

following sections of the chapter entitled "fences" do not apply to "lands laid out into lots outside of municipal corporations." It is quite evident to me that the lots referred to in Section 5908, supra, refer to building allotments where lots are laid out for building purposes and not to the lots set aside for burial purposes as provided in Section 10103, supra.

From the foregoing discussion and authorities cited, it is my opinion that where land owned by a cemetery association outside of a municipality adjoins land of other persons, that it is the duty of such cemetery association under the provisions of Sections 5908, et seq., of the General Code, to participate in the cost of the repairing or building of a partition fence, provided such fence will be of some benefit to the lands of such cemetery association.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1475.

APPROVAL, BONDS OF BREWSTER VILLAGE SCHOOL DISTRICT, STARK COUNTY, OHIO—\$85,000.00.

COLUMBUS, OHIO, December 30, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1476.

INCORPORATION OF TERRITORY IMMEDIATELY SURROUNDING SUMMER RESORT, PARK, ETC., DISCUSSED.

SYLLABUS:

In the course of proceedings for the incorporation of territory immediately surrounding a summer resort, park, lake or picnic grounds as provided in Sections 3545 and 3546, General Code, after the election therein provided for is held, and it is determined that a majority of ballots cast at such election contain the words "For incorporation" there should be filed with the county recorder of the county, wherein such territory is located, proof in writing of the existence of all the facts authorizing the incorporation of such territory and empowering it to function as a municipality, which written proof should be recorded by the county recorder and proper certification made by him to the secretary of state. Thereafter all laws governing the creation and regulation of incorporated villages will be applicable to the territory so incorporated.

COLUMBUS, OHIO, December 30, 1927.

HON. HENRY W. HARTER, JR., *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, requesting my opinion, as follows:

"In Canton Township, Stark County, Ohio, there is an amusement park bordering on a body of water known as Meyers Lake. This park is operated only in the summer with the exception of the public dance-hall, which is in operation the year round. There are more than fifty persons who reside at Meyers Lake Park the year round but none of them are freeholders.

An attempt was made to incorporate this territory which is unplatted under the provisions of Sections 3545 and 3546, and all things necessary to be done under said sections were accomplished including the holding of the election, at which election the majority voted for incorporation.

The question now arises as to what further must be done in order to complete the incorporation. A statement has been prepared by persons interested in incorporation which includes the notice, the map of territory to be incorporated, and the result of the election, which duly certified has been left for record with the County Recorder.

The last sentence of Section 3546 provides as follows:

'All laws governing the creation and regulation of incorporated villages shall have full force and effect insofar as they are not inconsistent and do not conflict with the provisions of this chapter.'

Query: Should the transcript now in the hands of the County Recorder be recorded by her and certified copy forwarded to the Secretary of State, or, the election having been held, must the incorporators proceed under Section 3526, et seq., except as to the election provided in Section 3528? In other words, is it possible under the provisions of Sections 3545 and 3546 to incorporate without petition to the township trustees as provided in Section 3526?

It is evident that it is not necessary to proceed by petition to the County Commissioners since the territory sought to be incorporated is unplatted."

Sections 3545 and 3546, General Code, read as follows:

Sec. 3545. "Any territory requiring police protection and containing a population of not less than fifty persons and immediately surrounding a summer resort, park, lake or picnic ground, kept regularly for such outing and pleasure, may incorporate by setting up notices of an election in three of the most public places in the territory proposed to be included in the corporation signed by five citizens and electors of the territory. Such notices shall be posted at least ten days before the election, stating time and place where the election shall be held, and shall contain an accurate description of the territory proposed to be taken into the corporation."

Sec. 3546. "The election shall as far as practicable be conducted in the manner prescribed for the election of township officers. The electors present shall choose three judges and two clerks from the electors present to act as judges and clerks of such election, and the ballot shall contain the words: 'For incorporation' and 'Against incorporation.' If the majority of the ballots cast at such election contain the words 'For incorporation,' it shall be deemed that the citizens of such designated territory have assented to such incorporation. If the majority of the ballots cast at such election contain the words 'Against incorporation,' it shall be deemed that the people of such designated territory have not assented to the incorporation thereof. All laws governing the creation and regulation of incorporated villages shall have full force and effect insofar as they are not inconsistent and do not conflict with the provisions of this chapter."

