



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 86

Lancaster Township Board  
c/o Bill Pruett, Trustee  
Lancaster, Kansas 66041

Re: Roads and Bridges; Roads -- General Provisions;  
Laying Out and Opening Roads -- The Effect of the  
1879 Non-User Statute on an Unopened Road

Synopsis: Pursuant to L. 1879, ch. 150, an authorized  
county road which remained unopened for seven years  
became vacated by operation of law. The subsequent  
repeal of that statute does not affect the vacation  
of a county road which occurred prior to the  
statute's repeal. Cited herein: K.S.A. 77-201;  
Laws 1879, ch. 150.

\* \* \*

Dear Board Members:

As the Lancaster township board in Atchison county,  
Kansas, you ask our opinion on several issues relating to the  
opening of Road 310 which was dedicated and established in  
January of 1881 but never completed west of the southeast  
corner of section 16.

Specifically, you question the effect, if any, on Road 310 of  
the 1879 Kansas law which provided that if a public road  
should remain unopened for seven (7) years at one time, such a  
road would be vacated by operation of law. (Laws 1879, ch.  
150). Based on the information given and the rationale set  
forth herein, we find that Road 310 has been vacated.

The 1879 Kansas non-user law provided:

"Section 1. That any county road or part thereof, which has heretofore or may hereafter be authorized, which shall remain unopened for public use for the space of seven years at any one time after the order made or the authority granted for opening the same, shall be and the same is hereby vacated, and the authority granted for erecting the same is barred by lapse of time; and any state road or part thereof, which has heretofore or may hereafter be authorized, which shall remain unopened for public use for the space of ten years after the passage of the act authorizing the same, shall be vacated, and the authority for opening it repealed for non-use." (Laws 1879, ch. 150).

When the legislature enacted this statute, they intended to "allow those interested seven years in which to avail themselves of the privilege offered" and "if no advantage should be taken of it within that time it should be withdrawn." Kollhoff v. Board of County Commissioners, 193 Kan. 370, 373 (1964) citing, Cowley County v. Johnson, 76 Kan. 65, 69 (1907). It has also been held that this statute "applies only to roads authorized which have never been opened or used." Kollhoff v. Board of County Commissioners, 193 Kan. 370, 374 (1964), citing Kuhl v. Jamison, 79 Kan. 788 (1909). However, in circumstances where the road was generally traveled, and there was nothing to prevent it from being traveled on, the road wouldn't be considered "'unopened' . . . when it is located and established and everything done which the law or necessity requires to be done in order to render it open for public use." Kollhoff v. Board of County Commissioners, 193 Kan. 370, 374 (1964), citing City of Topeka v. Russan, 30 Kan. 550, 559 (1883). Under these circumstances, the road would be considered opened and the 1879 non-user statute wouldn't apply.

The county records pertaining to Road 310 indicate that the road was petitioned and established in January of 1881, but it was never opened. Since the 1879 statute was meant to be applied to roads authorized but never opened or used, it applied to Road 310 when it was petitioned and established.

In order to avoid vacation under the 1879 non-user statute provisions, Road 310 would have to have been opened or used by 1888, and because there are no indications that the road was opened within seven (7) years after authorization, the road was vacated in 1888 and reverted back to the landowner. Kollhoff v. Board of County Commissioners, 193 Kan. 370, 373 (1964).

Although the 1879 statute was repealed in 1911 (Laws 1911, ch. 249, sec. 55), the repeal does not affect the vacation of Road 310. The Kansas statute pertaining to the repeal of a statute states that:

"A repeal doesn't affect any right which accrued, any duty imposed, and any penalty incurred or proceeding commenced by virtue of a statute." (K.S.A. § 77-201 First).

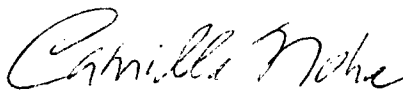
Since the 1879 statute affected Road 310 in 1888, the road was vacated before the repeal of the statute in 1911, and the repeal doesn't affect any penalty incurred by virtue of the statute.

In conclusion, Road 310 was vacated and reverted back to the landowner pursuant to the 1879 non-user statute because it remained unopened for seven years after it was authorized. Furthermore, the repeal of the 1879 statute in 1911 did not affect the vacation of the road because the vacation preceded the repeal and a repeal isn't meant to affect any action incurred by virtue of the statute pursuant to K.S.A. § 77-201 First.

Very truly yours,



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Camille Nohe  
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