COUNTY COURTS: County court may reconsider, set aside or modify its judgment at the same term of court in which the judgment reconsidered was made.

July 6, 1945

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33

Mr. Charles E. Ginn
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. Ginn:

In a letter dated June 20, 1945, you wrote this office for an official opinion, as follows:

> "Our county court recently made an order vacating a part of a street as provided in Section 7320, Revised Statutes of Missouri, 1939, and it is conceded that all of such proceedings were proper. They are now confronted with a petition to set aside their former judgment vacating a part of such street. The question which I am unable to determine for them is whether or not they have jurisdiction and authority to reopen this matter, since the time for appeal is already past.
>
> "It is conceded that the Circuit Court, due to their equity jurisdiction, have control over their judgments at any time during the term rendered, but I am unable to determine if the county court has the same authority. Will you please give me your opinion on this question at your earliest convenience, so that if the county court has such authority, they may reopen the matter during the present term of their court."

By various statutes of the state of Missouri now in force the county courts are authorized and empowered to perform func-

tions of a judicial nature. These statutes, even if inconsistent with the provisions of the Constitution of 1945, will remain in force until July 1, 1946. It is apparent, therefore, that the county courts must of necessity retain their judicial powers until July 1, 1946, or until the Legislature repeals these statutes.

County courts were declared to be courts of record by the old Constitution and also by Section 1990, R. S. Mo., 1939. Section 1990 will be in force until repealed or until July 1, 1946. The courts of Missouri hold that all courts of record have the power to modify or set aside their judgments during the term.

> In re Application of Henry County Mut. Burial Ass'n., (1934 Mo.) 77 S. W. (2d) 124, 229 Mo. App. 300;
> Boegman v. Bracey, (1926 Mo.) 285 S. W. 992;
> Bartling v. Jameson, (1869 Mo.) 44 Mo. 141.

The general principle that all courts possessed with judicial power can modify, set aside or reverse their judgments, if such action is taken during the same term of court, is enunciated in many cases in Missouri. This proposition is usually stated by saying that the judgment is within the breast of the court during the term in which the judgment was rendered.

> McCormick v. St. John & Brown, (1941 Mo.) 236 Mo. App. 72;
> In re Savings Trust Co. v. Skain, (1939 Mo.) 345 Mo. 59;
> Rottman v. Schumucker, (1887 Mo.) 94 Mo. 139.

In H. H. Johnson v. J. Underwood, (1930 Mo.) 24 S. W. (2d) 133, 324 Mo. 578, the owners of land within a special road district brought suit against the county to compel the county court to set aside and cancel certain tax bills upon the security of which bonds were issued and sold by the road district. The county court several times modified and changed its order and judgment regarding the amount of the cost of improving the roads. Some of these changes were made regarding judgments made during a prior term and others regarding judgments made during the same term. A new estimate of costs was made by the county court on December 3, 1923. There were errors in the calculations of the extra expenses and the court on January 16, 1924, at the same

term, set aside the prior order of December 3, 1923, and entered a corrected order. The court, in discussing this last and final order of January 16, 1924, said:

> " * * * The order of January 16, 1924, likewise shows that it was made at the same term and was, therefore, within time to correct prior erroneous orders made at the same term. * * * "

Throughout this case the court considered the action of the county court regarding the issuance of bonds, the estimates of cost, and the levying of assessments as a judicial proceeding. The early orders of the county court were taken, on certiorari, to the circuit court, and the Missouri Supreme Court, in the case cited, impliedly indicated that this was proper. If certiorari was allowed in the proceedings, they must have been, of necessity, judicial proceedings. Also, throughout the case, the court used the words "order" and "judgment" interchangeably. We think, from the context of the case, that the court considered the judicial function performed by the county court as an "order" of the county court. This is illustrated by the following quotation from the case which has to do with the orders of the court in the proceedings there dealt with (24 S. W. (2d) l. c. 140):

> " * * * This judgment continued the cause to May 2, 1922, upon which date the court rendered a correct judgment separating the two projects. On June 6, 1922, and at the same term, the court of its own motion corrected this order. The order and decree of December 8, 1923, based upon a reduced cost estimate, was expressly authorized as a new order by the terms of section 10845a, Laws 1923, p. 348. The validity of this order has already been discussed and sustained in this opinion. * * *"

It is, therefore, our opinion that the county court may reconsider its orders or judgments which are of a judicial nature at any time during the term at which the order reconsidered was made.

The question then arises as to whether the court was exercising a judicial function when it vacated a part of the street

which you refer to in your letter, under Section 7320, R. S. Mo., 1939.

