

Highways, Right of Legislature to Declare by Law.

The legislative assembly has no authority to pass any law compelling the owner of realty, upon the direction of the board of county commissioners, without other action, to open a public highway along section lines for the purpose of permitting stock on the public range to get to water, or for any other purpose. Under Article III of the Constitution private property cannot be taken without due process of law and just compensation therefor.

March 2, 1905.

Hon. S. F. Ralston, State Senator, Helena, Montana:

Dear Sir:—Pursuant to your request for an opinion upon the following question, namely: Has the legislative assembly the right and authority to pass a law directing the board of county commissioners of counties in the State, upon petition signed by taxpayers resident in the county, to compel, without other action, the opening of a lane or road through private property along section lines, as a means of access to water and water-ways for stock on the public domain, I give you the following as my opinion:

The legislature is absolutely without right or authority to pass any such law, and if such a law were passed it would be inoperative because contrary to our constitution and the well founded and basic principles of justice. From time immemorial it has been held that you cannot deprive a man of his property without due process of law and just compensation therefor. It is, of course, to be regretted that the large land owner has so fenced the country as to interfere with the property rights of others, but still such owner is the lord of his manor. He owns all above the land and everything below, and cannot be interfered with in his possession and ownership save and except for public use through condemnation proceedings, as prescribed by our constitution and laws enacted in accordance therewith.

Section 14 of Article III, of the constitution provides as follows: "Private property shall be taken or damaged for public use without just compensation having first been made or paid into court for the owner." And Section 15, of the same Article, provides: "Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount together with the expenses of the proceeding shall be paid by the person to be benefited."

Therefore, whether the opening of such a lane along section lines be considered a public road or a private road, the owner of the land is entitled to the protection in his ownership guaranteed by the constitution.

Just compensation being the condition precedent, an act of the legislature providing for the taking of a man's property for such use without provision for compensation is void. (Conn. River Co. v. Board of County Commissioners, 127 Mass. 50, 34 Am. Rep. 338; Sherman v. Milwaukee Railway Co. 40 Wis. 645.)

The constitution contemplates a proceeding in court in all cases of taking of private property for public use without the consent of the owner, and all other methods are excluded.

Yours respectfully,

ALBERT J. GALEN,

Attorney General.