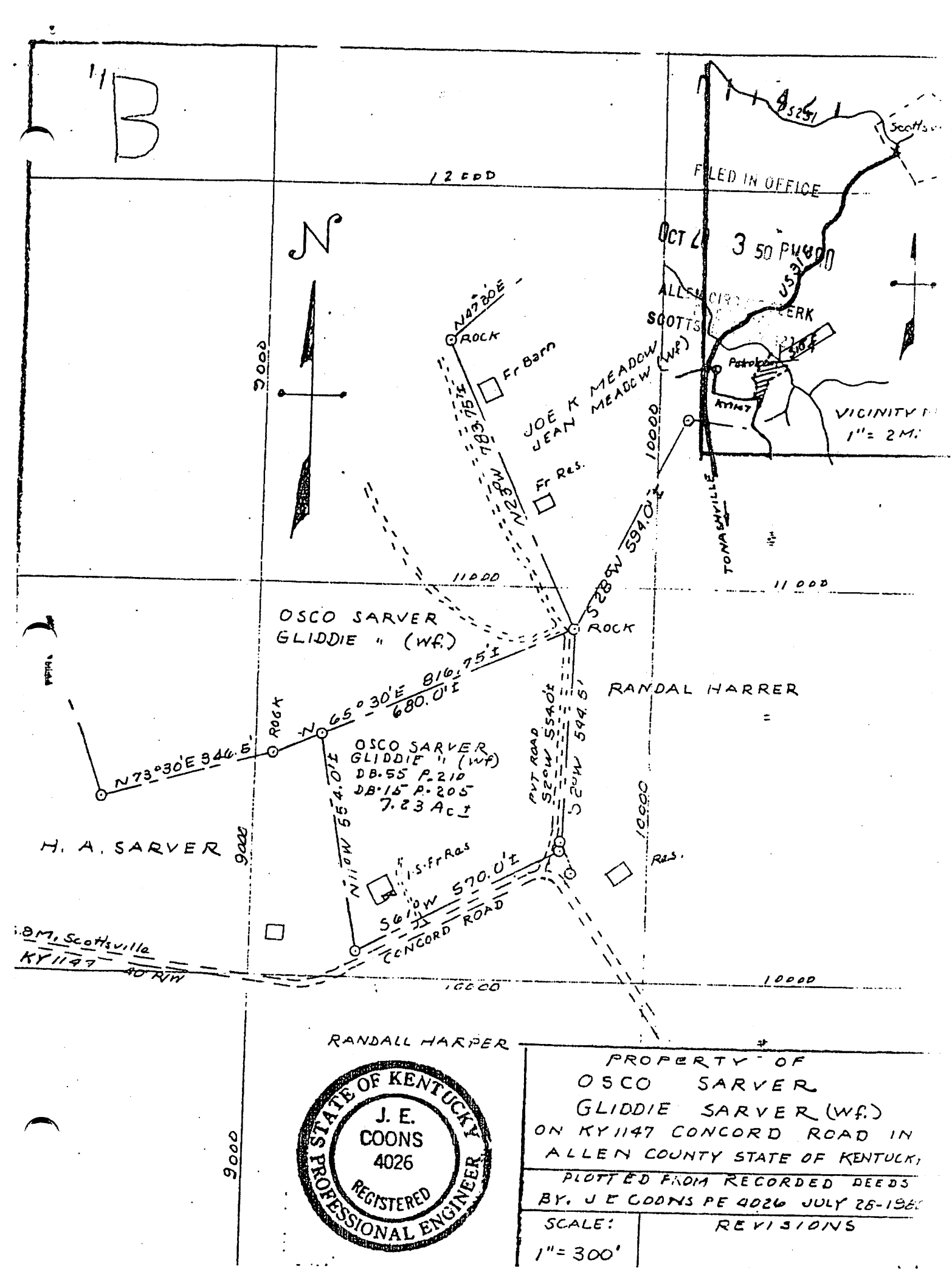
COUNTY ROADS IN KENTUCKY

THE LEGACY OF OSCO SARVER

Sarver v. County Of Allen, By and Through Its Fiscal Court,
Ky., 582 S.W.2d 40 (1979)

Kentucky County Attorney Association's Winter Conference
February 21, 2007



PROPERTY OF
OSCO SARVER
GLIDDIE SARVER (WF.)
ON KY 1147 CONCORD ROAD IN
ALLEN COUNTY STATE OF KENTUCKY

PLOTTED FROM RECORDED DEEDS
BY. J E COONS PE 4026 JULY 26-1988

SCALE:
1" = 300'

REVISIONS


43
BIG TRAMMEL CR
47
42
42-2
50
52
49A-3
51
49
EXHIBIT
#8

Renn v. Ross
Not Reported in S.W.3d, 2006 WL 3759169
Ky.App.,2006

This case comes from Woodford County and involves a gravel passway running from east to west connecting two other county roads. The essence of the claim was that, because the gravel roadway appeared on a map of roadways within the county, it must, therefore, be a "county road". The trial court rejected this argument, as did the Kentucky Court of Appeals, holding:

The adoption of a county road must satisfy the conditions of KRS Chapter 178, which requires more than the mere inclusion of a roadway on a map. A fiscal court must accept a road as part of the county road system according to KRS 178.010. ***Sarver v. County of Allen, Etc.***, 582 S.W.2d 40, 41 (Ky.1979). Prior to 1914, a county could accept a road informally, such as by maintaining the road at county expense. *Id.* After the enactment of Ch. 80, Acts of 1914, a fiscal court must issue a formal order to establish a county road.

