DETERMINING WIDTHS OF EXISTING RIGHTS-OF-WAY FOR COUNTY ROADS

By WILLIAM F. FRYE
Lane County District Attorney

FOREWORD

"How wide is our right-of-way?" This is a question which is frequently raised in Lane County, and, I would assume, in every county. It is vital to anyone who is concerned with the construction or improvement of county roads.

Any one of several factors may raise the question. It may be that no width was specified in the original establishment proceeding, or, it may be that the road was informally taken over by the county after it had been created by prescriptive use. Again, it may be that the road deviates from the boundaries originally established, or that the county built the road on the basis of defective establishment proceedings.

Even where the original right-of-way width is clear, a problem arises as to whether the county may have lost part of it through adverse possession, automatic vacation, or a rule of law called the "doctrine of equitable estoppel."

These are the problems that are dealt with in this paper. Many statutes and cases are discussed, and you will notice that instances where the law is not definite and clear. In these the citations and references are included mainly for the us of your own district attorney, for it is he who will have to apply such cases.

Primarily, however, I hope that this paper will itself provide a useful guide for you, who, day in and day out, must answer the question: "How wide is our right-of-way?"

WILLIAM F. FRYE
Lane County District Attorney

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I. DETERMINING ORIGINAL WIDTH OF COUNTY ROADS

A. Roads Established by County Court

1. Prior to June 6, 1931:

a. The statutory width of county roads prior to June 6, 1931 was prescribed as 60 feet, with the county court being empowered to determine a different width. Until 1889 the court had discretion only to establish a lesser width, but after 1889 the statutes allowed a maximum of 80 feet and a minimum of, at first 40 feet and, from 1915, 30 feet.

1.) In the Bush Code of 1855 at page 489 it is provided that "all county roads shall be sixty feet in width, unless the commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in point of width."

According to a footnote in the Deady Code of l854, at page 856, this statute probably took effect on January 27, 1854.

(2) This law was repealed and re-enacted in substantially the same form in Oregon Laws 1860, p. 36, section 10, changing only the term "commissioners" to "county court." This law took effect on January 17, 1861, according to the same footnote in the Deady Code referred to above.

(3) In Oregon Laws 1889, p. 87, section 2, the law was amended to read as follows:

> All county roads shall be sixty feet in width, unless the county court shall, upon the prayer of the petitioners for the same, determine on a different width, not less than forty feet nor more than eighty feet in width.

The effective date of this act, approved on February 25, 1889, would be 90 days from the adjournment of the 1889 session of the legislature, since the act carried no emergency clause.

(4) The 1889 law was repealed and re-enacted in the same form in Oregon Laws 1903, p. 262, section 16.

(5) In Oregon Laws 1915, ch. 263, p. 373, the law was amended to read as follows:

> All county roads shall be sixty feet in width, unless the County Court shall, upon the prayer of the petitioners for the same, determine upon a different width, not less than thirty feet nor more than eighty feet in width.

This act took effect on May 22, 19l5.

(6) This law was repealed and re-enacted in substantially the same form in Oregon Laws 1917, ch. 295, section 4, omitting the phrase "upon the prayer of the petitioners for the same." The reason for this change was that the general road law of 1917 provided for the establishment of county roads by resolution of the county court, as an alternative to the

petition system. The amendment became effective on May 21, 1917.

b. Under the law as it existed prior to June 6, 1931 there was no requirement that the width of a road be specified in the documents establishing it. Accordingly, the Oregon court has held that unless a width other than 60 feet was specified in the resolution initiating the road proceeding, the width is automatically 60 feet:

> "The law prescribes that all roads shall be sixty feet wide, unless otherwise ordered by the county court... This provision must be considered a part of the resolution unless a different width is specified therein. It would not confer a jurisdiction on the County Court to alter the road so as to establish any different width." Latourette v. Clackamas County, 121 Or. 323, 331 (1927).

