

DEDICATION:
ROADS:

County Court can enforce easement in platted streets for public uses unless there be an abandonment of the easement.

January 20, 1939



Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We acknowledge your letter of November 15, 1938, which reads as follows:

"The opinion of your office is requested on the following:

Approximately fifty years ago a section of land immediately North of Hannibal was subdivided into lots, blocks, streets and alleys and a public wharf on a bay connected with the Mississippi river. This settlement was known as Scipio. It was never incorporated and no settlement of any consequence was ever made. The plat of this section was duly filed in the office of the Recorder of Deeds of this county donating the streets and alleys to the public. Recently, and within the last six months, this property was purchased by a resident of this city from the McCooey estate which had owned it for many years having purchased this property at a tax sale. The present owner of the property has proceeded to fence across the streets and alleys and in brief has enclosed practically the entire area so that none of the streets or alleys are accessible to the public. A request was recently made of the County Court by a person owning land to the East of this section that the County Court take proper means to force the opening of the plated streets and it is because of this that the opinion of your office is requested."

In the case of Evans vs. Andres 42 S. W. (2d) 32, defendant was enjoined from erecting fences or obstructions across plotted streets, and the facts were similar to your facts, except that the plaintiff therein was not Phelps County, But was an aggrieved abutting property owner. In that case the court construed Section 11185 R. S. Mo. 1929, as the same relates to a county's title to streets dedicated as the streets of Scipio were dedicated, and at l. c. 35, the court said:

"The title of the county, under section 11185, supra, was not an absolute fee, but merely an easement for a special purpose, as by a common-law dedication, which easement, we think, might be lost by nonuser for such period of time as in legal contemplation would be construed as an abandonment, in which case the title would revert to the then owners of the abutting property. While this is true, the burden of proving loss of an easement by nonuser is upon defendant."

19 Corpus Juris, page 989, Section 246 reads as follows:

"The owner of an easement whose right has been invaded and injured or destroyed has a right of action therefor. * * * *"

Section 7915 R. S. Mo. 1929 provides:

"All streets and alleys in unincorporated towns and villages shall be under the control of the county court, and governed by the laws relating to roads and highways."

Section 7916 R. S. Mo. 1929 provides:

"The road overseer and county highway engineer shall have the same control over and their

duties in relation to streets and alleys in said towns and villages shall be the same as in relation to roads and highways on public roads."

Section 7932 R. S. Mo. 1929 provides:

"* * * * * Any person or persons who shall willfully or knowingly obstruct or damage any public road * * * * * by fencing across or upon the right of way of the same * * * * * shall be 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 or imprisonment. The road overseer of any district or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day of (if) such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

In the case of State ex rel. vs. Bunler, 90 Mo., 560
l. c. 569, 3 S. W. 68, the Supreme Court construed Section
7932, supra, and said:

"But the question remains, what is here meant by the term 'roads' in his district? Does it mean roads actually laid out, constructed, used and recognized as such, or does it mean roads that have only a nominal existence, de jure, without any visible or tangible existence de facto? We apprehend that, under a fair construction of the statute, the actually existing traveled and recognized public roads of his district are what are here contemplated by the statute.

We do not imagine that the statute ever intended to impose upon the road overseers the onerous and difficult duty of searching the records and proceedings of the county court, and, at his peril, pass upon and determine the regularity and validity of the various proceedings by which the different public roads in his district had been created, changed or vacated. On the contrary, we apprehend that it is his duty to accept the actually existing and recognized public roads in his district at the date of his appointment, or that may thereafter be established during his term of office, as the roads committed to his care, and which, under the law, he is bound to keep in good repair, as provided by the statute. The duty of deciding between roads de facto and roads de jure, we apprehend, in general devolves upon the court, in proper cases, rather than upon mere ministerial officers of the law. * *"

In State vs. Franklin 113 S. W. 652, 133 Mo. App. 486 l. c. 492, that court said:

"We strongly approve what was said on this subject by the St. Louis Court of Appeals, speaking through Judge Goode, in State ex rel. v. Vandalia, 119 Mo. App. 406: 'The Attorney-General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the State, for its abatement. This is the rule independent of any statute touching the matter as has been adjudged in many cases. * *"

Then at l. c. 493 the court continued:

"Both on reason and authority, it is quite clear that the maintenance of the obstructions in the public highway by the defendant Franklin and the neglect of the town to perform its duty to proceed for the abatement of the nuisance, justi-

fied the State in employing its visitorial power for the correction of the abuse. The petition states a cause of action. The right to prosecute the suit either as one in equity or under the statute quoted is not affected by the provisions of section 9674, Revised Statutes 1899. * * * *"

CONCLUSION

We interpret your question to be as follows: "Where the village of Scipio in Marion County in about 1889 was laid out and streets were plotted under the provisions of what is now Chapter 67 R. S. Mo. 1929, can the County Court or Prosecuting Attorney of Marion County force one who has enclosed with fences practically the whole plotted town to remove the fences and make the streets available to the public?"

According to the Evans vs. Andres case, supra, the filing of the plat gave to Marion County an easement for public use in the plotted streets of Scipio and unless that easement has been abandoned by nonuser it continues as an easement for the benefit of Marion County. Abandonment by nonuser depends entirely on what adverse possession the party fencing and claiming ownership can show, as the burden of proving an abandonment of streets dedicated for public uses is upon him, the matter could only be finally determined by a judgment of a court of proper jurisdiction.

Pursuant to Section 7932, supra, the one obstructing a public road by fencing can be prosecuted for a misdemeanor. After statutory notice to remove fences obstructing a public road the person who persists in the obstruction, throws himself open to a damage suit.

The Buhler case, supra, holds that it is the duty of the County Court to search and determine if Marion County still has an easement in the streets of Scipio, and if they determine the matter in the affirmative, then a right of action will lie to protect the easement of the County.

State vs. Franklin, supra, holds that the Prosecuting Attor-

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ney, where one obstructs a public road of a plotted city, may bring an action in the name of the State to abate the obstruction as a public nuisance, independent of any statutory action which might lie.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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