

ROADS AND BRIDGES:
MANDAMUS NOT PROPER REMEDY
TO COMPEL RECONSTRUCTION OF
BRIDGES, WHEN:

Where bridges adjudged sufficient and become part of road system of the county under Sec. 242.350 RSMo 1949, are subsequently destroyed, authority having charge of bridges cannot be compelled by mandamus to reconstruct bridges, since such authority is allowed discretion under this section.

March 13, 1951

Honorable Charles J. Hoover
Prosecuting Attorney
Grundy County
Trenton, Missouri



Dear Sir:

Your recent request for a legal opinion of this department has been received, and reads as follows:

"I am being requested to institute a proceeding in our Circuit Court to compel the proper authorities to construct or reconstruct bridges on public highways that have been washed out by floods. Several public roads in the county are impassable because the bridges are out. Most of the bridges are over drainage ditches. This takes in Medicine Creek, No Creek, Honey Creek, Muddy Creek, and the two Grand Rivers in this county.

"Some of the drainage districts have been dissolved and some have not. Some of the bridges have been adjudged sufficient by the County Court and have been taken over by the County Court in accordance with Section 12354 R. S. 1939, as amended by the Laws of 1949, page 260. The particular provision of this statute provides that when the drainage district constructs a bridge adjudged sufficient by the County Court, thereafter the bridge becomes a part of the road over which it is constructed and the act provides that the same shall 'be maintained by the authority authorized by law to maintain the road over which it becomes a part.' Of

Honorable Charles J. Hoover

course, there are two drainage acts but our drainage districts are under circuit court organization and are governed by said Section 12354 instead of Section 12427, known as County Court organization.

"You are familiar with the fact that Grundy County has township organization.

"A great number of our bridges spanning drainage ditches have been taken over by the County Court because they were adjudged sufficient, etc. The bridges thereafter went out during flood times and the roads are now obstructed. I understand that a mandatory injunction is the proper remedy and that this proceeding is to be instituted by the prosecuting attorney. The question that I am concerned with is the obligation or the duty of the county to construct a bridge.

"To narrow my question, let it be assumed that we have a bridge where there is no longer a duty on the drainage district to construct, reconstruct or maintain the same. Then, what is the duty of a county having township organization to construct a bridge?

"I direct your attention to Section 8534 and 8538 R.S. 1939. Under the language of that section it would appear that the County Court is given a discretion in regard to what bridges shall be built and maintained at the expense of the county.

"It is my understanding that the County Court has discretion which will not be interfered with; that the discretion is with the County Court to determine whether a bridge is a matter of necessity or not. I appreciate such rulings but we have a number of roads obstructed at this time by reason of bridges being washed out and they have been muchly traveled roads. They are roads where a number of farm families live and it interferes with communications, with markets, schools, churches, etc. The necessity of the bridge is not questioned.

Honorable Charles J. Hoover

"It would appear to me where the grave necessity of a bridge is not disputed that the County Court may no longer refuse to construct a bridge. Of course, the next question would be available funds, but assuming that there is a grave public necessity for the construction of a bridge, could the County Court, in its discretion, refuse to raise the necessary taxes to defray the expense?

"To state my question in other words, can the County Court or the County be compelled by mandatory injunction or by mandamus proceeding to construct a bridge on a public county road where the necessity for the bridge is beyond question.

"I am assuming that you have had this question before and that I will not impose upon your good time due to the fact that an opinion from your office is in existence. Under county court organization there is a case of Camden Special Road District, et al. vs Willow Drainage District, et al., 199 S. W. 716, which provided that the commissioners may do certain acts, including the building of all necessary bridges and the court held that even though there was a discretion, nevertheless, the district may be compelled to perform an act which would restore the public use of the road.

"To make the question that I am interested in more pointed, can a county be compelled to build a bridge where there is grave public necessity for the existence of the bridge, first, on a county road, and second, on a township road."

