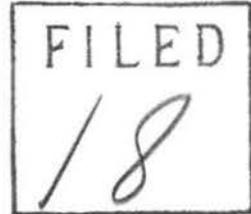


COUNTIES -) Mandatory that County Court
ROAD OVERSEERS) appoint Road Overseers. Such
appointment may be made any ti

September 29, 1943

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Honorable W. E. Coffey
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

This will acknowledge receipt of your letter under date of September 1, requesting an opinion.

You inquire if it is mandatory upon the County Court under Section 8516 to appoint Road Overseers and if the County Court should appoint said Road Overseers now or wait until February next year; to date no Road Overseers have been appointed; that since 1940 the County has employed a County Highway Engineer in accordance with Section 8660, R. S. Mo. 1939.

The County Court is not a general agent of the County or State, but their powers are limited by statute and any acts beyond the statutory authority are void.

In *Morris vs. Karr*, 114 S.W. (2d), 962, l.c. 963, the Court said:

"In *Sturgeon v. Hampton*, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' The court goes on to say that it should go far to uphold the acts of the county court when they are merely irregular, but such acts are not irregularities and are void when made without any warrant or authority in law."

Another cardinal rule of statutory construction is to ascertain, if possible, the intention of the legislature and give it that effect. As was said by the Court in *City of St. Louis vs. Pope*, 126 S.W. (2d), 1201, l.c. 1210, 344 Mo. 479:

"In the *Senter Commission Company Case*, *City of St. Louis v. Senter Comm. Co.*, 337 Mo. 238, 85 S.W. 2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * * this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose'. * * *"

In view of the foregoing, we shall examine the statutory provisions regarding appointment of such Road Overseers. Section 8514, Revised Statutes of Missouri, provides that the County Court of all counties, except those in township organization, shall, in January, 1918, with the advice of the County Highway Engineer, divide the county into road districts, and biennially thereafter the Court shall have the right to change the boundaries of such road districts as to the best interest of the public. Section 8514 reads as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Section 8516, Revised Statutes, further provides that the County Court shall appoint all Road Overseers and such appointment shall be made at the February term of court. This section reads as follows:

"All road overseers shall be appointed by the county court of the county at the February term of said court. No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village, within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write). Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to be fixed by the county court annually in the month of March, by order of record."

Under Section 8514, supra, we think that the County Court has no discretion regarding the division of the county into road districts; the lawmakers used the word "shall"; and furthermore made one exception as to all counties under township organization. Therefore, unquestionably the legislature definitely intended by making the exception that all other County Courts must divide their respective counties into road districts.

Generally, the use of the word "shall" makes it mandatory; however, this is not always the rule. In State ex rel. Carpenter vs. City of St. Louis, 2 S.W. (2d), 713, l.c. 727, 318 Mo. 870, the Court held that the word "shall" in statute, though imperative where the public has a right which ought to be exercised, may be directory or permissive. In so holding the Court said:

"But respondents call attention to the language of section 7191, that 'such mayor and common council shall direct the proper officer to give notice' so as to submit the matter to a vote, specifying the rate mentioned in the petition. The word 'shall', when used in a statute, is often construed to mean 'may'. It is imperative where the public or persons have rights which ought to be exercised or enforced; but, where no right or benefit depends upon its imperative use, it may be held directory only. 2 Lewis-Sutherland on Statutory Construction, Section 640. The word is

held to be permissive and not mandatory when necessary to sustain or accomplish the purpose of a legislative act. *People v. Fox*, 144 App. Div. 611, 129 N. Y. S. loc. cit. 651. 'Shall' is also construed in the permissive sense to mean 'may' where it is necessary to sustain the constitutionality of a statute. *Spring Creek Dist. v. E. J. & E. Ry. Co.*, 249 Ill. loc. cit. 294, 94 N.E. 529. Courts many times have construed the word 'shall' to mean 'may' under circumstances where it seemed consistent with the legislative intent. With that construction the mayor and common council had discretion either to deny the petition or to submit the proposition to a vote. Having that discretion it was the mayor and common council which fixed the tax rate when they ordered the election, the rate to go into effect contingent upon a favorable vote."

Under such a construction of the word "shall", it will necessitate an inquiry to determine if the public or persons have rights or benefits which would be infringed, or whether or not such rights or benefits do depend upon the appointment of such Road Overseers.

Turning to Section 8516, supra, we find the language used refers to "All Road Overseers shall be appointed by the County Court". Furthermore, under Article 9, Chapter 46, relative to County Highway Engineers, apparently the legislature contemplated that the County Courts in this State shall appoint Road Overseers, for in many instances under the Article it provides for County Highway Engineers supervising and directing the Road Overseers in the various counties.

In view of the foregoing rules and statutory provisions, we are of the opinion that it is mandatory upon the County Court to appoint such Road Overseers in conformity with Section 8516, supra.

As to the time when such appointments may be made, we hold it is not mandatory that such Road Overseers be appointed in February. In so far as possible such appointments should be made during the month of February; however, the decisions in this State have many times held that a statute is directory when specifying the time within which a public officer is to perform an official act, unless the phraseology of such statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer.

The Court in *Schafly v. Baumann*, 108 S.W. (2d), 363, 1.c. 365, 341 Mo. 755, said:

"Appellant, however, contends the provisions of the Jones-Munger Act that such lands 'shall be subject to sale * * * on the first Monday of November of each year' (section 9952a, Mo. St. Ann. p. 7993, supra), that a notice shall be published that such lands 'will be sold * * * on the first Monday in November next thereafter' (section 9952b, Mo. St. Ann. p. 7995, supra), and that 'on the day mentioned in the notice the county collector shall commence the sale of such lands' (section 9952c, Mo. St. Ann. p. 7995, supra), are directory and not mandatory. This may be true as to the quoted provision of section 9952a, but to so hold would delete the provisions of section 9952b calling for a sale on the first Monday in November next thereafter and section 9952c requiring the county collector to commence the sale on the day mentioned in the notice, to wit, said first Monday in November. * * * * * The general rule and its limitations, likewise, recognized in the cited cases, are stated in 59 C.J. 1078, Section 634: 'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer'."

In view of the above authority, we are of the opinion that such provisions requiring such Road Overseers to be appointed at the February term of court should be followed; however, it is not mandatory, but directory, and such appointment may be made at times other than during the month of February.

CONCLUSION

Therefore, we conclude that it is mandatory that Road Overseers be appointed under Section 8516. However, it is not imperative that such Road Overseers be appointed at the February

term of court. In so far as possible such appointments should be made at the February term of court, but since this requirement is merely directory and not mandatory, such appointments may be made at a later date.

Respectfully submitted,

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Assistant Attorney General

ARH:ml

APPROVED:

ROY McKITTRICK
Attorney General