

3606

1. INCORPORATION OF TOWNSHIP TERRITORY INTO A VILLAGE—TWO PETITIONS FILED WITH BOARD OF TOWNSHIP TRUSTEES—PRECEDENCE MUST BE GIVEN TO PETITION OVER WHICH BOARD FIRST ACQUIRES JURISDICTION—SECTION 707.15 RC.
2. JURISDICTION TO CONSIDER AND ACT ATTACHES AS OF TIME OF FILING PETITION—INCORPORATION UNDER SECTION 707.15 RC—FILED WITH TOWNSHIP CLERK OR BOARD OF TOWNSHIP TRUSTEES.
3. UNINCORPORATED AREA, POPULATION LAST FEDERAL CENSUS IN EXCESS OF 5,000 DOES NOT UPON INCORPORATION BECOME A CITY.
4. AREA UPON INCORPORATION MAY ONLY ACQUIRE STATUS OF VILLAGE—ADVANCE TO STATUS OF CITY—PROCLAMATION OF SECRETARY OF STATE—BASIS OF FEDERAL CENSUS SUBSEQUENT IN POINT OF TIME TO ORIGINAL INCORPORATION.

## SYLLABUS:

1. Where two petitions for incorporation of township territory into a village are filed with a board of township trustees under Section 707.15, Revised Code, precedence must be given to that petition over which the board first acquires jurisdiction for purposes of consideration and action.
2. Where a petition for incorporation instituted under Section 707.15, Revised Code, is filed either with the township clerk or with the board of township trustees at a regular meeting or a special meeting called for that purpose, jurisdiction to consider and act thereon attaches as of the time of such filing.
3. An unincorporated area having a population at the last federal census in excess of 5,000, does not, upon incorporation, become a city.
4. An area upon incorporation may only acquire a status of a village regardless of its population. It may only advance to the status of a city by a proclamation of the Secretary of State, based upon a federal census conducted subsequent in point of time to its original incorporation.

Columbus, Ohio, March 17, 1954

Hon. Jackson Bosch, Prosecuting Attorney  
Butler County, Hamilton, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"1. There was presented to the Clerk of the Board of Trustees of Fairfield Township on December 17, 1953, a petition for the incorporation of a certain portion of territory in Fairfield Township into a village. This petition was to be presented to the board for their consideration at a special meeting on December 19, 1953. On December 18, 1953, a second petition for the incorporation of Fairfield Township into a village, was presented to the Board of Trustees directly by the petitioners, at a special meeting called for the purpose of considering this second petition.

"Q. Since the Board cannot act on both petitions, which petition must the Board act upon first, or which petition has first been presented to the Board?

"The last Federal census reported a population of Fairfield Township in excess of 5,000 inhabitants.

"Assuming that the Board were to act upon the petition requesting the entire area to be incorporated into a village (a) would the new political subdivision automatically become a city; (b) could the Secretary of State at any time prior to the next Federal census, proclaim the village to be a city or, (c) would the political subdivision remain as a village until the next federal census and proclamation thereafter by the Secretary of State?"

In consideration of your first inquiry, it would appear that the board of township trustees must act upon that petition over which jurisdiction to consider was first acquired. *State, ex rel. Osborn v. Mitchell*, 22 Ohio C.C., 208; *State, ex rel. Chisholm v. MacKenzie*, 31 Ohio C.C. Dec., 475. The applicable principle is stated in 28 Ohio Jurisprudence, Section 20, page 50, as follows:

"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. Therefore, when a petition for the annexation of territory, under

§3548, G. C., is pending before county commissioners, any action sought before township trustees, under §3526, G. C., for the incorporation of any portion of the same territory, may be enjoined. And when more than one petition affecting the same territory is filed before the same board or tribunal, that to which jurisdiction to act first attaches is entitled to precedence. Under an earlier analogous statute, providing for the creation of hamlets, it was held that where two petitions were filed with township trustees for the creation of a hamlet, one embracing a portion of the township and the other the whole of the township, the petition first filed should be first acted upon and submitted by the trustees, and that any action taken upon the petition last filed, prior to action upon the petition first filed, was null and void."

It follows from the foregoing that, as a general rule, jurisdiction will attach as of the time of the filing of the petition unless there is a condition precedent, the fulfillment of which is necessary before the board may hear the petition. See *State, ex rel. Chisholm v. MacKenzie*, supra.

