

**OPINION
45-188**

May 15, 1945 (OPINION)

LANDS

RE: Public Grant - Highways

Mr. Neville of the state land department called at the office of the attorney general this morning and stated that McLean County has built a road across state school lands, that the right-of-way for such road has not been acquired by purchase or by the exercise of the power of eminent domain, ordinarily referred to as condemnation, but that the county contends that the road across said lands has been in continuous use for more than twenty years, and that consequently it has been established by prescription. Mr. Neville requested me to inform you whether the statute conferring the right to acquire the land by prescription is applicable to school lands. I stated to Mr. Neville my informal and offhand opinion that, in view of the fact that school lands are held in trust by the state for the benefit of the schools, and are in reality a part of the so-called "trust fund," such lands cannot be acquired by prescription for use as a highway. I informed Mr. Neville, however, that in the absence of Mr. Brace, who generally does the legal work for your department, I would prefer to submit an opinion after studying the question.

Section 24-0701 of the North Dakota Revised Code of 1943 reads as follows:

PUBLIC ROADS BY PRESCRIPTION. All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not."

Section 24-0701 of the Revised Code is much broader in its scope than section 1918 of the Compiled Laws of 1913 which the code commission was supposed to incorporate in said section 24-0701 of the Revised Code.

It is provided in the Enabling Act, enacted by Congress in 1899 that, "all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price of not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall direct, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 153 of our constitution provides that the "principal of the trust fund shall forever remain inviolate and may be increased but

never diminished."

It is, therefore, my opinion that a public road may not be established by prescription under the common law, nor under any law enacted by the legislative assembly. In this view I am sustained by the Supreme Court of Washington in the case of State of Washington v. City of Seattle, 107 Pac., 827, 27 L.R.A. (N.S.) 188, where the court held: "Land granted by an individual to the state for the purpose of a state university, upon certain conditions as to its sale, is held in trust and subject to the provisions of the constitution and statutes relating to the disposition of school lands, and the provisions of the statute making the statute of limitations run against the state does not apply to it, and therefore the state's title cannot be lost by adverse possession."

And in the case of Murtaugh v. Chicago M. & S. T. R. Ry. Co., 112 N.W. 860, the Supreme Court of Minnesota held: "Titles to land granted to the state of Minnesota for use of its schools by the United States cannot be acquired by adverse possession as against the state."

NELS G. JOHNSON

Attorney General