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Vacation and Abandonment of Streets and Highways in Ohio

John L. Grecol*

(Illustrated by Michael Chausanski)

Many long established thoroughfares are presently being abandoned and vacated to make way for the erection of urban redevelopment programs and the construction of freeway systems. Similarly, the application of scientific principles of traffic engineering to the modernization of existing thoroughfares eliminates jogged intersections and reduces sharp curves, frequently entailing vacation of the abandoned portions of such relocated roads. Resubdividing undeveloped tracts sometimes necessitates vacation of dedicated but unimproved streets in favor of revised thoroughfare plans. Modern fashion has rendered many alleys and courts obsolete and unnecessary. To avoid the expense of their maintenance both abutting owners and governmental subdivisions often proceed to vacate them. Legislation and case law have developed procedural methods which are followed in vacating streets and determining the rights of abutters and the public to the vacated areas.

The Doctrine of Accretion

The Ohio Supreme Court, in Traction Co. v. Parrish,1 held that the fee of streets is in the city or village, in trust, for street purposes:

The fee being in the municipality in trust for street purposes, the abutting lot owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and appurtenant to his lot for ingress and egress; and when the street becomes vacated the public thereby surrenders, or more properly speaking, legally abandons the public use thereof for travel, but the private or special use or easement, adheres to the abutting lots, and becomes part and parcel of them as by accretion, so as to preserve the right of ingress and egress to the lots over the land that

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1 67 Ohio St. 181, 190, 65 N. E. 1011 (1902).
formerly formed the street or part thereof. The reason that a street when vacated, becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by addition of the vacated street to the lots, and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere.

In furtherance of this doctrine it was held in Mt. Union College v. Mistelski,\(^2\) that the college acquired title to the easterly one-half of Miller avenue lying westerly of and contiguous to Out-Lot No. 236. (See Figure 1.) This vacated portion of Miller

\[\text{Figure 1}\]

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avenue was a property right that was incidental to the lot and it was acquired by the abutter upon the vacation of the street. Where the owner of a lot abutting on a street, which street is vacated during his ownership, conveys such lot by number and without reservation of any rights in the street, such conveyance transfers, in addition to the lot, all rights which the grantor may have acquired by reason of such vacation, even though the metes and bounds description in the conveyance extends only to the side of the street.

The rule that landowners presumptively own the fee of the soil under the half of the road which is contiguous to their lands is founded on the presumption that the land covered by the highway was originally granted by the adjoining owners in equal proportions, although when it appears that the entire street was granted by a single proprietor, this presumption is rebutted. Thus the Court held that a vacated street which did not come equally from adjoining owners reverted to the successors in title of the dedicator. (See Figure 2.)

However, in City of Dayton v. Woodgeard, the Court of Appeals determined that upon the vacation of Barksdale Avenue the fee of the land in the street accreted to all abutting lot owners, notwithstanding the fact that the land comprising such vacated street was originally owned and dedicated solely by the predecessor in title of the City of Dayton, whose lots abutted only the Westerly side of the street. This decision clearly is not in harmony with the decisions in the Mt. Union College and the Oberhelman cases. The Court, in the City of Dayton case, held that the dedicator transferred the fee title to the street to the City of Dayton, in trust, to be used as a street, and upon abandonment of the trust through vacation of the street, the fee to one-half of the vacated portion vested in Woodgeard Brothers, instead of reverting entirely to the successors of the deductive. (See Figure 3.)

If the deductive expressly reserves to himself the title to the street, or circumstances justify the inference of his intention

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4 Oberhelman v. Allen, supra note 2.
6 Supra note 2.
7 Supra note 2.
Figure 2

Figure 3
not to convey a fee to any part of the street, he remains the owner of the fee in the street, and upon vacation the title reverts to him or his successors in title, instead of to the abutting owners. In all such cases the intention of the grantor governs, but inasmuch as a deed is most strongly construed against the grantor, it will ordinarily be presumed, in the absence of express words to the contrary, that the grantor intended to convey his entire title to the frontage in the street. 8

If a street is vacated while the original proprietor and platter owns the lots, and thereafter he conveys a lot by metes and bounds description, and subsequently conveys the vacated portion to another, the grantee of such vacated portion obtains good title thereto. 9 Similarly, if a plat of a street is vacated by the original proprietor prior to the acceptance of the dedication by the city and before any of the lots are sold, a proportionate part of the street does not become a part of each abutting lot. 10

All rights of the public to vacated streets are extinguished by the vacation. 11 In Kinnear Mfg. Co. v. Beatty, 12 the Supreme Court held:

... the vacated portion reverts to the abutting lot owners, subject, however, to such rights as other property owners on the street or alley have therein, as a necessary means of access to their property.

