

COUNTY COURTS: County courts may organize
DRAINAGE DISTRICTS: drainage districts.

JOHN M. DALTON
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June 12, 1953

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Honorable Bernard DeLisle
Clerk of the County Court
New Madrid County
New Madrid, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"The County Clerk has had filed with him a petition for the organization of a drainage district by the County Court. (Under Section 243.030)

"We are in a quandary about the validity of any such drainage district being organized through the County Court, or of the jurisdiction of the County Court in such matters, since the 1945 Constitution.

"In order to be in the clear, because of the importance of this particular district, we think it would be best to have an opinion from your office.

"At your convenience kindly advise us, with an opinion, as to whether the organization of a drainage district by the County Courts is yet valid, or whether the 1945 Constitution nullified the provisions of the statutes pertaining to the right of the County Court to organize a drainage district."

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Organization of county court drainage districts is provided by Chapter 243, RSMo 1949 (unless otherwise noted all statutory references are to RSMo 1949).

Section 243.020 provides, in part:

"1. When it shall be conducive to the public health, convenience or public welfare, or when it will be of public utility or benefit, the county court of any county in this state shall have the authority to organize, incorporate and establish drainage districts and to cause to be constructed, straightened, widened, altered or deepened, any ditch, drain, natural stream (not navigable), bank protection, current control, or watercourse, when the same is necessary to drain or protect any land or other property."

Section 243.030 requires a petition to be filed by the county court, to be signed by one or more landowners whose land will be affected by the proposed improvement. The petition is required to set forth: "(1) The necessity for the proposed improvement, as well as the starting point, route and terminus thereof; (2) The boundary of the proposed district; (3) The names of the owners of lands or other property within the boundary of said proposed district, * * *."

Section 243.040 provides for the appointment of counsel after filing of the petition, to assist in the establishment of the district.

Section 243.050 provides for the appointment of an engineer and three viewers. The engineer and viewers are required to view the location of the proposed improvement. "If they find that the proposed improvement is necessary, practicable and would be of public utility or conducive to the public health, convenience or welfare, they shall so report and in said report they shall indicate approximately the proper character, dimension, location and probable cost of the improvement necessary to accomplish the object of said petition * * *."

Section 243.060 requires the county clerk to publish notice of the filing of the report of the viewers and engineer.

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Section 243.070 provides for the filing of remonstrances against the establishment of the district and for their hearing by the court in a summary manner. The section further provides:

"2. If, after hearing and determining all such objections, the court finds that the owners of a majority in acreage of the proposed district are petitioners or have joined in the prayer of said petition, by motion, or otherwise, then the court shall, or if less than a majority, the court, in its discretion, may find in favor of making the improvement. The petitioners shall be released from their liability and bond when the county court shall find in favor of making the improvement. If the court finds in favor of making the improvement, it shall, by order of record, incorporate the land and other property described in the report of the viewers and engineer or any part thereof into a drainage district for the purpose of this chapter, and shall designate the same by number.

"3. Such district shall be a body corporate and a political subdivision of the state, shall possess the usual powers of a corporation for public purposes, shall be capable of suing and being sued in its corporate name and shall be capable of holding such real and personal property as may be at any time either donated to or acquired by it in accordance with the provisions of this chapter or of which it may be rightfully possessed at the time of the passage of this chapter.

"4. If the court shall find against the improvement, it shall dismiss the petition and proceedings at the cost of the petitioners, and shall issue an itemized bill of all costs and expenses, in like manner and with like effect as fee bills are issued by the clerk of the circuit court."

Section 243.080 provides for the engineer and viewers to determine the exact location of the proposed improvement.

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They are required to make a report showing the land in the district which will be benefited or damaged by the improvements and to assess the amount of benefits and damages to each tract of land. They are also required to include in their report a list of land which will be needed for right of ways for ditches and the value of such land. The report must further show the total cost of the improvement.