While the gravel roadway may have been included on the Major Streets Plan of 1965, there is no evidence in the record that the requirements of KRS 178.010 were satisfied nor is there any evidence that the gravel roadway was ever used by the public or that it had been maintained at county expense. The trial court correctly found that the gravel roadway was not a county road.

Bentley v. Bentley
Not Reported in S.W.3d, 2006 WL 2988477
Ky.App.,2006.

This case comes from Laurel County and involves a claim that "Perry Lane" was a county road over which the appellant was entitled to access his property. It was initiated in 2003, when the appellant wanted to move a mobile home across this lane and onto his property, which was met with an objection by the landowner.

The appellant claimed a right to drive off the end of the blacktop road and across a grassy area in order to access his property. He claimed that this section of the road had been listed on county road maps in the past and that it had never been formally abandoned. The evidence of abandonment was conflicting and submitted to a jury.

The Court of Appeals held:

In ***Sarver v. County of Allen,*** [582 S.W.2d 40], the Court held that non-use of a public road for over 15 years constitutes an abandonment of that status. Additionally, it indicated that travel on the roadway for access to private residences and acts by county officials in improving or maintaining a road do not constitute a continued public use sufficient to negate abandonment. There was sufficient evidence to support the trial court's finding that the passway had not been used as a public road in excess of 15 years and thus had been abandoned.

Although appellants characterize their evidence concerning the status of Perry Lane as overwhelming, there was clearly sufficient evidence of the non-use of this road beyond appellees' residence to withstand appellants' motion for a directed verdict.

Abner v. Ealy
Not Reported in S.W.3d, 2006 WL 2787404
Ky.App.,2006.

This case comes from the Jackson Circuit Court. The Abners brought suit against the county road supervisor for his alleged failure to deal with a dead tree in the county right-of-way. Apparently, the dead tree had fallen and struck the plaintiff, causing injury and damage. Summary judgment was afforded to the road supervisor, and the Abners appealed.

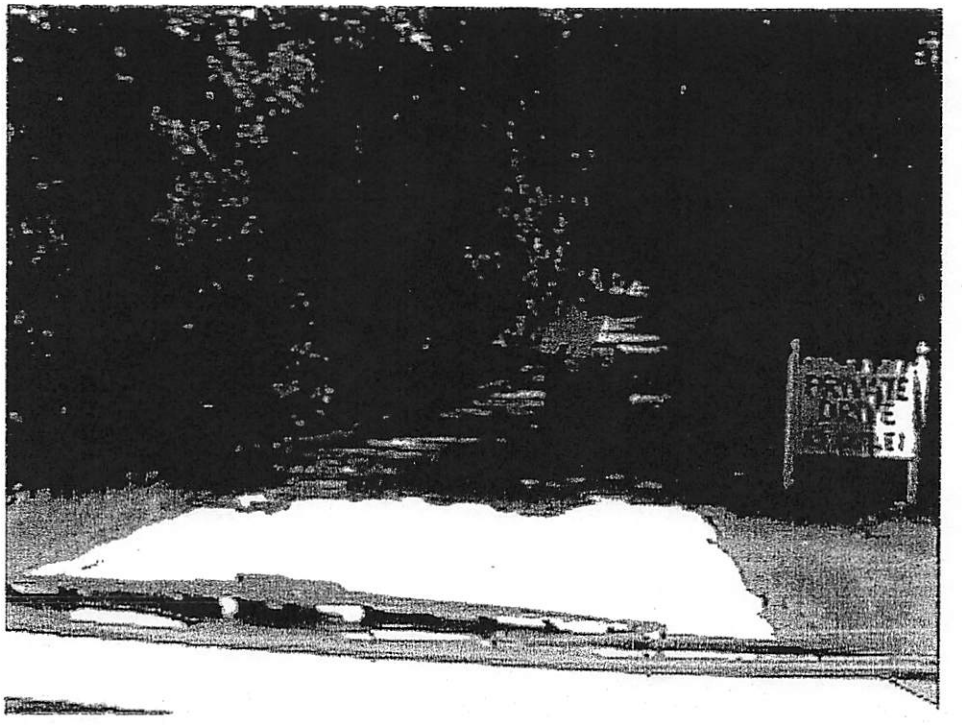
On appeal, Abner points out that Kentucky Revised Statutes (KRS) 179.070(1) establishes the duties to be performed by county road supervisors, most of which relate specifically to county roads. Abner acknowledges that state highways and county roads are different and that county road supervisors are not ordinarily responsible for state highways. But she counters that county road supervisors are responsible for publicly dedicated roads. And, despite being a state highway, Abner contends, U.S. Highway 421 is also a publicly dedicated road.

The Court held that, if Abner were correct, every county in the Commonwealth would be responsible for maintaining not only county roads, but state and federal highways as well. This would place an unwarranted financial burden on each of Kentucky's one hundred twenty counties and produce an absurd result. Furthermore, Abner's interpretation conflicts with KRS Chapter 176 which established the Department of Transportation for the purpose of constructing and maintaining state highways.

Since Hwy 421 was not a county road, the county road supervisor had no statutory responsibility relating to it.