2. Since June 6, 1931:

a. No general statutory width has been provided. It is required that the county court determine the width, subject to a minimum. It is also required that the proposed width be stated in most of the documents relating to the establishment of a county road.

(1) In Oregon Laws 1931, ch. 326, the former law was amended to read as follows:

> All county roads shall be of such width as the county court shall determine, which width shall not be less than thirty feet; provided, the proposed width shall be stated in all petitions, notices, orders or resolutions relating to any such county road.

This act took effect on June 6, 1931.

(2) The 1931 law was amended in Oregon Laws 1947, ch. 498, to read as follows:

> All county roads established after the effective date of this act shall be of such width as the county court shall determine, which width shall not be less than 50 feet; provided, that the county court shall have authority to accept any dedicated circular road or street of less than 30 feet in width and not exceeding one mile in length and maintain such road or street as a county road for one-way traffic only; provided, the proposed width shall be stated in all petitions, notices, orders or resolutions relating to any such county road.

This act took effect on July 5, 1947.

(3) The 1947 law was amended in Oregon Laws 1951, ch. 132, to read as follows:

> All county roads established after the effective date of this act shall be of such width as the county court shall determine, which width shall not be less than 50 feet; provided, that the county court shall have authority to accept any circular road or street of not less than 30 feet in width and not exceeding one mile in length and to maintain such road or street as a county road for one-way traffic only. The proposed width shall he stated in all petitions, notices, orders or resolutions

relating to any county road.

This act took effect on August 2, 1951.

(4) In Oregon laws 1953, ch. 229, the law was amended to read as follows:

> (1) Subject to subsection (2) of this section, all county roads established after August 2, 1951, shall be of such width as the county court shall determine, which width shall not be less than 50 feet. The proposed width shall be stated in all petitions, notices, orders or resolutions relating to any county road.
>
> (2) The county court, by majority vote, may accept as a county road any highway, road or street, irrespective of its actual or plotted width, if such highway, road or street was dedicated to the public as a highway, road or street before January 1, 1948. After acceptance the county shall maintain such highway, road or street as a county road.

This act took effect on July 21, 1953 and appears now as ORS 368.415.

b. It should be noted that under each of these laws since June 6, 1931, the proposed width must be stated in <u>all</u> "petitions, notices, orders or resolutions" relating to a county road. The language in Latourette v. Clackamas County, quoted above, could not be applied to the law as it has existed since June 6, 1931, because no statute since that time has prescribed the width of county roads. The width must be determined by the county court itself, subject to the statutory minimum in effect at the time.

B. <u>Roads Established by Prescription or Implied Dedication</u>

1. County roads can be informally established.

This has been held by the Oregon court, and the court has said that it makes no difference whether the theory proceeded upon is that of prescriptive use by the public or an "implied offer of dedication" by the land owner. The result is the same and a prescriptive use by the public is "based upon the assumption of a prior dedication or action by duly constituted authority." The court's logic is open to question since the two legal bases--of prescriptive use, on the one hand, and dedication, on the other--are directly contradictory, but the holding is clear:

> "The rights to the use of a way arising by prescription, arise not out of the formality of conveyance, but by informality; not by formal gift, grant or dedication, but by open, notorious, hostile, adverse use, based upon the assumption of a prior dedication or action by duly constituted authority. Thus a roadway so established is not controlled by the statutory requirement of formal acceptance, and unless required by statute, no formality is necessary to a valid acceptance...

> "An offer of dedication may be impliedly accepted by some act or acts showing that the municipality has assumed control and possession of the land dedicated as a public way, but the acts relied on must be unequivocal and not equivocal or isolated..." Huggett v. Moran, 201 Or. 105, 11l-ll2 (1954).

2. Width of roads established by prescription or implied dedication.
   a. Since 1889 (when a minimum width was first prescribed by statutes.

In Huggett v. Moran, quoted above, wherein a road arising by prescription was held to be impliedly accepted by the county, the court said:

> "Whenever a statute prescribes the minimum width of public roads to be established in the future, and a public road is established by prescription, the width thereof is the minimum necessary to the establishment of a legal road in the absence of evidence of the taking of a greater amount." (A guide as to what the court may consider as "evidence of a greater amount" may be found in the cases quoted under "b." below.)

This case appears to overrule Sweet v. Irrigation Canal Co.,198 Or. 166, 187-188 (1953), which, in discussing the width of a county road arising by prescription, stated that there were several factors to be considered in relation to width, none of which was held conclusive as a minimum.

b. Prior to 1889:

The Oregon court has several times, prior to the ruling in the Huggett v. Moran case (which would be limited to roads created after 1889, when the minimum width was first prescribed by statute),indicated the factors to be considered in determining the width of a road arising from prescriptive use by the public.

In Bayard v. Standard Oil Co., 38 Or. 438, 446-447 (1901), the court first stated that the width of a road arising by prescription cannot be any broader than its actual use by the public. However, the court went on to say:

> "Other conditions, however, may be effective to extend the exterior limits beyond the thread or course of actual travel, as where inclosures may have been permanently maintained by persons affected with reference to the highway, or the use is referable to a survey and plot recognized and adopted by owners of lands over which the way extends, or was under color of ineffectual proceedings to establish a legal road under the statute... Even where the highway is founded solely upon user, its width or extent of servitude is usually a question of fact for the jury. It would seem that it ought not, where the topography of the locality will permit, to be confined exclusively to the beaten track or thread of actual travel, because of the exigency that experience has shown for the passing and re-passing of those in the use of it. And circumstances such as that the use has been with reference to natural objects or artificial obstructions, or the character of the way requires improvement, necessitating access to the wayside, pertinent

for the consideration of the jury in determining the question."

In Montgomery v. Somers, 50 Or. 259, 267-268 (1907), a trail had been used for driving livestock, sometimes only 16 to 20 feet wide, and in other places 75 to 100 feet wide. The court said that the maximum width allowed would be 60 feet, since this was deemed by statute to be adequate for county roads, but went on to state general factors to be considered by the jury in determining the width:

> "Where the right to a highway depends solely on user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and the extent of the user, for the easement cannot on principal or authority be broader than the user. This does not mean, however, that the public will be confined to the precise portion of the soil on which the wheels of passing vehicles may run, commonly called the track....While it is the general rule that the width of a highway established by user is limited to the ground actually used, the question is usually for the jury, giving proper consideration to the circumstances and conditions attending the use."

Also, it should be noted that in Sweet v. Irrigation Canal Co., quoted above, it was held that the usual width of highways in the locality is a pertinent factor.

c. Where the prescriptive use is within the boundaries of a road purportedly, but ineffectually, established by the county, the road arising from such prescriptive use will have the width prescribed in the void proceedings:

> "Ordinarily, there must be an entry under, and a claim of right with reference to, the colorable title, in order to set the statute of limitations running. In such a case, actual possession need not be of the whole, but may be of a part only, and it will be extended constructively to the whole, by reason of the definite description contained in the defective or ineffectual muniment. The rule must have like application to public highways, if it has any at all; that is to say, user by the public must have been begun and continued with reference to the supposedly valid proceedings. In such a case, if there was user of a part, within defined limits, as shown by the proceedings, it would amount constructively to an occupation of the whole, and the width of the road, when thus established, would correspond with that designated by the authorities or by the law." Bayard v. Standard Oil Co., 38 Or. 438, 447 (1901). (The court held, however, that the field notes in the void proceeding were too vague to enable anyone to determine the purported boundaries of the road in the establishment proceedings.)

II. FACTORS ALTERING THE ORIGINAL WIDTH OF COUNTY ROADS

A. Adverse Possession

1. Prior to May 25, 1895, county roads were subject to the ordinary law of adverse possession. The legal elements of adverse possession are stated in Reeves v.

