

589.

COUNTY COMMISSIONERS—CANNOT REVIEW OR RESCIND ORDER  
MADE BY FORMER BOARD—EXCEPTION WHEN—DRAINAGE LAW  
DISCUSSED.

## SYLLABUS:

*A board of county commissioners has no right or power to review or rescind any order made by a former board of county commissioners unless it was illegal or unauthorized.*

COLUMBUS, OHIO, April 14, 1933.

HON. JAMES V. WILL, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“Your opinion is respectfully requested on the following question: W. L. P. and others, on March 5th, 1931, under authority of Section 6444 of the General Code, filed a petition with the auditor of this county, petitioning the commissioners of this county for the cleaning, deepening, widening, and straightening of a water course, known as M. run. The commissioners found in favor of the improvement, and dismissed claims of different parties for damages and compensation. The claimants appealed to the Common Pleas Court, under statutory grounds for appeal. Evidence was heard before the court as provided by statute and appeal was taken to the Court of Appeals by the appellants and the Common Pleas Court reversed on a question of procedure. The matter was then set down before a foreign judge and a few days before the hearing, the appellants filed a motion and entry dismissing their appeal to the Common Pleas Court. Thereafter, a few days ago, the clerk of Common Pleas Court certified the papers back to the county commissioners.

A motion was then filed with the recently elected board of county commissioners by the parties who had appealed the action to Common Pleas Court for a rehearing, requesting a rescission, reconsidering of the finding and order in the resolution passed by the board on May 20, 1930 in favor of widening and deepening a portion of said M. run; and to dismiss such petition and set forth a number of statutory grounds fully settled by the first Board of County Commissioners.

Under the ditch laws in the State of Ohio there is no provision calling for this procedure. However, the commissioners desire to reconsider and rescind the action taken by the former board of county commissioners on the above date. In searching the decisions of our courts in this State, I have been unable to find any ruling wherein the board of county commissioners have a right to rescind an order made at a prior regular session or by a former board of county commissioners.

If you have any ruling in your department setting forth that the Commissioners have a right to rescind actions taken by a former board or at a former session, I would appreciate it if you would cite the same to me, otherwise will you kindly render a ruling on the matter.”

A board of county commissioners is authorized to clean, deepen, widen and straighten water courses by virtue of sections 6443 and 6444, General Code, which read as follows:

"Sec. 6443. The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter (G. C. Secs. 6442 to 6508) by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary to drain any land, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio."

"Sec. 6444. Any owner of land may file a petition with the auditor of the county in which is located a part of the land that is averred to be benefited by the construction of the proposed improvement. The petition shall state that the construction of the improvement is necessary and will be conducive to the public welfare; and shall state the nature of the work petitioned for; and may ask to locate, construct, reconstruct, straighten, deepen, widen, box, or tile a ditch, drain, or watercourse, or to change the course or location thereof; or may ask to construct a levee; or may ask to straighten, deepen, or widen a river, creek, or run, or to change the course or location thereof. The petition shall state the course and termini of the proposed improvement, and the branches, spurs, or laterals, if any are petitioned for. The petition shall contain a list of the names and addresses where known, of all the owners of the land which the petitioner claims will be benefited or damaged by the construction of the proposed improvement. The petition shall be signed by one or more owners of land as petitioners."

Thus, the acts of the original board of county commissioners herein involved were proper and within the authority conferred upon them. The legality of these acts therefore will not enter into the final determination of this question. The law seems to be clear on the proposition that a board of county commissioners can reconsider and rescind its acts or orders unless some rights have accrued thereunder. These rules are well stated in 15 C. J., at page 470, as follows:

"Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or order made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision."

McQuillan Municipal Corporations, Vol. 2, secs. 642 and 643.

It is usually held that even the same board of county commissioners may not revise or rescind its orders subsequent to the term or session at which such orders were made. *Board vs. Road Co.*, 88 Ind. 199; *Plew vs. Jones*, 165 Ind. 21.

The authorities are all in accord with the doctrine that, where rights of other persons have become vested, under no circumstances will the board be allowed to change its former rulings unless there be some illegality in the transaction. I am assuming, however, that no rights have accrued under the order of the board of county commissioners involved herein.

However, in this case it is not the board which found in favor of the improvement which desires to reconsider and rescind its action but is a newly elected board. In such case the authorities are apparently all in accord with the rule that such new board may not review or rescind the orders of the former board which have been made under the authority of powers conferred upon it. If it were possible for a new board to rescind the acts and orders of the former board which were perfectly legal and authorized, it would put the county to great disadvantage. It would greatly delay and make more expensive improvements essential to the welfare of the county. The rule is well stated in 15 C. J., page 471:

"In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law."

In *Stenberg vs. State*, 48 Nebr. 300, the third branch of the syllabus reads as follows:

"In the absence of statutory authority one county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law."

And the court at page 308, said:

"The rule deducible from the authorities is that in order for an act by one executive or administrative officer or board to be binding upon a successor, such officer must in performing the same have acted within the scope of the authority imposed by law. If the act was outside of, or exceeded, the power conferred, it is a nullity and binding upon no one."

