

Strict compliance should always be made with the statute in road matters. It should ever be kept in mind that the laying out of a road over private property is taking that property against the will of the owner and that it cannot be taken even by the state, except by strictly pursuing the procedure prescribed by statute for that purpose.

*Latourette V. County Court
121 Or. 323*

CHAPTER 10

MISCELLANY

The Widths of Public Ways

Principle 97

The “width” of a public way or highway is the distance between the right-of-way side lines that mark the limits of the public easement created by: dedication, grant, statutory process or prescription.

The following is a brief history of Oregon laws and decisions regarding the widths of county roads.

The Bush Codes. These codes were in effect under the Provisional government of the Oregon Territory. Under the codes, all county roads were to be **60 feet** in width, unless the county commissioners, upon the prayer of the petitioners, determined a lesser number of feet.

Bush Codes incorporated into state laws. Effective in 1861, the Bush Codes were incorporated into Oregon law except that *county court* was substituted for *county commissioners*.

1889 Amendment, County Road Law. The Oregon law regarding the widths of county roads was amended in 1889. The amended law required that all roads were to be **60 feet** in width, unless the county court, upon the prayer of the petitioners, determined a different width which was not to be less than **40 feet** nor more than **80 feet**.

The 1915 amendment. In 1915, the Oregon Legislature amended the law to require that all county roads were to be **60 feet** in width, unless the county court, upon the prayer of the petitioners, determined a different width, which was not to be less than **30 feet** nor more than **80 feet**.

The 1917 amendment. In 1917, the Legislature amended the law to omit the phrase *upon the prayer of the petitioners* and, for the first time, giving the county courts the right to establish roads by resolution as an alternate to the petition system.

1927 decision of the Oregon Supreme Court. Prior to 1931 there was no requirement in Oregon law for specifying the road width in the road documents. Consequently, most documents prior to 1931 failed to note the specified or intended road width. But in April 1927, the Oregon Supreme Court announced, in *Latourette v. County Court*¹ (of Clackamas County), that the prescribed width must be considered as an important part of a resolution establishing a county road. (This case will be discussed in detail in this publication.) Consequently, the 1931 Legislative Assembly added the requirement that such widths be specifically noted in official road documents, i.e.:

1931 law recording road widths in records. Oregon Laws, 1931 ch. 326 required that, effective June 6, 1931, the proposed width of a county road was to be stated in all petitions, notices, orders or resolutions. *From this date to the date of this writing it has been required that the road width be stated in all documents relating to roads.*

The 1931 Legislature also provided that the county court determine the width of county roads, subject only to a minimum width, not to be less than **30 feet**.

1947 legislative amendment. Oregon Laws, Chapter 498, amended the 1931 law, i.e.: “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 the authority to accept any dedicated circular road or street less than **30 feet** in width not exceeding one mile in length, and maintain such road or street as a county road for one-way traffic. The proposed width to be stated on all documents.”

The 1951 amendment. Oregon Laws, Chapter 132, amended the 1947 law, i.e.: “All county roads established after the effective date of this act shall be of a 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 be stated in all documents.”

1953 Oregon laws. ORS Chapter 229 required:

“(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 widths 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 platted 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.”

1978 Oregon laws. ORS Chapter 368 provided:

ORS 368.415. “(1) subject to subsections (2) and (3) of this section, all county roads shall be of such a width as the county court shall determine. Such width shall not be less than 50 feet unless the court finds compliance with the standards adopted pursuant to subsection (3) of this

section. 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, if it is found to comply with the standards adopted pursuant to subsection (3) of this section. After acceptance the county shall maintain such highway, road, or street as a county road.

“(3) The county court may, by resolution, adopt standards for county roads less than 50 feet in width. Such standards may include, among other things, width, length, design and construction, limitations on access, and restrictions of onstreet parking.”²

1981 change. ORS 368.415 was renumbered by 1981 legislative act, ch. 153, subsec 45, as ORS 368.041.

1985. *Widths of county roads as published in the ORS and in effect on Sept. 27, 1987.*

ORS 368.041. “(1) Unless otherwise provided under ORS 368.036, a public road that is designated as a county road after August 2, 1951, shall be 50 feet or any greater width the county governing body establishes. The proposed width shall be stated in all petitions or notices that initiate consideration of the designation of a road as a county road. The width established for a road shall be stated in orders or resolutions accepting the road as a county road under ORS 368.016.”³

“(2) After a resolution or order designating a public road as a county road is final, the county shall maintain the public road as a county road.”

ORS 368.036 relates to “standards for county roads and road work,” and mentions *widths* in subsection (1), i.e.: “(1) County roads and work performed on county roads shall comply with specifications and standards, including standards for width, adopted by the county governing body...”

ORS Chapter 368 also provides for the legalization of county roads⁴ where, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a public road,⁵ where the location of the road cannot be accurately determined because of numerous alterations to the roads,⁶ there was a defective survey of the road or adjacent property,⁷ or the original survey of the road was lost or destroyed.”⁸

ORS 368.206 (Proceedings for legalization of roads; report; notice) provides: “(1) If proceedings for legalization of a road are initiated under ORS 368.201, the county governing body shall:

“(a) Cause the road to be surveyed to determine the location of the road and the *width* of the road according to:

“(A) The laws governing the width of roads at the time the road was originally established; or

“(B) If the original width of the road cannot be determined, to the width for roads of the same class established by the standards under ORS 368.036;

“(b) (cause filing of report.)

“(c) (cause notice of proceedings).”

ORS 368.221 provides: “Notwithstanding ORS 368.036, a county governing body may legalize a road at any width that is **less** than the width of the road described in ORS 368.206 if the county governing body determines that:

“(1) The legalization of the road at the lesser width is in the public interest; or

“(2) An encroachment on the road may not be practically removed under ORS 368.211.”⁹

With the foregoing laws in mind, consider the following scenario that is typical of road and mapping problems encountered in the statewide cadastral mapping program.

1. In the process of mapping a rural area of a county, the cartographer has assembled all of the available records, surveys, maps and plats of sections 4, 5 and 6 of a township.
2. A gravel, graded and drained county road runs through the sections. The records indicate this road has existed since 1925.
3. Part of the cartographer’s job is to draw this road on each map as accurately as possible, being careful to show the side lines, or right-of-way lines of the road at the width as established by the county court, or as subsequently revised by authorized action of the county court. Showing the precise location of the side lines of the public’s easement is important because:
 - a. The space between the side lines, that is, the bed of the easement, is exempt from taxation. The accuracy of the acreage exempt from taxation is dependent on the accuracy of the determination of the width of the county road.
 - b. The side lines, in some situations, will also be the boundary of abutting realty. Consequently, the accuracy of the side lines of the county road will affect the accuracy of the common boundaries of some parcels of land.
 - c. Although designed and prepared primarily for assessment and taxation purposes where the locations of boundaries are more “physical” (according to the best information available) than “legal,” the cadastral maps will be used by agencies of various political bodies for other purposes. When used for other than assessment and taxation, the maps are erro-

neously presumed to represent “legal” elements, rather than physical elements established by record. Road locations and widths take on the “official” image and the conclusions usually drawn are that the roads and road information is *legal and final*.

4. In analyzing surveys of land including or abutting the road, the cartographer has discovered that there is a conflict between the surveys as to the width of the road. Some surveys show the road to be 40 feet wide, and some show it to be 60 feet wide. There is no continuity in these conflicts that can be attributed to dates. That is, often surveys executed in the same year, differ on the width of the road.
5. The county roadmaster “thinks this is a 60-foot road,” but can find nothing to substantiate the claim. The resolution for establishing the road does not include the proposed road width. The road viewers’ report does not mention the width. The field notes of the road does not contain the proposed width.
6. The law in 1925, the 1889 Oregon law governing road widths (as amended in 1915 and 1917) required 60-foot county roads. However, the county court was allowed to determine a different width—anywhere between 30 feet and 80 feet—on the prayer of the petitioners. Consequently, the county road through sections 4, 5 and 6 could be 60 feet or 40 feet.
7. If the road was legally established as 40 feet, the county cannot change the width to 60 feet unless it compensates the abutting owners for the taking of the additional land. Failure to do so would amount to an unlawful taking of private property. However, making the “assumption” that it is 60 feet is not, in itself, unlawful. It would only be unlawful when the public or governing body began to exercise the right where the abutting owners had not been compensated for the taking of the additional land.

At what width does the cartographer draw the road on the cadastral map? This problem is so common it is nearly predictable. It is the justification for concern over the subject of the widths of public ways. The majority of road-width problems concern county roads. However, they are not confined to county roads. Some of the more serious, complex problems are associated with public way created by the operation of prescription. A few problems over road widths have their roots in the dedicated streets of townsite and subdivision plats.

Latourette v. County Court¹⁰

This was an appeal from a judgment of the Circuit Court of Clackamas County, dismissing the plaintiffs petition for writ of review. The plaintiff appealed, claiming numerous errors in the proceedings of the County Court (not the Circuit Court) for Clackamas County for the purpose of altering a certain road in said county. The proceedings were initiated by resolution of the county court as prescribed in Section 4556, Oregon Laws. The resolution was adopted by the county court Sept. 2, 1925, and designated Resolution No. 1224. The plaintiffs premises were affected by the proposed alterations of said county road for which he claimed damages of \$2,500. The viewers allowed him only \$300. The order approving the report of the viewers and the establishing of the road as altered was adopted by the county court by order dated Jan. 6, 1926. The Supreme Court said:

“1, 2. The resolution provided for in Section 4556, Or. L., must contain substantially the same statement of facts as a petition of freeholders for the same purpose, excepting the particulars noted in Section 4556. *The resolution, therefore, must contain a description of the particular manner in which said road is to be altered, widened, straightened or relocated as the case may be, and the public necessity therefore.*”¹¹ The petition under investigation, so far as material to the determination of the instant case is as follows:

“In the matter of altering, widening and *straightening* the present traveled road, known as the Oregon City-Viola Road Nos. 304 and 289, to make it conform to the established survey of Market Road No. 20.

“RESOLUTION NO. 1224.

“Whereas the County Court of Clackamas County has heretofore by appropriate order established Market Road No. 20 and is now deemed proper to alter, straighten, widen and re-establish said road to make it conform to the established survey of Market Road No. 20, Oregon City-Viola Road.

“Whereas the altering, widening and re-establishment of said road, is a public necessity for the reason that large sums of money are being expended on the same, and the exact location and status of said road should be on file for all time to come; that the County (county, state), hereby declare its intention to widen, alter, straighten and re-establish what is usually known as the Oregon City-Viola Road, to make the same in all respects to conform to the accepted survey of said Oregon City-Viola Road, Market Road No. 20 as follows.’

“Then follows a description of the road by describing the terminals, the general course and the names of the land owners to be affected. The resolution also di-

rects the county surveyor to post notices as required by law and that said resolution come on for hearing on the seventh day of October, 1925. This resolution is duly signed, and the affidavit of D.T. Meldrum, county surveyor of Clackamas County, shows that four notices were posted: Three in the vicinity of the road to be changed and one on the courthouse bulletin board. Attached to the proof of notice is a copy of the resolution which was posted. The copy shows that the names of the county judge and county commissioners appear at the foot of the resolution. The copy of the resolution was duly certified by the county clerk. The resolution came on for hearing on (10-7-1925), and is entitled, 'In the Matter of the Resolution of Market Road No. 20.' At this time the court by order appointed D.T. Meldrum, county surveyor, and A.H. Knight and R.A. Schuebel, disinterested free holders of Clackamas County, viewers, and directed them to meet at the courthouse (10-15-1925), at (9 AM), to view, survey if necessary, lay out, relocate or change said road to be located, and to assess and determine how much less valuable the premises through which the said road is located and set forth the same in their report, and to file said report in the office of the county clerk on or before (10-24-25). The road viewers duly reported in conformity with said order. Their report is dated October 14, 1925. The only reason for making the alterations and locating a road embodied in their report is in the following language:

"We, the undersigned Board of County Road Viewers, having been heretofore directed by an order of this court, at its last regular term, to view, survey if necessary, locate, relocate, alter or change said road and report upon the practicability of a road in (T. 2 & 3 S. R. 2 & 3 E. W.M.), and to assess the damages sustained by the lands through which said road passes, would respectfully report that we met at the place of beginning of said road on (10-14-1925), and to proceed to view, survey and locate the road as described in the petition heretofore filed herein.

"We find such route practicable for a good wagon road, and that such road is of public necessity in that large sums of money are to be spent in the improvement of said road and the exact location and status of the same should be definitely known. We therefore do recommend that said road be established as a County Road.