Beech Bend Raceway Park, Inc. v. Baker
Not Reported in S.W.3d, 2006 WL 2382720
Ky.App.,2006.

The Bakers bought their property in Warren County in 1997. At the time they purchased their property, and for approximately ten previous years, the driveway providing access to it had conspicuously posted the following sign:



They purchased their property believing this segment of driveway to be private. However, beginning in the year 2000, a local amusement park began using this driveway as a second access point to its facility. The parties became at odds, and suit was brought over the status of this road. A 1975 ordinance indicated Beech Bend Road was 1.6 miles long, as measured from the city limits of Bowling Green. A 1993 ordinance indicated that Beech Bend road was 1.5 miles long. The difference is significant in that the shorter distance as called for in 1993 would mean that the county roadway does not extend to the property owned by Beech Bend. The trial court found that both ordinances were presumptively valid, and that the 1993 ordinance effectively closed the last one-tenth of a mile of this particular roadway. The trial court further held that the proof on the existence of the road as a public road as of 1914 was insufficient.

The Court of Appeals reversed, holding that the strict requirements of KRS Chapter 178 must be complied with in order to discontinue a county roadway.

The holding of the Court of Appeals is curious – to say the least – because it was acknowledged by all parties that there was not strict compliance with KRS 178.115 in 1975, when the roadway was dedicated; yet, the Court of Appeals gave validity to the 1975 ordinance but not the 1993 ordinance.

The case of **Prather v. Fulton County,** Ky., 336 S.W.2d 339 (1960) unequivocally holds that a county's failure to comply with the legislative requirements in opening a roadway renders the resolution void.

In other words, the Bakers argue that either the 1975 and 1993 ordinances are both valid, or neither is valid.

The Court of Appeals held:

KRS 178.070 sets forth a number of procedural steps which must be accomplished in order to discontinue a county road. These steps include publishing notice as required by KRS 178.050, and placing notices at three public places in the vicinity of the road. Also, the county road engineer and two appointed viewers must view the road and issue a written report, and the fiscal court must hold a hearing as to the discontinuance. Under existing Kentucky case law, abandonment of a road may occur only in the manner prescribed by statute.

Both parties have moved for discretionary review as of this time, and these motions remain pending.

Jessamine County Fiscal Court v. Henry
Not Reported in S.W.3d, 2006 WL 1793236
Ky.App.,2006.

This case involves two declaratory judgment actions (which were consolidated) to determine whether a part of Henry Lane that crosses the Henry property is an easement or a public road. The trial court ruled that the passway running through the Henry farm is not a public road, and that the Henrys had the right to replace a gate across the road with a cattle guard.

On March 21, 2003, the Jessamine County Attorney, on behalf of the Jessamine County Fiscal Court, notified the Henrys that the passway running through their farm was a "public road and part of the Jessamine County road system"; that the Henrys no longer had the right to maintain gates along the passway; and that the Henrys had no right to utilize their farm land adjacent to the passway for grazing of their livestock.

On October 27, 2004, the trial court conducted a bench trial and found, that, from time to time, the Henrys, at their expense, and the Jessamine County Road Department, gratuitously placed and graded gravel on the passway while the Adjacent Owners did nothing to maintain or improve the passway. The trial court also found that the Henrys never solicited or requested assistance from the County in maintaining the road, that the Jessamine County Road Map indicates Henry Lane stops at the Henry's property line, although the Department of Transportation Highway Map appears to indicate Henry Lane is a public passway, which goes through the Henrys' farm. The passway was never used for mail service, garbage pickup or by school buses, and the Henrys never *intended* for the passway to become a public or county road. In September of 2000, the Jessamine County Road Department installed a new cattle guard at the entrance to the Henrys' property, without notice to the Henrys, and the asphalt paving was done over the Henrys' protest.

The County Road Map shows Henry Lane is a private road, while the Department of Transportation Map shows it is a county road.

The Court held:

The distinction between county roads and public roads was explained by our Supreme Court in ***Sarver v. Allen County***, *By and Through Its Fiscal Court*, 582 S.W.2d 40 (Ky.1979). Adoption of a county road must follow the formalities of KRS Chapter 178, which require more than merely including it on the county road map.

Prior to 1914 it was recognized that an "acceptance" by the county could be accomplished informally, e.g., by maintenance of the road at county expense. Since the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road. Otherwise, though a road may be "public," it is not necessarily a "county road."

It is true that neither dedication nor acceptance need be formal, but both may be presumed from the continual use of the road by the public for 15 years or more, accompanied by acts of control on the part of the county court, such as the appointment of overseers, etc., but such use, without the exercise of any power over the road by the county court, will not make it a public highway.

See also *Watson v. Crittenden County Fiscal Court*, 771 S.W.2d 47 (Ky.App.1989). Also, "acts of county officials in improving or maintaining a road, standing alone, do not constitute a public user capable of ripening into a prescriptive title...." *Sarver*, 582 S.W.2d at 43 (citation omitted). Accordingly, the trial court was correct in concluding that the acts of Jessamine County in graveling and paving Henry Lane did not convert it into a public road.

Seiber v. Blake
Not Reported in S.W.3d, 2006 WL 1045430
Ky.App.,2006.

This case comes from the Todd Circuit Court.

