

A person who induces the public to believe his or her land a gift, or knowingly permits them to use and treat it as their own, until they have so accustomed themselves and accommodated their business to it, that they cannot without detriment be dispossed, confers a right which that person can no more resume without wrong than he or she can rightfully seize what was acquired otherwise than by his or her gift.

*Parrish V. Stephens
20r. 59, 69*

17 SUB-CHAPTER

PUBLIC WAYS
BY PRESCRIPTION

Previously, this publication has discussed the establishment of public ways by: (1) dedication—common law and statutory, (2) grant—by purchase or donation, and (3) statutory proceedings, including eminent domain. All of these methods are more common than that of establishing public way by *prescription*: the right of the public to continue to use the land of an owner for travel, acquired by the public's continued, uninterrupted use of the owner's land for a period of time set by law (Oregon statutory period is 10 years, Code 1930 subsec 1-202).

Prescription is not only the rarest of the methods for establishing public highways, it is the method least favored by the courts (in the decision in *Shumate v. Robinson*¹ the court said, "Easements by prescription are not favored by the law").² This does not mean the doctrine of prescription is not recognized in Oregon, nor does it mean that claims of easement by prescription are not upheld. But it does mean the courts will be conservative and technical in recognizing such claims. They will reserve approval of the claims only in cases where the party gives notice in its pleadings that it is specifically asserting such a claim,³ and where that party can prove open, notorious, hostile (that is, the use is not by license), continuous and uninterrupted user for the statutory period of 10 years.⁴ The recognition by the courts is because the doctrine of prescription is founded on the idea that it is in the best interest of the public that title to property should not long remain uncertain and in dispute. It also promotes private justice by putting an end to and fixing a limit to contention and strife.⁵

Prescription has nearly all the characteristics of adverse possession, but is distinguished from the latter doctrine in that prescription is a means of acquiring incorporeal hereditaments (in our discussion, easements), whereas, adverse possession is a means of acquiring corporeal hereditaments (land). The court, in *Raab v. Casper*,⁶ explains the distinction better,

*"There is a difference between a prescriptive use of land culminating in an easement (i.e. an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e. corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different."*⁷

The acquisition of a public easement by user by the public, that is, by *prescription*, is similar to such an acquisition by *custom*. The latter is the result of a local usage, not connected to any particular person, but belonging to the community rather than its individuals. The major distinction between a prescriptive public easement and one established by custom is that the latter requires user for *time immemorial*; the former requires only continued, uninterrupted use for 10 years.

How is the doctrine of prescription relevant to the cadastral cartographer's task and the assessment and taxation of real property in Oregon?

Before that question is answered, consider the road or street, often encountered in the cadastral mapping process, that has all of the characteristics of a public way under jurisdiction of a city (or county), but there is no record of the way being dedicated, donated, granted, acquired by eminent domain, or established by any statutory means. Many such ways have been encountered during remapping programs. Typically, the circumstances will be:

1. The way is being used for public travel. In the majority of situations there is evidence of public use of the way for over 20 years.
2. The city (or county) has assumed maintenance of the way (but in many situations these ways are not maintained in as good condition as other streets in the area).
3. Other evidence that the city (or county) has assumed authority over the way includes:
 - a. Traffic signs are posted on the way.
 - b. Stop signs are placed at certain intersections with the way.
 - c. The way is patrolled by law enforcement agencies.
 - d. Curbside public parking is permitted. In many cases parking is regulated by city signs, yellow curbs and, in some situations, parking meters.
 - e. The city (or county) has painted a dividing line, separating traffic lanes, down the center of the way.
 - f. The city (or county) has installed a drainage system in the right of way.
 - g. City (or county) maps show the way in the same manner as public ways of record.
 - h. The city (or county) has passed ordinances relating to the way.
 - i. In some cases, city streetlights have been installed.
4. Appraisal records reveal that improvements (residential or commercial) have existed along the way for many years, and the occupants have apparently relied on the way for ingress to and egress from the abutting realty.
5. There is no record that the public use is by license.
6. The deeds to the land abutting the way are written in the same manner as deeds are written for

most metes and bounds parcels abutting a public way of record. In some deeds, the way is mentioned by name; in others, it is referred to as a public road, street or right of way. Two deeds make no mention of the way. All deeds, however, are described by running to a line that is coincident to the center of the way.

7. The status of this way has never been debated in a court of law. Moreover, there is no known claim that the public use of this way is unlawful.

Obviously, the deck is stacked in favor of a public way. But the purpose here is to show circumstances that are signals of a presumed public right to the use of such ways. The majority of the evidence, or clues, are not necessary for the operation of prescription, but it is not unusual to find most present in such situations.

This leads to the problem relevant to mapping, assessment and taxation, *i.e.*: *Is the privately owned land in the public way taxable? or exempt from taxation?*

If the way is public, the land of the bed of the way is exempt from taxation. If it is only used by the public, but is not a public way, the bed of the way is taxable real property.

It would be convenient if the status of the way (public or private) were resolved before being encountered in the mapping process. However, this is seldom the case. Of course, it would be unreasonable to ignore the problem under the presumption it would some day (in the near future, or far future) be resolved by the courts. In the scenario presented as exemplary of a road established by prescription, it is unlikely that its status will ever be debated in the courts. Moreover, it is important to remain aware that it is not the responsibility of the courts to legalize such roads as public. The court's only duty here is to settle disputes over the rights, title and interests of the ways, and to interpret the laws governing the ways when such an interpretation is essential to resolve the problem before it.

An understanding of the doctrine of prescription will aid you in making a determination (for mapping, assessment and taxation purposes) about the taxability of the land in the type of ways under discussion here. At least the knowledge will be helpful for presenting the problem to legal counsel for advice. But be advised! Regardless of who makes the determination (outside of the courts or legalization statutes), the decision regarding the way being public or not is not binding on the public or any person or governmental body. It is for the purposes of assessment and taxation only. However, this is not to say that the determination could not end up as part of a defendant's or appellant's case for, or against, a claim that a certain road is or is not a prescriptive public easement. If this

happens, you will at least have the opportunity to see how well you understand prescription.

The following case of *Bayard v. Standard Oil Co.*⁸ is one of the earliest Oregon cases dealing with prescription. It is instructive on how the court resolves problems regarding such claims.

Bayard v. Standard Oil Co.⁹

This action, by C.E. Bayard and Frank Watkins, administrators of the estate of Perry Watkins was against the Standard Oil Company to recover damages for injuries resulting in the death of Mr. Watkins. The plaintiffs alleged the injuries were caused because an unlawful obstruction (an oil tank) was placed in a public highway. The gist of the action was that the oil tank was in a county road, and if it was not in the limits of such county road, it was conceded that no action would lie.

Circumstances of the case were:

"Prior to 6-27-1896, the defendant had constructed a foundation of brick, by the side of or near the beaten track of a publicly traveled highway, and on that day was engaged in placing an oil tank thereon 10 1/2 feet in diameter, and 30 feet in length, cylindrical in form, and of a red or light brown color. When the tank was nearly in place, one Julian was driving by, and as he came opposite, his team became frightened, and ran upon the deceased (Perry Watkins), who was in a hack, driving ahead, causing his death. The theory of the plaintiffs is that the highway was a public county road; that the tank constituted an obstruction and a public nuisance within such road; and that the frightening of Julian's team thereat was the proximate cause of the injuries complained of. To sustain their contention, they introduced in evidence the records of the attempted establishment by the County Court of Wasco County, Oregon, in 1867, of a county road from The Dalles to the Lower Deschutes bridge, consisting of the original papers on file and record proceedings relating to the matter. These were not offered for the purpose of showing a valid establishment of the highway, *but to show color of title merely*, to be followed by proof that it had been opened up *and used by the public for about 28 years, regularly and continuously*, prior to the accident. Other evidence was produced, tending to show that between the years 1867 and 1880 there was a road leading from The Dalles to the Lower Deschutes bridge, commonly known as 'The Dalles and Deschutes Road,' which was regularly traveled by the public; that it was worked by the road supervisor from time to time; and that the thread or beaten track thereof passed over the ground where the oil tank was being placed.

"The defendant (oil company) produced evidence tending to show that one Mary Laughlin was the donee from the general government of the *locus in quo*; that on July 12, 1881, she deeded to the Oregon Railway & Navigation Company a strip of land, comprising the premises, upon which the oil tank was placed; that the Oregon Railway & Navigation Company, sometime about the year 1882, constructed an ice house near the west end thereof, and a few feet to the east of where the oil tank was substantially erected; that since said time the traveled track turned to the south, but in close proximity to the ice house, after passing which it gradually bears back, until it connects with the old way, several rods further west. The tank extends south, even with the ice house, but not upon the beaten track of the road as now used, and the defendant claims to have the authority of the (O.R. & N. Co.) for erecting it at that point..."

Mr. Justice Wolverson, after stating the facts, delivered the following opinion of the Supreme Court:

"The plaintiffs' cause of action depends upon whether the oil tank was being placed within and upon a public county road. If it was, the right of recovery was clear, the other conditions being that it must have been the proximate cause of the injury, which must have been special and peculiar, other and greater than that sustained by the public generally.¹⁰

"1. The first question of material moment arises upon the motion for a judgment of nonsuit, and has relation to the competency of the ineffectual road proceedings, as showing color of title in the public. The only way in which the record could serve the plaintiffs is to extend possession constructively on the whole, if there has been occupancy of any part within prescribed boundaries. User by the general public, under a claim of right, adversely, and not be mere permission of the owner, for the period prescribed by the statute as a limitation beyond which actions for the recovery of real property cannot be maintained, will establish an easement in the public. But the use must be continuous and uninterrupted, and substantially by way of a certain and well-defined line of travel for the entire period.¹¹

"2. It is not material to the present inquiry whether such an easement is acquired by prescription, which presupposes an establishment by competent authority, or by dedication which implies a grant (of an easement); for it is clear that such an easement may be acquired by adverse user, by whatsoever name the process of establishment may be called. As a general rule, when the highway depends solely for its establishment upon adverse and continuous user by the general public, its width and extent of servitude are measured and determined by the character and extent of the user, for the easement cannot, upon principle or authority, be broader than user.¹²

"Other conditions, however, may be effective to extend the exterior limits beyond the thread or course of actual travel, as where inclosures may have been permanently maintained by persons affected with reference to the highway, or the use is referable to a survey and plat recognized and adopted by owners of lands over which the way extends, or was under color of ineffectual proceedings to establish a legal road under the statute.¹³

"Even where the highway is founded solely upon user, its width or extent of servitude is usually a question of fact for the jury. It would seem that it ought not, where the topography of the locality will permit, to be confined exclusively to the beaten track or thread of actual travel, because of the exigency that experience has shown for the passing and repassing of those in use of it. And circumstances such as that the use has been with reference to natural objects or artificial obstructions, or the character of the way requires improvement, necessitating to the wayside, are pertinent for the consideration of the jury in determining the question.¹⁴

"3. It may be conceded, for the purposes of this case, that the irregular and ineffectual proceedings of the county court constituted color of title, so that a claim of right and continuous possession and user for the statutory period would give establishment to the highway for the full width designated in the supposed proceedings.¹⁵ Ordinarily, there must be an entry under, and a claim of right with reference to, the colorable title, in order to set the statute of limitations running. In such a case, actual possession need not be of the whole, but may be of a part only, and it will be extended constructively to the whole, by reason of the definite description contained in the defective or ineffectual muniment. The rule must have like application to public highways, if it has any at all; that is to say, user by the public must have been begun and continued with reference to the supposedly valid proceedings. In such a case, if there was user of a part, within defined limits, as shown by the proceedings, it would amount constructively to an occupation of the whole, and the width of the road, when thus established, would correspond with that designated by the authorities or by the law. From the very nature of things, there must be an entry and a user with reference to the color of title, as otherwise it could not be available for any purpose.

Principle 81

"Colorable title forms the basis upon which a prescriptive right to the full width of the defined limits is founded.¹⁶

"The next step in logical course of establishment is an entry and a user with reference to it, and, when this has been continuous and uninterrupted and adverse for

the statutory period, then has the right ripened into a valid title in the public. It would be fallacious reasoning, therefore, to indulge a presumption that a road as actually worked and used by the public was within and upon the way as attempted to be located, and thence to conclude that its width must be measured by that designated in the void proceedings. *It must be proven that the road as used falls within the colorable title, and, when this is done, the other condition follows; that is, the possession is extended constructively to the entire designated width, or occupancy of a part is then equivalent to an occupancy of the whole.* Where the highway as used runs without the exterior lines of that as surveyed and attempted to be located and established by lawful authority, the width must then be determined by the rules herein before ascertained, and the ineffectual proceedings can have no bearing whatever upon the subject. *Marchand v. Town of Maple Grove*¹⁷ was a case where a highway, four rods wide, had been lawfully established by competent authority, but at one point along its course, by reason of the marshy character of the soil, the travel had been diverted wholly without the limits of the road as laid, and so continued for a sufficient time to establish an easement by user, and it was held that the width of the road thus acquired *should be measured by the use.* If such is the rule, where there is a diversion from a road laid by valid proceedings, it must be so by a much stronger reason where the proceedings are invalid, and constitute color of title merely. So that...

Principle 82

"In order to make the easement or title available for the designated width, the road as used at the point in question must be shown to fall within the limits of the one attempted to be laid, otherwise the easement cannot be broader than the use."¹⁸

"4. In this view of the law, the record and files of the county court were not competent, under the evidence subsequently developed. Mr. C. Schultz, the plaintiffs' witness, who was a surveyor, attempted to relocate the road survey, but found it utterly impossible to do so. He says, in effect, that it was not possible to locate the ground where the line would run from the field notes, and that all of his efforts put the ice house and oil tank *outside of the road*, according to his survey. Nor does the evidence of the defendant help the plaintiffs' case. So that there was no testimony before the jury tending to show that the road as used, and which traversed the immediate ground occupied by the ice house and oil tank, was within the exterior limits of the road as attempted to be laid at that point; hence the ineffectual record was not pertinent or competent, and should not have been allowed to go to the jury" (of the trial court).

"The plaintiffs, however, produced evidence tending to show that there had been an adverse and continuous user by the public, under, claim of right, of a way passing over the ground occupied by the oil tank for a period of time extending from 1867 to 1880, and insist that it was competent for the jury to determine from the nature of the user whether the highway had been established thereby. If so established in 1880, the title thus acquired must be presumed to have continued up to the time of the accident, unless the contrary is shown. There was evidence, upon the other hand, from which it may reasonably be inferred that the road, as established up to 1880, had subsequently been abandoned at the point referred to by nonuser, caused, perhaps, by the encroachment of the (O.R. & N. Co.) in constructing the ice house within and upon the way. It was held, in *Grady v. Dundon*¹⁹ that uninterrupted obstruction of a county road for more than ten years bars the right of the public by adverse possession. But the way at this point, so far as the evidence tends to show, was established, if at all, by prescription, that is, *by user under claim of right.* As a way may be obtained and established by user, it may also be lost to the public by nonuser. Highways may be wholly, and there is no reason to hold that they may be partially, discontinued by nonuser.²⁰ And in a later case, the court said: It has been settled in this state that a highway can be partially discontinued by nonuser, and that it stands, as against long possession, no better than any other property.²¹ So it was held in *City of Peoria v. Johnston*.²² That the public loses its right to a highway where it has abandoned it, and has accepted another instead, for such a length of time, and under such circumstances, as to give it a title to the substituted road. 'But,' said the court, 'independently of this principle, conceding this highway was laid out as claimed by appellant, and conceding there was an intention to dedicate the premises on the southeast of section 4, we are of opinion that the adverse possession of the appellee, open and exclusive as it has been, and the complete nonuser of the easement by the public for more than twenty years, are a sufficient answer to the claim now made by the city.' It is said in 3 Kent,²³ 'That mere nonuser for twenty years affords a presumption of extinguishment, *though not a very strong one*, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land charged with the easement in consistent with, or adverse to, the right, and extinguishment will be presumed.'²⁴

Note: *In Oregon, it was later held that the public easement is not extinguished by nonuse (see Principle 43), nor do the statutes allow for extinguishment by adverse possession (see ORS 221.750 and 275.027, and Principles 38 and 39).*

“It would seem that by reason of the construction of the ice house, which was about the year 1882 and which has probably been maintained in the same position ever since, the thread of travel was diverted from the old highway before reaching the building from the east, and, after passing close by on the south, it again approaches the old way, and comes into it a few rods west; that this obstruction had existed, and this new way had been used, for more than ten years, and at the same time and during all the while there has been a complete nonuser of the old way between the points of divergence. Now, if these facts are established by the proof, the jury would be warranted in finding that there was or had been an abandonment of the old way by nonuser, and in acquirement of a new way, which should be measured, as respects its width, by the rules herein previously ascertained. If, therefore, the construction of the oil tank was without the exterior limits of the newly acquired highway, then the defendant was not liable, *and no recovery of damages could be had*. The instructions of the court below (speaking of ‘the lower court—or trial court’), as we understand them do not proceed under this view of the law, but rather, upon the space covered by the ice house, and that the construction of the tank within the limits of the old way, although not within those of the new would constitute an obstruction for which it would be liable if injury ensued on account of it. *These considerations render it necessary that the judgment of the (lower) court should be reversed, and a new trial ordered.*

“Reversed.”²⁵

Wallowa County v. Wade²⁶

The establishment of a public easement by prescription is not the only legal effect of public user for the statutory period. The use is also evidence of acceptance of an easement granted prior to the time the statute of limitations was set running.

In Oregon, public land cannot be acquired by adverse possession. However, the acquisition of an easement across public lands, by public user for the statutory period, has been held to be one of the ways recognized by the laws of this state for establishing a public highway. This principle was announced in *Wallowa County v. Wade, supra*. This was a decision of the post-pioneer era, and one that was based on a special set of circumstances. Consequently, it is probably irrelevant to most modern problems regarding prescription. But this case has historical significance to the development of the common law doctrine of prescription in Oregon. And it is instructive on how some public ways came into existence in this state.

The case was a suit to enjoin Wade, the defendant, from obstructing a public highway running through sections 24, 25, and 36 in T. 1S. R. 44E, W.M. in Wallowa County.

All of sections 24 and 25, except one 40-acre tract, was unoccupied public land of the U.S. until 1901, when it was settled upon under the homestead law. The 40-acre tract was taken as a homestead in 1896. Section 36 was school land belonging to the state until January 1901, when the defendant contracted for its purchase. The road in question is a part of a highway from the Town of Joseph, in the southern part of the county, leading north a distance of about 24 miles by and near the Town of Enterprise. It was traveled by the public as early as 1880.

“In 1888, upon a petition of the requisite number of householders, and after notice thereof, the county court appointed viewers²⁷ and a surveyor to lay out and locate a county road along the same route, who thereupon proceeded to lay out, survey, and locate the road, from the Town of Joseph north, following as near as they could the then traveled road. Upon the coming of their report, it was approved by the county court, and the road established and ordered opened. From that time the use by the public of that part of the road now in controversy was *continuous and uninterrupted until 1901*, when the defendant (Wade), by permission of the homestead claimants, built a fence across it near the south line of section 24, and another through the center of section 36.” The trial court ruled in favor of the plaintiff in the suit to enjoin the maintenance of the fences. Subsequently, the defendant appealed that decision to the Supreme Court of Oregon.

Here was the kind of testimony that showed the road had been used continuously by the public for more than 10 years:

A. S.A. Hart, who had lived near the north end of the road since 1883, was one of the “chain carriers” at the time the road was surveyed in 1888. He testified that the road was in use by the public as road “when he first knew it,” and he said the road had been “continuously used ever since” (to 1903, the year of the trial); “that he and the settlers in that portion of the county have used it since 1888, supposing it to be a public highway by reason of the action of the county court; that over sections 24, 25, and 36 the travel has held to the old, original track, although there has been some slight variation; that during all this time it has been a plain, open, well beaten track, and has been traveled by all the people that live in that section of the county; that it is the only road used by them in going to and returning from the county seat; that through section 24,25 and 36 the road passes through a can(y)on or gulch, and there is practically but one track.”

