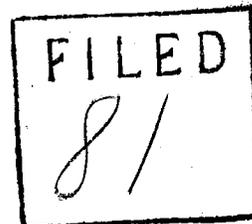


CONSTITUTIONAL LAW: County courts, under the 1945 Constitution, retain jurisdiction to entertain petitions for the incorporation of cities and towns.

September 12, 1946



9/20  
Honorable Robert M. Sevier  
Judge of the Probate Court  
Liberty, Missouri

Dear Judge Sevier:

This is in reply to yours of recent date wherein you request an official opinion from this department, which reads as follows:

"I am making this request directly since time does not permit me asking the Prosecuting Attorney to write for an opinion on the following question.

"Section 6217 Revised Statutes, Missouri, 1939, is the only section in the Missouri Statutes by which any place that desires to be incorporated as a city can take the steps therein indicated to do so. Now then, in view of the new Constitution in which the County Courts are no longer courts of record and in view of the function of the County Courts in such Section 6217, would you tell me if any pending legislation has been proposed placing the functions of the County Courts in any other court of record?

"As there is no County Court of record at this time, would there be any question as to the validity of the incorporation simply by reason of the fact that this section, if no new section has been proposed, is still in effect, especially in view of the new Constitution?"

The provisions of Section 6217, R.S. No. 1939, applicable to your question are as follows:

"Any city or town of the state not incorporated may become a city of the class to

which its population would entitle it under this article, and be incorporated under the law for the government of cities of that class, in the following manner: Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, setting forth the metes and bounds of their city or town and commons and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such city or town, and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated, designating in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic and incorporate, by the name and style of 'the city of . . . . .,' or 'the town of . . . . .,' and the first officers of such city or town shall be designated by the order of the court, who shall hold their offices until the first general election of officers, as provided by law, and until their successors shall be duly elected and qualified: Provided, that any city or town of the state of Missouri, not incorporated, having sufficient population to entitle it to become a city of the third class, in making application for incorporation as a city of the third class, may include in its petition for such incorporation a request that it be authorized to avail itself of the provisions of article 6 of chapter 38, and the county court, in passing upon such application, shall have power in its order of incorporation to authorize said city to be governed by the provisions of said article as fully as if the provisions of said article had been adopted by a formal election of the

inhabitants of the territory comprised therein; and thereupon such county court shall appoint the officers of such city provided by said article: Provided, that when any city or town is or may be situated on the county line, and in two counties, the petition shall be signed by a majority of the taxable inhabitants of such city or town in each county, and presented to the county court of each county, and designating which of the two county courts shall designate the officers therefor, and if the county court of each county declares such city or town incorporated, the inhabitants thereof shall thenceforth be a body politic and incorporate, by the name and style of 'the city of . . . .,' or 'the town of . . . .,' and provided further, that appeals taken from the decision of the mayor, judge or other officer before whom any cause is tried, acting for said city or town, may be sent to the circuit court of either county wherein such city or town is situated, as may be specified in the order granting such appeal."

Due to the fact that Section 7, Article VI, of the Constitution of 1945 does not contain the phrase, "which shall be courts of record," that was in Section 36, Article VI, of the 1875 Constitution, which provided for county courts to be courts of record, your request raises the question of the authority of the county court under the 1945 Constitution to entertain a petition for the incorporation of cities and towns. Section 7, Article VI, of the Constitution of 1945 reads as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Section 36, Article VI, of the 1875 Constitution, which was the source of said Section 7, Article VI, of the 1945 Constitution, reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

While the aforesaid phrase, "which shall be courts of record," was not included in Section 7, Article VI, of the Constitution of 1945, still said Section 7 contains the phrase "and keep an accurate record of its proceedings."

The 63rd General Assembly, by Senate Bill No. 229, amended Section 1990, R.S. No. 1939, which originally contained "county courts" as courts of record. By this amendment "county courts" were not included as courts of record. Even though the lawmakers by this bill defined courts of record, nevertheless the county court under its constitutional duties must "keep an accurate record of its proceedings." If the county court keeps an accurate record of its proceedings in performing its statutory duties under said Section 6217, R.S. No. 1939, relating to the incorporation of cities and towns, this record would be sufficient to authorize the court to entertain the proceedings.

Since the last paragraph of your request is somewhat general on the question of the jurisdiction of county courts over such matters, we will consider the question of the jurisdiction of the county court to entertain such a proceeding.

If the proceedings for the incorporation of cities and towns were purely judicial, then the county court would not have jurisdiction, because under the 1945 Constitution it no longer has purely judicial power. Section 1, Article V, of the 1945 Constitution reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

It will be noted that this section does not include county courts as courts of this state having judicial power. Section

1, Article VI, of the 1875 Constitution, which was the source of this section, did include county courts as courts which were vested with judicial power.

However, if the proceedings for the incorporation of cities and towns are quasi judicial or of an administrative or legislative nature, the county court may still entertain them. Said Section 1, Article V, of the 1945 Constitution, when considered alone, would not authorize a county court to exercise judicial functions. However, by referring to Section 22 of said Article V, one would conclude that some judicial or quasi judicial powers may still be exercised by an administrative officer or body existing under the Constitution or law. This section reads as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

It would, therefore, seem that, under this section, the county court may perform some judicial or quasi judicial functions, and that its orders in relation thereto would be subject to judicial review.

