

**OPINION
55-98**

February 4, 1955 (OPINION)

ROADS

RE: School Lands - Prescription

We have your request of January 22, 1955, wherein you ask our opinion upon the following summarized facts:

What is the legal status of a road that is located on the quarter section line on a piece of school land (original grant)? The road has been there for many years and it connects with the city limits of Ray in Williams County. The School Lands Department has sold the tract to a private individual who now plans to close the road.

As we understand the facts, this road has not been officially laid out but has been established by use of the public for over twenty years. The question therefore for our consideration is, has this road become a legally established road by prescription?

Section 24-0701 of the N.D.R.C. of 1943 provides:

"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 24-0708 of the N.D.R.C. of 1943 provides:

"STATE LAND SUBJECT TO CHAPTER. The provisions of this chapter shall apply to all lands owned by the state or any institution thereof, or held by virtue of any contract with the state, and notice of the altering, laying out, or discontinuing of any cartway or highway pursuant to this chapter shall be served by registered mail upon the board of university and school lands or other state agency having the control of the land affected, not less than thirty days prior to the taking of action by such board in regard to altering, laying out or discontinuing such cartway or highway."

The question then becomes: May a right of way by prescription be established over state lands acquired from the federal government under the Enabling Act for school purposes?

The pertinent parts of the Enabling Act and the North Dakota Constitution are as follows:

SECTION 11. ENABLING ACT. "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre,"

Section 205 of the State Constitution provides in part:

"The state of North Dakota hereby accepts the several grants of land granted by the United States to the State of North Dakota by an Act of Congress under the conditions and limitations therein mentioned;"

Then in Section 158 of the Constitution, as amended, it is provided:

"No original grant school or institutional land shall be sold for less than the fair market value thereof, and in no case for less than ten dollars (\$10.00) per acre,"

Our Supreme Court in the case of State Highway Commission v. State (ND) 297 N.W. 194 has held that such state lands may not be taken for highway purposes by means of eminent domain and condemnation proceedings where the fee title to the land so sought is involved.

In the present instance, however, no fee title is involved. It is an easement for public travel. The state is still the fee owner. The state, however, is deprived of the use of this strip of land over which this road passes. Is the obtaining of an easement of such land, whether by official action or by prescription in conflict with the terms of the Enabling Act or the Constitutional provisions herein cited? We think not. In the case of Ross as trustee of University (Wyo.) 222 Pac. Rep. on page 7 the Supreme Court of Wyoming says: "We think, therefore, that the granting of the right of way across the lands in question was not a sale of the lands within the meaning of the grant nor a disposal thereof within the meaning of the grant nor a disposal thereof within the meaning of the cited section of the State Constitution." See also a rehearing thereof in 228 Pac. Rep. 642. The Supreme Court of Arizona in the case of Grossetta v. Choate, 75 Pac. 2d. 1031 follows the same doctrine.

The Supreme Court of North Dakota in the case heretofore cited 197 N.W. on page 196 says that while the question is not before them and they express no opinion thereon, nevertheless they make this comment. "There is authority for the appellant's contention that under the terms of the Enabling Act, and the acceptance of the grant of land contained therein, the state may authorize the granting of easements for highway purposes over public lands."

The state of Nebraska holds to the contrary. See State ex rel Johnson v. Central Nebraska Public Power & Irr. Dist. 8 N.W.2d. 841.

Dealing now with the specific tract involved it is evident that this road has been in use for more than the required time to make it lawful by prescription. Furthermore, such easement or occupation has been with full knowledge of the state and the land department. No objection to such occupation has been registered. No complaint has been registered as to the deprivation of its use. In fact, we understand a bridge has also been built upon said highway. The land department has now sold and conveyed said land to a private individual. He took such title with full knowledge of the road. We, therefore, hold further that the present owner is not in a position to close or vacate such road without resort to the legal proceedings for the vacating or discontinuing of said highway.

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