They do not show however, and there is no proof of the fact that the territory described in the notice of election and designated on the map, immediately surrounds a summer resort, park, lake or picnic grounds, kept regularly for outing and pleasure, or that such territory requires police protection.

The notice of election, a copy of which is set out in the affidavit in proof of notice, contains this clause "such territory requires police protection and contains a population of not less than fifty persons and the boundary lines of such territory surround a summer resort, park, lake or picnic grounds kept regularly for outing and pleasure and as a place for recreation and residences."

While this is a proper provision of the notice and the affidavit shows that the notice was properly posted in accordance with the statute there is no affidavit to the effect that these facts are true.

Without proof of these facts there is nothing to show that the territory, for the incorporation of which an election was held, is territory authorized by the statute to be incorporated, and for that reason the transcript is to this extent incomplete.

When a proper transcript is made and filed with the recorder the same should be recorded by him and a certified copy thereof forwarded to the secretary of state. Thereafter all laws governing the creation and regulation of incorporated villages shall be applicable to the territory so incorporated.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1477.

SCHOOLS—TRANSPORTATION OF PUPILS—BEFORE AND AFTER JULY 10, 1925—RECOVERY WHERE PARENT TRANSPORTS OWN CHILDREN.

SYLLABUS:

1. *By virtue of former Section* 7764-1, *General Code, enacted in* 1921, *and prior to the effective date of its repeal July* 10, 1925, *a mandatory duty devolved upon either the local board of education or the county board of education to provide work in high school branches at some school within four miles of the residence of children of compulsory school age who had finished the ordinary grade school curriculum, or to make the said school branches accessible to such children by furnishing transportation to a high school or board and lodging near a high school.*

2. *If, while said former Section* 7764-1, *General Code, was in force, the local board of education and the county board of education, with full knowledge of the facts, failed to make high school privileges available to all children of school age entitled to the same by means of some one of the methods provided, and the parents of such children discharged the boards' obligation by transporting the said children to a high school, such parents may recover the reasonable value of said transportation from the local board of education in an action at law.*

3. *After the repeal of former Section* 7764-1, *General Code, and since the enactment of Section* 7749-1, *General Code, boards of education in school districts, which are a part of a county school district, other than rural school districts wherein the schools have been centralized and a high school is maintained and transportation of pupils is furnished, can not be required to provide transportation to a high school, unless the county board of education deems and declares such transportation advisable and practicable.*

4. *Under the present law, if a parent residing in a school district of a county school district transports his child to a high school, he can not recover in an action at law for such*

transportation, unless it is shown that the county board of education deemed and declared such transportation to be advisable and practicable, and the local board of education or the county board of education has failed to provide such transportation.

5. *In a proper case, where it appears that a parent is entitled to recover for the value of his transporting his child to school, the amount which he should recover is the reasonable value of such transportation, based on the probabilities to be determined from all the competent facts and circumstances involved in such case.*

COLUMBUS, OHIO, December 30, 1927.

HON. GEORGE A. MEEKISON, *Prosecuting Attorney, Napoleon, Ohio.*

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

> "Please give me your opinion on the following subject:
>
> The Board of Education of Marion Township, Henry County, Ohio, does not furnish transportation for pupils.
>
> A resident of Marion Township, Henry County, Ohio, in the school year of 1923-1924, 1924-1925, and the school year of 1925-1926 transported his minor child to the regular high school maintained by said board in the village of Hamler, Ohio. The distance of the residence from the school was 4½ miles. He claims compensation from the Board of Education in the sum of $599.40; being at the rate of $1.50 per day the first two years and $0.90 per day the last year.
>
> We note that Section 7764-1 of the General Code has been repealed, and we have examined the decision of the Supreme Court in the case of Sommers vs. Board of Education, 113 O. S. 177.
>
> Please give me your opinion as to whether this is a valid claim against the Board of Education?"

During the school year beginning September 1, 1923, and ending August 31, 1924, and from September 1, 1924, until July 10, 1925, there was in force Section 7764-1, General Code, which read as follows:

> Sec. 7764-1. "Boards of education shall provide work in high school branches, as mentioned in Section 7648, (7649) General Code, at some school within four miles of the residence of each such child for those children of compulsory school age who have finished the ordinary grade school curriculum except those who live within four miles of a high school and those for whom transportation to a high school has been provided."

The above statute was enacted in 1921, (109 O. L. 380), and was repealed in 1925, the effective date of such repeal being July 10, 1925.

While this statute was in force an obligation rested on boards of education to provide high school privileges for all pupils of school age within the district, who had completed the ordinary grade school curriculum, or furnish transportation to such a school, or pay board and lodging for such pupils near a high school. It was held in the case of *Sommers* vs. *Board of Education*, 113 O. S. 177, that, where high school privileges were not furnished by the board within four miles of the residences of the pupils and the pupils lived more than four miles from any high school, and the board did not furnish transportation to any such high school or board and lodging for the pupils near a high school, the pupils' parents might transport the pupils to the nearest high school and recover from the board in an action at law for such transportation.

