

PRIVATE ROADS: County court may not issue warrant to the officer of the court directing him to build fence under Section 7850, R. S. Missouri, 1929

September 10, 1937

Honorable Brevator R. Creech
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Dear Mr. Creech:

This department is in receipt of your request for an opinion, as follows:

"I would like to have an opinion from your department on the construction of Section 7850, R. S. 1929, in this particular:

Does the County Court have a right to issue a warrant to the Sheriff of the County directing him to build and construct a fence found to be necessary in report of commissioners where damages were allowed under Section 7845 to the landowner whose lands were condemned for private road purposes where the landowner turns over the right-of-way as is provided by order of the court but fails and refuses to construct a fence in which he has been awarded and has accepted the moneys for building of fences by the commissioners appointed by the court under Section 7845."

Section 7845 of the 1931 Laws, provides for the appointment of commissioners by the county court to proceed to view the premises and cause a road (not exceeding forty feet wide) to be marked out * * *, and shall make a report to the county court at its next term * * * and shall also make and report an assessment of the items of damages sustained by each person through whose land said proposed road passes, including the erection of fences and

the kind of fences to be erected, if the land is already enclosed, and if in the opinion of the commissioners, the location of the road makes the erection of a fence or fences necessary.

Section 7849 of said statute provides that the owner has six months to vacate and is as follows:

"The county court shall, at the time of giving judgment for the establishment of the road, specify the time when the possession shall be given by the owner, giving the owner of the land a reasonable time, not exceeding six months, to erect fences, if the commissioners' report shows that the fencing is required, and also time to gather growing crops, if they are growing at the time on the premises, which time shall be stated in the judgment."

Section 7850 of said statute, provides a penalty for the failure to open the road and is as follows:

"If any owner of real estate, against whom final judgment has been given as designated in the preceding section, shall neglect or refuse to open said road within the time specified in the said judgment, he shall forfeit and pay to the person in whose favor judgment was given five dollars per day as a penalty for each day that it remains unopened, to be recovered in an action of debt before any court having jurisdiction; and the county court shall have power and it is hereby authorized, upon the application of the person interested, to issue its warrant, directed to the officer of its court, to open said road immediately, and the costs of the proceeding shall be paid by the person

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so refusing to open said road; Provided, the damage shall have been previously paid to the county treasurer, as designated in this article."

The commissioners are required under Section 7845, to make a report as to the necessity of erection of fence or fences and Section 7849 provides that the owner be given a reasonable time, not exceeding six months to erect fences in case said commissioners' report shows that fencing is required.

According to your letter, a final judgment was rendered in the county court under the above sections wherein the commissioners found in their report that a fence was necessary and to which report the owner did not except. In your letter you further stated that the owner of the lands was paid the amount of the damages assessed by the commissioners for his right-of-way and a fence found necessary to be erected. As we understand it, you desire to know if the county court, under Section 7850, has a right to issue a warrant to the sheriff of the county directing him to build and construct a fence so found to be necessary in said report of commissioners.

Section 7850 is a penal section and there is no mention made therein of the court having a right to issue a warrant to the sheriff of the county directing him to build or construct a fence found to be necessary in the report of commissioners.

In the case of State ex Inf. L. L. Collins v. St. Louis San-Francisco Ry. Co., 238 Missouri l.c. 612, the court in defining a penal statute said:

"The provision is purely penal, and is to be strictly construed. (State to use v. Railroad, 83 Mo. 144). This means that it is

not to be regarded as including anything not within its letter as well as its spirit; which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature."

The same rule was stated in *Eddington v. Western Union*, 115 Missouri Appeal l.c. 98, which reads as follows:

"A statute, such as the one here authorizing a recovery without any proof of actual damages, injury or pecuniary loss, is harsh indeed, when applied to those cases which fall properly within its provisions. It is highly penal and must be strictly construed and applied only to such cases as come clearly within its provisions and manifest spirit and intent."

In *State v. Gritzner*, 134 Missouri l.c. 527; in commenting on the strict construction of a penal statute, the court said:

"Moreover, as criminal and penal statutes are to be strictly construed, construed stricti, if not strictissimi, juris; as no one is to be made subject to such statutes by implication (*State v. Bryant*, 90 Mo. l.c. 537, and cases cited; *Bishop Stat. Grim.*, secs. 190; 193, 194, 227); as they are nonelastic, as only such transactions are covered by them as are within both their spirit and letter (*State v. Schuchmann*, 133 Mo. 111),"

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CONCLUSION

Therefore, Section 7850 not requiring that the landowner shall construct the fence designated by the report of the commissioners and it being a penal statute and no provision is made therein for the county court to issue a warrant to the sheriff of the county directing him to build or construct a fence found to be necessary in the report of the commissioners, it is the opinion of this office that the county court has no right to issue such warrant.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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