Section 243.100 lists matters which are required to be taken into consideration in the assessment of benefits.

Section 243.090 provides for the filing of the report required by Section 243.080 with the clerk of the court, and Section 243.110 requires the clerk to publish notice of the filing of the report.

Section 243.120 provides for the filing of exceptions to the report with the county court, and the court is required to hear such exceptions in a summary manner and to approve the report as modified if the cost of constructing the proposed improvement is less than the benefits assessed. The section further provides for the condemnation by the county court of land within or without the district needed for right of ways, holding basins and other works. Said section also provides for an appeal to the circuit court limited to the following questions: "(1) Whether just compensation has been allowed for property appropriated; and (2) Whether proper damages have been allowed for property prejudicially affected by the improvements."

Section 243.130 provides for the condemnation by the county court of additional land not acquired or condemned on the report of the viewers.

Section 243.160 gives the county court authority to construct the improvements prescribed and set forth in the report of the viewers and engineer.

Section 243.240 vests continuous management and control of county court drainage districts in the county court.

Sections 243.290 to 243.370 provide for the levy and collection of drainage taxes. Under Section 243.290 the court is authorized to levy a tax of not more than fifty cents per acre upon each acre of land in the district, for the purpose of paying expenses incidental in organizing the district, as soon as the district has been incorporated. The taxes, based on the benefits, are levied by the county court under Section 243.200.

The foregoing scheme for the organization of drainage districts was adopted under the 1875 Missouri Constitution

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which conferred judicial power upon the county courts (Sec. 1, Art. VI) and gave them "jurisdiction to transact all county and such other business as may be prescribed by law." Section 36, Article VI. The 1945 Constitution removed the county courts judicial authority and provided that they "shall manage all county business as prescribed by law, * * *" Section 7, Article VI. In view of the change made in the authority of the county court under the 1945 Constitution, the primary question involved in answering your inquiry is whether or not county courts in organizing drainage districts are exercising judicial power. "Judicial power" does not admit of simple definition. A discussion of the meaning of the term is found in 50 C.J.S., page 568. The Supreme Court has considered the status of the county courts under the 1945 Constitution in several cases. In the case of Rippeto v. Thompson, 216 S.W. 505, the Supreme Court held that county courts, by virtue of the change in their status made by the 1945 Constitution, lost jurisdiction to establish private roads. In this case the court stated, 216 S.W. (2d) 1.c. 507:

"The authority to establish a private road comprehends judicial, not ministerial, action by a county court. Under the old Constitution (1875) a county court was a court of record. In acting on matters within its discretion, a county court is held to exercise judicial functions. Dumm v. Cole County, 315 Mo. 568, 287 S.W. 445. An appeal from a county court was not allowed where the order appealed from was entered by the court in its administrative capacity. Scott County v. Leftwich, 145 Mo. 26, 46 S.W. 963; Colville v. Judy, 73 Mo. 651. An appeal from a county court is held to be authorized only when the judgment appealed from was entered by the court acting in its judicial function. Bradford v. Phelps County, Mo. Sup., 210 S.W. 2d 996; St. Louis, I. M. & S. R. Co. v. St. Louis, 92 Mo. 160, 4 S.W. 664; State ex rel. Dietrich v. Daves, 315 Mo. 701, 287 S.W. 430. And we have pointed out above a judgment of a county court establishing private roads is appealable.

"Accordingly, there can be no question but that a county court is acting in its judicial capacity when it enters a judgment establishing a private road. Article VI, Section

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1 of the old Constitution (1875) vested judicial power in the county courts. Also Section 36 of that Article provided in part: '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. * * *'

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

In the case of State ex rel. Lane v. Pankey, 221 S.W. (2d) 195, the court, in discussing the jurisdiction of county courts to establish public roads, stated, 221 S.W. (2d) 1.c. 196:

" * * * The new Constitution, as construed in the Rippeto 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

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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."