This litigation arose over a disputed roadway that crosses the Seibers' property. The road in question runs from Highway 181 in Todd County across the Seibers' property approximately two tenths of a mile to the rear of the Blakes' property. When the Seibers purchased the land in 2000, they erected a gate to prevent others from using the roadway. The Blakes, as neighboring landowners, had previously used this roadway to reach the back acreage of their farm.

The statute at issue in this case is Kentucky Revised Statutes (KRS) 178.116, which addresses the discontinuance of a road.

(1) Any county road, or road formerly maintained by the county or state, shall be deemed discontinued and possession shall revert to the owner or owners of the tract of land to which it originally belonged unless at least one (1) of the following conditions exists:

(a) A public need is served by the road;

(b) The road provides a necessary access for a private person;

(c) The road has been maintained and policed by the county or state within a three (3) year period.

The trial court was affirmed, and it enjoined the Seibers from erecting a gate or otherwise obstructing the Blakes' use of their property.

Pulaski County ex rel. Pulaski County Fiscal Court v. Inabitt
Not Reported in S.W.3d, 2005 WL 1792187
Ky.App.,2005.

This case involves "Dark Hollow Road" in Pulaski County. The fiscal court maintained that this roadway was a county road, and Mr. Inabnitt contended that he had the right to obstruct this roadway by placing a gate across it. Specifically, the county took the position that the road passed through the entirety of the Inabnitt property and came out the other side. The county's proof dated back to April, 1924, and related to a petition filed in the Pulaski County Court. Various other documents were introduced, and a long list of witnesses testified. Mr. Inabnitt produced a written agreement with an adjacent landowner that the road was private in nature.

The Court held:

Prior to 1914 it was recognized that an "acceptance" by the county could be accomplished informally, e.g., by maintenance of the road at county expense. Since the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road. Otherwise, though a road may be "public," it is not necessarily a "county road."

The Court distinguished between "public roads" and "county roads". In order to close a county road, formal action is required by the county. Public roads can be discontinued much in the same way that they are created – by the statutory period of use and non-use. In that the 1924 County Court petition satisfied the statutory requirements for opening a county road, the only way that it could be closed was through a formal proceeding by the County in order to do so.

Jones v. Crouch
Not Reported in S.W.3d, 2005 WL 1313848
Ky.App.,2005.

This case comes from the Bath Circuit Court. The Circuit Court concluded that there was no evidence submitted that the roadway in issue was ever taken in by the county, and the Court of Appeals affirmed.

In granting summary judgment for Crouch and Manley, the circuit court ruled that Reeves Lane was not a county road because it was never "dedicated" or "impliedly dedicated." The court further determined there was no indication in the record that Reeves Lane was ever "used as a public passway or easement providing access to the property of the [Dickerson heirs], let alone continuously used in that fashion for fifteen years."

The dedication of a road as a "county road" is statutory in nature and requires "a formal order of the fiscal court." KRS 178.010 defines county roads as "public roads which have been accepted by the fiscal court of the county as a part of the county road system." It is well settled that a road may be public without being a "county road." As stated by the Supreme Court in *Sarver,* "[t]he obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and biways that chance to become 'public' through processes of dedication or prescription over which the counties have no choice or control."

In contrast, the establishment of a "public road" does not require any formality. A road may become a public road upon proof of "general public use and control and maintenance by the government for 15 years." A public road may be established "under the theory of dedication by estoppel" or "by prescription by adverse user for a period of 15 years." In *Whilden v. Compton,* the court relied on evidence such as "use of the roadway by residents along the roadway, use by customers of a resident who ran a blacksmith shop, repair and annual grading of the roadway by the county, and use for mail service to residents" as proof that a road was public.

The record lacked any proof that the road was ever "accepted by the fiscal court" of Bath County as a county road. However, the Dickersons argued in the alternative that the road was a public road by fifteen years of consecutive use by the public or that they had an easement across same. The Court reversed and remanded for further findings on the factual dispute that related to these claims.

Starr v. Magnum Drilling of Ohio, Inc.
Not Reported in S.W.3d, 2005 WL 678582
Ky.App.,2005.

This case comes from the Lawrence Circuit Court. Apparently, there was no contention by any party to this action that the roadway in issue was a county road. Rather, the distinctions drawn by the court in this case were over the concepts of a public roadway and a private easement.

The court held: "There is no indication that either party intended to permit or to dedicate the road for use by the general public. Consequently, the informal, permissive dedication of the road by Starr's predecessor-in-interest for the Tacketts' private use for ingress and egress cannot be characterized as having been intended for the benefit of the public at large. The passway did not become a public road."

Muhlenberg County v. Masuren Farms, LLC
Not Reported in S.W.3d, 2004 WL 2315115
Ky.App.,2004.

The appeal involves the status of a road in Muhlenberg County. The trial court found that the road in question was once a public road but ceased to exist as such no later than 1970, and currently is neither a county road, nor a public road. The Court of Appeals reversed.

Masuren Farms filed this declaratory judgment action in October of 2001, asking the trial court to declare that Mud River Mine Road was neither a county road nor a public road, and that the County and the public no longer possessed any rights in and to the road.

There is a cemetery located on the property owned by [Masuren Farms] near the point where Mud River Mine Road terminates, which is approximately two miles from the beginning of [Masuren Farms'] property. There are sixty-four graves located thereon. Three persons were buried in this cemetery between 1950 and 1975, and two persons have been buried in this cemetery since 1975. The last burial was in 1999. There is no organization, association, or business entity that owns, operates or manages this cemetery.

