

County Commissioners, Authority to Grant Right of Way Along Highway for Railroad. Highway, Authority of County Commissioners to Grant Right of Way Along for Railroad. Railroad, Right of Way, Authority of County Commissioners to Grant Same Along Highway.

The Board of County Commissioners have no authority to grant a right of way for a railroad along the county highway. Such should be acquired by condemnation proceedings under the eminent domain statutes.

Helena, Montana, October 29, 1909.

Hon. Thomas J. Walker,
County Attorney,
Butte, Montana.

Dear Sir:—

I am in receipt of your request over the telephone for an opinion upon the following proposition:

“Has the board of county commissioners authority to grant a right of way, by resolution or otherwise, for the construction of a railroad track along, and upon, a county road, without condemnation proceedings having been had?”

Subdivision 5 of section 4275 gives railroad companies the power to construct roads along highways, but such law is not a grant of a right of way, and the railroad before taking land in such highway must acquire the same either by purchase, or by voluntary grant or donation, or by condemnation proceedings.

State v. District Court, 34 Mont. 535.

The board of county commissioners have no authority to grant or donate such a right of way for a railroad along a county highway, unless they are expressly authorized so to do by statute, and even then there is a serious question, as will be hereafter shown.

There is an essential difference between county highways and streets in cities and towns.

Elliott on Roads and Streets (2nd Ed.), Sec. 397, et seq.

The statutes of nearly all states recognize this difference and expressly confer authority upon the council of a city or town to grant rights of way for street railways.

Subdivision 13 of section 3259 grants such authority to the city councils in this state. We find, however, that no express authority similar to that conferred upon cities and towns has ever been given to boards of county commissioners.

Subdivision 4 of section 2894, revised codes, provides that the county commissioners has jurisdiction and power

“to lay out, maintain, control and manage public highways within the county.”

This is a general power given to county commissioners to manage county highways.

Elliott on Roads and Streets, in section 398 says:

“The standard by which the authority and the right of the local officers in control of suburban roads are to be measured is fixed by law, for they have no authority to make any other use of the way than that to which it was dedicated, or for which it was appropriated under the right of eminent domain.”

And again in section 400 the same authority lays down the following rule:

“While the control of the highway officers over a rural road is, as is evident from what we have said, by no means so extensive as that of municipal officers over a city street, still it is extensive enough to authorize the rural highway officers to make it safe and convenient for passage, and to effect this object they may also use it for incidental highway purposes. They may not use it for purposes entirely disconnected with the purpose to which it was set apart, but they may use it for public purposes legitimately connected with the system of highways of which it forms a part.”

See Elliott on Roads and Streets, Sec. 455.

It is apparent from the above quotations that the granting of a right of way over a county highway for a railroad track by the county commissioners would be making a use of such highway for a purpose other than that to which it was dedicated or appropriated under the right of eminent domain, and therefore beyond the authority of the board of county commissioners, which extends only to the management and control of the highway for the express uses and purposes for which it was established. Furthermore, section 1342, revised codes, declares that

“By taking or accepting land for a highway the public acquire only the right of way and the incidents necessary to enjoying and maintaining the same subject to the regulations in this act and the civil code provided.”

This section clearly makes a county highway a public easement,

which is controlled by the provisions of sections 4507 to 4517, revised codes. And section 4516 expressly provides that

“The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.”

It is, therefore, apparent, under the above sections, that the county commissioners, should they attempt to grant a right of way for a railroad over the county highway, would be exceeding their authority, for the reason that there is the owner in fee of such land, and the owner in fee would have his right for damages for such right of way.

In *Bloomfield, etc. Gas & Light Co. v. Calkins*, 62 N. Y. 386, the supreme court of New York said:

“The introduction of railroads in this State presented the question whether a railroad corporation could use a public highway for the purpose of constructing and running its road, and it was held that it imposed an additional burden upon the soil of the highway besides what was included in the public easement; that the legislature had not the power to make such imposition within the meaning of the constitutional provision, which forbids the taking of property of the owner of the fee without compensation; and that the company can derive no title by any act of the legislature, or of any municipal authority, without the consent of the owner of the fee, or without the appraisal and payment of damages in the mode prescribed by law.”

Therefore, in our opinion, the board of county commissioners have no authority to grant such right of way, and that the only procedure is for the railroad company to institute proceedings under the eminent domain statutes, making the owners in fee of the land over which such county highway runs parties to the proceedings, or at least giving them the opportunity to appear in such condemnation proceedings in accordance with section 7339, revised codes.

Very truly yours,

ALBERT J. GALEN,

Attorney General.