In the case of *In re City of Kinloch*, 242 S.W. (2d) 59, the court considered the power of the county court to disincorporate a fourth class city. In this case the court stated, 242 S.W. (2d) 1.c. 63:

"A statute by which an official (or a board, commission or other agency) is required to ascertain the existence of facts and apply the law to the facts in order to determine his official action does not necessarily confer 'judicial power' in a constitutional sense. The constitutional meaning of 'judicial power of the state' does not contemplate every exercise of duties judicial in nature, but refers to such powers and authority as courts and judges exercise; such as legitimately pertain to an officer in the department designated by the Constitution as 'judicial'; such as are exercised in the ordinary forms of a court of justice, in a suit between parties, with process. *State ex rel. School District No. 1 v. Andrae*, 216 Mo. 617, 116 S.W. 561. Many administrative and quasi judicial bodies, as a part of their delegated duties, must hear and determine facts in order to ascertain what action the law imposes upon them. In this respect such bodies are performing duties judicial in nature. But an administrative body or even a quasi judicial body is not and cannot be a court in a constitutional sense. *State ex rel. Keitel v. Harris*, 353 Mo. 1043, 186 S.W. 2d 31.

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"Returning to the consideration of Section 79.490, supra - the sole duties of the County Court of St. Louis County were to determine if notice of the intended application had been given as required by the statute, and to determine if the petition was by two thirds of the legal voters of the City. The County Court could only hear and determine the facts which the legislature has said will effectuate the legislative power to disincorporate City. If the determined facts as to signatories to the petition and publication of notice met with the requirements of the statute, the statute was mandatory in effectuating the legislative will. The statute does not vest a county court with either legislative or judicial discretion. In such 'hearing and determination' the County Court was 'exercising a judicial function,' or performing 'duties judicial in nature.' In this respect an incorporating proceeding or a disincorporating proceeding has somewhat the characteristics of a true action at law or in equity. But in the performance of its whole duties, it seems to us, the County Court was not exercising 'judicial power' such as is vested in certain courts, other than county courts, by Section 1, Art. V, Constitution of 1945; it was merely acting as the legislative agent to hear and determine the facts. It was a part of the instrumentality through which, by Section 79.490, supra, the legislative power is exercised in disincorporating fourth-class cities. In re City of Uniondale, supra; Kayser v. Trustees of Bremen, supra; In re City of Berkeley, supra."

Taking the term "judicial power" in its broad sense, there would appear to be little doubt that the county court in organizing a drainage district does, in such broad sense, exercise judicial power. This conclusion is supported by the case of Turner et al. v. Penman et al., 220 Mo. App. 193, 282 S.W. 498, in which the court considered the question of whether or not the order of a county court organizing a drainage district was subject to review on certiorari. In its opinion the court stated (220 Mo. App. 1.c. 200):

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"As a general rule certiorari will lie to review proceedings to establish a drainage district where the court or other inferior tribunal before which the proceedings were had, fails to comply with the essential requirements of the statute, or otherwise acts without jurisdiction or in excess of its jurisdiction, and no appeal or other adequate remedy is provided. (11 C.J., p. 674, sec. 144; Dewell v. Commissioners of Sny Island Drainage District, 232 Ill. 215, 83 N.W. 811; Sanner v. Union Drainage District, 175 Ill. 575, 51 N.E. 857; State ex rel. v. Posz, 106 Minn. 197, 118 N.W. 1014; State ex rel. v. Grindeland, 195 N.W. (Minn.) 781; In re Jenson, 198 N.W. (Minn.) 455.)

"State ex rel. v. Weithaupt, on which relators rely to support their contention that certiorari will lie was decided in division in 1914, and State ex rel. v. Dawson, on which respondents rely to support their contention that certiorari will not lie was decided In Banc in 1920. The judge who wrote the opinion in State ex rel. v. Weithaupt, concurred in the opinion in State ex rel. v. Dawson. No mention is made of the Weithaupt Case in the Dawson Case. There is this distinction between the Weithaupt Case and the Dawson Case. In the former the act establishing the district was challenged, and in the latter the act extending the boundary lines was challenged. In extending the boundary no new entity was brought into existence, the arm of the old corporation was merely extended.

