2048

1. BRIDGE—COOPERATION OF CITY, COUNTY, RAILROAD, PRIVATE ORGANIZATION IN SHARING COST OF BRIDGE RECONSTRUCTION—TRACKS OF RAILROAD CARRIED OVER PUBLIC WAY—AUTHORIZED ONLY IN CASES WHERE BRIDGE WAS ORIGINALLY CONSTRUCTED UNDER SECTION 6956-22 ET SEQ., G. C.

2. REVENUES RECEIVED FROM TAX IMPOSED BY SECTION 5541 G. C.—MAY BE USED BY POLITICAL SUBDIVISIONS TO DEFRAY RESPECTIVE SHARES OF COST —REVENUES FROM TAXES IMPOSED BY SECTIONS 5527 AND 6309-2 G. C. MAY NOT BE SO USED.

SYLLABUS:

1. The cooperation of a city, a county, a railroad, and a private organization in sharing the cost of reconstruction of a bridge which carries the tracks of such railroad over a public way in such city is authorized only in cases where such bridge was originally constructed under the provisions of Section 6956-22, et seq., General Code.

2. In such a project, the revenues received by the political subdivisions concerned from the tax imposed by Section 5541, General Code, may be used by them to defray their respective shares of the cost; but the revenues received by them from the taxes imposed by Sections 5527 and 6309-2, General Code, may not be so used.

Columbus, Ohio, July 20, 1950

Hon. William E. Didelius, Prosecuting Attorney
Erie County, Sandusky, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Tiffin Avenue is a public street in the City of Sandusky, Ohio. It is also a part of the state highway system throughout its entire length, being part of State Routes 2, 12 and 101, as well as U. S. Route 6.

"A branch line track of the Nickel Plate Railroad crosses Tiffin Avenue within the City of Sandusky, approximately at right angles to Tiffin Avenue, on a span which provides a clearance of approximately eleven (11) feet between the bottom of the span and the surface of the improved portion of the highway.

"It is generally conceded that this span constitutes a hazard to users of the highway, particularly the owners and operators of motor trucks. On numerous occasions in the past, trucks traveling along Tiffin Avenue and having a height in excess of eleven (11) feet have struck the lower part of the span, with resultant extensive property damage.

"As the result of negotiations recently conducted between the railroad company and the City of Sandusky, the railroad company now proposes to replace its existing span with a new span which will provide a clearance of approximately fourteen (14) feet between the bottom of the span and the surface of the highway. The proposed improvement involves the making of no changes in the highway itself.

"It has further been proposed that the cost of this improvement be shared by the Nickel Plate Railroad, the City of Sandusky, the County Commissioners of Erie County and a private organization which is desirous of eliminating this particular traffic hazard, the proportion of the cost to be borne by each of the cooperating parties to be determined by agreement among them.

"I would appreciate having your opinion on the following matters:

"1. May the county commissioners cooperate with the Nickel Plate Railroad, the City of Sandusky and a private organization by sharing with them the cost of constructing the proposed new railroad span across Tiffin Avenue?

"2. If the county commissioners have such authority, may they pay the county's share of the cost of the improvement from the funds derived from the Motor Vehicle Fuel Tax levied under the provisions of Section 5527 of the General Code or from the Additional Motor Vehicle Fuel Tax levied under the provisions of Section 5541 of the General Code?

"3. If the county commissioners have such authority, may they pay the county's share of the cost of the improvement from funds derived from Motor Vehicle License Taxes and distributed to the county under the provisions of Section 6309-2 of the General Code?"

Your request does not mention the circumstances under which the overhead railway structure concerned was originally erected and I am unable, therefore, to ascertain under which of several statutes the construction was initially authorized if, indeed, it was authorized by any of them. In this connection a brief review of the history of railroad grade crossing elimination legislation may be helpful.

The first such legislation appears to have been Sections 8863, et seq., General Code, originally enacted in House Bill No. 1560, 90 Ohio Laws, effective April 27, 1893. This legislation was reenacted in the Codification of 1910 and, with the exception of certain amendments, notably that of Section 8868, effective August 11, 1939, is still in substantially the same form as originally enacted.

