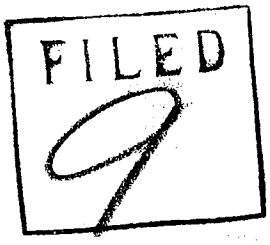
COUNTY COURT:
MUNICIPALITIES: County Court may not incorporate a city, town or village, where proceedings have been instituted by a City Council, to extend the city limits to encompass the same area; a constitutional charter city is not a city of the second class.



June 2, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

> "On May 7, 1955, the Council of the City of Joplin passed an ordinance between 11:00 and 11:30 a.m. calling a special election for August 9, 1955, for the voters to vote on an amendment to the Charter extending the boundaries of the City of Joplin, and the ordinance listed territory north, east and west of the City of Joplin. About one-half hour later residents of territory north and east of Joplin filed a petition to incorporate with the County Court at Carthage, asking for incorporation of territory adjacent to the City of Joplin and covering an area about three miles long by two miles wide, and asking that the County Court set a date for hearing, which has not yet been set by the Court. This territory is adjacent to and contiguous with the east city limits of the City of Joplin. The petition included more territory north and east of the City of Joplin than is covered by the ordinance and there was territory covered by the city ordinance. The petition to incorporate covered territory equivalent to about half the size of the City of Joplin and about 2,000 people allegedly reside in the area

covered by the petition. There are no incorporated villages or towns in the territory covered by either the petition or the ordinance. No other ordinance relative to the subject territory has been passed by the City Council and no other petitions or suits have been filed except those herein mentioned.

"The City has had under consideration the annexation of territory adjacent to Joplin and east thereof for some time and newspapers have carried articles over a period of months about proceedings before either the Council or the City Planning Commission. Petitions were being passed for an incorporation prior to the passage of the ordinance and there was publicity about the passage of such a petition. The counsel for the incorporation petitioners claims that the City acted at the last minute to defeat incorporation, that the ordinance is of doubtful legality because of descriptions and other points, that the ordinance was 'fraudulently passed' to frustrate the will of the people involved, and that the City is not a proper party to the incorporation proceedings and has no right to be heard in such proceedings.

"As above explained, the petition covers not only territory referred to in the ordinance, but also additional territory.

"Section 1.04 on Powers of the City under the Home Rule Charter passed February 9, 1954, gives the City all the powers of local government and home rule and all powers possible for any city to have under constitution and laws of the State of Missouri and all powers which the legislature would be competent to grant. Under Section 2.15, sub-paragraph 22, the City has power to extend limits by ordinance subject to the approval of the majority of the voters voting at any special election.

"The County Court is desirous of knowing, before proceeding with any hearing on this matter:

"1. Whether or not Section 72.130, R. S. Missouri, 1949, prohibiting organization of cities, towns or

villages adjacent or within two miles of the limits of any first or second class city, applies to the City of Joplin, a second class city until the adoption of a Home Rule Charter by election of February 9, 1954, on which date the City adopted a constitutional charter. Is Joplin still a second class city under Chapter 72 or is it entitled to the protection given by the above section?

"2. Does the 'prior jurisdiction' rule of the Supreme Court in the cases of State v. Smith, 53 S.W. 2d 271, and State v. North Kansas City, 228 S.W. 2d 762 that the County Court does not have jurisdiction or authority to incorporate a town or city so long as the annexation proceedings of the City Council covering the same territory were pending, apply here so as to oust the County Court of jurisdiction to proceed to hearing and determination of the question of incorporation on the petition of the residents of Duquesne?"

We understand the facts as stated to be as follows: On May 7, 1955, between the hours of 11:00 and 11:30 A. M., the City Council of Joplin, a constitutional charter city, passed an ordinance calling a special election for the purpose of amending the charter to annex to certain territory adjacent to the city. At a time subsequent to the passing of said ordinance, residents in an area adjacent to the City of Joplin filed a petition to incorporate with the County Court. The petition to incorporate included territory not covered by the ordinance, and the ordinance included territory not included in the petition filed with the County Court. However, a portion of the area was common both to the petition and to the ordinance. Other facts stated will be referred to herein as deemed necessary.

The questions which you have proposed will be treated in inverse order. You inquire whether the "prior jurisdiction" rule, as stated by the Supreme Court of Missouri in the case of State v. Smith, reported in 53 SW2d 271, and in the case of State v. North Kansas City, reported in 228 SW2d 762, applies to the facts stated so as to oust the County Court of jurisdiction to act upon the petition for incorporation filed with said body.

