

2546.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND THE CAREY COMPANY, OF CLEVELAND, OHIO, FOR CONSTRUCTION AND COMPLETION OF COVERING COLD WATER SUPPLY LINES, KENT STATE NORMAL SCHOOL, KENT, OHIO, AT COST OF \$585.00.

COLUMBUS, OHIO, June 8, 1925.

HON. L. A. BOULAY, *Director, Department 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 The Carey Company, of Cleveland, Ohio. This contract covers the construction and completion of covering cold water supply lines, Kent State Normal School, Kent, Ohio, and calls for an expenditure of \$585.00.

You have submitted the certificate of the director of finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, informal bids were taken and tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the workmen's compensation have been complied with.

Finding said contract in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
C. C. CRABBE,
Attorney General.

2547.

HIGHWAYS, ABOLISHMENT OF GRADE CROSSING—LEGALITY OF CONTRACT EXTENDED INTO BY COUNTY COMMISSIONERS AND RAILROAD COMPANY DISCUSSED.

SYLLABUS:

1. Pursuant to the provisions of section 8863, and related sections, of the General Code, county commissioners are authorized to enter into a contract with a railroad company, providing for the relocation and reconstruction of a separated grade crossing on an intercounty highway or main market road and without the limits of a municipality.

2. It is a condition precedent to the entering into of a valid contract for such purpose, that the county auditor first certify that the money required for the payment thereof is in the treasury to the credit of the fund from which it is to be drawn or has been levied and placed on the duplicate and in the process of collection and not appropriated for any other purpose, notwithstanding the provision of section 8866, General Code, providing for the filing of such agreement in the common pleas court for entry upon its records and giving to such agreement so filed and entered the same force and effect as a decree of the court.

3. In the absence of a substantial compliance by the county auditor with the

provisions of section 5660 of the General Code, a railroad company may not recover as against the county the money to be paid by the county in accordance with the terms of such agreement, although the contract on the part of the railroad company has been fully performed.

4. *Where a separated railroad and highway crossing has been relocated and reconstructed by a railroad company under the terms of such a contract, the railroad company may not close such relocated and reconstructed separated crossing and exclude the traveling public therefrom, notwithstanding the county has declined payment as provided in the terms of the contract under which such separated crossing has been relocated and reconstructed, on the ground that the contract is illegal and void for a lack of substantial compliance by the county auditor with the provisions of section 5660 of the General Code.*

COLUMBUS, OHIO, June 8, 1925.

HON. FOREST E. WEINRICH, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you, in substance, submit the following statement of facts and inquiries:

At a point on a main market road in this county, there existed an overhead railroad crossing, which also spanned a creek. This crossing was deemed dangerous and objectionable for the reason that the same was located on a sharp curve and the elevation of a part of the roadway was lower than the high water mark of the creek.

On November 6, 1922, the county commissioners and the railroad company entered into a contract wherein it was agreed that the highway at the point referred to should be relocated by removing the same two hundred and nineteen feet east thereof and constructing on the new location a separated crossing, with the highway passing under the tracks of the railroad. By the terms of this contract, the railroad company was to construct a temporary structure, the permanent structure and to grade the roadway within the limits of its right of way, according to plans and specifications agreed upon. The county commissioners were to construct the relocated highway, under the separation structure. The entire cost of construction of the temporary support and the permanent structure and the grading of the highway within the limits of the right of way of the railroad company was to be divided between the parties equally, the county to pay all costs of paving and draining the relocated highway.

All administrative and quasi-legislative proceedings leading up to the point of entering into the contract were duly and legally had upon the part of the county, excepting that no certificate of funds was ever made, filed or recorded by the county auditor, as is required by section 5660 of the General Code.

During the progress of the construction of the structure, due to unforeseen contingencies necessitating extensive use of piling, the railroad company, without consultation with or the consent or approval of the county commissioners, and without advertisement therefor, entered into a supplemental contract with the original contractor covering the additional construction, which was not covered by the original contract.

The project has been completed and the railroad company has paid the entire cost thereof and now makes claim of approximately \$23,000.00 on account thereof, and upon which claim there has been paid \$2500.00 by the county. The county has not available funds from which to make payment. The company is pressing payment.

Question 1. Is the contract entered into by the county commissioners and railroad company legal?

Question 2. If the contract is illegal, may the railway company lawfully close the new and completed crossing and thus force the public to use the old route?

In a recent opinion of this department, rendered under date of May 4, 1925, to Hon. Leslie M. Weaver, prosecuting attorney, Bryan, Ohio, being Opinion No. 2434, it was held that county commissioners are authorized to construct, in co-operation with a railroad company, a grade separation project at a grade crossing on an inter-county highway, under the provisions of section 8863, and related sections, of the General Code.

Inasmuch as all main market roads are also inter-county highways, it would follow that such authority would extend also to such a project on a main market road.

It is believed that it is pertinent to refer particularly to the statutes authorizing the entering into of a contract for the purposes involved in your inquiry, namely, section 8863, and related sections, of the General Code, for the particular reason, if for no other, that some confusion might appear in a consideration of the authority of the county commissioners in the first part of said section 8863, as well as the general bearing of said sections upon the subject under discussion.

Section 8863, General Code, reads:

"If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, or the commissioners of a county in which a railroad or railroads and a public road or highway cross each other at grade, and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public way, or the grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations they may be made as hereinafter provided; provided, however, that the commissioners of a county shall have the same powers with respect to that part of a state, county or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter or require to be altered, any railroad crossings, or to require any improvement in connection therewith to be made, and to apportion the cost thereof between the county and such railroad or railroads, as is provided in sections 8874, 8875, 8876, 8877, 8878, 8879, 8880, 8881, 8882, 8883, 8884, 8885, 8886, 8887, 8888, 8889, 8890, 8891, 8892, 8893 and 8894 of this chapter."

