



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 24, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79- 214

Vernon D. Grassie
Assistant County Attorney, Crawford County
Office of the Crawford County Attorney
Judicial Center, 4th and Pine
Pittsburg, Kansas 66762

Re: 1) Roads and Bridges--Roads--Laying Out and
 Opening Roads

 2) Counties and County Officers--County Attorney--
 General Duties

Synopsis: A district court is without the power to order the closing of an unused but unvacated road for the benefit of the adjoining landowners, and the county attorney may seek the removal of any obstruction placed on such road even though the county commission does not request such action.

* * *

Dear Mr. Grassie:

In your letter of June 22, 1979, you advise us that an unused road in Crawford County has been closed by order of the district court and with the consent of the adjoining landowners, but not the county commission. You inquire whether the court had the authority to do so, and if not, whether it is the county attorney's duty to seek a setting aside of the court's order.

Vernon D. Grassie
Page Two
September 24, 1979

As we understand the facts, a dispute arose between the adjoining landowners concerning a fence line. One sued the other, with the result that a court order was issued which directed that the fence be erected diagonally across a platted county road which was unused at the time, although it had never been vacated. While this was satisfactory to the parties at the time, one now wants the county commissioners to have the fence removed.

As to your first point, it would be our opinion that the district court was without the authority to act as it did, even with the consent of the adjoining landowners. Kansas appellate courts have held on numerous occasions that it is the legislature, as the representative of the public, which has plenary power over streets and highways, and as a general rule, full discretion as to opening, improving and vacating the same. Hill v. City of Lawrence, 2 Kan.App.2d 457, 459 (1978); Eastborough Corp., Inc. v. City of Eastborough, 201 Kan. 491, 494 (1968); Grantham v. City of Topeka, 196 Kan. 393 (1966). Such power of supervision and control may be exercised directly by the legislature, or it may be delegated to a subordinate agency or unit of government. Smith v. State Highway Comm. 185 Kan. 445, 453 (1959). This the legislature has chosen to do in the case of county roads, with the authority to open and vacate vested in the board of county commissioners. K.S.A. 68-101 et seq., Wagoner v. City of Hutchinson, 169 Kan. 44, 47 (1950). While the action of the district court might have been proper under some circumstances, even if the county is not a party, under facts herein presented, it would not appear to be binding on the county or public.

The fact that the adjoining landowners consented is of no relevance, since any rights they had were reversionary only after the board of county commissioners declared the road to be vacated. See, e.g., Rowe v. Bowen, 113 Kan. 641 (1923). Nor is it relevant that the road is unused, for it had been established in compliance with the law and there was nothing to prevent the public from travelling on it. While there formerly existed a statute which provided that roads which remained unused for seven years become vacated, it was repealed in 1911 and has not been re-enacted. Killhoff v. Board of County Com'rs of Reno County, 193 Kan. 370 (1964).

Your second inquiry is premised upon the conclusion reached above, and concerns whether it is the duty of the county attorney to act to reopen the highway. This question would appear to have been answered by the 1908 case of Eble v. The State of Kansas, 77 Kan. 179. There the court stated at syllabus para. 1:

Vernon D. Grassie
Page Three
September 24, 1979

"The county attorney has power to bring a suit in the name of the state to enjoin obstructions to travel upon a public highway without authority from the board of county commissioners and notwithstanding the disinclination or refusal of the local highway officers to move in the matter."

The court further stated in the body of the opinion that:

"The state at large has an interest in keeping the highways in every county free from obstruction to public travel, no matter what the attitude of the local authorities upon the question may be. The willful obstruction of a highway is a public offense which the state may prosecute, even though the township trustee be disinclined or refuse to do so. Such an obstruction may be enjoined and abated as a common nuisance by the state, even though the board of county commissioners should be opposed to the suit; and the legislature has made it the duty of the county attorney to prosecute, on behalf of the people, all suits, civil or criminal, arising under the laws of the state, in which the state is a party or is interested." 77 Kan. at 181, 182 (Emphasis added.)

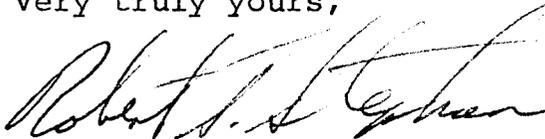
The statute to which the court makes an inference now appears at K.S.A. 19-702.

As the above-quoted sections from Eble, supra, appear to still be good law, it would be our opinion that it is within the sound discretion of your office to take the necessary steps to remove the obstruction from the section of highway in question.

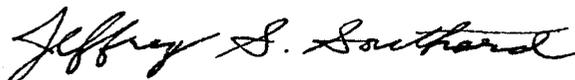
Vernon D. Grassie
Page Four
September 24, 1979

In summary, a district court is without the power to order the closing of an unused but unvacated road for the benefit of the adjoining landowners, and the county attorney may seek the removal of any obstruction placed on such road even though the county commission does not request such action.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk