

**Note from the Attorney General's Office:**

1946 Op. Att'y Gen. No. 46-942 was overruled in part by 2001 Op. Att'y Gen. No. 2001-003.

942

1. TREES STANDING WITHIN LIMITS OF TOWNSHIP ROAD—TOWNSHIP TRUSTEES—PERFORMANCE OF DUTIES TO MAINTAIN AND KEEP IN GOOD REPAIR TOWNSHIP ROADS—MAY REMOVE SUCH TREES IF THEY IMPEDE THE FLOW OF TRAFFIC OVER ROAD.
2. AFTER TREES REMOVED FROM ROAD, THEY CONTINUE TO BE PROPERTY OF ABUTTING LANDOWNER.

## SYLLABUS:

1. Township trustees, in the performance of their duty to maintain and keep in good repair township roads, may remove trees standing within the limits of a township road if such trees impede the flow of traffic over the road.

2. After the trees are removed from the road they are, as they were before, the property of the abutting landowner.

Columbus, Ohio, May 15, 1946

Hon. Richard E. Hole, Prosecuting Attorney  
Greenville, Ohio

Dear Sir:

Your request for my opinion reads:

“The Trustees of Wayne Township, Darke County, Ohio, have requested me to write your office for an opinion concerning the ownership of trees removed from the right-of-way of a township road.

I have examined several sections of the Code and some of the Ohio cases, but have not been able to satisfy myself as to the exact point in question. It seems well established that Township Trustees have the right to remove trees, if such trees impede the flow of traffic over the highway. I refer you to Section 7210 of the General Code, 21 O. S. 248, 112 O. S. 385, 127 O. S. 1, and 129 O. S. 505.

In the instant case, however, the Township Trustees, after removing the trees, desire to make use of them in building a township garage. In view of the above cited cases, there is considerable doubt in my mind whether such trees would be the property of the Township Trustees or of the abutting landowner.”

The public highways of our state are classified and defined by Section 7464, General Code, which provides as follows:

“The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act.”

Section 7467, General Code, provides as follows:

“The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto.”

Section 3370, General Code, reads in part as follows:

“The township trustees shall have control of the township roads of their township and shall keep the same in good repair.  
\* \* \*”

The above quoted sections of the General Code indicate clearly that it is the positive duty of township trustees to maintain and keep in good repair the township roads within their township. The presence on a road

of trees which interfere with travel over the road renders that road in a state of disrepair and requires the township trustees, in order fully to perform their duty, to remove the trees from the road. The right to remove the trees, though not expressly granted by statute, arises by necessary implication from the statutory direction to maintain and keep in good repair the township roads. *State, ex rel. Hunt v. Hildebrant*, 93 O. S. 1, 112 N. E. 138, affirmed in 241 U. S. 565, 60 L. Ed. 1172, 30 S. Ct. 708; *State, ex rel. Copeland v. State Medical Bd.*, 107 O. S. 20, 140 N. E. 660.

This right, however, does not carry with it the privilege of exercising dominion over the trees to the exclusion of the owner of the land upon which the trees are growing. It is well settled in this state that the fee to the county highway is in the abutting owner. *Ohio Bell Telephone Co. v. The Watson Co.*, 112 O. S. 385, 147 N. E. 907; *Phifer v. Cox*, 21 O. S. 248. Growing trees are an integral part of the land upon which they stand and are a part of the realty. *Hirth v. Graham*, 50 O. S. 57, 33 N. E. 90; *Clark v. Guest*, 54 O. S. 298, 43 N. E. 862; *Walcutt v. Treisch*, 82 O. S. 263, 92 N. E. 423. The owner of land abutting on a highway possesses in a tree which stands within the limits of the highway, as he holds in the land itself, a right of property for every purpose not incompatible with the public right of way. *Phifer v. Cox*, *supra*. By the establishment of the road the public acquired a mere easement—a right of way with the powers and privileges incident to that right. *Phifer v. Cox*, *supra*.

The right of the township trustees to cut down a tree standing within the limits of a township road when the presence of the tree constitutes a hindrance to travelers on the road is not a property right in the tree. It is only a power which is incident to the easement of the public, and must be exercised by the township trustees with due regard for the rights of the abutting landowner who is the owner of the tree.

After the township trustees have proceeded to cut down and remove trees from a road, such trees are no longer an obstruction to traffic. They cease, therefore, to be subject to the public right. They are, as they were before they were cut down, the property of the owner of the fee in the land upon which they stood. 9 A. L. R. 1269. For the township trustees to take the trees and to make use of them in building a township garage,

without compensating the abutting landowner, would constitute a violation of fundamental rights. Constitution of Ohio, Article I; Section 19.

In answer to your inquiry, therefore, it is my opinion that:

1. Township trustees, in the performance of their duty to maintain and keep in good repair township roads, may remove trees standing within the limits of a township road if such trees impede the flow of traffic over the road.

2. After the trees are removed from the road they are, as they were before, the property of the abutting landowner.

Respectfully

HUGH S. JENKINS  
Attorney General