

LEGALITY OF COUNTY : 1. Bond not sufficient in amount.
HIGHWAY ENGINEER'S 2. Bond insufficient because qualifica-
BOND. tion of legality keeps it from containing
conditions required by statute.
3. Members of County Court who voted to
accept bond might be liable if damages ac-
crued as a result of its insufficiency.

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Honorable Edw. W. Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This will acknowledge your recent letter in which you request an opinion of this department. Your letter is as follows:

"A member of the County Court of Chariton County, Missouri, has requested that I obtain an opinion from your office concerning the following proposition:

"Section 8656, Missouri Revised Statutes, 1939, provides that the County Highway Engineer shall provide a bond conditioned on the performance and matters of things therein stated.

"There is included herewith a copy of the bond of the County Highway Engineer of this county, which bond was accepted by two of the three members of the County Court over the objection of the third member. The objection of the third member being that the bond is improper and insufficient, particularly because the amount is only \$1000.00, while the value of property that will be placed in the engineer's custody will amount to about \$8000.00, and also, because of the clause included in the bond which provides that the engineer or his bondmen shall not be liable for any loss suffered because of the theft of any of the county property in his custody by others than himself. The member of the County Court objecting to the bond feels that the bond, if not worthless in its present form, is insufficient and does not comply with the law. He further desires to know what the personal liability of the mem-

bers of the County Court would be in the event county property in the custody of the engineer was stolen, by their acceptance of this bond.

"Your opinion will be greatly appreciated on this matter."

You have submitted with your letter the bond approved by two judges of the county court, as to the sufficiency of which your inquiry pertains.

Section 8656, R. S. Mo. 1939, which is the section requiring the county highway engineer to furnish a bond, is as follows:

"Before entering upon the performance of his duties, the county highway engineer and his assistants shall each execute and deliver to the county court a bond in such sum as may be fixed by the court, with two or more sufficient securities, or the bond of a surety company authorized to do business in this state, to be approved by the court, conditioned for the faithful discharge of his duties as such highway engineer; and that he will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the county and road districts thereof."

We direct your attention to the fact that the above-quoted statute makes no requirement as to the amount of the bond required, and by failing to do so necessarily leaves the matter of the amount to be required entirely within the discretion of the county court.

We are of the opinion that, in view of the fact that the statute left the matter of the amount of the bond within the discretion of the court and of the further fact that a majority of the court approved a bond in the amount of \$1000.00, the bond cannot be held to be illegal on any theory as to the insufficiency of the amount specified therein.

The second question involved in your inquiry is whether or not the bond is insufficient under the statute, because of the following provision thereof: "Said engineer not to be re-

sponsible for loss of county property due to theft by others." With reference to this question we contend that we do not believe that this provision should be in the bond, for the reason that the county highway engineer would not be liable for losses sustained by reason of theft by others, unless said theft was contributed to by his own negligence, and that, therefore, he needs no protection from such non-existent liability, and for the further reason that any liability of the engineer growing out of theft by others, contributed to by his own negligence or carelessness, is within the intendment of the statute requiring the bond, and the bond should afford protection against any loss arising therefrom.

The third question involved in your inquiry is whether or not since the county court, by permitting the incorporation of the above-quoted provision in the bond which it has accepted, has failed to require such a bond as affords the full measure of protection required by the statute, the members of the court would be liable for loss sustained by the theft of county property involved by persons other than the engineer.

Our first comment, with reference to this last-mentioned question, is that there certainly can be no liability on the part of any judge of the county court who dissented from and voted against the acceptance of such a bond, because negligence on his part could not be established. Whether the judges, who voted for the acceptance of a bond which did not contain all of the conditions required by the statute for the protection of the county property, would be liable, personally, for loss sustained by the county as a result of the failure of the bond accepted to contain such conditions and provisions so required by the statute, depends upon the question as to whether the act of the county court in accepting such insufficient bond was a judicial or a ministerial act. If it was a judicial act, the judges would not be liable in any event; but if it was a ministerial act, we are of the opinion that the judges who voted for the acceptance of the insufficient bond would be liable in the event of loss to the county, resulting from the failure of the bond accepted by them to contain the conditions and provisions required by the statute.

It has been held by the Supreme Court of Missouri:

"* * * No action could be brought against a judge for any judgment rendered by him in his judicial character.* * *" (Stone et al Graves, 8 Mo. 148, l.c. 151.)

It was further held, however, in the same opinion as follows:

"This principle is not to be understood as extending to ministerial acts required to be performed by an officer whose functions may be sometimes judicial. Some of the duties of the justices are judicial and some ministerial, and when he acts ministerially, or is requested to do a ministerial act for error and misconduct, he is responsible in like manner and to the same extent as all other ministerial officers. The distinction is between judicial and ministerial acts."

We are of the opinion that the acceptance by the court of the bond, a copy of which is submitted for our examination, and which contains a provision against the liability of the engineer for damages resulting from the loss of property, by theft by others, amounts to the failure and neglect on the part of the court to perform the ministerial duty prescribed by the aforesaid section of the statutes of requiring a bond from the highway engineer " * * * conditioned * * that he will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the county and road districts thereof."

Article 6, Section 7 of the present Constitution of Missouri, provides as follows:

"In each county * * there shall be elected a county court of three members which shall manage all county business as prescribed by law * * *."

We are of the opinion that under the foregoing constitutional provision most of the duties growing out of the management of the county business, for the performance of which function the county court exists, are purely ministerial.

We believe that the requirement of such a bond by the court is a ministerial rather than a judicial duty, for the reason that the specification of the character of the bond required is so plain and unmistakable as not to require judicial interpretation. Therefore, if the court accepts a bond which does not fulfill the requirements of the statute, it has thereby failed to perform a ministerial duty imposed upon it by statute, and the members who voted for that course of action would

be civilly liable if damages should result from such failure.

CONCLUSION.

We are, therefore, of the opinion that,

1. In view of the fact that the statute empowers the county court to fix the amount of the bond, the \$1000.00 submitted cannot be said to be insufficient in amount.

2. In view of the fact that the statute requires a bond to be furnished by the highway engineer, conditioned for the delivery of all property in his custody to his successor in office at the expiration of his term, the presence of a provision in the bond exempting the engineer from responsibility for the loss of such property, as a result of theft by others, is such a limitation of the aforesaid condition required by the statute as to render the bond insufficient.

3. In view of the fact that the failure by the county court to require a sufficient bond is the failure to perform a ministerial duty, those members of the court who voted for the acceptance of such insufficient bond would be secondarily liable for any loss accruing to the county as a result of the insufficiency of the bond.

Respectfully submitted,

SAMUEL M. WATSON,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General.

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