



STATE OF KANSAS

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June 19, 1987

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ATTORNEY GENERAL OPINION NO. 87- 93

Michael C. Hayes
County Attorney
Jefferson County Courthouse
P.O. Box 351
Oskaloosa, Kansas 66066

Re: Personal and Real Property -- Conveyances of Land
-- Adverse Possession Against Public Property

Synopsis: In Kansas, title by adverse possession cannot be invoked against a governmental subdivision of the state by a private individual.

* * *

Dear Mr. Hayes:

As County Attorney for Jefferson County, you request our opinion on a question concerning the county's right to make use of its easement for a roadway. You inform us that the county has maintained a road along its recorded easement since 1884. However, the county has recently discovered that the road has strayed off of the recorded easement and has intruded about ten feet onto the adjacent property owner's land. The county is now considering putting the road back into its original location.

You further inform us that the adjacent land owner, toward whose property the road will be moved, claims he has obtained the right by adverse possession to the recorded easement. Thus, the legal issue you raise is whether title by adverse possession can be invoked against a governmental subdivision of the state.

Generally, adverse possession does not run against public property or property affected with a public interest. See 2 C.J.S. Adverse Possession, § 13. Kansas Supreme Court decisions have adhered to this general rule of law. In Eble v. The State, 77 Kan. 179 (1908), the Supreme Court stated:

"This court is already committed to the doctrine that a private individual cannot obtain title to a public highway by adverse possession;" p. 184

Thus, in Eble the court set forth the general rule in Kansas that a private individual cannot obtain title to a public highway by adverse possession. See also Kollhoff v. Board of County Commissioners, 193 Kan. 370, 373 (1964). Following the Eble decision, the court held in Wallace v. Cable, 87 Kan. 835 (1912) that the title to an alley remained in the public, even though the alley had never been used by the public and had been occupied by an individual for more than fifteen years. See Syl. ¶ 3, p. 835.

In Wilson v. City of Neosho Falls, 93 Kan. 178 (1914), the court again ruled that the right of the public was predominant over the right of a private individual. In that case, the court stated:

"The fact that the plaintiff and those under whom he holds have kept the property in question inclosed and have been in possession for twenty years gives him no right against the city to continue in the occupation of any part of a street within the inclosure. Previous occupation of a portion of the street will be presumed to be subject to the paramount rights of the public." p. 184. See also Giffen v. City of Olathe, 44 Kan. 342 (1890). (Emphasis added).

Finally, in Douglas County v. City of Lawrence, 102 Kan. 656 (1918), the court stated:

"the great weight of authority is that those rights, duties and privileges which are conferred or imposed upon a municipal corporation exclusively for the public benefit are not ordinarily lost through

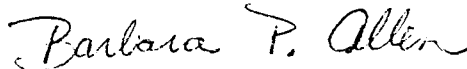
nonuse, laches, estoppel, or adverse possession," p. 659. (Emphasis added).

In light of these decisions, it is our opinion that an easement which is held by a Kansas county to maintain a road for the benefit of the public may not be adversely possessed by a private land owner. Accordingly, the right to use the recorded easement remains with Jefferson County. Since the county has the right to maintain use of its easement, we see no legal obstacle which would prevent the county from repositioning the roadway onto the original easement.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Barbara P. Allen
Assistant Attorney General

RTS:JLM:BPA:bas