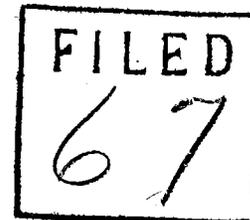


COUNTY COURTS: County courts have jurisdiction to entertain proceedings for establishment and vacation of public roads.

September 18, 1946



Honorable Wayne Norman  
Prosecuting Attorney  
Unionville, Missouri

Dear Sir:

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

"Will you kindly give me an opinion on the following?

"Which court now has jurisdiction over establishing or vacating public roads.

"If it is the Circuit Court, would the same procedure be followed as when the jurisdiction was in the County Courts?

"I have done considerable work on this matter but have found little or nothing on the point other than that I am of the opinion that jurisdiction of the matter was taken from the County Courts."

The duties of the county courts with respect to establishing and vacating public roads are set out in Article 1, Chapter 46, R. S. No. 1939. Since the procedure for establishing and vacating a public road is similar, we will deal with the sections of the statute relating to the establishment of a public road. Under Section 8473, R. S. No. 1939, the petition for the establishment of a public road, after having been signed by the necessary number of signers, is presented to the county court. This petition contains information relative to persons owning the lands through which the road passes, the amount of damage claimed,

and other matters which are not pertinent to the question here. After having made proof of proper notice of the intention to file the petition, the county court has jurisdiction to entertain the petition. If a remonstrance to the proposal has been filed in due time, the county court considers the remonstrance along with the petition. The county court, in its duties in connection with the establishment of such road, passes upon the question of the public necessity of the road, the expense of the establishment and building it, the amount of damages claimed by the owners of the land, and the practicability and probable damages, if any, that are claimed. Then, if the court, upon the hearing, finds the facts do not justify the establishment of the road, the petition is denied. On the other hand, if it finds facts to justify the establishment of the road, orders are made by the county court accordingly. In this connection, the county court makes a finding whether or not it is necessary to establish the road at the expense of the county or at the expense of the petitioners, or both. After the court makes this finding, it directs the county highway engineer to view, mark out and survey the road, and obtain other information as to relinquishments and claims of landowners through whose land the road passes. The engineer is also directed to obtain a description by section and subdivision of the lands of each owner sought to be taken, and also to estimate the cost of bridges, culverts and grading that may be necessary on such road. Then the law requires that all deeds and plats to such road be filed by the highway engineer in the office of the county clerk and preserved as public records. The deeds are recorded in the office of the recorder of deeds.

Under Section 8476, R. S. Mo. 1939, if the landowners fail to agree on the amount of damages that they have sustained on account of taking of such road, and they fail to relinquish the right of way, and the county court finds that the road is of such great public utility as to warrant the establishment of the same, then the court appoints commissioners to view and assess damages. These commissioners, after having performed their duties as such, make their report back to the county court. If exceptions are taken to the commissioners' report, then the matter goes to the circuit court, where it may be heard before a jury.

Under Section 8478, R. S. Mo. 1939, if no exceptions to the commissioners' report are filed, the county court retains jurisdiction, and, if payment of damages is made in accordance with the report of the commissioners, the court orders the road established. This order and the report of the highway engineer are recorded by the clerk of the county court in a book to be provided and kept for that purpose.

The foregoing duties relative to the establishment of a public road were delegated to the county court by the Legislature. The question here is whether or not, under the new Constitution, the county court still retains jurisdiction to establish or vacate public roads. The question is raised because of the fact that, under Section 1 of Article V of the Constitution of 1945, the judicial power of the state is vested in the supreme court, courts of appeals, circuit courts, probate courts, St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts. The source of this section was Section 1, Article VI, of the Constitution of 1875, and that section included "county courts." This section of the Constitution confers judicial power or jurisdiction on the courts named in that section. In Volume 21, C. J. S., page 188, Section 124, we find the rule in such cases to be stated as follows:

"The judicial power or jurisdiction conferred on certain courts by some constitutional provisions is exclusive in the sense that the grant thereof precludes the legislature from creating any other courts, or from conferring any additional jurisdiction on such courts, or from conferring all or a part of such courts' jurisdiction on other courts. Thus, unless the constitution provides for other courts, the specification therein of courts which may exercise judicial power operates as a limitation of the legislature's power to create other courts. \* \* \*

The Constitution does not distinguish between judicial powers and quasi judicial powers, and since the duties of the county court with respect to the establishment and vacation of public roads are both administrative or executive and judicial or quasi judicial, we look to the transcript of the debates of the Constitutional Convention for some information as to the intent. While this information is of comparatively limited value, it seems that our Supreme Court in *State ex rel. v. Osburn*, 147 S. W. (2d) 1065, has referred to debates of the Constitutional Convention for aid in the construction of the provisions of the Constitution. The same principle was applied in *State ex rel. Montgomery et al. v. Nordberg*, 193 S. W. (2d) 10.

