

Roads, Timber Growing on. County Commissioners, Authority of. Stumps in Roadway, Removal of.

The owner of trees growing on or near a highway must use reasonable care to prevent the trees becoming dangerous to travelers. Such trees may be cut down by the owner, but such owner is not compelled to remove the stumps. They should be removed at the expense of the county.

September 16, 1913.

Hon. W. M. Biggs,
County Commissioner, Lewis and Clark County,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 9th instant, requesting an opinion from the following statement of facts:

"A certain road in the Blackfoot Valley has been used by the public for the past fifty years. About 1895 the timber in that valley was acquired by the Blackfoot Commercial Company.

"The county claims a right of way sixty feet wide and the timber thereon. The Blackfoot Commercial Company, while admitting the county's right to its roadway, claims the timber on said right of way. We therefore ordered this company to remove this timber forthwith and the question that arises is: As they claim the ownership of the tree and have consented to the removal of the obstruction, does it follow that they must remove the stump? You will appreciate that the stump is as much of an obstruction as the entire tree.

"I should like very much if you will advise us as to the right of the county in the matter, and if we have the authority to order the removal of the tree, is the owner thereof under any obligation to remove the stump?"

As a general proposition public highways belong from side to side and end to end to the public, and any permanent structure or encroachment which materially encroaches upon a public street and impedes travel is a nuisance per se. (Elliott, Roads and Streets, Sec. 828.) But notwithstanding, when a highway is laid out for the use of the public, the title of the soil and all the profits thereof, consistent with the existence of the easement, remain in the owner, and he has title to the trees standing and growing thereon.

37 Cyc. 203.

Elliott on Roads and Streets, Sec. 876.

When a highway is laid out and established, the public acquire not only the right of way, but also the powers and liberties incident to that right, among which is the right to keep the highway in proper repair, and to this end the authorities in whom the power is vested may cut down trees and use the earth, stone and gravel within the limits of the highway in a reasonable and proper manner. (37 Cyc. 204.) To this general proposition may be added this qualification, that the abutter has the exclusive right, as the owner of the fee, to make such use of the highway as is not incompatible with the rights of the public.

See note to Chase v. Oshkosh, 15 L. R. A. 553.

Chap. 6 of Chap. 72, Session Laws of the Thirteenth Legislative Assembly, defines what are obstructions and encroachments on highways, and provides for their removal. Sec. 2 of this chapter provides that if any highway laid out or erected is encroached upon by buildings, fences or otherwise, the road supervisor must give notice re-

quiring the encroachment to be removed from the highway, and the sections which follow provide penalties for disobeying the notices, and also provide that if the same be not removed the road supervisor may do so at the expense of the owner, occupant or person controlling such obstruction. In my opinion, the obstructions and encroachments referred to in this chapter are only such as are of artificial creation, and in no sense can the provisions of this chapter be said to apply to trees naturally growing within the limits of the highway. Under the provisions of the general highway laws of Montana, the duty to improve and maintain the highways in this state devolves upon the board of county commissioners and subordinate officers, and the costs and expenses thereof are provided for by taxation. In the case of trees naturally growing upon or within the limits of an established highway, I am of the opinion that the board of county commissioners have the right to order removed only such as interfere with the rights of the public in making use of the highway, and if they be not removed by the owner after reasonable notice given, they may be removed by the proper county authorities, but even in such case, under the authorities cited, the title to the timber is still in the owner of the fee. I am further of the opinion that the owner of the trees may at any time remove any or all of such trees as may be standing or growing upon the highway. He must, however, use reasonable care to prevent the trees from becoming dangerous to travelers, for he will be responsible for any damage which may be sustained by reason of negligence, etc. (*Weller v. McCormick*, 19 Atlantic, 1101 (N. J.)), but the owner of the trees cannot be compelled to remove the stumps of trees naturally growing in the highway, though the trunks may be severed.

In your statement of facts I note that you concede the ownership of the trees in question to be in the Blackfoot Commercial Company, and that they have consented to remove them. From what has already been said, I am of the opinion that the stumps should be removed at the expense of the county, if their removal be necessary for the proper enjoyment of the highway by the public.

Yours very truly,

D. M. KELLY,
Attorney General.