- B. George S. Craig had lived in the county for 20 years, and knew of the road all of that time. He testified that it had been traveled by the public continuously as a highway, and he supposed it was a county road since 1888; “that through sections 24, 25, and 36 the road runs through a can(y)on, and there has been but one track or roadbed used by the public,” and he never noticed that it had been changed.
- C. J. B. Olmsted (as well as others) who had known and used the road since 1883 and prior to that time, testified substantially to the same state of facts. The court said, “Indeed, upon this question there is practically no controversy in the testimony.”
- D. The testimony of the defendant was directed mainly to showing that the road over the land enclosed by him had never been worked or improved by the county authorities, or under their direction, and that it had been obstructed or changed from the original survey at other places along the route.
- E. The county held the position that at the time the road was obstructed by the defendant, it was a public highway, becoming such by:
 1. establishment under the statutory proceedings;
 2. dedication and acceptance; and
 3. *prescription and user*.

The objection of the defendant to the statutory proceedings was that the petition upon which they were based was insufficient to give the court jurisdiction, because it did not sufficiently describe the beginning, intermediate, or terminal points of the highway. The Supreme Court felt that that particular argument was not worth examination in this case. It further held:

“1. The county court, acting upon such petition and notice given as required by law, caused the road to be surveyed and marked upon the ground, and this was followed by continuous user by the public for more than thirteen years prior to the construction of the fence by the defendant. *This is sufficient to amount to an acceptance of the grant made by Congress, and for the establishment of a highway over state land, either by dedication or prescription.*”²⁸

“Congress passed an act²⁹ providing that ‘the right of way for the construction of highways over public lands not reserved for public use is hereby granted.’³⁰ While the language of this act is somewhat indefinite and uncertain, it has usually been construed as a present grant of an easement over public lands for highways, but is applicable to railways and toll roads.³¹ ‘The object of the grant,’ says the Supreme Court of South Dakota, ‘was to enable the citizens and residents of the states and territories, where public lands belonging to the United

States were situated, to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. *And when the location of the highways and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it.*”³² The act of Congress is more than a mere general offer to the public, being in effect a dedication of the land, which becomes operative and relates back to the date of the act whenever the public, either by user or by some appropriate act of the highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway. The right is necessarily definite, and, in a sense, floating and liable to be extinguished by a sale or disposition of the land until the highway is surveyed and marked on the ground, or in some other way identified or designated; *but when the public authorities lay out and locate a road over public land of the United States by surveying and marking it on the ground, or by some legislative act, or when it is shown by user, the right becomes complete, and an intention to accept the dedication is manifested, and subsequent settlers on the land take (the land) subject to the easement.* The next year after the act of Congress referred to, the Legislature of Kansas passed an act declaring all section lines in a certain county to be highways; and it was held that it amounted to an acceptance of the dedication by Congress, and when the land passed into private ownership, was taken subject to the easement.³³

“2. In *Streeter v. Stalnaker*³⁴ it was held that *long-continued user by the public, together with a survey, marking out, platting, and improvement by public authorities was sufficient to show an acceptance of the dedication.* In that case it said: ‘By this act the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or *the public itself*, a highway was established.’

In *McRose v. Bottyer*³⁵ there was no action whatever by the public authorities, and nothing shown but user by the public. The Court held that sufficient, saying: ‘The fact that the land was public land of the United States at the time the right to use it as a public way was acquired, and also at the time the use of it ceased, makes no difference. The act of Congress of 1866³⁶ granted the right of way for the construction of highways over public land not reserved for public use. By the acceptance of the dedication thus made, the public acquired subject to the laws of this state; and the easement not hav-

ing been extinguished by the operation of such laws, when the defendant acquired the title to the land, she took it *subject to the easement.*'

"In *Smith v. Mitchell*³⁷ the same doctrine is announced; the Court holding that *a highway may be established over public land in any of the ways recognized by the laws of the state.* In deciding the case, Mr. Chief Justice Gordon, speaking for the court, said: 'It is a well known fact that many of the public highways in this state had their inception in adverse user, which ripened into prescription. The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by: *prescription, dedication, user, or proceedings under the statute.* Any other conclusion would occasion serious public inconvenience.'" The Supreme Court of Oregon, therefore, held: "...The long-continued user by the public shown by the testimony in this case, together with the action of the county authorities in surveying and locating a road over and through sections 24 and 25, was, under the construction thus given to the act of Congress, and acceptance of the dedication, and sufficient proof of a public highway.

"3. Section 36 was school land, and belonged to the state until 1901. *Prior to the act of February 10, 1903*³⁸ the statute of limitations ran against the state the same as against a private individual, and its title to school land could be extinguished by adverse possession.³⁹ The proof shows abundantly that the road had been used continuously through this section for more than twenty years by the public as a highway, under a claim of right, prior to the acquisition of the land by the defendant; and this was sufficient to establish the highway, as against the state, by prescription or adverse user,⁴⁰ even if the surveying, locating, and filing the plat thereof was not of itself a dedication of the land to the public for a highway, if followed by user by the public for that purpose.⁴¹ The county is an agency of the state in the location of highways, and there is reason for the position that the act is binding on its principle, even if not valid as against a private individual because of irregularities or imperfections. But a decision of the question is not necessary at the present time."⁴² The Court affirmed the decision of the trial court (in favor of Wallowa County).

Parrott v. Stewart⁴³

"O.J. Parrott brought this suit against John M. Stewart and R. L. Stewart, heirs of Barbara Stewart, deceased, and the Standard Oil Co., a corporation of California, and the Sumpter Valley Railway Company, a corporation in which the City of Baker intervened, to foreclose a certificate of delinquency issued to the plaintiff for the nonpayment of certain taxes assessed against the property described in the complaint, which is situated within the corporate limits of the city of Baker, and consists of a strip of land lying at the west end of Court Avenue. If Court Avenue, which is one of the principal thoroughfares of the city, were extended westerly to the right of way of the O.W.R. & N. Company, it would include the strip of contested land and also a strip lying immediately to the south, fourteen feet in width. The premises in controversy have been unenclosed, and, together with the adjoining tracts belonging to other parties, have been accessible for public travel. This suit involves the question of *whether or not the tract in dispute is a part of Court Avenue.*"

The City of Baker intervened in the suit and pleaded three separate defenses:

1. A dedication of the property by John Stewart and wife (the former owners), as a part of Court Avenue;
2. Conduct on the part of John Stewart and his grantees by reason of which they are estopped from claiming that the land in question is not a street; and,
3. A conveyance to the Standard Oil Company, dated November 1, 1896, of a right of way over the land, and a conveyance of the same by it to the city on the 24th day of April 1912, the latter being made after the commencement of this suit.

Other facts surrounding this litigation were:

"The record title to the real estate described in the complaint is in John M. and R. L. Stewart. The state, county, and city taxes for the year 1908 were regularly levied and assessed upon the property. John Stewart originally owned a body of land including this tract, and land immediately on the north and south. In 1882, Stewart platted the tract on the north as 'Stewart's Addition,' with the south line of the addition even with the north line of Court Avenue, and adjacent to the land in dispute, which was not shown on the plat as a street.

"In 1889, Stewart sold and conveyed the land on the south to Geo. Cates, describing the same by metes and bounds, without reference to Court Avenue. Stewart never conveyed any part of his land

by describing the same with reference to the above street. Of late years a warehouse abutting on the south of the tract near the railroad and a residence have stood upon the Cates lot. The depot grounds are located on the north side of the strip. After the O. W. R. & N. Company's railroad was built at this place in 1884, a warehouse was maintained for several years on the west side of the railroad, and freight from the interior was hauled over a crossing of the railway track and strip of land. This warehouse was burned some 20 years ago and the railroad crossing was abandoned. Immediately across the track lies private property. Later, other streets in the vicinity were opened across the railroad right of way, and tracks were laid by the Sumpter Valley Railway Company by the side of those of the O. W. R. & N. Company, making ten in all. The tract in dispute has been open from the west end of Court Avenue to the railroad right of way since 1884, so that anyone desiring could cross the same, as is the custom to use any vacant lot in the outskirts of such a city.

"It is evidence on behalf of defendant that there has been more or less public travel over the land involved, since the eighties; the line of travel not following exactly the strip of land claimed as a street, but verging to the north and passing over a portion of Stewart's Addition and the depot grounds. There is no means of ingress to or egress from the warehouse and dwelling on the south, except over the 14-foot strip mentioned. The city widened Court Avenue 14 feet on the south side, making the street that much more in width than the tract in suit, and paved the same to this lot, but not beyond. The plat of Stewart's Addition shows the lots and blocks thereon and also the alleys dedicated to the public. The lots face upon an alley and not the strip claimed as a street. For many years the premises were regularly assessed and levied upon for taxes, the same being paid by Stewart during his lifetime and by Mrs. Stewart after his death. The city assessed the property for storm sewer assessment, *but constructed no sewer, made no improvements thereon, and assumed no authority or dominion over the same.*

"The pleadings and record show that on November 1, 1896, John Stewart sold and conveyed to the Standard Oil Company a tract of land across the railroad tracks and west of the premises in controversy, and at that time *granted an easement to the company across the contested land*, in connection with the premises conveyed, to be used by the company as a means of ingress to and egress from the property across the railroad; that the Standard Oil Company conveyed the premises to J.W. Stuchell, but in so doing failed to specially mention any right of way or easement, although it did convey the ap-

purtenances; that Stuchell later conveyed the premises to the Sumpter Valley Railway Company in the same manner and form as they had been conveyed to him, omitting any mention of the right of way or easement over the Stewart land in controversy herein. All the defendants except the city of Baker defaulted. The circuit court found that the city had no right to the land for use as a street."

