

Highways, Public by Prescription. Roads, Established by User. Public Highways, by User. Statutes, Roads by Prescription Under. Prescription, Establishment of Roads. User, Roads Established By.

Statute relating to establishment of highways by user and by prescription, examined and construed. See opinion.

April 6, 1916.

Hon. H. F. Miller,
County Attorney,
Fort Benton, Montana.

Dear Sir:

I am in receipt of your letter of the 3rd instant, submitting the questions:

"1. What right has the County in and to roads traveled by the public over Sections 16 and 36, which roads have been continuously traveled prior to the enactment of Section 2600 of the Statutes of 1895? (b) In and to roads over Sections 16 and 36 traveled by the public continuously from a date prior to the sectional divisions of Townships?

"2. (a) In and to roads travelled by the public over 16 and 36 continuously, for a period of more than ten years before the sale of said land by the State?

"3. (a) In and to roads travelled by the public over land selected by the State, that is other than Sections 16 and

36, which roads have been traveled continuously prior to the said Section 2600 of the Statutes of 1895? (b) In and to roads travelled continuously by the public over land selected by the State for more than ten years prior to the sale of said lands?"

These questions may be answered only in a general way, for the reason that whether or not a particular public highway exists as such, unless the same has been laid out, or opened by the public authorities, can only be determined by a court of competent jurisdiction. The law relating to the subject is too much in doubt to permit of definite conclusions being reached until further consideration by the Supreme Court has been had. In *State v. Auchard*, 22 Mont., 14, the Supreme Court held that a road might be established by adverse user for the period of time required by the statute of limitations. The provisions, however, of Section 1340 of the Revised Codes, were a part of the road law of this state from the first day of July, 1895 until the repeal of said Section by Chapter 72, Laws of 1913, on March 11, 1913. Hence, the prohibitions contained in that section against the acquisition of a right-of-way by user, were in full force and effect between those two dates. This prohibition I apprehend would apply to all lands, whether owned by the individual, or by the state, but by reason of the dedication contained in Section 2477, Revised Statutes of the United States, does not apply to land owned by the government. The prohibition contained in this Section, 1340, requires the highway to be so declared as a highway by the Board of County Commissioners, or be dedicated by the owner. There is not any state law dedicating lands for public roads. Hence, as to land owned by private individuals or by the state, there is not any dedication, and under the prohibitions of said Section 1340, the same could not become public highways unless established by the Board of County Commissioners. The Supreme Court in *Barnard Realty Company v. City of Butte*, 48 Mont. 102, in discussing the provisions of Section 1337, Revised Codes, now found in Chapter 141, Laws of 1915, used this language:

"We think, however, as we said in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, that the intention was to declare those only to be public highways which had been established by the public authorities, or were recognized by them, and used generally by the public, or which had become such by prescription, or adverse use at the time the provisions was enacted."

This provision was enacted and became law of this state at 12 o'clock noon on the first day of July, 1895. Hence, unless the highway existed as such at that date, it cannot as a matter of law be declared to be a highway at the present time, for there has not been time since the repeal of this section, 1340, to obtain title by adverse possession, or by prescription.

However, as to lands still owned by the state, it is not necessary to rely either upon dedication, prescription or adverse possession, for by the provisions of Section 32, Chapter 147, Session Laws of 1909, such right-of-way may be obtained for the asking.

Where, therefore, the land has passed into private ownership, and it is sought to establish a public highway by user, I would recommend that an action be brought in the district court to test the question, and a judgment thus obtained would be ample protection to the county authorities in the expenditure or refusal to expend public moneys, on such right-of-way; and where the land is still owned by the state, application should be made for the right-of way, as required by Chapter 147, Laws of 1909.

Yours very truly,

J. B. POINDEXTER,

Attorney General.