COUNTY:

ROADS AND BRIDGES:

Construction of Sec. 8485, R.S. Mo. 1939, in view of facts stated in request.

July 10, 1945

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Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Mr. Boone:

This will acknowledge receipt of your request under date of July 2, 1945, which reads:

> "I would appreciate your opinion concerning a small strip of road and a bridge in this county.
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> "The road and bridge in question are a part of the road system leading from Dora, Mo. to West Plains, Mo. In the year 1927 a new bridge was constructed across the North Fork River to replace an old bridge, the new one being constructed approximately 100 feet southwest of the old bridge. No right of way was secured for the new construction. The bridge was financed by public subscription. In the year 1934 a change was made in the county road approaching this bridge on the northwest side of the river, and approximately 400 feet of new road was constructed which would intersect the old road at the bridge on the northwest side of the river. No right of way was secured from the owner of the land for the change of road, nor was a change ordered by the County Court.
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> "The road and bridge in question are situated within the Mark Twain National Forest, and in the year 1934, after the new road was constructed, the road and bridge were taken over, for the purpose of maintenance, by the U. S. Forest Service,

and have been maintained and kept in repair by use of the money provided by U. S. Forest Service since the year 1934. The bridge was kept in repair by County money between the years 1927 and 1934, when repair was needed.

"This road and bridge have been considered as public highway since date of construction and have been used as such since the date of construction by the public, including U. S. mail route, school bus, and all travel between Dora and West Plains.

"In the year 1941 there was some correspondence between the owner of the land and the Forest Supervisor at Springfield, Mo., regarding right of way for the road and bridge, and in a letter addressed to the Forest Supervisor, Springfield, Mo., dated March 5th, 1941, the owner of the land made the following statement,

'We have no objection to action being taken to clear a title for your right of way but the government must pay $500.00 for that right of way and bridge. The bridge cost much more money than that amount and is so substantially built that it can be used without a bit of additional strengthening.

'You are also aware of the fact that they cut through the 40, taking off the valuable corner, without our knowledge or consent a thing that should not have been done, and we have only waited filing a claim with the Court of Claims because we felt that the matter could be settled without that.

'If you want to draw up a deed describing the right of way including the bridge, of the proper width clear around the mountain and get us a check for $500.00 we will sign the deed and feel alright about it and I think that is the thing to do.'

"In answer to the above statement the Forest Supervisor by letter dated April 9, 1941, made the following statement,

'For your information in regard to submission of a bill to the U. S. Court of Claims, it is believed that this is a privilege which you can elect to follow since no funds are available to this Forest which we can assign to meet the expense of such a claim.'

"There has been no further correspondence or communication with the land owner regarding the road and bridge, although the U. S. Forest Service has continued to maintain same and the public has continued to use the road and bridge to this date.

"It is now necessary to rebuild the bridge, but since it will take a large sum of money to do so, the U. S. Forest Service desires to have the matter of right of way cleared before such a sum is expended.

"May I have your opinion as to whether or not the road and bridge have been legally established as a county road and bridge? It seems that the provisions of Section 8485 R. S. Mo. 1939 would apply, however your opinion on the matter is desired."

Apparently the old bridge and road were constructed on orders of the County Court, since you state they were a part of the road system leading from Dora to West Plains, Missouri. However, you do not state that the new bridge was ordered by the County Court. You do state the 400 feet of new road was not constructed as a result of the order of the County Court, and by implication we might assume that the new bridge was ordered by the County Court, if you had not informed us that it was built from public subscription. Be that as it may, in view of citations hereinafter quoted we are of the opinion that the new bridge, constructed in 1927 and maintained continuously thereafter from public funds and continuously traveled by the public after the construction of said bridge, is established as a county bridge.

However, we cannot say so much for the new road, even if it were constructed over the old roadbed, for the reason that in 1941 notice was given, as shown by your letter, that the owner did not intend to give the land to the public for a

public highway but that he retained the fee to said land. However, he did express his willingness to convey said land for $500.00. Under Section 8485, R. S. Mo. 1939, all roads that have been used as public highways by the public for 10 years continuously, and where there has been expended public money or labor during such period, said roads shall be deemed to be established as public roads. Section 8485 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 ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

It was held in State v. Haworth, 124 S. W. (2d) 653, l.c. 655 and 656, that the prescriptive period applying to the new road would begin to run when the public began to use it and would not be cumulative with the period of years the old road was used. In so holding the court said:

> "If the act of Tom Laidlaw's father in fencing off the old road in 1884 was hostile to the right of the public to use this road and the public took a new route across the land in question then the prescriptive period applying to the new road would begin to run when the public began to use it, to-wit, 1884 and would not be cumulative with the period of years that the old road was used.
> * * * * "

Since the new road was constructed in 1934, and in 1941 the owner of said land over which the road was constructed gave notice that he was not releasing said land, this amounted to a mere implied permission to use said land, since the statutory ten-year period had not run upon receipt of said notice.

It has been held that the public may acquire the right to use a highway even though it has not been opened by the County

Court as a public highway. The court in State v. Haworth, supra, l.c. 656, said:

> "Respondent contends that notwithstanding 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. (Cases cited) * * * '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.'
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> "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."