Mr. Justice Bean, delivering the opinion of the Oregon Supreme Court, said:

*"1. In determining as to a dedication, the intention of the owner is the controlling factor; but the law does not seek for his (or her) undisclosed intention. It acts upon his (or her) intention as evidenced by his acts and the circumstances which he (or she) permits or encourages."*⁴⁴

2. Principle 83, as follows:

Principle 83

"Where the situation of land is such as to indicate that it does not form part of the highway, although it may be alongside of the way and be used by the public, no dedication can be presumed without strong evidence of an intent on the part of the owner to devote the land to the use of the public."⁴⁵

*"3. In order to constitute dedication by parol there must be some act proved evincing a clear intention to dedicate the land to the public use."*⁴⁶

*"4. The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his (or her) property to the specific public use. If they be equivocal and do not clearly and plainly indicate his intention to permanently abandon the property to public use, they are insufficient to establish a dedication."*⁴⁷

"5. The evidence does not disclose that John Stewart ever made any dedication of the land to the public use. His acts, such as granting a right of way to the Standard Oil Company (which indicates the reason why he did not sell the land with the Cates tract), and the payment of taxes (negated) an intention to abandon the real property. There is no evidence tending to show that the strip was intended by anyone as a permanent street, or that the property was accepted by the public as a street. The contention of defendant that there has been a dedication cannot be upheld."

"6. The defendant city next claims the right to the use of the land as a street by prescription or adverse use by the public continuously for the statutory period of limitation. To establish a highway by prescription there must be an actual adverse public use, general, uninterrupted, continued for the period of the statute of limitations under a claim of right, where this is established for the

*statutory period, the right is deemed perfected and a permanent one.*⁴⁸

“It was held in *Smith v. Gardner*:⁴⁹

Principle 84

“Mere user of a highway, however long-continued and uninterrupted by the public, is not sufficient to give a right in the public; but such user must be accompanied by acts, such as working the road, keeping it up by the public, repairing it or removing obstructions, etc., showing the use to have been made under a claim of right, and not merely by permission of the land owner.”⁵⁰

Principle 85

“A permissive use of a way by certain portions of the community constitute a **license**, and not a dedication; and is something that may be revoked.” See Principle 87.⁵¹

And it was held in *Bayard v. Standard Oil Co.*⁵² that user by the general public, under a claim of right, adversely, and not by mere permission of the owner, for the period prescribed by the statute as a limitation which actions for the recovery of real property cannot be maintained, will establish an easement in the public.”

Principle 86

“The adverse use which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. As in the case of adverse possession, it must be continued for a long period; it must be adverse, under a claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiescence of the owner of the estate out of which the easement is claimed.”⁵³

Principle 87

“Where the use is merely permissive (constituting license), and not adverse, there is no basis on which a right of way by prescription may rest.”⁵⁴

“7. The use made of the property in question by those travelling over it does not appear from the evidence to have been at any time either adverse to the owner or under a claim of right. It does not appear that an action could have been maintained at any time Stewart or his successors in interest for any act of the city, or of anyone else, relating to the land. *But, rather, the use appears as a neighborly concession.* Anyone was allowed to travel over the tract for convenience, as is often the case with a vacant lot, as it did no harm, and the use was apparently

permissive in its very nature, and would not set the statute running.”⁵⁵

“8. The receipt by the city of taxes paid by the owner is inconsistent with the claim of the city to have held the same land, on which the taxes were paid, by prescription during the same years it received taxes thereon.”⁵⁶

“All that would have been necessary for Stewart or subsequent owners to have done to have changed the condition as to travel would have been to inclose the land. This would not have conflicted with any authority exercised or claimed by the municipal authorities. The city has not made out a case coming within the well-defined rules governing a prescriptive easement as announced and adhered to by this court. This disposes of the second contention of defendant.

“9. As to the conveyance by Stewart and wife to the Standard Oil Company of a tract of land west of the railroad together with a right of way over the land in dispute to be used in connection therewith, when the Standard Oil Co. conveyed the lot west of the railroad, together with its appurtenances, to Stuchell on July 12, 1909, which deed was duly recorded, this right of way, being appurtenant to the tract described in the conveyance, passed to the grantee without specific mention.⁵⁷ Therefore, the deed executed by the Standard Oil Co. to the City of Baker on April 24, 1912, describing the right of way over the land in controversy, conveyed no right thereto, as that company then had nothing to convey, and the city obtained no benefit by virtue of such deed.

*“The decree of the lower court was right, and it is affirmed.”*⁵⁸

City of Clatskanie

v. McDonald⁵⁹

This was a suit brought by the City of Clatskanie, a municipal corporation, to determine an adverse claim asserted by defendants to certain property which plaintiff claimed to be part of Bridge Street. The only dispute related to a strip of land 47 feet long; its width varied from 3.13 feet at the southeast to 2.68 feet at the northeast. It was conceded that the record title to the property was in the defendants (McDonald), but the city claimed “title” (sic) by prescription,⁶⁰ parol dedication and estoppel. The Columbia County Circuit Court had upheld McDonald’s contentions. Subsequently, the city appealed that ruling in the Oregon Supreme Court.

Mr. Justice McCamant delivered the opinion of the court.

"In 1885 a county road thirty feet in width was laid out on the site of what is now Bridge Street in Clatskanie. The land included in and abutting on this road was platted in April 1902, but the road does not appear on the plat. It is established by testimony that the road extended fifteen feet on each side of the line dividing Lot 26 from Lot 27 in the subdivision. On June 7, 1912, the owners conveyed Lot 26 to the defendant J.W. McDonald and in the following month he commenced the construction of a building which has since been continuously used for hotel purposes. This defendant set the front of the building back twenty feet from some stakes which, as he supposed, marked the center line of the road. In front of the building he laid flooring five feet in width and roofed it over. The roof was supported by six wooden pillars which stood out five feet from the front of the building. A door and two windows on the second floor of the hotel opened out on this roof, which was on the same level as the second floor of the hotel. In 1908 the pillars were removed and thereafter the roof was supported by braces; at the same time this defendant extended the flooring or sidewalk in front of the hotel to a width of eight feet. Prior to this time some planks had been placed lengthwise the street in front of the defendants' property.

"Defendants' hotel was the first building constructed on this part of the street, but in 1904 Barbara H. McKiel constructed a building about fifty feet northerly from that of the defendants; and the same year Ben Berkenfeld built on property which adjoined the defendants on the south. The front of the McKiel building was in line with the front of the defendants' hotel. Berkenfeld had intended to extend his house five feet farther into the street than the defendants' property, but in consideration of some privileges granted to him by the defendants in the use of their hotel for twenty-five years he more nearly conformed to their building line; his building juts out two feet beyond the hotel.

"Berkenfeld and McKiel laid sidewalks in front of their property. In 1905 the street was filled and graded and shortly thereafter the sidewalks on the street were connected up with planking. From the time when the defendants' hotel was constructed in 1902 down to the bringing of this suit in October, 1915, the public has used the sidewalk in front of the defendants' hotel more or less and it is admitted that subsequent to 1906 most of the foot travel on the street has passed over this sidewalk. For a short time the defendants boarded up the northerly end of the sidewalk on their property because of

a hole in the dock on the adjoining property into which they feared someone might fall. When this hole was covered, the board was removed. *The defendants have continuously paid taxes on the property in dispute.*"

The Supreme Court held:

"1. In *Parrott v. Stewart*, (*supra*), Mr. Justice Bean says:

"To establish a highway by prescription there must be an actual adverse public use, general, uninterrupted, continued for the period of the statute of limitations under a claim of right..

"A permissive use of a way by certain portions of the community constitutes a *license* and not a dedication, and is ordinarily something that may be revoked.

"Where the use is merely permissive, and not adverse, *there is no basis on which a right of way by prescription may rest.*'

"To the same effect see *Peters v. Robertson*.⁶¹ Plaintiff has failed to establish that the use of the premises was *hostile or adverse to the title asserted by the defendants*. The sidewalk was constructed originally for the use of defendants and those doing business at their hotel. *The use of the sidewalk was permissive in its origin and it could not become adverse without some unequivocal assertion of the rights of the public as inconsistent with the title on which the defendants rely.*⁶² The evidence tends to show that no such claim was asserted by the plaintiff until 1915, shortly before the bringing of this suit.

"2-4. The plaintiff contends that there has been a dedication of these premises by acts *in pais*. *Such a dedication will not be assumed without clear evidence, manifesting an unmistakable intention on the part of the owner to abandon his property to the public use.*⁶³ The plaintiff's evidence fails to satisfy this requirement. The evidence shows circumstances indicating that the defendants had no intention of abandoning their dominion over this property. For a short time they boarded it up and the evidence fails to show that anyone protested. They continuously paid the taxes. *It is held that the levy of taxes on property does not estop the public from claiming it as a highway.*⁶⁴ But the continuous payment of taxes is evidence rebutting the **presumption** of dedication."⁶⁵

Note: The previous statement must not be taken out of context. The word "*presumption*" is important here. The court is saying that, in cases where a dedication is *presumed*, as in a claim of prescriptive rights to an easement, the payment of taxes is better evidence of an intent to retain dominion over the land than if the taxes were not being paid (being important evidence

tending to refute a claim that the owner intended to retain dominion over the land), or if the land were exempt from taxation (evinced a presumption that the easement was public, the public was exercising its rights, and consequently the land was exempt from taxation). But where the intent to dedicate has sufficed to operate as a statutory dedication, or common law dedication, the levy of taxes on the land of the way **will not** estop the public from claiming it as a highway.

“The maintenance by the defendants of the roof over the sidewalk is some evidence that they continued to claim the property in dispute. The roof was also a porch used in connection with the second story of the hotel. These circumstances are each of slight evidentiary value, but taken in connection with the inadequacy of the plaintiff’s proof on the main issue, they satisfy us that there was no dedication.

“5-6. Plaintiff’s final claim is that the defendants are estopped to set up title to the property in question. In *Parrish v. Stephens*⁶⁶ it is said:

‘He (or she) who induces the public to believe his (or her) land a gift, or knowingly permits them to use and treat it as their own, until they have so accustomed themselves, and adjusted their property and accommodated their business to it, that they cannot without detriment be dispossessed, confers a right which he (or she) can no more resume without wrong than he (or she) can rightfully seize what was acquired otherwise than by his gift.’

“The plaintiff contends that by constructing their hotel as above indicated and permitting the public to travel in front of it have induced other property owners to build on substantially the same line and that injustice would be done them if the defendants were now permitted to claim as their own the property in dispute. On this issue the case is not free from doubt, but the burden of proof rests on the plaintiff.

