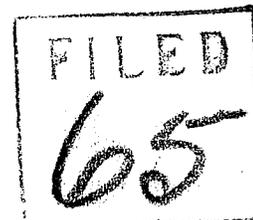


ROADS & HIGHWAYS: Bridge built by county on public road remains
COUNTIES: property of county, and may be moved to a new
COUNTY COURT: location, when road on which bridge is located
BRIDGES: has been abandoned.

February 19, 1959



Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Mr. Murrell:

This refers to your letter requesting an opinion of this office, which letter reads as follows:

"I would like an opinion from your office for the benefit of the County Court of Knox County as to whether or not the county owns and can remove bridges under the following state of facts.

"We have in Knox County several roads that have not had public money spent on them for more than five years. Many of the roads have grown up in brush and trees and are impassable and, in some instances, the roads or roadways are not used, but farmers use their fields for travel until they reach a creek or gully where a bridge is located on the old roadway, they then come back upon the old road right-of-way, cross the bridge and go back in their fields again. In most cases the use amounts to private use of the bridge by one or two farmers, and in some cases the bridges cannot be used since the flooring is gone and only the steel framework remains. In many of the cases the bridges are built of steel and iron and could be removed and used on other roads now in use which need bridges badly at this time. Although the roads have not been used for more than five years by the public and public money has not been spent on the roadway by the County for more than five years, an order of court has not been made to the effect that the road is abandoned.

"We would like to know if the County still own the bridges and can remove them, or does the bridge

Honorable Charles E. Murrell, Jr.

belong to the landowners adjoining the roadway if the road is considered abandoned.

"If possible, we would like to remove the bridges and use them where they can be of service and are needed by the public."

As indicated by your letter, Section 228.190, RSMo Cum. Supp. 1957, provides that "nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same." The question whether there has been such nonuser as to result in the abandonment and vacation of a road depends, of course, upon the facts of the particular case. For the purposes of this opinion, we shall assume that there has been, in fact, an abandonment and vacation of the roads pursuant to this statutory provision; and we shall deal only with the question concerning the effect of such abandonment upon the ownership of bridges located upon such roads.

While it is not expressly stated in your letter, we shall assume that the bridges in question were built by the county, so that, prior to the abandonment of the roads, the bridges were owned by the county or by the county as trustee for the public. We shall further assume that, in the event the rights-of-way for the roads were originally provided by deeds, such deeds contained no specific reference to the ownership of bridges upon the abandonment of such roads.

We are enclosing herewith copies of two prior opinions of this office which have a bearing upon the question presented by you. The first opinion, dated October 16, 1949, and furnished to John M. Cave, dealt with the question whether a bridge which had been built by a county in an area which was later included in a special road district could be moved by the county to a new location after the abandonment of the road upon which the bridge was located. In that opinion, this office concluded as follows:

"In the premises we are of the opinion that the title to a bridge erected out of county funds remains in the county court even though such bridge be located within the boundaries of a subsequently incorporated special road district; and that upon vacation of the county road, of which such bridge forms a part, the county court may dispose of such bridge in the same manner as any other county property. In other words, it may be disassembled and reassembled in a location which will serve the interests of the public in carrying traffic across streams or it may be disposed of for cash."

Honorable Charles E. Murrell, Jr.

The second opinion, dated May 28, 1954, and furnished to Mr. W. C. Whitlow, involved a situation in which a special road district had constructed a bridge and the question presented was whether the county or the road district owned the bridge upon the abandonment of the road upon which it was located. In that opinion, this office concluded as follows:

"In the premises we are of the opinion that the 'title' to a bridge constructed out of district funds by a special road district upon a public road located within such district is not affected by the abandonment of such public road. It is our further opinion that the board of commissioners of such special road district may thereafter dispose of such bridge or may dismantle and re-erect the same at some other place within such special road district where public convenience and necessity may require."

"The foregoing conclusion is based upon the assumption that such bridge was paid for out of funds belonging to the special road district."

It will be noted that these opinions are to the effect that, after the abandonment of a road, a bridge located upon such road remains the property of, and may be moved by, the county or road district which constructed the bridge. However, neither opinion considered directly the question whether the owner of the land adjoining the road, rather than the political subdivision which constructed the bridge, was the owner of the bridge.

