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1. COUNTY COMMISSIONERS, BOARD OF— PETITION TO DETACH TERRITORY—JURISDICTION SPECIAL—CONDITIONED UPON CONSENT AT TIME OF BOARD'S ORDER OF DETACHMENT—MAJORITY OF FREEHOLDER ELECTORS CONCERNED — FREEHOLDERS MUST BE ELECTORS OF MUNICIPALITY — FREEHOLDER ELECTORS HAVE RIGHT PRIOR TO BOARD'S ORDER OF DETACHMENT TO WITHDRAW CONSENT—SECTION 3577 GC.
2. CONVEYANCE — INCONSIDERABLE FRACTIONS OF LAND—SEVERAL INDIVIDUALS—TO PROMOTE OR IMPEDE PROCEEDINGS TO DETACH TERRITORY FROM MUNICIPAL CORPORATION—INEFFECTIVE TO CONSTITUTE INDIVIDUALS FREEHOLD ELECTORS—MOTIVE A QUESTION OF FACT TO BE DETERMINED BY COUNTY COMMISSIONERS—SECTION 3577 GC.

SYLLABUS:

1. 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.

2. The conveyance of inconsiderable fractions of land to several individuals solely for the purpose of promoting or impeding proceedings to detach territory from a municipal corporation under the provisions of Section 3577, General Code, is ineffective to constitute such individuals "freehold electors;" and the question of whether a particular conveyance was made for such purpose, or was made in good faith, is a question of fact to be determined in the first instance by the county commissioners.

Columbus, Ohio, August 5, 1953

Hon. William Ammer, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir:

I have your request for my opinion relative to certain proceedings to detach territory from a municipal corporation. From an examination

of the factual situation you have described it appears that the following questions are presented:

"1. Do the words 'freehold electors' as appearing in Section 3577 of the General Code of Ohio indicate that the signers of the petition must be electors of the municipality?

"2. Under the provision of Section 3577 of the General Code of Ohio is a hearing by the County Board of Commissioners on said petition necessary or proper to determine if there is a majority of the freehold electors asking for the detachment?

"3. May names be withdrawn from an original petition for detachment if such petition has been submitted to the Board of County Commissioners and City Council but before action is taken by either body?

"4. At what point in the proceedings can it be determined as to the number required for a majority of the freehold electors?

"5. After the initial petition is filed, can the number of freehold electors necessary for detachment be increased by one purchasing a piece of property in said area and dividing such property into several lots whereby there will be three or four freehold electors of that lot instead of the one at the time the original petition was circulated and this being done so as to increase the number of signatures required?

"6. At what point in the proceedings should it be determined if one is a freehold elector?

"7. Would land owners who are not 'freehold electors' have any right to participate and object to the actions of the Board of County Commissioners?

"8. In view of the withdrawal of petition whereby the number of freehold electors consenting to detachment is below the majority, would the Board of County Commissioners have any authority to act in any way on the original petition of detachment?

Section 3577, General Code, reads in pertinent part as follows:

"Upon petition of a majority of the freehold electors owning land in any portion of the territory of a municipality, accurately described in such petition with an accurate map or plat thereof, praying to have such portion of territory detached therefrom the commissioners of the county in which such portion of territory is situated, with the assent of the council of the municipality given in an ordinance passed for that purpose, shall detach such portion of the territory therefrom and attach it to any township contiguous thereto, or, if the petition so requests, they

shall erect the territory into a new township, the boundaries of which need not include twenty-two square miles of territory:"
(Emphasis added.)

Your first question may be disposed of by reference to my informal opinion No. 286, addressed to you this date, in which I expressed my concurrence in the conclusion stated in the second paragraph of the syllabus of Opinion No. 3061, Opinions of the Attorney General for 1928, page 2911, as follows:

"2. In order to detach territory from a municipality under the provisions of Section 3577 of the General Code, the petition for such action must be signed by a majority of the owners of the lands in the portion of the territory of the municipality so proposed to be detached, which owners must also be electors of the municipality involved."

