

1886.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS ARE NOT AUTHORIZED TO PURCHASE OR APPROPRIATE LAND FOR WIDENING OF INTER-COUNTY OR MAIN MARKET ROAD FROM FORTY TO FIFTY FEET.

Neither section 1201 G. C. nor sections 6860 to 6878 G. C. confer power on county commissioners to purchase or appropriate land for the widening of a section of inter-county highway or main market road from forty to fifty feet.

COLUMBUS, OHIO, March 2, 1921.

HON. FOSTER E. KING, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—You have recently submitted to this department for opinion the following:

“There is about to be constructed in Hardin county certain road work under the state highway department. The roadway is not wide enough and it is necessary to secure additional land to make this road the required width.

Can the commissioners charge to the cost of constructing the road the price paid for the land or must the same be taken out of some other fund? If not charged up to the road what fund should this money be taken from?”

In response to a request for additional information, you have submitted the following:

“In answering your first question I will state that the proposed widening is a continuous and substantial widening of the present right of way. The road in question is designated as an inter-county highway and the construction of this proposed improvement will be made with the assistance of both state and federal aid.

The present right of way is but forty feet and a fifty foot right of way is required.

Under this condition it is proposed to take five feet on each side of the proposed improvement. The fifty foot right of way is required by the federal government.

This proposed improvement is over what is known as the Lincoln Highway which runs in an easterly and westerly direction across the northern part of Hardin county.

In this connection I might call your attention to section 4 of regulation 5 of the Federal Aid Road Act of 1916, also section 1201 of the General Code which are the only sections that I have been able to find bearing on the matter of compensation.

From the above facts and from the facts set out in my former letter can the cost of this additional right of way be taxed to the county's share of constructing the road, or must this additional right of way be taken out of some other fund, and if so what fund should the same be taken from?”

Your question, of course, assumes that authority has been granted for the widening of the road in question in the manner described in your statement. Unless such authority in fact exists the matter of funds for payment of expense is of no moment.

You refer to section 1201 G. C. as the only statute which you have found bearing on the subject of compensation. That section is in the series relating to the state highway department, and reads in part:

“If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement, the county commissioners or township trustees making application for such improvement must provide the requisite right of way. If the board of county commissioners or township trustees are unable to agree with the owner or owners of such land or property as may be necessary for such change or alteration, or if additional right of way is required for the same, and the county commissioners or township trustees are unable to agree with the owner or owners of the land or property in question then the board of county commissioners or township trustees, as the case may be, may by resolution declare it necessary to condemn and appropriate for public use such land or property, and shall proceed to fix what they deem to be the value of such land or property sought to be condemned or appropriated, together with the damages to the residue, if any, and deposit the value thereof together with such damages with the probate court of the county for the use and benefit of such owner or owners, and thereupon the board of county commissioners or township trustees shall be authorized to take immediate possession of and enter upon said lands for the purpose aforesaid.

* * * * *

(Here follow provisions regarding notice to owner, of deposit of money, proof of service, appeal, etc.)

* * * * *

It shall be the duty of the state highway commissioner in the improvement of inter-county highways and main market roads to change the line of the existing highway whenever such change is practicable and whenever by making such change it is possible to eliminate dangerous curves, sharp angles or steep grades. * * *.”

You also refer to section 4 of regulation 5 respecting granting of federal aid. That section is part of a series of rules and regulations promulgated by the secretary of agriculture for the carrying out of the federal aid road act, and provides in substance that rights of way necessary for any project and incidental damages to adjoining property due to construction work shall be paid by or on behalf of the state and that the expense thereof shall not be included in any estimate paid directly or indirectly by the federal government.

Of course, it is plain that mere regulations issued under authority of the federal government are of no force in conferring authority on either state or local officers for acquiring right of way or paying damages to adjoining owners, the effect of such regulations being merely to throw the burden on the state or someone on its behalf to provide the right of way and pay the damages without charging any part of the cost to the federal government.

Recurring then to section 1201 G. C.: The authority conferred on county commissioners by such a statute as this must be measured by the ultimate power of appropriation. This is true because a mere grant of power to widen or alter the course of a road amounts to very little in actual practice unless accompanied by provisions authorizing appropriation of land in case the commissioners cannot the improvement “deviates” from the existing highway or a change is made in the widening or alteration. Furthermore, we must bear in mind that statutes granting

the right of appropriation are to be strictly construed in favor of the land owner and not extended by implication beyond their plain terms.