Principle 88

“The title to real property cannot be divested by estoppel without clear and satisfactory evidence.”⁶⁷

“There is evidence that the defendant J.W. McDonald requested McKiel and Berkenfeld to conform to his building line in constructing their buildings, but there is no evidence that this defendant made any representations with reference to the use of the sidewalk. Berkenfeld received a valuable consideration from McDonald for constructing on the line selected.

“In order to sustain the estoppel contended for, the city should have proved that other property owners

were induced to construct their buildings substantially in line with defendants’ hotel by a belief induced by defendants that the strip of land in front of these buildings could be used as a sidewalk without claim thereto by defendants. The evidence fails to establish these facts. There is no evidence that other property owners constructed their buildings on the line selected because of their belief that they could use the sidewalk in front of the defendants’ hotel.

“Plaintiff’s claim of estoppel is predicated in part on the contribution by defendant J.W. McDonald of \$40 to a fund to pay the expense of widening the street. The street was widened by moving back the houses on the opposite side from that with which we are concerned in this case. The defendants’ part in the matter does not estop them from claiming title to the property in dispute.

*“The decree of the lower court is affirmed.”*⁶⁸

Macleay Estate Co. v. Curry County⁶⁹

This was a suit to quiet title to a tract of land. The appeal before the Supreme Court centered on an alleged existence of three public roads on the controversial tract of land: Bagnell Ferry Road, Port Orford-Ellensburg Road, and the Witness Rock-Salthouse Road. It was conceded that the Bagnell Ferry Road legally existed, but the estate company denied the existence of the other two roads.

In the trial court the estate company admitted that the Port Orford-Ellensburg Road had been legally established, but contended that it was subsequently abandoned, and that therefore its title as owner of the fee had been freed from the road easement. The county made no claim that the Witness Rock-Salthouse Road had an origin in dedication, or had been established pursuant to action by any public body. However, it did claim a right in behalf of the public to its continued use by prescription. The Supreme Court held:

“1,2. The parties agree upon the principles of law applicable to this controversy but differ as to what facts are established by the evidence... The Witness Rock-Salthouse Road is approximately 350 feet in length and 30 feet in width; it runs from the edge of the Rogue River to the Roosevelt Highway in the town of Gold Beach. We are satisfied that it was not until the spring of 1916 that a use was made of this land which informed the plaintiff that a road was being established; at that time the present road was graded. This suit was begun April 10, 1926. The aforementioned work was neither done nor supervised by the county; in fact, the county had no con-

nection of any nature with this improvement; its cost was borne by the plaintiff and two others. The completion of the work was followed immediately by the posting of notices by the plaintiff which bore the information that the road was a private one, and that permission to use it was revocable; at three different times such notices were posted. In 1925 the roadway was obstructed by a fence erected by the plaintiff. It is true that someone tore down the notices as time went on, and that the fence was demolished shortly after it was built, but, nevertheless, the erection of the fence served the purpose, as is suggested by Elliott on *Roads and Streets*⁷⁰ of informing the public that the *use was a permissive one*. Indeed, there is reliable evidence to the effect that the public understood that those who used the road enjoyed that privilege, not as a right, but as a permission from the plaintiff. Both Mr. W. A. Wood, County Judge from 1912 to 1924, and Mr. Chas. H. Bailey, his successor, testified that the county had never asserted any claim to the road. Upon the other hand the county had negotiated for some time with the plaintiff for the purpose of acquiring it as a public highway. We have read the testimony with care and fail to find any substantial evidence to the effect that anyone ever claimed a right to pass over this road as a matter of right.

"In *Stotts v. Dichdel*⁷¹ this court said:

"To establish a highway by prescription, the land impressed with the use must have been used by the public with the actual or implied knowledge of the land owner, adversely under claim or color of right, and not merely by the owner's permission, and uninterruptedly and substantially by way of a defined road for the period required to bar an action for the recovery of possession of land."

"And in *Curtis v. La Grande Water Co.*,⁷² this court said:

Principle 89

"To acquire a right of prescription in the lands of another upon the presumption of a grant, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land upon which the easement is claimed. If this inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect that result, the possession taken must be open, hostile, and continuous; 'he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.'" Under this rule, an adverse possession cannot grow out of a permissive enjoyment; and so speak the decisions without a dissentient voice, including this court.

"In *Chapman v. Dean*⁷³ Mr. Justice Burnett, in pointing out succinctly the elements of a prescriptive right, stated as the first:

"The possession must be hostile and under a claim of right."

"Since we conclude that the public never asserted any hostile claim in the land which constitutes the roadbed of the Witness Rock-Salthouse Road, but upon the other hand availed itself of a permissive right, our findings are that the defendant (county) has *no right in this road*."⁷⁴

The remainder of this report dealt with abandonment of the Port Orford-Ellensburg road (discussed under "Abandonment").

Sweet et al v. Irrigation Canal Co.⁷⁵ (Reference only)

This case was a suit by the abutting owner to obtain a decree enjoining the maintenance by the Irrigation Canal Company of a ditch, in a county road, which interfered with the plaintiffs' right of ingress to, and egress from their land. The width of the road was an issue in this case, and the details of the case and decision of the Supreme Court, pertinent to the width and margin (right-of-way line) of the road, is included in the section of this publication on "The Widths of Public Ways." Noted in that section are the principles of law on the width of highways established by prescription, or where the highway depends solely for its establishment upon adverse and continuous user by the general public.

Huggett et ux v. Moran et ux⁷⁶

This suit was commenced by the plaintiffs to rescind a contract for the purchase of real property from the defendants (W.G.) Moran and (E.F.) Moran, husband and wife; however, his wife being deceased, the cause was continued against W.G. Moran, who was the sole owner of the property. The plaintiffs alleged that the defendant, himself or through his agents, represented that the roadway leading from what had been called the "Rocky Point" county road to the property purchased by the plaintiffs was a county road, that the statement was material and false, and that they would not have purchased the property except for their reliance upon the false representations of the defendant.

Moran, by answer, alleged that the roadway *was not a private roadway*, but that it was *a public road maintained by Washington County and used by the general public*

without restrictions for a period of over 40 years. He admitted it was not a *county road*, and denied that he ever represented it to be a county road.

The defendant's principal contention was that the uncontradicted evidence showed that the road in question was used and traveled by the public as a county road, and was improved, worked upon, and maintained by the county since 1938. The defendant added that for all legal purposes the roadway has become a "county road by *prescription*, and, therefore, the representation, if made, was not false. The Supreme Court said:

"The principle question, therefore, before this court is whether or not the evidence disclosed that for the purpose of this cause there was a county road leading from the 'Rocky Point' county road to the farm purchased by plaintiffs.

"In this state there are two systems of highways, those designated as state highways, and those designated as county roads.

"State highways were first so designated by the legislative assembly of the state by Chapter 237, 1917 Or. Laws.

"In *Postal Telegraph Co. v. State Highway Commission*,⁷⁷ it is stated:

"Prior to the authorization for the construction of this class of highways, there were no such roads in the state. Whatever roads existed were known as county roads, except that, earlier in the history of the country, there were certain highways known as *toll roads*, and certain others known as *territorial roads*. By statute, however, all territorial roads were declared to be county roads.⁷⁸ By the same title⁷⁹ it was declared that all county roads shall be under the supervision of the county court of the county wherein the road is located, and that none such shall be altered or vacated except by authority of such court of the proper county.

"This same section⁸⁰ was later revised as subsection 100-1202, OCLA (ORS 368.205), and insofar as is material to this issue reads as follows:

"All county roads shall be under the supervision of the county court wherein said road is located. Each county court within this state shall have the authority, and it shall be its duty, to supervise control and direct the laying out, opening, establishment, locating, relocating, changing, alteration, straightening, working, grading, maintenance and keeping in repair, improvement and vacation of all county roads within its county, and to prescribe the methods and manner of working, improving and repairing the same, and to *legalize old roads* and to restore monuments thereon; and except as shall be

expressly provided, no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this state, except by authority of the county court of the proper county.'

"Section 100-1203, OCLA (ORS 368.405), provides for the establishment of county roads in the following manner:

"(1) By petition of freeholders,

"(2) By resolution of the county court,

"(3) By grant of owners of necessary rights of way (which includes dedication),

"(4) By condemnation proceedings,

"and then provides:

"This provision shall not preclude the acquirement of public ways by adverse user.'

"So that there has been expressly provided by statute the right of counties to obtain public roads by prescription.

"1,2. While strictly speaking way is not synonymous with road (the word 'way' being more generic than the word 'road,' and referring to many things besides roads),⁸¹ as used in the statute authorizing the establishment of county roads it must be construed as including therein county roads. The statute does not in anywise change what we have said in the past regarding the ultimate fact that 'In this state a highway may be established by adverse user, and "where length of time of such use by the public has been greater than the period prescribed by the statute of limitations for the recovery of real property, that will be regarded as sufficient evidence of the existence of a highway independently of any supposed dedication."⁸² And generally it is unimportant whether the right arising by prescription is based on the presumption of an antecedent regular and lawful exercise of established authority or by prior dedication, the result is the same.

"3. With relation to prior dedication of roadways, the rule is that, regardless of the easement of use acquired by the public, property owners for their own benefit, or convenience, cannot impose a street or highway upon a municipality against its will and compel it to improve or repair the street or highway.⁸³

"4. By enactment of a law a county cannot be compelled by *formal dedication or gift* to accept a highway and thus be impressed with the burden of improvement and repair without the formal sanction of the county court.⁸⁴ (Note: Do not misinterpret this as barring common law dedication. But it is true that a county does not have to improve or re-

pair a road created by common law dedication unless it accepts the road.) However, if the roadway is duly accepted by the county, the duty to establish and maintain the way arises.

"Each of the above methods of establishing a county road with its attendant liability requires formality of offer and formality of acceptance, and refers solely to the statutory methods of 'laying out, opening, establishment, alteration, straightening, locating, and relocating county roads.'⁸⁵

"5. The rights to the use of a way arising by prescription, *arise not out of the formality of conveyance, but by informality; not by formal gift, grant or dedication, but by open, notorious, hostile, adverse use, based upon the assumption of a prior dedication or action by duly constituted authority.* Thus a roadway so established is not controlled by the statutory requirement of formal acceptance, and unless required by statute, *no formality is necessary to a valid acceptance.*⁸⁶

"6. An offer of dedication may be impliedly accepted by some act or acts showing that the municipality has assumed control and possession of the land dedicated as a public way, but the acts relied on must be unequivocal and not equivocal or isolated.⁸⁷

"7. Whenever a statute prescribes the minimum width of public roads to be established in the future, and a public road is established by prescription, the width thereof is the minimum necessary to the establishment of a legal road in the absence of evidence of the taking of a greater amount.⁸⁸

"With these rules of law before us we shall now consider whether or not the evidence is sufficient to establish a county road by prescription for the purposes of the instant case.