As to your second question I perceive no requirement in the statute that the board hold a hearing to determine whether the petition before them is in fact that "of a majority of the freehold electors owning lands" in the municipality concerned. There is, of course, a clear duty on the board's part to make such determination, and if they should conclude that such determination can best be made by holding a hearing on the matter, I perceive no basis on which an objection could be made to such method of proceeding. In this connection, with respect to your seventh question, in view of the conclusion stated above that the board is under no duty to hold a hearing it necessarily follows that no claim of a right to be heard at such hearing could be established by anyone, whether or not a "freehold elector." I do not hesitate to suggest, however, that considerations of common courtesy, fair play, and good administrative practice all indicate the desirability of allowing all who claim an interest in the matter to be heard.

On the matter of the right of a signatory to withdraw from a petition, although the statute is silent on the matter, the law as established in the judicial decisions appears to be well settled. In the per curiam decision in *State ex rel. Kahle v. Rupert*, 99 Ohio St., 17, we find the following statement, p. 18:

"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. *Duten v. Village of Hanover*, 42 Ohio St., 215; *Hays et al. v. Jones et al.*, 27 Ohio St., 218, and *McGonnigle et al. v. Arthur et al.*, 27 Ohio St., 251, 256."

In the instant case the final "official action * * * thereon" is to be taken by the board of county commissioners, and under the rule above noted in the Rupert case, it would appear, with reference to your fourth question, that it must be determined by the board on the date of its official action on a petition submitted for action under authority of Section 3577, supra, that such petition does in fact constitute one "of a majority of the freehold electors" etc.

The effect on the jurisdiction of a board of county commissioners to proceed where there have been withdrawals of signatories to a petition which invokes such jurisdiction was under consideration in *Hays v. Jones*, 27 Ohio St., 218, the second paragraph of the syllabus in which is as follows:

"2. The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident landholders, who are to be charged with the costs of the improvement."

In discussing the right of signatories to withdraw and the effect of such withdrawal in the *Hays* case, Judge Ashburn said:

"The second question in this case is the right and effect of remonstrance by any portion of the petitioners upon their relation to the prayer of the petition for the improvement.

"The right to remonstrate is not questioned, but the effect of remonstrance, as viewed by defendants, is certainly ingenious. If a petitioner for the improvement can have his name erased from the petition, as to him it has no vitality. If he signs the petition, and he afterward subscribes a remonstrance against the affirmative action of the commissioners upon the petition, it is claimed he is still petitioning for the improvement in the attitude of one trying to convince the commissioners that it would not be advisable to grant their prayer as petitioners, but rather to grant their prayer as remonstrants. This view of the case is not sound. They are for the improvement as prayed for, or against it, and can not be allowed to occupy any middle ground. The statute can not mean that, if there is a majority of qualified persons at some time between the commencement of the proceedings and the time the final order is to be made, whether

there be such a majority at that time or not, the improvement may be ordered. As held on the first proposition, this jurisdictional majority must be found in the attitude of asking for the improvement at the time the proposed final order is to be made; and one who has subscribed the petition may, at any time before the board makes the final order, by remonstrance or other unmistakable sign, signify his change of purpose. His assent is within his own control up to the time the commissioners move to make the final order. He could not, after having signed the petition for the improvement, be silent until after the order had been made for the improvement, and then put in a remonstrance that would avail him anything. The form or manner in which his dissent is made known is immaterial. If it is clearly made known to the board of commissioners, that is sufficient. Story on Agency, treating upon the subject of revoking an agency, section 474, says:

‘It may be express as by a direct and formal declaration publicly made known, or by an informal writing, or by parol or it may be implied from circumstances.’ * * *.”

This reasoning, and the court’s conclusion noted above, is primarily based on a consideration of the circumstance that the applicable statute provided in part, Act of March 31, 1868, 65 Ohio Laws 41, 42:

“* * * but such order shall not be made until a majority of the resident land-holders * * * shall have subscribed the petition * * *.”

In the instant case the language is not so explicit as this but it does provide:

“Upon petition of a majority of the freehold electors * * * the commissioners * * * shall detach such portion * * *.”

This language is easily sufficient to indicate beyond the least doubt that (1) the board’s jurisdiction can be invoked only by such a petition, and (2) the board loses such jurisdiction to make an order of detachment when the petition before it no longer constitutes one “of a majority of freeholders.” Accordingly, the point in the proceedings at which a determination must be made as to what number constitutes a “majority of freeholders” is the date of the board’s action; and on this date, too, a determination must be made as to the status of the several signatories as “freehold electors.” These conclusions thus dispose of your fourth and sixth questions.