Railway vs. Daniels, 16 O. S. 390;
Platt vs. Railway Co. 43 O. S. 228;
Grant vs. Village of Hyde Park, 67 O. S, 166, 172;
Railway vs. South, 78 O. S. 10.

Examining section 1201 G. C. in the light of these principles the conclusion becomes inevitable that the statute is not broad enough in scope to permit of any such widening as you describe. You state that the proposed widening is continuous and substantial; in fact, it contemplates the extension of a section of road from its present width of forty feet to a width of fifty feet. Certainly such a widening does not upon the most liberal view come within the meaning of the word "deviates" as used in section 1201. That word as so used imports rather the idea of incidental changes in the line of the road. This view is fortified by reference to the fact that the last paragraph of section 1201 as it now reads was added by amendment in 108 O. L. 486, to the effect that it shall be the duty of the state highway commissioner to change the line of the improvement whenever by making such change it is possible to eliminate dangerous curves, sharp angles or steep grades. It is true enough that the word "additional right of way" are used in section 1201, but taken in their context these words plainly refer to the change or alteration mentioned in the first sentence of the section, namely, when the line of the improvement "deviates" from the existing highway or a change is made in the channel of a stream in the vicinity of the improvement.

It thus appearing that section 1201 does not confer power on your county commissioners to make the widening contemplated, it remains to be seen whether the provisions of sections 6860 et seq. may be resorted to. These sections relate particularly to the powers and duties of county commissioners in the matter of location, alteration and vacation of roads.

Section 6860 reads:

"The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."

Sections 6862 to 6878 provide for the procedural steps to be taken in the matter of location, establishment, alteration, widening, etc., of roads. The last sentence of section 6862 reads:

"The word 'improvement' used in sections 6862 to 6878 inclusive of the General Code signifies any location, establishment, alteration, widening, straightening, vacation or change in the direction of a public road, or part thereof, as requested in a petition filed under the authority of such sections, or determined upon by a board of county commissioners or joint board by resolution adopted by unanimous vote."

Section 6878 reads:

"The commissioners of any county or any joint board of commissioners of two or more counties, at a meeting had for that purpose, may by resolution declare by unanimous vote their intention to locate, establish, alter, widen, straighten, vacate or change the direction of any road,

and such notice shall thereupon be given as is provided for upon the filing of a petition for such improvement and like proceedings shall be had by such commissioners or joint board thereof as in the case of the filing of a petition before them asking for such improvement."

In an earlier opinion of this department found in Opinions of Attorney-General, 1916, Vol. II, p. 1239, it was held among other things, as shown by the first headnote:

"Neither section 1 of the Cass highway law, section 6860 G. C., nor section 19 of the act, section 6878 G. C. authorizes county commissioners to appropriate property for the sole purpose of widening a main market road."

This conclusion of my predecessor was clearly correct; for it is beyond question that the terms of section 6860 must be read into the entire series of sections down to and including section 6878 G. C. with the result that the authority conferred on the county commissioners by section 6862 et seq. does not extend to inter-county highways and main market roads.

In view of the foregoing considerations, in connection with the fact that no other statutes have been found having a bearing on the subject, it is the conclusion of this department that your county commissioners are without power to purchase or appropriate land for the proposed widening of the section of inter-county highway in question.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1887.

DOG REGISTRATION LAW—WHERE NO HUMANE SOCIETY IN COUNTY—WHEN IT IS DUTY OF COUNTY COMMISSIONERS TO TRANSFER MONEYS IN DOG AND KENNEL FUND TO COUNTY BOARD OF EDUCATION—BASIS OF COMPUTATION FOR SUCH TRANSFER SHOULD BE TOTAL AMOUNT OF FUND RATHER THAN YEARLY RECEIPTS.

1. *Under the provisions of the dog registration law, in a county in which there is not a humane society, it is the duty of the county commissioners, at their December session, to transfer any sum that remains in the dog and kennel fund in excess of one thousand dollars, after payment of the expenses of operation of the law as provided in section 5652-13 G. C. and the animal claims as provided in section 5653 G. C., to the county board of education.*

2. *The basis of computation for such transfer should be the total amount of the fund rather than the yearly receipts. "Such year" as used in section 5653 G. C. relates to the "fund" of such year rather than the receipts for such year.*

COLUMBUS, OHIO, March 2, 1921.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your recent communication is as follows:

"There is in the dog and kennel fund of Shelby county something over \$3,000, and the county board of education claims that it should receive all of this fund in excess of \$1,000. The county commissioners think that the board of education is entitled to what is left in excess of \$1,000 each year. See section 5653 G. C., 108 Ohio Laws, p. 537, which reads: