become a part of such buildings, additions or contemplated remodelings should not, in my opinion, be paid for out of appropriations made under the G-2 classification.

However, upon investigation I am advised that upon application of the Department of Public Welfare the Controlling Board, in releasing the funds required to construct the cell block under consideration, granted authority to construct the same by force account, using prison labor. Authority for such action is found in Section 6 of House Bill No. 502 of the 87th General Assembly, which in so far as pertinent, provides:

> "Whenever in the judgment of a department, board, commission or institution affected it seems desirable and in the interests of economy to construct or repair any building or make any other improvement herein provided by force account, plans, specifications, bill of material and estimate of cost shall first be presented to the Controlling Board and then filed with the Auditor of State; if the Controlling Board consents to such method and certifies such consent in writing to the Auditor of State and the Director of Finance in duplicate, Sections 2314 to 2330 inclusive, of the General Code shall be deemed not to apply to that part of such work to be done by force account. It shall be the duty of the Auditor of State or the Director of Finance to see that these provisions are complied with."

Under these circumstances, it would seem obvious that the Department of Public Welfare having authority to proceed with the work by force account has, as an incident to such authority, the right and power to purchase such tools and machinery as are necessary to carry the power granted into effect. It follows that if the Department of Public Welfare, in the exercise of a reasonable discretion, determines that a motor truck is necessary for use in the construction of the cell block and that it would be cheaper to purchase such truck than to hire the work done, such discretion will not be disturbed in the absence of a clear abuse thereof or fraud, and the purchase price of such motor truck may be charged to and paid out of the appropriation for the construction of the new cell block above referred to.

In view of the foregoing and answering your question specifically, it is my opinion that where an appropriation is made to the Department of Public Welfare under the classification G-2, Buildings, for the construction of a new cell block at the Ohio Penitentiary, and permission is given by the Controlling Board to erect said cell block by force account, using prison labor, the Department of Public Welfare may purchase a motor truck for use in building such structure and the purchase price of the same may be charged to and paid out of such appropriation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2468.

HIGHWAY—EXTENSION OVER CROSSING AT GRADE—HOW RIGHT OF WAY IS ACQUIRED—ASSUMPTION OF COST.

SYLLABUS:

1. *Where a new highway is to be extended across the tracks of an existing railroad at grade, the municipality must obtain court authority therefor under Sections*

8898 et seq. of the General Code, and thereafter acquire the right of way for such street over said railroad tracks either by condemnation or purchase.

2. In such case, the municipality must assume the obligation of paying the entire cost of the improvement, including the cost of the right of way over the railroad's property.

COLUMBUS, OHIO, August 21, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent communication as follows:

"Section 8897, G. C., provides that the cost of building a highway across a railroad shall be paid 35% by the municipality and 65% by the railroad.

Sections 8898, G. C., et seq., provide that such crossing may be at grade when so ordered by the Common Pleas Court.

Sections 3677, G. C., et seq., provide for the appropriation of the right of way across railroad tracks and for the payment of compensation, etc.

In the case of *Railroad* vs. *Martins Ferry*, 92 O. S. 161, it was decided that the enactment of Sections 8897 et seq. of the General Code, did not repeal Section 3677, or in any wise modify its requirements. The question of compensation was not raised or decided.

Question 1. In view of the provisions of Section 8897 et seq., of the General Code, may a municipal corporation by agreement with a railroad company and without appropriation proceedings pay the entire cost of extending a street across railroad tracks and property?

Question 2. May a municipal corporation pay a railroad company an agreed amount for the right of way across tracks and railroad property in connection with a street extension without appropriation proceedings?"

The answer to your inquiry depends on whether or not the portion of cost given in Section 8897 of the General Code is applicable at all to the construction of a crossing at grade. Section 8897 is as follows:

"Every municipality or other authority hereafter building a highway across an existing railroad, shall construct it above or below the grade thereof, unless in the manner hereinafter provided allowed to build at grade. The cost of such work shall be paid, thirty-five per cent by such municipality or other authority, and sixty-five per cent by the company owning the railroad. The word 'railroad' shall include interurban railroads and the words 'railroad company' shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. The method or procedure for the construction of such highway and the manner of construction thereof shall be governed by the statutes regulating the abolition of grade crossings."

You will observe that this section specifies that all crossings by new highways over an existing railroad shall be hereafter constructed above or below the grade thereof, unless in the manner hereinafter provided. The section then states that the cost shall be divided thirty-five per cent and sixty-five per cent, which is in accordance with the percentages applicable in the case of the elimination of existing grade crossings.

