

COUNTY HIGHWAY ENGINEER:

Custodian of road tools, machinery, etc.  
Supervisor of construction and maintenance of highways.  
Authority to appoint "assistants".  
County Court to hire workmen.  
County courts cannot issue road warrants without approval of highway engineer.

October 30, 1933

11-13



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Hon. C. Arthur Anderson  
Prosecuting Attorney  
St. Louis County  
Clayton, Missouri

Dear Sir:

We have your request of October 21st, 1933 for an additional opinion upon the following state of facts:

"First: In the County Highway Garage all tools, machinery and other property belonging to the County and the Road Districts belonging to St. Louis County are maintained. Under Section 8007 Revised Statutes of Missouri, 1929, the County Highway Engineer is required to give a bond for the faithful performance of his duties, said bond to be approved by the Court, conditioned further that the Highway Engineer will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the County and Road Districts thereof. The County Highway Engineer has given this bond, which has been approved by the Court. In view of Sections 8007, 8012, and 8013, is it your opinion that the County Court has the right to appoint employees in the County Highway Garage, over whom they exercise exclusive control, or does that right belong to the Highway Engineer?

Second: In considering the above numbered statutes, has the County Court the right to order the issuance of warrants in payment for road work, or any other expenditures by road overseers, or for work done under contract with the County of St. Louis, without the knowledge or approval of the County Highway Engineer?

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Will you please clarify in your opinion the respective rights of the County Highway Engineer in making appointments under the terms of his bond, under the Section of the Statute which creates his office, and those duties of the County Court, imposed upon them by the Laws of this State?"

I.

THE HIGHWAY ENGINEER IS THE CUSTODIAN OF TOOLS ETC.

In this connection we call your attention to that part of Opinion No. 3 under date of January 25, 1933, issued by this office and to which we still adhere, and which is as follows:

"In applying our conclusion to Section 8012 it is our opinion that this section requires the Highway Engineer to be the custodian of the tools, materials and machinery belonging to the road district and the county. He has the care and responsibility and the safe-keeping of the county property therein enumerated and may, under certain conditions deliver the same to others, but the statute gives him no further right or duty than that of a custodian. He is not required to maintain or repair the tools or equipment, nor to do other than to keep them safely in a proper place. None of the approved definitions of custodian of property, or custodian, require more than a safe-keeping. The New York courts in PEOPLE VS. BURR, 41 How. Prac. 293 have defined custodian of property as follows:

"The term 'custodian of property' as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction without any interest or right therein adverse to him\*\*\*\*"

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Corpus Juris in Volume 17 at page 439 defines a custodian as

"One whose duty it is to watch, guard and account for that which is committed to his custody"

and approves the definition of "custodian" as set out in TURNER vs. COFFIN, 74 Pacific 962, which is as follows:

"Custodian. The term means the keeping, guarding, care, watch, inspection, preservation or security of a thing"

and further defines "custodian of property" to be

"The keeping of property by one who is charged with or assumes responsibility for its safety"

These tools etc. are to be used by two groups of individuals:

- (1) By the road overseers,
- (2) By the highway engineer.

The highway engineer is made responsible on his bond for the delivery of all tools in his custody to his successor in office at the expiration of his term. Section 8007 R. S. 1929.

The only provision we find in the law wherein tools etc. may be taken from the custody of the highway engineer is that part of Section 8012 R. S. 1929 which reads as follows:

"When delivering to any road overseer the tools and machinery belonging to the district, he shall require from the overseer an inventory and receipt for all such tools and machinery, and the overseer shall be responsible for the proper care and handling of said tools and machinery, and shall see that they are properly kept when not in use, and shall account for the same to the county highway engineer."

In all cases where the work is being done under the direct supervision of the highway engineer, these tools remain in the custody of the engineer, who has the authority to "supervise" such work under Section 8013, and in the event that the county engineer cannot properly perform such supervision of said work, he shall, under the provision of Section 8011, appoint an "assistant" to perform such duties, and the tools then are in the constructive custody of such assistant for and on behalf of the county engineer. Therefore, it shows that the authority of the engineer, as custodian of all tools, machinery, etc. extends to the places wherein said tools are kept, and the possession, management, and control of the county highway garage is vested in the county highway engineer.

II.