Section 8864 of the General Code reads:

"When it is deemed necessary by a municipality or a county to join with any railroad company or companies in the alteration or abolition of a grade or other crossing, the council of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote, by resolution, shall declare such necessity and intent, and state therein the manner in which the alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other

property it is necessary to appropriate, and how their cost is to be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done, and how its cost is to be apportioned between the municipality or county and the railroad company or companies."

Section 8865 of the General Code provides for the publication of the resolution adopted under the provisions of section 8864, and for notice of its passage to owners of property abutting on the proposed improvement.

Section 8866 of the General Code reads as follows:

"In not less than thirty nor more than ninety days after the passage of such resolution the council and commissioners shall determine whether it or they will proceed with the proposed improvement or not. If it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed, which ordinance or resolution must contain, in addition to the terms and conditions stated in such resolution, the plans and specifications of the proposed alteration and improvement, a statement of the damages claimed or likely to accrue by reason thereof, and how their payments is to be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies through their directors, it shall constitute an agreement, valid and binding on the municipality or county and the railroad company or companies, respectively. Such agreement shall thereupon be filed in the common pleas court of the county in which the crossing is located, for entry upon its records, whereupon it shall have the same force and effect as a decree of the court."

It is not deemed pertinent to refer to other sections in this relation.

While it will be noted that in the first part of said section 8863, General Code, it is in substance provided that if the public officials and the officials of the railroad company are of the opinion that the security and convenience of the public require alterations in a crossing at *grade*, or *otherwise*, of a railroad and a street within a municipality, and provides only for alterations of crossings at *grade* outside of municipalities, it is believed that a reading of the entire section will show the clear intention to provide the same authority in the county commissioners to deal with crossings at *grade* or *otherwise*, outside of municipalities, as is granted to the municipal authorities in relation to crossings at *grade* or *otherwise* within the municipal limits.

This theory is strengthened by reference to section 8864, above quoted, wherein it is in part provided, "when it is deemed necessary by * * * a county to join with a railroad company * * * in the alteration or abolition of a *grade* or *other* crossing."

The pertinent fact in your statement under your first inquiry is the lack of substantial compliance by the county auditor with section 5660 of the General Code. The pertinent parts of section 5660 of the General Code read:

"The commissioners of a county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treas-

ury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county * * * is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

The pertinent parts of section 5661 read:

"All contracts, agreements or obligations and orders or resolutions entered into or passed contrary to the provisions of the next preceding section shall be void."

It was said in the case of *State vs. Kuhner and King*, 107 Ohio St. 406, at page 413 of the opinion, that

"The purpose in requiring such certificate to be made and in prohibiting public officials entering into any such contracts unless such certificate is first made, is clearly to prevent fraud and reckless expenditure of public funds, but particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose. Such provisions have frequently been held mandatory and compliance therewith an absolute essential prerequisite. *In the absence of such compliance, no valid contract can be entered into.*"

By the express terms of said section 5661 of the General Code, the lack of substantial compliance by the auditor with the requirement relating to the making of a proper certificate of funds renders the contract, agreement or obligation void; and to the same effect are the uniform holdings of our courts.

A contract entered into without the auditor first making the certificate is as though no contract had been entered into, and it would add nothing to the effectiveness of such a void contract to file the same in common pleas court for entry on the record thereof; for the very basis of giving vitality and effectiveness to such a proceeding is a valid and not a void contract.

State vs. Kuhner and King, supra;
Buchanan Bridge Co. vs. Campbell,
60 Ohio St., 406.

At page 419 of the case of *Buchanan Bridge Co. vs. Campbell, supra*, it is said:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party of the other side."

This is in line with a long list of cases holding that before public officials may be held liable upon a contract, such contract must have been entered into in substantial compliance with the statutes relating thereto.

In the syllabus of the Buchanan Bridge Company case it is said that "the courts will leave the parties to such unlawful transaction where they have placed themselves and will refuse to grant relief to either party."

The railroad company, being party to this void contract and having gone forward and constructed for, and opened to, the use of the public the relocated highway and separated crossing, may not thereafter close the same and exclude the traveling public therefrom. *Buchanan Bridge Co. vs. Campbell*, supra.

It would follow, and you are so advised, that the contract entered into by the county commissioners and the railroad company is illegal and void, and that it avails the company nothing from the fact that the project has been completed and fully paid for by the railroad company; and further, that the railroad company may not now close to and exclude the public from the relocated highway and reconstructed crossing.

Respectfully,
C. C. CRABBE,
Attorney General.

2548.

NEWSPAPER DEFINED—ARTICLE XVI SECTION OF THE CONSTITUTION OF OHIO CONSTRUED.

SYLLABUS:

Definition of "newspaper" as contemplated under the provisions of section 1 of article XVI of the constitution discussed.

COLUMBUS, OHIO, June 8, 1925.

HON. THAD H. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your recent communication you request my opinion on the following:

"Article XVI, section 1 of the constitution of Ohio provides:

" 'Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published.'

"Will you kindly give this office a definition under this article and section as to what essentials constitute a newspaper, in distinction and contrast from other publications?"

Your question, of course, is, what is a newspaper within the meaning of the section of the constitution which you quote. It will be observed that there is no description of such publication referred to in the section. A newspaper has been defined by Webster to be:

"A paper published periodically, usually daily or weekly, containing the most recent intelligence."