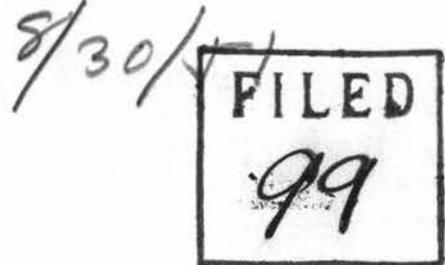


COUNTY COURT
VACATION OF COUNTY ROADS:
EXECUTION OF QUIT CLAIM DEEDS
EXTINGUISHING EASEMENT:

County court may vacate county road upon petition of twelve freeholders. Road right of way not used within preceding ten years extinguished by operation of law.

August 29, 1951

Honorable Thomas G. Woolsey
Prosecuting Attorney
Versailles, Missouri



Dear Mr. Woolsey:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"I would appreciate your rendering me an opinion, at your earliest convenience, as to whether or not a County Court may declare a former County Road abandoned upon a petition brought by adjoining land owners.

"I would also appreciate an opinion as to whether or not a County Court may give a Quit Claim Deed to the adjacent land owners, to an abandoned right of way, originally obtained by prescription and which, to the best knowledge and belief of the Court is no longer needed for road purposes and has not been used, as such, more than ten years."

Your first question is whether or not a county court may declare a former county road abandoned upon a petition brought by adjoining landowners. Section 228.190, RSMo 1949, is 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

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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."

(Emphasis ours.)

We are of the opinion that the above quoted language of the statute warrants the opinion that a county road not used by the public within the preceding ten years period is actually abandoned and vacated by operation of law.

Section 228.110, RSMo 1949, is as follows:

"1. Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless, and the repairing of the same an unreasonable burden upon the district or districts. The petition shall be publicly read on the first day of the term at which it is presented, and the matter continued without further proceedings until the next term.

"2. Notice of the filing of such petition and of the road sought to be vacated shall be posted up in not less than three public places in such township or townships, at least twenty days before the first day of the next term of the court, and a copy of the same shall be personally served on all the persons residing in said district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law; and at the next regular term the same shall again be publicly read on the first day thereof.

"3. If no remonstrances be made thereto in writing, signed by at least twelve freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners; but if a remonstrance thereto in writing, signed

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by at least twelve freeholders, residents of such township or townships, be filed, and the court after considering the same shall decide that it is just to vacate such road, or any part thereof, against the vacation of which the remonstrance was filed, the costs shall be paid by the parties remonstrating, and the original costs, and damages for opening such vacated road shall be paid by the petitioners to those who paid the same; provided that if five years have elapsed since the original opening of the same no such reimbursement shall be made."

We find no statutory provision for the vacation of county roads by action of the county court other than the provision made by the last above quoted statute and we comment that action by the county court under this section for the vacation of a county road is not limited to roads that have not been used by the public during the preceding ten years and we comment that the petitioners who initiate the proceeding for the vacation are not limited by the statute to adjoining land owners but rather to freeholders of the township, or townships, through which the road runs.

In our opinion of July 12, 1949, addressed to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, Missouri, a copy of which we are enclosing herewith, we held that a county court may order a public road vacated upon a finding that no necessity for such road exists. It occurs to us that said opinion should be helpful to you.

In answer to your second question which is whether or not the county court may lawfully execute a quit claim deed conveying to the adjacent land owners an abandoned right of way originally obtained by prescription and no longer needed for road purposes, and which has not been used for road purposes for the preceding ten years we comment that a right of way originally obtained by prescription constitutes an easement over the land which it crosses. The following is a quotation from Volume 2 of Thompson on Real Property, Section 524, Page 113:

"* * * Before a prescriptive right can be established in the public, there must have been a public use of the land exclusive of

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the private rights of the owner. Thus, for a municipality to establish a public way by prescription it must prove an adverse use of the land, which has continued for the requisite period of time under claim of right and without the acquiescence of the owner or his predecessors in title in such use."

We suggest the fact that an easement has been said to be "* * * a charge or burden upon one estate for the benefit of another.* * *" (Thompson on Real Property, Volume 1, Section 315, Page 503.)

We are of the opinion that under the provisions of Section 228.190, RSMo 1949, the right of way described by you has been abandoned and vacated by operation of law and that the easement has been extinguished and that the charge or burden thereof on the land formerly traversed by the right of way has been extinguished and that said land is now free from the encumbrance of the easement and that any quit claim deed purporting to extinguish said right of way would be unnecessary and ineffective and therefore, for that reason, if for no other reason, the execution by the county court of a quit claim deed to the adjoining landowners is beyond the authority of the court.

CONCLUSION

We are accordingly of the opinion that under the provisions of Section 228.110, RSMo 1949, a county court pursuant to a petition filed by twelve freeholders of the township or townships through which a county road runs may vacate a county road provided all of the provisions of said sections shall be complied with.

We are of the further opinion that in view of the provisions of Section 228.190, RSMo 1949, an abandoned road right of way originally obtained by prescription and not used in the last ten years has been extinguished by operation of law and that the land across which it runs is no longer encumbered by an easement for road purposes and that the execution of a quit claim deed by the county court is unnecessary and ineffective and is for that reason, if for no other, beyond the authority of the court.

Respectfully submitted,

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APPROVED:



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