



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

December 19, 1949

Hon. Vernon D. Adcock
County Attorney
Dawson County
Lamesa, Texas

Opinion No. V-975.

Re: The authority of the
Commissioners' Court
to close a public road
in the county under
the submitted facts.

Dear Sir:

We refer to your letter from which we quote in
part:

"Enclosed are copies of proceedings had in connection with the closing of a certain public road in Dawson County, which had previously been opened under Article 6703, et seq., R.C.S. This road has been used and maintained by Dawson County for several years. Land adjoining the road on one side is owned by H. F. Barron; land adjoining the road on the other side is owned by Mrs. R.C. Kilgore. This road when opened was laid out with one-half the road taken from the said two tracts of land, the division line forming the center of the road.

"The petition to close the road was signed by H.F. Barron and others but not by Mrs. R.C. Kilgore. Mrs. Kilgore is opposed to the closing of the road and contends that she had no notice and did not realize there was a petition pending until after the Commissioners' Court order had been passed closing the road. She contends also that the road has been graded and maintained by the county during the last three years and that it has been used by her and others continuously during said period.

"From questioning members of the Commissioners' Court and the County Judge, it appears that the order was made after the Court heard Mr. Barron explain to them the reasons why he wanted the road closed.

"Your opinion is requested as to whether

or not this is a valid order, and whether it legally closes this road."

The submitted copy of the Petition for Closing Public Road addressed to the Commissioners' Court of Dawson County, filed on September 7, 1949, and signed by H.F.Barron and ten others reads, in substance, as follows:

"We, the undersigned citizens, free-holders, residing in the precincts through which the following described road does run, pray that a public road of the first class, 40 feet in width, be closed in said county, having its points of beginning and ending as follows:

Field Notes (describes boundaries of entire road.)"

The submitted copy of the Public Road Notice, Closing Road, reading in substance, the same as the above-quoted petition, is dated September 7, 1949. It is signed by H.F.Barron and the same ten others.

The submitted sworn affidavit reads:

"I, H.F.Barron, one of the signers of the within petition, upon my oath, state that notices of the intended application for the closing of said new road were posted for at least twenty days before the first day of the term of the Commissioners' Court at which this petition is presented, exclusive of the day of posting, as follows, to-wit:

"One at the Court House door in Lawesa, Dawson County, Texas. One at the south end of Proposed road to close, and one at the North end of the proposed road to close, two other public places in the vicinity of the route of the proposed new road.

H.F.Barron

Subscribed and sworn to before me, this 16th day of November, 1949.

FERN ROGERS, Notary
Public, in and for
Dawson County, Texas"

(SEAL)

The copy of the Commissioners' Court's action

on said petition which you submit reads:

"BE IT REMEMBERED That the Honorable Commissioners' Court of Dawson County, Texas, met in regular session this the 10 day of October, A.D. 1949, with the following members present, to-wit:

R. W. REEDON, County Judge, Presiding.
E.G.MURPHY, Commissioner, Precinct No.1.
W.T.SHELLESGROVE, Commissioner, Precinct No.2.
ALTON ADDISON, Commissioner, Precinct No.3.
CECIL O'BRIEN, Commissioner, Precinct No.4.
HOWARD HUMPHREY, County Clerk and Ex-Officio Clerk of the Commissioners' Court.

"The following business being transacted:

". . .

"Petition #208, for the closing of a Public road between Section 6, Block 34, T 4 N., and Section 1, Block 35, T 4 N., N. P. Barron and others, was presented to the Court and the Court voted unanimously to close said road, and the road is here now ordered closed."

Article 6704, Vernon's Civil Statutes, requires that the Commissioners' Court shall classify all public roads in their counties and provides in part as follows:

"First Class roads shall be clear of all obstructions, and not be less than forty (40) feet nor more than one hundred (100) feet wide."

Article 2351, V.C.S., provides that each commissioners' court shall:

"3. Lay out and establish, change and discontinue public roads and highways . . ."
(Emphasis added)

Article 6703, V.C.S., insofar as the question at hand is concerned, provides:

"The commissioners court shall order . . . and discontinue . . . any road whenever it shall be deemed expedient . . . and

no entire first or second class road shall be discontinued except upon vacation or non-use for a period of three years . . ."

We construe this Statute to mean that the court may discontinue a road by (1) a vacation order, or (2) where there has been a non-use of a three-year period. The three-year limitation applies only to non-use and not to a vacation order.