Sections 6956-22, et seq., General Code, were enacted in House Bill No. 35, 110 Ohio Laws 231, approved April 21, 1923. House Bill No. 35 contained also an amendment of Section 8869, relative to maintenance of structures erected under authority of Sections 8863, et seq., General Code.

Sections 1229, et seq., General Code, were originally enacted in House Bill No. 67, 112 Ohio Laws 430, approved May 10, 1927, to become effective the first Monday of January, 1928. These sections were substantially reenacted in Senate Bill No. 204, 121 Ohio Laws 455, approved July 10, 1945.

Prior to the enactment of any of this legislation, however, it occasionally happened that railroads had erected, at their own expense, and for their own convenience, grade separation crossings, with the consent or sufferance of local highway authorities, by constructing bridges over established highways upon which to carry their tracks. Such a case, for example, is that which was under consideration in the case of Yackee v. Village of Napoleon, 135 O. S. 344, decided May 3, 1939. For convenience of discussion we may consider with this class of cases those instances also where such structures were erected under authority of statutes since repealed.

Accordingly, since it appears that the structure you have described could have been erected in any of four distinct situations, each of them will be considered herein with a view to ascertaining what parties are responsible for the construction, maintenance or reconstruction (in the event of inadequacy) of such structure.

We may consider then, as the first possibility, that the structure in question was erected by the railroad company prior to the effective date of the legislation of 1893 (Sections 8863, et seq., General Code), or under authority of a statute since repealed without being substantially reenacted. A situation somewhat similar to this was considered in an opinion of one of my predecessors in Opinions of the Attorney General

for 1922, Volume II, Opinion No. 3814, page 1020, the syllabus of which reads as follows:

> "1. Where a railroad company, prior to the enactment of the grade crossing elimination statutes (Secs. 8863 et seq.) has erected bridges along a public road so as to constitute an overhead crossing for the public road, it is the duty of the railroad company and not of the county to keep up all repairs of such bridges.
>
> "2. But by reason of section 2408 G. C., the county, in order to afford a safe way for the public, may and should make repairs of (if) the railroad fails to do so, and charge the cost to the railroad company.
>
> "3. Further, an action in mandatory injunction may perhaps be available to the county commissioners to compel the railroad company to make the necessary repairs."

The Attorney General in this opinion also makes the following statement relative to the law as it existed prior to 1893:

> "In this general state of legislation, it would seem that since the bridges in question, notwithstanding that they constitute a part of the line of public road, were inserted in the public road primarily for the benefit of the railroad company, such bridges are to be maintained in all respects at the sole expense of the railroad company, and that the county is not charged as between railroad company and county with any part of the maintenance and upkeep of the bridges. * * *"

In Yackee v. Village of Napoleon, 135 O. S. 344, a personal injury case involving a bridge which carried the railroad tracks above the highway, the court expressed the following rule in the sixth branch of the syllabus:

> "Where an overhead railroad bridge, built and maintained by a railroad company within a municipality with the latter's acquiescence and consent, originally met the reasonable requirements of travel over the street spanned by the bridge, but has since become insufficient in clearance above the street by reason of changed conditions in lawful modes of street travel, it is the duty of the railroad company to make such alterations in its bridge as become essential to so meet changed conditions as to permit such travel with reasonable safety. A failure to perform such duty, resulting in injury to a person coming in contact with such bridge while traveling upon the street underneath it, presents a jury question as to whether the railroad company was in the exercise of ordinary care in the premises."

A similar situation was considered in an opinion by one of my predecessors, Opinion No. 2555, Opinions of the Attorney General for 1947, page 652, the third and fourth branches of the syllabus of which read as follows:

> "3. Where a bridge was built by a railroad company separating the grade of its tracks so as to place them over or under a state highway which had been laid out before the laying of such tracks, and such bridge was constructed either for the convenience of the railroad, or because of public requirements before the enactment of grade separation statutes applying to such crossings, and such structure has become wholly inadequate and insufficient for the present travel upon such highway, an obligation is imposed by the final paragraph of Section 1182-20, General Code, on such railroad company to make such crossing safe, adequate and sufficient, if necessary, by complete reconstruction of such bridge and approaches thereto.
>
> "4. Where bridges separating the grades of railway tracks crossing state highways were built prior to the Highway Act passed April 21, 1927, 112 O. L., 430, pursuant to statutes then in force but since repealed, and such bridges have become wholly inadequate and insufficient for present day traffic, the railroad company may under the terms of the last paragraph of Section 1182-20, General Code, be required to replace them with structures which will provide a safe, adequate and sufficient crossing."