In *Special Road District No. 4 of Hollinger County vs. Stepp, Mo. App., 4 S.W. 2d 480*, a landowner contended that a bridge could not be moved after the abandonment of a road upon which the bridge was located. In that instance, the road at the site of the bridge had been taken by a drainage district for drainage purposes and the bridge and road had been rendered useless for public travel. The road had been relocated and the road district had undertaken to move the bridge to the new road, but it had been prevented from doing so by the owner of the adjoining land. The road district had thereupon sought to enjoin the landowner from interfering with its efforts to move the bridge. In affirming the action of the trial court in granting such injunction, the Springfield Court of Appeals stated, in part, as follows:

"[4] Defendant at the trial contended that he had relinquished the right of way at and approaching the bridge, with a reservation that, when the right of way was no longer used for a road, it would revert to him. He claims to have executed and delivered to the county court a right of way

Honorable Charles E. Murrell, Jr.

deed containing such reservation, but no such deed was produced, and a diligent search failed to find such deed. Defendant, however, introduced evidence tending to show that he did execute and deliver such deed, but he says himself that there was no provision in the deed whereby the bridge should be his property if the road on which it was installed was abandoned as a public road. Clearly defendant cannot justify his taking charge of the bridge on the theory that his right of way deed so provided.

"[5] It is next contended that plaintiff had no right to remove the bridge from a legally established road and install it on a road that had not been legally established, and that, as a resident taxpayer of plaintiff district, he (defendant) had the right to protect the bridge from such diversion in the interest of himself and of the public. It is contended that the proceedings in the county court to abandon the old road and establish the new one were void for failure to comply with the statute regulating such matters. Sections 10625 et seq., R.S. 1919. The record shows that the old road at and approaching the bridge was destroyed by the drainage district. If it was destroyed, it was, of course, no road at all, and, even though the proceedings in the county court were void, which we do not determine, such could not leave the old road in existence, and therefore defendant had nothing to protect and preserve.

"We do not think it is necessary to pursue the questions further. Defendant was clearly in the wrong, and plaintiff, under the law, was clearly entitled to the remedy it sought. The judgment should be affirmed, and it is so ordered."

In the case of Board of Nevada School District, Mo. Sup. 251 S.W. 2d 20, the Missouri Supreme Court considered a somewhat similar problem involving the ownership and right of removal of a school building upon the abandonment of a schoolhouse site and, in holding that the school district had the right to remove the school building, the court stated:

"[10] The evidence tended to show, as the court found and as appellants admit, that the premises were conveyed to School District No. 119 'for a

Honorable Charles E. Murrell, Jr.

schoolhouse site' and that 'in pursuance thereof a schoolhouse and other buildings and necessary improvements were built thereon.' The court found that there were no improvements on the acre of land when the deed was executed, but that shortly thereafter the schoolhouse was built. In view of the evidence we draw the inference that the improvements were made by School District No. 119 at its own expense and with public funds, at least, appellants offered no evidence tending to show that there were any improvements on the property when it was conveyed to School District No. 119 or that any of the improvements were made by the grantors or their heirs. We further imply from the terms of the grant that the construction of a school building and improvements at the expense of the School District was contemplated by the parties when the deed was executed and delivered. It was further contemplated by the parties that there was a possibility the property might not always be used for the purpose for which it was being conveyed. Accordingly, the deed further provided, 'whenever it is abandoned by the directors and ceases to be used for that purpose the title shall immediately revert to the grantors herein.' In such situation we hold that the improvements placed upon the property remained the personal property of School District No. 119 and that said district or its successors in interest would continue to own the school building and improvements, and only the land in its unimproved condition would revert to the grantors or their heirs in the event that the estate granted expired by reason of the limitations stated in the Board deed. In this connection it should be said that appellants who brought the ejectment suit and sought to recover possession of both the real estate and the improvements, offered no evidence tending to show that the improvements could not be removed from the premises without injury to the freehold estate.

