ROADS:
CLOSING:
COUNTY COURTS:

In a situation where, by virtue of the authority granted in Section 228.110, RSMo 1949, twelve freeholders of a township have filed an application with the county court for the closing of a road in such township and no remonstrances against the closing of the road have been filed and the time within which the filing of remonstrances could be made had expired, it is not mandatory upon the county court to close such road, but is discretionary.

September 19, 1960

FILED
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Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Mr. Wilson:

Your recent request for an official opinion reads:

"The Judges of the Polk County Court have requested that I obtain the opinion of your office as to the construction to be placed on Section 228.110, Laws of Missouri, 1949, with respect to the vacating of a public road. In the situation about which we are concerned, a petition has been presented to the county court by 12 freeholders of the township for the closing of this particular road, the notices have been properly posted and served upon interested parties, and the time for filing remonstrances against the closing of the road has expired and no such remonstrances have been filed.

The relevant part of sub-section 3. of section 228.110 reads as follows: " if no remonstrances be made thereto in writing, signed by at least 12 freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners, ****."

The question of the county court is as to whether they have any discretion as to the closing of the road in this situation where no remonstrances are filed. They wish to know if they can lawfully refuse to close any part of this road as requested by the petitioners

> even though no remonstrances were filed by any person against such closing. Thanking you in advance for your help on this matter, I remain"

As you indicate above the determination of this issue depends upon the meaning to be given to the word "may" as it is used in Section 228.110, RSMo 1949, the pertinent portion of which is set forth above.

We believe that the meaning to be given to permissive words such as "may" in contradistinction to such words as "shall" and "must" is well set forth in the case of State v. City of Maplewood, 99 SW2d 138, a 1936 opinion of the St. Louis Court of Appeals. In that case the court stated (l.c. 142 [5-7]:

> "The general rule with respect to the use of permissive words in a statute is stated in 59 C.J. §633, pp. 1077 and 1078, as follows:
>
> 'On the other hand, where statutes are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do, and no public interests in private rights are involved, they will be construed as permissive. Generally, statutes, directing the mode of proceeding by public officers, designed to promote method; system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith. * * *
> 'Permissive words in a statute in respect of officers or courts will not be construed as mandatory where such construction would create a new public obligation; and it has been held that even mandatory words or provisions in a statute defining the duties of administrative officers may be construed as directory only, unless something in the body of the statute indicates the contrary.'
>
> "Our Supreme Court in State ex rel. Ellis v. Brown, 326 Mo. 627, 633, 33 SW2d 104, 107, stated the rule for determining whether a statute is directory or mandatory in the following broad terms: 'There is no universal

> rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished'"

In this connection we also note the case of Kansas City, Missouri v. J. I. Case Threshing Mach. Co. et al., 87 SW2d 195. In that case the Missouri Supreme Court stated (l.c. 205 [15-17]):

> "The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, §635; 25 R. C. L. 768, §12; 2 Lewis-Sutherland (2d Ed.)1153, §640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Statutes, 416-419, §§306,307. 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, §635. Of course, all of these rules of construction are auxiliary rules. 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent.' Meyering v. Miller, 330 Mo. 885, 51 SW2d 65, 68.***"

It will be noted that in the above case the court made a distinction between the use of a permissive word where the statute in which it was contained was "purely enabling in character" and the use of a permissive word in a statute "directing the mode of proceeding by public officers ...."

The court indicated that the use of the permissive word in the first category was simply permissive, but that in the second category it was mandatory.

An illustration of the position of the court with respect to the first category is found in the case of State v. Bland, 210 SW2d 31. In that case the Missouri Supreme Court stated (l.c. 36[7-8]):

> "It is true Sec. 1516 does provide 'it shall be lawful' for the defendant in a divorce suit to file an answer charging the plaintiff with conduct which would entitle the defendant to a divorce; and it further provides the defendant in the answer 'may' pray for a divorce. This is only permissive, not mandatory, it is true. * * *"

In the case of State v. Dinwiddie, 213 Sw2d 127, the Missouri Supreme Court stated (l.c. 130 [4-5]):

> "* * *That provision of the statute states: 'The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant.' (Emphasis ours.) By that provision it is clearly optional with plaintiff whether he will accept the third-party defendant as a defendant in the case * * *"

Other cases of the same purport could be adduced.

From the above, it will be noted that ordinarily and unless there is a definite indication to the contrary the word "may" will be regarded as being permissive. We believe that a guiding light in the determination of the meaning of this word is set forth in the case of Kansas City v. J. I. Case Threshing Machine Company, a portion of which opinion is set forth above and in that particular portion wherein it is stated that the words "may", "most" and "shall" are in each case to be given that effect "which is necessary to carry out the intention of the legislature as determined by ordinary rules of construction." With this principle in mind let us attempt to determine what the legislative intent was in the instant situation.

The first sentence of Section 228.110, RSMo, 1949, reads as follows: "Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless and the repairing of the same an unreasonable burden upon the district or districts.

From the above it will be seen that an application for a vacation of a road presents a question of fact, and that an

order of the county court vacating a road must be predicated upon a finding in accordance with the underscored words in the above section. It would appear to be highly unreasonable to assume that simply because no remonstrance is filed to such an application that a county court must close its eyes to facts which may be known to it and that a road should be vacated even though the court may know that as a matter of fact such road is not "useless," that the repairing of such road would not be "an unreasonable burden upon the district or districts," and that as a matter of fact the road in question is highly useful and necessary. If it were the law that upon the application set forth in Section 228.110, supra, it was mandatory upon a court to close a road where no remonstrance was filed, it is conceivable that a court might find itself in a position where it was required to order the vacation of a heavily traveled road merely because no one took the trouble to file a remonstrance.

That such is not the law is made clear by the decision of the Missouri Supreme Court in cases arising under this section. That court has consistently held that, in order to vacate a road, the County Court must find that the road is "useless and the repairing of the same an unreasonable burden upon the district or districts." Witte v. Sorrell, 219 SW 595, 596 (2), Burrows V. Carter County, 308 SW(2d) 299, 304 (4). These are jurisdictional facts which must be found to exist before the court can exercise the power conferred upon it and determination of their existence necessarily involves the exercise of discretion and judgment on the part of the County Court. The conclusions and opinions of others cannot be substituted for the courts' judgment and conclusion with regard to such facts. Burrows v. Carter Co., 308 SW (2nd) l.c. 305.

Clear evidence that the legislature was aware of the implication of discretion arising from the use of the word "may" in the statute presently under consideration may be found by reference to §228.040 RSMo., relating to the opening of roads. There the legislature has provided that when no remonstrance has been filed against the opening of a road, "the County Court, without discretion to do otherwise, Must open said road."(Emphasis ours). §§ 228.040 and 228.010 were enacted by the same bill in the General Assembly. Laws of Mo. 1917, p. 442, § 5, § 12. The fact that in such enactment the legislature made quite clear its intention that no discretion be involved under one section certainly indicates a deliberate use of the word "may" in § 228.110, as a grant of discretionary power.

Further evidence of the discretionary nature of the power granted the County Court is clearly gleaned from the provision that the court " may proceed to vacate such road, or any part thereof, * * *" (Emphasis ours). This provision again must mean that the court may exercise judgment and discretion in determining what part, if any, of the road should be closed.

Honorable Robert E. Wilson

We would further call attention to the provisions of § 228.070 RSMo 1949, requiring the approval of the county highway engineer for the changing of a road. As shown by the enclosed opinion to Richard Ichord, dated June 25, 1956, the Supreme Court has held that this includes the vacating of a road.

CONCLUSION

It is the opinion of this department that in a situation where, by virtue of the authority granted in Section 228.110, RSMo 1949, twelve freeholders of a township have filed an application with the county court for the closing of a road in such township and no remonstrances against the closing of the road have been filed and the time within which the filing of remonstrances could be made had expired, that it is not mandatory upon the county court to close such road, but is discretionary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General