

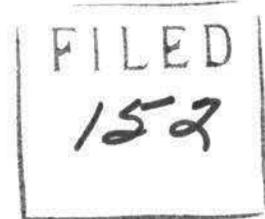
ROADS AND BRIDGES:

A county which acquires a road less than 30 feet wide by prescription pursuant to Section 228.190, RSMo Supp. 1967, cannot take private land from adjoining landowners in order to widen said road without instituting proceedings in the Circuit Court.

OPINION NO. 152

July 10, 1970

Honorable Kenneth R. Babbit
Prosecuting Attorney
Stone County Court House
Box 185
Galena, Missouri 65656



Dear Mr. Babbit:

This is in reply to your request for an official opinion from this office. Your request reads as follows:

". . . There has been a road located in the southern part of Stone County which has been used by the public for over 10 years and public money has been expended on the maintenance of said road for over 10 years. It appears, then, that this is a legally established public road under Sec. 228.190.

"The roadbed on said road has never been over 12 to 14 feet wide, and the landowner adjacent to the road, who, incidently, owns on both sides of said road, has fenced on both sides of said road leaving a distance between fences of only, about, 20 feet.

"Query: Under 229.010, all public roads shall not be less than 30 feet

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in width.

"Can the County Court of Stone County, or the road district in which area the road lies, widen this road and cause the fences of the landowner to be set back 15 feet from the center line of the now existing road so as to constitute a 30 foot road right-of-way without instituting any proceedings in said County Court or Circuit Court."

It is our understanding that no order of the County Court was ever entered establishing this road but that such road was legally established by use by the public for ten years continuously and upon which road there was expended public money for ten years.

A county road acquired by the public by prescription gives the public use only of the land actually used for road purposes. Eckerle v. Perry, 297 S.W. 424, 425 (Spr.Ct.App. 1927). Furthermore, in the case of State ex rel McIntosh v. Haworth, 124 S.W.2d 653, (Spr.Ct.App. 1939), the court stated:

". . . under the statutes of Missouri, no highway could be established as a public highway by prescription since 1887 unless public money or labor had been expended on it and in order to establish a highway as a public highway by prescription where there has been no expenditure of public money or labor thereon there must be proof of adverse user for the statutory period of ten years prior to 1887. . . ." Id. at 654.

Therefore, the highway referred to in your request has been acquired by Stone County by prescription. Where a road is acquired by a county by prescription, the public has a right only to that portion actually used or maintained by the county. Hall v. Flagg Special Road Dist., 296 S.W. 164 (Spr.Ct.App. 1927). In the case of Eckerle v. Perry, supra., the court stated:

". . . When the public acquires a right to a roadway by prescription that right extends only to the land actually used for road purposes. It is entirely different when a road has been established by condemnation

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or statutory dedication. In that event the public has the right to the entire road so condemned or dedicated regardless of whether or not the entire width of the road, as established, is actually used for travel. . . ." Id. at 425.

In addition, in the case of Drydale v. Kiser, 413 S.W.2d 506, Mo. 1967, the court considered the effect of Section 229.010, RSMo 1959, on Section 228.190 RSMo Supp. 1967, and said:

"Leslie v. Mathewson, and in particularly in State v. Lewis, the roads were far less than 30 feet wide-- '[a]ll public roads in this state which hereafter may be established shall not be less than thirty feet in width,' RSMo 1959, § 229.010, V. A.M.S. The point was not made in those cases as it is here that 'no public road can be less than 30 feet in width' but the appellants only cite the statute and that is not in itself sufficient to demonstrate that a public road created under the statute involved here, § 228.190, is invalid merely because its dimensions do not meet the standard. . . ." Id. at 509.

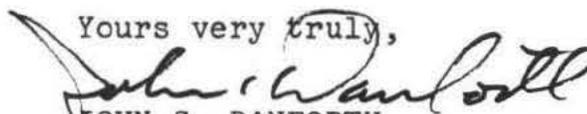
Therefore, it seems clear that Stone County could maintain a road acquired by prescription which is less than 30 feet wide. Acquisition by prescription pursuant to Section 228.190 RSMo Supp. 1967, does not give the County the right to take up to 30 feet of land from the adjacent landowners without condemnation proceedings.

CONCLUSION

It is therefore the opinion of this office that a county which acquires a road less than 30 feet wide by prescription pursuant to Section 228.190, RSMo Supp. 1967, cannot take private land from adjoining landowners in order to widen said road without instituting proceedings in the Circuit Court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Yours very truly,


JOHN C. DANFORTH
Attorney General