While technically following the doctrine of accretion by transferring vacated streets to abutting owners, county auditors have frequently followed the questionable practice of assigning separate tax listings to the vacated pieces. When abutting owners who are not aware of their liability for assessments on the vacated portions fail to pay the assessments, the vacated parcels forfeit to the state and are sold at auditor’s tax sales. 13

8 McQuillan, Municipal Corporations (3d ed. 1950), Sec. 302.202, para. 2.
9 Id., at para. 3.
10 Id., at p. 170.
11 Stevens v. Shannon, 6 Ohio C. C. R. 142 (Cir. Ct., 1892).
12 65 Ohio St. 264, 62 N. E. 341 (1901).
13 See Cuyahoga County Treasurer’s real estate tax duplicate vol. 109, p. 11, item 76, being a part of Gertrude Court N. E., vacated by Cleveland, Ohio Ordinance No. 45689-17 (1917) and sold April 21, 1948 as Cuyahoga County Auditor’s Forfeited Land Sale Item No. 185.
Procedures for Vacation

Statutes of the Ohio Revised Code provide methods for vacation of streets and highways by various governmental authorities and by the Common Pleas Court. Proceedings may be instituted by the State department of highways, a municipal corporation, a board of county commissioners, or by any interested individual, partnership, or corporation. A plat prepared and certified by a licensed surveyor or civil engineer showing the public way that is sought to be vacated must form a part of the proceedings and petition for vacation, and after a thoroughfare has been declared vacated, such plats must be transferred by the county auditor and filed for record with the county recorder.\textsuperscript{14} Cross references to vacation plats must be made by the county recorder on the margin of recorded plats showing dedications of streets that are vacated.\textsuperscript{15} Since the legislative authority of the municipal corporation does the actual vacating, whether upon their own proceedings or upon the petition of abutters, the fee for the recording of vacation plats as prescribed by Section 317.32 of the Ohio Revised Code must be paid such legislative authority.\textsuperscript{16}

Any street or alley not exceeding twenty-five feet in width which abuts any tract of land acquired by the United States is vacated to the center line upon such acquisition, subject to the right of other property owners abutting such street or alley to claim damages.\textsuperscript{17}

Roads of the state highway system are changed, abandoned, and vacated in conformance with Ohio Revised Code Section 5511.01 which provides:

\ldots \text{The director may, upon giving notice and holding a [public] hearing, abandon a highway on the state system or part thereof which he determines is of minor importance, or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering such action shall be filed in the office of the director, and the director shall certify his action to the board of the county in which such highway or portion thereof so abandoned is situated.}

\ldots \text{No change in the route of any highway through a mu-}

\textsuperscript{14} Ohio Rev. Code, Sec. 711.39.
\textsuperscript{15} Ibid.
\textsuperscript{17} Ohio Rev. Code, Sec. 159.02.
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A municipal corporation shall be made except after notice and hearing.

Section 5529.01 of the Ohio Revised Code provides that the original portion of a state highway which remains after a relocation is not vacated or abandoned until a journal entry to that effect is entered by the director of highways, and that such portions that are not vacated or abandoned may be used for roadside parks or purposes incidental to the construction, maintenance, and repair of the highway system.

A municipal corporation may vacate or narrow streets or alleys upon good cause which is not detrimental to the general interest of the public by an ordinance of council on its own initiative or upon petition by an owner of a lot in the immediate vicinity of such proposed vacation. Notice of the pendency and prayer of a petition to vacate must be published in a newspaper of general circulation in the interested city for six consecutive weeks preceding such action, and action must be taken on the proposed vacation within three months after completion of the required notice; publication of notice is not necessary if written consent to the vacation has been obtained from all property owners who abut a proposed vacation.

Municipal corporations do not have legislative authority to vacate county roads within a city. A road which is brought into a city by annexation of territory is still a county road; it was not created by the city, and inasmuch as the legislature has seen fit to give only the boards which have established and laid out such roads the authority to vacate them, an implied power to vacate them by the municipality does not necessarily exist.

