

ROADS AND BRIDGES: Vacating of roads for non use.

7839 R3 9M 199

7-26

July 13, 1933

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Hon. Peter H. Huck
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

Your letter of July 7th addressed to General McKittrick relating to a certain public road in your county has been handed to me for answer. You desire an opinion based on the following facts:

"We have a legal proposition pending before our County Court that we cannot decide with satisfaction. The Court asked me to obtain an opinion from your department.

In the year of 1892 a county road was legally established in our county, from six to eight miles in length; the road was opened, and both ends of said road have been open and in use ever since, but for some reason or other about two miles of said road near the middle thereof was neglected and fenced some twenty or more years ago, and said two miles had been put to other uses by the farmers over whose lands the road was located. The two ends of said road however were continuedly used as a road to the present time.

About two years ago some of the farms changed hands on which said unused road is located and the new owners with some others filed a petition in 1932, with our County Court, praying the Court for an order that said unused part of said road be opened.

July 12, 1933

Said petition is still pending in the County Court and the Court would like to know what action it has a right to take at its next regular term of Court which convenes on the First Monday in August next.

The pending petition, as I understand, is not a petition to establish a new road or for the change of a road as provided by law, but simply a petition praying the Court to order the unused part of said road opened as established in the year of 1892.

The petitioners seem to insist that it is the duty of the County Court to order the unused part of said road opened where the road was originally located and established.

The County Court seems to take the position that at this time it has no right to order the unused part of said road opened, simply at the request of petitioners.

If you require additional information concerning the facts let me hear from you at once and I will try to supply the same.

Kindly advise us as to the above and oblige."

In the beginning it would appear that Section 7839 R.S. Mo. 1929, should decide the matter. Said section being as follows:

"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."

But upon further examination we find that in a situation such as you outlined in your letter such a portion of the road which has not been used for more than twenty years would not be automatically abandoned because of non use.

In the case of Lottie Baughman v. Charles Faulwell, 156 Mo. A. l.c. 239, the court decided the matter in the following language:

"It is not claimed that the description of the road as laid out is defective, so we see then no application for the rule stated. We are of the opinion that when a public road is located by proper authority and is accepted and used by the public within its boundaries as established, the fact that some part thereof is not used for actual travel is no evidence whatever of abandonment. We know that there is scarcely a public road in this state where a part of its boundary has ever been actually used by the public or worked by the road overseer. And because the part of the road upon which plaintiffs fence had been erected was unoccupied and unused for so many years did not cease to be a part of such road by reason of nonuser. If such was the law, at least one-half the roads in the state which have been located and fenced for many years by adjoining landowners, would be subject to reductions to within the actual parts traveled, if the owners chose to move their fences so as to include that part not used. And in that case the highways would be reduced to narrow alleys."

This case is further upheld in the case of Proctor et al v. Proctor, 232 Mo. A. l.c. 27.

In 2 Elliott on Roads and Streets, 3rd Edition, Section 1172, we find the following language:

"Once a highway always a highway is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good."

In the case of Johnson v. Rasmus, 237 Mo. l.c. 590, the court adopted the following rule:

"It is a very ancient rule of law that vacations of highways are not favored, and that the presumption will always be in favor of their continuance."

The petition on the part of those desiring the road to be opened are not asking for an establishment of the road, the vacating or abandonment or change in the road, they simply desire that the unused portion of the road be opened.

From the foregoing authorities it would appear that the road has never been abandoned or vacated and that the county court has the authority to open the road if it so desires and that the petitioners are within their rights in so asking.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

(Acting)
Attorney General.

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