Article 6705, V.C.S., provides in part:

"The commissioners court shall in no instance grant an order on an application for any new road, or to discontinue an original one . . . unless the applicants have given at least twenty days notice by written advertisement of their intended application, posted up at the court house door of the county and at two other public places in the vicinity of the route of such road. All such applications shall be by petition to the commissioners court, signed by at least eight freeholders in the precinct in which such road is desired to be made or discontinued, specifying in such petition the beginning and termination of such road . . ."

Article 6703 empowers the Commissioners' Court to order the discontinuance of any public road. Article 6705 provides that such court shall in no instance grant an order on an application to discontinue a road unless the notice procedure of that statute is met. So while the Commissioners' Court is given power to act upon its own motion (which point is not now before us), it has the power to act upon the application of freeholders to discontinue a public road, subject, of course, to the provisions of article 6705. Compare: Robinson v. Whaley Farm Corp., 120 Tex.633, 37 S.W.2d 714 (1931); Irion County v. Meyer, 149 S.W.2d 629 (Tex.Civ.App.1941).

Consideration has been given to that restriction in Article 6703 which provides "no entire first . . . class road shall be discontinued except upon vacation or non-use for a period of three years." Prior to the revision of the laws in 1925, that restriction was found in Article 4713, R.C.S., 1895, and in Article 6902, R.C.S., 1911, but read as follows:

"No entire road of the first . . . class shall hereafter be discontinued except upon vacation by orders of the Commissioners court or non-use for a period of three years." (Underscoring ours).

Excepting the underscored words, that entire statute was incorporated in Article 6703, R.C.S., 1925, along with Articles 6860-1-2-76, R.C.S., 1911. Since the first sentence of Article 6703 as revised in 1925 authorized the Commissioners' Court to order the discontinuance of roads, we think that for that reason alone the words "by orders of the commissioners court" following the word "vacation" in Article 6703 were deleted in the revision. In short, we are of the opinion that the three-year provision in that restrictive clause does not restrict the power of the Commissioners' Court to pass a vacation order whenever it shall be deemed expedient. We view the order granted in the proceedings submitted as being in substance and legal effect such a vacation.

Under the facts submitted it appears that the road in question was an entire public road, classified as first-class; that the petition to close the entire road was signed by at least eight freeholders in the precinct in which such road was desired to be discontinued; and that applicants had given at least the twenty days notice and posted same, all as required by Article 6705. There having been compliance with the provisions of Article 6705, it is our opinion that the Commissioners' Court acting under that statute and its authority granted in Article 6703, had the power to grant the order in question in the manner and at the time it did. A.G. Opinion V-443. The law does not require that personal notice shall have been served on anyone, it provides only for posting of three public notices for at least twenty days.

However, further with respect to the power of a Commissioners' Court under Article 6703 to discontinue or close any public road, we quote from Commissioners' Court v. Kaiser, 23 S.W.2d 840 (Tex. Civ. App. 1929, error ref.) at page 842:

"The power conferred upon that (Commissioners') court by Article 6703 of our Revised Statutes to discontinue any public road cannot be construed as authorizing the closing or obstruction of a roadway in the use of which residents thereon have a vested property right;

Hon. Vernon D. Adcock, page 6 (V-975)

even the Legislature of this State has no such power.

"The power to discontinue a public road conferred by the cited statute is restricted to abandonment by the county of its maintenance as such public highway, and does not include the right to deny its use to the owners of property situated thereon." (Word in parenthesis added)

This holding is followed in MacFarlane v. Davis, 147 S.W. 2d 528 (Tex.Civ.App.1941).

Therefore, in the light of Article 6703 as construed in the Kaiser Case, the effect of the order of the Commissioners' Court of Dawson County in question was an abandonment by the county of the maintenance of such entire first-class public road, to relieve the public from charge of maintaining the road discontinued in accordance with the provisions of Articles 6705 and 6703. See also: Texas Co. v. Texarkana Mach.Shops, 1 S.W.2d 928 (Tex.Civ.App.1928). It does not close the road in the sense that it denies its use to persons who may have vested rights therein.

Your second question involves matters concerning private rights, the determination of which does not lie within the province of this office.

SUMMARY

Under submitted facts, the order of a Commissioners' Court to discontinue an entire first-class public road, passed under authority of Article 6703, V.C.S., and in compliance with Article 6705, V.C.S., was valid. The effect of such order was an abandonment by said county of the maintenance of such road. It did not deny its use to persons who may have had vested rights therein. Commissioners' Court v. Kaiser, 23 S.W.2d 840; MacFarlane v. Davis, 147 S.W.2d 528.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

APPROVED
Joe R. Greenhill
FIRST ASSISTANT
ATTORNEY GENERAL
GEO:sw

By *Chester E. Allison*
Chester E. Allison
Assistant