COUNTY COURTS: IN RE: THE ERECTION OF CATTLE GUARDS ON COUNTY ROADS.

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November 7, 1945

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Honorable A. L. Wright
Prosecuting Attorney
Stone County
Crane, Missouri

Dear Mr. Wright:

This will acknowledge your request for an opinion of this Department in a letter dated September 22, 1945, which reads as follows:

> "In the south end of this county is located a forrest preserve owned by the Federal government.
>
> "It is enclosed by the fences of adjoining owners. Through the forrest runs a county road. The government wants to rent the preserve to the public for grazing purposes. The government is unwilling to fence the roadway.
>
> "Would it be a violation of law to place in the roadway cattle guards where the road enters and comes out of the preserve area? The cattle guard would be only large enough for a car, truck or wagon. A driver of stock or a person in wagon or buggy drawn by horses would have to enter from a gate to one side of the guard."

We think the matter presented in your letter of September 22, 1945, raises the following questions:

First: Are private persons authorized to place any obstruction upon public roads?

Second: Is the County Court authorized to allow any obstruction of the use of a public road?

A public road is for the use of the general public, and is a way which is open to all the people, without distinction, for passage, and repassage at their pleasure. Wright vs. City of Doniphan (1902), 169 Mo. 601; Carson vs. Baldwin (1940), 346 Mo. 984; State ex rel. vs. Vandalia (1906), 119 Mo. App. 406; In re 23rd Street vs. Crutcher (1919), 279 Mo. 249; State vs. Campbell (1899), 80 Mo. App. 110; State ex rel. vs. St. Louis (1900), 161 Mo. 371; State vs. Dixon, 335 Mo. 478; Sumner Co. vs. Interurban Transportation Co., 213 S.W. 412; 141 Tenn. 493; Cincinnati Railroad Co. vs. Commonwealth, 80 Ky. 137; Heninger vs. Peery, 47 S.E. 1013, 102 Va. 896.

In Carson vs. Baldwin, supra, the Court, l.c. 987, said:

> "The common law condemns as a public nuisance any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes its use by the travelling public. It made indictable such a disturbance of the public convenience or safety. * * * "

In State ex rel. vs. Vandalia, supra, the Court, l. c. 416, 417, said:

> "* * * A municipality holds its streets in trust for the general public, to be used, principally, as thoroughfares. (Glasgow v. St. Louis, 87 Mo. 678.) * * * "

In re 23rd Street vs. Crutcher, supra, at l. c. 277, 278, the Supreme Court of Missouri said:

> "* * * The trust reposed in the City of St. Louis to regulate the use of the streets is for the purpose of keeping them open and free to all, and we can but conclude that the ordinance in question violates that trust and is void. * * * "

In State vs. Campbell, supra, at l. c. 113, the Court said:

> "* * * Every person has a right to go over or upon any part of the highway, and the fact that from notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. * * * "

In State ex rel. v. City of St. Louis, supra, at l.c. 383, the Court said:

> "* * * 'The public highways belong from side to side and end to end, to the public, and "the public are entitled, not only to a free passage along the highway but to a free passage along any portion of it not in the actual use of some other traveler," and the abutting property-owner has the right to the free and unobstructed passage to and from his property.' (Schopp v. St. Louis, 117 Mo. 136-7; Sherlock v. Kansas City Belt Line, 142 Mo. 172; Knapp, Stout & Co. v. Railroad, 126 Mo. 26; Schulenburg v. Railroad, 129 Mo. 455.)"

The nature of a public road being what it is, it follows that any obstruction which denies the use of a public road to any part of the public, or which creates inconvenience thereto, is contrary to the very purpose for which the road was created. The cases have so held. Carson vs. Baldwin, supra; Williams vs. Beatty 139 Mo. App. 167; Downing vs. Corcoran, 112 Mo. App. 645.

However, it is not necessary to rely upon case authority for the proposition that a public road may not be obstructed, since we have a direct statutory prohibition. Section 8581, R.S. Mo. 1939, reads in part, as follows:

> "* * * Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road

> or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. * * * "

This statute has been construed in the case of Wilmore vs. Holmes (1828), 7 S.W. (2d) 410. That case was an action for damages for personal injuries sustained when an automobile turned over on a highway in Missouri. The plaintiff charged that defendant placed a pile of gravel on the side of the travel portion of the highway, which gravel extended over onto part of the main roadway. The plaintiff's car hit this gravel, and over-turned. The Court in that case held that the plaintiff should recover, under the theory of nuisance, and said in their opinion: "In fact, the placing of any obstruction on the highway is illegal and constitutes a misdemeanor. Section 10720, R.S. Mo. 1919." The 1919 statute was the present Section 8581.

That the placing of an obstruction upon a public road is a nuisance at common law, as well as a misdemeanor under the statute, is held in Carson vs. Baldwin, supra, quoted above; Williams vs. Beatty, supra, (where it was held that a person who altered a drainage culvert so as to obstruct a public road, was guilty of a nuisance); in Downing vs. Corcoran, supra, (where it was held that it was a nuisance to obstruct a road by piling rocks thereon, and digging ditches, obstructing the road); and in State vs. Campbell, supra.

