

### Highways—Right-of-way—Homesteads.

When a homestead entry has been filed on land pending proceedings to acquire a right-of-way over said land for highway purposes but before a highway has been actually established, the county cannot acquire a free right-of-way under section 2477, revised statutes of U. S. but must procure same from the entryman.

February 7, 1928.

H. A. Gibbs, Esq.,  
County Surveyor,  
Scobey, Montana.

My dear Mr. Gibbs:

You inquire relative to the establishment of public highways on homestead lands prior to the issuance of patent, and concerning the effect of a right-of-way deed.

Section 2477 of the revised statutes of U. S. grants a right-of-way for the construction of highways across public lands. This statute was considered by our supreme court in *State ex rel. Dansie v. Nolan*, 58 Mont. 127.

The court held that the act amounts to an offer of a right-of-way but that the right becomes fixed only when a highway is definitely established and constructed in some one of the ways authorized by law. It therefore follows that since the entryman filed on the forty acres referred to in your letter before a public highway had been actually established and constructed across the land, the rights of the county under section 2477 must be held to be modified by whatever subsequent rights the entryman has acquired. The rights acquired by a homestead entryman are thus stated in 32 Cyc. 833:

“The homestead law clearly confers the right of possession on the entryman when the preliminary entry is made, and although title does not finally pass from the United States until the issuance of a patent, the receiver’s receipt issued to a homestead entryman in possession and claiming land under the statute constitutes ample title to enable him to maintain or defend a suit concerning the land, and to entitle him to damages for an injury to the land.”

The case of *Parrier v. Itasca County* (Minn.) 71 N. W. 382, is cited, involving the establishment by county commissioners of public road across land.

It is therefore my opinion, in view of the above principles of law, that the county will have to procure its right-of-way from the homestead entryman and cannot claim a free right-of-way under section 2477.

Very truly yours,

L. A. FOOT,  
Attorney General.