

Fork of Yellow as follows: N. $23\frac{1}{2}^{\circ}$ E. $44\frac{1}{2}$ feet; N. 28° E. 43 feet; N. 67° E. $115\frac{1}{2}$ feet; N. $101\frac{1}{4}^{\circ}$ E. $82\frac{1}{2}$ feet; N. 47° E. 33 feet; N. 72° E. 312 feet; N. 48° E. 142 feet; N. $47\frac{3}{4}^{\circ}$ E. 89 feet; N. 60° E. 57 feet; N. $65\frac{1}{2}^{\circ}$ E. $77\frac{1}{2}$ feet; N. 78° E. 183 feet; S. 69° E. 33 feet; N. $46\frac{1}{2}^{\circ}$ E. $49\frac{1}{2}$ feet; N. $73\frac{1}{4}^{\circ}$ E. 70 feet; thence S. 18° W. 766 feet; thence N. $82^{\circ} 30'$ W. 273 feet; thence S. 31° W. 959 feet, to Umensetter's line; thence N. 919 feet to the beginning, containing 22.3 acres, more or less."

Upon examination of the submitted abstract, I am of the opinion that the same shows a good and merchantable title to said 22.3 acres in William H. Ramsey and Carrie L. Ramsey, subject to the following:

1. An easement given by A. L. Hendricks to The Bergholz Telephone Company on November 11, 1922, by which the grantor gave the grantee the right to erect poles, stretch wires and maintain its lines along the streets, roads or highways adjoining his land, in Salem Township, with the right to reenter the premises at any time and to rebuild said lines on said premises or repair the same, together with the right to trim any trees on the highways abutting the lands of the grantor, or upon the lands, necessary to keep the wires clear eighteen inches, and the right to set the necessary guy or brace poles, and attach to trees the necessary guy wires.

2. A mortgage by William H. and Carrie L. Ramsey to The National Exchange Bank & Trust Company, to secure the payment of a note of the grantors for \$4,000.00, dated December 15, 1925, and recorded in M. R. 105, page 169, Jefferson County, Ohio. The note carries interest at the rate of six per cent per annum, payable quarterly, and the note matured one year after date.

3. Taxes in the sum of \$67.57 are noted as due by the abstractor, but it is not stated for what period and when payable. It is assumed that these are the taxes payable in June, 1927. In addition, the 1927 taxes, payable in December, 1927, and June, 1928, are likewise a lien.

4. A road assessment of \$37.92, payable in thirteen instalments, is a lien. The first instalment is to be made in 1927. Apparently the amount stated to be due is only the 1927 instalment, and the entire assessment is probably much greater than the amount stated by the abstractor. The amount of the total assessment and each annual instalment should be ascertained.

The abstract shows that no examination has been made in the United States Court and that an examination of the judgment indexes in the Clerk's and Sheriff's offices for judgment liens only goes back as far as 1910.

The form of deed submitted has not been executed, witnessed and acknowledged. However, the form is correct and when properly executed, witnessed and acknowledged will transfer a good title to the land under consideration.

The abstract of title and form of deed are herewith returned to you.

Respectfully,

EDWARD C. TURNER,
Attorney General.

739.

GRADE CROSSING—WHERE HIGHWAY WAS CONSTRUCTED AFTER
RAILROAD—EDWARDS-NORTON HIGHWAY BILL DISCUSSED.

SYLLABUS:

1. *Where there exists a separated crossing which was not constructed under and in accordance with the provisions of Sections 8863, et seq., or Sections 6956-22, et seq., General*

Code, and such crossing is located on a road or highway which was laid out and opened after the construction of the railroad and is in need of reconstruction in order to provide for the safety and convenience of the traveling public, the Director of Highways and Public Works may, after the first Monday in January, 1928, cause a railroad company whose tracks are so separated from such highway by such crossing to contribute towards the reconstruction of said crossing.

