

COUNTY COURTS:

County Court has no authority to close a public road to permit strip mining, in a county under township organization.

ROADS:

April 11, 1950.

4/13/50

Honorable Barkley M. Brock,
(Acting) Prosecuting Attorney,
Henry County,
Clinton, Missouri.



Dear Mr. Brock:

We have your recent request for an opinion from this office. Your letter is as follows:

"Will you please advise if in your opinion the county court now has jurisdiction to temporarily close roads in order that coal companies may strip the coal under the public road? I, of course am familiar with the decision of the Supreme Court holding that the County Court has no discretionary powers and therefore has no authority to close a public road. This appears to be true, because of the failure of the new constitution to grant discretionary powers to the County Court. I have been asked if this can be applied to the situation where public roads are temporarily closed. In our county there are many instances where public roads have been temporarily closed by the County Court in order that the coal could be stripped thereunder. After the coal is stripped, the roads are restored.

"Would you please advise if in your opinion the County Court has this authority in view of the provisions of the new constitution?"

You refer to a recent opinion of the Supreme Court holding "that the County Court has no discretionary powers." We assume you have in mind the recent case of Rippeto et al. v. Thompson 216 S.W. (2d) 505, where it is stated as follows, l.c. 507:

"But this has now been changed. Under the new Constitution (1945) judicial power is no longer vested in county courts. Article V, Section 1,

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omits county courts in enumerating the courts in which the judicial power of the state is now vested, Article VI of the new Constitution (1945) which concerns local governments, not courts, provides in part in Section 7 that the county court 'shall manage all county business as prescribed by law.' Although that section provides that a county court shall 'keep an accurate record of its proceedings', it did not carry over the old provision that a county court shall be 'a court of record.'

"Thus, it is clear under the new Constitution (1945) county courts are no longer vested with judicial power, are not now 'courts of record' and are not what we generally know as courts of law. 'County courts are no longer courts in a juridical sense, but are ministerial bodies managing the county's business.' State ex rel. Kowats v. Arnold, 356 Mo. 661, 204 S.W. (2d) 254, 258; Bradford v. Phelps County, Mo. Sup., 210 S.W. (2d) 996, supra."

However, in the very recent case of State ex rel. Lane v. Pankey et al. 221 S.W. (2d) 195 the Supreme Court, en banc, held as follows, l.c. 196, 197:

"* * * The county court proceeding is in conformity with Sections 8473 to 8478, both inclusive, Revised Statutes Missouri 1939, Mo. R.S.A., which purport to vest in the county court exclusive authority to establish and maintain public roads.

* * * * *

"Respondents, while conceding that county courts no longer have judicial power and that some phases of the establishment of public roads involve the exercise of judicial or quasi judicial power, contend that the new constitution does not invalidate the above statutes. Their reasoning is: that the main features of the establishment and maintenance of public roads are administrative county business and that Section 7, Article VI, of the new Constitution, Mo. R.S.A., gives the county court exclusive authority to transact all county business.

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"They are also correct in asserting that many of the functions connected with the establishment and maintenance of public roads, properly fall within the term 'county business' as used in the Constitution. But when it becomes necessary to exercise the power to eminent domain to take private property for the purpose of a road, either public or private, the judicial power of a court must be invoked. To that extent our decision in the Rippetto case is pertinent to the issues in the instant case.

* * * * *

"The new Constitution, as construed in the Rippetto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power.

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"But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

(Underscoring ours)

The language in the above case indicates clearly that the Supreme Court of this state believes that no step in the opening of a public road, except that of adjudging the amount of compensation in condemnation proceedings, encompasses the exercise of judicial power. A fortiori, the closing of a public road would involve no exercise of judicial power.

It is made equally certain by the Lane case, supra, that all existing statutes, concerning the authority of the county courts over county public roads, which do not entail the exercise of judicial functions by said county courts, are not invalidated by the

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new Constitution or by the Rippeto case, supra.

In summary, then, we see that county courts have, under the new Constitution and the decision in the Rippeto case, no judicial powers. However, the Supreme Court of this state has ruled, in the Lane case, that the establishment and maintenance of public roads, with the exception noted above, does not involve the exercise of judicial powers. It is, of course, perfectly obvious that closing a public road involves, if anything, less judicial discretion than the creation of a road. The court has also held that existing statutes concerning the powers of county courts over county roads are valid insofar as they do not require said "courts" to use judicial discretion.

We note, however, that Henry County is under township organization. This latter fact is of utmost significance here because the applicable statute in such counties, Section 8860 R.S. Mo. 1939, providing as follows:

"Sec. 8860. Where coal or other valuable mineral underlies any public road in this state that has not been designated as a state highway or is not under the control of the state highway department, if said coal or other mineral is being mined on or from adjoining lands by the 'strip pit' or surface process of mining, the commissioners of any special road district or the township board of directors if said road be not located in a special road district, may provide for the temporary abandonment of said road and the removal or mining of said coal or other valuable mineral underlying said road and the rebuilding of said road, in the manner and under the conditions provided in this article, when in the opinion of said commissioners or township board the public good would best be served thereby."

clearly vests the power to close public roads for strip mining, not in the county court, but, explicitly in the road district commissioners or in the township board. Therefore, in your county and in all others under township organization, the county court has no authority to temporarily close a public road to permit strip mining.

CONCLUSION

It is, therefore, the opinion of this office that the

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county court, in counties under township organization, has no power to temporarily close a public county road in order to permit strip mining, but said power is vested in the commissioners of any special road district, or in the township board of directors, if said road is not located in a special road district.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
Attorney General

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