Sections 3545 and 3546, supra, were originally enacted in 1902 (95 O. L. 469). The provisions contained in these sections of the Code comprised an entire act entitled "An Act—To supplement Section 1566 of the Revised Statutes." Section 1566, Revised Statutes, provided at that time for the incorporation of villages in adjoining portions of territory lying in two or more counties, and read precisely the same as Section 3537, General Code, now reads. The provisions of both Sections 3545 and 3546, General Code, were contained in one section of the Revised Statutes known at that time as Section 1566a, Revised Statutes. This section was published in the Fourth, Fifth and Sixth Editions of Bates' Revised Statutes as Section 1536-23, Revised Statutes.

In the original act, and as carried into the Revised Statutes, the last word of the Act was "act." Upon the codification of 1910 the statute was divided and carried into the Code as Sections 3545 and 3546, General Code, and the last word was changed from "act" to "chapter." The chapter wherein this section of the Code appears, beginning at Section 3516, General Code, relates to different methods of incorporation of villages, and it is apparent that the last sentence of Section 3546, supra, has reference to the incorporation of territory surrounding a summer resort, park, lake, or picnic ground as described in Section 3545, supra.

The adoption by reference of the statutory provisions relating to the incorporation of villages, as provided by the last sentence of Section 3546, supra, for the incorporation of territory surrounding summer resorts, lakes, parks or picnic grounds, makes it necessary to consider the provision of the statutes relating to the incorporation of villages and determine which of the said provisions are not inconsistent and do not conflict with the provisions of Sections 3545 and 3546, supra.

The law with reference to the incorporation of villages is contained in Sections 3516 to 3546, inclusive, of the General Code. In addition to the method provided in Sections 3545 and 3546, supra, for the incorporation of territory surrounding summer resorts, parks, lakes and picnic grounds, two methods of incorporation of villages are provided.

Sections 3517 to 3525, inclusive, of the General Code, provide for the incorporation of territory which has been laid off into village lots, and territory lying on an island or adjacent islands or parts thereof by petition to the county commissioners. Section 3521, General Code, provides for a hearing on the petition. Sections 3522 and 3523, General Code, provide for the making of an order by the board of commissioners authorizing the organization of the village when, upon the hearing of the petition, it finds certain facts to be true, entering the same upon its journal, and causing a certified copy of the orders and proceedings of the board of commissioners together with the petition, map and all other papers on file relating to the matter, to be delivered to the recorder of the county. Sections 3524 and 3525, General Code, provide as follows:

Sec. 3524. "The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as hereinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records and preserve in his office the original papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded."

Sec. 3525. "When the record is made, the corporation shall be deemed the village of -----, to be organized and governed under the provisions of this title. Thereupon the recorder shall make, and certify under his official seal, two transcripts of the record, one of which he shall forward to the secretary of state, and, on demand, deliver the other to the agent of the petitioners, with a certificate thereon that the duplicate has been forwarded to the secretary of state. When a municipal corpora-

tion is organized by the election of its officers, notice of its existence shall be taken in all judicial proceedings."

The other method provided for the organization of a village is contained in Sections 3526 to 3530 of the General Code. Section 3526 provides for the filing of a petition with the trustees of a township by the inhabitants of any territory which the petitioners desire to have incorporated as a village. The petition must be accompanied by the request of the petitioners and an election held to obtain the sense of the electors residing within the territory described in the petition. Sections 3527 and 3528, General Code, make provision for the calling of the election and the form of ballot to be used. Sections 3529 and 3530, General Code, provide as follows:

Sec. 3529. "If a majority so cast have thereon the words, 'For incorporation,' the township trustees shall cause to be entered on their journal, a minute of all their proceedings, the number of votes cast for incorporation, and the number cast against incorporation, and they shall then declare that such territory shall from that time be deemed an incorporated village, and shall make an order declaring that such village has been incorporated by the name adopted."

Sec. 3530. "The trustees shall make a certified transcript of the journal entries of all their proceedings and a majority of them having signed it, with the original petition and plat, they shall deliver it to the county recorder, who shall forthwith make a record of the petition, transcript, and plat or map, in the public book of records, and preserve in his office the original papers delivered to him by the trustees, and certify thereon that the transcribed petition and map are properly recorded. When the recorder has so made such record, he shall certify and forward to the secretary of state a transcript thereof."