In this same opinion the following statement is made at page 659:

> "Your letter states that there were many bridges built a long time ago by railroad companies to carry the highways over their tracks, either for their own convenience or as a condition to their right of crossing, possibly before the enactment of grade separation statutes. These bridges are now too weak and too narrow for modern traffic. I cannot believe that the law is so lame as to permit the railroad companies to escape further responsibility to the public by once building primitive bridges which are now worse than useless, and which may actually become a nuisance in a modern highway."

The final paragraph of Section 1182-20, General Code, mentioned in the second preceding quotation, reads as follows:

> "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." (Emphasis added.)

In view of these plain provisions of Section 1182-20, the expression of the Supreme Court in the Yackee case, supra, and the views of my predecessors, with which I agree, I must conclude that if the structure in question was erected by the railroad company prior to the enactment of the first grade crossing separation legislation in 1893, or under authority of a statute since repealed without being substantially reenacted, neither the county nor the municipality could lawfully expend funds to reconstruct the crossing, or any part of it, for the reason that the entire expense of such is required to be paid by the railroad company.

The second possible situation to be considered is that in which you should find that the structure in question was erected under authority of Sections 1182, et seq., General Code. Parenthetically, it may be said that this is an unlikely possibility in view of the present inadequacy of the structure and the fact that this statute was enacted as late as 1927.

In this act, Section 1182-9, General Code, provides for the apportionment of the cost, unless otherwise agreed upon, between the state and the railroad company with 85% of such cost borne by the state and 15% borne by the railroad company. Although Section 1182-16, General Code, authorizes the participation by a municipality with the state in the constructon of separated grade crossings, with the municipality bearing such share of the costs as may be agreed upon by the council of such municipality and the director of highways, I find nothing which would permit the participation of a county in such a project in the manner outlined in your inquiry. In the absence of any statutory authority for the county so to participate, I must conclude that its participation is not legally possible. On this point the rules expressed in 11 Ohio Jurisprudence, Counties, Sections 4 and 7 at pages 240 and 244, respectively, are applicable. These sections read as follows:

"§4. A county is a subdivision of the state, organized by itself for judicial and political purposes. In other words, it is a mere political organization of certain of the territory within the

state, particularly defined by geographical limits. It is not a legal person. Neither is it a separate political entity. Nor is it invested with any of the attributes of sovereignty. It is rather a constituent part of the plan of permanent organization of the state government—a wholly subordinate political division or instrumentality, created and existing almost exclusively with a view to the policy of the state at large, and serving as a mere agency of the state for certain specified purposes."

"§7. Generally speaking, the function of the county is to serve as an agency or instrumentality of the state for purposes of political organization and local administration, through which the legislature may perform its duties in this regard more understandingly, efficiently, and conveniently than it could if acting directly. As such agency, the county is a creature in the hands of its creator, subject to be molded and fashioned as the ever-varying exigencies of the state may require. Except as restricted by the state Constitution, the power of the legislature, through which the sovereignty of the state is represented and exercised, over counties, is supreme, and that body may exercise plenary power with reference to county affairs, county property, and county funds. *Counties, therefore, possess only such powers and privileges as may be delegated to, or conferred upon, them by statute. These powers and privileges must be strictly construed, and may, in general, be modified or taken away.* * * *

(Emphasis added.)

A further word is in order at this point relative to the *maintenance* of structures erected under this statute after completion of the work of construction *or of reconstruction.* Section 1182-18, General Code, provides, in the case of a crossing where the public way passes *under* the railroad tracks, that the cost of maintaining the bridge, and its abutments, carrying such tracks shall be borne by the railroad company alone. The next logical question to be determined then is whether the proposed changes you have described are properly to be classed as maintenance or as reconstruction.

