 2:

"The Governor, Lieutenant Governor, Secretary of State, Treasurer, and Attorney General shall hold their offices for two years; and the Auditor for four years. Their terms of office shall commence on the second Monday of January next after their election, and continue until their successors are elected and qualified."

Section 3:

"The returns for every election for the officers named in the foregoing section shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the president of the senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each house of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses."

It should be noted at the outset that several of the foregoing sections were under consideration in my opinion No. 2523, rendered to Hon. H. Ross Ake on November 10, 1930, relative to the question of the canvass of the election returns for the candidate elected for the short term as Treasurer of State. It was therein held that Section 3 of Article III of the Constitution has no application to an election for an unexpired term in the office of State Treasurer,—this, in view of the later provisions of Section 2, Article XVII of the Constitution adopted in 1905. This opinion, however, expressly recognized that Section 3, Article III of the Constitution is controlling as to the canvass of the returns of an election for the regular terms of the elective state officers mentioned in Section 2, Article III of the Constitution. The election for the office of Lieutenant Governor being for the regular term, the constitutional provisions of Section 3, Article III are accordingly controlling.

It must, therefore, be borne in mind that the successful candidate for Lieutenant Governor can only be declared elected by the president of the senate in the presence of a majority of the members of each house of the General Assembly. This fact has been specifically recognized by the Legislature in the enactment of the new election laws. The first portion of Section 154, *supra*, contains almost the same language as the Constitution, and Section 156, providing that the Governor shall declare certain officers elected after the canvass of the returns by the Secretary of State, as provided in Section 155, specifically excepts those offices included in the abstract submitted to the president of the senate.

In your letter you state that under the provisions of Section 4785-155, *supra*, you have, as therein provided, opened the returns of the abstracts of votes for Governor, Lieutenant Governor, etc., sent to you from the several counties upon the sheet provided in Paragraph 2 of Section 4785-153. There is probably no question but that Section 155 of the election code expressly authorizes you as Secretary of State so to do notwithstanding an inconsistency appearing in Section 154. Section 154 provides that if the General Assembly is not in session in January after such election for any of the executive officers of the state "The Governor and Secretary of State * * * shall * * * open the returns of the abstracts made to the Secretary of State for such offices." The inference appearing from this provision is that the abstracts made to the Secretary of State for such offices shall not have been previously opened. Section 155, however, expressly provides that not later than December 15, these abstracts shall be opened by the Secretary of State.

Coming now to your inquiry as to whether or not, in view of the circumstances set forth in your letter, the Secretary of State or the officials participating in this canvass have the right to accede to the request of one of the candidates and ask the various boards to recertify the vote in the several precincts of their counties for Lieutenant Governor, although their abstracts appear correct on their face, it is my view that the officials to which you refer as participating in the canvass have no such right for the reason that they are merely witnesses to the canvass by the Secretary of State. Section 155, *supra*, provides that the Secretary of State shall perform the various duties therein set forth in the presence of these officials.

It is next necessary to determine the question of whether or not the Secretary of State, either as the canvassing authority or as chief election officer, has the authority in view of the circumstances to satisfy himself of the fact that the abstract sheets are correct, by requesting of the boards of elections of the various counties a recertification thereof.

Before determining the question of whether or not it is your duty as chief election officer in view of the circumstances set forth in your letter to check all the abstracts submitted to you from the various counties showing the votes cast for Lieutenant Governor, it should be noted that there is a question as to whether or not you have

performed all the duties set forth in Section 155 of the Election Code in canvassing these returns, or whether you have any further duty to perform relative to the matter of making any further announcement than that you have already made. No opinion is expressed upon this specific point, since this exact question is now pending in the Supreme Court of Ohio. In view of the fact, however, that the question of your authority or duty to require boards of election of all the counties to recheck the abstracts submitted to you or resubmit new abstracts of the precinct vote cast for the office of Lieutenant Governor, is not before the Supreme Court, consideration is given to this phase of your inquiry. An examination of the statutes defining your duties as chief election officer is necessary.