The County, by formal vote of the Fiscal Court, adopted a State Department of Transportation map prepared for the County as the official system of County roads. This map includes Mud River Mine Road. The Fiscal Court did not provide notice to the public that it was taking this action. The minutes of said meeting do not specifically mention Mud River Mine Road and there is no formal order of the Fiscal Court specifically mentioning Mud River Mine Road.

The trial court found that the road was not a county road because the County had not satisfied the requirements of Kentucky Revised Statutes (KRS) 178.010(1)(b). KRS 178.010(1)(b) provides, in relevant part, that " 'County roads' are public roads which have been accepted by the fiscal court of the county as a part of the county road system after July 1, 1914...." The County did submit county road maps which were prepared by the Kentucky Department of Transportation for Muhlenberg County in 1954, 1970, 1984, and in 1996. Only the 1996 map was adopted by the fiscal court. However, adoption of a county road must follow the formalities of KRS Chapter 178, which require more than merely including it on the county road map.

However, the Court of Appeals held that the trial court's finding that the road in issue was not a public road was clearly erroneous under the evidence presented, given the evidence of county maintenance, burials at the cemetery, and other proof adduced at trial. Among other witnesses at trial were the county judge-executive, who testified as to the public outcry when the roadway was gated and that several members of the community regularly use the road.

McKeehan v. Wells
Not Reported in S.W.3d, 2004 WL 1948734
Ky.App.,2004.

This case involves the right to use a roadway in Whitley County.

Appellees presented testimonial evidence that the creek crossing area between Jim Lane and Willow Road had fallen into disrepair and had not been used regularly as a road in over fifteen years. They also included photographic evidence that the creek crossing was impassable due to large stones in the creek

bed. Although appellants on appeal cite testimony by residents that they had driven through the creek crossing within the last fifteen years, the sporadic use described by residents is not sufficient to establish that the creek crossing was a public road. *Cole v. Gilvin*, Ky.App., 59 S.W.3d 468, 475 (2001).

Blankenship v. Acton
159 S.W.3d 330
Ky.App.,2004.

This case is from Pulaski County and holds that a public road that is not a state or county road may be abandoned without any formal government action. However, the court went on to hold that an individual may maintain a private right to use the road without the general public being afforded the same right.

After the construction of Kentucky Highway 39 in 1931, remnants of the Crab Orchard Road became known as the "old Crab Orchard Road." The parties agree that the Somerset and Crab Orchard Road was a public thoroughfare, and that prior to 1931, it was recognized to be the main highway between Somerset in Pulaski County and Crab Orchard in Lincoln County. However, there was no evidence that it was ever officially adopted or maintained by Pulaski County as a county road, nor was there any evidence that the original road was maintained by the state.

The dispute between the parties arises over the use of a remnant of the old Crab Orchard Road which was bypassed by Kentucky Highway 39. Blankenship and the Actons each own tracts which adjoin a remnant of the old Crab Orchard Road on opposite sides.

The court held:

Prior to 1914 it was recognized that an "acceptance" by the county could be accomplished informally, e. g., by maintenance of the road at county expense. *Riley v. Buchanan*, 116 Ky. 625, 76 S.W. 527, 528, 25 Ky.Law Rep. 863, 63 LRA 642, 3 Ann.Cas. 788 (1903). Since the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road. *Rose v. Nolen*, 166 Ky. 336, 179 S.W. 229, 230 (1915); *Illinois Central Railroad Co. v. Hopkins County*, Ky., 369 S.W.2d 116, 118 (1963). Otherwise, though a road may be "public," it is not necessarily a "county road."

The trial court relied on KRS 178.020, 178.025, 178.050 and 178.070 to conclude that formal governmental action is necessary to discontinue a public road. However, KRS 178.020, 178.050 and 178.070 address the establishment or discontinuance of county roads. KRS 178.025 addresses only the establishment of public road, not its discontinuance. Thus, these statutes are not applicable to this case.

Roberie v. Vonbokern
Not Reported in S.W.3d, 2003 WL 22976126
Ky.App.,2003.

This case is from the Owen Circuit Court.

In May 1996, the Goderwises subdivided their Owen County property, and sold a portion consisting of approximately thirty-five acres and a house to the Roberies. The boundary between the Roberie and Goderwis properties is demarcated by an unimproved dirt road (hereinafter referred to as it was in the

trial proceedings as the "Roberie road").

Conflict started between the neighbors when Roberie noticed VonBokern taking measurements of the road. He ordered VonBokern to leave his property and used threatening language; VonBokern consequently called the state police although no citations were issued.

Owen County refused to take a position in the dispute, stating that the roadway was not a county road and that the county had no intention of maintaining it.

The Roberies' first claim is that the underlying cause of action in this lawsuit was invalid because it was an attempt by the VonBokerns to quiet title in a third party, namely Owen County. The Court of Appeals disagreed and, rather than calling the action one of quieting title, the court referred to it as a declaratory judgment case.

The jury found that the County purchased the road in question in 1897. There was ample evidence in the record for a reasonable jury to make such a finding. The court further held that it was reluctant to extend the doctrine of abandonment, which is generally applied to roads that became public roads through prescriptive public use, to a road which was purchased with tax proceeds.