This section reads as follows:

> "Whenever a tract or parcel of land, being outside the limits of any town or city, shall have been subdivided, and streets, avenues or roads marked on the recorded plat of the subdivision, it may be lawful for the county court of the county in which the subdivision has been made to vacate the streets, avenues or roads, or a part of either, upon petition of the owner or owners of the ground lying on both sides of or fronting on the street, avenue or road or part thereof proposed to be vacated. But no such vacation shall be ordered until proof shall be made to the court of the publication in a newspaper published in the county, or of written or printed notices posted in five public places in the county, at least fifteen days prior to the term of the court at which such petition shall be presented, that application would be made at that term of the court for the vacation of the street, avenue or road or part thereof, as described in the petition. Such notice shall state distinctly the nature of the application, when it is to be made, and what street, avenue or road, or part thereof, is proposed to be vacated; and if no person interested in such subdivision shall appear and show cause to the court why the vacation should not be made, the court may make the order for the vacation as requested in the petition."

We think the court's action, under this section, was a judicial proceeding.

Section 88 of 39 C. J. S., page 1020, reads as follows:

> "<u>Judicial and discretionary acts</u>. Within the rule that certiorari lies only to review

> judicial acts, the proceedings of highway officers in opening or vacating public roads, under statute authority, are judicial proceedings. * * * "

In Barnett v. County Court, (1905) 111 Mo. App. 699, the court had before it the question of appeal from the decision of a county court. The case turned upon the question of whether the county court was acting in a judicial function. The court held that it was acting in such manner where the order or judgment involved the life, liberty, or property rights of an individual.

In City of Berkeley v. Petitioners for Disincorporation, (1941 Mo.) 155 S. W. (2d) 138, the court was concerned with the right of appeal from a judgment of the county court disincorporating the city. Here, again, the question was whether the action was judicial in nature. A newspaper notice of the petition to disincorporate was required to be given by the statute governing such actions by the county court. The court held the county was acting judicially. In deciding the case, the court said, l. c. 140:

> " * * * If in acting on the application the county court is to merely perform an administrative function, as petitioners contend, there would be no purpose of a notice being given. * * * "

In Section 7320, supra, the statute also requires a notice to be given before action by the county court.

In State v. Cracraft, (1943 Mo. App.) 168 S. W. (2d) 953, which was an action in prohibition to restrain the judges of the county court from taking further action in a proceeding for vacation of a public road, the county court, on February 10, 1941, entered an order vacating a road. The circuit court, on appeal, set aside the judgment of the county court. Afterwards, in September, 1941, another proceeding by the same parties and twenty-six others was instituted in the same county court to vacate the same road. The present action was to restrain the county court from acting on the second petition. The relator contended the second county court proceeding was barred under the doctrine of res adjudicata by the judgment of the circuit court in the first proceeding barring vacation of the road.

The circuit court entered a final order in the prohibition action and the defendant appealed.

The St. Louis Court of Appeals reversed the circuit court's final order of prohibition. They held the question of whether the decision of the circuit court was res adjudicata in the first proceeding for vacation was for the county court to determine. The court said, l. c. 955:

> "Res adjudicata is an affirmative defense. It goes to the merits, not to the jurisdiction. It raises issues of fact and maybe issues of law as well. The decision of issues arising on the merits is peculiarly within the jurisdiction and power of the inferior court. * * * "

The court further indicated the judicial nature of the proceeding in the county court by the following:

> " * * * If there was a substantial compliance with these provisions in the first proceeding for the vacation of the public road in question here, and there was no subsequent change in the conditions, we think the judgment in the first proceeding becomes res adjudicata as to the second proceeding, notwithstanding the petition in the second proceeding may be signed by twelve or more freeholders who were not parties to the petition filed in the first proceeding. But the issues thus raised are clearly for the decision of the county court. It has full jurisdiction and power to decide the same. If its decision is wrong, it is a matter of error and not of jurisdiction, and the relators have their remedy by appeal."

From the above, we are of the opinion that an order of the county court vacating a public road, or a part thereof, is in the performance of the judicial function of the county court.

However, we think the result in the matter of whether the county court can reconsider its decision at the same term would not be changed if the court was acting in an administrative capacity. In State v. Cooper County Court, (1853) 17 Mo. 507, the Supreme Court held:

> " * * * But if the county court, in its administrative capacity, does an act which should afterwards be deemed unwise, inexpedient or exceeding its authority, it may at any time correct its course. * * * "

So far as we have been able to determine, this case has never been overruled or modified.

We are, therefore, of the opinion that the county court may reconsider an order rendered in the exercise of either its administrative or judicial functions at any time during the same term of that court.

The provisions of the new Constitution might so change the county court's organization that the old law, as set out above in this opinion, would not apply after July 1, 1946. However, since your question does not raise this issue, we have not considered that point in this opinion.

CONCLUSION

It is, therefore, the opinion of this department that the order of the County Court of Lawrence County rendered at the present term, which you refer to in your letter, may be reconsidered, modified and set aside by the county court at any time during the present term.

Respectfully submitted,

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APPROVED:

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