"We find there will be damages to the premises through which said road is to be located; that said premises will be rendered less valuable by reason of said location, and we assess the damages as follows:

"D.C. Latourette. \$300

"Ed Leek. \$50'

"A description of the road as contained in the resolution is contained in the directions issued by the county clerk to said road viewers. The report of said county viewers is not entitled in any road matter and contains no description, except as set out above. There is contained in the return to the writ of review a document not entitled in any matter but headed as follows:

"Field Notes of Market Road No. 20'

"The same being the field notes of the survey of Resolution No. 1224, Clackamas County, Oregon. Located by the Board of County Road Viewers on the 14th day of October, 1925.'

"Then follows the field notes to which is added the following certificate:

"I hereby certify that the foregoing is a true and correct copy of the original field notes of Market Road No. 20, Clackamas County, Oregon, located by the Board of County Road Viewers on the 12th day of October, 1925.

"(Sgd.) D.T. Meldrum,

"County Surveyor.'

"By reference to the excerpts from the resolution it will be seen that the description does not contain the particular manner in which the road is to be altered, *widened*, straightened or relocated, unless it is found in the first paragraph thereof, which reads as follows:

"Whereas the County Court of Clackamas County has heretofore by appropriate order established Market Road No. 20 and it is now deemed proper to alter, straighten, widen and re-establish said road to make it conform to the established survey of Market Road No. 20, Oregon City-Viola Road.'

"The record discloses, however, that on (9-2-1925), the survey of Market Road No. 20 had not been established. As shown above by the report of the viewers, that survey was not made until (10-12-1925), a month and ten days after the adoption of the resolution by the County Court. This information appears not only from the body of the field notes but also from the certificate of the surveyor appearing at the foot of the field notes. There was then at the time said resolution was adopted no established survey of Market Road No. 20. How, then, could a property owner along the road mentioned in the title to said Resolution No. 1224 inform himself of the manner in which the road was to be altered or changed, or how his property was likely to be affected by such alteration? The only notice given to property owners is a copy of said resolution posted in four public places in the county. The purpose of requiring copies of the resolution to be posted is to give the land owners along the route of the proposed road or road to be altered notice of the manner in which such road or alteration will affect his premises. It is idle

to refer to an established survey for information when no such survey has been made. The Resolution would have been indefinite even if it had referred to a survey mentioning the place where the description contained in the survey could be seen and read. The writer is inclined to the opinion that the description of the proposed alteration of an established road should be embodied in the resolution so that information would be given directly to land owners in a way to convey to them a clear idea of the nature of the alterations which would be likely to affect their land. But in any event such information should be on file or on record in a public office to which the land owner has free access.

“The only statement of the public necessity for the alterations and relocation is contained in the following language:

“Whereas the altering, widening and re-establishing of said road, is a public necessity for the reason that large sums of money are being expended on the same, and exact location and status of said road should be on file for all time to come.’

“This description is hardly a description of a public necessity. If the alignment of the road is sufficient, if the grades of the road are practicable, if the ground occupied by the road is capable of becoming a firm roadbed, the fact that large sums of money are to be expended would not describe a public necessity for alterations. The petition should have stated what constitutes a public necessity for alterations and relocation. . . . (The court elaborated here on the insufficiency of ‘expenditure of large sums of money’ as describing a public necessity for alterations.) Large expenditure of money is not a public necessity for changing location of a road.

“3. Other alleged errors are assigned in plaintiff’s brief, many of which are well taken but we believe are not jurisdictional. One of the other assigned errors was that the directions to the viewers required them to meet at the courthouse at 9 o’clock on a certain day. Instead of following the directions, their report shows that they met at the beginning of the road to be altered which was not at the courthouse. While we adhere to the former decisions of this court requiring strict compliance with the statute in road matters, yet where jurisdiction has attached by proper petitions or the adoption of the proper resolution and the required notice is given, *mere irregularities will not be sufficient to reverse the order of the County Court establishing a road, unless it clearly appears from the record that grave injustice has been done to an interested party.*”¹²

“4. Another assigned error is that the resolution does not prescribe the width of the road when widened as proposed by the resolution. The law prescribes that all roads shall be sixty feet wide, unless otherwise or-

dered by the County Court.”¹³ *This provision must be considered a part of the resolution unless a different width is specified therein.* It would not confer jurisdiction on the County Court to alter the road so as to establish any different width:

“The other errors are of a similar nature and from the conclusions we have reached it is not necessary to further discuss them.

Principle 98

“Strict compliance should always be made with the statute in road matters. It should ever be kept in mind that the laying out of a road over private property is taking that property against the will of the owner and that it cannot be taken even by the state, except by strictly pursuing the procedure prescribed by statute for that purpose.”¹⁴

“Because the resolution does not describe the proposed alterations of the road mentioned therein, nor refer to any record where a correct description could be examined by any persons interested, and fails to state any public necessity for the proposed alterations the County Court *never acquired jurisdiction to make the alterations proposed.* . . .”¹⁵

The Supreme Court reversed the judgment of the circuit court, and the case was remanded, with directions to sustain the writ and annul the proceedings of the circuit court.

Sweet et al v. Irrigation Canal Co.’s¹⁶

The central issue in this case was an open irrigation ditch which interfered with the plaintiffs’ right of ingress to and egress from their land which abutted a county road. The ditch was found to be within the right of way, and consequently constituted misuser. That element of the case was discussed in the section of this publication on “Lawful and Unlawful Uses of Public Ways.”

The *width* of the road was considered by the Supreme Court, and the court’s remarks concerning that element will be discussed here.

The plaintiffs acquired their land by warranty deed dated June 13, 1945, executed by Bernard W. Wise and wife containing the following description of the premises conveyed:

“Beginning at the (SE) corner of Lot 1 of Block 73 in Riverside Addition to La Grande, (county, state), and running thence (N 88 degrees 49’ W) along the north line of the alley in said block a distance of 200 feet to the north line of the old county road; (th) following the north line of said old county road (N 68 degrees 23’ W) 189.45 feet to a point 592.42 feet north and 1320.0 feet west of the (SE) corner of (SW 1/4) of

section 31, in (T2S, R38E, W.M.); (th) continuing along the north line of said county road (N 70 degrees 4' W), 333 feet; (th) (N 30 degrees 34' W) 150.2 feet; (th) (N 1 degree 11' W) 47.24 feet to the center of the channel of Grande Ronde River (th) (N 70 degrees 54' E) along said river channel, 475.0 feet; (th) (S 1 degree 11' E) 163.00 feet; (th) (S 89 degrees 22' E) 138.2 feet; (th) (S 45 degrees 21' E) 87.7 feet; (th) (S 79 degrees 59' E) 111.0 feet; (th) (S 1 degree 11' E) 270.5 feet to the place of beginning.

“Containing 5.30 acres, more or less, and situated in the SE 1/4 of SW 1/4 and in the SW 1/4 of SW 1/4 of section 31, (T2S, R38E, W.M.)

“Being the same premises conveyed by L.J. Walls and Millie Walls, his wife, to Bernard W. Wise and Nancy G. Wise, his wife, by deed dated October 22nd, 1942.”

In addition to that deed, there were in the record the following instruments: Deed from Grande Ronde Meat Company to Elizabeth Bushnell dated Dec. 2, 1935; deed from E.N. Bushnell to L.J. Walls, et ux, dated April 23, 1941; deed from L.J. Walls and wife to Bernard W. Wise and wife dated Oct. 22, 1942. All these are warranty deeds. There was also in evidence a quitclaim deed from F.A. Epling and wife to W.H. Sweet and wife dated June 13, 1946, the date of the deed executed by Bernard W. Wise and wife to the plaintiffs. These deeds were in the chain of title of the premises in question, *and all describe the land as bounded on the south by the old county road*, with the exception of the quitclaim deed from the Eplings to the plaintiffs, which contains as a part of the description the following:

“Beginning at a point on the North line of the old county road 592.42 feet north of the (SE) corner of (SW 1/4 SW 1/4) of section 31, in (T2S, R38E, W.M.); thence along the north line of said old county road (N 70 degrees 43' W) a distance of 333 feet.”

By reference to the description in the deed from Wise and wife to the plaintiffs it could be seen that, beginning at the southeast corner of block 73 in Riverside Addition to La Grande, the southerly line of the tract runs west 200 feet to the north line of the old county road. Then it followed the line of the old county road in a general northeasterly direction a distance of 672.25 feet, then north 47.24 feet to the center of the Grande Ronde River. A bridge known as the Orodell Bridge spanned the river near the west line of the plaintiffs' property. The distance from the middle of the bridge to the plaintiffs' line was 30 feet.

Figure 4-25, from the court report,¹⁷ illustrates the *locus in quo* except it does not show the beginning point in the plaintiffs' deed description, and shows only a part of the first course. The small circle marked

I.P. near the circled 73 at the right-hand side of the map indicates an iron pipe placed there by S.B. Morgan, county engineer, roadmaster and Union County surveyor, in April 1946, when he surveyed the premises. This pipe marks the change from the first course to the second one, to wit, “thence following the north line of said old county road (N 68 degrees 23' W) 189.45 feet,” etc.

Southwesterly from the plaintiff's land, and roughly paralleling it for a distance of 500 feet or more, is the right of way of the Union Pacific Railway. The right of way widens as it approaches the city of La Grande to the east, bringing its northeasterly line 20 feet nearer to the plaintiffs' southwesterly property line. Distances between the parallel lines of plaintiffs' property and right of way vary from about 65 to 100 feet.

In 1894, proceedings were started to establish a county road from the south end of the Orodell Bridge running southeasterly along the north side of the right of way of the Oregon Railway and Navigation Company (now the UPRR) to La Grande's west city limits at a definitely located point. The road was about one-half mile long. It would have run between the railroad right of way and the plaintiffs' land. It was practically conceded that the proceedings were ineffectual to establish a road because of defects. But the plaintiffs claimed that the road was established by prescription under color of title of the void proceedings and to the full statutory width of 60 feet, and that the exterior northeasterly line was the southwesterly line of the plaintiffs' land. The defendant did not deny the existence of the road. The evidence showed, without contradiction, that for many years in excess of the prescriptive period (noted by the court as 10 years in Oregon by subsection 1-202, OCLA), the road, leading from the Orodell Bridge and passing between the plaintiffs' property and the railroad right of way, had been used by the general public and improved and kept up by the county. The court noted that “the width of the highway so used and improved—the graveled portion—is approximately 25 feet. It is designated ‘County Road’ on the map, between the broken lines which indicate the exterior boundaries of the improved highway. The northeasterly boundary of the graveled portion at no place touches the southwesterly line of plaintiffs' land, but is south of it, the distance varying from 25 to 30 feet. Defendant's irrigation ditch, which was constructed in 1937 under circumstances to be later detailed, is located in this strip between the plaintiffs' land and the road as improved and used.” It was the defendant's position that *such user determined the width of the road*. The Supreme Court held:

