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1. MUNICIPALITY — WHERE COUNCIL PASSED ORDINANCE TO ANNEX CONTIGUOUS TERRITORY AND NO ELECTORS RESIDED IN TERRITORY TO BE ANNEXED, SECTION 3561-1 G. C. AS TO VOTE OF ELECTORS IN TERRITORY HAS NO APPLICATION — COUNTY COMMISSIONERS, UPON FILING MUNICIPALITY'S PETITION FOR ANNEXATION, MAY PROCEED TO HEARING AND ACTION ON PETITION — SECTION 3558 ET SEQ., G. C.
2. MUNICIPALITY — FILED PETITION WITH COUNTY COMMISSIONERS TO ANNEX CONTIGUOUS TERRITORY — RESIDENT ELECTORS — FILED WITH TOWNSHIP TRUSTEES, WHERE TERRITORY LOCATED, PETITION TO INCORPORATE VILLAGE WHICH WOULD INCLUDE SUCH TERRITORY — PETITION FIRST FILED WILL HAVE PRECEDENCE — PROCEEDINGS UNDER PETITION LAST FILED WILL BE STAYED — SECTION 3526 ET SEQ., G. C.

SYLLABUS

1. When the council of a municipality passes an ordinance looking to the annexation to such municipality of territory contiguous thereto, pursuant to the provisions of Section 3558 et seq. General Code, and there are no electors residing within the territory sought to be annexed, Section 3561-1, General Code, providing for a vote by electors residing in territory so proposed to be annexed has no application, and the county commissioners may upon the filing of the petition of the municipality for such annexation proceed to a hearing and action on such petition.

2. When a petition is filed by a municipality with the county commissioners pursuant to Section 3558 et seq. General Code, praying for the annexation to said municipality of contiguous territory, and there is also filed with the township trustees of the township in which such territory is located, a petition of resident electors as provided in Section 3526 et seq. of the General Code, praying for the incorporation of a village which would include such territory, the petition first filed will have precedence, and proceedings under the petition last filed will be stayed.

Columbus, Ohio, March 22, 1944

Hon. Roland Pontius, Prosecuting Attorney
Jefferson, Ohio

Dear Sir:

I acknowledge receipt of your communication, requesting my opinion, and reading as follows:

"The council of the City of Conneaut has passed an ordinance, in pursuance of the provisions of Section 3559 of the General Code, authorizing the annexation of land outside the city limits. This land is occupied by the Bessemer and Lake Erie R. R. Company, and on it are located all of the dock and storage facilities of the company, at its Lake Erie port. The territory sought to be annexed is now a part of Conneaut Township. There are no electors residing within the limits of the territory which is sought to be annexed.

We have been informed that the city council now proposes to submit the question of annexation at the primary election to be held in May.

We wish to know: First, whether or not this question should be submitted at all, there being no electors within the territory sought to be annexed, or, if it is to be submitted, should it be submitted to all of the electors of Conneaut Township?

Second: Assuming that there are no electors within the territory and that electors within the territory are the only ones who may vote, what, if any effect would an election have?

Third: Assuming that the election would be without effect, is the matter of annexation then a question to be submitted to the county commissioners, and subject to their discretion?

Fourth: The city council having passed the ordinance providing for annexation, can the freeholders residing in a territory which would include the property which is sought to be annexed, now file a petition with the trustees seeking to have such a territory incorporated as a village, and assuming that they did file such a petition and the electors of the territory should vote favorably to such incorporation, would the village so established include the territory which is sought to be annexed?"

The following sections of the General Code govern the proceedings

relative to the annexation of territory to a municipal corporation upon application of the corporation:

“Section 3558: When the inhabitants generally of a municipal corporation desire to enlarge its corporate limits by the annexation of contiguous territory, it shall be done in the manner hereinafter specified.”

“Section 3559: The council of the corporation, by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one to be named in the ordinance, to prosecute the proceedings necessary to effect it.”

“Section 3560: The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council the territory therein described was authorized to be annexed to the corporation. The petition shall contain an accurate description of the territory, and be accompanied by an accurate map or plat thereof.

“Section 3561: When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required in case of annexation on application of citizens in this chapter.”

