

**Public Highway—Establishment Of—Prescription.**

1. Roads traveled for ten years prior to July 1st, 1895, became public highways by prescription.

2. Roads cannot be established by prescription, without some act of the county commissioners recognizing the road as such.

June 10th, 1919.

Mr. M. L. Parcels,  
County Attorney,  
Columbus, Montana.

Dear Sir:

I am in receipt of your letter of the 4th inst., regarding the establishment of public highways by prescription under the general highway law.

Your attention is directed to the following cases decided by our Supreme Court:

State vs. Auchard, 22 Mont. 14, 55 Pac. 361;

Barnard Realty Co. vs. Butte, 48 Mont. 102, 136 Pac. 1064;

Barnard Realty Co. vs. Butte, 55 Mont. —, 177 Pac. 402.

From the foregoing it appears to be the settled law in this state that:

1. When the codes went into effect on July 1, 1895, all roads which had been traveled by the public for a period of ten years prior to that date became public highways by prescription;

2. Since July 1, 1895, public highways cannot be established by prescription, that is by adverse user by the public, alone, but there must be some act done by the board of county commissioners recognizing the road as a public highway followed by adverse use by the public for a period of ten years.

You are therefore advised that if a road had not been traveled by the public as a public road for ten years prior to July 1, 1895, the same did not become a public highway by prescription on July 1, 1895, and that if, since

July 1, 1895, the board of county commissioners has not performed any act sufficient to constitute recognition thereof as a public highway, then the same is not a public highway even though the public may have used the same for more than ten years. On the other hand if, since July 1, 1895, the board of county commissioners has performed any act sufficient to constitute recognition of a road traveled by the public as a public highway, and such act has been followed by adverse user by the public for a period of ten years, then the same is a public highway by prescription.

Respectfully,

S. C. FORD,

Attorney General.