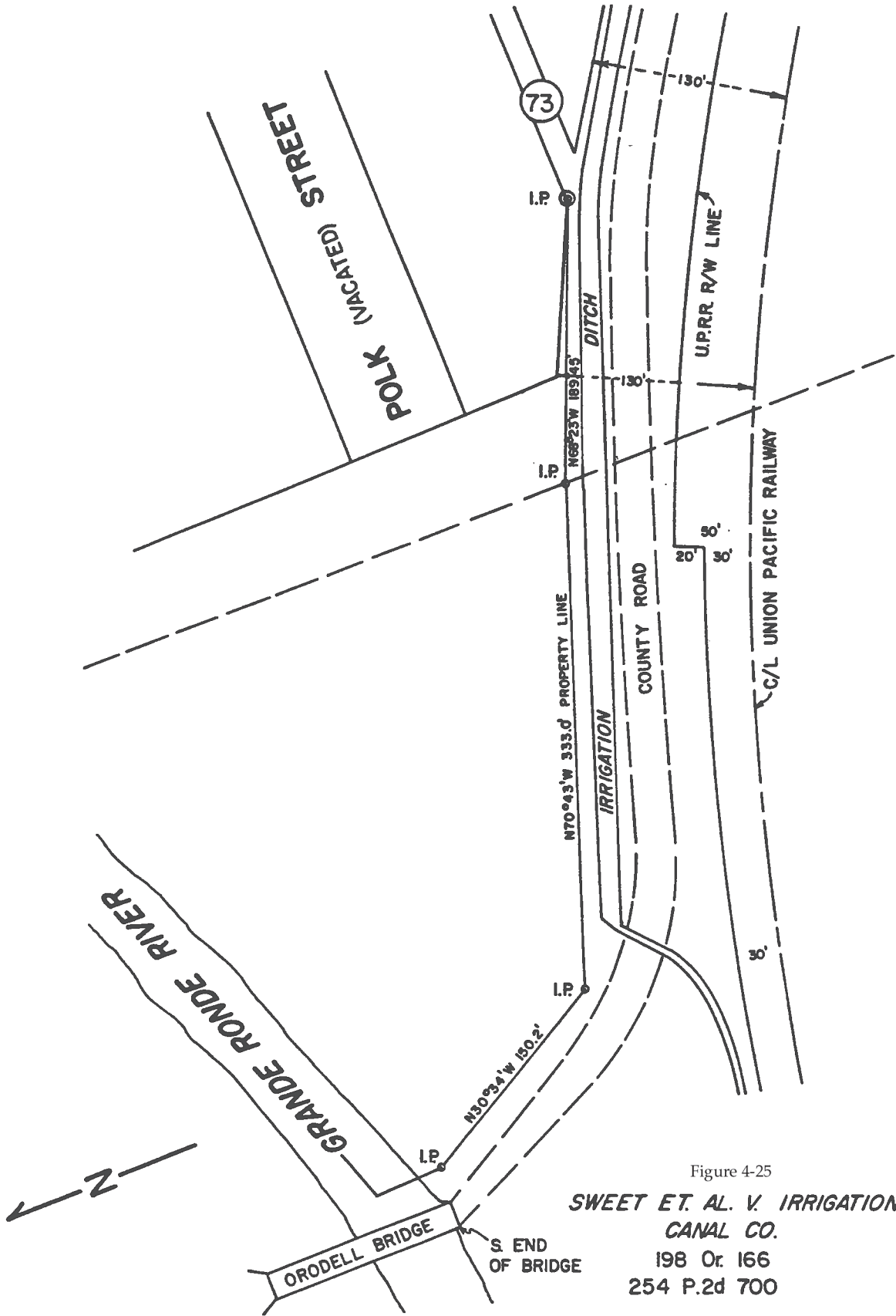


Figure 4-25
**SWEET ET. AL. V. IRRIGATION
 CANAL CO.**
 198 Or. 166
 254 P.2d 700

"1. The contention that its width may be determined by reference to ineffectual proceedings for the location of a road may be at once laid out of view."

Principle 99

It is true that "ineffectual proceedings" are "evidence of color of title, and that a subsequent user by the public of the road attempted to be located, for the statutory period, if begun and continued with reference to the proceedings of the county court, is proof of a legal highway, the full width designated in such proceedings."¹⁸

But as stated in *Bayard v. Standard Oil Co*, *supra*:

"... Colorable title forms the basis upon which a prescriptive right to the full width of the defined limits is founded. The next step in logical course of establishment is an entry and a user with reference to it, and, when this has been continuous and uninterrupted and adverse for the statutory period, then has the right ripened into a valid title in the public. It would be fallacious reasoning, therefore, to indulge a presumption that a road as actually worked and used by the public was within and upon the way as attempted to be located, and thence to conclude that its width must be measured by that designated in the void proceedings. It must be proven that the road as used falls within the colorable title, and, when this is done, the other condition follows; that is, *the possession is extended constructively to the entire designated width, or occupancy of a part is then equivalent to an occupancy of the whole.*

Principle 100

"Where the highway as used runs without the exterior lines of that as surveyed and attempted to be located and established by lawful authority, the width must then be determined by the rule that possession is extended constructively to the entire designated width, or occupancy of a part is then equivalent to an occupancy of the whole; and the ineffectual proceedings can have no bearing whatever upon the subject. Of course possession must meet the requirements for prescription to operate.

"2. As the evidence in the *Bayard* case failed to show that the road, as used at the particular point involved, was within the exterior limits of the road as attempted to be laid out at that point, it was held that the ineffectual record was not pertinent or competent and should not have been allowed to go to the jury. In the present case the record of the proceedings for the location of a road consists only of the petition and the order of the county court setting forth a copy of the report of the viewers and surveyor, and directing that the report be approved and adopted by the court, that the proposed road be declared a public high-

way of Union County, Oregon, and ordered opened up and placed in repair for travel according to law. It was further ordered that the report of the viewers be placed on record, and that the surveyor's plat of the proposed road and his field notes of the survey thereof be placed on record. If these things were ever done, the evidence does not so disclose, and there is no way to determine the exterior limits of the road attempted to be established. Hence, under the decision in the *Bayard* case, the proceedings do not evidence of color of title and are no basis for application of the rule invoked by the plaintiffs.

"3. The question, however, is one of fact,¹⁹ and there is additional evidence bearing upon it which must now be considered.

"As already stated, five deeds conveying all or a part of the plaintiffs' land indicate that its southwesterly boundary is the county road. The evidence shows that for more than 25 years a fence has been maintained along the southwesterly line in approximately the same position as the present fence, which is on the southwesterly line as surveyed by the witness Morgan. It is a fair inference from the evidence that both the county officials and the officers of the defendant company considered that the land on which the irrigation ditch is located is a part of the county road. Before April, 1937, the defendant's irrigation ditch extended from the Grande Ronde River about a quarter of a mile easterly from the Orodell Bridge, and thence through the city of La Grande to the lands to which the company supplied irrigation.

"Lowering of the river made it necessary to move the point of intake to its present location slightly west of the Orodell Bridge. Certain arrangements with the city, not material here, were made for moving the ditch, and a permit was obtained from the county court..."

The permit, in part, was quoted in the court report.²⁰ It was not disputed that the location of the ditch, described in the permit, was somewhere between the UPRR right of way and the plaintiffs' southwesterly line. The defendant pleaded the permit was consent given by the county for the maintenance of its ditch in the county road "if any part of said road is inside of defendant's right of way." But the court said:

"We think that the evidence shows that defendant relied on the permit as its authority for locating the ditch where it is. In reading the testimony to which we shall refer, it should be borne in mind that the witnesses, in using such expressions as 'alongside the road' and 'between the road and the fence' were obviously referring to the improved portion of the road.

"Royal Frank Tyler, a director of the defendant company, who represented it in the negotiations with the

county court respecting the relocation of the ditch, gave a pretrial deposition in which, while he would not admit that he intended to put the ditch in the county road, he did testify as follows: (In the following, 'Q' denotes questions, 'A' denotes the answer of response to the questions.)

“Q: You talked to the County Commissioners with reference to permission to put your ditch along the road?

“A: Yes, sir.

“Q: You did get permission to put the ditch along the road, did you not?

“A: Well, we got permission to cross the road, and as Mr. Cochran states, there was a contract drawn up with the County, that we should put a permanent crossing across the road.

“Q: You didn't intend to go on anybody's land without permission, did you, Frank?

“A: Sir?

“Q: You didn't intend to put the ditch on anybody's land without permission, did you?

“A: Well, a bunch of us went up and looked the ground over, there, and said it seemed to be an extra wide road, and we could put it on the side next to Bushnell's land (referring to the then owner of plain-tiffs' land).

“Q: There was plenty of room for it alongside the road?

“A: Yes.

“Q: And that would avoid the necessity of going upon private land, wouldn't it?

“A: Yes, sir.

“Q: It was your intention to avoid going on private land down there, wasn't it, along the road?

“A: The only private land we knew we was going on was what we bought from Mr. Carter. (The last answer refers to a right of way for its ditch which the defendant purchased from Carter, who owned land which lies west of the county road and extends from the river south to the railroad.)

“Q: (Mr. Cater) Does the Irrigation Canal Company claim to own that land where the ditch is, alongside the road there, Frank?

“A: Do they claim to own it?

“Q: Yes.

“A: Well, to my mind there is no question but what they owned it at the time Mr. Sweet bought it.

“Q: You didn't claim any right of ownership when you first put the ditch there, did you? You just claimed permission from the County, which you had? Isn't that correct?

“A: Well, that, I suppose; and the arrangements we made with Mr. Bushnell to fill a hole up.

“Q: But you didn't have any arrangements with Mr. Bushnell that any part of that ditch was to be on his land, did you?

“A: As I say, there was nothing at the time said about it. The stakes was there, and he knew where we was running it.

“Q: When you put that ditch along the road there, you relied on permission from the County for your right to put it there, didn't you?

“A: Not entirely, because we asked Mr. Bushnell about it.

“Q: What did you ask Mr. Bushnell?

“A: We talked it over with him, the three directors, and, I think, Si Perkins was up there, and several others; and he said it was perfectly satisfactory if we would put the dirt in that hole and fill the hole up for him.'

“On the trial Mr. Tyler gave the following testimony:

“Q: Now then, did you take up the matter with the County Court relative to crossing the road?

“A: Yes, sir.

“Q: And in accordance with your interviews with them, did the County Court view the premises out there?

“A: Yes, sir.

“Q: And with reference to the part of the ditch that crossed the road, was the County Surveyor, Mr. Morgan, also present?

“A: No; it wasn't Mr. Morgan. It was Mr. McLean—oh—Morgan for the County? Yes.

“Q: Mr. McLean made the survey?

“A: Yes.

“Q: Now then, was there anything said by the County Court as to the location of the ditch after it crossed the road?

“A: Well the sticks were all set when they were out looking it over, and the agreement was that we was to tile it across the county road, and the sticks *were down the side of the county road*, and they said that was O.K. with them.

“Q: Now then, after crossing the road, and on the east side of the road, did you learn who owned that property in there?

“A: We didn’t learn definitely no. I know I spoke about it, that the property was off of the graveled road, or the road that was used, and looked more like a lawn than anything else and I didn’t see why the ditch should bother the road.

“Q: Whose property was that there?

“A: There was nothing said by anyone at any time about whose property it was.

“Q: Before getting the ditch finished, did you consult someone with regard to that property?

“A: I talked with Mr. and Mrs. Bushnell.

“Q: E.N. Bushnell?

“A: Yes.

“Q: The father and mother of Alfred J. Bushnell, who was just on the stand?

“A: Yes. And as a courtesy, more than anything else I believe, and asked them if they objected to this ditch running along their property there; and they immediately replied no, “If you will fill this hole up on our ground, we are perfectly pleased with it.” We was anxious to have a place to dump the dirt, and so we immediately told them we would be glad to do that, because we wanted a place to put the dirt.

“Q: (Mr. Cater) When the ditch was placed there, and you were making the arrangements you have mentioned, Mr. Tyler, you supposed that the fence which was there, and still in the same place, you supposed that the fence was the boundary of Mr. Bushnell’s land, didn’t you?

“A: As I said before, I remember very definitely telling the County Court this road was extra wide there and seemed to be a boulevard on the side, and it didn’t seem there should be any objection to the road to have the ditch down there.

“Q: In the road?

“A: Down on the boulevard. We didn’t put it on the road. The graded road was put to the side of it. That is what I told them. They immediately said “You are probably right.” “It is alright with us.” And Bushnell said “Fill that hole there” and it would be all right to put it there. There was nothing said at the time whether it was a road or a boulevard, outside of the fact I mentioned it that way. The road was extra wide and I didn’t see that the ditch would interfere with the road at all.

“Q: I would like an answer to my question.

“A: Well, as was stated there, it never come up whether that was, but it was the supposition probably that it was, as I testified before, but the question of the boundary never come up, outside of what I have stated before.

“Q: (Mr. Cater) Mr. Tyler, when you came through Mr. Carter’s land, did you get permission?

“A: Yes, sir. I didn’t. I think Mr. Perkins was on the ditch at that time, and he made the arrangements with Carter.

“Q: Did you get anything in writing from him?

“A: I didn’t. I think there was a deed made to the ditch company for it.’

“4. The witness Morgan, who had been county engineer for the Union County since 1922 and was also county surveyor and roadmaster, and who made the survey of the plaintiffs’ land in April, 1946, as well as a map thereof which is in evidence, testified with reference to the southwesterly line of the property: ‘When I made the survey, it was my endeavor to run that portion of the line as near as I could determine *on the edge of the county road right of way or the edge of the road right of way* I should say.’ The line which he so ran was the line on which the plaintiffs’ fence is located. Moreover, the description which he prepared for the deed from Wise and wife to the plaintiffs concludes; ‘Being the same premises conveyed by L.J. Walls and Millie Walls, his wife, to Bernard W. Wise and Nancy G. Wise, his wife, by deed dated October 22nd, 1942.’ The Walls’ deed describes the property as ‘bounded ... on the south by old county road.’ While such a reference does not render it conclusive that it was the intention of the grantor to convey all the premises included in the former deed,²¹ yet there is nothing in this record to indicate that the reference did not mean exactly what it said.