"Under the facts shown in this record, we think the applicable rule of law as to ownership and right of removal of improvements is well stated in *Hatton v. Kansas City, C. & S.R. Co.*, supra, 253 Mo. 660, 162 S.W. 227, 232, 234, when the court quoted with approval from another case, as follows: "The fact that the estate conveyed

Honorable Charles E. Murrell, Jr.

by the grantor to the grantee reverted to the former, upon the abandonment of the railroad and that the grantor entered upon the possession of the land, did not in our opinion prevent the vendee of the grantee from removing the structure erected by the former, in accordance with the terms of the grant. The erection was entirely consistent with the grant and with the uses and purposes for which it was made. It did not, therefore, become a part of the realty, but was a part of the estate granted, and, upon the reversion thereof, remained the property of the grantee. The right to sell the same was no greater than the right of removal, and, when sold, the vendee had the same right to remove as had his vendor." And see 27 Am. Jur. 261, Improvements, Sec. 4; May v. Board of Education, 12 Ohio App. 456.

"The trial court did not err in declaring the law to be that if and when respondent ceases to use the described premises for a schoolhouse site or for school purposes, and abandons the same, the respondent shall have the right, and at present has the right, to cause the buildings and improvements to be removed from the land."

In the Hatton case, mentioned in the above quotation, the Supreme Court held that, where a railroad company had abandoned a portion of its right-of-way, the railroad company still owned, and had the right to remove, the rails, ties and similar property located on such abandoned right-of-way. In its opinion in that case, the court stated as follows:

"[9] We think that there is but one view that, where the railroad is a trespasser and in most cases and for most purposes, rails, ties, bridges, and other paraphernalia formerly personal property, when affixed to the soil, become real estate. But that is not the case when a dispute arises between the railroad company, or its assignees, and the owner of the servient estate, in those cases where the dominant estate has arisen from consent, express or implied. Where a house, a depot, or other structure is erected by the railroad upon the land of another pursuant to an act of trespass, or without any permission

Honorable Charles E. Murrell, Jr.

then the structure becomes a fixture and may not be removed. Hunt v. Railroad, 76 Mo. 115. This is but a stating as a truism, the converse of the general rule as to fixtures, which is: That structures erected upon the land of another with the consent of such owner continue to be personal property. * * *

"[10] If there be a question as to such consent, or a question as to an agreement that it shall become a fixture, the tests have been said to be: (1) Real or constructive annexation of the property in question to the soil; (2) Adaptation of the property in question to the ordinary use or purposes of the land to which the alleged fixture is annexed; and (3) the intention of the party making the annexation to make the property in question a permanent accession to the freehold. Scobell v. Block, 82 Hun. 223, 31 N.Y. Supp. 975; Taylor v. Collins, 51 Wis. 123, 8 N.W. 22; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368. And of these three unities the question of intention is said to be controlling. Press Brick Co. v. Brick & Quarry Co., 151 Mo. 501, 52 S.W. 401, 74 Am. St. Rep. 557. And this presumption of intention has been held to be the governing test in a case such as the instant one as to rails of a railroad erected with permission of the owners of the freehold. The rule is stated by Elliott thus: 'The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad and hence are not to be regarded as fixtures forming part of the real estate.' 2 Elliott on Railroads, 998, citing Northern Central Ry. Co. v. Canton Co., 30 Md. 347; Wagner v. Cleveland, etc. Ry., 22 Ohio St. 563, 10 Am. Rep. 770; Hays v. Texas, etc., Ry. Co., 62 Tex. 397."

In our review of the Missouri statutes, we find no provision that the abandonment and vacation of a public road pursuant to Section 228.190, RSMo Cum. Supp. 1957, shall effect any change in the ownership of bridges located upon such road; and, in the light of the above mentioned authorities, it is our opinion that a bridge constructed by

Honorable Charles E. Murrell, Jr.

a county remains the property of, and can be removed by, the county notwithstanding such abandonment and vacation of the road upon which the bridge is located.

CONCLUSION

It is the opinion of this office that where a public road is deemed to be abandoned and vacated, pursuant to Section 228.190, RSMo Cum. Supp. 1957, because of nonuser by the public, a bridge which had been constructed upon such road by a county remains the property of the county and may be moved by it to another location.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John C. Baumann.

Yours very truly,

JOHN M. DALTON
Attorney General

JCB:mv

Encs (2)