It will be observed that in both the methods of incorporation above described, provision is made for a finding of incorporation and a declaration of the same, in the one case by the county commissioners, in the other by the township trustees, while in the case of incorporation of territory surrounding a summer resort no such provision is made. The corresponding statutory provision in the latter case is that contained in Section 3546, *supra*, which says that upon the election provided for "if the majority of the ballots cast at such election contain the words 'For incorporation' it shall be deemed that the citizens of such designated territory have assented to such incorporation."

In cases where the incorporation is effected by petition to the county commissioners or township trustees, it is provided that certified copies of all entries and findings, together with all original petitions, maps and papers relating to the matter shall be forwarded to the county recorder who shall record them. No similar provision is made in Sections 3545 and 3546, General Code, when incorporation is effected of territory surrounding summer resorts. Up to the point of the finding and declaration of incorporation, and the certification of that fact and other pertinent evidences of procedure in effecting the incorporation to the county recorder, the laws governing the incorporation of villages other than those from territory surrounding summer resorts are inconsistent and in conflict with the provisions of Sections 3545 and 3546, *supra*.

However, inasmuch as no provision is made in Sections 3545 and 3546, for a finding of incorporation and a certification to the recorder, the provisions with reference thereto where incorporation is otherwise effected than in accordance with the provisions of these two sections, is not inconsistent or in conflict with these provisions and should be followed.

As will be observed, the certification to the recorder is somewhat different when done by the commissioners than when done by the trustees, yet, in each case it is provided that all the pertinent papers, maps, orders and findings shall be certified, and it is my opinion that the same rule should be followed where incorporation is effected in accordance with Sections 3545 and 3546, General Code.

There must necessarily in such cases be an official determination as to whether or not a majority of the ballots cast at the election provided for by Sections 3545 and 3546, General Code, contain the words "For incorporation" or otherwise.

Inasmuch as the election is to be conducted in the manner prescribed for election of township officers, this determination should be made by the township clerk of the township in which the territory is located, as provided by Section 5112, General Code, which reads as follows:

"The returns of township elections shall be made by the judges and clerks in the several precincts to the proper township clerk within one day after the election. Such clerk shall canvass the vote, declare the result and issue and deliver certificates to the officers so elected."

As the record made by the county recorder should contain all the pertinent facts showing not only the right to incorporate, and as well a compliance with the statute authorizing the same, and no method is prescribed for the making of proof of these facts, it should be done by affidavit so that some permanent record may be made. These affidavits should contain proof of the right to incorporate under the statute, and compliance with the statute.

You state in your inquiry:

"A statement has been prepared by persons interested in incorporation which includes the notice, the map of territory to be incorporated, and the result of the election, which duly certified has been left for record with the County Recorder."

and you inquire whether or not this transcript now in the hands of the county recorder should be recorded and a certified copy forwarded to the secretary of state.

You also inquire whether or not it is possible under the provisions of Sections 3545 and 3546, General Code, to incorporate without petition to the township trustees as provided in Section 3526.

Answering your second question first, I am of the opinion that if it be desired to incorporate territory requiring police protection and containing a population of not less than fifty persons immediately surrounding a summer resort, park, lake or picnic grounds kept regularly for outing and pleasure, the same may be done by complying with the provisions of Sections 3545 and 3546, General Code, without petition to the trustees or county commissioners.

With reference to your first inquiry, I have been furnished a copy of the transcript which you refer to in your letter as having been filed with the county recorder of Stark County. This transcript contains an affidavit in proof of notice of the election; affidavit in proof of election; certificate of signers of the notice, to the effect that the affidavit in proof of notice and the affidavit in proof of election are correct copies; certificate of judges and clerks of election and the certificate of the township clerk to the effect that he had canvassed the vote and declared the result to be that 92 votes had been cast "For incorporation" and 29 votes "Against incorporation" and that the majority of such votes were "For incorporation."

These affidavits are proper in form and sufficient in substance so far as proof is necessary of the facts contained in the affidavits. They show that the election was properly called and conducted and the result thereof properly canvassed and declared.

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*