Flathead Indian Reservation, Public Highways In. County Right to Establish Highways in Indian Reservation. Highways, in Indian Reservation.

Where the county authorities had complied with the rules and regulations relative to the establishment of highways in the Indian Reservation and such action had been approved by the Interior Department prior to the opening of the reservation the right of the county to open and maintain such highways is established, and subsequent occupation of the land by settlers would not divest the county of that right.

May 21, 1912.

Hon. Joseph A. Edge,
Chairman, Board of County Commissioners,
Kalispell, Montana.

Dear Sir:

I am in receipt of your letter of the 15th inst., submitting the question:

"What, if any, right has the county of Flathead to establish and maintain public highways within the limits of what was the Flathead Indian Reservation, where the roads have been determined upon and the plate thereof sent to the department prior to the opening of the Reservation?"

It appears from the statement of facts in your letter that sometime during the year 1909 the county authorities determined upon certain lines of road within the Reservation, that they made plats thereof and sent the same to the proper department (Department of the Interior) at Washington and that these plats were approved by said department on April 12, 1910. That since said time settlers upon the lands along the line of the proposed roads object to the maintenance of the roads and especially so, where the same is laid out diagonally across sections and subdivisions thereof.

I am not informed at this time of the precise wording of the rules established and promulgated for the acquisition of rights by the county to lay out and establish public highways within the boundaries of said Indian Reservation, but I take it that those rules and regulations have been complied with and if the Reservation had not been opened to settlement, the right of the county to maintain these roads would have been complete. The question then is, whether the county may still maintain that right or whether the settlement of the land has had the effect of nullifying or divesting the right thus acquired.

The law relating to the opening of this Reservation is contained in the Act of Congress of April 23, 1904, (33 Stat. 302) and in the proclamation and subsequent proceedings had in pursuance thereof. It appears that the proclamation of the President regarding these lands was issued on May 22, 1909, and that under its provisions all "persons holding numbers assigned to them under this proclamation will be permitted to present their applications to enter (on filing their declaratory statements),' on and after nine o'clock A. M., April 1, 1910, and that as to the other lands entry could not be made prior to September 1, 1910, except in the manner prescribed in the proclamation. It appears then, that these plats were filed with the Department of the Interior sometime during the fall of 1909 and that on April 12, 1910, the same were approved by the Department and that on April 1, 1910, parties holding numbers were permitted to present "their applications to enter" and that the land was not open to general settlement until September 1, 1910.

Sec. 2477, Revised Statutes of the United States, provides "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted." It has been unanimously held that this is a grant of a right **in praesenti** but that it does not attach to any particular strip of land until the line has been definitely determined.

The Supreme Court of Oregon in considering a similar question states the rule very clearly.

"The act of Congress is more than a mere general offer to the public, being in effect a dedication of land, which becomes

operative and relates back to the date of the Act whenever the public, whether by user or by some appropriate act of the highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway. The right is necessarily indefinite, and, in a sense, floating and liable to be extinguished by a sale or disposition of the land, until the highway is surveyed and marked on the ground, or in some other way identified or designated; but when the public authorities lay out and locate a road over public land of the United States by surveying and marking it on the ground, or by some legislative act, or when it is shown by user, the right becomes complete, and an intention to accept the dedication is manifested, and subsequent settlers on the land take subject to the easement."

Wallowa County v. Wade, 45 Ore. 253; 72 Pac. 798.

See also, Red River, etc., R. Co., 32 Minn. 95.

In 1902 a case was presented to the Supreme Court of Kansas involving substantially the following statement of facts: The Act of Congress granting the right of way over public lands, said Sec. 2477, Revised Codes was enacted in 1866. Subsequent thereto and in 1867 the Legislature of Kansas declared all section lines in Washington County to be highways. The strip of land in question was at that time public land and subsequently it was settled upon and in 1880, the road overseer without further action on the part of the county authorities opened a road along the section line. The owner of the land brought suit for damages but the Supreme Court held that the provisions of Sec. 2477 was in effect a dedication of land to the use of the public and that by it the public acquired an easement thereon subject to the laws of the State and the easement not having been extinguished by the operation of any law when the plaintiff acquired the title to the land, she took it subject to the easement, that the act of the Legislature which declared each section line to be a public highway showed a sufficient intention on the part of the authorities to accept the dedication of the land and that the easement thus acquired was prior to the rights of any subsequent settler.

Tholl v. Koles, 65 Kans. 802; 70 Pac. 881.

This same doctrine is affirmed in,

McRose v. Bottyer, 81 Cal. 122; 22 Pac. 393.

Schwerdtle v. Placer Co., 108 Cal. 589; 41 Pac. 448.

Walcott Tp. vs. Skauge, 6 N. D. 382; 71 N. W. 544.

Keene vs. Fairview Tp., 8 S. D. 558; 67 N. W. 623.

See also cases cited in 6 Fed. Stat. Anno. 498.

Wells v. Pennington Co. (S. D.) 48 N. W. 305; 39 Am. St. Rep. 758.

Streeter vs. Stalnaker, 61 Nebr. 205; 85 N. W. 47.

The Act of Congress of April 23, 1904, (33 Stat. 302) does not appear to contain any provision modifying or changing the law as expressed in said Section 2477, R. S. U. S.

The Statutes of Montana do not specifically provide that section lines are public highways but rather advise the laying out of high-

ways on such lines where the same can be done, but the statute does give authority for laying out roads on diagonal lines when public purposes shall be best subserved thereby. (Sec. 1409, Revised Codes.) This Section of the Montana statute if it provided specifically that section lines were public highways would be sufficiently definite in pointing out the particular strip of land to give effect to hte dedication as expressed in said Sec. 2477, Revised Statutes, U. S., but in as much as the statute does not so declare just where roads shall be laid out, it is necessary that the precise line of road shall be definitely determined upon prior to the attaching of the rights of settlers upon the land, but it appears from the statement of facts in your letter that this all had been done. That the precise line and route of road had been marked and platted and approved by the Interior Department. Under this state of facts and the law here cited, I believe that you have a right to maintain roads on the lines so indicated and that the right of the county thereto is prior to the right of the settler.

Yours very truly,

ALBERT J. GALEN,
Attorney General.