In the debates we find that Mr. Bradshaw, who was handling this provision of the Constitution before the Convention, made

statements to this effect, pages 1688 et seq.: "The committee did not wish, of course, to interfere with the proper administration of the activities of the county." "I think Senator Phillips was correct that the committee had in mind excepting judicial functions to except what are generally accepted as the truly judicial functions going with a court of record." "Road matters are a part of the county business." Further referring to the debates on this provision of the Constitution, we find that no delegate questioned the correctness of his interpretation of this provision of the Constitution.

By Section 7, Article VI, of the Constitution of 1945, provision was made for a county court, and its duties were proscribed. This section 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."

The source of this section was Section 36 of Article VI of the Constitution of 1875. The principal difference between the new section and the old section is that, under the Constitution of 1875, county courts were "courts of record" and they were authorized to transact "such other business as may be prescribed by law." It will be noted, however, that this section requires the court to "keep an accurate record of its proceedings."

In speaking of the powers of the county court, under the clause of said Section 36 of Article VI of the 1875 Constitution relating to county business, the Missouri Supreme Court, in *State v. Corneli*, 347 Mo. 1164, 152 S. W. (2d) 33, 35 (6,7), said:

"We concede that the county court is created as a court of record and its jurisdiction partially fixed by the constitution. Section 36 of Article VI of the Missouri Constitution Mo. St. Ann. vests such court with 'jurisdiction to transact all county and such other business as may be prescribed by law.' But the authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal

affairs of the county, such courts possess no powers except those conferred by statute. State ex rel. v. Redman, 270 Mo. 465, 194 S. W. 260; State ex rel. v. Oliver, 202 Mo. App. 527, 208 S. W. 112."

If the duties of the county court with respect to establishment and vacation of public roads are purely judicial, then the foregoing provisions of the statutes relating to the establishment and vacation of public roads under Section 2 of the Schedule of the Constitution of 1945, would be ineffective after July 1, 1946.

Section 1 of Article II of the Constitution of 1945, which is the same as Article III of the Constitution of 1875, provides as follows:

"The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

From a reading of the opinions of the courts relative to the division of powers, we find that the courts have held that it is not always easy to distinguish between the powers and duties of the various branches of our government. In the case of Rhodes v. Bell, 230 Mo. 138, l. c. 152, we find the following statement of the Missouri Supreme Court, through Hough, J.:

"\* \* \* \* 'It is not always easy to distinguish between the powers and duties which may, and those which may not, be assigned by the Legislature to the several departments among which the Constitution requires the distribution of the powers of government to be made. This difficulty has given rise to much litigation, and has induced the courts to adopt very liberal views in determining where any power not easily classified may be properly lodged. In State v. Harmon, 31 Ohio St. 250, it was

said: "Whether power in a given instance ought to be assigned to the judicial department, is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may appropriately be assigned to either of the departments." Judge Cooley, in his work on constitutional limitations, speaking of the division of the powers of government, says:

"If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed." \* \* \* "

With this principle in mind, we will attempt to analyze the duties of the county court with respect to establishment of public roads and determine which are judicial, quasi judicial, and which are administrative or executive.

Many of the boards and bureaus of this state perform quasi judicial functions, and those powers seem to be recognized under the Constitution. Section 22 of Article V of the Constitution of 1945 provides 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."

Therefore, it would appear from this section that the framers of the new Constitution and the people who adopted it recognized the fact that an administrative officer, or body existing under

the Constitution or by law, would perform judicial or quasi-judicial functions which affect private rights. This provision of the Constitution would also indicate that the rule announced in the case of Rhodes v. Bell, supra, was recognized, and that the administrative agencies could, under certain circumstances, perform judicial or quasi-judicial functions. In Volume 35, Permanent Edition, Words and Phrases, at page 640, we find the term "quasi judicial functions" defined as follows:

"\* \* \* \* when the law \* \* \* commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed 'quasi judicial.' \* \* \* \*"

Also at page 640, we find this further statement relative to quasi judicial functions:

"Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed 'quasi judicial.' Bair v. Struck, 74 P. 69, 71, 29 Mont. 45, 63 L.R.A. 481, citing Mochem, Pub. Off. Sec. 637; Bish. Non-Cont. Law, Sections 785, 786; People ex rel. School Dist. No. 5 in Mineral County v. Van Horn, 77 P. 978, 982, 20 Colo. App. 215, quoting with approval Bish. Non-Cont. Law, Sections 785, 786."