2. *Under the provisions of Section 77 of House Bill No. 67, as amended in House Bill No. 511, when it becomes necessary to repair or maintain an existing separated crossing at the intersection of a railroad and a road or highway on the state highway system, or an extension thereof, which crossing was not constructed under the provisions of Sections 8863, et seq., and 6956-22, et seq., General Code, for the reason that the same is unsafe and inadequate for public travel, and such repair and maintenance does not involve a relocation of such existing separated crossing, it is the duty of the railroad company to make the repairs necessary to properly maintain such structure and that duty may be enforced by proper court action.*

COLUMBUS, OHIO, July 14, 1927.

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

DEAR SIR:—Receipt is acknowledged of your letter of recent date, which reads as follows:

“Suit was brought by your predecessor in office to compel the Pennsylvania Railroad to rebuild the above mentioned bridge early in 1926. Decisions adverse to the state were rendered both in the Court of Common Pleas and the Court of Appeals, and on December 29, 1926, Mr. J. R. Burkey, of this department, was advised by letter from Mr. J. C. Williamson, Special Counsel of the Attorney General, that on December 23, 1926, a motion was submitted to the Supreme Court to certify the record in this case to that court. Since that time, we have no further official record on this subject.

We are in receipt of numerous requests that this bridge be reconstructed at once. Considering the fact that the structure has been closed to travel for the past 18 months, we feel that something must be done as soon as possible to relieve the present situation.

Under the provisions of the recently enacted House Bill 511 amending certain sections of the Norton Highway Bill, the state can proceed on a co-operative basis with a railroad company to reconstruct an existing grade separation wherein the highway was laid out subsequent to the construction of the railroad. We had planned, as soon as we are notified that the case is out of court, to rebuild this structure this year out of present highway funds. If, however, we can proceed after January 1st under House Bill No. 511 with the assurance that the railroad can be made to participate, I believe the local community would be willing to wait until that time if public money could be saved by so doing.

Will you kindly advise me whether or not, if we should proceed under House Bill 511 next year, we would be in a position to compel the railroad to participate in this reconstruction?”

The law suit to which you refer was brought by my predecessor to compel the railroad company to reconstruct a bridge carrying the public highway over the tracks of said company. The overhead crossing was located in the village of Caldwell, Noble county, Ohio, and the action to compel the railroad company to reconstruct the said

bridge so that the same would be adequate and sufficient for the travel on the highway going over the bridge was based upon the provisions of Section 8843, General Code.

The Common Pleas Court of Noble county as well as the Court of Appeals of that county refused to grant the relief sought by the state on the ground that Section 8843 General Code, did not apply to those instances wherein the highway was already separated from the tracks of the railroad company by means of an overhead bridge and that said section only applied to crossings at grade. A motion to certify the record to the Supreme Court of Ohio was filed in that Court, which was denied.

An examination of House Bill No. 511 entitled:

“AN ACT

To amend Sections 2, 38 and 77 of Amended Substitute House Bill No. 67 passed by the Eighty-seventh General Assembly on the 21st day of April, 1927, and also to amend Sections 6956 and 8843 of the General Code of Ohio, relating to highway construction and improvement.”

will clearly reveal that the legislature intended by such amendment to provide a remedy to cover a situation similar to that which caused the suit to which you have made reference.

Neither House Bill No. 67, commonly known as the Edwards-Norton Bill nor House Bill No. 511, amending sections 2, 38 and 77 of House Bill No. 67, go into effect and become the law of the state until the first Monday in January, 1928.

Being somewhat familiar with the work of the committee of both the House and the Senate in preparing these sections, I may state that one of the underlying reasons for the enactment of the amendment to Section 77 of House Bill No. 67 was to provide means to make adequate and sufficient those separated crossings that had not been constructed under the provisions of Sections 8863, et seq., and Sections 6956-22, et seq., of the General Code.