"5 Ruling Case Law, p. 259, says that it is fairly well settled that judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process and upon whose claims some decision or judgment is

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rendered. The order establishing Drainage District No. 38 certainly has all of the earmarks of judicial action as defined by Ruling Case Law. And in addition to creating a corporate body this order went further and levied an assessment of 35 cents per acre upon all the lands in the district for the purpose of paying the expenses of organization. In State ex rel. v. Dawson, the court uses the following language: 'The mere fact that the lands of the relators in this case have been incorporated into the Albany Drainage District does not ipso facto in any manner affect relators' rights in the premises, so long as their property had neither been benefited nor damaged.' Then follows a quotation from Buschling v. Ackley, 270 Mo. 157, l.c. 165, 192 S.W. 727, as follows: 'From this it is evident that it is the taking or damaging of the property, and not the incorporation of the district that affects the owners' rights.' But by the order at bar which we are asked to declare legislative in character the court not only incorporated the district and included relators lands therein, but also placed an assessment upon their lands which would result in literally taking the lands should they refuse to pay.

"It is our conclusion that the Weithaupt Case was not overruled by the Dawson Case, and that certiorari is the proper remedy to reach the merits of relators' cause."

However, the Supreme Court, in the Pankey case and the Kinloch case, did not hold that the county courts were excluded from the exercise of any judicial power. They held, rather, that the county courts could no longer exercise judicial power in the strict sense. In the earlier Rippeto case the court had leaned toward the idea of applying the more strict concept of judicial function, stating: "In acting on matters within its discretion, a county court is held to exercise judicial functions." 216 S.W. (2d) l.c. 507. However, in the Pankey and Kinloch cases the court did not adhere to this strict test, and the decision in the Kinloch case upholds the power of the county court to exercise "duties judicial in nature" but not judicial power in the strict sense.

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The incorporation of drainage districts is a legislative matter and a drainage district organized by the county court is a municipal corporation. In re Mississippi and Fox River, 270 Mo. 157, 192 S.W. 727; Thompson v. City of Malden, 118 S.W. (2d) 1059. In view of the holding of the Supreme Court in the Kinloch case, we are of the opinion that the incorporation of a drainage district is not such exercise of judicial power as has been denied the county courts under the 1945 Constitution.

There are two provisions of the County Court Drainage law which might give rise to the question of whether or not the court exercises judicial power. One is Section 243.070, providing for the court's hearing remonstrances against the establishment of the district. This, however, is quite similar to the court's duties to hear remonstrances against the establishment of a public road (Sec. 228.050), and in the Rippeto case the court did not strike down the county court's exercise of such function. Therefore, we believe that the county court would not be precluded from exercising a similar function regarding county court drainage districts.

Section 243.120 provides for the county court's hearing exceptions to the report of the viewers assessing benefits and fixing damages. This section further provides for the county court's condemning land required for right of ways, holding basins and other work. This provision for condemnation in the county court is clearly unconstitutional under the Supreme Court's decision in the Pankey case. However, the Legislature has provided for the county court's condemnation in the circuit court of lands for drainage systems in Section 49.300. Adequate provision having been made for the condemnation of land for such purpose, we are of the opinion that the invalidity of the provision therefor in Section 243.120 would not invalidate the County Court Drainage District law.