“At the time of the ineffectual proceedings for location of the road, and for many years thereafter during the period of use of the road by the public the statute provided: ‘*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 eight feet in width.*’²²

“Until 1931 the standard width of 60 feet continued in effect, though changes were made in the maximum and minimum widths allowable upon prayer of the petitioners.²³ By Chapter 326, Oregon Laws 1931, the county court was given discretion to fix the width, which must be not less than 30 feet; and ever since then the county court has had this power with certain changes respecting the minimum width allowable.²⁴

“5, 6. The factors to be taken into consideration in determining the width of a highway established by

prescription were thus delineated in the opinion in the *Bayard, supra*, case:

“...As a general rule, when the highway depends solely, for its establishment upon adverse and continuous user by the general public, its width and extent of servitude are measured and determined by the character and extent of the user, for the easement cannot, upon principle or authority, be broader than user.²⁵ 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 plat 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.²⁶ 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 repassing of those in the use of it.”²⁷

“7. In *City of Newberg v. Kienle*²⁸ this court approved the following from *Washington Borough v. Steiner*:²⁹

“Where the right to a public highway is acquired by adverse user, an important element in determining the width thereof is the recognition of the limits of the way by the owners whose lands front thereon, as indicated by the monuments and fences which they themselves place upon the ground, and the lines which they fix for the same in making conveyances of their property.”³⁰

And the court cited Elliott:

“... A deed between third parties referring to the way has likewise been held competent ‘upon the question of the location and existence of the way, as a matter of public and general interest upon which reputation is admissible.’”³¹

“In *Hoban v. Bucklin, supra*, the court said:

Principle 101

“The erection of a fence or wall as a permanent structure along the side of a wrought road is more probably than not intended to mark the line separating highway use from private occupancy and possession, in the absence of evidence that it was not thus intended. As physical barriers such structures, especially stone walls apparently designed as permanent boundaries, normally denote separation and distinction of use, and are notice of the line to which use is made.”³²

8-11. (Principle 102).

Principle 102

“The usual width of highways in the locality is a pertinent factor.”³³

“...Declarations of the owner of the land over which the road runs, or of the public authorities, tending to show that it is or is not a highway, are admissible as are also acts of public authorities in working or otherwise recognizing the highway, in allowing a road tax to be worked out on the road in question, or in refusing to assess the land for taxation. Evidence may be given that it is the general understanding in the community that the locus *in quo* is a highway.”³⁴

“12. The evidence in this case presents a number of relevant facts which convince us that the county road and southwesterly boundary of plaintiffs’ land are contiguous. These facts include deeds so describing the property, the maintenance of the line fence for so many years, and the fact that the standard width of a county road was 60 feet. In addition the county court, in its dealings with the defendant, asserted its jurisdiction over the way in dispute and the defendant recognized its authority in that regard. Before the defendant built its ditch on the property of Mr. Carter it bought a right of way from him and received a deed to it. It did not even inquire, however, as to the ownership of the land lying between the plaintiffs’ fence and improved portion of the road, but evidently assumed that it was public property, and, so believing, asked permission of the county authorities to locate its ditch there.”

(Note: This is one of the points that was sought by the line of questioning in the testimony quoted. If the defendant honestly believed it was constructing the ditch outside of, and abutting the county road, as it claimed, then it must have concluded the ditch would be constructed on private land. And if this was the defendant’s conclusion, then it would be justifiable to expect it to have purchased a right of way from the plaintiff, just as it did when it planned to construct the ditch across the land of Carter.)

“This permission was granted both orally, and, as we think, by the written consent which is in evidence. We do not accept the witness Tyler’s version of the arrangement for disposal of the dirt excavated from the ditch (Note: although in all probability the underlying fee in the road was in the plaintiffs—not at issue in this case—and consequently, the plaintiffs were entitled to the dirt.) It is quite different from that given by another witness, Alfred J. Bushnell, who was called by the defendant to testify on this subject. He was present when the arrangement was made, and testified that there was a big hole on his father’s land, that the representatives of the defendant asked permission to put the dirt in the hole, that this was con-

sidered to be ‘a favor to both of us’—that is, to his father and the defendant—and that neither he nor his father gave anything for the dirt. We think this testimony is to be preferred to Tyler’s, not only because it comes from a disinterested source, but also because it is more reasonable and probable, since the defendant knew how to obtain a right of way over private property, and, moreover, in its own view of the matter, had already acquired from the county all the legal authority to build its ditch that it needed. That being so, why should it have bargained with Bushnell for a right of way? We think the agreement was simply one under which the defendant got rid of the dirt and Bushnell got the hole in his land filled.

*“Our conclusion from the evidence is that defendant’s ditch is in the county road and that plaintiffs’ land adjoins the county road. They are, therefore, abutting owners with the right of access to the highway, which is cut off as long as defendant maintains its irrigation ditch as an open ditch.”*³⁵

The remainder of the case settled other issues unrelated to the width of the county road, and are discussed elsewhere in this publication. The ditch was held to be a public nuisance and the Irrigation Canal Company was required to provide access across the ditch so the plaintiffs were provided a means of ingress to and egress from their abutting land. In a petition for rehearing,³⁶ the court noted that there was nothing that it had not considered and discussed, except a contention that, to quote from the brief:

“The Court’s opinion gives a road 80 feet wide without any proof of such a road being necessary or required.”

The **court** responded:

“This assertion is based on what, in our opinion, is an unwarranted assumption that the southerly boundary of the road is the northerly boundary of the (UPRR) right of way, and that assumption in turn derives from the description in the ineffectual proceedings to establish a road. For reasons which it is unnecessary to repeat *we rejected the plaintiff’s contention that the width of the road could be determined by reference to those proceedings*. That being so, we were unable to see how they can have evidentiary value for any purpose. Assuming, however, that resort may be had to the proceedings for the purpose suggested by counsel, we will consider counsel’s contention that the description in the petition fixes the southerly boundary of the road. The petition describes a proposed road as ‘running along the north side of the right of way of the (O.R. & N.) Company.’ This, it is said, means the road was to be contiguous with the North boundary of the right of way. *But this is not necessarily so, and in this instance the construction suggested would be unreasonable.*

“24. (See Principle 103, as follows:)

Principle 103

“The word ‘along’ is, defined in Funk & Wagnall’s Dictionary as ‘At points extending through or over the length (of anything); by the side; near.’ The meaning of the word must be determined from the context, and it **does not necessarily** imply contact.”³⁷

“For a portion of its length opposite the plaintiffs’ property the railroad right of way is 60 feet in width. It then widens out to be 100 feet, and the north line becomes 20 feet closer to plaintiffs’ land (20 feet additional on *each side of the center line*) than is the case with the remainder of the right of way to the west. According to the testimony of the witness McLain, an engineer who prepared two of the maps in evidence, this additional 20 feet was ‘bought after, in later years.’ He did not state when it was bought, and there is nothing to indicate whether it was before or after the abortive proceedings were commenced. But, whatever may be the fact about that, it is unreasonable to suppose that the petitioners intended the road to adjoin the (r/w) as it is now because the line of the road would have then proceeded in a southeasterly direction along the railroad right of way some 300 or 400 feet, then turn at left angles to the northeast for a distance of 20 feet, and then, turning again at right angles, continue in a southeasterly direction. It would be equally unreasonable to say that, if the railroad right of way at the time of the attempted establishment of the road was 60 feet in width throughout its entire length, a county road was established which adjoins the railroad’s right of way because, if that be the case, it would follow that the railroad company is now occupying 20 feet of the county road. *We conclude, therefore, that the words ‘along the north side of the right of way’ in this instance mean near the right of way.*

“Moreover, the boundary of the road, had one been established pursuant to the ineffectual proceedings, would not necessarily have been the exact line referred to the petition for the viewers, had there been any, might have made reasonable deviations so long as they stayed within the course specified in the petition.³⁸ But since there were no viewers and the proceedings were without legal effect for any purpose, the entire discussion would seem purely academic.

“Our holding is that the road is 60 feet in width, its northerly boundary being contiguous with the southerly boundary of plaintiff’s land.

“We are not persuaded that we should change the views of this case heretofore expressed, and the petition is therefore denied.”³⁹

Miscellaneous Rules and Principles of Law—Road Widths

The case of *Huggett et ux v. Moran et ux*⁴⁰ was a suit to rescind a contract for purchase of real property on grounds of alleged false representations by the defendant that the road leading to the property was a county road. The court considered the possibility that the road was under jurisdiction of the county by adverse user by the public and continued maintenance by the county. The case is discussed and quoted in detail in the section of this publication on “Public Ways by Prescription.” The rule announced by the court regarding the width of a way established by prescription is:

Principle 104

“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 absence of a taking of a greater amount.”⁴¹

But in *Silverton v. Brown*⁴² the court supplied this advice:

Principle 105

“While it is a **general rule** that the width of a highway established entirely by user is limited to the ground actually used, the question is usually for the jury, giving a proper consideration to the circumstances and conditions attending the same.”⁴³

For information on determining the width of a dedicated waterfront street, refer back to the case of *Parrish v. Stephens, supra*, cited in its entirety in this publication.

City of Eugene v. Garrett⁴⁴

(Width of a street created by abutting subdivision)

This was a suit to establish the right of the City of Eugene to a street known as Agate Avenue. The facts as set out in the Supreme Court report are:

“In 1890 ‘Fairmount,’ Lane County, Oregon, was platted into lots and blocks with streets and alleys. It was located some distance beyond the limits of the City of Eugene as the same then existed. The addition was embraced within the limits of the donation land claim of William Smith and wife, with the west line of the claim as the west line of Fairmount. The street on the west side was designated as Agate Avenue, and extended from the Oregon & C.R.R. right of way on the north to the south side of the platted portion of the

claim. This street was platted and dedicated to the **width of 53 feet to 60 feet**; the variation being due to the fact that the west line of the claim did not coincide with the line of the street. (**Note:** Apparently, this meant the two lines were not parallel.)

“In 1891 University Addition to Eugene was platted with the east line the same as the West line of Fairmount (**Note:** apparently meaning the two additions abutted one another), and the plat shows the street **90 feet wide** from the east line of Agate Avenue. This would take 53 feet to 60 feet east of the claim line and 30 to 37 feet on the west of the claim line to make the width dedicated.

“In 1892 the owners of Fairmount Addition filed an amended plat, subdividing some of the lots. This plat shows the west line of the lots facing on Agate Avenue, 11 (eleven) feet farther west than the first, in order to correct an error in the first plat and to conform to the stakes set in the ground marking that line of the lots.

“In 1895 all that part of University Addition south of 15th Street was ordered vacated by the County Court of Lane County. Thereafter the owners of University Addition instituted a suit in the Circuit Court to quiet title to this tract of 34 acres, and to register the same under the Torrens Registration Act. After due service and publication of notice a decree was rendered in effect quieting the title and ordering the same registered. After this the title to the tract was acquired by the Board of Regents of the University of Oregon. This tract embraced all the land which was formerly a part of University Addition, from the south line of 15th Street to 18th Street. Both of the additions mentioned, were outside of the limits of the City of Eugene, and were not within the boundaries of any municipality, until the limits of the City of Eugene were extended by an act of the legislature in 1903, after which a portion of what was formerly University Addition, south of 18th Street, was platted as Gross Addition, and the plat was accepted by the city and duly recorded. In 1908 the city council of Eugene passed an ordinance providing for the improvement of Agate Avenue. The centerline of the improvement was declared to be 10 feet east of the claim line above referred to. The street was then improved by grading 40 feet in width, with a high grade of macadam 16 feet in the center, of a 70 foot street. Wooden sidewalks were constructed along the west side of the 70 foot line for a portion of the distance north of 15th Street, and some shade trees were planted which are now about twelve feet high. Gutters and drains were arranged to conform to this proposed line, and the plumbing of the property owners was connected with the sewers. By an agreement with the Board of Regents of the University the use of a sufficient area to make a 70 foot street along the 34

acre tract was obtained, and the fence on the east side of the tract was adjusted to this line agreed upon.

"In 1914 the property owners along Agate Avenue petitioned the city council to take formal action to *definitely determine the lines of the street*. An ordinance was passed by the council *declaring the street to be 70 feet in width* and vacating the remaining portion. This ordinance, however, was vetoed by the mayor and never became effective. Therefore it cannot be further considered in connection with this case. This suit was instituted by the direction of the city officials to quiet title to the street *to the width of 90 feet, as formerly dedicated*."