The "prior jurisdiction" rule is simply and concisely stated in 43 C. J., p. 83, Section 23:

> "Also, where under different statutes, vesting jurisdiction in different persons or authorities, the same territory is subject either to formation into a new municipality or to annexation to an existing municipality, the jurisdiction first invoked becomes exclusive."

This rule has been adopted and applied by the Supreme Court of Missouri as the law of this state in the cases above noted. Let us first consider briefly the case of State v. Smith, 53 SW2d 271, since it bears a marked similarity to the instant facts. In that case, an ordinance was duly presented to the City Council of Louisiana, proposing to extend the city limits, on May 3, 1929. The ordinance was tabled for 30 days to permit property owners of the area involved to protest the passing of the ordinance. On May 13, 1929, the residents of the area presented a petition to the County Court asking for the incorporation of the territory as a village, and the County Court, on the same day, entered its order of incorporation. The ordinance for the extension of the city limits was not finally passed until May 14, 1929. The Supreme Court, after reviewing several cases from other jurisdictions, stated:

> "The question arises which of the proceedings instituted in this case takes precedence of the other. It is a well-established principle of law that, when several separate authorities have concurrent jurisdiction of the same subject-matter, the one in which proceedings were first commenced has exclusive jurisdiction to the end of the controversy.* * *
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> "* * *In the case now before us an ordinance, extending the city limits of the city of Louisiana, was presented to the city council by the ordinance committee on May 3, 1929. The inhabitants of the territory, proposed to be taken in under the ordinance, through their attorney, presented a petition of protest and asked thirty days further time in which to be heard. The city council granted the request. The ordinance was read and ordered published. Final action was postponed for thirty days. The inhabitants of the territory, through their attorneys, having lulled the city authorities into inaction, proceeded to obtain their purpose and to

> defeat the action of the city council by instituting proceedings before the county court and obtaining an order of incorporation the same day the petition was filed with the county court. Such a course of procedure should not receive the sanction of a court of justice. As illustrated by the cases cited above, it is evident that the county court of Pike county did not have jurisdiction or authority to incorporate the town of Elmwood so long as the annexation proceedings of the city council covering the same territory were pending. The order of the county court incorporating the territory as a village was void."

The import of the cases reviewed by the court is to the effect that the legislature did not intend to give one governmental body the power to annex or incorporate a given area and, at the same time, authorize another governmental body to defeat such right by a subsequent proceeding; that it would be an anomalous situation if coordinate bodies exercising governmental power could operate upon the same subject-matter at one and the same time and thus enter upon a race to accomplish the objects of the proceedings.

The doctrine of prior jurisdiction, as above noted and as applied in the Smith case, was reaffirmed by the Supreme Court in the case of State v. North Kansas City, 228 SW2d 762. In the latter case, the city of Kansas City, Missouri (a constitutional charter city), and the city of North Kansas City (a city of the fourth class) were attempting to annex identical territory. An ordinance was introduced in the city of Kansas City Council on August 19, 1946, and an ordinance was introduced in the Board of Aldermen of North Kansas City on August 20, 1946. In the course of its opinion, the court said:

> "Under the instant circumstances, the well established doctrine of 'prior jurisdiction' must be applied. We so held (and applied it) in State ex inf. Goodman ex rel. Crewdson v. Smith, 331 Mo. 211, 53 S.W.2d 271, 272. In that case there was introduced in the Council of the City of Louisiana, on May 3, 1929, a proposed ordinance to extend its limits to include a certain area contiguous to that city. On May 13, 1929, the inhabitants of that area presented a proper petition, and on that day the county court made an order incorporating Louisiana's proposed annexation area

as the village of Elmwood. The proposed ordinance of Louisiana was not passed until May 14, 1929. Upon the appeal of a quo warranto proceeding filed by Louisiana to test the validity of Elmwood's incorporation, we held that 'when several separate authorities have concurrent jurisdiction of the same subject-matter, the one in which proceedings were first commenced has exclusive jurisdiction to the end of the controversy.' We there sustained the right of Louisiana to carry its first instituted annexation proceedings through to a conclusion. The impact of that principle cannot be escaped here. A situation identical with the instant one was before the Texas Supreme Court in City of Houston v. State, supra. In that case the City of Houston and the City of West University Place each sought to annex the identical territory which was contiguous to each of those cities. The doctrine of 'prior jurisdiction' was there recognized. Under the circumstances which obtain in this case the doctrine is universally recognized and applied. See also, Popenfus v. City of Milwaukee, 208 Wis. 431, 243 N.W. 315; State ex rel. Johnson v. Clark, 21 N.D. 517, 131 N.W. 715; People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal.App. 715, 181 P. 825; McQuillin Municipal Corporations, 2nd Ed. Vol. 1, p. 476; 43 C.J. Municipal Corporations, p. 83; 62 C.J.S., Municipal Corporations, Sec. 9.

