

Railroads, Crossings by Highways. Public Highways, Crossing Railways, Highways.

When a public highway crosses a railroad, the railroad is under the duty of making and maintaining suitable approaches and crossings; and this whether the highway was constructed at a time subsequent to the building of the railroad or not.

January 7th, 1914.

Honorable Railroad and Public Service Commission,
Helena, Montana.

Gentlemen:

I am in receipt of your letter of December 24th, 1913, with attached correspondence relative to highway crossing at Hibbard, and in which you asked for my opinion as to who is legally required to stand the expenses of such crossing.

The petition is from the residents of Hibbard, which I assume to be an unincorporated town. The provisions of Chapter 65 are therefore applicable, if the railroad crosses a public highway at that point. I note that Mr. Barrett, the assistant general superintendent of the railway involved, takes the position that it is the duty of the county officials to do the necessary grading upon the highway at the point where the road crosses the railroad. The provisions of our law other than that of Chap. 65 of the Session Laws of the Thirteenth Legislative Assembly which affect this question are found in Subdiv. 5 of Sec. 4275, Revised Codes of Montana, which is as follows:

"Every railroad corporation has power:

"To construct their road across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

I assume for the purpose of this discussion that the building of the railroad was prior in time to the laying out and construction of the highway, for upon no theory could it be held that the railroad by its franchise and easement can destroy the use of the roadway. Even in the absence of any statutory provision, such as that quoted above, railroads are under the necessity of putting roadways in as good condition for public use as such roads were previous to the advent of the railroad.

The maintenance and opening of highways for public use is merely an exercise of the police power inherent in the people of the state, and such right cannot be affected or abrogated by the granting of a franchise to a railroad company. The railroad company takes its franchise subject to this inherent power in the state, and it matters not whether the exercise of that power occurs previously or subsequently to the building of the railroad. It is in no sense a taking of private property for public use without compensation within the provisions of the constitutional prohibition.

"Regulations in regard to fencing railroad tracks and the construction of farm crossing for the use of joining land owners are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built as well as to those thereafter constructed."

Railroad v. Willenborg, 7 N. E. 698.

This language was quoted, approved and applied in the case of Chicago & Northwestern Railroad Company v. Chicago, 29 N. E. 1109, and held to apply to street crossings in construing a statute similar

to Sec. 4275, Revised Codes of Montana. Elliot in his work on railroads has this to say in regard to this subject:

"Where the duty is imposed by statute, the weight of authority is to the effect that it applies to crossing of highways laid out after the construction of the railway as well as those in existence at the time of its construction."

Elliott Railroads, 2nd Ed. Sec. 1102.

I am aware that there are some decisions which hold to a doctrine contrary to that expressed above but I am of the opinion that the views above expressed are founded upon the better reasoning, and that they should be followed.

You are, therefore, advised that it is the duty of a railway company to construct and maintain suitable crossing at all points where the line of their railroad crosses public highways, and that such construction and maintenance includes whatever grading, cutting and filling or bridging as may be necessary to provide a safe and convenient way for the passage of traffic over their railroad.

Very truly yours,

D. M. KELLY,
Attorney General.