The court held:

As the owner of the road, the County could not abandon the road simply through its refusal to acknowledge ownership or its failure to perform maintenance. Furthermore, under the current statute governing county roads, a county wishing to discontinue a road must go through a formal procedure of notice and advertisement. *See* KRS 178.050.

Hudson v. Ayars
Not Reported in S.W.3d, 2003 WL 1225900
Ky.App.,2003.

This case is from the Trimble Circuit Court.

Chester D. Hudson and Brenda Hudson appeal from an opinion and order of the Trimble Circuit Court deciding that Jean S. Ayars retained a private right-of-way easement over an abandoned portion of a public road known as Perkinson Lane across property owned by the Hudsons for the purpose of reasonable ingress and egress.

The Court of Appeals reversed. In March, 2000, Ayars filed a petition seeking the unimpeded use of a certain roadway in Trimble County. The Roadway passed over the Hudson property. The trial court conducted a bench trial at which six witnesses testified as to the use of the road.

The trial court concluded that the asphalt portion of Perkinson Lane was a county road. The court also concluded "that Perkinson Lane as a county road does not extend beyond the end of the asphalt portion." However, there is no question that Perkinson Lane was not a "county road" because there was no legislative action by the fiscal court accepting the road as part of the county road system. *See generally* KRS Chapter 178; ***Sarver v. County of Allen,*** Ky ., 582 S.W.2d 40 (1979).

The trial court found that Perkinson Lane was a public road and that, even though it had been abandoned by nonuse, the abutting landowners still retained a private easement over the roadway for reasonable ingress and egress. *See Hylton v. Belcher,* Ky., 290 S.W.2d 475, 477 (1956). The Hudsons

contend the trial court erred in finding that Perkinson Lane was a public road.

Ultimately, the Court of Appeals held that Ayars failed to prove sufficient evidence in order to sustain the claim of public use.

Further, the court held that the Hudsons adversely possessed that portion of the Perkinson Lane roadway on their property since 1979, a period in excess of 15 years. They gave notice of their adverse possession by preventing others, including the Hortons and Ayars (and her former husband), from using the roadway without their permission. Ayars admitted that she asked Chester Hudson for permission to cross his property whenever he was present. There were two gates across the roadway at the Hudsons' property lines that they periodically kept closed. Chester Hudson also plowed and planted crops on a portion of the roadbed and placed other obstacles on it. The trial court erred by failing to recognize that even if Perkinson Lane had been a public road and Ayars had retained a private easement upon abandonment by the public, her right-of-way easement was extinguished or lost due to adverse possession of the easement by the Hudsons for the requisite time period.

Cole v. Gilvin
59 S.W.3d 468
Ky.App.,2001.

This case is from the Todd Circuit Court.

Nelson Cole and his wife, Marilyn, have appealed from a final judgment of the Todd Circuit Court entered on June 12, 2000, which held that they have no legal right of way to their realty over a passway or roadway on the property owned by the Gilvins. Having concluded that the trial court properly found that the Coles had no easement and the passway was not a public road, the Court of Appeals affirmed.

The trial court thoroughly analyzed the three legal theories relied upon by the Coles: public passway, easement by prescription, and quasi-easement or easement by implication. After discussing the history of the two tracts and the disputed passway, the trial court held that none of the three legal theories supported the Coles' claim to a right of access over the Gilvins' property.

The trial court stated that although there was some evidence of public use of the passway, the evidence was too weak to make an affirmative finding that the passway qualified as a public road. It noted that there was no indication on any map that the passway was a public road.

The evidence of public use consisted of testimony from a few witnesses for the Coles that the passway had been used by the general public for access to Whipplewill Creek and surrounding property for hunting and fishing. The Court of Appeals held that the trial court was not clearly erroneous in finding that the Coles had failed to establish that the use of the disputed passway was of sufficient nature or frequency to justify establishing it as a public road.

The road was virtually unused from the 1940s through the 1970s. The court held that the conclusions of some witnesses that the road was "public" are based upon their seeing others and assuming that they did not have permission. In reaching their conclusions they may not have considered the family relationship of the owners of the tracts and the lack of any legitimate destinations along the road which might benefit the "public." The road led nowhere except to Marion Wells' field.

Trimble Fiscal Court v. Snyder
866 S.W.2d 124
Ky.App.,1993.

This case is from the Trimble Circuit Court.

The Snyders petitioned the Trimble Fiscal Court to close a road. The Trimble Fiscal Court declined to do so. An appeal to the Circuit Court ensued.

Here the local legislative body – the fiscal court – was not acting in a policy-making or law-making role, ··· it rather was acting in an adjudicatory fashion to determine whether a particular individual by reason of particular facts peculiar to his property was entitled to some form of relief. Therefore, procedural due process requires at least that the local legislative body in rezoning matters act on the basis of a record and on the basis of substantial evidence.

The Court of Appeals indicated the difference in the fiscal court's role as a law making body, as opposed to its role as an adjudicator of facts. In a law making capacity, the fiscal court may not be "arbitrary", but it is free to make a decision as it sees fit under the circumstances. As an adjudicatory body, the basic precepts of due process must be afforded. The Trimble Fiscal Court was acting in an adjudicatory capacity, since it was deciding whether the Snyders' peculiar factual situation entitles them to relief from the presence of the county road on their property. As a result, the Trimble Fiscal Court was required to meet the basic requirements of due process, and judicial review is limited to determining whether the decision not to close the road was arbitrary, including whether there was substantial evidence to support the decision.