A Board of County Commissioners may straighten, alter, vacate, or change the direction of all roads within the county, however, it must first obtain the approval of the director of highways as to state roads. A dedicated alley is a public road which may be vacated by a board of county commissioners. The board

18 Id., Sec. 723.05.
19 Id., Sec. 723.04.
20 Id., Sec. 723.07.
21 Id., Sec. 723.06.
22 Cleveland T. & V. Ry. v. Akron, 6 Ohio N. P. (n. s.) 81, 97, 18 Ohio Dec. 236 (Ohio Com. Pl. 1907); Railroad Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89 (1895); Railroad Co. v. Cummins, 34 Ohio L. Bull. 301 (Cir. Ct. 1934).
23 Ohio Rev. Code, Sec. 5553.02.
may act upon its own resolution when it is of the opinion that the change will be for the convenience or welfare of the public, or it may act upon a petition signed by at least twelve freeholders who reside in the vicinity of the proposed change.\textsuperscript{25} In the resolution required by Section 5553.04 of the Ohio Revised Code, the Board of County Commissioners must fix a date when it will view the proposed improvement or change and a date for a final public hearing, and the notice of the time and place of such view and hearing and the nature of the improvement or change must be published for two consecutive weeks in a newspaper of general circulation within the county.\textsuperscript{26} Upon a petition to turn, change, or alter a county road solely on the land of the petitioner and which may entail vacation of part of the existing road, publication must be had once, at least two weeks prior to a hearing on the matter before the Board of County Commissioners.\textsuperscript{27}

When in the construction or improvement of a state highway, the Director of Highways is of the opinion that it is in the public interest to vacate a public highway or portion thereof that is under the jurisdiction of the county commissioners, the director may petition the county commissioners to vacate in the same manner as a freeholder may petition for vacation. The county commissioners shall act upon such a petition within thirty days, and in the event they refuse to vacate said highways as requested, they shall show action by a proper resolution. The Director of Highways or an owner of property abutting on the portion of the highway to be vacated may, within thirty days, appeal to the Court of Common Pleas of the county in which such highway is located upon the reasonableness of the action of the commissioners and the court may disapprove the action of the commissioners and direct the commissioners to proceed with the requested vacation. At the hearing before the Common Pleas Court evidence may be introduced for or against the reasonableness and necessity of the requested vacation. The decision of the Common Pleas Court may be appealed to the Court of Appeals and the Supreme Court.\textsuperscript{28}

\textsuperscript{25} Ops. Ohio Att'y. Gen., No. 2279 (1950).
\textsuperscript{26} Ohio Rev. Code, Sec. 5553.04.
\textsuperscript{27} Id., Sec. 5553.05.
\textsuperscript{28} Id., Sec. 5553.23.
\textsuperscript{29} Id., Sec. 5553.041.
When a Board of County Commissioners orders that a road be vacated, it ceases to be a public road, and when the commissioners order a change or alteration in an existing road, any part of such road that is made unnecessary by such change or alteration shall be ordered vacated by the commissioners. If a road, or part thereof, remains unopened for seven years after the order establishing it, the right to build it pursuant to the establishment on the original proceedings is barred.

If a public road established through private land but not improved by public funds and for more than twenty-one years has been enclosed by bars or gates, and if no easement has been given through such property, the owner may file with the Board of County Commissioners a sworn statement of such disuse, and upon such filing, the road shall, without further proceeding, be deemed vacated by such disuse and neglect. A township shall lose all its rights to any public road which has been abandoned for twenty-one years. If upon petition for vacation by any abutting landowner, the Board of County Commissioners finds that such road has been abandoned as alleged, it shall order the road vacated, and such road passes in fee to the abutting landowners, subject to the preservation of any existing right of way in, over, or under such roadway by any public utility or rural electric cooperative service and subject to the right of ingress and egress for the purpose of servicing and maintaining such facilities.

The Court of Common Pleas may, upon the petition of a landowner in a municipal corporation for the vacation of a street or alley in the immediate vicinity of his lot, declare such street or alley vacated. The Supreme Court, in Cincinnati v. Wess, upheld the validity of vacation of streets by the Common Pleas Court upon petition by the abutting landowners.