It is clear that in the case you mention, inasmuch as the board did not maintain a high school within four miles of the residence of the pupil, the pupil was entitled to transportation to the school or have his board and lodging paid near the school, and if the board failed in these respects, with full knowledge of the facts, and the parent transported the pupil to the high school, he would have a valid claim against the board for the reasonable value of such transportation for the school year of 1923, and 1924, and for the time from the beginning of the school year 1924 to July 10, 1925.

It should be borne in mind, however, that the board had a choice of three ways of making high school privileges available to the pupil, and before it can be held accountable for failure to exercise a choice in the matter and the parent recover for the transportation it must be charged with the knowledge that the child was eligible to admission in a high school and desired to have high school privileges afforded to it by the board of education of Marion Township.

In the recent case of *Board of Education of Swan Township* vs. *George Cox*, decided by the Supreme Court on December 7, 1927, it was held:

> "1. By virtue of Section 7764-1, General Code, enacted in 1921 and prior to its repeal July 10, 1925, a duty devolved upon either the local board of education or the county board of education to provide work in high school branches at some school within four miles of the residence of children of compulsory school age, who have finished the ordinary grade school curriculum if such children live more than four miles from a high school, or such boards may at their election provide transportation of such children to a high school, or provide board and lodging for such children near a high school.
>
> 2. In order that such boards of education may have a choice of the means of discharging the duties imposed upon them, it is the duty of such children or their parents to communicate to such boards the fact of readiness for high school work and the further fact of residence more than four miles from a high school in order that the board may have an opportunity to take official action in exercising such choice of means and to make provision therefor."

The syllabus of this case is published in the Ohio Law Bulletin and Reporter in its issue of December 12, 1927, at page 600.

In the course of the opinion, Chief Justice Marshall, after referring to former Section 7764-1, General Code, said:

> "By former decisions of this court interpreting this and other related sections it is declared that a board of education has a choice of means, viz.; that the board may either provide the high school transportation within a distance of four miles from the residence, or provide transportation, or provide board and lodging to the pupil near the high school. State ex rel. Master vs. Beamer, 109 O. S. 133; Sommers vs. Board of Education, 113 O. S. 177. The statute does not in terms require that any formal request or demand be made upon the board but it must be apparent that there could be no opportunity to the school board to exercise a choice of means unless the matter were brought to the attention of the board by request or demand."

With respect to the claim of the parent for transportation for the period after July 1, 1925, a different situation exists.

At the time of the effective date of the repeal of Section 7764-1, supra, there became effective Section 7749-1, General Code (111 O. L. 123), which reads as follows:

"The board of education of any district, except as provided in 7749, may provide transportation to a high school within or without the school district; but in no case shall such board of education be required to provide high school transportation except as follows: If the transportation of a child to a high school by a district of a county school district is deemed and declared by the county board of education advisable and practicable, the board of education of the district in which the child resides shall furnish such transportation."

Section 7749, General Code, referred to in the above statute, provides that:

"When the elementary schools of any rural school district in which a high school is maintained are centralized and transportation of pupils is provided, all pupils resident of the rural school district who have completed the elementary school work shall be entitled to transportation to the high school of such rural district. * * *"

In view of the provisions of Section 7749-1, supra, the board of education of Marion Township could not be required to provide transportation for the pupil in question after July 10, 1925, unless the county board of education of Henry County school District deemed and declared such transportation advisable and practicable.

With reference to the amount of compensation that a parent should be paid for transporting his minor child to a high school, if it is once determined that he has a claim therefor, that question is a question of fact to be determined in the light of all the circumstances. In all cases it should be a reasonable amount per day for such number of days as it may be determined from all the pertinent facts, the transportation was furnished.

In the case of *Board of Education* vs. *Cox* referred to above, the court in the third branch of the syllabus said:

"In an action against a board of education to recover the reasonable value of transportation of children, living more than four miles from a high school, it is not error on the part of the trial court to refuse an instruction that before they can find a verdict for the plaintiff they must find definitely from a preponderance of the evidence the number of days that plaintiff transported his child to a high school. The jury is only required to determine the probabilities from all the competent evidence in the case."

I am therefore of the opinion, that the parent of the child referred to in your communication has a valid claim for the reasonable value of the transportation which he has furnished, in transporting his minor child to the high school, for the period from the beginning of the school year of 1923 and 1924 until July 10, 1925, provided it appears that the board of education of Marion Township, with full knowledge of all the facts, failed to provide high school privileges for such pupil within four miles of his residence, or furnish transportation to a high school or board and lodging near a high school, and a like claim for the reasonable value of such transportation furnished by the parent after July 10, 1925, if the transportation of such pupil was deemed and declared to be advisable and practicable by the board of education of Henry County.

Respectfully,
EDWARD C. TURNER,
Attorney General.