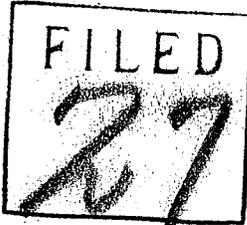


COUNTY ROADS:  
PRESCRIPTION:

A road which has been in continuous use for over forty years and upon which public money and labor have been spent in such amount as to keep the road passable, is a legally established public road although it was not established by order of the county court. Such a road is confined to that portion actually used as a road bed.



May 24, 1954

Honorable Irvin D. Emerson  
Assistant Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri

Dear Sir:

Your recent request for an official opinion is based upon a letter addressed to you by Warren Lynch, County Highway Engineer of Jefferson County. The Lynch letter reads as follows:

"There has been in use in this County for forty years or over a road known as the Byrnesmill Road connecting State Highway No. 30 with the Eureka-Byrnesmill Road. County Judge William Hilgert's father worked the road forty years ago as road overseer. Mr. Frank Hluzek, presently employed by Highway Engineer J. Warren Lynch, worked the road back in 1938. The last work done by the County on the road was in 1946 to the extent of hauling in several loads of gravel.

"There is no record of this road having been established by any action of the County Court of Jefferson County. There are fences several places on both sides of road and the property owners so fenced their land to leave about forty feet of space between fences. In 1928 there was a petition filed to close the road which was made, but rescinded a few months later when the County Court found a defect in the petition. This road is still traveled by the public and is the only access of some property owners along the road. The condition is presently such that in spots the road is safe for only one way traffic. Recently the County Court ordered Warren Lynch, Highway Engineer, to place the road in reasonably good repair. William Knollman, a property owner along the road, ordered the workmen away from in front of his property claiming the road has been abandoned by the County.

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"In view of the above, Mr. Warren Lynch, Highway Engineer, wishes to have the following questions answered.

"1. Is this a County Road, and if so what are its boundaries?

"2. If this is not a County Road can the County Court spend County Funds to maintain and repair the road?

"3. What is the liability of the Highway Engineer to the property holder if it is found to be a County Road and he works the road against the wishes of the property owner?

"4. What legal procedure should be followed to establish the boundaries if this is a private road dedicated to public use?"

The situation here is that of a road which, although so far as is known, was not established by order of the county court, has been continuously used for at least forty years, and upon which, from time to time, public labor and money have been expended in maintenance.

We now direct attention to Section 228.190 RSMc 1953, which reads:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same."

Obviously the road in the instant case comes within the definition of a legally established road as given in Section 228.190, supra.

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The latest decision that we have found construing the above section is the 1952 Springfield Court of Appeals case of George et al. vs. Crosno, 254 S.W.(2) 30. That case held that where no public money or labor had been expended on the highway and there was no evidence that the road had been used by the public for ten years prior to March 30, 1887, that it could not be held to be a public highway by prescription.

In the instant case, as we have noted, public money and labor was expended on this road from time to time and as late as 1945. We are unable to find any indication as to how much public labor and money must be expended or how frequently. We deduce that in order to come within the requirement of the cases a sufficient amount of public money and labor must be expended to keep the road in a fit condition for travel.

In the case of Borders v. Glenn, 232 S.W. 1062, at l.c. 1064, the court stated:

"We find that in the case of School Dist. No. 84 v. Tooloose, 195 S.W. 1023, that the Supreme Court has held that, even in the absence of any order made in the county court's office concerning a road, or any expenditure of public money or labor on the road, it may yet become a public road by prescription or by estoppel in pais, where it is shown that the owners along the road have treated it as a public road, and have permitted the traveling public and the neighborhood to so treat such traveled way. In that case, as in this, the road had been used by the public for a great number of years. It had been kept in a usable condition by the residents of the district who used it for their own accommodation. A schoolhouse had been located on the road for a great number of years, to which the children and those going to and from school constantly traveled the road; that the road had been fenced by the defendant in each of the cases. In that case it was said, and we think it most applicable here:

"All that is necessary to be shown in such cases is an adverse use on the part of the public, either for a sufficient time to create a bar under the statute of limitations, or a user by the public under such circumstances and for such a period of time, with the acquiescence of the owner, as to imply on his part a dedication of the land and a prescriptive right there- to on the part of the public by its acceptance and ap-

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propriation as a public highway, all of which may be shown by facts and circumstances, as well as positive proof.'

"(3) This case clearly declares the law to be that where a landowner permits the public to travel over a portion of his land, using it as a roadway, where he permits for years, without any objection, the location of public houses such as churches, schoolhouses, etc., on such traveled way, and, without objection, permits those going to and from these institutions, and then sets that portion of ground apart between fences, and permits uninterrupted travel by any one who wants to use it as a road and highway, will be denied the right to afterwards gainsay that it was a public road. The law will imply a dedication on his part; and, he and the public having done these things which would be done if it was a public road, he will be estopped from denying that it is a public road after these, acting upon the theory that it was a road, have made improvements, and have by use and travel shown a manifestation to accept the implied dedication."

In view of the above, and on the basis of the facts submitted to us by you, we feel that the road in the instant case is a legally established public road.

The next question is as to its boundaries. In the case of *Eckerle et al. vs. Perry*, 297 S.W. 424, at l.c. 425, the court stated:

"\* \* \* When the public acquires a right to a roadway by prescription that right extends only to the land actually used for road purposes. It is entirely different when a road has been established by condemnation or statutory dedication. In that event the public has the right to the entire road so condemned or dedicated regardless of whether or not the entire width of the road, as established, is actually used for travel. *California Road Dist. v. Bueker* (Mo. App.) 256 S.W. 98; *Id.* (Mo. App.) 282 S.W. 71; *State v. Thompson*, 91 Mo. App. 329; *Hall v. Flag Special Road Dist.*, 296 S.W. 164, decided by this court at this term but not officially reported; *Johnson v. Rasmus*, 237 Mo. 586, 141 S.W. 590; C.J. Vol. 29, Sec. 6, p. 374."

Our answers to your questions are:

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(1) The road in question is a county road, and its boundaries are the land lying beyond that portion of the road which is actually used as a road bed.

(2) This question is answered by our answer to your first question.

(3) Since this is a county road, the county highway engineer has a right to go upon it and improve it, and will incur no liability by so doing.

(4) Your fourth question is moot in view of our holding that this is a public road.

CONCLUSION

It is the opinion of this office that a road which has been in continuous use for over forty years and upon which public money and labor have been spent, in such amount as to keep the road passable, is a legally established road although it was not established by order of the county court. Such a road is confined to that portion actually used as a road bed.

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

Very truly yours,

JOHN M. DALTON  
Attorney General

HPW/ld