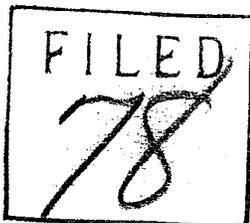


COUNTY:

County court unauthorized to bring a civil action to determine if the road in question is a public road. Prosecuting Attorney, if satisfied that it is a public road, may bring suit to abate the obstruction across said road as a nuisance.

ROADS AND BRIDGES:



February 3, 1954

Honorable Earl Saunders
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion on the questions contained in the enclosed copy of a letter from the County Clerk of Jefferson County, addressed to you as Prosecuting Attorney of said County.

The following facts are contained in the Clerk's letter. In 1951, a petition was filed in the county court of Jefferson County, Missouri, requesting said court to declare and order a certain road to be a public road. Apparently, the county court took no action on said petition. Subsequent thereto, during the past years said road was closed by the construction of a fence across said road by a property owner over whose property said road is constructed. Said property owner claimed such right because of non-use and relocation of said road.

The Clerk specifically inquires: 1) if it is the duty of the county court to institute a civil action to determine whether or not a road in question is a public road, and, 2) is it the duty of persons signing a petition and filing same in the county court in 1951, requesting said court to declare said road a public road, to institute a civil action to determine whether or not the road in question is a public road.

The Clerk inquires in both instances if it is the duty of said persons to institute a civil action to determine whether said road is a public road. We find no statute making it the mandatory duty of any of such persons to bring any such action. However, we assume that you really are inquiring if they may do so under the law and if so, what is the nature of such action.

Honorable Earl Saunders

The latter request contained in the Clerk's letter relates to the right of certain individuals who had signed a petition, filed in the county court, to bring a civil suit to determine if the road in question is a public road. While we believe these petitioners do have a remedy at law, they are in no manner county or public officials and there is no official duty incumbent on you as county prosecuting attorney to furnish them legal advice, therefore we regret to advise you that as of necessity, we must confine this opinion to only the first request for an opinion which deals specifically with the authority of the county court.

Under Section 7, Article VI, Constitution of Missouri, 1945, it provides that there shall be elected a county court which shall manage all county business as prescribed by law and keep an accurate record of its proceedings. See also Sections 49.270, 49.310 to 49.510, RSMo 1949.

Therefore, the county court is vested with only such authority as may be granted by the legislature and necessary implied authority to carry out such expressed powers.

A careful examination of the statutes, constitution and decisions in this state fail to disclose wherein the county court is vested with any authority to bring such civil action to determine whether such road be a public road.

Therefore, it is the opinion of this department that said county court is not authorized to bring any such civil action to determine if the road in question is a public road.

Notwithstanding the foregoing, we are of the opinion that if you, as county prosecuting attorney, upon investigation shall determine that this is a public road, that such obstruction does inconvenience the travel in the county and is not authorized, that you may bring suit in the circuit court at the relation of the state to abate such obstruction.

It has been held that the construction of a fence across a public highway constitutes a nuisance which may be abated by action of the prosecuting attorney in behalf of the State of Missouri. In State v. Franklin, 133 Mo. App. 486, l.c. 493, the court said:

"Both on reason and authority, it is quite clear that the maintenance of the obstructions

Honorable Earl Saunders

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, justified the State in employing its visitorial power for the correction of the abuse."

Furthermore, in State ex rel. v. Vandalia, 119 Mo. App. 406, l. c. 418, the court said:

"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. (Smith v. McDowell, 148 Ill. 51, 22 L. R. A. 393; State v. Dayton, 36 Ohio St. 434; Hunt v. Railroad, 20 Ill. App. 282; People v. Beaudry, 91 Cal. 213, 220)"

CONCLUSION

Therefore, it is the opinion of this department that the county court in this instance is unauthorized to bring any civil action to determine if the road in question is a public road. If the county prosecuting attorney determines that the road in question is a public road, then acting in his official capacity, he may bring a suit to abate the obstruction across said road as a nuisance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH:sm