

I am therefore of the opinion that county commissioners may legally purchase handcuffs and pistols for the use of the sheriff and his deputies from county funds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

102.

DISAPPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND McCURRAN BROTHERS OF XENIA, OHIO—TO CONSTRUCT SEWER C. N. & I. DEPARTMENT, WILBERFORCE UNIVERSITY, WILBERFORCE, OHIO—\$40,875.00.

COLUMBUS, OHIO, February 24, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, and McCurran Bros. of Xenia, Ohio. This contract covers the construction and completion of combined general contract for sewage disposal, C. N. & I. Department, Wilberforce University, Wilberforce, Ohio, and calls for an expenditure of \$40,875.00.

Said contract is returned herewith disapproved for the reason that the copy of the resolution passed by the Board of Trustees of the C. N. & I. Department on December 2nd, 1926, as shown by a letter dated December 3, 1926, does not show that a quorum of the Board of Trustees participated in the meeting at which said resolution was passed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

103.

DIRECTOR OF HIGHWAYS—HAS AUTHORITY TO LAY SEWER PIPES ACROSS RAILROAD PROPERTY OCCUPYING PUBLIC HIGHWAY BY VIRTUE OF EASEMENT—CONTRACT TO PAY COMPANY RENT WOULD BE WITHOUT CONSIDERATION TO THE STATE OF OHIO.

SYLLABUS:

The Director of Highways and Public Works has lawful authority to lay sewer pipes across and under the tracks of a railroad company occupying the public highway by virtue of an easement and a contract entered into to pay said company an annual rental fee for such use would be without consideration to the State of Ohio.

COLUMBUS, OHIO, February 25, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of recent date, to which is attached an agreement granting to the Department of Highways and Public

Works a license to lay and maintain one and one-tenth inch transmission pipes under and across the tracks of a railroad located in High Street, New Philadelphia, Ohio. The contract further provides that the department shall not only pay a twenty dollar license fee for the privilege of placing said pipes across and under said crossing, but likewise provides for the payment of a rental of twenty dollars a year for the privilege of maintaining said transmission pipes under said tracks during each year they so occupy said crossing.

Your letter transmitting the contract described reads as follows :

"We have recently completed a garage at New Philadelphia and in order to connect with the city sewer we must cross under the B. & O. railroad. This crossing is to be made on our own right of way and outside of the city limits. The pipe is to be laid along I. C. H. No. 408. The railroad wants us to pay them \$20.00 for a license fee and \$20.00 a year rental for the privilege of crossing under their tracks.

This department does not feel that we should pay a rental to the railroad since the highway was established before the railroad was built and they only have an easement to cross our right of way.

I would appreciate very much your advice in this matter. You will find enclosed a location map and agreement submitted by the railroad company to be signed by this department. Will you please return same with your reply?"

Inquiry was addressed to your department as to the manner in which the department proposes to lay the pipes across and under the railroad tracks. Information was received that the pipes were to be pushed under this crossing and that this would not materially disturb the use of said crossing during the operation of the placing of the pipes under the tracks or thereafter.

You request my opinion as to whether or not the department may lawfully enter into an agreement to pay the railroad company an annual rental for the occupancy of said crossing with sewer pipes laid across and under said tracks after the same have been laid, the railroad company owning an easement for right of way purposes across said highway.

Since the constructing, improving, maintaining and repairing the state system of highways is an exercise of the sovereign power of the state, and since the pipes to be laid across and under the tracks of the company are for the purpose of obtaining gas and providing sanitary and sewage facilities for a state garage that has been constructed to house equipment and tools, which are to be used in the constructing, improving, maintaining and repairing the highways of the state system, the right to lay the pipes in question is a power possessed by the state. All persons who have heretofore acquired the right to use the public highways by the grant of an easement from the state take such right subject to the paramount right of the public, for the general weal cannot be sacrificed for private or quasi public benefit.

The use of the railroad company's easement in this instance will not be impaired or destroyed, nor will any added burden be incurred by said railroad company because of the placing of the sewer pipes across and under its tracks.

It was held in the case of the Louisville & Nashville Railway vs. Jacob Baum, found in 15 C. C. (N. S.) 383, that :

"The construction on land bordering a railroad viaduct of a building which is necessary to the use and enjoyment of the land and which will not unreasonably interfere with the operation of the viaduct, will not be enjoined

notwithstanding it will cause some inconvenience to the railway company."

This case was affirmed without opinion in 78 O. S., 427.

The highway over which this railroad crossing passes was in existence previous to the construction of said crossing by said railroad company. The railroad company occupies said highway with its tracks by virtue of the easement and its right to so occupy said highway is subservient to the right of the Department of Highways and Public Works to carry to a conclusion all matters which may directly or indirectly aid in the constructing, improving, maintaining and repairing all highways composing a part of the system of inter-county highways and main market roads.

The Director of Highways and Public Works, having the right to construct said sewer pipes across and under the tracks of the railroad company in such a manner as not to interfere with the use of said crossing by the railroad company, is not compelled to obtain a license from the company in order to lay said pipes across and under its tracks.

I am, therefore, of the opinion that the Director of Highways and Public Works may not lawfully enter into the contract in question, which provides for the payment of an annual rental to the railroad company for the privilege of occupying said crossing with sewer pipes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

104.

COUNTIES MAY EXPEND FUNDS APPORTIONED UNDER SECTION 5537
TO PURCHASE ROAD DRAGS.

SYLLABUS:

Counties may expend funds apportioned to them under Section 5537 of the General Code, to purchase road drags, which are to be used exclusively in maintaining and repairing roads, which are a part of the county road system.

COLUMBUS, OHIO, February 25, 1927.

HON. W. W. BADGER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Receipt is acknowledged of your request for my opinion as to whether the county may expend gasoline tax money to purchase road drags to be used exclusively on gravel roads that are a part of the county road system.

The pertinent part of Section 5537 of the General Code as it applies in answering your question, reads:

"Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the Auditor of State in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties."

Your question is whether a board of county commissioners may purchase road drags to be used exclusively on gravel roads which are a part of the county road sys-