Right-of-way — Highways — Prescriptions — Federal Grants—Railroads.

A right-of-way cannot be obtained by user on railroad right-of-way held under grant from congress, but where the land in question is relinquished by the railroad company it reverts to the federal government and becomes public land and the county or state may then establish a right-of-way for highway purposes on said land under the provisions of section 2477, revised statutes of the U. S.

February 9, 1928.

State Highway Commission,
Helena, Montana.

Gentlemen:

You have requested my opinion on the following questions:

"In regard to right-of-way for F. A. P. No. 127 'D' of Sweet Grass county, which traverses land that was originally Northern Pacific right-of-way, obtained under act of congress of July 2, 1864, and which right-of-way occupies the same land as that occupied by the county road for more than ten years, has the county acquired title to this right-of-way by adverse possession, or prescription? Will the fact that the railroad obtained its right-of-way under a grant from congress prevent the county from obtaining title by prescription?"

Section 9018 R. C. M. 1921 provides as follows:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action."

And in construing this statute our supreme court has held:

> "This section appears to recognize the doctrine 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, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings." (State v. Auchard, 22 Mont. 14, 55 Pac. 361.)

An examination of the decisions of the supreme court of this state will show some decisions to the effect that a right-of-way by prescription cannot be obtained unless the right-of-way was used for a period of five years prior to 1895. This is due to the fact that prior to that time the period of use was five instead of ten years and also that section 1340 of the revised codes of 1907 which was adopted as section 2603 of the codes of 1895 provided as follows:

> "A highway laid out and worked and used as provided in this act must not be vacated or cease to be a highway until so ordered by the board of county commissioners of the county in which said right may be located; and 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 county commissioners or by dedication by the owner of the land affected."

It will be observed that this section expressly prohibited the establishment of a road by user alone, but by chapter 72 of the laws of 1913 section 1340 of the codes of 1907 was expressly repealed and in its place section 1614 R. C. M. 1921 was enacted. Section 1614 R. C. M. 1921 does not prohibit establishing a road by use alone, as did section 1340 of the revised codes of 1907.

By repealing section 1340 of the 1907 codes the legislature clearly manifested an intention to permit highways to be thereafter established by use alone. If this were not so, what could have been the motive for repealing section 1340 of the 1907 codes?

It is my opinion that since the enactment of chapter 72 of the laws of 1913, highways may be established by use alone when the use is continued uninterruptedly for the period of ten years after that date, and inasmuch as the particular land in question has been used as a county road for more than ten years it is evident that the entire land included in the highway has been in actual use, and therefore the county has acquired title by prescription under the laws of this state, unless prohibited by the fact that the land involved was part of a federal grant. This brings up your second question, that is, will adverse possession run against a railroad company if its right-of-way was acquired by grant from congress?

In the case of N. P. Ry. Co. v. Smith, 171 U. S. 260, the court said:

> "As the necessity for the use of the full width of the right of way had been 'conclusively determined' by Congress, 'neither

> courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad.* * * The whole of the granted right of way may be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right to possession for private purposes."

And the law laid down in this case has been followed by the supreme court of this state. (See Stepan et al v. N. P. Ry. Co. 81 Mont. 361, 263 Pac. 425, and authorities therein cited.

However, in regard to the land in question, it is my understanding that the railroad company has relinquished its right to the land and given its permission to the taking of the same for state highway purposes. This would not carry any title or right in the land to an individual for the reason that the land would revert back to the federal government, yet in view of the fact that congress has expressly granted the right-of-way for the construction of highways over public lands, not reserved for public uses (section 2477, revised statutes of U. S., U. S. compiled statutes, section 4919) it is my opinion that since the railroad company has relinquished its right to said land that the state can and has acquired good title to the right-of-way in question.

Very truly yours,

L. A. FOOT,
Attorney General.