"Mr. Carl R. Tannock, called as a witness by the defendant, testified that the road in question had been open for use by the general public since about 1916, and that it has never been shut off or closed since that time; that the county did work thereon in the year 1938, and the road has been maintained by the county since that date.

"Mr. Clarence D. Nelson, called as a witness by the defendant, testified that he had lived in the vicinity nearly 60 years; that he thought the road had been open for public use since 'about 1910 or '11'; that the road has been open to the use of the public and not restricted since that date.

"Mrs. Nellie R. Grant, called as a witness by the defendant, testified that to her knowledge the road had been open since 1918 to the use of the public and had never been closed.

"Mr. L.L. McIntyre... testified that he was employed by Washington county as a county engineer and roadmaster and had charge of the maintenance and construction of county roads (testifying to continued improvement and maintenance of the road, from 1938)."

"Mr. Herman H. Reese... testified that he had been formerly employed by the (county) road department... "June, 1943 to October, 1950 (testifying to continued county maintenance)."

"8,9. It is quite clear from the evidence set forth above (uncontradicted) that (the county had maintained the road for 10 years)... this case discloses that a county road, in fact, existed..."

Hay v. Stephens⁸⁹ (1972)

This case involves a claim of a private easement across a pathway instead of a roadway. Although a private claim is involved, rather than a claim on behalf of the public, the decision here would be relevant to that of a public claim of a right to the use of a pathway. And since such rights are often presumed, this case would be of some value to the subject of establishing public easements by prescription.

This suit by the plaintiffs was to establish a prescriptive easement in the form of several pathways across the defendants' land. The trial court, Clatsop County, had held in favor of the plaintiffs, and the defendant appealed that decision to the Supreme Court.

The facts presented were:

"Defendants own a parcel of land at Cannon Beach, Oregon, between plaintiffs' land and the beach. The plaintiffs purchases one parcel of their property (Lot 4) from Mrs. Morrison and an adjoining parcel (Lot 5) from a Mr. & Mrs. Wolff. Plaintiffs and their predecessors in title to both parcels used the pathways above to get to the public part of the beach.

"The only question on appeal is the sufficiency of the evidence to sustain plaintiffs' claim to a prescriptive easement.

"In 1933 the Wolffs began crossing defendant's parcel to get from their house on Lot 5 to the beach. The house sat close to the edge of a steep decline described as a 'cliff' by some witnesses. Paths from each of two sides of the house converged into a single path down the 'cliff' so steep that steps were cut into it for footholds. Three pathways led from the house on Lot 4 to the beach; each followed a steep gradient similar to that of the paths on Lot 5. Since the houses on both lots were used principally during summers and week-ends, use of the paths were intermittent."

The court held:

"1. Defendants contend that there was not adequate proof to establish a prescriptive right. They first argue that plaintiffs failed to prove the element of continuity of use. There was evidence that the paths were used regularly during the periods when the homes on Lots 4 and 5, were occupied. Although, as indicated above, these periods were intermittent, we are of the opinion that the evidence demonstrates the necessary continuity of use.

"As pointed out in Restatement of Property (Servitudes):⁹⁰

Principle 90

"To satisfy the requirement that the use be continuous it is not necessary that it be constant. A use may be continuous though there are periods of time more or less extended between the specific acts of use. Many easements, such as rights of way and rights of hunting or fishing, which are periodical or only occasional in use, may be acquired by prescription. The requirement means that there be **no break in the essential attitude of mind** required for adverse use rather than that the use be constant.'

"In cases in which title was claimed by adverse possession we have acknowledged continuity of use *despite considerable periods of time during which there was no use of the property*. Thus in *Springer v. Durette et ux*⁹¹ we held that the fact that the land was used for grazing only from April to November did not preclude the claim for lack of continuity. There we pointed out:

Principle 91

"An important consideration in testing continuity is the character of the property and the manner which the average owner would use it."⁹²

"In the present case the pathways were used in a normal manner for owners of beach property and therefore the use was sufficiently continuous.

"2,3. It is further contended that the plaintiffs failed to establish the element of adverseness in the use of the pathways. Defendants rely upon admissions, on cross examination, made by plaintiff William Hay and his predecessors in title that they did not intend to acquire *ownership* of the pathways and that they would have discontinued using the pathways if the defendants had made them stop. These admissions do not negate adverseness of use; however; they amount to no more than disavowal by plaintiffs of any claim to ownership in the land and recognition by them of the legal authority of defen-

dants to have prevented the use which was being made of their land.

Principle 92

"A use 'is adverse though made in recognition of the wrongfulness of the use and, also, of the legal authority of another to prevent it.'⁹³ A use is adverse if 'not made in subordination' to the person against whom it is claimed to be adverse."⁹⁴

"The evidence establishes that the use made by plaintiffs was 'not in subordination' to defendants. We conclude, therefore, *that plaintiffs acquired a prescriptive right to use the pathways over defendants' land*.

"There is evidence that the strip of land owned by defendants is so steep and narrow that it is not practicable for the defendants to build upon it or put it to any other useful purpose...."⁹⁵

City of Ashland v. Hardesty⁹⁶ (1975)

1. This was a suit for declaratory judgment in which the plaintiff, the City of Ashland, sought a ruling that, in addition to certain deeded rights of way it possessed, it acquired by prescription and easement giving it a right of way across the defendants' properties from the public street to the city's sewage treatment plant. The trial court of Jackson County found that the city had acquired such an easement and one of the defendant property owners appealed that decision to the Oregon Court of Appeals. Since it was in the nature of a suit in equity, the Court of Appeals review was *de novo*.⁹⁷

"The issues raised by the assignments of error are the following: (1) whether there was a material variance between the complaint and the proof at trial, (2) whether a municipal corporation can acquire an easement by prescription, and (3) whether the City of Ashland acquired a prescriptive easement across defendants properties.

"2. The defendant contends that the description in the complaint of one defendant's property leaves out a portion of the property across which the claimed prescriptive easement actually runs. The legal description of the prescriptive easement contained in the complaint is not alleged to be faulty or incomplete. ORS 16.630 provides that: 'no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits....'

“Defendant does not claim that he or any other defendant was misled or prejudiced in any way by this omission. The variance is immaterial and was properly disregarded by the trial court.

“3. Defendant also argues that a municipal corporation is prevented from acquiring a property interest by prescription or adverse possession by Or. Const. Art. I, subsec. 18, which prohibits the taking of private property for public use without just compensation. We are not here dealing with the question whether the right of eminent domain may be exercised, but with whether a state or municipal corporation may acquire property by adverse possession. The federal government is subject to a similar eminent domain provision in Amendment V to the Constitution of the United States, but in *Stanley v. Schwalby*⁹⁸ the United States Supreme Court held:

Principle 93

“The federal government (can) acquire property by adverse possession in the same manner as a private individual.”

“In *Stephenson v. Van Blokland*⁹⁹ the Oregon Supreme Court said:

Principle 94

“Even though the statute does not run against the State, adverse possession by the State for the statutory period will give title by prescription.”¹⁰⁰

“The rule that states and municipal corporations may acquire interests in property by adverse possession or prescription is **widely recognized**.”¹⁰¹

“We find that:

Principle 95

“Or. Const. Art. 1, subsec. 18, does not prevent the state or a municipality from acquiring property interest by adverse possession or prescription.”

“4. For the City of Ashland to establish its claimed easement by prescription it must prove ‘an open and notorious use of defendants’ land adverse to the right of defendants for a continuous and uninterrupted period of ten years.’¹⁰² It must establish these elements by clear and convincing evidence.”¹⁰³

“In 1936 the City of Ashland bought a piece of property on which it built a sewage treatment plant. The parties stipulated that about that time the city had acquired the right by deeded easements to cross the two pieces of property between the plant and the public street about one-quarter mile away. Sur-

veyors’ testimony and diagram established that the right of way claimed by the city did not wholly correspond with the deeded easements, although they intersected and overlapped in some places. For example, one of the deeded easements contained an extremely sharp angle, while the easement here claimed by the city made a gradual curve, cutting off that acute angle entirely.

“5,6. In relation to the issues raised by appellants, Restatement of Property¹⁰⁴ defines adverse use as follows:

“‘A use of land is adverse to the owner of an interest in land which is or may become possessory when it is:

“(a) not made in subordination to him, and

“(b) wrongful, or may be made by him wrongful, as to him, and

“(c) open and notorious.’

“City officials and employees testified that they believed that their usual route to the sewage treatment plant followed the deeded easements claimed by the city. The city, in fact, paved this now claimed right of way in 1961. The city’s belief and actions establish that its use of the route was not subordinate to the property owners whose land they crossed, but adverse thereto.”¹⁰⁵

Principle 96

“An intent to claim land occupied under a mistaken belief of ownership is sufficient to prove hostile intent.”¹⁰⁶

“7. Although the city believed it had an easement to use the right of way it followed, it did not have that right under deeded easements and its occupation and regular use of the portions wholly or partially outside the deeded easements, was without consent of the property owners, *but with their full knowledge*, and had been continuous since 1949. The property owners neither protested nor made any effort to require the city to confine its use to the deeded easements until about the time this suit was filed.

“See *Arrien v. Levanger*¹⁰⁷ where it is held that to establish adverse use *it is not required that the use be continuous, but merely the normal use a claimant would have made of the property for his (or her) purpose if he actually owned the property*. Here the city’s employees used the claimed right of way whenever they needed to work at the sewage treatment plant.