Since the circuit court failed to undertake the proper review, the Court of Appeals remanded the matter. In making the review, the circuit court is limited to the record before the Trimble Fiscal Court, such as it is. If that record does not meet the substantial evidence test, as well as being in compliance with all statutory requirements regarding road closings, then the Trimble Fiscal Court should be reversed.

Watson v. Crittenden County Fiscal Court
771 S.W.2d 47
Ky.App.,1989.

This case is from the Crittenden Circuit Court.

The road in question was never formally dedicated, but was adopted as part of the county road system upon the premise that it was already a "public road," having been dedicated to public use by prescription.

James F. Watson filed suit challenging the action of the fiscal court. Watson maintained there was a genuine issue of fact as to whether the road became a public road by prescriptive use. He insisted that summary judgment was improper. The Court of Appeals agreed.

The court held that a public road may be acquired by prescription only upon (1) fifteen years public use and (2) a like number of years of control and maintenance by the government.

On remand, the jury was to be directed to determine the existence or nonexistence of facts requisite for prescription-namely, public use and county control (i.e., maintenance) for a period of fifteen years. If the jury were to find public use and county control for that period, then Watson's complaint should be dismissed, as the fiscal court was free to take the road into the county system.

Sarver v. Allen County, By and Through Its Fiscal Court
582 S.W.2d 40
Ky., 1979.

This case is from the Allen Circuit Court. As this case is the leading case for essentially all county road issues in the Commonwealth of Kentucky, the full text of the decision is being provided.

PALMORE, Chief Justice.
This dispute concerns the status, private vis-a-vis public, of an old road or passway in Allen County. The real parties in interest are neighboring landowners, but through the device of a KRS Chapter 178 proceeding to establish the disputed passway as a "county road" the county has been drawn into the position of acting as surrogate for one of them.

The facts of the case should be approached with a clear understanding of the distinction between a "county road" and a "public road."

According to KRS 178.010, " 'County roads' are public roads which have been accepted by the fiscal court of the county as a part of the county road system". Prior to 1914 it was recognized that an "acceptance" by the county could be accomplished informally, e. g., by maintenance of the road at county expense. Riley v. Buchanan, 116 Ky. 625, 76 S.W. 527, 528, 25 Ky.Law Rep. 863, 63 LRA 642, 3 Ann.Cas. 788 (1903). Since the enactment of Ch. 80, Acts of 1914, however, a formal order of the fiscal court has been necessary to establish a county road. Rose v. Nolen, 166 Ky. 336, 179 S.W. 229, 230 (1915); Illinois Central Railroad Co. v. Hopkins County, Ky., 369 S.W.2d 116, 118 (1963). Otherwise, though a road may be "public," it is not necessarily a "county road." Ibid. The obvious reason for this particular distinction is, of course, a public policy against holding counties responsible for the upkeep of any and all highways and biways that chance to become "public" through processes of dedication or prescription over which the counties have no choice or control.

As KRS 178.010(b) necessarily implies, most "county roads" were "public roads" before they were accepted as county roads, but it is not necessary that this be so, because a county is statutorily empowered to lay out and establish a county road before acquiring the necessary right-of-way from the owners of the property over which it will be opened. Cf. KRS 178.080.

This litigation originated in an order adopted by the Allen Fiscal Court on August 16, 1976, formally accepting as a part of the county road system "that certain roadway leading from the Macedonia Ridge Road (Ky. Highway No. 1147) in a Northerly direction by the real property owned by Osco Sarver, Randall Harper, and Joe K. Meador (formerly Audrey Lyles) to the Osco Sarver farm."

The strip in question runs northward several hundred feet from an elbow in Kentucky 1147, turning left, or westward, for a short distance to a sassafras tree. Many years ago it was a wagon road and continued on through to the village or community of Petroleum, but not within the past 20 years or so. In modern times it has been used only to reach the Wyatt Sarver farm, where it now ends, and the R. M. Lyles farm, which adjoins the east boundary of the Wyatt Sarver place and corners on the disputed passway at the point where it turns westward into the Wyatt Sarver tract.

Wyatt Sarver was the father of Osco Sarver, who now owns the Wyatt Sarver farm. Osco Sarver also owns the land situated between the Wyatt Sarver tract and Highway 1147 as it extends westwardly from the mouth of the disputed roadway, which runs on or along Osco Sarver's east boundary. The property on the west side of this roadway, adjoining the Lyles tract on the north and extending southward beyond the elbow of Ky. 1147, is owned by Randall Harper.

The Lyles tract is now owned by Joe Meador, but in the interest of clarity we shall call it the Lyles tract

and shall likewise refer to the north part of the Sarver tract in which the passway ends as the Wyatt Sarver tract.

In 1958 Wyatt Sarver and his wife resided in a house near the end of the passway. Evidently the old lane leading to Highway 1147 had deteriorated to the extent that it was not passable for vehicular traffic, so Osco Sarver approached the county judge for help, in order that his father's and mother's home might be accessible in the event of necessity. The county thereupon ditched, widened, graded and gravelled the passway at Osco's expense. Later, in October of the same year, the fiscal court voted to accept it as part of the county road system if the adjoining landowners executed right-of-way deeds. Admittedly, however, no such deeds ever were executed. In 1959 Osco Sarver's mother died and he moved his father into his own home, which is located on Highway 1147. The Wyatt Sarver residence has been unoccupied since that time.