The reference in Section 3561 General Code, to the proceedings required in the case of annexation on the application of citizens, takes us back to Section 3548 et seq., whereby it appears that upon application of the inhabitants residing on territory adjacent to a municipality, annexation may be initiated by presentation to the county commissioners of a petition signed by a majority of the freeholders residing on such territory, accompanied by an accurate map or plat thereof, and here, again, we are referred by Section 3549, General Code for further proceedings to the provisions relative to the proceedings of the commissioners on application for the incorporation of a village as contained in Sections 3520 to 3525, inclusive, of the General Code. Briefly stated, the law requires that when such petition is filed, the commissioners shall fix a time and place for hearing of the petition, which shall not be less than sixty days after such filing. Thereupon, the agent of the petitioners named in the petition is required to cause a notice of such hearing to be published for six consecutive weeks. The commissioners are given powers which appear to be quasi-judicial in

nature, and, if, upon hearing, they find that the petition contains all of the matters required, that its statements are true, that the limits of the proposed territory to be annexed are accurately described and are not unreasonably large or small, that the map or plat is accurate, that notice has been given as required "and if it seems to the commissioners right that the prayer of the petition be granted" they shall then cause an order to be entered to that effect.

Prior to 1941, this procedure was carried through without consulting the will of the people residing on territory proposed to be annexed. By a new act effective September 6, 1941, Section 3561-1, General Code, was enacted reading as follows:

"A vote, by the electors residing in the contiguous territory, shall be taken under the election laws of the state of Ohio at the next general or primary election occurring more than thirty days after council passes the ordinance mentioned in section 3559 of the General Code. Thereupon all annexation proceedings shall be stayed until the result of the election shall be known. If a majority favor annexation, proceedings shall begin within ninety days to complete annexation, and if a majority vote is against annexation, no further proceedings shall be had for annexation for at least five years.

If territory is annexed as herein provided subsequent to the day upon which taxes became a lien, the new corporation tax rate shall not apply until the day preceding the second Monday of April next following when the lien of the state for taxes levied attaches, while in the meantime the old township rate shall apply."

It will be observed that by the provisions of Sections 3560 and 3561, the proceedings before the county commissioners have already been started by filing the petition, and Section 3561-1 provides in effect that the election provided for by that section shall operate as a stay of such proceedings. The purpose of this act is manifestly grounded solely on a recognition of the right of the inhabitants residing on the territory in question to have a voice in the matter. It will be noticed that the statute provides that "a vote by the electors residing in the contiguous territory shall be taken", etc. Manifestly, if there are no electors residing on the territory, there are none to be consulted and it would be impossible to take a vote, and the holding of an election under such circumstances would be an empty farce.

It is a well settled principle that the law does not require the doing of an idle or vain thing. As stated in 37 O. Jur. p. 634:

“It is a maxim that the law never requires the doing of an idle thing or compels the doing of the impossible. Accordingly, the court will not assume or presume that the legislature intended the doing of a vain, useless, purposeless or impossible thing.”

Citing *Webber v. E. Liverpool*, 5 O. N. P. (n. s.) 468; *Kent v. Bierce*, 6 Oh. 336; *Nichols v. Poulson*, 6 Oh. 305; *State, ex rel. Frazine*, 110 O. S. 523.

Accordingly, it is my opinion that under the facts stated in your letter, an election would be of no effect and would not be required by the law as a condition precedent to the proceedings before the county commissioners and the entry of an order by them, of annexation. In this connection you raise the collateral question of whether or not in case an election is had, it should be submitted not merely to the electors on territory sought to be annexed, but to all the electors in the township in which located. Plainly, the statute provides that this proposition when it is to be submitted, is to be submitted only to the electors residing in the contiguous territory. The electors in the balance of the township would have no part in such election under any circumstances.

There remains for consideration only the fourth question which you raise, to wit, the possible effect on the annexation proceedings begun by the city of an independent proceeding by the inhabitants of the township who might file a petition with the township trustees seeking to have incorporated as a village a territory which embraces the territory involved in the proposed annexation. Such petition for incorporation and the proceedings relative thereto are covered by Section 3526 et seq. of the General Code. Section 3526 provides that a petition to that effect may be filed with the township trustees, signed by at least thirty electors, a majority of whom shall be freeholders, which petition shall contain among other things, a request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation.

By Section 3527, General Code, the township trustees upon re-

ceipt of the petition, with proof that the persons who signed it are electors and reside within the limits of the proposed incorporation, and that a majority of them are freeholders, shall make an order that such territory shall with the assent of the qualified voters thereof, as hereinafter provided, be an incorporated village by the name specified in the petition. They are then required to order an election to be held within the next fifteen days and by the terms of Section 3529, if the result of the election shows a majority of the votes cast in favor of incorporation the township trustees are required to enter upon their journal a minute of all their proceedings, the number of votes cast for and against the proposition and an order declaring that such territory is to be deemed an incorporated village and that it has been incorporated by the name adopted.