Section 77 of House Bill No. 67 as amended by House Bill No. 511 passed by the 87th General Assembly to become effective on the first Monday in January, 1928, reads as follows:

“When a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39 both inclusive, of the General Code, is situated on a road or highway on the state highway system, or an extension thereof, and is so located that in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway, or extension thereof, the director deems it necessary to relocate and reconstruct the same in whole or in part without the right of way of such road or highway, or extension thereof; or when in the opinion of the director a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of sections 6956-22 to 6956-39, both inclusive, of the General Code, and which separated crossing is located on a road or highway, or an extension thereof on the state system, which road or highway was laid out and opened after the construction of the railroad, is in need of widening, reconstruction or realignment in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway, or extension thereof, the director is authorized to relocate and reconstruct or widen, reconstruct or realign the same.

In order to accomplish the things hereinabove in this section provided for, the director is authorized to take such action and initiate and prosecute such proceedings as hereinbefore in this act provided to secure the elimination of existing grade crossings; and the cost and expense of such relocation and reconstruction, or such widening, reconstruction, or realignment shall be borne by the state or by the state and any other political subdivision in which the crossing is located, and by the railroad company or companies in the proportions set out in this act in relation to the elimination of existing grade crossings, unless otherwise agreed upon.

Every person or company owning, controlling, managing or operating a railroad in this state shall maintain and keep in good repair good, safe, adequate and sufficient crossings, and approaches thereto, whether at grade or otherwise, across its tracks at all points, other than at separated crossings separated under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, of the General Code, or under and in accordance with the provisions of this act relating to the elimination of existing grade crossings, and other than separated crossings relocated and reconstructed or widened, reconstructed or realigned under and in accordance with the provisions of this section hereinbefore set out, where such tracks intersect a road or highway on the state highway system, or an extension thereof."

The railroad now located within the village of Caldwell, Ohio, was constructed in about the year 1868, and in 1895 the commissioners of Noble county started condemnation proceedings for the purpose of constructing a public highway across the tracks of the railroad company. By agreement between the commissioners and the railroad company the condemnation proceedings were dismissed and the county commissioners constructed the present bridge, the Cleveland and Marietta Railway Company contributing the sum of Four Hundred and Fifty Dollars (\$450.00) towards its construction.

Mention is made of the construction of this bridge in the manner as aforesaid for the purpose of showing that said bridge was not constructed under and by virtue of Sections 8863, et seq., or 6956-22, et seq., General Code.

From a reading of your letter I gather that it is proposed to build an entirely new structure to replace the present one which is unsafe and inadequate. You state that this bridge has been closed to travel for the past eighteen months. If the plans were made up for the proposed improvement so that I could learn therefrom whether or not it is proposed to use any of the present structure in the rebuilding of a new structure, I could more readily determine the procedure that should be followed by the Department of Highways and Public Works when the Edward-Norton Highway Bill together with the amendment thereto, becomes effective.

A reading of the first part of the amendment clearly shows that if the bridge separating the highway from the tracks of the railroad company, which was not constructed under Sections 8863, et seq., or 6956-22, et seq., General Code, is to be reconstructed or relocated, and requires the widening or a realignment, which will carry the same without the bounds of the right of way of the existing highway, the railroad company or companies can be called upon to bear fifty per cent of the cost of such relocation and reconstruction.

Notice this language of Section 77 of House Bill No. 67, as amended in House Bill No. 511:

"* * * and the cost and expense of such relocation and reconstruction, or such widening, reconstruction, or realignment shall be borne by the

state or by the state and any other political subdivision in which the crossing is located, and by the railroad company or companies in the proportions set out in this act in relation to the elimination of existing grade crossings, unless otherwise agreed upon. * * *

It will be observed that that part of Section 77 as above quoted substantially makes provision for a proportion of the cost of such improvement to be borne by a railroad company or companies as set out in the Edwards-Norton Bill. To determine the proportion of the cost to be borne by the railroad company and the state we must look to Section 61 of the Edwards-Norton Bill (House Bill No. 67), the pertinent part of which reads as follows:

