

County Commissioners, Duty of. Highways, by Prescription. Public Highways and Roads, Duty of County Commissioners as to.

Roads and highways, no matter how laid out, and irrespective of width, if used by the public generally, may become public highways either by dedication, abandonment to the public or by prescription, in any of which events it would become the duty of the county commissioners to assume and exercise jurisdiction thereover in all respects as they do over highways generally.

March 14th, 1914.

Hon. Paul D. Pratt,
Chairman Board of County Commissioners,
Libby, Montana.

Gentlemen:

I am in receipt of your letter of the 10th instant, as follows:

"Referring to Chap. 72, Session Laws of 1913, 'General Highway Law,' Sec. 3 of Chap. 1 of this act provides as follows:

"'All highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the petition of real property are public highways.'

"Is it the purpose of this section to correct all errors, omissions or irregularities in the establishment of public highways by the board of county commissioners, and to give these roads the same legal status as a road established by proceedings, every step of which was regular and as required by the old road law?

"Further: In this county we have many miles of road which were built without expense to the county. There were no petitions and, in fact, no proceedings had by the board of county commissioners in the establishment of such roads. Later these roads became, in a way, public roads through use by the general public and are generally recognized throughout the county as such. Since construction these roads have been maintained at the expense of the county, and we are desirous of learning whether, in your opinion, these roads, under the

section quoted above, gain the same legal status as roads which were established by the board of county commissioners, all proceedings in the establishment of which were perfected as required by the old road law.

"In other words, we desire to know if all roads within the county which were used by the general traveling public and generally recognized as being public roads, became legal county public highways when the above mentioned act became operative?"

The section of the road law to which you refer is not a new law, but has been carried forward through various enactments from Sec. 2600 of the Political Code of 1895 to Sec. 1337, Revised Codes of 1907, and finally to Chap. 72 Session Laws of the Thirteenth Legislative Assembly. In *State v. Auchard*, 22 Mont. 14, our supreme court, after quoting the language of the section, say:

"This section must be interpreted as a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of the roads, and as recognizing the existence of highways by prescription, when they had been used or traveled by the people generally for the period named in the statutes of limitation."

Where highways are claimed by prescription, it must be made clearly to appear that the general public has had the uninterrupted use thereof for the statutory period. (*State v. Auchard*, *Supra*.) In *Pope v. Alexander et al.*, 36 Mont. 82, it is said:

"We agree with counsel that where it is sought to establish a public highway by prescription, without color of title, by proof of travel over it for the statutory period, the testimony must definitely show a use of the identical strip of land over which the right is claimed, and that travel generally over an unenclosed lot or parcel of ground is not sufficient to establish any right."

Where the county commissioners make record of a county road, and it is shown that it has been used by the public generally as a public highway, it will usually be deemed to be a public road.

Smith v. Zimmer, 45 Mont. 282.

Lockey v. City of Bozeman, 42 Mont. 387.

In *M. O. P. Co. v. B. M. C. M. Co.*, 25 Mont. 427, the doctrine is laid down by the adoption of Sec. 483, Code of Civil Procedure, 1895 (R. C. 1907, 6432), where a particular road is claimed by prescription it must be shown that it has been traveled generally by the public for ten years.

In view of the doctrine announced in the decisions referred to, the county commissioners should be reasonably certain, when road improvements at public expense are contemplated, that the particular highway in question is in fact a public road, irrespective of the language of Sec. 3, Chap. 1, Chap. 72, Session Laws of the Thirteenth Legislative Assembly, which as pointed out in the *Auchard* case, *supra*, is only a curative statute, hence it cannot have the effect of creating a public highway where none existed before. It may be

well to bear in mind that a road, though not traveled and used by the public for the statutory period, may nevertheless become a public highway by abandonment or by dedication.

"No specific length of time is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment."

1 Elliott Roads and Streets, 3rd Ed. Sec. 178.

In conclusion will say that a road to become a public highway need not, in view of the foregoing, have been laid out as provided by law for the laying out and establishing of such by the county commissioners, for a highway not so laid out may become a public one by abandonment, by dedication or by prescription, in any of which events it would be the duty of the county commissioners to assume and exercise jurisdiction thereover, in all respects as they do over highways generally.

Yours very truly,

D. M. KELLY,

Attorney General.