

1215.

COUNTY RECORDER—RECORDING FEES FOR FILING RIGHT OF WAY DEEDS BY A STATE DEPARTMENT OR COUNTY COMMISSIONERS.

SYLLABUS:

1. *When right of way deeds are executed and delivered to the state and are filed with a county recorder by a state department for recording, as provided for in Section 267, General Code, it is the duty of such department to pay to the county recorder the proper recording fees.*

2. *When right of way deeds are executed and are delivered to the state and are filed by the Board of County Commissioners, as provided for in Section 267, General Code, it is the duty of such Board to pay to the county recorder the proper recording fees.*

COLUMBUS, OHIO, October 31, 1927.

HON. C. O. TURNER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent communication requesting my opinion upon the following:

“The county recorder requested me to write you a few lines asking whether or not when the State of Ohio filed a deed for right of way made out to the state the state would have to pay this fee, and if not and the recorder filed the same whether or not the recorder would have to pay the fee for the filing.”

Your question involves a consideration of Sections 267 and 2778 of the General Code. These sections read as follows:

“Sec. 267. The evidence of title of lands other than public lands, belonging to or hereafter acquired by the state, shall be recorded in the office of the recorder of the counties in which they are situated, and when so recorded such evidence of title shall be deposited with the auditor of state and kept in his office. He shall make an abstract of the title of all lands acquired by the state in a book prepared for that purpose and open for inspection by all persons interested.”

“Sec. 2778. For the services hereinafter specified, the recorder shall charge and collect the fees provided in this and the next following section. For recording mortgage, deed of conveyance, power of attorney or other instrument of writing, twelve cents for each hundred words actually written, typewritten or printed on the records and for indexing it, five cents for each grantor and each grantee therein; for certifying copy from the record, twelve cents for each hundred words.

The fees in this section provided shall be paid upon the presentation of the respective instruments for record upon the application for any certified copy of the record.”

In Opinion No. 90, issued by this department under date of February 18, 1927, it was held, *inter alia*,

“1. When the department of highways and public works purchases lands for the purpose of locating or relocating a highway, it is not necessary

for the department to acquire a fee simple title thereto; a perpetual easement in the public for a right of way for road and highway purposes is sufficient.

* * * * *

4. Section 276 of the General Code, requiring *all* evidence of title of land other than public lands acquired by the state to be deposited with the state auditor and kept in his office, applies to any evidence of title to lands acquired by the department of highways and public works for highway purposes."

It is mandatory on the part of the state to record right of way deeds or easements in the proper county recorder's office, and the question is presented as to whether or not the state is required to pay the filing fees for said recording as is provided for in Section 2778, *supra*.

Section 2778, *supra*, is a general statute and it is a well settled rule of statutory construction "that the general words of a statute do not include the state or affect her rights unless she be specially named, or it be clear and indisputable from the act that it was intended to include the state." (Sedgwick on Statutory Construction, page 337.) Again it is said "a government, making laws for its subjects, will not be presumed to be binding itself by them, unless this intent affirmatively appears." (Bishop on Written Laws, Par. 102.)

The above rule of statutory construction would be determinative of the instant question were it not subject to certain exceptions. One well established exception is "the *usage* of the departments and officers of the government under a statute within their special cognizance, especially when long, and uniformly acquiesced in, has almost controlling force with the courts." (Bishop on Written Laws, Par. 104.)

It has long been the policy of the courts in construing old statutes, that contemporaneous construction, as evidenced by usage, will not be departed from without most cogent reasons. If the construction is doubtful, usage will control. See *Chestnut vs. Shane's Lessee*, 16 Ohio, 599, 607.

As was said by Chief Justice Nichols in *Industrial Commission vs. Brown*, 92 O. S. 309 on page 311:

"Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do."

Statutes similar to Section 2778, *supra*, providing for fees to be paid to county recorders upon the filing of deeds have been on the statute books of Ohio for over seventy-five years. Prior to the enactment of the salary law (98 v 89), these and other fees constituted the sole compensation of county recorders. During that period under the fee system county recorders were paid only for work actually done and they were paid for work done for the state as well as for other work. It is unnecessary to consider the reasons why county recorders under the fee system were entitled to be paid for work done for the state. Suffice it to say, subsequent to the enactment of the salary law the practice has continued.

Upon investigation I find that it has been the uniform practice for county recorders to charge the state the prescribed recording fees and it has been the custom for the state to pay the same. For example, the Department of Highways and Public Works has a fund out of which it pays for the recording of right of way deeds which it acquires for the state.

When, however, the right of way is acquired by the Board of County Commissioners, said board should pay the necessary recording fees, this being in compliance with Opinion No. 996, issued by this department under date of September 14, 1927, the first paragraph of the syllabus reading:

"It is the duty of a Board of County Commissioners to provide the necessary right of way when a road is being constructed or improved, under the provisions of Section 1191, et seq., General Code, and such Board of County Commissioners may pay for such right of way out of the money received from taxes levied, under the provisions of Section 1222, General Code, or out of the proceeds of bonds issued, in anticipation of the collection of such taxes, as provided in Section 1223, General Code."

In view of the foregoing and specifically answering your question, it is my opinion that:

1. When right of way deeds are executed and delivered to the state and are filed with a county recorder by a state department for recording, as provided in Section 267, General Code, it is the duty of such department to pay to the county recorder the proper recording fees.

2. When right of way deeds are executed and are delivered to the state and are filed by the Board of County Commissioners for recording, as provided in Section 267, General Code, it is the duty of such board to pay to the county recorder the proper recording fees.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1216.

COUNTY COMMISSIONERS—AUTHORITY TO CLEAN DITCHES RUNNING THROUGH FARM OWNED BY COUNTY.

SYLLABUS:

A board of county commissioners which has been petitioned for the cleaning out of a ditch is not disqualified to act in the premises merely because the course of such ditch runs through a farm owned by the county.

COLUMBUS, OHIO, October 31, 1927.

HON. ALBERT E. STROUP, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of October 6th, which reads as follows:

"Where County Commissioners have been petitioned for a clean-out of a ditch and the ditch runs through a farm owned by the County (farm on which County Home is located) can the County Commissioners act in the proceedings in their office regarding said ditch, or must the Common Pleas Judge appoint others as acting Commissioners to act in their stead."

Your attention is directed to Sections 6501 and 6508, General Code, which, so far as pertinent to your inquiry, provide: