

Opinion No. 248.

**Counties—Highways and Bridges—
Fences—County Commissioners.**

HELD: 1. Where the county owns the fee title to land upon which a highway is constructed, the county commissioners may regulate the fencing by abutting land owners of a non-navigable stream over which a bridge has been built.

2. But where the county or public has only an easement for highway purposes the abutting land owners normally would have the right to fence to the bridge or bridge approach even though it prevents watering of livestock travelling the highway.

February 10, 1936.

Mr. E. O. Overland
County Attorney
Big Timber, Montana

In your letter of January 3, you stated substantially that in your

county there are a number of county roads which cross various non-navigable streams. At the stream crossings the county has built bridges which are usually about 16 feet in width. The roads themselves are generally 60 feet in width. Many of the ranchers owning land abutting these bridges, have constructed fences which border the rights of way up to the bridges and at the point where these fences reach the streams or the approaches to the bridges, the ranchers have built their fences in toward the bridges and have fastened the fences to posts standing immediately next to the bridges. The ranchers contend that if they construct their fences across the streams in a straight line with the rights of way, high waters in the spring of the year will tear them out. On the other hand, stockmen who take cattle over the roads complain that the fences are so constructed that their livestock cannot get down to the streams to water.

You inquire whether the county board may designate the width of rights of way for roads at stream crossings and whether the board may allow or refuse land owners the privilege of building their fences adjoining the road up to the county bridges in such a way that livestock travelling the roads cannot get down to the streams for water.

It seems impossible to state a rule which will apply to all cases. In general, it would seem that cases would fall into one or two categories, namely: (a) Where the county or state owns the fee title to the land upon which the highway is constructed, and (b) where the county or public has only an easement for highway purposes. In the first class of cases, it would seem that the board of county commissioners would have power to regulate the matter to suit themselves, within the limits of the land so owned. In the second class of cases, which would be by far the more numerous class, our statute provides as follows: "By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this act

and the civil code provided." (Section 1616 R. C. M. 1921.)

The quoted statute seems to be in accordance with the rule at common law. The right of the public is a right of passage. 1 Elliott, Roads and Streets (4th Ed.) 563 (Sec. 500); Id. 571 (Sec. 508); Id. 552 (Sec. 489); Id. 1141 (Sec. 876n).

The owner of abutting land is not bound to fence his land, but if he does not a person herding cattle along the highway need use only ordinary care to prevent trespass by straying cattle (Elliott, supra, 571). At common law, the owner of the fee was entitled to herbage growing on the highway (Elliott, supra, 1146).

"Where nothing but the right to use the land is acquired, the owner of the fee retains a right to make such use of the land as is not inconsistent with the easement acquired by the corporation. Nothing can be done by him that will make the use of the way inconvenient or unsafe, nor can he do anything that will disturb the public in the free use of the way, but, subject to the superior right of the public, the owner is generally entitled to the use of the way and to all the profits that accrue from it." (Elliott, supra, 310 (Sec. 259.)

See also: Sections 1615 and 1644, R. C. M. 1921; Chapter 59, Laws of 1929; 29 Corpus Juris 545, 546; and Van Roy v. Watermolen, 125 Wis. 333, 104 N. W. 97.

We conclude that in the last mentioned class of cases the abutting land owner normally would have a right to construct his fences in the manner you describe in your letter, even though it prevents watering of livestock travelling the highway, provided it did not hinder or obstruct the free passage of traffic. It is conceivable that in a desert country it might become absolutely impossible to use a road if it were not possible to reach water, in which case our conclusion might be otherwise, but I take it such is not the situation in your county.