The Circuit Court of Lane County passed a decree establishing the line of the street as prayed for (90 feet) in the complaint, and the answering defendants appealed. Mr. Justice Bean delivered the following opinion for the Supreme Court:

"1, 2. We shall first consider that part of Agate Avenue not adjacent to the University tract. The request to establish a seventy-foot street and vacate the remainder thereof came principally from the property owners on the west side of the street and north of the University tract. Prior to 1909 this street had been used but little. It was then graded to the width of 40 feet with macadam in the center of the grade 16 feet in width. Sidewalks were constructed for a portion of the distance on the west side and some five or six dwelling houses were built and some of the lots graded and adorned with shrubbery with a view to conforming to the proposed 70 foot street. *None of the houses were built within the 90-foot street line* but some of them are near that line. It appears from the evidence, taking into consideration all of the proceedings relating thereto, that it was proposed by some of the city officials, and desired by some of the property owners, that a 70-foot street should be established. This was never done. Most of the lot owners who made improvements on the west side of the street knew that no portion of the 90-foot street had ever been vacated. All of them could, with reasonable diligence, have obtained such information. This is shown and recognized by their petition to the city council to vacate a portion of the street and establish the same seventy feet wide, as proposed by the ordinance which was vetoed by the mayor. Plainly expressed, these lot owners took chances on the street being narrowed. Their request in this respect was denied. Subdivision 36 of the charter of the city of Eugene, Special Law of Oregon, 1905, page 254, empowers the city council to provide for the vacation of any street or alley, upon the petition or with the consent of not less than three-fourths of the owners of the property adjoining or abutting upon such street or alley or part thereof to be so vacated. *The passage of the ordinance for the partial*

*improvement of Agate Avenue and fixing the center line of the street, without the required petition or consent, could not have the effect of vacating a portion of the street. The municipal authorities have no right to sell or dispose of streets or alleys dedicated to the public except in the manner provided by law.*⁴⁵ It is contended on behalf of the defendants that the city is estopped from claiming a street 90 feet wide, for the reason it has never used any portion of the street outside of the 70-foot line, and has by its acts led the property owners to improve their property to that line. It is not usually expected that a city will improve all of its streets at one time. It may also, if necessity requires, with the same propriety grade a portion of a street. When this street is permanently improved or paved, the work already done will not be lost. The evidence in this case does not disclose acts done by the adjoining proprietors which indicate that they, in good faith, have claimed a part of the highway as their own property, or have expended money on the faith of such a claim by adjusting their property to the highway as they claim it to be, so that such private rights are of more persuasive force than those of the public. In other words the city is not estopped by its acts from asserting its rights to the full width of this part of the street, under the rule adopted in this state ...⁴⁶

"3, 4. As to the portion of Agate Avenue between 15th Street and 18th Street, along the east side of the University tract a different situation is presented. It should be remembered that in 1895 upon the petition of the owners of University Addition the County Court of Lane County ordered vacated all that part of the streets and alleys of the addition south of the south line of 15th Street as designated upon the plat. This affected the 34 acre tract. The order was acted upon. Thereafter the owners of the tract instituted proceedings in the Circuit Court for the purpose of quieting the title to the tract and registering the same. After due service and publication of notice a decree was passed adjudging the Lane County investment Company a corporation to be the owner in fee simple and in possession of said tract; and that no other person or corporation had any interest or claim of any kind to said land; and confirming such title, and ordering the same registered as provided by the statute. After this the 34 acre tract, extending to the east line of the Fielding McMurray D.L.C. was conveyed to the Board of Regents of the (U of O) for university purposes.

"It is contended on behalf of the city that the County Court was without jurisdiction to order a vacation of the streets and alleys for the reason that the petition therefore did not state that University Addition was not within the limits of any incorporated city or town, and did not show that the addition was outside the boundaries of the City of Eugene, in order to conform

to the requirements of Sections 3276 or 3284, L.O.L. The city limits were then fixed by the legislative charter of Eugene, and the County Court could take judicial notice of the same and also of the public survey of the D.L.C. which was named upon the plat recorded and referred to in the petition.⁴⁷ However, this may be we do not deem it necessary to decide as to the force of the order of vacation of the County Court. The decree of the Circuit Court precludes the city authorities from establishing Agate Avenue as 90 feet in width, along the east side of the University tract, so as to appropriate a portion of the land belonging to the state. The Board of Regents relied upon the title to the 34 acre tract according to the decree of the Circuit Court as they had a right to do. Equity does not demand that the title to the streets and alleys in that part of what was formerly University Addition should be disturbed, at the suit of a political division of the state. Such claim is not in harmony with the agreement made by city officials and the Board of Regents, as mentioned above.

"The decree of the lower court will be modified so as to exclude from the declaration of a street 90 feet in width, all that portion of Agate Avenue over the University Tract between 15th Street and 18th Street and affirmed as to the remainder of the decree."

On a petition for rehearing, the rehearing was denied. Mr. Justice Bean delivered the following opinion of the court.⁴⁸

"In a petition for rehearing, counsel for the defendants urge that this is not a suit for equitable cognizance, for the reason that the plaintiff has not shown that the land improved *within the street* is not in possession of another. There is more than one ground for equitable interference.

"It is conceded that Agate Avenue in the City of Eugene, was regularly dedicated as a public street to the width of 90 feet and that the plat and dedication were duly recorded. The fences and so forth mentioned in the answer of defendants indicate an encroachment upon this public highway.

"5-7. It is also shown and unquestioned that a portion of the street is improved and occupied by the public to the width of about 70 feet. *Where there is possession and user of a part of the street within the well-defined limits of the dedication, record of which has been duly made, it amounts constructively to an occupation of the entire dedicated width as designated upon the plat in so far as the possession is necessary for the purposes of this suit.*⁴⁹ This rule has been applied to public highways where the question of adverse possession was involved and by analogy is applicable here.⁵⁰ A city as trustee of streets for the use of the public is in duty bound to remove all obstructions and encroachments which materially disturb

the public user. Any course may be adopted which is consistent with fundamental law and is adequate and best adapted to effect the desired result and protect the rights of the public in the street.⁵¹ An unauthorized obstruction of a public highway is a nuisance.⁵² The application of Section 341, L.O.L., providing for the abatement of a nuisance, or a summary removal, might not be appropriate in a case of this kind, where there is a difference of opinion between city officials and some dispute between lot owners and the city. The remedy provided by the section of the Code for nuisances is not conclusive; but whenever a nuisance will cause irreparable damage or require numerous actions equity has concurrent jurisdiction with courts of law and will enjoin continuance of the objectionable conditions.⁵³ In legal effect the encroachments upon the street in question, or trespass upon the easement, constitute a purpresture or public nuisance. One of the earliest recognized forms of public nuisance with which equity has interfered is that of purpresture. The jurisdiction of equity in cases of purpresture, as well as of public nuisance, generally rests in the necessity of preventing mischief and avoiding vexatious litigation. This remedy is more efficacious than that at law.⁵⁴ We therefore feel safe in holding that equitable jurisdiction in this case is founded upon solid grounds.

"... The petition for rehearing is denied."⁵⁵

Alteration of County Roads—Case Study, Re Procedural—Problems

The case of *Nyman v. City of Eugene*⁵⁶ was found to be instructive in resolving dedication and road and highway problems. This case was difficult to categorize under the subjects discussed to this point in this publication. Yet this case announces rules, principles of law and considerations that are important to the subject of public ways, specifically county roads. Consequently, it is presented as a separate section of this publication.

The primary issue was the effect to be given to a recitation in a county court (not the circuit court) that certain property owners agreed to the widening of a county road. The Court of Appeals held that the recitation was insufficient to confer jurisdiction on the county court "without an affirmative showing in the record that all of such owners signed the agreement."⁵⁷

The Oregon Supreme Court granted a review."⁵⁸

The parties submitted this controversy without suit or action pursuant to ORS Chapter 27.⁵⁹ The facts were stipulated as follows:

"Plaintiff is the owner of real property adjacent to a road in the City of Eugene known as Barger Drive ... (orig. established as a county road in 1895, with a 40 foot r/w). The public has used the roadway at all times since.

"On or about (1-31-51), the Lane County Court adopted Resolution 2178 declaring its intention to widen Barger Drive to 50 feet. The resolution stated that the widening was '(a)ll as agreed to by the property owners abutting on said road.' However, the parties to the present proceeding *have failed to find any record that plaintiff's predecessor in interest agreed to the widening.* The parties located County Road File 2178 as it now exists and found in that file an agreement to the widening of the road, consisting of three unnumbered pages which were executed (2-1950). The agreement contains the signatures of certain owners of property abutting Barger Drive at that time, but *the signature of the plaintiff's predecessor in interest does not appear on any of the pages.*

"Pursuant to Resolution 2178, notice of the widening was posted and a return of that notice was made on or about (2-5-'51). On (4-2-'52), the county court decided to establish a 50-foot right of way and made an entry in the county journal to that effect.⁶⁰

"In the fall of 1952, Lane County blacktopped Barger Drive. The blacktop was within the boundaries of the original 40-foot right of way. The fences ran approximately one-quarter mile along Barger Drive but did not traverse the property of plaintiff's predecessor. Lane County maintained the roadway until 1966, when the City of Eugene assumed jurisdiction.

"On (4-14, 1975), the City adopted an ordinance providing for the improvement of Barger Drive, including the widening of the roadway. In (9-1975), the City commenced construction of Barger Drive improvements on that portion of the (r/w) that Lane County sought to acquire in 1952. That portion includes a strip of the property owned by plaintiff.

"*Plaintiff contends that no actions of Lane County or the City of Eugene have operated to widen the right of way and that she is entitled to compensation for the taking of the strip on her property.* The City contends that plaintiff's rights are subject to a right of way in the public because: (1) the 1952 Lane County order lawfully extended the right of way to include the strip on plaintiff's property; (2) plaintiff cannot now collaterally attack the 1952 resolution because her predecessor in interest failed to seek a writ of review and because of passage of time; and (3) plaintiff's rights to the disputed property are barred by the doctrine of adverse user.

"I. Validity of the 1952 Order

Plaintiff contends that the 1952 order is invalid because the resolution on which it was based contained no *statement of public necessity* or, alternatively, because the signature of her predecessor in interest does not appear on any of the documents found in public records. The trial court agreed with plaintiff's first contention, concluding that the statement of public necessity is 'jurisdictional' and that the failure to include such a statement *rendered the 1952 order 'void.'* The Court of Appeals rejected the plaintiff's first contention. However, it agreed with her alternate position; concluding that in order for the county court to acquire 'jurisdiction' to widen a road by agreement, *the signatures of all affected property owners had to appear in the record."*

The Supreme Court provided an enlightening explanation of *jurisdictional*, as used here:

"It is important to observe at the outset that the characterization of a statutory mandate as 'jurisdictional' simply states a conclusion. In the context of a case such as this, it means that this court has concluded that failure to comply with the statutory requirement renders the government action void as to this particular party. The characterization is, therefore, the ending point of our analysis, not the starting point. In a number of cases, however, this court has characterized statutory requirements as 'jurisdictional' with little or no analysis. Thus, in various challenges to the establishment or alteration of roads, we have held that the county court acted without 'jurisdiction' when it relied on an earlier non-final order by the same court⁶¹ when no statement of public necessity appeared in the authorizing resolution;⁶² when an affidavit disclosed that notice was not posted according to statutory requirements;⁶³ when a recitation in the record did not disclose the manner in which notice had been posted;⁶⁴ when the petition to establish the road did not describe the road's terminus;⁶⁵ and when there was no recital in the record that notice had been given to affected landowners.⁶⁶ At the same time, we have dismissed challenges on the ground that the alleged defects were not 'jurisdictional'; holding that once 'jurisdiction' is established, the county court proceedings are 'presumed' regular.⁶⁷

"It is difficult, if not impossible, to determine from these cases why certain statutory requirements are considered 'jurisdictional' and others not. Our decisions also seem to apply the concept of jurisdiction indiscriminately without distinguishing 'legislative' or policy-making functions from 'quasi judicial' or fact-determining functions.⁶⁸ We are now of the opinion that clear analysis in this area requires that we establish criteria for determining what statutory requirements are indispensable to the validity of the

challenged action. We are also of the opinion that our analysis will be facilitated if we abandon the use of the label '*jurisdiction*' in cases as this and focus instead on the specific statutory language that permits the government to affect the rights and obligations of its citizens.

"ORS 368.405⁶⁹ provides that proceedings for the establishment and alteration of public roads may be instituted by petition of freeholders, by resolution of the county court, by grant of owners of necessary rights of way, or by condemnation proceedings. The mechanics of establishing a road by petition are described in ORS 368.430-465, and the mechanics of establishing a road by resolution are described in ORS 368.470. Because ORS 368.470 requires that the county court, when establishing a road by resolution, *give notice 'as provided for upon the filing of a petition for such purposes' and that it follow 'like proceedings ... as in the case of the filing of a petition,'* the procedures are basically the same whether the court acts under a petition or a resolution."