“8. The last element that the city must establish is whether the right of way that it used was *sufficiently clear and definite so that what it utilized can be identified*. There is conflicting testimony. The defendant claims that the city had no definite route or

that the route shifted. City employees testified that they followed essentially the same route. The surveyor for the city testified that when, following a 1974 flood in the area, he surveyed the route for reconstruction, he found remains of the asphalt from 1961 paving along the straight sections of the route, and around the curve, where the route was covered by sand and gravel from that January 1974 flood of Ashland Creek. Air photos taken in 1961, 1962 and 1969 all indicate a clearly defined roadway.

*“We conclude, as did the trial court, that the City of Ashland did acquire an easement by prescription giving it a right of way across the described real property of defendants.”*¹⁰⁸

It is important to understand that a public way cannot be established by prescription where the adverse use is by a limited number of persons, such as in the Oregon case

of Hay v. Stephens, supra, discussed here. In that case even though the plaintiffs were part of the public, they could not have acquired the right to use the land if they had claimed that right to be public, instead of private, because the use was limited to the plaintiffs and their guests. But the test of user is not so much the *number of persons* actually using the road or path, *but the character of its use*; that is, whether the public has had a free and unrestricted right of use of road or path.¹⁰⁹

Also noteworthy is that the *only* right the public can acquire by prescription is *the right of passage*.¹¹⁰ Such a right can never ripen into ownership of the land by the public.

For width of prescriptive easement, see the next section, *i.e. Sweet et al v. Irrigation Canal Co, supra*.

Endnotes

1. *Shumate v. Robinson*, 52 Or. App. 199 (1981), 627 P.2d 1295.
2. *Id.* *Op. cit.*: *Wood v. Woodcock*, 276 Or. 49, 56, 554 P.2d 151 (1976); *Boyer v. Abston*, 274 Or. 161,163, 544 P.2d 1031 (1976); *Thompson v. Scott*, 270 Or. 542, 528 P.2d 509 (1974); *Woods v. Hart*, 254 Or. 434, 458 P.2d 945 (1969). See: *Wemmer v. Young*, 167 Neb. 495.
3. *Shumate v. Robinson*, *supra*, at pp. 204-205.
4. Code 1930, subsec 1-202; ORS 368.201.
5. *Lehigh Valley R. Co. v. McFarlan*, 43 N.J.L. 605 *cited in*: 2 *Thompson on Real Property*, 1961 ed., subsec 335, n. 18, pp. 156-157. See: *State ex rel McNutt v. Orcutt*, 221 Ind. 523, 199 N.E. 595; *Buss v. Dyer*, 125 Mass. 287.
6. *Raab v. Casper*, 51 Cal. App. 3d 866, 876, 124 Cal. Rep. 590, 596 (1975), *cited in*: *Shumate v. Robinson*, *supra*.
7. *Id.* *op. cit.*: *Glatts v. Henson*, 31 Cal.2d 368, 371-372, 188 P.2d 745; *Cleary v. Trinble*, 229 Cal. App. 2d 1, 6.
8. *Bayard v. Standard Oil Co.*, 38 Or. 438, 63 P. 614, *But*, *Milarkey v. Foster*, 6 Or. 378, 25 Am. Rep. 531, was earlier.
9. *Id.*
10. *Milarkey v. Foster*, 6 Or. 378, 25 Am. Rep. 531; *Wakeman v. Wilburn*, 147 N.Y. 657, 42 N.E. 341.
11. *Elliotts' Roads & Streets*, 2d ed., *supra*, subsec 175, 176; *Jones, Easmts*, subsec 458; *State v. Auchard*, 22 Mont. 14, 55 P. 361; *Shellhouse v. State*, 110 Ind. 509, 11 N.E. 484; *Manrose v. Parker*, 90 Ill. 581; *State v. Keokuk, etc.*, R.R. Co., 45 Iowa 139.
12. *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N.W. 606; *Valley Pulp & Paper Co. v. West*, 58 Wis. 599, 17 N.W. 554; *Bartlett & Beardmore*, 77 Wis. 356, 46 N.W. 494; *Scheimer v. Price*, 65 Mich. 638, 32 N.W. 873; *Western Ry. v. Alabama G.T.R. Co.*, 96 Ala. 272; *Wayne Co. Say. Bank v. Stockwell*, 84 Mich. 586, 22 Am. St. Rep. 708.
13. *Whiteside v. Green*, 13 Utah 34, 57 Am. St. Rep. 740, See: note of 25 pages, *Highways by User*, 44 P. 1032; *Pillsbury v. Brown*, 82 Me. 450, 19 A. 858, 9 L.R.A. 94, see: note, "Right of Public to Use Entire Width of Highway," *Sprague v. Waite*, 17 Pick. 309; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N.W. 494.
14. *Davis v. City of Clinton*, 58 Iowa 389, 10 N.W. 768; *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N.W. 606.
15. This is in reference to an argument by counsel for the respondent that the record of the proceedings attempting to establish a county road, though invalid, was admissible as color of title, 38 Or. 438, pp. 443,444, *op. cit.*: on p. 444.
16. *Bayard v. Standard Oil Co.*, 38 Or. 438, at page 447, 63 P. 614.
17. *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N.W. 606.
18. *Bayard v. Standard Oil Co.*, *supra*, *cit.*: *State v. Auchard*, 22 Mont. 14, 55 P. 361.
19. *Grady v. Dundon*, 30 Or. 333, 47 P. 915. *But see*: *City of Molalla v. Coover et ux*, 192 Or. 233, 235 P.2d 142. Public ease cannot be defeated by adverse use, or by nonuser.
20. *Gregory v. Knight*, 50 Mich. 61, 64, 14 N.W. 700.
21. *Coleman v. Flint & P.M.R. R. Co.*, 64 Mich. 160, 163, 31 N.W. 47.
22. *City of Peoria v. Johnston*, 56 Ill. 45.
23. 3 Kent 11th ed., marg., p. 448.
24. *Beardslee v. French*, 7 Conn. 125; *Holt v. Sargent*, 15 Gray 97; *Amsbey v. Hinds*, 46 Barb. 622; *Hamilton v. State*, 106 Ind. 361, 7 N.W. 9; *Simplot v. City of Dubuque*, 49 Iowa 630; *State v. Culver*, 65 Mo. 607, 27 Am. Rep. 295; *Wayne County Say. Bank v. Stockwell*, 64 Mich. 586, 48 N.W. 174, 22 Am. St. Rep. 708, See: "Note on Highway by User and Discontinuance by Nonuser."
25. See: Three extensive notes, "Abandonment of a Highway by Nonuser or Otherwise than by Act of Public Authorities," 26 L.R.A. 449-469; "Discontinuance or Vacation of a Highway by the Acts of Public Authorities," 26 L.R.A. 821-840; and "Effect of Abandonment of a Highway," 26 L.R.A. 659-665; and a further note, "Rights Acquired as Against the Public by Adverse Possession of City Street," 18 L.R.A. 146-150. Reporter. *But see*: *City of Molalla v. Coover et ux*, 192 Or.; *Lowell et al v. Pendleton Auto Co.*, 123 Or. 383; ORS 221.750 and 275.027; Principles 42 and 43, and footnotes.
26. *Wallowa Co. v. Wade*, 43 Or. 253, 72 P. 703 (1903).
27. *Black's Law Dictionary*, *supra*, defines viewers as persons appointed by a court to make an investigation of certain matters, or to examine a particular locality (as the proposed site of a new road), and to report to the court the result of their inspection, with their opinion on the same. Rev. 4th ed., page 1740, "Viewers."
28. *Bayard v. Standard Oil Co.*, 38 Or. 438, 63 P. 614; *Nosler v. Coos Bay R. Co.*, 39 Or. 331, 64 P. 644, 22 Am. & Eng. R. Cas. 720.
29. Act of July 26, 1866, ch. 262, subsec 8, Stat. U.S. 253.
30. Rev. Stat. U.S. subsec 2477 (U.S. Comp. St. 1901, p. 1567).
31. *Flint & P.M. Ry. Co. v. Gordon*, 41 Mich. 420, 2 N.W. 648; *Wason Toll Road Co. v. Townsite of Creede*, 21 Land Dec. Dep. Int. 349, 351; *Pasadena Toll Road Co. v. Schneider*, 31 Land Dec. Dept. Int. 405.
32. *Wells v. Pennington County*, 2 S.D. 1, 48 N.W. 305, 39 Am. St. Rep. 758.
33. *Tholl v. Koles*, 65 Kan. 802, 70 P. 881. To the same effect is *Wells v. Pennington County*, *supra*.
34. *Streeter v. Stalnaker*, 61 Neb. 205, 85 N.W. 47.
35. *McRose v. Bottyer*, 81 Cal. 122, 22 P. 393.
36. Sec 2477, Rev. Stat. U.S., U.S. Comp. St. 1901, p. 1567.
37. *Smith v. Mitchell*, 21 Wash. 537, 58 P. 668, 75 Am. St. Rep. 658.
38. 1903 Or. Laws, p. 18.
39. B. & C. Comp. subsec 4, 13; *Ambrose v. Huntington*, 34 Or. 484, 56 P. 513; *Schneider v. Hutchinson*, 35 Or. 253, 57 P. 324, 76 Am. St. Rep. 474.
40. *Elliotts' Roads and Streets*, 2d ed., subsec 175.
41. *Hanlin v. Chicago & Al. W. Ry. Co.*, 61 Wis. 515, 526, 21 N.W. 623.
42. *Wallowa County v. Wade*, 43 Or. 253, 72 P. 793; See: Note 57 Am. St. Rep. 744.
43. *Parrott v. Stewart*, 65 Or. 254, 132 P. 523.
44. 3 *Dillon, Mun., Corp.*, 5th ed. subsec 1079; *Kuck v. Wakefield*, 58 Or. 549, 115 P. 428; *Hogue v. City of Albina*, 20 Or. 182, 25 P. 386, 10 L.R.A. 673.
45. *Parrott v. Stewart*, *supra*, *op. cit.*: *Elliotts' Roads & Streets* 2d ed., subsec 167.
46. *Lownsdale v. City of Portland*, 1 Or. 381, 405, F. Cas. 8578; *Lewis v. City of Portland*, 25 Or. 133, 155, 35 P. 256, 22 L.R.A. 736, 42 Am. St. Rep. 772.
47. *Hogue v. City of Albina*, 20 Or. 186, 187, 25 P. 386, 10 L.R.A. 673.
48. *Parrott v. Stewart*, *supra*, *cit.*: *Wood v. Hurd*, 34 N.J.L. 87; *Marion v. Skillman*, 127 Ind. 130, 26 N.E. 676, 11 L.R.A. 55.
49. *Smith v. Gardner*, 12 Or. 226, 6 P. 771, 53 Am. Rep. 342.
50. *Id.*
51. *Id.*

