

1440.

INCORPORATION OF MUNICIPALITY—PROCEEDINGS NOT HINDERED  
BY REPEAL OF SECTIONS 3527 AND 3528, GENERAL CODE.*SYLLABUS:*

*Even though Sections 3527 and 3528 of the General Code were repealed by the 88th General Assembly, it is still possible to incorporate a municipality on petition to the township trustees, in accordance with the proceedings provided for by Section 3526, et seq., of the General Code.*

COLUMBUS, OHIO, January 23, 1930.

HON. JAMES M. AUNGST, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion in answer to the following question:

“Is it possible to proceed to incorporate a municipality under proceedings, starting with Section 3526 G. C. providing for petition to township trustees for incorporation in view of the fact that this last General Assembly has repealed Sections 3527 and 3528 of the General Code?”

In 1896 there was enacted by the General Assembly an act entitled: “An Act to permit the incorporation of territory within a township”. (92 O. L. 333). Prior to that time, there was no method provided by statute for the incorporation of unplatted territory. Provision had been made for the incorporation of territory which had been laid off into village lots, a plat of which territory had been acknowledged and recorded, by making application to the county commissioners. This law is still in force, and has come down to us as Sections 3517, et seq. of the General Code.

The act of 1896, above referred to, provided for the incorporation of any unincorporated territory, whether the same had been platted or not, upon petition to the township trustees of the township in which the territory was located. The said act was carried into the Revised Statutes as Sections 1561a, 1561b and 1561c of the Revised Statutes of Ohio. These sections were codified in 1910 as Sections 3526 to 3531 inclusive, of the General Code of Ohio, and with a slight modification made in 1898, were in force as originally enacted until the repeal of that portion of the act codified as Sections 3527 and 3528, General Code, in 1929.

Section 3526, General Code, provides in substance that when the inhabitants of any unincorporated territory desire to incorporate such territory into a village, application may be made to the trustees of the township in which the territory is located by petition to be signed by at least thirty electors of the territory, a majority of whom must be freeholders, which petition must contain an accurate description of the territory sought to be incorporated and the request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation. The petition is to be presented at a regular or special meeting of the township trustees.

Section 3527, General Code, provided that the trustees, upon receipt of the petition and upon being satisfied that the petition was properly signed by the proper number of qualified electors, should give notice for an election to be held at a convenient place within fifteen days thereafter, to determine whether such territory should be incorporated. This section also provided for the publication of a notice of said election either by publication in a newspaper or by the posting of notices.

Section 3528, General Code, provided for the manner of conducting the election and the form of the ballot.

Section 3529, General Code, provides for the proceedings of the township trustees after the election, if the result of the election be in the affirmative.

Section 3530, General Code, provides that the trustees shall make a certified transcript of the journal entries of all their proceedings with reference to such matter and deliver the same 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. When the recorder has so made such record he is required to certify and forward to the Secretary of State a transcript thereof.

Section 3531, General Code, provides that the corporation after the proceedings hereinbefore outlined have been completed shall then be a village under the name adopted in the petition, with all powers and authority given to villages, and that no injunction shall be brought, as provided by law in case of filing the transcript with the county commissioners, unless the said action be instituted within ten days from the filing of the papers by the trustees with the county recorder.

The 88th General Assembly, in House Bill No. 362, known as the Morgan Repealer Bill and codified as Section 13767-4, General Code, repealed Sections 3527 and 3528, General Code. (113 O. L. 685).

Sections 3526, 3529, 3530 and 3531, were not repealed or changed in any manner at the time of the repeal of Sections 3527 and 3528, General Code, and are still in force.

It will be observed that Sections 3527 and 3528, General Code, before their repeal, pertained only to the procedure and conduct of the election which the law required to be held before territory could be incorporated upon petition to the township trustees. The effect of the repeal of these sections is simply to do away with the manner of conducting the election set out in former Sections 3527 and 3528, General Code, and has no effect upon the right to incorporate in the manner provided for in Section 3526, General Code, or the proceedings for incorporation to be conducted in the manner provided for by these statutes, except as to calling and conducting the election.