“* * * The raising or lowering of the grades of the railroad tracks, sidetracks and switches for such distance as may be required as provided for in the plans and made necessary by such improvement, including the cost of moving or changing existing structures, sheriff’s fees and other incidental expenses, together with the cost of land or property purchased or appropriated and damages to owners of abutting property or other property shall be chargeable to the improvement; and all costs and things made chargeable to the improvement by this section shall be borne unless otherwise agreed upon, fifty per cent by the state and fifty per cent by such company or companies.* * *”

If the proposed structure is to be repaired or maintained without relocating the same, then it would appear that under the last paragraph of Section 77 of House Bill No. 67 as amended in House Bill No. 511, it would be the duty of the railroad company to keep in repair and maintain in a good, safe, adequate and sufficient condition the bridge in question. You will notice that the provisions of said section place the duty upon the railroad company to maintain and keep in repair, safe and adequate crossings, whether at grade or otherwise, across its tracks at all points other than at separated crossings that have been constructed according to Sections 8863, et seq., and 6956-22, et seq., General Code.

If the present over head bridge can be made sufficient and adequate for public travel by the proper maintenance or repair of the same, then, clearly it is the duty of the railroad company to make the repairs necessary to properly maintain the structure, and that duty may be enforced, if necessary, by proper court action. The term maintenance might imply almost the entire reconstruction of a bridge. On the other hand, if it is proposed to construct an entire new structure, and it will result in a relocation and a reconstruction of the same beyond the right of way of the public highway, you should proceed under Sections 52, et seq., of House Bill No. 67, and in that event you may compel the railroad company to contribute fifty per cent of the cost of such improvement, unless a different percentage is agreed upon between the Department of Highways and Public Works and the railroad company.

The former action brought by this department against the railroad company would not prevent you from acting under the sections hereinabove referred to. In that case it was sought to compel the railroad company to construct the entire bridge under the provisions of Section 8843 of the General Code. The court held, among other things, that said section applied only to grade crossings and did not apply to such structures as the one in question, and that there was no section which required the railroad company to rebuild the structure or to maintain it at its expense. In the opinion of the common pleas court I find the following:

“It therefore follows that the claim of the state must entirely depend upon express legislative authority, and this I am unable to find.”

It is a well settled rule that a judgment is not a bar to other actions, unless there is an identity of parties, issues and subject-matter. Of course, the parties would be identical in any subsequent action, if the same should become necessary, but the cause of action and the subject-matter would be different.

In 23 Cyc., page 1159, I find:

"Where a plaintiff is defeated in an action based upon a certain theory of his legal rights or as to the legal effect of a given transaction or state of facts through failure to substantiate his view of the case, this will not preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory. *This rule applies where he bases his claim in the second suit upon a different right or title from that set up in the first action, providing the two titles are so inconsistent that they could not both have been brought forward in the same action; where he alleges a different ground of liability on the part of the defendant: * * * **"

And again on page 1161, supra:

"The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene before the second suit, *furnishing a new basis for the claims* and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment can not be pleaded in bar. But the change of facts will not affect the estoppel, if no new element is introduced, and the legal rights and relations of the parties remain as before. * * *"

If it should become necessary to institute a second suit under the statutes hereinabove referred to, the action would be "upon a different right" and there would be "a different ground of liability on the part of the defendant". There would also be "a new basis for the claim".

Answering your question specifically, it is my opinion that if the Department of Highways and Public Works determines to delay the matter of the reconstruction of the bridge located within the Village of Caldwell, Ohio, which separates the highway from the tracks of the railroad company, until the first Monday in January, 1928, at which time House Bills No. 67 and No. 511, respectively, become effective, you may cause the railroad company to contribute fifty per cent towards the reconstruction of such bridge. Also, if the proposed improvement involves only the repair and maintenance of the present existing structure and does not require the relocation of the same without the right of way of the public highway, under the provisions of Section 77 of House Bill No. 67 as amended in House Bill No. 511, the duty to proceed rests upon the railroad company and that duty may be enforced by proper court action.

Respectfully,
EDWARD C. TURNER,
Attorney General.