The Supreme Court decision is as follows:

"1. ORS 368.470(7) also allows the county to 'procure right of way' by 'agreement.' Subsection (7) was apparently designed to *permit the county to dispense with some of the formalities described below when all the affected property owners agree to the action.*

However, the subsection must be read to mean that *absent agreement of all the property owners affected, the same proceedings must be followed as in the case of the filing of a petition.*

"ORS 368.445 (1) provides that when the petition authorized by ORS 368.430 is presented to the court:

"... (I)t shall be accompanied by satisfactory proof by affidavit that:

"(a) Notice has been posted at the place of holding county court and at three public places in the vicinity of the proposed road to be located, laid out, relocated or changed, 30 days previous to the presentation of the petition, notifying all persons concerned that the application will be made to the court at its next term.

"(b) Notice has been forwarded by mail, postage prepaid, not less than 30 days prior to the date of the presentation of the petition, to each record owner of land, on or over which the proposed road or portion thereof is to be laid out, relocated or changed, at the last-known post-office address of the owner.⁷⁰

"ORS 368.445(2) provides:

"If the address of the owner is unknown to the person mailing the notice mentioned in paragraph (b) of subsection (1) of this section, it may be mailed to the address given on the latest tax roll in the office of the

tax collector of the county. If the address is unknown to the person mailing the notice, cannot with reasonable diligence be ascertained and cannot be found on the latest tax roll, the notice may be addressed to the owner at the county seat of the county where the land is situated.'⁷¹

"ORS 368.455 requires that the notice contain a description of the proposed road, the date of presentation to the county court, and, if the road is initiated by petition, the signature of one or more of the petitioners. ORS 368.450 provides that any owner of land affected by the proposed road who signs the petition waives all further notice.

"ORS 368.460 provides that upon presentation of the petition 'with satisfactory proof of posting and mailing notice,' the county court shall appoint a board of road viewers to survey the proposed road and assess damages. Having done this, the viewers are required to file a report, which must be read at public meetings by the county court at least twice.⁷² ORS 368.480 then provides:

"'At any time prior to the expiration of the day on which the report mentioned in ORS 368.480 is publicly read for the second time, any person whose lands are directly affected by the report may file a petition for damages, and any freeholder, residing in the road district where the road is located, whose name does not appear upon the petition, may file a remonstrance against the proposed establishment.... Failure to file a petition for damages within the time allowed by this section is *a waiver of all rights thereto by every person interested therein, except minors or other persons under disability*⁷³ (emphasis supplied).'

"After considering the report by the road viewers and any claims for damages or remonstrances, the county court may adopt or reject the report and enter an order to that effect.⁷⁴ That order may be appealed to the circuit court, as may the award for damages, within 20 days after the report is adopted.⁷⁵ On appeal, the circuit court's scope of review is limited by ORS 368.535, which provides:

"'No final order establishing, altering or relocating any road or highway shall be set aside or annulled upon appeal or review, nor shall any county court refuse to render any such final order, on account of any defect or irregularity in the petition or resolution, or notice thereof, which does not materially affect the substantial rights of an interested part. *The following irregularities are immaterial defects:*

"'(1) Errors of description of the intermediate points, courses or distances of the proposed road, when the proposed road can be otherwise definitely located.

“(2) *Errors in the posting of the notices, where it can be shown that all persons objecting to the proceedings for the proposed road had actual notice* thereof prior to the time of the first reading of the petition or resolution.

“(3) *Errors in or omissions of the names of the petitioners appearing on the notice, where no remonstrance is filed.*”⁷⁶

“2. As we read the above statutes, *they demonstrate a legislative intent to place the burden of objecting to a proposed road on the property owners who may be affected by the decision to establish or alter the road. At the same time, however, the statutes impose strict requirements on the county to ensure that affected property owners receive actual notice of the proposal insofar as possible. On appeal, an order of the court may not be set aside if the irregularity affects the ‘substantial rights of an interested party.’*

“In establishing a statutory scheme for road development, the legislature was faced with two competing policies. *On the one hand, it wished to ensure that county orders establishing roads would be final and unassailable. At the same time, it wished to ensure that all parties who might be affected by the road would have an opportunity to participate in the decisionmaking process. This was particularly true with respect to property owners over whose land the road would be established and who had a property interest as well as a general civic interest in the decision. Accordingly, the legislature, while limiting the nature of defects that could be used to attack an order, established elaborate procedures for ensuring that affected property owners received actual notice of the proceedings.*

“3. From our reading of the statutory scheme, we conclude that with respect to persons whose property must be acquired for the road, compliance with the notice requirements contained in ORS 368.445 is *indispensable to the validity of the action and that failure to comply with those requirements prevents the county from barring claims for compensation by owners who do not receive notice.* We also conclude that *compliance with the other statutory requirements is not indispensable to the validity of the action unless the non-compliance in some way renders the notice ineffective.* We think this conclusion reflects the balance that the legislature struck in enacting ORS 368.405 *et seq.* To the extent the cases cited above are inconsistent with our holding today, *they are disapproved.*

“4. It follows from this that we must reject plaintiffs claim that the 1952 order by the Lane County Court is ‘void’ because of the court’s failure to include a statement of public necessity deprived it of ‘jurisdiction.’ No contention is or could be made that a statement of public necessity was necessary to give plaintiffs

predecessor in interest fair notice of County Court proceedings.

“A different question, however, is presented by the plaintiffs second contention. Plaintiff contends, and the Court of Appeals agreed, that where a county court attempts to *establish a road ‘by agreement’ pursuant to ORS 368.470(7), it can ‘obtain jurisdiction’ so as to cut off a landowner’s claim to compensation only if the record affirmatively shows the agreement of all the affected land owners.* Because the signature of plaintiffs predecessor in interest does not appear in the county court records, the Court of Appeals held that the Lane County Court did not have ‘jurisdiction’ when it acted in 1952.

“Insofar as the majority of the Court of Appeals refers to the ‘jurisdiction’ of the county court to widen the road, it reflects the analytical error found in past opinions by this court. It also illustrates why we believe it is preferable that the label be abandoned in the context of cases such as this. A county court that decides to widen a road is not acting judicially at all but rather is making a policy decision. The concept of jurisdictional is judicial in nature and is out of place in the legislative context.

“5,6. Nevertheless, we agree with the Court of Appeals’ ultimate conclusion. As noted above, we read ORS 368.470(7) as allowing the county to ‘procure right of way’ by ‘agreement’ only if the agreement includes all the property owners whose land will be taken for the road. If the agreement does not include all the property owners, the county may cut off the claims of nonparticipating owners only by complying with the notice requirements contained in ORS 368.445. Either ‘agreement’ or notice is indispensable to the validity of the order if the effect of the order is to deprive persons of their property. We therefore examine the record before us to see if these requirements are met.

“The City admits the plaintiff’s predecessor in interest did not sign the three pages of ‘agreement’ found in County Road File 2178, and there is nothing else in the record that indicates plaintiffs predecessor agreed to the widening or received notice thereof pursuant to ORS 368.445. The City, however, contends that the statement in Resolution 2178 that the widening of Barger Drive was ‘(a)ll as agreed to by the property owners on said road’ is *prima facie evidence* that all the affected property owners agreed to the widening, that there is no affirmative evidence to rebut the recitation, and that absent such evidence, the recitation is sufficient to show that the County Court validly widened Barger Drive ‘by agreement.’

“We shall assume, without deciding, that a recitation that *all* the affected property owners agreed to the wid-

ening would have the effect contended for by the City.⁷⁷ The fact remains that *Resolution 2178 does not contain such a recitation*. The resolution simply states that the widening was '(a)ll as agreed to by the property owners abutting on said road.' *It does not necessarily mean to state that the widening was agreed to by all the property owners*. Given the state of the record, particularly the contents of County Road File 2178, we decline to give the recitation the broader construction contended for by the City. It is just as reasonable to conclude that the recitation was intended to mean that the widening was agreed to by the property owners who signed the three-page document in the file as it is to conclude that the recitation refers to all property owners.⁷⁸ This is particularly true in light of the sequence of events occurring from 1950 through 1952. In 1950, a group of property owners signed the document found by the parties in the county road file. On January 31, 1951, the county court adopted Resolution 2178 declaring that the widening was 'all as agreed to by the property owners abutting on said road.' There is nothing in the official record, the file, or the stipulated facts to indicate an investigation by the county to determine whether there were property owners abutting Barger Drive in addition to those who signed the document. It is reasonable to conclude from this that the language used in the recitation was *intentional*, because at the time it adopted Resolution 2178 the county court may not have *known* whether all the property owners agreed to the widening.

"7. We do not say, of course, that the City's interpretation of the recitation is an unreasonable one. Nevertheless, we believe that if a bare recitation in a public record is to be considered *prima facie evidence*⁷⁹ of the fact alleged, this court should **not extend the effect of the recitation** beyond what it literally states, at least in cases where the matters dealt with in the recitation concern elements of procedural fairness and there is evidence tending to indicate that the recitation may not have been a carefully considered one.⁸⁰

"8. The City also relies on the statutory presumption contained in ORS 41.360 (15) that official duty has been regularly performed. *We hold that the presumption cannot be applied to establish that the Lane County Court gave notice to (the) plaintiff's predecessor in interest*. In a long line of prior decisions, this court has held that a county court that seeks to establish or alter a road can bar claims of affected property owners to compensation for the taking of their property only if it actually appears in the records that the county complied with the notice statutes.⁸¹ We think this rule has developed out of more than a formalistic concern over 'jurisdictional' requirements and that the **primary concern** is *one of fairness to the property owners*. It is not unreasonable to require the county to make some record, at least by way of 'allegation or recital,' that notice

requirements have been complied with when it **attempts to acquire property of others**. On the other hand, to '*presume*' that notice was given simply by virtue of the fact that an order was entered would impose an almost insurmountable burden of proof on the property owner to prove lack of notice, particularly in a case as this when the county does not act on its order until over 20 years after it is entered.⁸²

"9. Moreover, even were we to hold the presumption available in this case, one of the conditions precedent to the operation of the presumption is 'that the circumstances of the particular case add some element of probability.'⁸³ For the reasons stated above, we do not believe the circumstances of this case suggest an element of probability that plaintiff's predecessor in interest received notice of the 1951 proceedings.

"Contrary to the position taken by plaintiff, however, we do not conclude from this that the 1952 order is 'void' for 'lack of jurisdiction.' We agree with the conclusion reached by Judge Joseph in his concurring opinion in the Court of Appeals that the failure of the Lane County Court to procure the agreement of plaintiff's predecessor did not deprive the county court of 'jurisdiction' to acquire the property of the persons who signed the agreement.

"10. The county court complied with the initial requirements of ORS 368.470 when it declared its intention by resolution to widen Barger Drive and when it posted notices to that effect. The passage of the resolution being a legislative act, it was not necessary, *at this stage of the proceedings*, for the County to acquire 'jurisdiction' over anyone. In order to acquire the property necessary for the road, however, it was necessary that the County comply with the notice requirements contained in ORS 368.445, which include a requirement that notice be mailed to the last known address of each affected owner.

"11. With respect to the property owners who joined in the 1950 agreement, however, mailed notice was not required. ORS 368.450 provides that any owner of land who signs the petition authorized by ORS 368.430 waives all further notice. By analogy, and under a general common law principles of waiver,⁸⁴ a county court that attempts to authorize a road by resolution need not send mailed notice to persons who have signed an agreement *to give up their property for the road*. It follows that insofar as the property owners who signed the 1950 agreement are concerned, the Lane County Court had the power to acquire their property.

"In summation, we hold that (1) the Lane County Court validly acquired the property of those persons who signed the 1950 agreement, and (2) the Lane County Court did not validly acquire the property of plaintiff's predecessor in interest because it does not

appear in the record, either by proof or by recital, that plaintiff's predecessor agreed to or received notice of the proposed widening.

"II. Plaintiff's Collateral Attack

"The City's second contention is that the plaintiff is barred from collaterally attacking the county court's 1952 order because (1) the only means of challenging the 1952 order is by writ of review,⁸⁵ and plaintiff's predecessor in interest failed to pursue that remedy, and (2) plaintiffs collateral attack is barred *by the passage of time*.

"12. In light of our conclusion above that Lane County never validly acquired the property of plaintiffs predecessor in interest, we must reject the City's contention that plaintiff is now barred from seeking remedy because her predecessor failed to challenge the county court's 1952 order by writ of review. On this point we agree with the analysis contained in Judge Joseph's concurring opinion below:

"On the record before us, the defendant City simply entered on property **it did not own**. It did not own it because the County had never got beyond the stage of simply declaring its intention to take the property by resolution ... and posting the notices.'⁸⁶

"13. We find the City's claim that plaintiffs remedy is barred by the passage of time equally unconvincing. The City argues that plaintiffs' predecessor in interest had to challenge the county court decision within 60 days, the period established by the writ of review statute.⁸⁷ Alternatively, the City argues that plaintiffs claim is barred by the statutes of limitation because more than 10 years have passed since the order of the county court.⁸⁸ Both of these arguments beg the basic question, which is whether or not the 1952 order was binding on the plaintiff's predecessor. If it were, plaintiff would lose on the merits. If not, the present controversy *simply arises out of a trespass by the City that occurred in 1975*.

"14. With respect to the City's claim that plaintiffs remedy is barred by the equitable doctrine of laches, we are generally in agreement with the analysis contained in the majority opinion of the Court of Appeals. Moreover, even were we to agree with the city that plaintiff was on notice of the County's claim when she purchased her property in 1967, we are aware of no rule of law that would require plaintiff to immediately have brought a declaratory judgment procedure or the like in order to determine whether that claim was valid. There was no actual interference with plaintiff's rights until the City began improving Barger Drive in 1975, and she then asserted her claim immediately. The fact that the City 'planned for, held hearings on, financed and began construction of the improved road' did not serve to charge her with

knowledge that the City planned to take her property without compensation.

"III. Adverse User

"The City's final contention is that the 1952 order by the Lane County Court conferred color of title to the disputed property upon the County and that the County, and now the City, have thus acquired title by adverse possession.

"15. We have recognized that a possessor having color of title to a parcel of land may acquire title by adverse possession of the land described in the deed through the actual possession of only a part.⁸⁹ This doctrine of '*constructive adverse possession*,' however, is applicable only when the land described in the deed is recognized in the community as a single defined lot.⁹⁰ *The doctrine has no application when the premises consists of several known lots or tracts even though they are described in the same deed. In such a case, each parcel is distinct, and an entry upon one parcel under color of title is not constructive occupancy of all.*⁹¹

"16. We find these cases dispositive of the City's claim that it acquired title to the strip of land on plaintiff's property by constructive adverse possession. Even if we assume that the 1952 action by the Lane County Court conferred color of title upon the county to a 50-foot wide right of way extending the length of Barger Drive, there is nothing in the stipulated facts to indicate that the County, or the City, actually possessed any part of plaintiff's property until 1975, when the City began construction of the Barger Drive improvements. Plaintiff's property is a *distinct parcel of land*, and the County's extension of the Barger Drive fences onto the property of others did not enable it to constructively possess the property of the plaintiff.

"The City also contends that it is entitled to the disputed strip of land under this court's holding in *Huggett v. Moran*,⁹² where we 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 establishment of a legal road in the absence of evidence of the taking of a greater amount (emphasis ours).'

"We agree with the Court of Appeals that the City's reliance on *Huggett* is misplaced. Unlike *Huggett*, this case does not involve a road established by prescription, and the reasoning we used in *Huggett* is therefore inapplicable.

"The decision of the Court of Appeals is affirmed."⁹³

Nyman is important to Oregon road and highway law. The principles of law announced or confirmed were needed to clarify two obvious fallacious presumptions.

One presumption is that just about any statutory requirement for establishing, altering the route, or widening a county road could be ignored because these highways were under “jurisdiction” of the county courts. This opinion was not only held by many county courts, it was held by the circuit courts and obviously, at times, the Supreme Court, i.e.:

“Our decisions also seem to apply the concept of jurisdiction indiscriminately without distinguishing ‘legislative’ or policy-making functions from ‘quasi-judicial’ or fact-determining functions.”⁸⁴

The idea that statutes could be disregarded in matters involving the taking of private real property for a public way can be confusing. A question to consider when reviewing road and highway statutes and the cases relating to those laws: “Why would the Oregon Legislature bother to establish and amend the county road statutes if the statutes could be disregarded by the county courts?” Apparently, the term *jurisdiction* has been interpreted differently by county courts, circuit courts, and, on occasion, the Supreme Court. The Supreme Court, in *Nyman*, identified that term as part of the problem, i.e.:

Principle 106

The term “jurisdiction” is inappropriate in situations where a county court decides to widen or alter the location of a county road. “A county court that decides to widen (or alter the location of) a road is not acting judicially at all, but rather is making a policy decision. The concept of jurisdiction is judicial in nature and is out of place in the legislative context.”⁹⁵

Consequently, it is not within the “jurisdiction” of a county court to dispense with the notice requirement ordered by the Oregon Revised Statutes.

Principle 107

“ ... With respect to persons whose property must be acquired for the road, compliance with the notice requirements contained in the ORS is indispensable to the validity of the action, and failure to comply those requirements prevents the county from barring claims for compensation by owners who do not receive notice.”⁹⁶

Principle 108

As regards the acquisition of real property for establishing, widening or altering a road, “Compliance with other statutory requirements is **not** indispensable to the validity of the action unless the non-compliance in some way renders the notice ineffective.”⁹⁷

And as regards those conclusions, the court said they “reflect the balance that the legislature struck in enact-

ing ORS 368.405 *et seq.* To the extent the cases cited above are inconsistent with our holding today, they are disapproved.” A re-examination of holdings 4, 5 and 6 will explain why the statutory requirement of “notice” could not be disregarded, yet a “statement of public necessity” could be dispensed with.

The other presumption that exists is actually a misunderstanding of how one statutory presumption is to be applied. The statutory presumption, now contained in ORS 40.135 (and was ORS 41.360 in 1979), is the presumption, “Official duty has been regularly performed.” That presumption is dependent on many other presumptions, including another presumption of statutory law: “The law has been obeyed.” Both of these presumptions rely on unofficial presumptions, or assumptions, that (a) those who are presumed to know the law, **do know the law**, (b) those who are presumed to know the law, **understand that law**, (c) those who know the law, know when the laws can be dispensed with, (d) those who are in the capacity to make official decisions, will abide by the law when so required, and (e) those who are assigned statutory responsibilities, in the chain of command beginning at the county court level, will do as instructed.

Obviously, those presumptions, or assumptions, do not always prove to be accurate. Consequently, the legislature has provided:

*‘In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the non-existence of the presumed fact is more probable than its existence.’*⁹⁸

The fallacious presumption exists that where a county has *jurisdiction* to widen, alter or establish a road, the presumption that “official duty has been performed” bars **any** attack on the actions of the county.

To the laymen, such a presumption is “taking an awful lot for granted.” Indicative of this are the cases presented in this chapter, where a city, county, or the state has lost its case due to “too much being presumed or assumed.” Such is the case in *Nyman*. The court held that the presumption that “official duty has been regularly performed” could not be applied to establish that the county had performed every necessary duty. The court felt that “to ‘presume’ that notice was given simply by virtue of the fact that an order was entered would impose an almost insurmountable burden of proof on the property owner to prove lack of notice...”

This principle, established in “a long line of prior decisions” by the court, was developed out of a “primary concern” of “fairness” to the property owners:

Principle 109

"A county court that seeks to establish or alter a road can bar the claims of affected property owners to compensation for the taking of their property only if it actually appears in the records that the county complied with the notice statutes."

In other words, some evidence of an effort to comply is necessary to the application of the presumption.

As ORS 40.120 implies, for the presumption that *official duty has been performed* to be applicable, there must be some circumstance of the case that would indicate that in all probability the "official duty" would have been performed. In *Nyman*, the court felt this case did not hold such circumstances, and, in all probability, notices were not mailed as required. This was because the widening was by resolution. With respect to the property owners who join in such agreements:

Principle 110

"... A county court that attempts to authorize a road by resolution need not send mailed notice to persons **who signed** an agreement to give up their property for the road." This rule is based on statutory law that provides that any owner of land who signs the petition (authorized by ORS 368.430) waives all further notice."

Consequently, in all probability, the county overlooked the plaintiff who never signed the agreement. Here, some evidence or indication was necessary to presume that "official duty had been regularly performed."

The presumption that "official duty has been regularly performed" remains a necessity in Oregon Law. As regards county roads, the presumption allows counties to establish, alter or widen a road without each action being open to frivolous or vexatious suits on those actions. But, as emphasized by the court, the legislature "wished to ensure that all parties who might be affected by the road *would have an opportunity to participate in the decision-making process. This was particularly true with respect to property owners over whose land the road would be established and who had a property interest as well as a general civic interest in the decision.*"

Abandonment of a Public Easement

*Abandonment of real property is the relinquishment of all right, title, claim and possession, with the intention of not reclaiming it or resuming its ownership, possession or enjoyment.*⁹⁹ Land cannot be abandoned in favor of a spe-

cific party. The act of abandonment must be voluntary and intentional.

One method of terminating an easement is by the act of *abandonment*. However, it has long been recognized that abandonment is **not** a recognized means of terminating a public way, except in absence of a vacation statute. Since Oregon has such statutes, abandonment is not recognized as a common-law vacation of public ways.

Abandonment of a public way has not been a big subject of controversy or litigation in Oregon road law. So it is not essential to devote a lot of time and space to this subject. However, it is important enough to justify some attention here. The case of *Martin v. Klamath County*¹⁰⁰ will help explain how abandonment is relevant to the Law of Dedication and road law in this state. That case is quoted in the section of this publication on "The Extinguishment of Public Ways." The principles of law announced by the court, relevant to abandonment, were:

Principle 111

The doctrine of common-law abandonment does not apply in an action by a landowner to quiet title to a strip of land which has previously been used by the public as a roadway.¹⁰¹

Principle 112

The fact that the legislature provides a method whereby a county (or city) may abandon a road (street or alley) is positive inhibition against other methods of termination.¹⁰²

Note: The elimination of sections of state highways is often referred to as abandonment. The provisions of statutory law governing such abandonment is provided by ORS 366.300.

Dedicated Parks, Public Squares, Etc.

As was announced at the beginning of this publication:

*"There is no difference in the principles applicable to the dedication of public streets and public squares or parks."*¹⁰³

The sections of this publication on "Common Law Dedications" and "Statutory Dedications" apply equally to dedicated public parks and squares, **except: the effect of the dedication of such lands differs in that the fee in dedicated parks and squares is in the city or county having jurisdiction over the land at the time of dedication.**

Consequently, the title to a park, common or square vests in the city **in** which the land is located (ORS 271.150) or in the county when the park, common or square is outside the city boundary of any city.

Principle 113

“ ... If a public square is vacated the title thereto shall vest in the city.”¹⁰⁴

Under Principle 75: *“If the property vacated is a public square, the property shall vest in the county.”*¹⁰⁵

Note: Before making a final determination of where title to a public park, square or common vests, the plat should be carefully examined to see if the dedicatory has designated some other party or parties as fee simple owners of the underlying fee in the land.

