

Highways on Carey Act Projects.

Unless public highways existed across land of settler on July 1, 1895, there can be no highway there at present by adverse use or prescription. The strip of land along exterior section lines reserved for public highway does not become a public highway merely by such reservation, but must be so ordered by County Commissioner or requested by Water Company and approved by Carey Land Act Board. A settler may fence all of his land until a highway has been established.

October 10th, 1917.

Carey Land Act Board,
Helena, Montana.

Gentlemen:

You have handed me a letter from a settler upon the Valier-Carey Act project in which he asks the following questions:

“(1) Does the strip 30 feet wide along all section lines contiguous to Carey lands, belong to the County for public roads without notice from the County Commissioners?

“(2) Where these section lines cannot be followed all the way, does the purchaser have to let the public travel over his land that is fenced, taking down the fences and injuring them so range cattle can come in and damage growing crops? or is the purchaser under obligation to leave gateways off section lines and allow the public to travel the same travel they followed when it was all open country?

"(3) Against whom does the settler have recourse for damages?"

"(4) Can the purchaser put gates across section lines where the county has done no work and travel cannot follow the section line all the way?"

Title XVI of the contract between the State of Montana, acting thru the Carey Land Act Board, and the Water Company, provides in relation to highways:

"The party of the first part agrees that all entries and patents of 'Carey Act Lands' shall be made subject to rights of way, without compensation to entrymen or purchasers, for roads upon all exterior section lines. And such entries shall likewise be subject to such rights of way for other roads, not exceeding sixty (60) feet in width, as said party of the second part may request, the location thereof and the necessity therefor to be subject, however, to the approval of said Carey Land Act Board, before said lands are patented by the State, and said rights of way shall be reserved in the patents to said lands."

In *State vs. Auchard*, 22 Mont. 14, it was held that adverse use by the public for the period named in the statute of limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period. A highway by prescription does not exist unless the proof shows that the general public has used the way as one common to all the public, without substantial interruption, for the time prescribed by the statute of limitations applicable to lands. In this case the court quotes Section 2600 of the Political Code of 1895 providing that, "all highways, roads, 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 partition of real property, are public highways," and held that it was a remedial statute intended to cure irregularities. Section 2603 of the Political Code of 1895 which became a law on July first, 1895, provides that, "no route of travel used by one or more persons over another's land shall hereafter become a public road or by-way by use, or until so declared by the board of commissioners or by dedication by the owner of the land affected."

These two sections were incorporated as sections one and three of Chapter XLIV of the 1903 Session Laws and Sections 1337 and 1340 of the Revised Codes of 1907, and remained a part of the highway law until they were repealed by Chapter 72 of the 1913 Session Laws. In *Barnard Realty Co. vs. City of Butte*, 48 Montana, at 110, Mr. Chief Justice Brantly, in delivering the opinion of the court said: "By these enactments the legislature explicitly declared it to be the rule that after July 1, 1895, when the Codes went into effect, a highway could not be established by use unless the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway."

Therefore, unless a public highway existed as such, across the land of this settler on July 1st, 1895, there can be no highway there at present by adverse use of prescription, for the reason that the statutory period of ten years has not elapsed since the repealing of Section 1340 of the Revised Codes of 1907.

To take up the questions submitted in their order, I am of the opinion that the settler has the right to the possession of, and in case patent has been issued, owns, all the real estate up to the section line, subject to a right of way for roads upon all exterior section lines. But, such strip of land does not become a public highway merely by the reservation in the above mentioned contract and the patent from the state, but it must first be so ordered by the board of county commissioners after proper proceedings being had under Chapter IV of the General Highway Law, Chapter 141 of the 1915 Session Laws as amended by Chapter 172 of the 1917 Session Laws, or requested by the Water Company and approved by the Carey Land Act Board.

An owner can fence any part of his land, whether it is being traveled by the public or not, unless he closes a public highway duly established or dedicated according to law or acquired by adverse use prior to July 1st, 1895, and it is not necessary for him to maintain gates or permit anyone to trespass on his land. If a highway is desired along the section line, proper proceedings should be had to establish the same and if a highway is desired over any other portion of the land of this settler, proper application should be made to the Carey Land Act Board under Title XVI of the contract above mentioned.

The only recourse an owner of land has for a trespass is against the party committing the same. As I have indicated above, the settler may fence to the section line until the highway has been established along the same, although he may be required to move his fence upon such highway being established.

I am returning the letter to you herewith together with a carbon copy of this letter for your convenience, and I trust that I have answered all of the several questions presented by you.

Respectfully,

S. C. FORD,

Attorney General