The word "maintenance" in a case of this sort is susceptible, in my opinion, of two possible interpretations. First, it may denote the retention of an existing structure in as good a state of repair as when first built. Second, it may denote the retention of a structure in a state of adequacy and sufficiency under a standard which changes with the "changed condition in lawful modes of street use."

The latter sense is, of course, that in which the court used this term in the Yackee case, supra, the seventh branch of the syllabus in which is hereinbefore quoted.

However, it must be noted that in that case the court was considering a structure erected by the railroad at its own expense and for its own convenience and presumably prior to the legislation of 1893. In such a case the burden of *reconstruction to meet inadequacy,* as well as maintenance of the existing structure, would clearly fall, under the provisions of the final paragraph of Section 1182-20, General Code, solely on the company. For this reason, and because Section 1182-18, General Code, clearly indicates the fact that maintenance responsibility attaches only "after completion of the work of constructing *or of reconstructing,*" I conclude that the maintenance contemplated in this section refers only to the retention of the existing structure in a state of good repair as originally built. Accordingly, I conclude that if the structure with which you are concerned was originally erected under authority of Sections 1182, et seq., General Code, the presently proposed changes, being in the nature of reconstruction to remove inadequacy, could not be required to be made at the sole expense of the company under authority of Section 1182-18, General Code.

The third possible situation to be considered is that in which you should find that the structure in question was erected under authority of Sections 6956-22, et seq., General Code. In that statute the apportionment of the cost of initial construction is provided for in Section 6956-28, General Code, with the county bearing 85% and the railroad bearing 15%, unless otherwise agreed upon. Section 6956-34, General Code, provides, in a case where the public way passes under the tracks, that maintenance cost of the public way and its approaches shall be borne by the county while that of the bridge and its abutments shall be borne by the railroad.

By another provision of this same statute, viz., the first paragraph of Section 6956-35, General Code, any township or municipality in which such improvement is made is expressly authorized, but not required, to assume and agree to pay a portion of the costs assumed by the county. This express provision, of course, appears by its terms to apply only to the initial construction of the improvement, as distinguished from (a) maintenance or (b) reconstruction to remove inadequacy of an existing structure. Our question thus resolves itself into that of whether such joint participation by the county, city and railroad can be said to be authorized by implication as to the expense incurred *after* the initial construction of the improvement.

The first point to be ascertained in this connection is whether the

proposed changes you have described constitute "maintenance," for which the railroad would be solely responsible under Section 6956-34, General Code, or reconstruction to remove inadequacy.

The word "maintain" is defined by Websters New International Dictionary, in the sense in which I deem it is used in this statute, as follows:

> "To hold or keep in any particular state or condition, especially in a state of efficiency or validity * * *."

The word "maintenance" is defined, in this same sense, as:

> "The upkeep of property, machinery, equipment, etc."

In ordinary business operations a distinction is made in the loss of value of fixed assets between "depreciation," "obsolescence" and "inadequacy." The latter is defined as that loss which occurs when an asset, while still perfectly capable of carrying its old load, is unequal to the increased service required. See Finney's General Accounting, page 274.

It is clear, I think, that the structure you have described can properly be classed as inadequate in this sense; that no amount of upkeep would remove such inadequacy; and that the proposed changes in such structure would not be maintenance but rather would be classed as reconstruction.

Although this statute has not, in express terms, provided a means or a procedure of effecting such reconstruction, it is not to be supposed that the law is so feeble as to fail somehow to provide against contingencies of this sort. The power of the state to maintain a continuing control over its highway system is well described in 25 American Jurisprudence, Highways, Section 253, at page 544, where it is said:

> "The use of highways and streets may be limited, controlled, and regulated by the public authority in the exercise of the police power whenever and to the extent necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it. * * *"

The legislature has provided in the final paragraph of Section 1182-20, General Code, that railroads "shall maintain and keep in good repair, *safe, adequate and sufficient* crossings * * * whether at grade or otherwise

* * *." This section, however, exempts those structures, among others, which were erected in accordance with provisions of Sections 8863, et seq., General Code and 6956-22, et seq., General Code. Thus, in the case under consideration, the railroad is not required to bear the sole burden of keeping the crossing structure in a state of "adequacy and sufficiency."

