

SHERIFFS:

MAGISTRATE COURT: Sheriff allowed fee for each day he or deputy attends magistrate court.

EMINENT DOMAINS IN COUNTY COURTS: County court can condemn land to establish public roads.

March 15, 1948

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Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Scott:

This is in reply to your letter of recent date presenting two questions for the opinion of this department. Your letter reads as follows:

"Please advise as to whether or not the sheriff in counties like Stone, in the fourth class, is allowed and entitled to \$3.00 per day for waiting on the Circuit Court, and or the Magistrate Court. Also whether or not the deputy sheriff may collect such fee.

"Does the County Court now have jurisdiction to establish public roads and condemn lands for the right-of-way for such roads?"

This department has previously ruled that the service performed by sheriffs for attending courts of record is in the nature of a civil service and that the fees allowed for this service may be retained because they are earned in a civil matter and do not pertain to the sheriff's duties in criminal matters.

I am enclosing herewith copies of our opinions to Honorable Clyde V. Hastings, Prosecuting Attorney of Worth County, dated January 27, 1945, and Honorable Ralph B. Nevins, Prosecuting Attorney of Hickory County, dated July 1, 1946, which can be taken as authority for allowing sheriffs said fees for each day they attend a court of record which is in session. An opinion to Honorable Ralph H. Duggins, Prosecuting Attorney of Saline County, dated January 22, 1948, is also enclosed herewith holding that said fees are allowed for each deputy actually employed in attending such court and that even though said fees are allowed for the attendance of deputies they should actually be collected by the sheriff for the deputy's attendance upon such court. Since the magistrate court is a court of record, the statutes allowing sheriff's fees for attending each court of record will necessarily apply with equal force to the magistrate court.

With reference to the second question involved, the power of eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare. The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the Constitution. *State v. Gordon*, 38 S.W. (2d) 105. The right to exercise the power, or to authorize its exercise, is wholly legislative. It does not exist in any subordinate political subdivision unless granted by the sovereign power.

By Section 8486, R.S. Mo. 1939, the power of eminent domain in connection with the establishment of public roads is vested directly in the several counties of the state and the county court is made the agent through which the power is to be exercised. *Petet v. McClanahan*, 297 Mo. 677. Section 8486 provides, in part, as follows:

"The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. * * *"

The Legislature clearly intended to vest in the county court the power to establish and open public roads whenever and wherever necessity requires such action. *Petet v. McClanahan*, 297 Mo. 677. Whenever the county court is of the opinion that a public necessity exists for the establishment of a public road it may by an order of record so declare and then proceed in accordance with the provisions of Section 8486, and other applicable statutes, to establish such road.

Conclusion.

Therefore, it is the opinion of this department that the sheriff in counties of the fourth class is allowed \$3.00 per day for each day he or his deputies are employed in attending a court of record, said fee to be collected by the sheriff even when a deputy attends such court of record.

It is further the opinion of this department that the county court may establish public roads and through its right of eminent domain condemn private property for such purpose.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JEB*
Attorney General

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Enc.