

Opinion No. [30-64]

April 15, 1930

BY: J. A. MILLER, Assistant Attorney General

TO: Grace S. Massie, County Clerk, Rosewill, New Mexico.

PUBLIC HIGHWAYS -- Bridges at road crossings to be maintained by county. Sec. 151-161, Code 1929.

OPINION

I have before me yours of the 12th inst. in which you re-submit the question proposed by you on the 8th asking for an interpretation of section 151-161, 1929 Compilation, your question being whether after the installation of a culvert at a road crossing by the owner of any ditch and later said culvert would be replaced is this responsibility incumbent upon the owner or the board of county commissioners.

You say you agree with us that in the section mentioned the language is plain that the public highway shall be maintained by the board of county commissioners, but you say that does not include the culvert beneath the highway.

The section being a long one I shall not quote it in its entirety as you are familiar with it and also have it before you. However, the statute requires that "the owner or owners of any ditch, canal, or other structure for carrying or storing water, shall construct a substantial bridge where the crosses any public road with a passageway not less than fourteen feet wide; or reconstruct the road . . ." "The county commissioners may make reasonable requirements as to the size and character of such bridge along public highways, or . . ." "After the construction of such bridge . . . as part of a public highway the same shall be maintained by the county commissioners."

We note here the alternative where it is desired to cross a public highway with a ditch or canal for the carrying of water, the owner of the ditch may construct a bridge as a part of the highway or he may reconstruct the highway otherwise. The statute is not entirely clear as to who decides this question though I take it that the county commissioners determine the question ultimately since the county commissioners may make reasonable requirements as to the size and character of such bridge or for the necessary construction of roads, but after the construction of such bridge as a part of a public highway, the same (that is the bridge or public highway **of which the bridge is a part**) shall be maintained by the county commissioners.

The owner having by the construction of a bridge restored the highway to which he had done damage, it then becomes the duty of the county commissioners to maintain such restored highway. That is, to maintain the bridge as a part of the highway.

From Volume V. Words & Phrases, First Series, page 4277, we quote:

"MAINTAIN. Webster's International Dictionary defines 'maintain' to mean to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; to keep possession of; not to surrender; to continue; not to suffer to cease or fail; to bear the expense of. *Lucas v. St. Louis & S. Ry. Co.*, 73 S. W. 589, 591, 174 Mo. 270, 61 L. R. A. 452; *Breen v. City of Troy (N. Y.)* 41 How. Prac. 475, 479."

The word maintain at times means to rebuild or reconstruct. See Words and Phrases, Third Series, Volume IV, page 1031.

"Where, prior to Acts 1903, c. 227, sec. 1 (*Burns' Ann. St. 1914, sec. 5707*), requiring interurban railroads to fence their right of way and saving rights under existing contracts, a landowner had deeded to defendant's predecessor in title a right of way with a covenant that the grantee should erect a substantial fence which the grantor agreed to 'maintain,' plaintiff, a tenant of a subsequent owner, cannot recover from defendant for killing a cow escaping through the fence which had become so decayed that it could not be effectually repaired except by rebuilding it, the duty of maintaining the fence being on the landlord, and not on the defendant, the word 'maintain' as used in the deed meaning to rebuild or reconstruct. *Ponsler v. Union Traction Co. of Indiana*, 132 N. E. 708, 709, 76 Ind. App. 616."

"Laws 1878, c. 51, requiring a railroad to erect and maintain a viaduct or bridge over a county road, and the county to erect approaches thereto, applied so as to require the railroad to maintain the viaduct or bridge after it had been broken down by the negligence of a member of the public in running a steam shovel over it, as the word 'maintain' includes 'keeping up,' 'preserving,' and 'rebuilding' in case of destruction. *State v. Chicago, M. & St. P. Ry. Co.*, 159 N. W. 919, 921, 164 Wis. 304."

From a consideration of the statute and the court decisions hereinbefore quoted, we are of the opinion that when the owner of a ditch or canal crossing a highway has once constructed a substantial bridge meeting the requirements of the county commissioners as to its size and character, thereafter the maintenance of the same even to the extent of reconstructing or rebuilding, should such become necessary, devolves on the county commissioners.