Meanwhile, the roadway had been used intermittently by occupants of the Lyles tract. Audrey Lyles, who was born on the place, left it in 1930 or 1931 and sold it to Joe Meador in 1974. Osco Sarver lived in the Lyles house as a renter for some years until 1956, after which a family named Carter occupied it for five or six years during the 60's, but since that time it has been uninhabitable and, perforce, uninhabited.

The legal status of the old road first became a matter of real significance shortly after Joe Meador bought the Lyles place in 1974. Although the evidence on the point falls somewhere between scant and nonexistent, it may be inferred that this passway would be the only means access to the Lyles tract. It may be, of course, that there is a private easement for the benefit of the Lyles place, but that question does not fall within the purview of this litigation. In any event, it was Meador who instigated the 1976 action by the fiscal court.

As explained earlier in this opinion, it is not necessary to the establishment of a proposed county road that it be an existing public road or, indeed, that it be an existing road or passway of any kind. Hence a fiscal court order establishing a county road would not necessarily be erroneous on the ground that the designated roadway had not heretofore attained the status of a public road. In this instance, however, it is manifest from the content of the fiscal court's preliminary order of August 10, 1976, and final order of August 16, 1976, that its action was premised upon a finding that the passway in question already had the legal status of a "public road" and that there was no intention on the part of the county either to acquire or to perfect title to the right-of-way. So, too, the case has been practiced on the issue of whether, at the time the fiscal court accepted it as a county road, it was already a public road. For that reason our review of the record is directed to that issue.

For purposes of the discussion, we need not question whether the disputed way was at one time a public road. When it was open and passable all the way through to Petroleum, we shall assume (but without deciding, of course) that it was a public road. The real issue, then, is what does the evidence prove, or not prove, with respect to its abandonment?

A public road that is not a "county road" can be abandoned without formal action. Williams v. Woodward, Ky., 240 S.W.2d 94, 95 (1951); Sowards v. Commonwealth, 297 Ky. 613, 180 S.W.2d 545, 546 (1944); Phillips v. Lawrence, 23 Ky.Law Rep. 824, 64 S.W. 411 (1901). When the public has acquired the free use of a roadway by user, as appears to be the case with respect to this old shortcut, it may abandon that right by a long period of nonuser. In Phillips v. Lawrence, 23 Ky.Law Rep. 824, 64 S.W. 411 (1901), although a road had been created by formal action of the fiscal court, its abandonment was established by proof of absolute nonuser for 33 years, during which time the road had become impassable to vehicular traffic and the travelling public had used other and better public roads in the neighborhood. Considering that a public user ordinarily ripens into a prescriptive easement in 15 years, cf. Cummings v. Fleming County Sportsmen's Club, Inc., Ky., 477 S.W.2d 163, 167 (1972), it would seem reasonable to apply the same criterion to a reversal of the process that is, an abandonment through nonuse by the general public.

The evidence leaves no room for doubt that for over thirty years, and probably longer than that, prior to the fiscal court order in this case there had been no travel whatever on the disputed passway except for the purpose of access to the old Lyles and Wyatt Sarver houses, and except for some amount of grading work done by county employes from time to time after Osco Sarver had asked for help in 1958. In short, for thirty years or more the road has had no purpose for which it could have been put to a legitimate use by the public. Cf. Cummings v. Fleming County Sportsmen's Club, Inc., Ky., 477 S.W.2d 163, 165 (1972). Its only possible use was to serve the private convenience of the owners or occupants of the Lyles and Wyatt Sarver tracts. Cf. Marrs v. Ratliff, 278 Ky. 164, 128 S.W.2d 604 (1939). As the acts of county officials in improving or maintaining a road, standing alone, do not constitute a public user capable of ripening into a prescriptive title, cf. 477 S.W.2d 167, by parity of reasoning neither can they alone amount to such a continued public user as will negate a public abandonment.

The characterization of the passway in question by some of the witnesses as a "public road" reflects a conclusion rather than a fact, and cannot be accorded any effect beyond the probative weight of the facts from which it was derived. Those facts do not reasonably support a finding that at the time of the fiscal court's order of August 16, 1976, this disputed passway was a public road, and for that reason we are of the opinion that the trial court's finding to that effect was clearly erroneous.

Two points mentioned in the opinion of the Court of Appeals affirming the judgment of the trial court require clarification. The first, upon which the county has placed reliance in its arguments to this court, is that Osco Sarver did not prove his title to the land in question. The answer, we think, is that his title is not involved. Whether the alleged road is on his property or merely borders it, under KRS 178.115(2) he was an aggrieved party and had standing to contest the fiscal court's order through an action in the circuit court. The contest goes only to the validity or propriety of the order.

The other point is the suggestion that because the fiscal order had been subjected to a review in the circuit court, its further review by the Court of Appeals was a matter of discretion rather than a matter of right. In this sense, however, a statutory "appeal" to the circuit court from any agency or tribunal other than the district court is an original action and not an "appeal." Cf. KRS 23A.010(4). Though not effective until January 2, 1978, this statute reflects a proper construction of the term within the meaning of Const. Sec. 115(a) and the rules promulgated by this court.

The decision of the Court of Appeals is reversed with directions that the cause be remanded to the trial court for entry of a new judgment setting aside the order of the Allen Fiscal Court entered on August 16, 1976.