Opinion No. 353
Answered by Letter Richard C. Ashby

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Nov. 24, 1965

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri 64856

Dear Mr. Paul:

This letter is given in response to your question on the authority of the county court or special road district to maintain the ditches, cut brush along side a public road, and to do similar work on the land contiguous to such road where the roadway had been established by prescription.

In discussing the facts over the telephone with a member of this office, you cite a case where the specific facts involved were as follows:

> At an intersection involving roadways established by prescription, the road gang had cut back the brush from the traveled roadway from 12 to 15 feet and graded down a corner at the intersection. This was done as a safety measure to allow people using the road to obtain thereby a wider angle of vision while approaching the corner. In this case, they cut down an 8 inch oak. No fences were involved. Consent of the owner had not been obtained prior to the action by the road gang.

You asked that we comment on this situation when we respond to your letter.

The general rule on the extent of a highway (width and length) acquired by prescription is stated in 39 C.J.S., Highways, Section 20, at page 938. It reads as follows:

> "Width and extent generally. Generally speaking, the width and extent of a highway established by prescription or user are governed, measured, and limited by the extent of the actual user for road purposes. The easement is not, however, necessarily limited to the beaten path or traveled track, or to such path and the ditches on either side, but carries with it the usual width of highways in the locality, or such width as is reasonably necessary for the safety and convenience of the traveling public, and for ordinary repairs and improvements. In other words, a highway established by user or prescription includes the traveled track and whatever land is necessarily used as incidental thereto for highway purposes; but this does not mean that the prescriptive right carries with it a right in the public to lay out and construct an extended and enlarged highway.
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> "The question of the width of a highway by user is affected in some states by statutes prescribing the width of highways generally. Such a statute does not govern the width absolutely; a prescriptive highway may be either broader or narrower than the width prescribed for highways generally.
>
> "An important element in determining the width of a highway by prescription is the recognition of the limits of the way by persons whose lands front thereon, as indicated by the monuments and fences which they themselves place upon the ground, and the lines which they fix for the same in making conveyances of their property."

In Missouri, the courts seem to apply a more restrictive interpretation than that set out in C.J.S. The principle announced by the courts is that the only right that the public has in a highway, as a result of adverse user for the statutory period, is limited to the traveled or used portion of the road.

See the following cases: City of Higginsville ex rel and to Use of Kasco, Inc., v. Alton R Co., 171 S.W. 2d 795, 805; Roth v. Hoffman etaal, 111 S.W. 2d 988, 992; Eckerle v. Perry, 297 S.W. 424, 425, and California Special Road Dist. v. Bueker, 256 S.W. 98.

Thus, on the limited question based on the facts recited above, the road gang (in cutting down the brush and grading off that portion or area of land at the corner which was not part of the traveled or used portion of the road) exceeded their authority.

The term "used portion of the highway" is not limited to the narrow traveled tracks made by the vehicles but to the full extent of any user which the public, etc., (as a question of fact) may have exercised such as ditching, maintenance, etc., (State v. Auffart, 180 S.W. 571, 572).

Concerning the broader question posed by your letter, it is possible for the land owner of contiguous land to a public road to dedicate additional land for public use either by actual dedication in fact or by an implied dedication or estoppel in pais. The court in State ex rel McIntosh v. Haworth, 124 S.W. 2d 653, l.c. 656, had this to say:

> "[4,5] Respondent contends that nothwithstanding the provisions of the laws of 1887, page 257, section 57, the highway in question became a public highway by implied dedication or estoppel in pais. While it has been held that regardless of the Laws of 1887, page 257, section 57, that the public may thus acquire the right to use a road as a public highway even though it not be opened by order of the county court and though no public money or labor has been expended thereon (Mayo v. Schumer, Mo. App., 256 S.W. 549, Borchers v. Brewer, 271 Mo. 137, 196 S.W. 10; Walker v. Southwest Missouri R. Co., Mo. App., 198 S,W,441; School Dist. No. 84 et al v. Tooloose, Mo. Sup., 195 S,W, 1023), yet mere user in and of itself alone is not sufficient to establish a public highway by dedication or estoppel. Our Supreme Court in Borchers v. Brewer, 271 Mo. 137, loc. cit. 142, 143, 196 S.W. 10, 12, quoting from Elliott, Roads and Streets, gives the following rule to be applied in such cases: 'An implied dedication is one arising by operation of law from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does

> it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel.* * * It is essential that the donor should intend to set the land apart for the benefit of the public; for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.'
>
> "[6] The sole test in determining whether or not there has been a dedication, is the intent on the part of the owner of the land to dedicate the same to public use as a highway. This intent can be either express or implied but if the intent to dedicate is absent there can be no valid dedication."

See also the cases of Borders v. Glenn, 232 S.W. 1062, 1064; City of Caruthersville v. Cantrell et al, 230 S.W. 2d 160, 166.

We conclude that such work can be done on private land only if the consent of the owner (either express or implied) is obtained and only then, if it is in the public interest.

Yours very truly,

NORMAN H. ANDERSON
Attorney General