Porta, 173 Or. 147, 149 (1944):

> "Ownership of land by adverse possession can be acquired only by actual, open, notorious, hostile, continuous and exclusive possession under a claim of right or color of title... These elements must coincide, and the possession must be continuous for the statutory period, which, in this state, is ten years... Where adverse possession is in issue, it is held generally that all of the elements thereof must be alleged and must be established by clear and positive proof..."

A good review of several Oregon cases on this subject can be found in Thomas v. Spencer, 66 Or. 359 (1913).

2. Oregon Laws 1895, p. 57, sec. 2, took effect on May 25, 1895, providing:

> The right of counties in this state to public roads, or to open public roads, shall not be extinguished by any adverse possession however long continued, and no title to lands included in such public roads, when such roads are once established, shall be acquired as against such county through the operation of the statute of limitations.

This law was repealed and re-enacted in the same form in Oregon Laws 1903, p. 262, sec. 55 and appears now as part of ORS 368.620.

All 10 years of the prescriptive period must have run prior to May 25, 1895. The court so stated in Killam v. Multnomah County, 137 Or. 562 (1931).

B. Automatic Vacation

1. Prior to May 22, 1903, 0regon statutes provided for an automatic vacation of roads not open for at least two years, and later four years, after the time of their location. In Killam v. Multnomah County, 137 Or. 562, 565 (1931), it was held that: "All these enactment's had particular reference to roads laid out by county courts and not to streets or roads dedicated to the public by the realty owner."

The statutes are as follows:

a. "Provided: That all territorial and county roads which have been or hereafter may be located for the term of two years and not opened, shall be considered as vacated." Oregon Laws 1855, p. 492, sec. 24. This was amended in 1860 to read:

b. "If any part of any road in this state shall not be opened for two years from the time of its location the same shall become vacant." 0regon Law 1860, p. 42, sec. 37. This in turn was amended in 1864 to read:

c. “If any part of any road in this state shall not be opened for four years after, or from the time of its location, the same shall become vacated.” Deady code, chapter 47, section 37, page 868. This was repealed by Oregon Laws 1903, p.

262, effective May 22, 1903.

2. It would seem reasonable to conclude that the full statutory period must have run prior to May 22, 1903. Yet the Oregon court, in Hawkins v. Rodgers, 91 0r. 483, 502,(l919), stated in dictum that the statute would apply to a road "initiated under the law as it stood prior to" May 22, 1903. And the attorney general in 1944-1946 Attorney General's Opinions, page 435, indicates that the statute would apply to roads "established" prior to that tine. (February 24, 1903, the date the repeal was enacted, is referred to in the opinion as being the effective date of the repeal, but this is an error.)

3. Did these automatic vacation laws apply to vacate that part of the road width which was not physically opened to travel within the prescribed time, even though the road itself was opened and a traveled portion constructed? It would seem not. The language of Bayard v. Standard Oil Co., 38 Or. 438, 447 (1901), stated that "if there was user of a part, within defined limits, as shown by the proceedings, it would amount constructively to an occupation of the whole, and the width of the road, when thus established, would correspond with that designated by the authorities or by the law."

But the Oregon court in Hawkins v. Rodgers, cited above, said by way of dictum that the statute would apply to vacate that part of a road which lay behind a bordering fence. The court does not elaborate on this conclusion, but possibly was following its statement in Bradtl v. Sharkey, 50 Or. 153, 156 (1911), that "It is frequently and very generally true that possession of a part of a tract of land, under a deed to the whole, is constructive possession of the whole, but the rule is not absolute." In this case this court went on to quote a New Hampshire decision stating that "the actual possession of a part must be of such a character as to give rise to a reasonable presumption that the owner knows that the entry was made under color of title." (This case did not involve any road.) However, the Oregon court would probably not follow the dictum in the Hawkins case in light of its recent reluctance to declare forfeiture of public road rights-of-way. See City of Molalla v. Coover, 192 Or. 233 (1951), discussed below.