The Court of Common Pleas will hear any person who owns a lot in the immediate vicinity of a proposed vacation and who claims that he will sustain damage thereby. The court may render judgment against the petitioners for damages and assess such
damages ratably against the petitioners according to the value of their property as it stands on the tax duplicate and award such amounts to those who sustain injury as a result of the vacation. Any street or alley that is declared vacated by the court of common pleas cannot be closed until all damages have been fully paid to the persons entitled to them.

It was held in Dorsch v. Beaumont Glass Co. that the statutes which authorize a Court of Common Pleas to vacate a street do not authorize the court to narrow the street; the statutes confer express authority to narrow streets on municipal corporations and Boards of County Commissioners, but they give no such jurisdiction to the Court. Dorsch demurred to the petition of Beaumont Glass Co. to vacate the northerly fourteen feet of Clay street on the grounds that the court had no jurisdiction over the subject matter. (See Figure 4.) The Court held:

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Figure 4

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56 Ohio Rev. Code, Sec. 723.11.
57 Id., Sec. 723.12.
It is quite clear that if the general assembly ever intended to empower the court of common pleas to narrow a street or alley, it would have so expressed itself at some time during the past three quarters of a century or more; especially, when it had knowledge that it had given municipal councils that power. It has not been a matter of oversight, but on the contrary it has been the steady, consistent pursuit of an original purpose. There are some apparent reasons which might be furnished for this, but the statutory reasons alone are sufficient.

We believe that the power to narrow a street is left alone with the council because it is entrusted with the care and control of the streets and alleys and other public ways of the city or village, and it is better qualified locally to determine when it is proper to narrow an existing street. Its action in so doing, leaves to the abutting owner his easement in the vacated portion, while the narrowing by the court, if it had such power under the guise of vacating, would take the easement from him by assessing damages.

Rights of Abutters, Non-Abutters, and Utility Companies

Since rights of the public to vacated streets are extinguished by vacation, it was held in Caraway v. Feigley that property owners abutting the vacated portion may close the vacated portion against any use, subject only to such rights as other property owners might have therein as a necessary and reasonable means of access to their property. Abutting owners on a vacated street do not have the right, by reason of the vacation, to isolate another owner. Such other owner would still have an easement or right of way over the vacated portion to a point where he could have reasonable access to other public ways.

In Kinnear Mfg. Co. v. Beatty, the portion of Cedar Alley that was vacated by the predecessors in title of Kinnear Mfg. Co. did not abut the premises of Beatty. The Supreme Court held that the right of easement to a vacated portion of a street is limited to abutters who do not have other means of access to their land. Thus when a property has no physical contact with the vacated portion, and the owner has other means of access, although he may have to travel a greater distance in some direc-

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42 McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595 (1897).
tions, the remedy of injunction is not available. (See Figure 5.) And he is simply one of the general public suffering an inconvenience common to all, although by reason of proximity he may suffer a greater inconvenience than others. There is no implied covenant that the streets and alleys indicated on a recorded plat are to remain open for public use. (See Figure 5.)

![Diagram of street layout](https://engagedscholarship.csuohio.edu/clevstlrev/vol12/iss3/15)

**Figure 5**

It was held in *Paul v. Wissalohican Camp Co.*[^1] that after High Free Pike was relocated, the old road and an unused triangle of land appropriated for the new road which was situated between the old and new roads both reverted to the owner of the fee in the northwest half of the old highway. (See Figure 6.) The Camp Co. sued for the right to use part of the vacated portion of the old highway in order to reach the new highway. The Court held that it was entitled to this right of easement even though it still had another access to the highway. The remaining access, which was on high ground, served a different part of the Camp Companies' premises, and it would have been incon-

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venient, impractical and expensive to connect the isolated exit with the other drive. The court also held that Voss, a lessee or licensee of the Camp Co., had no title to which an easement might attach or be appurtenant. The Court noted that

An abutting owner’s easement in a vacated highway must be distinguished from an easement of necessity... An easement of necessity arises upon a grant in favor of land which would otherwise be inaccessible; whereas a private easement in a public highway is already in existence when the highway is vacated, and continues if there is a reasonable need for it.

Continuation of the abutting owner’s easement after vacation does not depend upon absolute necessity. It is suitable that no other road is reasonably suitable to meet the necessities of such owner.