Section 7 of the Election Code prescribes the duties of the Secretary of State as chief election officer and provides that it shall be his duty "to require such reports from the several boards as are provided by law *or as he may deem necessary*; to compel the observance, by election officers in the several counties, of the requirements of the election laws; * * * to make an annual report to the Governor containing the results of elections, * * * . In the performance of his duties as the chief election officer, the Secretary of State shall have the power to administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records and other evidence; and to fix the time and place for hearing any matters relating to the administration and enforcement of the election laws."

Section 13 of the Election Code defines the duties of the boards of elections of the various counties. One of these duties is set forth in paragraph "1" as follows :

"To receive the returns of elections, canvass the returns, make abstracts thereof and transmit such abstracts to the proper authorities provided by law."

It is obvious that there is a mandatory duty imposed upon boards of elections to transmit to the proper authorities correct abstracts of the returns of elections and the submission of an incorrect abstract is not a performance of this duty. The Secretary of State as chief election officer is charged with the duty of seeing that the provisions of the election laws are complied with and with the further duty of requiring any reports from the several boards of elections which "he may deem necessary". I am unable to say that in the event of a close election for any state office when the Secretary of State as chief election officer has reason to believe that material errors may exist in the abstracts submitted to him from the various counties whether these abstracts appear correct upon their face or not, he has no right to require the various boards of elections to recheck their abstract submitted with the precinct returns or resubmit an abstract of the precinct vote for such office. It is my view that if you as chief election officer, in consideration of all the circumstances set forth in your letter, believe that material errors may exist in some of the abstracts from the sixty-seven counties which have not been rechecked, it is your duty to require the boards of elections of these counties to recheck the abstract submitted with the precinct returns or resubmit a new abstract of the precinct vote for the office of Lieutenant Governor, in order that there may be available to the president of the senate during the first week of the session of the General Assembly in January, 1931, correct abstracts which may be canvassed as provided in Section 3, Article III of the Constitution and Section 4785-154 of the General Code. In the last analysis this must rest in your sound discretion as chief election officer. I may say further that should you, because of the closeness of the election and the numerous errors already discovered in twenty-one of the abstracts, all of which were not apparent before recheck, decide that material errors may exist in the remaining sixty-seven abstracts, such decision would not in my opinion constitute an abuse of discretion.

Summarizing, it is my opinion in specific answer to your inquiry that :

When, under the provisions of Section 4785-155, General Code, the Secretary of State has opened the abstracts submitted to him in accordance with the provisions of Section 4785-153, General Code, showing the votes cast for the offices included in the abstract submitted to the president of the senate under the provisions of Section 4785-154, General Code, and publicly canvassed these returns, in the event he has reason to believe that material errors may exist in some or all of the abstracts received by him from the various counties, it is his duty as chief election officer charged with the enforcement of the election laws to require the boards of elections of such counties to recheck the abstracts submitted to him or resubmit new abstracts of the precinct vote for any office included in such abstracts, in order that any county boards of elections which might have made errors in the preparation of their abstracts may have an opportunity to correct such errors, thus enabling the president of the senate, during the first week of the session of the General Assembly in January next following the election, to have correct abstracts to canvass as provided in Section 3, Article III of the Constitution and Section 4785-154 of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General

2680.

NOTARIAL SEAL—USE OF RUBBER STAMP AND INK IN AFFIXING
SEAL NOT A COMPLIANCE WITH STATUTE.

SYLLABUS:

A rubber stamp and ink are not proper constituents of the seal with which the statutory law enjoins each notary public to provide himself.

COLUMBUS, OHIO, December 16, 1930.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I wish to acknowledge the reception of your letter which reads as follows:

“I am enclosing herewith a paper showing an imprint of what purports to be a notarial seal, said imprint having been made by rubber stamp.

I understand that several companies are selling these stamps and represent that it is legal to use them. I respectfully ask your opinion as to whether or not such a stamp will take the place of the notarial seal which we are accustomed to use.”

The statutory provisions which relate to the constituents of a notarial seal are Sections 30, 31, 32 and 123 of the General Code. They necessarily constitute a starting point to the solution of your inquiry and, therefore, I deem it advisable to quote them in part:

Section 30.

“Device of coat of arms of the state. The coat of arms of the State of Ohio shall consist of the following device: A shield, in form, a circle; on it, in the foreground, on the right, a sheaf of wheat; on the left, a bundle of