52. *Parrott v. Stewart*, *supra*, *cit.*: *Bayard v. Standard Oil Co.*, 38 Or. 438, 445, 63 P. 614. See: *Doyle Milling v. Georgia Pacific*, 256 Or. 271,473 P.2d.
53. 22 *Am. & Eng. Ency. of Law*, 2d ed. 1192; *Coburn v. San Mateo County (c.c.)*, 75 F. 520; *Shellhouse v. State*, 110 Ind. 509, 11 N.E. 484; *City of Topeka v. Cowee*, 48 Kan. 345, 29 P. 560, 563. And review *Doyle Milling v. Georgia Pacific*, 256 Or. 271,473 P.2d 135; 39 *Am. Jur. 2d, Highways, Streets & Bridges*, subsec 25 et seq.
54. *Elliotts'*, 2d ed., *supra*, subsec 175; *Engle v. Hunt*, 50 Neb. 358, 69 N.W. 970-972; *Town of Brushy Mound v. McClintlock*, 150 Ill. 129, 36 N.E. 976, 977.
55. *Altschul v. O'Neill*, 35 Or. 202, 211, 58 P. 95; *Trump v. McDonnell*, 120 Ala. 200, 24 So. 353.
56. *Elliotts'* 2d ed., *supra*, subsec 167; *Illinois Cent. R. Co. v. City of Bloomington*, 167 Ill. 9, 47 N.E. 318; *Niles v. City of Los Angeles*, 125 Cal. 572, 58 P. 190; *Hesse v. Strode*, 10 Idaho 250, 77 P. 634.
57. *George v. Cox*, 114 Mass. 382, 387; *Spaulding v. Abbott*, 55 N.H. 423; *Brown v. Thissell*, G Mass. (6 Cush.) 254, 258.
58. *Parrott v. Stewart*, 65 Or. 254, 132 P. 523.
59. *City of Clatskanie v. McDonald*, 85 Or. 670, 167 P. 560
60. The city must have meant title in an easement because title in the land cannot be acquired by "prescription."
61. *Peters v. Robertson*, 73 Or. 263, 266, 144 P. 568.
62. 1 R.C.L. 704; 2 C.J. 124; 130
63. *Hogue v. Albina*, 20 Or. 182, 187, 25 P. 386, 10 L.R.A. 673; *Lewis v. Portland*, 25 Or. 133, 155, 35 P. 256, 42 *Am. St. Rep.* 772, 22 L.R.A. 736; *Parrott v. Stewart*, *supra*; *Harris v. Ss. Helens*, 72 Or. 377, 386, 143 P. 941, *Ann. Cas.* 1916 D. 1073.
64. *Campau v. Detroit*, 104 Mich. 560, 562, 62 N.W. 718; *San Leandro v. LeBreton*, 72 Cal. 170, 177, 13 P. 405; *Rhodes v. Brightwood*, 145 Ind. 21, 30, 43 N.E. 942; *Gillean v. City of Frost*, 25 Tex. Civ. App. 371, 377, 61 S.W. 345; *Johnson v. Knott*, 13 Or. 308, 315, 316, 10 P. 418.
65. 1 *Elliotts' Roads and Streets*, 3d ed. 185; *Parrott v. Stewart*, *supra*; *Bauman v. Boeckler*, 119 Mo. 189, 199, 202, 24 S.W. 207; *Lockey v. Bozeman*, 42 Mont. 387, 113 P. 286, 290.
66. *Parrish v. Stephens*, 1 Or. 59, 69, *supra*.
67. *Urguhart v. Belloni*, 57 Or. 314, 321, 322, 111 P. 692.
68. *City of Clatskanie v. McDonald*, 85 Or. 670, 167 P. 560.
69. *Macleay Estate Co. v. Curry County*, 127 Or. 356, 272 P. 263.
70. *Supra*, 4th ed., sec 198.
71. *Stotts v. Dichdel*, 70 Or. 86, 139 P. 932.
72. *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 P. 808, 10 L.R.A. 484.
73. *Chapman v. Dean*, 58 Or. 475, 115 P. 154.
74. *Macleay Estate Co. v. Curry Co.*, 127 Or. 356, 272 P. 263.
75. *Supra*.
76. *Huggett et ux v. Moran et ux*, 201 Or. 105, 266 P.2d 692.
77. *Postal Telegraph Co. v. State Highway Commission*, 276 F. 958, 961.
78. Sec 38, title 1, ch. 47, *General Laws of Oregon 1645-1864*.
79. *Id.*, sec 1.
80. *Oregon Laws, 1645-1864*, subsec 1, title 1, ch. 47.
81. *Kister v. Reeser*, 98 Pa. 1, 4, 42 *Am. Rep.* 608.
82. *Douglas County Road Co. v. Abraham*, 5 Or. 318; to the same effect is: *Bayard v. Standard Oil Co.*, *supra*; *Ridings v. Marion County*, 50 Or. 30, 33, 91 P. 22.
83. *Moore v. Fowler*, 58 Or. 292, 114 P. 472.
84. Subsec 100-1225, OCLA, as amended (ORS 368.550); and as to the conveyances by individuals rights of way see: subsec 100-1224, OCLA (ORS 368.545).
85. Subsec 100-1203, OCLA (ORS 368.405).
86. *Hendrickson v. City of Astoria*, 127 Or. 1, 270 P. 924; *Christian v. Eugene*, 49 Or. 170, 89 P. 419; *Carter v. City of Portland*, 4 Or. 339.
87. *Hendrickson v. City of Astoria*, *supra*, p. 8; 18 C.J. 82, *Dedication*, subsec 80; 26 C.J.S. 104, *Dedication*, subsec 40A.
88. *Pillsbury v. Brown*, 82 Me. 450, 19 A. 858, 9 L.R.A. 94; *Kritzberger v. Traill County*, 62 N.D. 208, 242 N.W. 913; *City of Seattle v. Abrahamson*, 109 Wash. 116, 186 P. 644; 25 *Am. Jur.* 360, *Highways*, subsec 36; 39 C.J.S. 939, *Highways*, subsec 20.
89. *Hay v. Stephens*, 262 Or. 193 497 P.2d 362 (May, 1972).
90. *Restatement of Property, Servitudes*, subsec 459, comment b, p. 2936 (1944).
91. *Springer v. Durette et ux*, 217 Or. 196, 352 P.2d 132 (1959).
92. This factor is discussed in 3 *American Law of Property* subsec 15.3 p. 767 (1952) where it is stated that "possession may exist in a person who uses the land in the way in which an average owner of the particular type of property would use it though he does not reside on it and his use involves considerable intervals in which the land is not actually used at all." See also: *Norgard et al v. Busher et ux*, 220 Or. 297, 349 P.2d 490, 80 A.L.R. 2d (1960); *Knecht v. Spake et al*, 218 Or. 601, 346 P.2d 98 (1959).
93. 5 *Restatement of Property, Servitudes*, subsec 458, comment c, p. 2926 (1944).
94. *Id.* p. 2924.
95. *Hay v. Stevens*, 262 Or. 193, 497 P.2d 362, See: adverse use prerequisite to acquisition of easement by prescription. 25 *Am. Jur. 2d, Easements and Licenses*, subsec 51-55; C.J.S., *Easements*, subsec 13.
96. *City of Ashland v. Hardesty*, 23 Or. App. 523, 543 P.2d 41.
97. *Black's Law Dictionary*, rev. 4th ed. p. 483 defines *de novo* as: "Anew; afresh; a second time;" *op. cit.*: A writ for summoning a jury for the second trial of a case which has been sent back from above for a new trial; *cit.*, *Slaughter v. Martin*, 9 Ala. App. 285. The court in *City of Ashland v. Hardesty*, *cit.*: *Port of Portland v. Maxwell*, 9 Or. App. 105, 110, 496 P.2d 23 (1972).
98. *Stanley v. Schwalby*, 147 U.S. 508, 13 S. Ct 418, 37 L. Ed. 259 (1893).
99. *Stephenson v. Van Blokland*, 60 Or. 247, 118 P. 1026 (1911).
100. Citation omitted, 60 Or. at 255.
101. 10 *McQuillin, Municipal Corporations* 41-42, subsec 28. 15, 3d rev. ed. (1966); 7 *Powell, Real Property* 751-52, subsec 1020, (1974); 5 *Thompson, Real Property* 586, subsec 2555, (1957); Annotation, 18 A.L.R. 3D, 678, 689, (1968).
102. *Thompson v. Scott*, 270 Or. 542, 528 P.2d 509 (1974).
103. *Id.* at page 546.
104. 5 *Restatement of Property, Servitudes*, 2924, subsec 458.
105. *Id.* comment d; *Port of Portland v. Maxwell*, 9 Or. App. 105, 110, 496 P.2d 23 (1972).
106. *Rider v. Pottratz*, 246 Or. 454, 456 425 P.2d 766 (1967); *Port of Portland v. Maxwell*, *supra*, at 110.
107. *Arrien v. Levanger*, 263 Or. 363, 369, 502 P.2d 573 (1972).
108. *City of Ashland v. Hardesty*, *supra*. See: right of municipality to acquire easement in private property by adverse possession; 25 *Am. Jur. 2d, Easements and Licenses*, subsec 40; 18 A.L.R. 3d 678; C.J.S., *Easements*, subsec 70.
109. 2 *Thompson, Real Property*, 226, subsec 342, 1961, *cit.*: *Swinford v. Roper*, 389 Ill. 340, 59 N.E.2d 863; *Verb v. Morris*, 410 Ill. 206, 101 N.E.2d 566; *Discher v. Klapp*, 124 Ind. App. 563, 117 N.E.2d 753.
110. 2 *Thompson, supra*, 229, subsec 342, (1961) *cit.*: *Stengl v. Starr Bros.*, 370 Ill., 118. 18 N.E.2nd 179.