HIGHWAYS ) Right of way for county highway subject to easement for electric lines and electric company. Must be compensated for removing lines from right of way.

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Honorable Omer H. Avery
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

> "Please give me any opinion your office has compiled concerning the right of R.E.A. co-operatives to use county highway rights of way, and rights of the County Court to regulate the use of same by REA.
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> "The condition in Lincoln County under present controversy is as follows: R.E.A. had a line of poles along the property line of a road and a few feet on the landowners. The County widened the right of way for purpose of a King Bill road, and acquired deeds to most of the additional right of way, and condemned three tracts. No R.E.A. leases or rights of way deeds appeared of record, and R.E.A. was not made a party to the suit. After construction of the road got under way R.E.A. was requested to move the poles required to be moved to complete the road and maintain it. Only the poles obstructing the roadway were requested moved. R.E.A. refuses to move them, and asserts that it acquired a right of way for its poles from private landowners but that it did not record

the right of way deeds, nor does it intend to record them. R.E.A. claims that it is not required to record them but that the existence of their deeds to rights of way are made known to the world by reason of the fact that they have constructed poles and lines. It is my contention that by reason of the failure to record the deeds neither the County nor anybody else had notice of their existence. I might add that the County did not have actual notice of the existence of the deeds, nor has it yet received such notice, other than hearsay. No such deed has ever been presented to the County Court, to me, nor to anyone else interested.

"Now the County has constructed the King Bill Road, and the State Highway Department representative requires the moving of 36 REA poles before he will consider the road safe for travel and capable of maintenance. Hence state financial aid will not be forthcoming unless the poles are moved. The County has previously given REA by court order permission to use County rights of way for poles, which order provides that the poles 'shall not be so placed, constructed or maintained as to obstruct the use of roads or highways for travel, or as to interfere with their maintenance and repair.' It is further our contention that REA has violated this order in maintaining poles that obstruct use and maintenance of the roadway.

"Your reflections on these matters and advice concerning the rights of the county and the proper procedure will be greatly appreciated. As we have a November 15 date for compliance under King Bill, an early reply will be appreciated."

The problem in the situation presented by you does not appear to involve the power of the county court with regard to permission to use highway rights of way by power companies. The question here presented is that of the effect of the acquisition by the county court of a right of way for highway purposes upon the rights of a power company which has constructed its lines upon land which was at the time of such construction privately owned and which was subsequently acquired by the county as a right of way for a highway.

To a considerable extent discussion of this problem depends upon the factual situation. We shall attempt to answer your question insofar as possible on the basis of the facts submitted. You state that the REA had obtained right-of-way deeds from the private landowners but had not placed such deeds of record. You do not state how long the power line had been erected. Presumably, however, the line and poles were present at the time the construction of the widened highway began. Although it does not appear from your letter, we presume that the lines and poles were also present when the proposed new right of way was laid out by the county highway engineer.

> "One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement. The rule applies whether the sale is voluntary or involuntary. The rule that a purchaser with actual or constructive notice takes subject to easements has been applied to ways, stairways, drains, and various other easements.
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> "The law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary diligence. Thus, where the easement is open and visible, the purchaser of the servient tenement will be charged with notice, although the easement was created by a grant which was never recorded. There

> should be such a connection between the use and the thing as to suggest to the purchaser that the one estate is servient to the other. The grantee is bound where a reasonably careful inspection of the premises would disclose the existence of the easement, or where the grantee has knowledge of facts sufficient to put a prudent buyer on inquiry. It is not necessary that the easement be in constant and uninterrupted use. The purchaser of property may assume that no easements are attached to the property purchased which are not of record except those which are open and visible." (28 C.J.S., Easements, Sections 48-49, Pages 711-714, Inclusive.)

In the case of Missouri Power and Light Company v. Thomas, 102 S.W. (2d) 564, the Supreme Court in considering a case involving an easement granted for the construction of a power line, where the deed creating the easement had been recorded, stated at l. c. 566:

> "The burden was apparent and obvious and defendants must be presumed to have purchased the land with knowledge of the burden."

In the present situation the county must have obtained knowledge of the presence of the lines on the right of way when construction of the road was begun. Knowledge on the part of the county highway engineer undoubtedly existed at the time he surveyed the purposed new right of way. Under such circumstances we feel that the county would be charged with knowledge of the existence of the easements, although the deeds creating them had not been placed of record, and, therefore, the rights acquired by the county remained subject to the easements existing at the time of the county's acquisition of the right of way.

The situation is the same whether the right of way was acquired by voluntary conveyance or condemnation. The REA was not made a party to the condemnation proceedings. They possessed the right in the land for which they were entitled to compensation, and such right was not extinguished.

In the case of Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613, 79 L. Ed. 1090, the Kansas Highway Commission had ordered the Panhandle Eastern Pipe Line Company to make specified changes in its transmission lines. Panhandle had acquired rights of way from private landowners and had constructed pipe lines and other facilities. Afterwards, the commission adopted plans for new highways over Panhandle's right of way in several places. Permission of the owners of the fee to use the necessary land was obtained, but Panhandle refused permission to use its right of way. Changes in the pipe line which the new highways would have necessitated would have cost approximately $5,000.00. When Panhandle refused to make the changes, the highway commission ordered them to do so without compensation under a statute which provided in effect that whenever a pipe line was constructed along, upon or across a highway, its location was subject to control by the commission. The United States Supreme Court in that case held that the highway commission had no authority to make the order. The court in its opinion stated, 79 L. Ed. l. c. 1095:

> "If carried into effect, the challenged order of the Commission would result in taking private property for public use, * * * . A private right of way is an easement and is land. * * * No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the Fourteenth Amendment. * * *
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> "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * *"

The court concluded at 79 L. Ed. 1097 as follows:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect

> its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.
> * * *
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> "As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the State Highway Commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution."

CONCLUSION

Therefore, this department is of the opinion that where the county court acquires a right of way for the widening of a county highway and REA lines are present on the proposed new right of way, although the deeds for the easements to the REA are not of record, any acquisition by the county by either voluntary conveyance or condemnation of the highway right of way is subject to the easements held by the REA, and the REA may not be forced to remove its lines from the new highway right of way without being compensated therefor.

Respectfully submitted,

APPROVED:

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Attorney General

RRW/feh