

1232.

## HIGHWAY—WIDTH AND TITLE DISCUSSED.

## SYLLABUS:

*Question of width and title to certain county roads considered and discussed.*

COLUMBUS, OHIO, November 2, 1927.

HON. J. CARL MARSHALL, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

"I am writing this letter at the request of the county commissioners after a suggestion of Mr. Schlesinger, State Highway Director, who incidentally called at the commissioner's office in Xenia yesterday.

The county commissioners in co-operation with the state highway department contemplate the construction of a road leading from Old Town to the village of Osborn, Greene County, Ohio. In building a road under this plan, the county commissioners must furnish a right-of-way 60 feet wide and it seems that to do so the county will have to purchase several feet on either side of the road as the road at the present time varies from 30 to 50 feet in width.

The amount of the compensation and damages asked by the abutting property owners is prohibitive and it is the judgment of the county commissioners that the amount the county will be required to pay if they secure the right-of-way by condemnation proceedings, will also be prohibitive. Therefore, the county will very likely be compelled to abandon the project unless we can show the road was 60 feet wide at the time it was received by the county.

I have found that the county did purchase the Xenia and Fairfield Turnpike Toll Road from the Xenia and Fairfield Turnpike Company in 1882, but the deed to the commissioners of the county is absolutely silent in regard to the width of the road.

I have also found that the legislature passed an Act in 1847 authorizing the incorporation of the Xenia and Fairfield Turnpike Company, which is also silent in regard to the width of the road.

I also find that there was an Act by the legislature in 1817 providing for the regulation of Turnpike Companies. The Act provided that 'all turnpike roads shall be opened not to exceed 60 feet wide, 33 feet of which shall be cleared and at least 18 feet shall be made artificial road, etc.' Also I found that the legislature passed an Act in February, 1824, in which it was provided that all county roads shall be 60 feet wide.

I have been advised by the Secretary of State that the files there do not disclose anything in regard to the Xenia and Fairfield Turnpike Company.

I have been unable to find anything in the Greene County recorder's office bearing on the subject save the deed from the company to the county, neither have I been able to find any condemnation proceedings on the part of the Turnpike Company at the time the road was established by the company.

I am furnishing you this information hoping it may assist you in advising the county commissioners and the State Highway Department in regard to this matter."

The situation arising in your county relative to establishing the boundaries of an old road in order to widen the same is not unlike that which exists in many counties. In many instances there are no existing available records, fixing the boundaries of land originally acquired for road purposes. Before the advent of automobiles, the traveled portion or improved portion of many roads was not more than from twelve to eighteen feet in width. As time went on, parts of the lands originally conveyed to the public for road purposes were farmed, fences were extended into the right of way and the owners of land abutting upon the highway, in many instances, occupied part of the highway for agricultural purposes.

In your communication you mention several legislative acts, among which is an act passed by the General Assembly on January 7, 1817, entitled "An act to provide for the regulation of turnpike companies," (15 v. 39).

Section 9 of this act reads as follows :

"That all turnpike roads shall be opened not exceeding sixty-six feet wide, thirty-three feet of which shall be cleared from brush & logs & at least eighteen feet shall be made an artificial road composed of stone, gravel, wood or other convenient materials well compacted together in such manner as to secure a firm, even & substantial road, rising in the middle with a gradual arch, & in no case shall the ascent in any such turnpike road be greater than five degrees."

It is manifest that this act throws no light upon the question submitted, for by its very terms it does no more than provide that "all turnpike roads shall be opened *not exceeding sixty-six feet wide.*" Even if it were to be assumed that the above act is to be considered as evidence in determining the title to highway involved, it would only show authority to acquire and establish a highway at a width *not in excess of sixty-six feet.*

The act of 1824 to which you refer was passed on February 11, 1824 (22 v. 305), and was entitled "An act for opening and regulating roads and highways." Section 1 thereof read as follows :

"That all roads and highways which have been or may hereafter be laid out and established agreeably to law, within this state, shall be opened and kept in repair in the manner hereinafter provided, and all county and township roads, shall hereafter be laid out and established agreeably to the provisions of this act, and all county roads shall be sixty feet wide, and township roads not exceeding forty feet wide."

While the above section provides that "all county roads shall be sixty feet wide," it does not necessarily follow that in laying out or establishing a county road, the county commissioners acquired title to the land necessary for a road of the prescribed width.

You state in your letter that Greene County purchased the Xenia and Fairfield Turnpike Toll Road in 1882 and it is entirely probable that the commissioners acquired title to the roadway of the Turnpike Company only, at whatever width such road had been established.

It has been the experience of the Department of Highways, that, in those instances, where the widening of a road is under contemplation and the state or county is unable to establish the actual boundaries of an old road, either by record evidence or by the testimony of old residents, the land adjoining the berme and ditches of the used portion of the road either belongs to the owner of the property abutting

upon said improvement, or the abutting owner being in possession at least has a better claim than the state or county can establish.

In this connection your attention is invited to the fact that where there is a dispute between the abutting owner and the state or county as to the boundaries of the highway, information may at times be obtained as to the actual amount of land owned by the owner of property abutting upon the improvement by looking to the evidence of title of the abutting owners. If his deed contains a description by metes and bounds and the monuments mentioned in said description are still in existence, the exact boundaries of his land may be determined and the boundaries of the roadway thus established.

It is well settled that the right of prescription or adverse user does not run against the state or county. As stated in the case of *Heddleston vs. Hendrix*, 52 O. S. 460:

“The general rule of law is that the statute of limitations does not apply as a bar to the rights of the public unless expressly named in the statute.”

See also *Haynes vs. Jones*, 91 O. S. 197, in which it was held that:

“No adverse occupation or user of land belonging to the state can divest its title,”

and the cases cited in *Commissioners vs. Railway*, 12 O. N. P. (N. S.) 129.

The facts set forth in your letter are too meager to enable this department to pass on the title to the road referred to in your letter.

The most that can be said is that, I cannot see that the sections of the two acts above quoted are of any value in attempting to establish the width of the road or the county's title thereto.

If the county can establish that it at one time acquired title to a sixty foot right of way, since an abutting owner can not acquire title by adverse possession, the possession and use of a part of the right of way by such owner would be of no avail to him. On the other hand, if the county cannot establish that it at one time acquired title to a sixty foot roadway, if the abutting owner has possession, such owner would probably prevail in a court action, under that principle of law stated in 32 Cyc. 677, in the following language:

“Physical occupancy and legal possession of property are not necessarily identical, but although the presumption is a rebuttable one, possession is prima facie evidence of title to and ownership of either real or personal property and is good against any one but the true owner and so one in the actual possession of land although without title is entitled to retain possession thereof as against a stranger.”

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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APPROVAL, BONDS OF THE CITY OF NILES, TRUMBULL COUNTY,  
OHIO—\$26,715.00.

COLUMBUS, OHIO, November 2, 1927.

*Industrial Commission of Ohio, Columbus, Ohio.*