Since, from the recitation of facts in your letter of inquiry there would be no condition precedent to consideration of either petition, the primary question resolves itself into a determination of what constitutes filing, etc., or, in more concrete terms, whether filing with the township clerk is a filing with the board of township trustees, or whether such filing may only be accomplished at a regular meeting or special meeting of the board. Section 707.15, Revised Code, provides as follows:

"When the inhabitants of any territory or portion thereof desire that such territory shall be incorporated into a village, they shall make application, by petition, to the board of township trustees of the township in which the territory is located, or, if the territory is located in more than one township, to the board of the township in which the majority of such inhabitants reside. Such petition shall:

"(A) Be signed by at least thirty electors of the territory, a majority of whom are freeholders;

"(B) Be accompanied by an accurate map of the territory;

"(C) Contain, in addition to the matter required by section 707.04 of the Revised Code to be set forth in petitions to incorporate territory laid off into village lots, the request of the petitioners that an election be held to obtain the opinion of the electors upon such incorporation. Such petition may be presented at a regular or special meeting of the board."

In the case of *State, ex rel. Osborn v. Mitchell*, supra, our former Circuit Court had occasion to consider precisely the same situation as that presented by your inquiry. The holding in that case, in so far as it is here pertinent, is best expressed by the first and fourth branches of the syllabus :

“1. The clerk of a township is also the clerk of its board of trustees, and when the board is not in session papers should be filed with the clerk, in order to constitute a legal filing with the trustees.

“4. Where two petitions are filed with township trustees each for a hamlet, one for a portion of the township and the other for the whole township, the petition first filed should be first acted upon and submitted to vote, and if the petition filed last is first acted upon, the proceedings thereunder will be null and void.”

The same principle was applied in the case of *State, ex rel. Chisholm* supra, where filing with the clerk of the board of county commissioners, while the board was in recess between adjourned meetings of their regular sessions, was held to constitute an application to the commissioners.

I am not unaware of the holding of the Court of Appeals in the case of *Decker v. City of Toledo*, 56 Ohio App., 344, which holds inter alia, as expressed in the first branch of the syllabus, as follows :

“The fact that a petition to incorporate territory into a village as provided for in Section 3526, General Code, was presented to the clerk of the township trustees does not operate to suspend or invalidate previously instituted and subsequently consummated proceedings to annex to an adjoining municipality territory of which that described in that petition is a part.”

The court in considering the validity of filing the petition to incorporate with the clerk of the board of township trustees stated, in part, at page 347 :

“1. Among other things, it is urged by plaintiff that the action of the city is invalid because it prevents the election authorized in Section 3526, General Code, to organize these precincts into a village.

“This proceeding has one fatal infirmity which disposes of this contention. Section 3526, General Code says such a petition shall be presented ‘to the trustees of the township,’ and this may be done ‘at a regular or special meeting of the township trustees.’

“The record shows this petition ‘was presented to the clerk

of the township trustees,' and it does not appear that it has ever been presented to the trustees. Without such proper presentation, it could not have the force claimed for it."

The above argument, as compared to that of the court, in *State, ex rel. Osborn v. Mitchell*, supra, is open to demonstrable objections. The first sentence of Section 707.15, supra, in speaking of an application by petition to the board clearly means an application *addressed* to the township trustees, the body statutorily charged with acting upon it; but it does not mean that it must be placed in the hands of such board in order that it be considered properly filed. The language in the latter part of the section under consideration, to the effect that the petition "may be presented at a regular or special meeting of the board," also means, in my opinion that it be presented for consideration at such a meeting rather than that it be filed at such time. Furthermore, even if it be assumed that the word "presented" is equivalent to "filed", the use of the permissive "may" does not preclude a filing with the clerk, and may even be said to contemplate or authorize such a filing. The *Decker* case is also factually distinguishable both from the *Osborn* case and the situation presented in your inquiry, in that the *Decker* case deals with an annexation proceeding conflicting with an incorporation rather than with two opposing petitions for incorporation. In addition, the petition for incorporation in the *Decker* case, was filed subsequent to previously instituted annexation proceedings. However, it should be recognized that these distinctions are ones of accident rather than of substance, and the two lines of cases are irreconcilable in principle. In the absence of any pronouncement of the Supreme Court, resolving the conflict, I am constrained to give effect to the consideration of what I conceive to be the legislative intent. While it is conceivable that in the case of conflicting interests in petitions of incorporation, the legislature might well have envisioned and intended that the race be to the diligent and swift, it can hardly be supposed that it was intended that the prize of prior consideration be bestowed upon that group which, peradventure, might be apprised of the time and place of a special meeting of the board, public notice of which is not a statutory requirement. See *State, ex rel. Cline v. Wilksville Twp.*, 20 Ohio St., 289. This is not, however, to imply that a filing with the board of trustees at a regular meeting or a special meeting called for such purpose, would not also be proper.

It is also noteworthy that in *State, ex rel. Youngs v. Board of Elections of Lucas County*, 81 Ohio App., 209, a comparatively recent case be-

fore the Court of Appeals for Lucas County, where a petition to incorporate a village was the subject of collateral attack by a taxpayer and elector, the fact that the petition was filed with the township clerk and addressed to the township trustees, was not the subject of any claimed irregularity and in fact its validity was apparently assumed by the court.

With respect to your second inquiry it will be observed that Section 703.01, Revised Code, reads in pertinent part, as follows:

“Municipal corporations, which, at the last federal census, had a population of five thousand or more, are cities. All other municipal corporations are villages. Cities, which, at any federal census, have a population of less than five thousand, shall become villages. \* \* \*”

The foregoing statutory provision carries out the constitutional mandate with respect to classification of municipalities according to population as provided by Article XVIII, Section I, Constitution of Ohio, which states as follows:

“Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.”

The first sentence of Section 703.01 supra, would appear to fix the status of municipal corporations as of the time of the enactment of that statute, and makes the results of the last federal census the determining factor in arriving at this classification. The second and third sentences of that section, as authorized by the constitutional provision quoted above, establish “the method of transition from one class to another,” in futuro, based on subsequent censuses. The first sentence of Section 703.01 supra, clearly contemplates that the municipal corporations to which it refers, and which are subject to the classification therein made, shall have been a municipal corporation as of the time of the last federal census. Thus, if we were to assume that the township mentioned in your inquiry were to subsequently become a municipality, in the words of the statute it will not be a “municipal corporation, which at the last federal census had a population of 5,000 or more, \* \* \*”; rather, it will be a municipal corporation which at the last federal census had no corporate existence whatsoever.

If further evidence of the legislative intent were required in this connection, it may be noted that the statutes are barren of any procedure for incorporating a given territory into a city. The sole procedure provided is for the incorporation of a territory into a village, as set forth in Chapter 707, Revised Code. For example, in those sections dealing with the incorporation of platted lands under Section 707.02 to Section 707.14, Revised Code, it is specifically provided in Section 707.10, Revised Code, that upon compliance with the provisions thereof, “\* \* \* the municipal corporation shall be known as the village of———, to be organized and governed under Title VII of the Revised Code.” In a cumulative proceeding for incorporation of platted or unplatted lands, as provided by Sections 707.15 to 707.20, Revised Code, a like result is dictated by Section 707.18, Revised Code, which states in part, that “the board shall then declare that such territory \* \* \* is an incorporated village \* \* \*.”

A city then, can come into existence only by advancement from the status of a village, 28 Ohio Jurisprudence, pages 46 and 47, and while the legislature has the constitutional authority to regulate the method of transition into a city, as well as the authority to regulate the transition of a city back into the status of a village, it has chosen to exercise that authority solely in the manner set forth in Sections 703.02 to 703.08, inclusive, Revised Code. It is apparent from these sections that a transition from the status of city may only be effected by a proclamation of the Secretary of State, based on the results of a federal census conducted subsequent in point of time to the original incorporation as a village. It may be observed that Section 3498, General Code, which is the forerunner of Section 703.06, Revised Code, provided that the Secretary of State issue the proclamation upon “the result of any future federal census” being made known to him. In the enactment of the revision the word “future” was eliminated from Section 703.06 supra, but in view of the expressed intent of the legislature, as set forth in Section 1.24, Revised Code, it may not be assumed that any substantive change was effected thereby.

Subdivisions b and c of the second question, as propounded in your letter of inquiry, have been the subject of a formal opinion addressed to the Honorable Ted W. Brown, Secretary of State, issued under date of March 17, 1954, as Opinion No. 3608, Opinions of the Attorney General for 1954, and it will not be necessary to restate the conclusions of that opinion or the reasons therefor at this juncture. However, said conclusion

may be summarized, to the extent that it is my opinion that the Secretary of State could not at any time prior to a federal census, proclaim a village a city, and that the village would remain such until the next federal census and proclamation thereafter by the Secretary of State. See *Murray v. State, ex rel. Nester*, 91 Ohio St., 220.

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

1. Where two petitions for incorporation are filed with a board of township trustees under Section 707.15, Revised Code, precedence must be given to that petition over which the board first acquires jurisdiction for purposes of consideration and action.

2. Where a petition for incorporation instituted under Section 707.15, Revised Code, is filed either with the township clerk or with the board of township trustees at a regular meeting or a special meeting called for that purpose, jurisdiction to consider and act thereon attaches as of the time of such filing.

3. An unincorporated area having a population at the last federal census in excess of 5,000, does not, upon incorporation, become a city.

4. An area upon incorporation may only acquire a status of a village, regardless of its population. It may only advance to the status of a city by a proclamation of the Secretary of State, based upon a federal census conducted subsequent in point of time to its original incorporation.

Respectfully,

C. WILLIAM O'NEILL

Attorney General