

as the property of adjacent owner?"

It may be stated at the outset that a county road once laid out is a public highway. (*French v. County of Lewis and Clark*, 87 Mont. 448, 288 Pac. 455).

Section 32-103, Revised Codes of Montana, 1947, defines public highways as follows:

"All highways, roads, lanes, streets, alleys, courts, places, and bridges laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways."

That a bridge has been recognized as "part and parcel" of a highway is acknowledged. (See *State ex rel. Foster v. Ritch*, 49 Mont. 155, 140 Pac. 731; *State ex rel. Donlan v. Board of Commissioners*, 49 Mont. 517, 143 Pac. 984; *State ex rel. Farnish v. Mullendore*, 53 Mont. 109, 161 Pac. 949). However, it does not follow that the abandonment of a public highway ipso facto constitutes an abandonment of a bridge thereon. As stated in *Elliott on Roads and Streets*, Vol. 1, page 4, Bridges:

"While it is true that a bridge is, in a general sense, a highway, and that the rules of the common law applicable to highways apply, generally, to bridges, still it is, nevertheless, true that a bridge cannot invariably be regarded as a highway nor the term "highways" always be held to include bridges. It is obvious that there are differences between the ways usually designated by terms "highways" and "bridges" which render it impossible to always bring them under one rule. This is true, although they have in common the chief characteristic of being ways of passage for the public. It cannot, in view of these differences, always be true that statutes respecting highways extend to and include bridges, whether they do or not must depend upon the general tenor of the particular statute and the purpose it was intended to accomplish. * * *"

It seems to me that a proper analysis of the problem submitted, of necessity, involves a consideration of the public's interest in the road and in the bridge on the road. Although a bridge is con-

Opinion No. 84

Bridges—County Bridge—Highways— Roads—Abandonment of High- way—Property.

Held: The abandonment of a highway does not, unless clearly indicated in the resolution of abandonment constitute an abandonment of a bridge crossing a river and connecting two sections of the abandoned highway.
The county bridge not having been abandoned is under the management and control of the county.

May 12, 1952.

Mr. Robert T. Pantzer
County Attorney
Park County
Livingston, Montana

Dear Mr. Pantzer:

You have requested my opinion as to the status of a steel bridge spanning the Shields River connecting two portions of an abandoned county road. You inform me that the bridge has been carried as property of Park County since the abandonment of the road. A part of your letter reads:

"The question specifically seems to be that if the road is formally abandoned according to law, and apparently it was in this case, if the lands which are part of the road become the property of an adjacent owner, then will the bridge also be treated

sidered as part of a highway, the two terms are not interchangeable and each in itself involves an interest not alike. Whereas, bridges may be said to be part of the road, yet in their character and construction, they are different than the road. Bridges are generally much more expensive to construct and maintain than are roads and highways, and are in themselves distinctive and expensive works on the highways. The fact that the statutes provide the board of county commissioners power and jurisdiction to lay out, maintain, control and manage bridges, and to set up separate budgets for bridges is indicative that bridges are not to be considered the same as highways in all respects. (See Sections 16-1004, 16-1902, 32-303, Revised Codes of Montana, 1947). The Montana Legislature recognized the distinctive character of bridges as separate and apart from highways. Section 84-426, Revised Codes of Montana, 1947, although limited to franchises owned by persons or corporations, refers to bridges for assessment purposes as personal property. Section 94-3201, Revised Codes of Montana, 1947, also recognizes the feasibility of setting out bridges as entities apart from highways. (See also sections 94-3303 and 94-3304, Revised Codes of Montana, 1947, to the same effect).

Section 32-107, Revised Codes of Montana, 1947, expressly states the interest acquired by the public in accepting land for a highway in these words:

"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 code provided."

What the public receives then is a qualified property right in the land used as a public highway. Upon abandonment this qualified property right in the land is extinguished and reverts to the owner in fee. (Schuenke v. Pine River, (Wisc.) 54 N.W. 1007).

Does a steel bridge connecting two sections of an abandoned highway become the property of the adjacent owner? There are no judicial interpretations in Montana on the question presented. An exhaustive search of the cases of other jurisdictions shows only Wisconsin to have passed upon the

question. There the bridge was held to pass with the abandonment of the roadway to the adjacent owners. In the Wisconsin case, however, the court looked to a specific statute which was mandatory, in effect compelling the court to disregard the ordinary legal principles governing the problem.

Inasmuch as this is a matter of first impression in this jurisdiction, it must be viewed from the general law on the subject.

Granted that a qualified property interest, the easement, was extinguished in the highway, it must be remembered that the public has more than a mere easement in the bridge. The County had and has a property interest in the bridge, interest which is superior to the mere easement acquired over the soil and the bridge acquired by the public. 8 Am. Jur. Bridges, Sec. 14, p. 920). Public bridges are maintained by the county at large under the management and control of the board of county commissioners and the expense of construction, maintaining and repairing of such bridges are provided for in the law. (Sjostrum v. State Highway Commission, 5 State Rep. 111, Mont., 228 Pac. (2d) 238.

By establishing a road on the land of the owner, the owners interest was diminished to the extent of the interest acquired by the public in the easement. It was not diminished by the placing of a bridge in and over the Shields River.

While it is true that the bridge may be presently attached to the approaches to the bridge itself and that the easement to these approaches has been abandoned by the public, it is also true that it is not the approaches in which the public presently has an interest but the bridge. In the bridge, the public has a definite and unqualified property interest.

It is, therefore, my opinion, based on the foregoing and the fact, that the resolution of abandonment did not in any way indicate an intent to abandon the bridge, that the bridge was not abandoned and is still under the management and control of the county.

Very truly yours,
ARNOLD H. OLSEN
Attorney General