"Inasmuch as relator's charter amendment extending its city limits northward into Clay County, Missouri, was legally passed by its City Council and approved by its mayor; and inasmuch as said charter amendment was thereafter legally adopted and approved by relator's electors, all as required by the Constitution; and inasmuch as it is conceded that the proceedings to so amend its charter as to extend relator's city limits northward into Clay County were instituted and begun prior to the time respondent instituted its proceedings to extend its limits and thereby annex a portion of the area relator proposed to annex, we cannot escape the ruling that (1) relator, by the institution of its prior proceedings on August 19, 1946 thereby acquired prior jurisdiction of

> the subject matter, and (2) relator thereby acquired the right to continue its proceedings to a conclusion, unimpaired by any effort whatever upon the part of respondent to annex any of the same area."

In view of the foregoing authorities we must and do hold, assuming of course no irregularities in the proceeding before the City Council, that when the ordinance providing for the submission to the electors of the City of Joplin of a proposal to amend the charter to extend its corporate limits was duly presented to the Council and passed prior to the filing of a petition with the County Court for the incorporation of common area, the city obtained jurisdiction of the proceeding and acquired the right to continue its proceeding to conclusion and to the exclusion of the County Court.

In other words, we are of the opinion that the County Court does not have authority to act upon the petition for incorporation pending termination of the proceedings by the city.

You further inquire whether the city of Joplin, having adopted a charter form of government at its election held February 9, 1954, is also a city of the second class and thereby subject to the provisions of Section 72.130 RSMo 1949, relating to cities of the second class. Section 72.130 prohibits the organization of a city, town or village adjacent to or within two miles of the city limits of any city of the first or second class unless such city, town or village is in a different county. Such section more fully provides as follows:

> "No city, town or village shall be organized within this state under and by virtue of any law thereof, adjacent to or within two miles of the limits of any city of the first or second class, unless such city, town or village be in a different county from such city."

It is our opinion that the above section would not prohibit the organization of a city, town or village adjacent or within two miles of the city limits of the city of Joplin since the city of Joplin is a constitutional charter city. It is to be noted that the prohibition contained in said section applies only where a city of the first or second class is involved. In view of the fact that Joplin is a constitutional charter city, it could not, we believe, be a city of the second class and, therefore, is not subject to the restrictions or entitled to the benefits of laws relating to cities of the second class. In

this regard see the case of Elting v. Hickman, 172 Mo. 237, wherein the court said, l.c. 255, 256:

8529
7615
6095
6217.010
72.080
.090
.100

> "* * *It thus seems that although a city organized under a special charter may have the requisite number of inhabitants to become a city of the third class, it does not ipso facto become such, but that in order to do so it must proceed in accordance with section 5257, Revised Statutes of 1899. * * *
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> "By the Constitution the Legislature was required to provide for four classes of cities, and to give to each city of a given class, the same powers, and to subject each class to the same restrictions, but cities of the third class having special charters are not included in this classification unless they elect to become so, as before indicated. It is therefore plain that cities which retain their special charters do not belong to either of the classes provided for by the Constitution, although they may have the requisite number of inhabitants to become such, unless they first elect to do so." (Underscoring ours.)

See also State v. City of St. Louis, 2 SW2d 713.

CONCLUSION

Therefore, it is the opinion of this office that:

A County Court does not have the authority to incorporate a given area as a city, town or village where an ordinance has been introduced into the Council of a constitutional charter city providing for the submission to the electors of such city of a proposal to amend the charter to extend its corporate limits, including the same area.

It is the further opinion of this office that a constitutional charter city is not, insofar as laws relating thereto are concerned, a city of the second class, although such city may have the requisite number of inhabitants to become such.

Honorable Cowgill Blair, Jr.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

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