From your letter it appears that a number of bridges over drainage ditches in Grundy County (under the provisions of Section 12354, Laws of 1949, page 260) have been adjudged sufficient by the county court, have become a part of the public roads over which they were constructed, and that the county has become liable for maintaining such bridges. It further appears that floods have washed away or destroyed many such bridges, and that since they are part of widely traveled road systems of the county, your chief inquiry now is whether or not the county court may be compelled by mandatory injunction or mandamus to reconstruct the bridges. This inquiry does not state whether you refer to proceedings to compel the county court to reconstruct all bridges

Honorable Charles J. Hoover

of the county road system which have been destroyed, or whether you refer only to those bridges which have been adjudged sufficient and have become a part of the county roads for which the county is obligated to maintain, under Section 12354, supra.

In a recent opinion of this department rendered to the Honorable J. Harry Latham, Prosecuting Attorney of Andrew County, it was held that bridges across drainage ditches in drainage districts organized by the circuit court, are maintained by the county where the bridges were adjudged sufficient by the county court, but those not adjudged sufficient were to be maintained by the drainage district in which they were located.

It is assumed that you refer only to those bridges adjudged sufficient, and the county's obligation to maintain same has already become fixed.

Section 12354 of the 1949 Laws of Missouri, page 260, supra, now Section 242.350, RSMo 1949, reads as follows:

"All bridges contemplated by this article and all enlargements of bridges already in existence shall be built and enlarged according to and in compliance with the plans, specifications and orders made or approved by the chief engineer of the district. If any such bridge shall belong to any corporation, or be needed over a public highway or right of way of any corporation, the secretary of said board of supervisors shall give such corporation notice by delivering to its agent or officer, in any county wherein said district is situate, the order of the board of supervisors of said district declaring the necessity for the construction or enlargement of said bridge. A failure to construct or enlarge such bridge within the time specified in such order shall be taken as a refusal to do said work by said corporation, and thereupon the said board of supervisors shall proceed to let the work of constructing or enlarging the same at the expense of the corporation for the cost thereof, which costs shall be collected by said board of supervisors from said corporation, by suit therefor, if necessary. But before said board of supervisors shall let such work, it shall give some agent or officer of said corporation, now authorized by the laws of this state to accept

Honorable Charles J. Hoover

service of summons for said corporation, at least twenty days' actual notice of the time and place of letting such work. Any owner of land within or without the district may, at his own expense, and in compliance with the terms and provisions of this article, construct a bridge across any drain, ditch, canal or excavation in or out of said district. All drainage districts shall have full authority to construct and maintain any ditch or lateral provided in its 'plan for reclamation,' across any of the public highways of this state, without proceedings for the condemnation of the same, or being liable for damages therefor. Within ten days after a dredge boat or any other excavating machine shall have completed a ditch across any public highway, a bridge adjudged sufficient by the county court of said county or counties shall be constructed over such drainage ditch where the same crosses such highway, and after such bridge has been constructed it shall become a part of the road over which it is constructed and shall be maintained by the authority authorized by law to maintain the road of which it becomes a part. When any drainage district has heretofore constructed or shall hereafter construct a bridge over a drainage ditch where the same crosses any public highway, said drainage district shall not be under obligation thereafter to further maintain or reconstruct any such bridge or bridges for more than twenty years after it first constructed or constructs such bridge at said place. If said bridge has been constructed by the drainage district and has become a part of said road and is then destroyed the authorities having control of the road are authorized, if they desire, to reconstruct such bridge, provided, however, the word corporation as used in this section shall not apply to the state or any political or civil subdivision thereof."

(Underscoring ours.)

While we fully appreciate the facts outlined in your letter as to the bridges being destroyed, the great inconveniences caused the traveling public thereby, and that there cannot be any question as to the necessity of such bridges, you seem to assume that from such facts it is the duty of the authorities having charge of the bridges to reconstruct same, and the implication is that the duty

Honorable Charles J. Hoover

of such authority is a ministerial one, and that it might be compelled either by mandatory injunction or mandamus to have said bridges repaired.

We cannot agree with your theory, since it seems that the duty of the authority having charge of the bridges is not merely a ministerial duty, but under the provisions of the above statute, particularly that part we have underscored, it appears that such authority has been given discretion as to what bridges, if any, it may reconstruct.

