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AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable M. E. Coons
County Attorney
Sherman County
Stratford, Texas

Dear Sir:

Opinion No. O-6566

Re: May a railroad company be compelled by mandatory injunction to install necessary drainage structure under its right of way to provide drainage for a state highway? And other related questions.

We are in receipt of your letter of recent date requesting the opinion of this department on the above stated matters. We appreciate your excellent discussion of the points involved in this inquiry. We quote from your letter as follows:

"About a year ago the State Highway Department requested the Commissioners' Court of Sherman County to secure by purchase or condemnation, for the purpose of widening and improving U. S. Highway No. 54 from Stevens to Texhoma in Sherman County, an additional 106 feet of right-of-way adjoining to the southeast the present highway, under the provisions of Art. 6674n, Vernon's Ann. Civ. St. The right-of-way requested has been duly secured and paid for.

"However, when the pavement is laid it is necessary that it be drained; and the engineers of the State Highway Department have determined

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that at a point near the northeast terminus of the highway (in Texas) the most practical drainage for a portion of the highway would be through the right-of-way of the Chicago, Rock Island and Gulf railway, which adjoins and parallels the highway on the north. An alternative would be to construct a drainage channel along the sides of the new highway some distance to the northeast across the Texas-Oklahoma boundary line into Oklahoma and in the town of Texhoma, Oklahoma.

"The alternative channel would probably flood the town of Texhoma, Oklahoma, and be disastrous to businesses therein situated.

"The Railway Company has been requested by the State Highway Department to install the necessary drainage structures through its right-of-way and under its track at the point indicated, which would be a natural drainage channel were it not for the railroad embankment; but the Railway Company has refused to do so.

"The railroad was constructed about the year 1901, and there has never been a culvert under the track at the point indicated. And, as stated, were it not for the railroad embankment, the water would naturally drain along the ground at the point where the drainage structure was requested.

"It is the opinion of the writer that, as the Railway Company did not install culverts at this place when the railroad was constructed, as required by Art. 6328, Revised Statutes, they may be compelled to do so now by mandatory injunction or mandamus; but am undecided as to the proper party to institute such a proceeding. It is probable that the Commissioners' Court, under the provisions of Art. 6674n, would have the authority to do so; and it is also probable that the State, through the Attorney General might do so.

"It is also the opinion of the writer that a drainage channel may be condemned by the Commissioners' Court under the provisions of Art. 6674n, V. A. C. S., subject to the use by the railroad. In the latter

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event, proper compensation would have to be made to the railroad for any resultant damage, which might include the cost of the culvert and other drainage structures. The fact that the drainage channel to be condemned is already occupied for a public purpose (for a railroad) would make no difference because the prior public use would not be interrupted nor destroyed. See 20 C. J. 609, Sec. 91, and the authorities there cited.

"The questions upon which your opinion is asked are as follows:

"1. May the Chicago, Rock Island and Gulf Railway Company be compelled by mandatory injunction or mandamus to install the necessary drainage structures on their right-of-way and under their tracks to drain the highway at the point requested?

"2. If the answer to the above question is in the affirmative, who is the proper party to institute the proceedings?

"3. Is the Commissioners' Court of Sherman County authorized to condemn, in a proper proceeding under Art. 6674a, V. A. C. S., a drainage channel through the railroad right-of-way, and under the tracks?"

Article 6328, Vernon's Annotated Civil Statutes, provides:

"In no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires, for the necessary draining thereof."