In Rosendahl v. Buecker, 27 S. W. (2d) 471, in holding that if the owners knew for over ten years that the road was being used by the public; that there had been actual and continuous use for a prescribed period with the knowledge of the owners; and that the law would presume the grant unless the owners could show it was merely permissive, the court said:

> "In the light of the facts as we have set them out above the result in this case hinges upon the question as to whether or not the use by the public of this roadway, for the number of years it has been in use, was adverse to the claim of defendant and those under whom he claims, or was permissive; if it was adverse, plaintiff has made out his case and the judgment of the circuit court

should be sustained. If it was merely permissive and plaintiff and the public were merely, in a sense, licensees, then the defendant, as owner, could revoke the license at any time, and that without rendering him liable to action.

"The burden of proof rests with the defendant to show that the first use of the road was permissive. Anthony v. Building Co., 188 Mo. 704, 87 S.W. 921; Gerstner v. Payne, 160 Mo. App. l.c. 295, 142 S.W. 794; Novinger v. Schoop (Mo. Sup.) 201 S.W. 64; Strong v. Sperling, 200 Mo. App. 66, 205 S.W. 266.

"It is our view, and we must so rule, the appellant, defendant below, under the evidence in this case, has failed to carry this burden as is required by law. There can be no question under the record in this case but that the owners of the land throughout all of the years back prior to 1860 knew that the road was being used by the public, and where there has been actual and continuous use for the prescribed period with the knowledge of the owner, the law raises a presumption of grant, unless the owner can show that the use is merely permissive. And while such knowledge and consent of the owner would not of itself vest and establish a prescriptive easement without evidence to explain how it became such, the use would raise a presumption that it was adverse under a claim of right and shifts the burden to the defendant to show that it was by permit or some license.

"After the year 1847, when the limitation period of actions to recover real property was reduced from twenty to ten years, our supreme court in State v. Wells, 70 Mo. 635, specifically held that 'ten years adverse occupancy and use of a road by the public would be sufficient, if acquiesced in by the owner, to vest in the public an easement in the road and cause it to become a highway.' This continued to be the law until the passage of the Act of 1887, now section 10635,

> Rev. St. of Mo. 1919, which, in addition to user by the public for ten years continuously, now requires that public money be spent on the road before the same shall be held to be a road by prescription. Lee v. Ry. Co. 150 Mo. App. 175, 129 S.W. 773. This act, now section 10635, has been specifically held not to operate retrospectively. Leiweke v. Link, 147 Mo. App. 19, 126 S.W. 197."

The courts have also held that upon showing an open, continuous, visible and uninterrupted use for a period of more than ten years, the burden is cast upon the other party to show its use was merely permissive. In Wallach v. Stetina, 28 S.W. (2d) 389, l.c. 391, the court said:

> "We think the evidence sustains the finding of the trial court to the effect that the claim of the use of this road by prescription shows an open, continuous, visible, and uninterrupted use for a period of more than ten years. Under these circumstances, the burden is cast upon the defendant to show that its use was permissive. In view of the decision of the Supreme Court above referred to, transferring the case to this court, its proper solution at first seemed rather difficult. * * * * "

Furthermore, the courts have held that it becomes a question of fact for the jury to determine whether a road is a public road. In Morris v. Atlas Portland Cement Company, 19 S.W. (2d) 865, the court said:

> "Whether or not the land, by reason of the proof of its use and maintenance for the time required by the statute (section 10635, supra), became a public road, was a question of fact for the trial court and its finding in that regard will not be disturbed on appeal (Bingham v. Kollman, 256 Mo. 573, 165 S.W. 1097).
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> "Technically considered, there is no assignment of errors in this case; but the narrow limit of the issue involved and its character, affecting as it does the establishment of a public highway, are deemed sufficient to entitle it to a review and determination."

Another decision which will throw some light on the questions involved herein is Garbee v. St. Louis-San Francisco Ry. Co., 290 S.W. 655, l.c. 657, 658, wherein the court held that a road may be given the status of a public road without the order of the County Court. Also, that it is not essential that public money be expended upon it each year. In so holding the court said:

> "Defendant contends that the order of the county court establishing the road as a public road is void and without effect because it does not recite the giving of notice of petition or application for the establishment of the road as was required by section 7797, R.S. 1889. This section has come down without substantial change and is now section 10626, R.S. 1919. But we do not deem it necessary to rule the point made. A road may be given the status of a public road without having been so established by petition and court order. Section 10635, R.S. 1919, among other things provides that all roads that have been used as such by the public for 10 years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads. Such was in effect the statute law in 1894 when the public began the use of the road here in question. See section 7847, R.S. 1889. And it is not absolutely necessary that public money or labor be expended upon the road each and every year for such 10-year period. It is sufficient if the road is kept in substantial repair. State v. Kitchen, 205 Mo. App. 31, 216 S.W. 981."
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> (See also State v. Kitchen, 296 S.W. 981.)

We assume that the arrangement whereby the U. S. Forest Service has kept up the repairs upon the new bridge and road in question has in no way disturbed the interest of the county in said bridge and road.

In view of Section 8485, supra, and the foregoing authorities, it is the opinion of this department that the so-called new bridge constructed in 1927, as a part of the public highway, is a public bridge and belongs to the county, since it had been continuously used by the public for more than ten successive

years prior to 1941. However, the new road constructed in 1934 does not belong to the county, for the reason notice was given in 1941 by the owner of the land over which the new road was constructed, prior to the public using said road for ten successive years, to the effect that no right of way was secured for said road, but that he would gladly convey title for $500.00. By this notice we conclude that he merely gave the public a permission to the use of said road and did not release any interest held by him.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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