I do not, however, regard the jurisdiction of the municipal council to give assent to the detachment to be similarly affected by such a defect

in the petition. I find no statutory requirement that such petition be filed with or presented to the council and I assume, therefore, that the request for such assent may be made in any practicable manner which will apprise the council of the pendency or imminence of the detachment proceedings before the commissioners. Indeed, I perceive no reason why such municipal assent should not be given even prior to the filing of such petition with the commissioners, but it is obvious, of course, that such assent could not be effective unless, at the time of the commissioners' action, the petition before them was actually that of a majority of the freehold electors.

As to your fifth question it is seriously to be doubted whether the multiple subdivision therein contemplated would be effective to constitute the transferees as freeholders. The test to be applied in any such case where inconsiderable fractions of land have been conveyed is whether such conveyances were made in good faith, or merely for the purpose of qualifying them for participation in the detachment proceedings. Thus in 18 American Jurisprudence 226, Section 71, it is said:

“* * * Some courts have taken the view that the ownership of an equitable interest only in real estate does not constitute one a freeholder, within the meaning of a statute prescribing qualifications for voting. The same has been held with respect to the holders of inconsiderable fractions of land conveyed to them merely for the purpose of qualifying them to vote.”

In *Jones v. Carver*, Texas Court of Civil Appeals, 1902, 67 S. W. 780, the first paragraph of the headnotes reads:

“At an election to determine whether stock may be allowed to run at large, voters to whom land has been conveyed for the sole purpose of enabling them to vote are not ‘freeholders’ and qualified to vote.”

In the opinion by Rainey, C. J., we find the following statement:

“Two grounds are urged against its validity:

“First, that the judges of election rejected the votes of a certain number of freeholders, which if they had voted would have changed the result of the election. No statement of facts is found in the record. The record, however, contains the conclusions of the trial judge, who found on this issue that a few days before the election one Davis, who owned an undivided half interest in 100 acres of land within the proposed stock law district, ‘executed and delivered to each of seven men, who were otherwise qualified to vote in stock law elections, severally, a deed to an

undivided interest of one acre in his undivided half interest in the one hundred acres. The purpose of the vendor was to thereby make each of said vendees a "freeholder," so that they could vote and defeat the stock law. They had no other purpose. The one acres (undivided) was fit for no other purpose, either of farming or other useful purpose and the deeds were made for the sole purpose of defeating the election by making the seven persons technically "freeholders," but not substantially so, in so far as the land was contemplated to be of utility.' This clearly shows a fraudulent attempt to defeat the wishes of a majority of the bona fide freeholders of the district, and is contrary to the spirit, if not the letter, of the law giving to freeholders only the right of suffrage in such elections. We are of the opinion that the deeds to such a fraction of real estate, made for the purpose as stated by the trial judge, did not make the grantees therein such freeholders, under the law, as entitled them to vote in said election, and their votes were properly rejected. The trial court erred in holding to the contrary. *McGraw v. Commissioners Ala.*, 8, South, 852."

In the McGraw case, cited above, the court said with respect to a similar situation:

"And we think the court of county commissioners * * * rightly refused to count or consider as freeholders those persons to whom an inconsiderable fraction of land had been conveyed solely for the purpose of enabling them to vote * * *."

In view of these authorities I conclude that the rule of good faith is applicable in the instant case and thus the determination of the factual question whether the conveyances described in your fifth question were made (1) in good faith or (2) merely for the purpose of blocking the detachment proceedings is one which must be made in the first instance by the county commissioners.

For these reasons, therefore, I conclude in specific answer to your inquiry, that:

1. 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.

2. The conveyance of inconsiderable fractions of land to several individuals solely for the purpose of promoting or impeding proceedings to detach territory from a municipal corporation under the provisions of Section 3577, General Code, is ineffective to constitute such individuals "freehold electors;" and the question of whether a particular conveyance was made for such purpose, or was made in good faith, is a question of fact to be determined in the first instance by the county commissioners.

Respectfully,

C. WILLIAM O'NEILL
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