Generally speaking, a railroad company may be held liable in damages by reason of the fact that the road has been so constructed as to interfere with the drainage or flow of water. 35 Tex. Jur. pp. 184-185. In the case of Pence v. Galveston & S. A. Ry. Co., (Civ. App.) 190 S. W. 538, the court said:

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" . . . It has long been the law that, if a railway company fails to construct the proper culverts or sluices, necessary to pass off the surface waters falling on higher grounds, in the direction the water would have flowed but for said embankment or obstruction, it is responsible for the damage incurred by such failure. . . ."
(underscoring ours)

In the case of *Timpson & N. Ry. Co. v. Smith*, (Civ. App.) 165 S. W. 86, the court held that when the cause of action and the judgment rendered were based upon facts showing, that in the construction of its roadbed, a railroad company had interfered with and diverted the natural flow of water across land, and that, as a result, the land was flooded, washed and damaged by each recurring overflow, an order of the court issuing a mandatory injunction, requiring the railroad company to construct its roadbed and openings and sluiceways in such manner as the natural lay of the land required, was in accordance with statutory requirements.

In the case of *Gulf C. & S. F. R. Co. v. Harbison* (Civ. App.) 88 S. W. 452, 454, affirmed, 99 Tex. 536, 90 S. W. 1097, the court said:

"The statute imposes upon a railway company the duty of first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof, before it has the right to construct its roadbed, or rather, complete the construction of its roadbed. This being true, if it fails to construct sufficient culverts and sluices for the necessary drainage of the land over which its roadbed is being constructed as the natural lay of the land requires, and damage to the property of others results from such failure, an injunction will lie to compel such railroad company to construct the necessary culverts or sluices, and in the event the railroad company has constructed a dam across the channel of a stream over which its road passes, and such dam creates a nuisance by diverting the water from its natural channel and causing it to overflow and injure the lands of adjacent proprietors, an injunction will lie in favor of such proprietors against the railway company to compel the removal of such dam."

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In view of the foregoing authorities, it is our opinion that in case of damage to the highway or other property, by reason of the railroad company's failure to construct and maintain proper culverts and sluiceways in conformity to the requirements of the natural lay of the land, the railroad company would be liable for such damages. With reference to compelling a railroad company by injunction to construct the necessary culverts or sluices in accordance with the requirements of the natural lay of the land, we note that in each of the above cited cases, a cause of action existed for damages, and in the same case, the court granted a mandatory injunction to compel the railroad company to construct the proper drainage structures; consequently, the damage to the owner of the property involved had already actually accrued prior to the court's granting of the injunction.

In view of the circumstances stated by you, and prior to the time of the actual accrual of damages to the highway, by reason of the railroad company's failure with respect to constructing proper drainage structures, and in view of the existence of a legal remedy (condemnation), whereby proper drainage for the state highway may be obtained, it is our opinion that a mandatory injunction would not lie to compel the railroad company to construct the desired drainage structures.

It is our further opinion that an easement could be condemned for the purpose of constructing a drainage through the railroad right-of-way. The fact that the property to be condemned is already occupied for a public purpose would not prevent the condemnation for a drainage channel under the railway for the necessary purpose of properly draining a state highway. In the case of Missouri K. T. Ry. Co. vs. Rockwall Co. Levee Imp. Dist. No. 3, 297 S. W. 206 (Tex. Sup. Ct.) the court held that property owned by or devoted to the use of a railroad is subject to appropriation for another public use when the condemnation is reasonably necessary to the purpose of the public use and not inconsistent with the use of the right-of-way for railroad purposes nor detrimental to the public. Particularly is this true where the right of eminent domain is exercised by the sovereign itself and will not materially impair or interfere with the use of the right-of-way for railroad purposes. (29 C. J. S., Sections 75-80, pp. 865-875)

Art. 6674n, V. A. C. S., in part provides:

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"Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or other material, necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. Provided that the County in which the State Highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners' Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width or stream bed diversion in connection with the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction, or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners' Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners' Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925. . . ."

It is our opinion that the Commissioners' Court of Sherman County, at the request of the State Highway Commission, would be authorized to secure by purchase or condemnation an easement for the purpose of constructing the necessary

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drainage for the state highway under the railroad right-of-way in a proper proceeding under the provisions of Article 6674n.

We trust that the foregoing fully answers your inquiries.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By

J. A. Ellis
J. A. Ellis
Assistant

APPROVED MAY 23 1945

A. E. Coons

ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY *h73*
CHAIRMAN