Section 243.120 also provides for the county court's review of the assessment of benefits and the fixing of damages. In the case of Beck v. Missouri Valley Drainage Dist., 46 F. (2d) 632, 84 A.L.R. 1089, the United States Court of Appeals discussed the nature of proceedings for the assessment of benefits and damages under the Circuit Court Drainage District law (Chap. 242). In this case the court stated, 84 A.L.R. 1.c. 1096:

" * * * We have already seen that the mere inclusion of appellant's land within the district does not deprive him of due process,

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if, at some stage of the proceeding, he is given an adequate hearing upon the question of benefits and damages. Such a hearing is provided by section 4392. Any landowner who feels aggrieved thereby may file exceptions to the report of the commissioners, or to any assessment of either benefits or damages, and such exceptions shall be heard by the court in a summary manner. If this action of the state circuit court be deemed judicial, it must be conceded that the hearing granted satisfies the demands of due process. But, if we assume, as we think we must, that, under the cited statutes, the report of the commissioners making the assessments, the filing of exceptions, and the action of the court upon these exceptions, taken together, form a part of the legislative or administrative procedure of the state in perfecting and carrying out the purposes of these drainage districts, then it is incumbent upon the landowner concerned to avail himself of the administrative remedy afforded by the state law. * * *

That case did involve a circuit court drainage district, but we are of the opinion that the nature of the function of the court in reviewing assessments is the same under the County Court Drainage District law and that the exercise of such function by the county court does not constitute an exercise of judicial power.

Some question might also arise as to whether or not the county court is precluded from exercising jurisdiction respecting drainage districts by reason of the provision of Section 7 of Article VI of the 1945 Constitution, which authorizes the county court to manage only county business. As previously pointed out, the corresponding provision of the 1875 Constitution authorizes the county court to manage county "and such other business as may be prescribed by law." When the section here under consideration was first presented to the 1945 Constitutional Convention it read: "The court shall manage all county and such other business, except judicial as prescribed by law, and keep an accurate record of its proceedings." (Transcript of Debates, Constitutional Convention, page 1623.) An amendment was offered

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to strike the words "except judicial" because of the ambiguous meaning of the term "judicial." After considerable discussion the further amendment was offered to strike the words "and such other." When this amendment was offered the following discussion took place:

"MR. PHILLIPS (of JACKSON): There are a good many functions which are delegated to the county court and which are really of a state nature, and it would be rather dangerous to strike out the words 'and such other business as prescribed by law' * * * The county is a subdivision of the state in a sense that all of the powers of the county court carrying out county business are essentially state activities delegated by the states to the local units of government, but I think do not agree that it is true that if you go through our statutes you will find that the General Assembly has placed upon the county court a number of responsibilities.

"MR. BRADSHAW: Yes, that is true, and the organization of drainage and levee districts, etc., is in the county. I think that could be considered as county functions. Since they are within the territorial limits of the county, I think so."

In *In re City of Kinloch*, above cited, the court took a similar view of the nature of the powers which might be conferred upon the county court, stating, 242 S.W. (2d) 1.c. 64:

"We do not construe Section 7, Article VI, Constitution of 1945, as meaning the county court may not be given authority by law to act as the legislative agent in proceedings to effectuate the legislative power in creating or abolishing cities. Section 7 does not say county courts may not be given such statutory authority. Nor do we consider the cases of *State ex rel. Lane v. Pankey*, 359 Mo. 118, 221 S.W. 2d 195; *Rippeto v. Thompson*, 358 Mo. 721, 216 S.W. 2d 505; and *State ex rel. Kowats v. Arnold*, supra, as authorities for strictly construing

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Section 7 to mean county courts may have statutory authority to act only in the management of the county's fiscal affairs. But the Lane, Rippeto and Kowats cases do clearly hold county courts now can have no authority to determine matters comprehending judicial action in the exercise of 'the judicial power of the state.'

In view of the foregoing, we are of the opinion that Section 7 of Article VI of the 1945 Constitution does not preclude the Legislature's continuing to impose the organization and management of drainage districts upon the county courts.

CONCLUSION

Therefore, it is the opinion of this office that county courts may continue to organize drainage districts under Chapter 243, RSMo 1949, but county courts may no longer exercise the power of condemnation conferred upon them by Section 243.120, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

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