C. The Doctrine of Equitable Estoppel

This doctrine, as applied to public roads, was given its broadest application in Dabney v. City of Portland, 124 Or. 54 (1928). In this case, 45 years had elapsed since the establishment of a city street and a section of the street had never been opened. The city had built a sidewalk across the end of the open portion of the street, indicating that it did not intend to extend the street. The city had never exercised dominion of control over the unopened portion. Taxes had been mistakenly levied against the plaintiff on the unopened part. The plaintiff built a porch and a cement driveway on the street right-of-way and subsequently sought to enjoin the city from opening the street.. The court, in granting the plaintiff an injunction against the city, said (at page 58):

"Whatever may be the authorities elsewhere, it is well established in this

jurisdiction that, while title to property held in trust for public use by a municipality cannot be acquired by adverse possession, special cases may arise where, in the interests of equality and justice, a city may be estopped from asserting that the property upon which the improvements were made is a street…

"Where there has been long-continued nonuser by a municipality and valuable and permanent improvements have been made with its consent or acquiescence, in good faith, equity will not permit the city to change its position to the material damage of tho person thus misled. The groundwork of equitable estoppel is a species of fraud. The conduct of the city must have been such as to have caused the plaintiff reasonably to believe that it was the intention to abandon the strip of land for street purposes. Plaintiff must have been misled to her prejudice, and the damage sustained must be of a substantial character thus to invoke the aid of equity."

The court went on to say:

"Mere lapse of time, nonuser nor improper levying and assessment of taxes will not constitute an estoppel... but certainly these are factors to be taken into consideration."

Therefore it seems that the act of the city in constructing a sidewalk across the open portion of the street was the determining factor, although the language itself indicates that mere acquiescence by the city in the acts of the landowner may be enough to estop the city.

For a thorough discussion of cases applying the doctrine, see "The Law of Dedication in Oregon," by Sheldon W. Parks, 20 Oregon Law Review, pp, 146-150 (1940).

The Oregon court has recently retreated from this position--certainly to the point that a municipality will no longer be estopped by mere acquiescence in construction of improvements by the abutting owner, and probably further. In City of Molalla v. Coover, 192 Or. 233 (1951), the city had vacated only a part of a street and the defendant, believing that all had been vacated, built a fence across the unvacated part and constructed a barn on it. The city never warned the defendant that he was on the right of way, and 19 years later the city sought to open the street. The court, holding in favor of the city, said (at page 249):

"As against holdings that the city may be estopped by passive acquiescence, we find persuasive authority and sound reasons for the severe restriction of the doctrine." The opinion stated (page 252) that "the courts have frequently cautioned that the doctrine of equitable estoppel should be applied in street cases only in exceptional instances of extraordinary hardship." Continuing, the court said that the doctrine "is a product of the pioneer era. It is ill-adapted to the needs of progressive and growing cities." The court overruled the doctrine insofar as it stood "for the proposition that a city will be estopped to open a street by reason of its tacit acquiescence in the construction therein of permanent and valuable improvements by persons who knew or should have

known that the erections were within the line of dedicated though unopened streets..."

The court concluded (at page 253):

> "While he may have been honest in his belief that Seventh Street had been vacated, he is in no position to claim an estoppel against the city. If the city had a duty to prevent and remove purprestures, the defendant also had a duty not to construct or maintain them. Here the equities are not equal. The public interest must prevail. Our decision is limited to the facts of the pending case. Whether estoppel may in exceptional cases be predicated upon affirmative action by a city or its officers need not be and is not here decided."

Note that in the last sentence the court indicated that the question is reopened in Oregon as to whether even affirmative action "by a city or its officers" will give rise to equitable estoppel.

And in Sweet v. Irrigation Canal Co., 198 Or. 166, 199 (1953), the court said of its opinion in City of Molalla v. Coover:

> "The opinion re-emphasizes the holdings of this court that a public or governmental corporation is not estopped by the acquiescence of its officers when they exceed their powers... The opinion may be said to be founded in adherence to the fundamental theory of the doctrine...that there can be no estoppel where the knowledge of both parties is equal and nothing is done by the one to mislead the other."