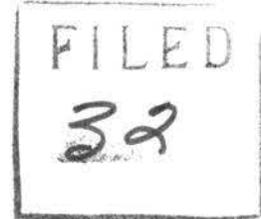


ROADS:  
CRIMINAL LAW:  
PUBLIC NUISANCE,

One who damages roads by turning water on it may be prosecuted and, in addition, act may be abated by Prosecuting Attorney as public nuisance.

February 24, 1945



Mr. J. B. Gallagher  
Assistant Prosecuting Attorney  
Moniteau County  
California, Missouri

Dear Sir:

Recently you requested an opinion upon the following:

"The County Court of this county has a difficult problem. The farmers while improving their lands are doing considerable terracing and some are running the water into the road ditches, which has in some instances and may in others do considerable damage to the public road.

"Section 8581 R. S. 1939 apparently makes such conduct a criminal offense. I do not find any criminal cases in the reports making this specific conduct a criminal offense. There are many cases cited under this section for obstructing public roads by other means.

"However, in view of Section 645 R. S. 1939, the statutory law contained in Section 8581 controls, and I have so advised the county court. Am I right?"

Section 8581, R. S. Mo. 1939, denounces various acts and makes them separate misdemeanors, the separate acts being distinguished from each other by disjunctive "or." The following language of the section is pertinent here:

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"\* \* \* Any person or persons who shall willfully or knowingly \* \* damage any public road \* \* by turning water upon such road or right of way, \* \* \* \* \* shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. \* \* \* \* \*"

In addition, to authorize criminal prosecution the section provides for the enforcement of a civil penalty upon failure to remove an obstruction pursuant to a notice. Thus, two different procedures are provided by the section.

This act has been passed upon and held valid upon several occasions by our courts of last resort. While no decision has been found containing the exact factual situation here presented, we conclude that any person who knowingly or intentionally damages a road by turning water upon it has violated its terms and is subject to prosecution. A charge in the language of the statute would be sufficient. State v. Burns, 172 S. W. (2d) 259, 351 Mo. 163.

The unlawful obstruction or damaging of a public road or highway constitutes a public nuisance. 29 C. J. Sec. 371, p. 616; 40 C. J. S. Sec. 217, p. 212. And, such nuisance may be abated by injunctive proceedings. The latter action may be brought by the prosecuting attorney and is cumulative. 29 C. J. 627; State ex rel. Rucker v. Feitz, 160 S. W. 585, 174 Mo. App. 456; State v. Franklin, 113 S. W. 652, 133 Mo. App. 486.

In the Feitz case, supra, and wherein the prosecuting attorney brought a mandatory injunction proceedings to bring about the removal of an obstruction in a public road, it was held (174 Mo. App. 1. c. 460, 461):

"These are well-recognized and frequently applied rules and it must be conceded that the statutes of this State cited by defendant provide means for the removal of obstructions in public highways and for the punishment of those who willfully or knowingly set up such obstructions. But the existence, of these remedies is not exclusive for the reason that they cannot

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be held to be complete and adequate in all cases. The facts of the present case pointedly exemplify the inadequacy of the legal remedies. For a number of years the defendant has maintained a purpresture upon public rights and property in contempt and defiance of the law and the efforts of its officers to enforce it. A successful criminal prosecution has proved insufficient to overcome his determination and ability to persist in wrongdoing. The power and jurisdiction of a court of equity to give speedy and complete relief to the public in such case cannot be successfully questioned and has been expressly sanctioned in recent decisions of the Supreme Court and of this court. (State ex rel. v. Canty, 207 Mo. 439; State ex rel. v. Lamb, 237 Mo. 437; State v. Franklin, 133 Mo. App. 486; Heitz v. City of St. Louis, 110 Mo. l. c. 626.)"

CONCLUSION

It is, therefore, concluded that any person or persons who shall willfully or knowingly damage any public road by turning water upon it may be prosecuted under the provisions of Section 8581, R. S. Mo. 1939, and that, in addition to such prosecution, the Prosecuting Attorney may institute proceedings to abate such damage as a public nuisance, and that the criminal prosecution is not the exclusive remedy.

Respectfully submitted,

VANE C. THURLO  
Assistant Attorney General

APPROVED:

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HARRY H. KAY  
(Acting) Attorney General

VCT:CP