If the establishment of a public road is purely county business, then, under Article VI of Section 7 of the Constitution, there would be no question but that the county court would have jurisdiction to perform these duties. Again referring to the statutes we find that they require, (1) the petition for the establishment of the road to be signed by twelve free-holders out of the municipal township or townships through which the proposed road may run, three of whom shall be in immediate neighborhood, (2) it shall specify the proposed beginning, course, and termination

thereof, (3) shall be accompanied by all names of persons owning land through which said road shall run, (4) the amount of damages, if any, claimed by them, so far as can be ascertained, (5) the names of those who are willing to give the right of way for the proposed road. Section 8474, R. S. Mo. 1939, requires the posting of handbills giving notice of the intended application for the establishment of the road.

Under Section 8475, R. S. Mo. 1939, after the petitioners have made proof of the posting of the notices, if no remonstrance is filed, and if the petitioners give the right of way for the proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by the landowners through whose land said proposed road would run, the court must, without discretion to do otherwise, open said road. Under this provision of the law, there is no question but that the court performs merely a ministerial function, and does not exercise any discretion. We do not think that there is any question but that this provision of the act is not in conflict with the provision of the 1945 Constitution which takes away from the county court judicial functions.

If a remonstrance is filed to the petition for the establishment of the road, then the county court is required to hear witnesses and pass upon the question of the public necessity, practicability and probable damages, if any claimed by the owner of the land through which it is proposed to establish such road. The court must also investigate as to the expense of establishing and building a road, including bridges and culverts.

Then, if the court, on a hearing, finds that the facts of the case do not justify the establishment of the road at the expense of the county or the petitioners, proceedings are dismissed. On the other hand, if it finds that the facts justify the establishment of the road, either at the expense of the county, or at the expense of the petitioners, or both, it makes an order accordingly. The law further provides that if the court finds it necessary to establish the road at the expense of the county, or if it be found necessary to establish the road either wholly or partially at the expense of the petitioners and the petitioners pay into the county treasury within the time fixed by the court, the probable amount of the damages to the use of the owners of the said lands, then the court makes an order directing the engineer to (1) view, mark out, and survey the road, (2) take all relinquishments of the right of way, (3) take the names of all owners of land, through which the road runs, (4) the names of those who

have not given or will not give the right of way, (5) and the amount of damages claimed by each one separately, together with the description by section and subdivision thereof, and (6) the engineer's estimate of the cost of the bridges, culverts and grading that may be necessary. The engineer is required to report his proceedings to the court within a time prescribed by the court. The section further provides that, if it shall appear from the report of the engineer, the right of way has been secured, the deeds have been filed, and that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners, the court without exercising any discretion must order the road established.

Section 8476, R. S. Mo. 1939, makes provision for the appointment of commissioners in case the landowners fail to agree to the amounts fixed by the court as damages for taking the land for road purposes. These commissioners view the premises taken, assess damages, if any, and report back to the county court. If exceptions are taken to the report of the commissioners, the county court has no further jurisdiction in the premises. If exceptions are not taken, then the court enters the order establishing the road, and provides for the payment of the damages, if any, as fixed by the commissioners. These duties would seem to be business functions of the county and within the classification contemplated by Section 7 of Article VI of the Constitution of 1945.

From the foregoing, it will be seen that the county court does perform some judicial functions in the procedure providing for the establishment and vacation of public roads. However, we think that the duties of the county court with respect to the establishment of public roads are quasi judicial and administrative, and that there is as much, or more, "county business" in the establishment of a public road than there is judicial function.

A rule on the construction of the constitutional provision relating to the legislative, executive and judicial departments of government is stated in State ex rel. Lionberger v. Tolle, 71 Mo. 645. The substance of that rule is that limitations of the article relative to the divisions of the government are liberally construed when it is not easily determined where the power may be lodged.

We recognize the fact that there is some doubt as to whether or not the duties of the county court with respect to the establishment of public roads are judicial. However, that is debatable. Applying the rule that "the court resolves all doubts in favor of the constitutionality of a statute, and its unconstitutionality

must appear beyond a reasonable doubt before it will be declared unconstitutional," then the statutes relative to the establishment of public roads could be upheld under the 1945 Constitution by holding that the functions of the county court relative to the establishment of such roads are not purely judicial, but are both quasi judicial and are county business.

Conclusion

From the foregoing, it is the opinion of this department that county courts have authority under the new Constitution and Article 1, Chapter 46, R. S. No. 1939, to establish and vacate public roads.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

TWB:LR