The right to incorporate in the manner provided for by these sections of law and the duty of the trustees to submit the question to an election still exists.

The intent of the Legislature in repealing Sections 3527 and 3528, General Code, is expressed in the title of the act by which they were repealed. The title of this act is as follows:

"To further supplement Section 13767 of the General Code by the enactment of supplemental Sections 13767-3 and 13767-4. To repeal the following sections of the General Code and the appendix thereto, which are obsolete, unconstitutional or unnecessary: \* \* \* 3527, 3528 \* \* \*"

It is a well settled principle of law that the express repeal of certain sections of law relating to a particular subject implies an intent not to repeal other sections applying to the same subject. Lewis' Sutherland on Statutory Construction, Section 292. It seems apparent that the Legislature had no intent to take away the right to incorporate territory in the manner provided by Section 3526, et seq., General Code, and that the only reason for repealing Sections 3527 and 3528 of the General Code, was, as stated in the act itself, because they were either obsolete, unconstitutional or unnecessary.

By reason of the fact that the other sections of the Code pertaining to the same subject were not repealed it could not be said that these two sections were

obsolete, nor may it be said that the said sections were unconstitutional if for no other reason than that the Common Pleas Court of Cuyahoga County in the case of *Lawrence vs. Mitchell*, 8 N. P. page 8, specifically held the said sections of the law to be constitutional, which fact the Legislature must be presumed to have known. It appears therefore that the reason for the repeal was because, to the legislative mind, they were unnecessary.

Ample provision is made in the act of the General Assembly, passed in 1929, to revise and re-codify the election laws of Ohio, (113 O. L. 307) for the submission to the electors of issues such as the incorporation of territory under Section 3526, General Code. See Sections 4785-2, 4785-4, 4785-5, 4785-99 and 4785-103, General Code. See also Weinland's *Ellis' Ohio Municipal Code*, 8th Edition p. 53 note.

I am therefore of the opinion, in specific answer to your question, that even though Sections 3527 and 3528 of the General Code were repealed by the 88th General Assembly, it is still possible to incorporate a municipality on petition to the township trustees, in accordance with the proceedings provided for by Section 3526, et seq., of the General Code.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

1441.

APPROVAL, ABSTRACT OF TITLE TO LAND OF VAUGHTERS KRAMER  
COMPANY IN HUNTINGTON TOWNSHIP, ROSS COUNTY.

COLUMBUS, OHIO, January 23, 1930.

HON. CARL E. STEEB, Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.

DEAR SIR:—This is to acknowledge receipt of your communication of recent date submitting for my examination and approval abstract of title, warranty deed, encumbered estimate No. 5843, Controlling Board release certificate and other files relating to the proposed purchase of a tract of thirty-five acres of land in Huntington Township, Ross County, Ohio, which tract of land is owned of record by The Vaughters Kramer Company, a corporation, and which is more particularly described as follows:

“Beginning at an iron pin in the center of the public road leading from Portsmouth Pike to Stony Creek known as the Sam Simeral Road, one rod from the southeast corner of Dortha Cox, two acre tract of land, thence north fifteen degrees, east six poles to a stone north 50 degrees east 92½ poles to a stake; thence south 64 degrees east 38 poles to a stake, thence south 15 degrees west 96 poles to center of road to northeast corner of a 50 acre tract of land now owned by Hortense Smith, thence following center of road to place of beginning, containing thirty-five (35) acres, more or less, and being part of the same premises conveyed to Floyd A. Cox by H. D. Yates, and also being part of the same premises conveyed to H. D. Yates by Andrew M. Cox and wife, by deed dated July 8, 1927, and recorded in Volume 204, Page 434, of the deed records of Ross County, Ohio, to which said deeds reference is here made.”