Where the authority is allowed to exercise its discretion in matters pending before it, and we feel that it is allowed discretion in the matter of constructing bridges, mandamus is not the proper remedy to compel it to construct bridges, this principle having been decided in the case of *State ex rel. Bartle v. Coleman*, 33 Mo. App. 470, at l. c. 474, the court said:

"The substantial question in the case arises upon the construction which must be placed on the following section of the statute concerning bridges: Section 4326: 'The County court shall, whenever it is necessary, without delay, make an appropriation to repair any public bridge in the county, and whenever any bridge shall be repaired, the like preliminary steps shall be had as in case of building a bridge; and the commissioners shall have the same powers, and proceed in like manner, as the commissioner for building a bridge.' The italics in the quotation are our own. The relators contend that the law leaves no discretion whatever in the county court. They maintain that the words whenever it is necessary are synonymous with the words whenever it is out of repair; that therefore the case is governed by the principle, that whenever an imperative duty is imposed on public officers by law, its performance may be enforced by mandamus, as has been frequently decided in this state. State ex rel. v. School Directors, 74 Mo. 22; State ex rel. v. Meyer, 80 Mo. 601; State ex rel. v. County Court of Gasconade, supra, and has been decided by us in the recent case of State ex rel. v. Baker, 32 Mo. App. 98. To this view we cannot accede, as it seems opposed to the context of other sections of the law on the same subject. The words, 'whenever it is necessary,' certainly leave the necessity to be determined by some one. Were it otherwise, we would be compelled to hold that the county court

Honorable Charles J. Hoover

can be forced to repair a bridge, when, owing to the physical facts of the case, such repair is wholly impracticable, as seems to be the case upon the facts developed at the hearing of the case at bar. We cannot hold that the legislature intended a result so totally opposed to the interests of the community, as long as the section admits with equal reason of another and more rational construction. The view we hold to be the correct one gains additional strength by two considerations. In the next succeeding section, referring to bridges to be kept in repair by contract, the words are, 'if any public bridge require repairing,' thus showing that the legislature used unequivocal terms in the proper case. On the other hand, the section under consideration requires that the like preliminary steps shall be had in cases of repairs as in cases of building bridges. One of such steps is a preliminary estimate or bid, upon the receipt of which the county court may or may not in its discretion make an appropriation under section 4317 of the law. This being so, it is not evident how a mandamus to repair could aid the relators, since the appropriation for such repairs is left to the discretion of the county court. We must therefore conclude that the words 'whenever it is necessary' invest the county court with a reasonable discretion to determine the necessity of the repair. Courts have gone to great length in controlling the discretion of municipal authorities, where they have exercised such discretion in a manner grossly oppressive. * * *

In view of the foregoing, it is our thought that when the authority having charge of the maintenance of the bridges, after being properly requested to reconstruct bridges over drainage ditches as noted above, that mandamus is not the proper remedy to compel the authority to reconstruct said bridges, since the provisions of Section 242.350, supra, leave the matter of reconstruction of such bridges within the discretion of such authority.

Since it appears that the question as to whether the county court might in its discretion refuse to raise the necessary taxes to defray the expense of reconstructing the bridges, presupposes that the authority having charge of said bridges as noted above, might be compelled by legal proceedings to reconstruct the bridges, we feel that this question is premature, and in the light of our

Honorable Charles J. Hoover

discussion above, that such question is not proper, or necessary to a determination of the chief inquiry of the opinion request. For these reasons, we believe it is unnecessary to discuss the question further.

CONCLUSION

It is therefore the opinion of this department that in a county where bridges over drainage ditches originally constructed by drainage districts of said county, have been adjudged sufficient by the county court, and have become a part of the road system of the county under the provisions of Section 242.350, RSMo 1949; and that subsequently thereto said bridges are destroyed by floods, that the authority having charge of the maintenance of same fails or refuses to have said bridges reconstructed, mandamus is not the proper remedy to compel the authority to have said bridges reconstructed, since the authority has some discretion under the provisions of Section 242.350, supra, as to whether or not it shall take such action.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

PNC:hr