Again referring to said Section 6217, R.S. 1939, we find that the Missouri Supreme Court, in the case of *In re City of Uniondale--Coyne et al. v. Rugh et al.*, 225 S.W. 985, had before it for construction the provisions of said section. At l.c. 987 the court said:

"The procedure prescribed is brief and simple:

"Whenever a majority of the inhabitants \* \* \* shall present a petition to the county court, \* \* \* praying that they may be incorporated, \* \* \* if the court shall be satisfied that a majority of the taxable inhabitants \* \* \* have signed such petition, the

court shall declare such city or town incorporated. \* \* \*

"No notice of any kind is required. It is not necessary that the petition shall have been on file for any length of time, or even that it shall have been filed at all, before being taken up for consideration by the court. Upon its presentation the court may immediately proceed to determine whether it is signed by a majority of the taxable inhabitants, and, if it is satisfied that such is the case, may make its order of incorporation without further ado. Not only, therefore, is notice not required, but the statute does not contain the slightest implication that the taxable inhabitants of the territory sought to be incorporated, who do not sign the petition, may appear and contest it. It must be borne in mind that this proceeding is not an 'action,' within the meaning of the Code, wherein any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff. It is a special statutory proceeding. \* \* \*"

From this statement it would appear that the provisions of the statute which provide for the incorporation of municipalities under said Section 6217, supra, are primarily legislative, and that while the functions of the county court in determining whether the petition for incorporation has been signed by a majority of the taxable inhabitants is a judicial function, it is only incidental to the primary function which is legislative, and, therefore, could more appropriately be termed as "quasi judicial." The question here is analogous to the proceedings in the formation of a drainage district under circuit court procedure. The drainage laws make provision for such procedure to be in the circuit court. Since the circuit court under the Constitution exists and functions under the judicial department of government, the question of the authority to confer upon the circuit court the duties of incorporating such districts was raised in the case of Birmingham Drainage District v. C.A. & Q. R.R. et al., 274 Mo. 141. In speaking of the authority to impose upon the circuit court as a legislative agent the duties of entertaining proceedings for incorporation of drainage districts, the court said, l.c. 150:

"Although article three of the State Constitution, while distributing the powers of the State Government into three distinct departments--the legislative, executive and judicial--forbids any person or collection of persons charged with the exercise of powers properly belonging to one of those departments to exercise any power properly belonging to either of the others, we have held (State ex rel. v. Higgins, 125 Mo. 364, 368) that duties which are not judicial may be performed by judicial officers unless they are clearly such as are confined by the Constitution itself to the executive or legislative department. This literal and altogether reasonable construction is founded in the necessities inherent in all governments. While the power to indicate what the laws shall be is purely legislative, the power to authoritatively determine what they are is judicial, and these are frequently so interlocked as to suggest the assistance of the judiciary in giving practical effect to a legislative enactment. The case before us is an excellent illustration of this principle, because it includes in the accomplishment of the single result contemplated by the Legislature the performance of both legislative and judicial functions distinctly separated by the Constitution, and each definitely assigned to its own magistracy. To accomplish the single purpose of putting in action a drainage district required not only the enactment of a statute fixing the extent, purpose and general powers of the district, which is a purely legislative function, but the appropriation of private property for such purpose and determining the damage therefor by jury trial, which are distinctly judicial functions. Between these lies 'no man's land,' a region of action unclassified by the terms of the Constitution."

From this opinion, it will be noted that the court has recognized the rule that legislative functions are sometimes imposed by statute upon the judicial department and, under certain circumstances, are not violative of the provisions of the Constitution which distribute the powers of state government. These provisions are now contained in Section 1, Article II, of the 1945 Constitution.

If Section 6217, R.S. Mo. 1939, confers on the county court "purely judicial powers," then by virtue of Section 2 of the Schedule of the Constitution of 1945, it would be void because it is in conflict with said Section 1, Article V, of said Constitution, which has taken away from the county court the judicial powers which it had under the 1875 Constitution. From a reading of the transcript of the debates of the 1945 Constitutional Convention relating to this subject, it seems that the framers of that article construed this section to mean that the county court would no longer exercise powers which are "purely judicial." Referring to the debates, however, we recognize the principle that reliance on such debates must be limited. *State ex rel. v. Osborne*, 147 S.W. (2d) 1065.

The rule that, "where a statute or ordinance is susceptible of two constructions, one of which makes it valid and the other invalid, the construction which sustains the validity will be applied," should be applicable here. The foregoing rule has been applied on numerous occasions, and we find in the case of *Automobile Gasoline Co. v. City of St. Louis et al.*, 32 S.W. 281, 283, where the application was made. Applying this rule to this statute and giving it the construction that the duties of the county court prescribed thereunder are primarily legislative, and that the judicial functions are incidental to the legislative functions and are, therefore, more in the nature of being quasi judicial functions, then the statute can be upheld and not violative of Section 1 of Article V of the 1945 Constitution.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the duties imposed on the county court by Section 6217, R.S. Mo. 1939, relating to the incorporation of towns and villages, are primarily legislative; that the duty of the

county court of finding that "a majority of the taxable inhabitants of such town have signed such petition" is a judicial function, but that this function is only incidental to the legislative function imposed by said act; that it is not such a judicial function as is included in Section 1 of Article V of the 1945 Constitution, but is more in the nature of a quasi judicial function, which is contemplated by the provisions of Section 22 of Article V of the 1945 Constitution, which functions may be performed by a county court even though it is not named by the Constitution as one of the courts having judicial power.

Therefore, the county court now has authority to perform the duties relating to incorporation of towns and villages which are imposed by Section 6217, R.S. No. 1939.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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