The second question to be determined is whether or not municipal or county authorities can allow the obstruction of public roads.

In Berry-Horn Coal Company, vs. Scruggs-McClure Coal Company et al., (1895), 62 Mo. App. 93, the defendant had constructed a building and platform containing private weighing scales, which extended out into the public highway passing through the village of Webster Groves, Missouri. This building and the scales operated to prevent the use of part of the public highway. The County Court of St. Louis County, had granted permission to the plaintiff's predecessor to erect the scales at the point in question. The plaintiff offered in evidence this order of the County Court. The Court in that case, l.c. 96, said:

> "* * * Private scales are not a public purpose, and municipal authorities can not grant rights in highways for private purposes, and certainly not without the consent of the adjoining owner, who, in this case, is shown to have been the owner of the fee of the ground, subject to whatever easement the public may have acquired to travel over it. Glaessner v. Brewing Association, 100 Mo. 514."

In Brown et al. vs. Chicago Great Western Railway Company, (1897), 137 Mo. 529, the defendant had constructed a railway side track along an alley in the city of St. Joseph, Missouri. The construction was pursuant to an ordinance of the city authorizing the construction of tracks on certain streets in the city. The plaintiff contended that the use which the defendant made of the tracks was purely private, and that the plaintiff had been damaged by the use of these tracks which ran along the side of buildings owned by the plaintiff. The Court held that the use being made of the tracks was not a private use but was a public use, which the city was authorized to allow. The Court in that case said, however, at l. c. 537:

> "That the legislative bodies of cities have no power to authorize the use of their public streets for purely private purposes is too well settled to require discussion. Ordinances which undertake

> to do so are invalid. Cummings v. St. Louis, 90 Mo. 263; Glaessner v. Brewing Ass'n, 100 Mo. 511; Schopp v. St. Louis, 117 Mo. 133; Lockwood v. Railroad, supra. "

In State ex rel. vs. St. Louis, supra, the question was raised as to whether the city could authorize the erection and maintenance of refuse boxes to be placed in the streets of the city, and to be used by the relator for advertising purposes. The Court, at l.c. 382, said:

> "But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to-wit, the advertising of individual business and enterprises. Can the city devote its streets to such a purpose? We hold that it can not. * * * "

Other cases holding that municipal authorities may not grant the use of public roads, or of public streets for private purposes are:

Glaessner vs. Brewing Association, 100 Mo. 511, (1890); Wright vs. City of Doniphan, supra; Morie vs. St. Louis Transit Company (1905), 116 Mo. 12.

It will be noted that several of the cases cited above are cases which involved the obstruction of public streets in cities and towns. We think, however, that the rights in a public street and in a public road are so similar as to make these cases clearly applicable to the situation now before us. We are, therefore, of the opinion that a County Court would have no authority to grant the right to create anything which would obstruct a County road if such obstruction was not clearly for a public purpose. The information which you very kindly gave to us, regarding the use of the Government Forest Preserve in Stone County, Missouri, reveals that a very small portion of the population would be entitled to graze cattle in the forest preserve. Therefore, only this very small portion of the people would be beneffitted by the cattle guards placed on the County roads at the entrances to the forest preserve. Thus, the conclusion is inescapable that the construction of cattle guards in such places is for a

private purpose which the County Court would be unable to authorize.

CONCLUSION

It is, therefore, the opinion of this Department that the placing of cattle guards on the County road of Stone County at the entrances to the Government Forest Preserve in the southern part of that County would be a misdemeanor under Section 8581, R.S. Mo. 1939, and would also be a common law nuisance. It is the further opinion of this Department that the County Court of Stone County would be unauthorized to allow the erection of said cattle guards.

Some considerable study of the matter presented by your letter of September 22, 1945, leads us to the conclusion that, if the erection of the cattle guards which you mentioned, is of considerable importance to the people of that area, the only proper way to allow the erection of these cattle guards is by virtue of a Legislative enactment. An investigation of Bills now pending in the 63rd General Assembly discloses that there is a Bill now before that Assembly, which will allow private citizens to erect cattle guards over public roads, when this road runs through a part of the land owned by private individuals. This Bill was introduced by Representative Turley of Carter County, and its designation is House Bill #656. The information you forwarded us shows that at least some of the individuals who will graze their cattle in the forest preserve, own land within the preserve. Therefore, if the County road runs through their property, the House Bill referred to would authorize them to erect cattle guards. If this would not take care of the situation, we suggest that an attempt be made to amend the Bill through your representatives in the Legislature, so as to allow cattle guards to be placed at the entrances of the forest preserve. We are of the opinion that such an amendment would not be objectionable to the Legislature, and that, in fact, it would require very little alteration of the Bill to accomplish this purpose.

I enclose herewith, a copy of House Bill #656, which shows that the Bill was reported out by the Committee on Roads and Highways due pass, and was ordered perfected and printed.

The copy enclosed is the Bill as perfected. Any amendment now made would have to be made in the Senate since House Bills cannot be amended on third reading and final passage.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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