

**Taxation—Highway, Land Included Within Right of Way
Assessment, Not to Include.**

Where land has been dedicated by the owner to and is used by the public as a highway, the acreage thereof should be excluded from the amount assessed to such person.

March 16, 1920.

Mr. Joseph C. Tope,
County Attorney,
Terry, Montana.

Dear Sir:

I am in receipt of your letter submitting the following:

“Shall the county authorities of Prairie County exempt from taxation such lands as may be included in roads and highways now used and traveled by the public in Prairie County, which roads and highways have not been dedicated by the owners to the public, nor legally laid out or designated by the county authorities, so that the said county may at some future period obtain title to said roads or highways by adverse possession.”

As I understand the situation, your county is now proceeding under Chap. 89 Sess. Laws 1919, to have the lands within your county classified, and, as when highways have been legally laid out or dedicated to the public, the area within such roads or highways is deducted from the area of the land over which they cross, so that the owner of the land will only be assessed for the area remaining you desire to know if, when roads have not been legally laid out or dedicated by the owner, the same procedure should be followed, so that no taxes will be assessed against the land included in the roads and highways, and you refer to Chap. 3, Sess. Laws 1917.

I do not see how Sec. 3, Sess. Laws is applicable in any way. This act was intended merely to state one of the elements constituting adverse possession by one individual claimant as against another individual claimant. While the words "adverse possession" are frequently used in connection with the right of the public to acquire the use of a strip of land as a road or highway, when so used as they are improperly used, as the public never acquires such a right by adverse possession but by "prescription", and whether or not the record title holder has or has not paid the taxes does not affect the question of whether the right have been acquired by prescription in any way.

In the case of *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064, our court held that under Sec. 1340 Rev. Codes, a right of way by prescription or user could not be acquired unless the authorities having control of the highways have exercised some act indicating an intention to consider the same a public highway folowed by user by the public for the required length of time after such act had been performed. By Chap. 72, Sess. Laws 1913, such section was repealed, and we have not had any such provision in our highway laws since the enactment of said Chapter. The result is that from 1895 to 1913, no highway could be established by public use unless the authorities had performed some act showing an intention to regard the highway or road as a public highway folowed by use for the required length of time by the public, while since 1913 a highway may be required by prescription or use by the public for the required length of time, which is ten years, but as such a period has not expired since 1913, it follows that no such road can have been made a public highway at this time by use by the public since 1913. However, I am of the opinion that if at any time since 1895, the authorities have performed such work on a highway as would clearly indicate an intention to consider the same as a public highway, no matter in what year the said work was performed, and ten years have expired since that date, during all of which time it has been used as a public road by the public, it is now a public road by prescription or public use.

However, it is also possible that a great many of the roads in your county, and particularly all of those used and traveled by the public over lands to which title has been acquired from the United States since the public first commenced to use such roads, are now public highways under Sec. 2477 U. R. R. S. 14 St. L. 253; 8 Fed. St. Ann. 2nd ed. pg. 785), and in this connection you might examine the following; 72 Pac. 881; 32 Pac. 549; 80 Pac. 262; 90 Pac. 674; 99 N. W. 464; 110 N. W. 703; 112 N. W. 902.

I am, therefore, of the opinion that it would be advisable in all cases where such roads are now being traveled an used by the public, to have those making the classification, show the same on the plats, and the areas embraced therein, taxing the land owner with only the acreage remaining in his possession. Should it be hereafter determined at any time that any such road is not a public highway, and that the

public has no right to use or travel the same, it will be a very easy matter for the assessor to make the proper notation on the plat books so that all of the land will be assessed to the proper owner.

Truly yours,

S. C. FORD,

Attorney General.