Section 8898, General Code, which deals specifically with crossings at grade, is as follows:

> "When it is desired by a railroad company constructing a new railroad, or in changing or in altering the location of one heretofore constructed, or by any municipality or authority constructing a new highway that the railroad or highway should be so constructed that the railroad and highway will cross each other at the same grade or if it is desired to divert, change or alter an existing public highway, a petition shall be presented by the party desiring such construction or diversion, to the Common Pleas Court of the county within which the crossing or diversion is situated, and if it is a highway asking for the right to cross a railroad, the railroad company shall be the defendant. If it is a railroad company asking for the right to cross a highway, or divert, change or alter any existing public highway, in a municipality, such municipality shall be the defendant. If outside the municipality, the trustees of the township and the board of county commissioners of the county shall be the defendants. Summons shall be served and the rule days and the rights of the defendants to plead shall be the same as in civil actions in such court."

The next section specifies what the petition filed in the Common Pleas Court shall contain and grants authority to the court to make an order permitting the crossing at grade, and also describing what safeguards shall be provided by the railroad company.

Section 8900, General Code, is as follows:

> "All costs and expenses of the proceedings shall be ascertained and allowed by the Court of Common Pleas and be paid by such party as it decides; or by it apportioned between the parties, and may be collected by execution out of such court."

This section has obvious reference to the cost of the court proceedings, and does not in any way affect any possible division of the cost of the improvement itself.

As you suggest, however, the Supreme Court of Ohio in the case of *Railroad Company* vs. *Martins Ferry*, 92 O. S. page 157, held that the order of the court under these sections does not in any way modify or repeal Section 3677 of the Code, which, so far as is pertinent, is as follows:

> "Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.
>
> 1. For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the corporation may appropriate the right of way across railway tracks and land held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement, and for obtaining material for the improvement of streets and other public places; * * * "

At the same time it was therein held that these two proceedings might be combined, and the practicability of the crossing determined, and also the necessity, in one

proceeding. Apparently, with respect to rights of way across railroad tracks the foregoing section of the Code makes necessary a judicial finding as to whether or not the appropriation will unnecessarily interfere with the reasonable use of the railway property, and in this respect the provision is different from that applicable to ordinary proceedings by municipalities where the determination of council as to the necessity is not ordinarily subject to judicial review.

It, of course, follows from the fact that the municipality is required to appropriate property that it must pay the reasonable value of the property rights taken. It also follows that where the right to appropriate is given for a specific purpose, it necessarily follows that the city also has a right to acquire by purchase, lease, etc., as authorized by Section 3615 of the Code. Accordingly, if the municipality and the railroad company can reach a mutually satisfactory price for the property involved, I see no reason to prevent the municipality from carrying out such an agreement.

In your first inquiry you raise the question as to whether the municipality may validly agree with the railroad company to pay the entire cost of extending the street across the railroad tracks and property, and I am assuming from your statement that the agreement does not call for any separate payment to the railroad company for the right of way across its tracks. This necessarily brings us to a consideration of whether or not the percentage division of the cost mentioned in Section 8897, General Code, has any application where the crossing is at grade. As I have before observed, the section is discussing primarily the avoidance of a crossing at grade, and I am of the opinion that the percentages are only applicable in the case of a new structure at other than grade. While the section is not clear, I believe that this is the proper interpretation of the language used. This is especially true in view of the language of the succeeding sections dealing with grade crossing which do not in any way attempt to deal with the subject of a division of the costs of the proposed improvement, and I believe it manifest that whichever party is the one attempting to cross the property of the other they must assume the obligation of paying the entire cost of the improvement, including the cost of the right of way over the other's property. This is, of course, subject to the exception that the court may order the railroad to make proper provision for safeguarding the public using the highway.

From what has been said, it follows that your second inquiry must also be answered in the affirmative. A municipality being required to condemn the right of way for a new street over the tracks of a railroad company may, instead of proceeding by condemnation proceedings, purchase the right for an agreed amount under its general powers to purchase property for municipal purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2469.

COURT—WORDS "DULY CONSTITUTED MUNICIPAL COURT" DOES NOT INCLUDE MAYOR'S COURTS OF CITIES AND VILLAGES.

SYLLABUS:

1. *In the interpretation of the terms of Section* 6212-19 *of the General Code, as amended by the* 87*th General Assembly,* (112 *O. L.* 260), *the words "duly constituted municipal court" should not be construed as including mayor's courts of cities and villages.*