

**OPINION  
45-142**

June 1, 1945            (OPINION)

HIGHWAYS

RE: Prescription

Re: Establishment of Highway by Prescription

Your letter of May 31, regarding the question as to whether or not a road continuously traveled in your county for thirty-five years has become a highway by prescription, or not, has been received.

It is my opinion that the question really involved is whether or not the travel for the last twenty years has or has not been in substantially the same course. If the trail wandered widely from year to year, it might be held not to have been established as a highway by prescription. If, however, the travel has been substantially the same course. If the trail wandered widely from year to year, it might be held not to have been established as a highway by prescription. If, however, the travel has been substantially in the same course through the past twenty years, it is my opinion that the road has been established by prescription. I have this opinion on two cases subsequent to the cases cited in your letter. In the syllabus of one case the court says:

Following *Burleigh County v. Rhud*, 23 N.D. 362, 136 N.W. 1082, it is held that since the adoption of chapter 112, Session Laws of 1897, the common-law rule with respect to the establishment of a highway by prescription is in force in this state."

In this case the question of the variation of the road during the twenty years is discussed. This is the case of *Berger v. Morton County*, 57 N.D. 305, 221 N.W. 270.

In a still later case, the syllabus says:

Road traveled by public continuously from March, 1897, without interruption by landowner becomes public highway after expiration of 20 years."

This is the case of *Kritzberger v. Traill County*, 62 N.D. 208, 242 N.W. 913. In view of the holding in these two cases, it is my opinion that the common law applies and that if the road was in use for over twenty years continuously up to the present time, it has become a public highway by prescription.

This, however, is subject to the question whether or not the travel has been in substantially the same course during that time.

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