The right of way and easement of any lot owner is not impaired by an order of the legislative authority of a municipal corporation to vacate or narrow a street and as noted above a street that has been vacated by an order of the Common Pleas Court cannot be obstructed until all damages awarded by the court have been paid.

In Bohm v. Kelley, Bohm brought an action to enjoin Kelley from interfering with his alleged easement over a portion

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45 Id., at 405.
46 Ohio Rev. Code, Sec. 723.08.
47 17 Ohio C. C. R. (n. s.) 265 (Cir. Ct. 1910).
of Lorain Street. Kelley was erecting a building on a small triangle of land situated on the southerly side of Lorain Street at its intersection with the northerly line of Denison Avenue. (See Figure 7.) A seven foot strip had been appropriated by the city for the purpose of widening Lorain Street and the City Council subsequently vacated a part of the strip in order to make the southerly line of Lorain Street uniform up to its intersection with the northerly line of Denison Avenue. The court held that abutting lot owners do not have an easement in a vacated street when the vacated portion has been appropriated rather than dedicated.

An injunction was granted in *Messinger v. City of Cincinnati*[^48] against the city of Cincinnati when it vacated the easterly fifteen feet of Teakwood Avenue at the easterly corporation line of the City to prevent extension of the street into a new subdivision in the adjacent village of College Hill. (See Figure 8.) The abutting owners within the City of Cincinnati consented in writing to the vacation and publication of notice was dispensed with. The court held that the owners of the unimproved subdivision in the village of College Hill were abutting owners to the vacated street within the meaning of the statute. As abutting

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owners, they were entitled to notice of the vacation proceedings and they had the right to challenge the validity of the ordinance even though their property was situated outside the city limits of the municipality in which the vacation was to occur.

Figure 8

A landowner must bear without compensation depreciation in value caused by proximity to a vacation if it is damage common to the neighborhood. Only special injury suffered by the land is ordinarily compensable.49

In Lowell v. Buffalo County,50 Lowell owned a farm situated between meanders on the north side of the North Platte River. His farm was served by a highway which crossed onto his land on bridges at the east and west ends of the property. This road was relocated to the north and the bridges were removed. (See Figure 9.) Lowell sued for special damages because his only means of access was from the end of a cul-de-sac, his distance to market, rural mailbox and the schoolhouse were moved quite far as a result of the relocation. The court held that the constitutional provision forbidding the taking or damaging of private

49 McCormick, Damages, 545 (1935).
50 230 N. W. 842 (Neb. 1930).
property for public use without just compensation applies to special damages to land caused by the vacation of a public highway, and one who suffers damages that are not common to the public generally is entitled to compensation for the difference in the value of the land immediately before and immediately after the change.

Large scale urban renewal programs and freeways projects have brought about several recent additions and amendments to the Ohio Revised Code at the instigation of lobbyists for utility and mining interests. Railroads and utilities ordinarily have a permanent easement and access to maintain, operate, renew, reconstruct, and remove tracks, cables, conduits, wires, towers, poles, sewer lines, steam lines, pipe lines, and gas and water lines in roadways vacated by a municipality, a Board of County Commissioners, or abandoned by a township. When a road is altered by a board of county commissioners upon petition of the owner of rights to mine coal under a road, all costs of relocat-

51 Ohio Rev. Code, Sec. 723.041.
52 Id., Sec. 5553.043.
53 Id., Sec. 5553.042.
tion of the road and utilities located on, over, or under the portion of the road that is vacated must be borne by the petitioner.\textsuperscript{54}

\textbf{Conclusion}

The State of Ohio, standing with the majority, follows the doctrine of accretion in holding that vacated streets generally revert to the proprietors who originally owned the fee in the abutting land or to their successors in title. In settling litigation caused by the vacation of streets, Ohio courts invariably follow the principles set forth in the leading case of \textit{Kinnear Mfg. Co. v. Beatty}.\textsuperscript{55} The legislature has enacted statutes setting forth procedures for the vacation of streets, alleys and highways. Landowners affected by proposed vacations must be given notice of the changes and the opportunity to appear at hearings. Utility companies and landowners who would be isolated by street vacations have easements over the vacated portions and courts may award compensation to property owners who suffer special damages resulting from vacations.

\textsuperscript{54} Id., Sec. 5553.04.

\textsuperscript{55} Supra note 12.