Endnotes

1. *Latourette v. County Court*, 121 Or. 323, 255 P. 330.
2. Amended by 1953 Or. Laws ch. 229 subsec 2; 1971 Or. Laws ch. 427 subsec 1; and 1981 Or. Laws ch. 153 subsec 66, renumbered ORS 368.041.
3. Formerly ORS 368.415, prior to 1981. Note: ORS 368.036, noted in subsection 1, relates to standards for county roads and road work.
4. ORS 368.201.
5. *Id.*, subsection (1).
6. *Id.*, subsection (2a) 7. *Id.*, subsection (2b).
8. *Id.*, subsection (2c).
9. 1981 Or. Laws ch. 153, subsec 25.
10. *Latourette v. County Court*, 121 Or. 323, 255 P. 330. See: 9 L.R.A. 95; 11 L.R.A. 59.
11. Section 5441, Or. Laws.
12. *Steiver v. Steiver*, 112 Or. 485, 489, 490, 230 P. 359; Or. Laws, subsec 4555; *Lauderback v. Multnomah County*, 111 Or. 631, 226 P. 697; *Keane v. Portland*, 115 Or. 1, 7, 235 P. 677; *Lewis, Eminent Domain*, 3d ed., subsec 387; *Elliott's Roads and Streets*, 3d ed., subsec 355; 20 C.J. 881, subsec 310.
13. Or. Laws, subsec 4539.
14. *Latourette v. County Court*, 121 Or. 323 at p. 331, 255 P. 330.
15. *Id.* See: 9 L.R.A. 95, Notes on statutory procedure for widening highway. Also see: 11 L.R.A. 59.
16. *Sweet et al v. Irrigation Co.*, 198 Or. 166. (1953) 254 P.2d 700.
17. 198 Or. at p. 174.
18. *Nosier v. Coos Bay R.R. Co.*, 39 Or. 331, 334, 64 P. 644; *Bayard v. Standard Oil Co.*, 38 Or. 438, 447, 63 P. 614, (discussed under this chapter in section on "Prescription").
19. *Bayard v. Standard Oil Co.*, *supra*; *Silverton v. Brown*, 63 Or. 418, 128 P. 45; *Montgomery v. Somers*, 50 Or. 259, 90 P. 674.
20. 198 Or: 166 at pp. 178 and 179.
21. 18 C.J. 282, Deeds subsec 250.
22. Subsec 4790 B & C.
23. See: 6293, L.O.L.; subsec 4539, 1920 Or. Laws subsec 44-1305, Oregon Code annotated (1930).
24. See: subsec 100-1205, O.C.L.A., and subsequent amendments thereof, 1947 Or. Laws, ch. 498, 1951 Or. Laws, ch. 132.
25. Cit. authorities.
26. *Whitesides v. Green*, Utah, 34, 57 Am. St. Rep. 740, 44 P. 1032; *Pillsbury v. Brown*, 82 Me. 450, 19 A. 858, 9 L.R.A. 94; *Sprague v. Waite*, 17 Pick. 309; *Bartlee v. Beardmore*, 77 Wis. 356, 46 N.W. 494.
27. 38 Or. 446, 447.
28. *City of Newberg v. Kienle*, 60 Or. 486, 489, 120 P. 3.
29. *Washington Borough v. Steiner*, 25 Pa. Super. 392.
30. To the same effect see: *Hoban v. Bucklin*, 88 N.H. 73, 80, 184 A. 362, 186 A. 8; *Geer v. Chapin*, 163 El. App. 654, 659, 660; *Whitesides v. Green*, *supra*; *Burrows v. Guest*, 5 Utah 91, 12 P. 847; 39 C.J.S. 939, *Highways*, subsec 20.
31. *Elliott's Roads and Streets*, *supra*, 4th ed., 242, subsec 198
32. *Sweet et al v. Irrigation Canal Co.*, 198 Or. 166 at p.187, 88 N.H. 80.
33. *Whitesides v. Green*, *supra*; *Town of Randall v. Rovelstad*, 105 Wis. 410, 430 81 N.W. 819; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N.W. 494, 496.
34. 39 C.J.S., *Highways*, subsec 23; See, also: 29 C.J. 392, *Highways*, subsec 28; *Parkey v. Galloway*, 147 Mich. 693, 111 N.W. 348; *Richardson v. State*, 109 Tex. Crim. 403, 5 S.W. 2d 1412.
35. *Sweet et al v. Irrigation Canal Co.*, 198 Or. 168, 254 P.2d 700. Petition on rehearing denied, 198 Or. 202, 266 P.2d 252.
36. *Id.*, at pp. 202, 204.
37. *Watts v. City of Winfield*, 101 Kan. 470, 168 P. 319. See, also: *Williams v. Routt County*, 37 Colo. 55, 84 P. 1109; *Pratt v. Atlantic and St. Lawrence Railroad Co.*, 42 Me. 579, 585; *People v. Astle*, 337, Ill. 253, 256, 169 N.E. 185.
38. *Ames v. Union County*, 17 Or. 600, 605, 22 P.118.
39. *Sweet et ux v. Irrigation Canal Co.*, *supra*, 198 Or. 166, 254 P.2d 700. Petition on rehearing denied, 266 P.2d 252.
40. *Huggett et ux v. Moran et ux*, 201 Or. 105, 266 P.2d 692 (1954).
41. *Pillsbury v. Brown*, 82 Me. 450, 19 A. 858, 9 L.R.A.; *Kritzberger v. Train County*, 62 N.D. 208, 242 N.W. 913; *City of Seattle v. Abrahamson*, 109 Wash. 116, 186 P. 644; 25 Am. Jur. 360, *Highways*, subsec 36; 39 C.J.S. 939, *Highways*, subsec 20.
42. *Silverton v. Brown*, 63 Or. 418, 128 P. 45.
43. *Id.*, at page 425, *cit: Bayard v. Standard Oil Co.*, 38 Or. 438, 63 P. 614.
44. *City of Eugene v. Garrett*, 87 Or. 435, 169 P. 649, 170 P. 731.
45. *Christian v. Eugene*, 49 Or. 170, 174, 89 P. 419.
46. *Oliver v. Synhorst*, 48 Or. 292, 86 P. 376. 7 L.R.A. (N.S.) 243; *Schooling v. Harriburg*, 42 Or. 494, 71 P. 605; *Oliver v. Synhorst*, 58 Or. 582, 109 P. 762, 115 P. 594; *Crusen v. Lebanon*, 64 Or. 593, 131 P. 316; and *Portland v. Inman-Poulsen Lumber Co.*, 66 Or. 86, 133 P. 829, Ann. Cas. 1915B, 400; 46 L.R.A. (N.S.) 1211.
47. See: 17 *Am. & Eng. Enc. of Law*, 2d ed, pp. 894, 940 and 913.
48. *City of Eugene v. Garrett*, *supra*, 87 Or. at 443, 170 P. 731.
49. *Joy v. Stump*, 14 Or. 361, 12 P. 929.
50. *Bayard v. Standard Oil Co.*, 38 Or. 438, 447, 63 P. 614.
51. 28 C.Y.C., p. 896.
52. 37 C.Y.C., p. 247.
53. *Fleischner v. Citizen's Real Estate & Inv. Co.*, 25 Or. 119, 129, 35 P. 174, *Blagen v. Smith*, 34 Or. 394, 402, 56 P. 292, 44 L.R.A. 522; *Union Power Co. v. Lichty*, 42 Or. 563, 566, 71 P. 1044; *Morton v. Oregon S.L. Ry. Co.*, 48 Or. 444, 87 P. 151, 1046, 120 Am. St. Rep. 827; 7 L.R.A. (N.S.) 344.
54. 1 *High on Injunctions*, 4th ed. subsec 759.
55. *City of Eugene v. Garrett*, *supra*.
56. *Nyman v. City of Eugene*, 286 Or. 47, 593 P.2d 515, (1978).
57. 32 Or. App. 307, 315, 574 P.2d 332 (1978).
58. When it granted review, the Supreme Court requested argument on the following questions:
"Did the 1952 Lane County Court have jurisdiction to enter it's order widening the County Road?
"What are the jurisdictional requirements which had to be met before the order could be entered?
"Do the necessary facts appear on the face of the record to prove that these jurisdictional requirements were satisfied?
"In particular, is the recital in the record that the road widening was `all as agreed to by the property owners abutting said road' sufficient or must the record show affirmatively that all such property owners agreed to the road widening?"
59. Citing ORS ch. 27, i.e. ORS 27.010, 27.020 and 27.030.
60. No formal order widening the road appears in the record in this proceeding. The only evidence of the order is the journal entry, which provides as follows:
"2178.
"In the Matter of the Resolution of the County Court for widening of a County Road.
"Now at this time this matter came on regularly to be heard and is hereby

- ordered established as a 50-foot right of way.”
(The wording to the right of these three lines was “Order Established.”)
61. *Columbo et al v. Hewitt et al*, 221 Or. 121, 350 P.2d 893 (1960).
 62. *Latourette v. County Court*, 121 Or. 681, 226 P. 697 (1924).
 63. *Lauderback et al v. Multnomah County*, 111 Or. 681, 226 P. 697 (1924).
 64. *State of Oregon v. Officer*, 4 Or. 180.
 65. *Johns v. Marion County*, 4 Or. 46
 66. *Thompson v. Multnomah County*, 2 Or. 34 (1861).
 67. *Morton v. Hood River*, 88 Or. 144, 171 P. 584 (1918); *French Glen Co. v. Harney County*, 38 Or. 138.
 68. Cf., *Fasano v. Washington Co. Comm.*, 264 Or. 574, 507 P.2d.
 69. “Citation is to the current (1979) statutes for convenience. The statutes in effect at the time of the 1952 order did not materially differ from the current statutes.”
 70. The Supreme Court cited 1979 law for convenience.
 71. *Id.*
 72. ORS 368.480, ORS 368.485 (1979 law).
 73. 1979 law cited.
 74. ORS 368.495, 368.500 (1979 law).
 75. ORS 368.525 (1979).
 76. Citing 1979 law. Check current statutes for the law that must be followed for establishing, altering or relocating a county road at the present.
 77. See: ORS 43.370. But see: *Lauderback et al v. Multnomah County*, 111 Or. 681, 701, 226 P. 697 (1924), holding that a journal entry that notice has been posted aiding a defective affidavit must also be supported by some competent evidence of record.
 78. See: 1 *Freeman on Judgments* 812-13, 5th ed, 1925, where the author states: “The recitals or findings of jurisdiction may affirm, in general terms, the service, or due service, of process, without indicating that the attention of the court has been specially called to the kind of service made, or that it has based its finding upon other evidence than that disclosed by the record. In such cases it is not reasonable that the general statement should prevail over the evidence contained in the record. It should rather be construed as referring to and founded upon it; and if the service shown by it is not such as will support the judgment, it should be treated as void, notwithstanding the general statement in the judgment that process has been duly served.” (Emphasis supplied, and footnote omitted in the court report.)
 79. *Prima facie evidence* is, in the judgment of the law, sufficient to establish a given fact, or the group or chain of facts constituting a party’s claim or defense, and which, if not rebutted or contradicted, will remain sufficient. “It is evidence which suffices for proof of a particular fact until contradicted or overcome by other evidence.” *Black’s Law Dictionary*, rev. 4th ed., page 1354, *cit. Dodson v. Watson*, 110 Tex. 355, 220 S.W. 771, 772, 11 A.L.R. 583.
 80. Cf., *State of Oregon v. Officer*, *supra* (holding a recitation that proof of posting notices had been made “to the satisfaction of the court” insufficient to prove that it had been made as required by statute).
 81. *Lauderback v. Multnomah County*, *supra*; *State of Oregon*, *supra*; *Thompson v. Multnomah County*, *supra*.
 82. “As the Court of Appeals noted, the presumption could just as easily operate to require a conclusion that plaintiff’s predecessor did not agree to the widening. ORS 41.360 (15) establishes a disputable presumption that official duty has been regularly performed. ORS 205.110(2)(d) imposes a duty on the county clerk to file all papers delivered to him (or her) for filing. We could therefore assume that the clerk did not receive any documents relevant to Resolution 2178 other than those appearing in County Road File 2178.”
 83. *Highway Comm. v. Heintz Constr.*, 245 Or. 530, 539, 423 P.2d 175 (1967).
 84. *Wood v. Honeyman*, 178 Or. 484, 548, 169 P.2d 131, 171 A.L.R. 587 (1946); *Kinkade v. Myers*, 17 Or. 470, 21 P. 557 (1889); *White v. Northwest State Co.*, 5 Or. 99 (1873).
 85. ORS 203.200 provides: “The decisions of the county court made in the transaction of county business shall be reviewed only upon the writ of review provided by the civil procedure statutes.” The provisions governing the availability of the writ are contained in ORS 34.010 through .100.
 86. 32 Or. App. 326.
 87. ORS 34.030 provides in part: “... A writ shall not be allowed unless the petition therefor is made within 60 days from the date of the decision or determination sought to be reviewed” (1979).
 88. ORS 12.050 provides: “An action for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within 10 years” (1979 law). ORS 12.115 (1) provides: “In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act of omission complained of” (1979). ORS 12.140 provides: “An action for any cause not otherwise provided for shall be commenced within 10 years” (1979 law).
 89. See: e.g., *Arrien v. Levanger*, 263 Or. 363 370, 502 P.2d 573 (1972)
 90. See: *American Law of Property*, 820 Casner ed., 1974.
 91. *Real Estate Co. v. Hendrix*, 28 Or. 485, 42 P. 514 (1895); *Hicklin v. McClear*, 18 Or. 126, 22 P. 1057 (1889); *Wilson and Wakeman v. McEwan*, 7 Or. 87 (1879).
 92. *Huggett v. Moran*, 201 Or. 105, 112, 266 P.2d 692 (1954).
 93. *Nyman v. City of Eugene*, *supra*. 94. *Id.*
 95. *Id.* at pp. 57, 58.
 96. *Nyman v. City of Eugene*, *supra*, at pp. 56, 57.
 97. *Id.*
 98. ORS 40.120. 1981 Or. Laws ch. 892 subsec 17.
 99. See: *Jackson v. Steinberg*, 186 Or. 129, 200 P.2d 376.
 100. *Martin v. Klamath County*, 39 Or. App. 455 (1979), 592 P.2d 1037.
 101. *Id.*
 102. *Id.*
 103. *Steel v. City of Portland*, 23 Or. 183.
 104. ORS 271.140 amended by 1981 Or. Laws ch. 153, subsec 58 (as exists Sept. 27, 1987).
 105. ORS 368.366(b) (1985 law).