

Public Highways, Obstruction Of. Obstruction of Public Highways Gives no Adverse Title to the Obstructor.

An obstruction placed upon a public highway constitutes a continuing nuisance and the statute of limitations does not run in favor of such obstructor and against the public.

Helena, Montana, June 27, 1908.

Hon. Frank P. Whicher,
County Attorney,
Red Lodge, Montana.

Dear Sir:—

I have your letter of June 24th, 1908, in which you enclose a copy of your letter of June 5th. The questions by you submitted are sufficiently stated in the opinion following:

In 1895 the county commissioners of your county laid out and established a public highway from Joliet to Rockvale. All the provisions of the statute at that time being complied with. The land over which this road was laid out was paid for in so far as it was owned by private persons, and in some places where it ran across Indian allotments, which allotments afterwards reverted to the government and became again public lands, the road was established under authority of federal statute, and immediately upon the reversion of the Indian allotments to the government the road in its entirety became a public highway. You state that immediately after the land was relinquished by the Indians to the government some persons settled upon this Indian land.

The road having been established across this land prior to this settlement took the land subject to the easement of the public highway. From the time of settlement of this land gradual encroachments have been made upon this highway until now it is in many places obstructed so as to be impassable and the travel is upon the railroad right-of-way.

The Political Code of the state of Montana took effect July 1st, 1895, which was in the month following the petition of the county commissioners for the establishment of the road in question. By virtue of Section 2600 of said Code "all highways, roads * * * laid out or erected by the public or now traveled or used by the public * * * are public highways. The encroachments now existing upon the highway, or at least some of them, have obstructed the road for a sufficient length of time to give the owners thereof adverse title to those portions of the road, provided the statute of limitations applies. I agree with your contention that the statute of limitations does not run against the public in this case.

Hoadley vs. San Francisco, 50 Cal. 265; People vs. Pope, 53 Cal. 437; Visalia vs. Jacob, 65 Cal. 434, cited by you in your letter, state the rule of law prevailing in this jurisdiction.

In the case of Ter. vs. Deegan, a criminal prosecution for the obstruction of a highway, reported in 3rd Mont., page 82, it is held that the statute of limitations does not effect the right of the public to the use of a street or alley, and that the defendant was properly indicted for obstructing the same by maintaining his fence and buildings which had been erected twelve years previous to the indictment. The latest case which I have been able to find on this question is the case of Ebley vs. State ex rel Levenworth, county attorney, decided in January of the present year, and reported in 93 Pac., page 803, in which the court lays down the rule that an obstruction to a public use of a highway is a continuing nuisance, and no equities in favor of persons committing such nuisances can be founded upon the negligence of the highway or other officials, or upon their laches, in taking steps to punish or abate. Further, that lapse of time will not bar the remedies of the state against encroachments upon a highway, and that a private individual cannot obtain title to any portion of a public highway by adverse possession.

You also ask the advice of this office as to the proper method of procedure to oust the persons whose fences or buildings encroach upon the highway.

Article 7 of Chapter XLIV, Laws 1903, provides the methods of procedure, and there is included a criminal as well as a civil penalty and liability for the persons so encroaching.

Section 40 of the said act provides that if the encroachment is denied, which I take it is the case here, the road supervisor must commence an action to abate the encroachment as a nuisance, and if he recover judgment he may recover also ten dollars for every day such nuisance remained after proper notice had been given for its removal. The method of giving notice being provided in the preceding

sections of the article. Section 42 of the same article provides that whoever obstructs or injures any highway is liable to a penalty of ten dollars for each day such obstruction or injury remains; and further, that he must be punished as provided in Section 1031 of the Penal Code. So it is a matter wherein you, being familiar with all the conditions, will exercise your discretion as to the nature of the action to be brought.

Very truly yours,

ALBERT J. GALEN,
Attorney General.