It will thus be seen that while no wide discretion is conferred upon the township trustees, their duties being confined mainly to ordering the election and declaring its result, yet the effect of the whole proceeding is to accomplish the incorporation of a village.

The question naturally arises as to the possible conflict of jurisdictions in case a proceeding for incorporation of a village is begun while the proceedings for annexation are pending. It appears to me that jurisdiction attaches to the proceedings relative to the annexation not upon the adoption of the ordinance looking to annexation but upon the filing with the county commissioners of a petition based upon such ordinance. On the other hand, the proceedings of the inhabitants of territory desiring to be incorporated as a village are begun by the filing with the township trustees of a petition to that effect. While the two proceedings are somewhat different in character, yet in a case such as you present, both concern the matter of taking into a municipal corporation certain territory; in the one case by making it a part of an existing municipality by annexation, and in the other case by making it a part of a municipality proposed to be created.

The principle governing conflicts of jurisdiction of courts, it appears to me, is equally applicable to other tribunals having quasi-judicial power. It is thus stated in 11 O. Jur. p. 726:

“As between courts of concurrent and co-extensive jurisdiction, the one whose power is first invoked by the institution

of proper proceedings and the service of the required process acquires the right to adjudicate upon the whole issue and to settle the rights of the parties to the exclusion of all other tribunals."

Applying this principle to proceedings for annexation or incorporation of villages, it is said in 28 O. Jur., p. 50:

"When a particular board or tribunal has acquired jurisdiction of a proceeding for the incorporation of territory no other board or tribunal may acquire jurisdiction under another petition subsequently filed for the incorporation of the same or a portion of the same territory during the pendency of the first proceeding."

Citing *Waltz v. Bummersteen*, 5 O. L. A. 712.

If the annexation proceeding has been commenced by filing the petition of the city with the county commissioners, then the matter is pending and it would appear that an attempt on the part of residents of the township to seize upon that territory by incorporation of a village including it would properly be enjoined. In the case of *Waltz v. Bummersteen*, supra, decided by the Court of Appeals of the 8th District, it was held:

"Where case is pending before County Commissioners, any action sought before Township Trustees, including ensuing election following their order for incorporation, may be enjoined if such action concerns territory comprised in petition pending before Commissioners."

It appears that after the filing of a petition with the county commissioners asking that certain territory contiguous to the Village of Brecksville be annexed to such village, a petition was filed with the township trustees in which such territory was located, praying for the incorporation of the Village of Chippewa Heights and including the same territory, which petition for incorporation was granted by the township trustees. The court, in its opinion said:

"When a case is pending before the County Commissioners, any action sought before the Township Trustees, and the ensuing election following their order for incorporation, may be enjoined, if such action concerns territory comprised in the petition pending before the County Commissioners.

The Common Pleas Court erred in refusing plaintiff the injunction prayed for, and in dismissing the petition. A final order may be entered enjoining the County Recorder as prayed for in the petition."

It would follow from the principle above stated that if the proceedings for the incorporation of a village were instituted, as suggested in your letter, prior to the filing of the petition for annexation the latter proceeding would be stayed until an election has been held on the proposition of incorporating the village and decided adversely.

Specifically answering your questions it is my opinion that:

1. When the council of a municipality passes an ordinance looking to the annexation to such municipality of territory contiguous thereto, pursuant to the provisions of Section 3558 et seq. General Code, and there are no electors residing within the territory sought to be annexed, Section 3561-1, General Code, providing for a vote by electors residing in territory so proposed to be annexed has no application, and the county commissioners may upon the filing of the petition of the municipality for such annexation proceed to a hearing and action on such petition.

2. When a petition is filed by a municipality with the county commissioners pursuant to Section 3558 et seq. General Code, praying for the annexation to said municipality of contiguous territory, and there is also filed with the township trustees of the township in which such territory is located, a petition of resident electors as provided in Section 3526 et seq. of the General Code praying that the incorporation of a village which would include such territory, the petition first filed will have precedence and proceedings under the petition last filed will be stayed.

Respectfully,

THOMAS J. HERBERT

Attorney General