THE COUNTY HIGHWAY ENGINEER SHALL HAVE SUPERVISION  
OVER THE CONSTRUCTION AND MAINTENANCE OF PUBLIC HIGHWAYS.

Under the provisions of Section 8013, the county highway engineer shall have direct supervision over:

- (1) The public roads of the county,
- (2) The road overseers,
- (3) The expenditure of all county and district funds made by the road overseers of the county,
- (4) The supervision over the construction and maintenance of all roads, culverts, and bridges.

The term 'supervision' or 'supervise' is defined in 60 C. J. p. 1163 as follows:

"To direct; to have charge of, with the authority to direct or regulate; to inspect with authority; to oversee; to oversee for direction; to superintend; to superintend and direct. The word does not mean to do work in question in detail, but to see that it is done."

It is therefore the duty of the highway engineer to direct, regulate, inspect, and have charge of the construction and main-

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tenance of all roads, culverts, and bridges. He shall specify what instruction is necessary, and when, where, and how, repairs in the maintenance of a road are to be made; in substance, he is to boss the job of construction and maintenance of public roads. If he is unable to perform this duty personally, then, under the provision of Section 8011, he shall, with the approval of the county court, appoint one or more assistants to perform such duties.

### III.

#### COUNTY COURT HAS THE AUTHORITY TO EMPLOY WORKMEN,

#### BUT NO AUTHORITY TO EMPLOY "ASSISTANTS" TO THE HIGHWAY ENGINEER.

In the construction and maintenance of roads, culverts, and bridges, it is the duty of the county court to designate who shall be "employees" to do the labor in such projects. We base this conclusion upon the general authority found in Sec. 36, of Art. 6 of the Constitution of Missouri, and under the statutory authority of 7946 R. S. 1929. They are as follows:

#### Sec. 36, Article VI:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

#### Sec. 7946 R. S. 1929:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end

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may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor."

These "employees" must do the work under the supervision of the engineer, or one of his assistants.

The county court has no authority to perform, or to assist in performing any of the duties delegated by law to the highway engineer, because that authority is vested exclusively in the highway engineer under that part of section 8011 which is as follows:

"\*In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

This power of the county court to "approve" the appointment of "assistants" to the county highway engineer is limited to the question of whether or not an assistant is necessary, and it is proper for the county court to decide how many assistants are necessary to carry on the work delegated to the highway engineer. The authority of the county court to "approve" does not extend or give the county court authority to say who shall be employed by the county highway engineer as an assistant. The power of choosing the man or men who are to be assistants to the engineer is vested exclusively in the highway engineer himself.

#### IV.

#### A COUNTY COURT CANNOT ISSUE WARRANTS FOR ROAD WORK WITHOUT THE APPROVAL OF THE HIGHWAY ENGINEER.

While the county court possesses the authority to employ workmen exclusive of the class of "assistants" to the highway engineer, a workman so employed cannot receive pay without performing satisfactory services, and the county court cannot pay them until their claims for services have been examined and ap-

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proved by the highway engineer.

Any workman who fails, neglects, and refuses to perform his duties in accordance with the plans and directions of the engineer is not entitled to pay. Public money cannot be paid out at the behest of any individual or officer unless the person receiving the same has rendered the services required by law to entitle him to receive money from the public treasury.

This authority is set out in section 8013 R. S. 1929, as follows:

"No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

It is, therefore, apparent from the very plain language of the above statute that the examination and approval of the highway engineer is a condition precedent to the county court's authority to issue a warrant, disbursing county funds for:

- (1) Road work,
- (2) Expenditures by road overseers,
- (3) For road work done under contract.

Under the state law, the county court is charged with certain specific duties relative to the handling of finances thereof. Its power and duties are prescribed by the constitution and statutes. A trust is reposed in them, the execution of which is frequently attended with difficulty and embarrassment. By accepting such trust, each county court judge obligates himself to perform the duties as the law directs, and if there is a misapplication of the funds, or the wrongful disbursement of any part thereof, the judges of the court may be required to personally respond in damages therefor. The disbursement of public funds by the county

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court for any one of the last three above enumerated purposes, without the same having been examined and approved in advance by the county highway engineer, definitely fixes the personal liability of the county judges therefor.

Respectfully submitted,

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Assistant Attorney-General

APPROVED:

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