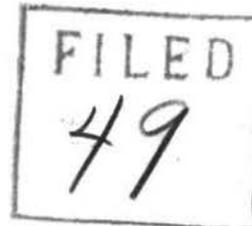


COUNTY COURTS: A county court may order a public road
CLOSING PUBLIC ROADS: vacated upon a finding that no necessity
for such road exists.

July 12, 1949



Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon the following matter:

"Does the county court have authority under the new Constitution and the recent cases to vacate previously existing public roads upon a finding of no necessity for same?"

On May 13, 1949, the Missouri Supreme Court rendered an opinion in the case of State ex rel. Lane v. Pankey, et al., in which it ruled upon the powers of a county court to establish or change the course of a public road. In that opinion the court stated:

"The new Constitution, as construed in the Rippeto (Rippeto et al v. Thompson, 216 S.W.(2d) 505) 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. A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. 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.

"County courts may acquire the right-of-way for such roads by purchase or donation, but, if land owners are unwilling or unable to convey, the necessary right-of-way can be acquired only by condemnation proceedings in a tribunal having the necessary jurisdiction. Section 8486, Revised Statutes Missouri, 1939, (Mo. R.S.A.) and Laws of 1945, page 1469, Section 2518, (Mo. R.S.A.) expressly authorize a county court to institute such proceedings in a circuit court and provide a speedy and expeditious method of acquiring the necessary land for road purposes."

It will be observed that in the above the court states that a county court may determine the necessity for a public road, its location, and the type of road to be built; that it may acquire the necessary land by purchase or donation, and may then supervise the construction and maintenance of such road. The court further says that the new Constitution, as construed in the Rippeto case and as it is construed in the instant case, "invalidates no provisions of existing statutes relating to the authority of the county courts over public roads, except such as purport to authorize the county court to exercise judicial power."

The court further states that county courts may do all things necessary to opening or changing the course of a public road except that "a county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof."

From the above language of the Supreme Court it would seem to be its opinion that no step in the opening or changing the course of a public road entails the exercise of judicial power except that of adjudging the compensation to be paid for lands taken for road purposes, and rendering judgment divesting title from the owners thereof. Since this is the case, and since the closing of a public road does not entail the adjudgment of compensation to be paid a landowner nor a judgment divesting a landowner of title, it would appear that the closing of a public road is not, in the opinion of the Missouri Supreme Court, a judicial act. Furthermore, it will be remembered that in the Lane case the Supreme

Court stated that a county court could determine when the necessity for opening a public road arose. It would seem, inferentially, that county courts would have equal power to determine the necessity of closing a public road. Furthermore, in the Lane case the Supreme Court states that no provision of existing statutes relating to the authority of county courts over public roads has been invalidated except such as purport to authorize county courts to exercise judicial power. The "existing statutes" referred to do give a county court power to close a public road. Therefore, in view of the fact that the Lane case holds, as it seems to us it does hold, that the only act of a county court in opening or changing the course of a public road which is judicial, and therefore beyond its power, is that of fixing the value of land to be taken for road purposes, and entering a judgment divesting the owner of title, and in view of the further fact that the closing of a public road does not entail the exercise of this power, it is the opinion of this department, that under the holding in the Lane case, a county court does have authority to vacate and close a public road upon a finding of no necessity for keeping the aforesaid road open.

CONCLUSION

It is the conclusion of this department that a county court may order a public road vacated upon a finding that no necessity for such road exists.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
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