In *Noble vs. Union River L. R. R.*, 147 U. S. 378, the Supreme Court of the United States held that a decision of the Secretary of Interior in the exercise of the powers conferred upon him could not be revoked by his successor in office.

For a final determination of this question, however, we must first examine the statutes relative to the drainage law. It is provided by the statutes of Ohio that when county commissioners receive notice of the filing of a petition for drainage improvement, they shall fix a date for hearing thereon. When the commissioners find in favor of the improvement, as they did in this instance, they order the surveyor to prepare reports and schedules as provided for in section 6454, General Code. After these reports and schedules are filed the commissioners have a final hearing on said improvement. After hearing all of the evidence and studying the reports and schedules thoroughly, the commissioners are required to review and reconsider their former order and either affirm such order or dismiss the petition.

If the finding is in favor of their former order they are then required to order the surveyor to let the contracts for the construction of the improvement in accordance with section 6463, General Code. This order has been termed a final order of the board of county commissioners and it would seem that there could be no appeal to the commissioners, nor any opportunity to have the board of commissioners review its decision made at the final hearing. This would seem to be the logical conclusion, due to the fact that the legislature has made specific provision for an appeal to the court of common pleas from a final order of a board of county commissioners.

The questions on which the interested owner may appeal are stated in section 6467, General Code, as follows:

Any owner interested may appeal to the court of common pleas from a final order made by the commissioners, as provided in this chapter (G. C. Secs. 6442 to 6508), and may appeal any one or more of the following questions:

- (1) Is the improvement necessary?
- (2) Will the improvement be conducive to the public welfare?
- (3) Is the cost of the improvement greater than the benefits conferred?
- (4) Is the route, termini, or the mode of construction the best to accomplish the purpose of the improvement?
- (5) Are the assessments levied according to benefits?
- (6) Is the award for compensation or damages just?

Such appeal may be taken from any order affecting any part of the improvement, as well as from any order affecting the entire improvement."

The procedure on such an appeal is provided for in sections 6468, General Code, et seq. However, the assumption that such final order of the board of county commissioners concludes their jurisdiction is rebutted by the Supreme Court of Ohio in the case of *Rambarger vs. Curl, et al.*, 115 O. S. 81, where the court says at page 85:

"While we find no provision specifically authorizing a board of county commissioners in a county ditch improvement to correct its own mistake in determining that the improvement will be conducive to public health, convenience, or welfare, we do find provision for an appeal from final orders of boards of county commissioners in ditch proceedings, such as the order here under consideration; and, since the purpose of such appeal is but to retry and redetermine the issue, to the end that a just and lawful determination may result, and since the function of the board of county commissioners in the construction of a county ditch improvement is that of an arm of the state, acting in a governmental capacity, with a purpose to promote the public health, convenience, or welfare, we are of opinion that as an incident to the powers specifically conferred upon such board to determine whether such improvement will be conducive to the public health, convenience, or welfare there exists the power, when such board finds that it is mistaken in its conclusion that such improvement will promote the public health, convenience, or welfare, to correct such mistake, and thus itself accomplish that which by specific provision may be accomplished by appeal."

The language of the court is very broad and would seem to cover every case, but it is my opinion that the decision must be limited to the particular facts involved therein. It should be noted that in the case cited, the same board which found in favor of the improvement also made an order dismissing all of its action taken on the matter. In the case involved herein, there is an entirely new board endeavoring to rescind the action of the former board. Also, in the case cited, the board of county commissioners were not rescinding their former action because of any further investigation or determination of its value or necessity to the public health, convenience or welfare but merely on the ground that they were without further jurisdiction to proceed with the improvement, due to the unconstitutionality of certain sections of the drainage law. However, the board of county commissioners in the case involved here is being asked to make a new finding as to the necessity or value of the improvement which would involve hearing additional testimony and making further investigation. Because of these two important distinctions, it is my opinion that the case of *Rambarger vs. Curl, supra*, would not be controlling in this case.

The question is not asked as to whether or not the order of the former board of county commissioners is mandatory on the new board and as a result no opinion is rendered thereon.

In specific answer to your question, assuming that no rights have accrued by virtue of the board's order, I am of the opinion that a board of county commissioners has no right or power to review or rescind any order made by a former board of county commissioners unless it was illegal or unauthorized.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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590.

SOLDIER'S RELIEF—STEPMOTHER OF SOLDIER, SAILOR OR MARINE NOT ENTITLED THERETO UNDER G. C. SEC. 2930 ET SEQ.—DISTINGUISHING STEPMOTHER AND ADOPTING PARENT—PARENT DEFINED.

SYLLABUS:

*The stepmother of a soldier, sailor or marine is not eligible to relief under sections 2930 et seq. of the General Code, such person not being a member of any of the classes of beneficiaries in section 2934, General Code.*

COLUMBUS, OHIO, April 14, 1933.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

"The Soldiers' Relief Commission of this county desires to know whether under Section 2934 of the General Code it is within their power to give relief to the stepmother of a World War Veteran. The stepmother has acted in the position of mother, having married the father of the veteran while the veteran was still a minor and having cared for him during that time."