HIGHWAYS AND BRIDGES: Private citizens are responsible for removing an obstruction from a public road which was created by digging a drainage ditch across the road when they had not formed a legal drainage district.

October 14, 1946

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10/29

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion from this department which reads as follows:

> "Our County Surveyor has requested us to write you for an opinion on the following facts, to-wit:
>
> "In the Arrow Rock Special Road District is an area of approximately 3000 acres, or less, that has a public road into it, which deadends into it--no other outlet.
>
> "In 1944, as a private enterprise, various land owners of this particular acreage, cut a drainage ditch along the bluff in such way as to cut the public road that serves this area of land. They didn't form any legal drainage district, but got their money, and heads together and with some aid from the Government, cut the ditch.
>
> "After the ditch was cut they came in and asked the County Highway Department to put a bridge across the ditch. We, the County Highway Department--maintain that it's the obligation of those parties who cut the ditch and cut the public road, to bridge it--no provision for a bridge was made by the land owners. We did loan them four (4) piling and enough lumber to span the creek with a temporary bridge. The temporary bridge washed out once and was replaced by the citizens, and a truck went through it on another occasion, broke the piling and it was also replaced by the

> citizens with piling off the river. The renters particularly, and to some extent, the land owners, want us to build a substantial bridge so they can haul heavy loads, crops, etc. this fall. We want to know, is it our obligation to build a bridge or can we make them build it?"

As we understand your letter, the citizens who cut the drainage ditch across the public road did not form a corporation or legal drainage district, but merely proceeded as private individuals. It is under this premise that this opinion is being written.

In digging a drainage ditch across the road, an obstruction was created which is in violation of Section 8581 R. S. Mo. 1939, which provides:

> "All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day

> after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

Even though criminal proceedings were not brought under this section, it would still be possible to force them to either build a bridge or fill in the ditch. In the case of Carson v. Baldwin et al., 144 S.W. (2d) 134, the Supreme Court said at l. c. 135:

> "The common law condemns as a public nuisance any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes its use by the travelling public.* * *"

Since an obstruction on a public road is a public nuisance, this raises the question of who may bring proceedings to abate this nuisance. Declaratory of the rule that the prosecuting attorney may proceed in behalf of the state to abate a public nuisance, we quote from State ex rel. Detienne v. City of Vandalia, 119 Mo. App. 406, l. c. 418:

> "* * The Attorney-General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the State, for its abatement. This is the rule independent of any statute touching the matter, as has been adjudged in many cases.* * *"

The Supreme Court has upheld the ruling in the above case in State ex rel. W. A. Thrash v. Fred Lamb, 237 Mo. 437, wherein they stated at l. c. 455:

> "Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond.* * *"

From the above quotations, it seems clear to us that the people referred to in your letter have created a public nuisance and the prosecuting attorney may bring proceedings to abate this nuisance.

CONCLUSION

Therefore, it is the opinion of this department that the people referred to in your letter, who were responsible for digging the drainage ditch across a public road, would have to remove the obstruction, either by building and maintaining a suitable bridge or by filling in the ditch.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:VLM