

Cities or Towns, Incorporation Of. Incorporation, of Cities or Towns. Elections, for Incorporation of Cities or Towns. Contest, of Elections for Incorporation of Cities or Towns.

An election on the question of the incorporation of a municipality must be had and conducted substantially as required by statute, and if not held in substantial compliance with statute it is subject to contest.

Sections 7234 to 7249 of the Revised Codes have no application to contesting elections upon the question of the incorporation of a municipality; these sections applying only to certain elections and referring only to contest pertaining to the rights of individuals declared to be elected to public office.

Under the provisions of Section 6943, et seq., the attorney general may institute quo warranto proceedings to determine whether or not a proposed municipality has a legal existence, and when upon a complaint or otherwise he has good reason to believe that a case can be established by proof he shall commence such an action.

Only such persons whose names appear upon the official register or check list of the last preceding election, and who are residents within the limits of the proposed incorporation or precincts covering the territory proposed to be incorporated, are entitled to vote at an election to determine whether or not the city or town shall be incorporated.

Illegal votes will not render an election invalid if it appears that the result was not affected thereby.

Helena, Montana, September 24, 1910.

Mr. J. W. Speer,
County Attorney, Cascade County,
Great Falls, Montana.

Dear Sir:—

Your letter of September 19th has been received, requesting an opinion of this office upon the following propositions, to-wit:

1. Is the election upon the question of incorporation of a city or town subject to contest upon the ground that a sufficient number of qualified electors have been denied the right to vote, or that if their votes had been accepted the result of the election would have been different?
2. Is an election of this character subject to contest upon the ground that the polls were closed by the judges and clerks from 11 a. m. until 3 p. m. of election day, and that the judges and clerks refused to permit a large number of electors to participate in the voting?
3. Are the provisions of Section 7234 to 7249 of the Revised Codes applicable to the contest of an election held under Section 3209?
4. If they are not, what remedy or remedies are open to the electors who have been denied the right to vote at such an election and whose votes would have produced a different result had they been allowed to participate in the election?

5. Who would be qualified electors upon the question of incorporation? Would the right to vote be limited to those whose names appeared on the last official register list of the election in the fall of 1908 or could those who actually possessed the necessary qualifications to entitle them to register at the general election this fall be entitled to vote upon the question of incorporation?

In answer to your first question, I will say, that it is a well settled principle of law, that an election on the question of the incorporation of a municipality must be had and conducted substantially as required by statute, (28 Cyc. p. 165); and if a sufficient number of qualified electors have been denied the right to vote, which vote would have changed the result of the election, there can be no question but what a substantial compliance with the statute has not been had, and therefore the election would, upon this ground, be subject to contest.

Answering your second question, Section 514 of the Revised Codes provides:

"The polls must be opened at eight o'clock in the morning of election day, and must be kept open continuously until six o'clock in the afternoon of said day, when the same must be closed."

It would appear that if the polls were closed from 11 a. m. until 3 p. m. of election day, and that by reason of this fact a sufficient number of the electors were precluded from participating in the election to affect a different result, a substantial compliance with this section would not have been had, and therefore the election would be subject to contest upon this ground.

Replying to your third question, as to whether or not the provisions of Sections 7234 to 7249 of the Revised Codes are applicable to the contest of such an election, I will say, that in my opinion the sections referred to apply only to contesting "the right of any person declared to be elected to an office." This being a special statutory proceeding for the purpose of contesting certain elections and referring only to contests pertaining to the right of individuals declared to be elected to a public office, I do not believe the sections would have any application to the question of incorporating a municipality. I have attempted to find some authority construing these statutes in a case similar to the one presented but have been unable to do so; and from my construction of these sections, I do not believe they apply to the character of contests here under consideration.

If a pretended municipal corporation has failed to become a corporation de jure, even though it may be one de facto, by reason of there being no valid law authorizing the incorporation, or by reason of failure to substantially comply with the requirements of the law, the state may in quo warranto proceedings oust it from the exercise of corporate powers and privileges.

People vs. Stratton, 81 Pac. 245;

People vs. Loyalton, 147 Calif. 774; 82 Pac. 620;

People vs. City of Los Angeles, 65 Pac. 749.

Under the provisions of Section 6943 et seq., the attorney general, when directed by the governor, or such officer may upon his own relation, bring an action in quo warranto to determine whether or not such a corporation has a legal existence; and when, upon complaint or otherwise he has good reason to believe that such a case can be established by proof, he shall commence such an action.

It appears that the only case in which quo warranto proceedings may be instituted by a private person is under Section 6947, where a person claiming to be entitled to a public office, unlawfully held and exercised by another, may bring an action therefore in the name of the state; but in the question under consideration this particular section would not apply, and in my opinion it would be necessary for the person aggrieved to make complaint with sufficient showing to the attorney general for the purpose of having that officer institute quo warranto proceedings to determine the legality of the existence of the proposed municipality.

A private individual cannot institute quo warranto proceedings to contest the validity of the existence of a municipal corporation unless such proceeding is authorized by statute.

Moore vs. Seymour, 69 N. J. L. 606;

State vs. McLeon Co., 92 N. W. 385.

It is my opinion therefore that the only way in which the electors desiring to contest the validity of the proposed incorporation, in the event it was determined that the proposition for incorporation was carried, would be by a complaint in the nature of quo warranto as above set forth.

However, it is quite possible that if the board of county commissioners have not as yet called the first election of officers of the corporation, an injunction might lie to prevent them from doing so, in the event it could be shown that the corporation was illegally formed and that the board had no authority, by reason of a fraudulent election, to declare the existence of the corporation, or to give the notice of election prescribed by Section 3210.

Your fifth question is answered in the opinion of this office addressed to Mr. A. J. Walrath, county attorney, Bozeman, Montana, under date of March 22, 1905. (See Opinions of Attorney General, 1905-6, p. 314). In that opinion it is held that elections held for the purpose of voting upon the question of incorporating a town are governed by the general provisions of Title II, Part III, of the Political Code, and that only such persons as have been registered and whose names appear upon the registration list of the precinct or precincts covering the territory proposed to be incorporated, have a right to vote upon the question of incorporation.

Section 3209 of the Revised Codes provides that the county commissioners must call an election of all the qualified electors residing "in the territory described in the petition for incorporation."

Section 491, Revised Codes, provides that:

“At any special election held for any purpose in any county, copies of the official register and check list, which were printed or written before and used at the last preceding general election, must be used, and no new registration need be made.”

It is therefore our opinion in answer to question five, that only such persons whose names appear upon the official register, or check list of last preceding general election and who are residents within the limits of the proposed incorporation are entitled to vote at such election.

However, illegal votes will not render an election invalid, if it appears that the result was not affected thereby.

People vs. Loyalton, 147 Calif. 774; 82 Pac. 620.

Trusting that the foregoing opinion sufficiently advises you upon the questions submitted, I remain,

Yours very truly,

ALBERT J. GALEN,

Attorney General.