Since the provision for maintenance of adequacy and sufficiency of such structures has been omitted from Section 1182-20, General Code, and because, under the rule quoted above, it must surely reside somewhere, I conclude that the exception was placed in Section 1182-20, General Code, by the legislature with the intent that reconstruction to remove the inadequacy of structures erected under the provisions of Sections 6956-22, et seq., General Code, should be accomplished under authority of that same act.

This notion is the more logical in view of the broad powers given the county commissioners under Section 6956-22, General Code. This section provides that such commissioners may require a railroad to cooperate in raising or lowering its tracks above or below the public way "whenever in the opinion of the board of county commissioners the raising or lowering of the grade of any railroad * * * may be necessary * * *."

For these reasons I conclude that if you find that the original structure in question was erected in accordance with the provisions of Sections 6956-22, et seq., General Code, then the reconstruction of the structure as proposed may be accomplished under authority of the same statute; that the cost should be apportioned in accordance with Section 6956-28, General Code; and that the municipality concerned may assume a portion of the cost in accordance with the provisions of Section 6956-35, General Code.

As to the inclusion of a private organization as a party to a proposed agreement among the county, the city and the railroad, I perceive no objection thereto in view of the authority of the city to accept a gift from such organization "for any municipal purpose authorized by law" under the provisions of Section 3615, General Code. In such a situation it should be a simple matter to provide by the terms of the agreement that such gift should be included to defray a portion of that part of the cost of the improvement which the city assumes under authority of Section 6956-35, General Code.

In passing it is proper to note that although the second, third and fourth paragraphs of Section 6956-35, General Code, authorize the issuance of bonds and the levy of a property tax to meet the expense of initial improvements, and repairs of them, made by joint action of the city and county with a railroad, such provisions are permissive only and nothing would preclude such joint action under the first paragraph of such section wherein financing of the cost thereof is otherwise lawfully arranged.

The fourth and final possible situation is that in which you should find that the structure in question was erected under the provisions of Sections 8863, et seq., General Code.

This act also authorizes grade separation improvements by amicable joint action of a railroad and a county or by a railroad and a municipality. Section 8868, General Code, provides for the apportionment of the cost of such improvement, the county, or city, bearing 85% thereof and the railroad the remaining 15%. Section 8869, General Code, provides for maintenance, where the public way passes under the railroad tracks, of the bridge and abutments by the railroad company alone.

Sections 8874, et seq., General Code, authorize action by a municipality to compel cooperation by a railroad in grade separation improvements in cases where action by agreement is found to be impossible.

Sections 8883 and 8889, General Code, provide for apportionment of construction and maintenance costs in substantially the same way as is provided in the case of improvements made by agreement of the parties under Sections 8863, et seq., General Code.

Nowhere in this statute is there any express provision for action to make improvements to existing separated crossings which have become inadequate due to changed conditions of use of the public way. However, for the same reasons advanced herein with reference to structures erected under Section 6956-22, General Code, and in view of the final sentence of Section 8874, General Code, I conclude that such reconstruction projects may be accomplished under the provisions of this act. I conclude also that the cost of such projects must be apportioned in the same manner as in the case of the initial construction, i.e., under the provisions of Section 8868, General Code.

There is, however, no provision whatever in this act authorizing joint action by the city and the county in any one project. Indeed, the language

of Section 8863, General Code, makes it quite clear that either the city or the county may act jointly with the railroad but not with each other. This section reads in part as follows:

> "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 section 8874, * * *."
>
> (Emphasis added.)

Accordingly, in view of the rule that counties have only such authority as is given them by statute, I must conclude that if you should find that the structure in question was erected under the provisions of Sections 8863, et seq., General Code, the participation of both the county and the city in this project, as presently proposed, is not authorized by law.

There remains only the question of the use of certain tax revenues by the subdivisions concerned to defray the cost of this improvement in the event you should find that joint action, as proposed, is authorized by virtue of the original structure having been erected in accordance with Sections 6956-22, et seq., General Code.

The purposes for which the tax imposed by Section 5527, General Code, may be used are stated in the first paragraph of that section which reads in part as follows:

> "For the purpose of providing revenue for maintaining the state highway system of this state for widening existing surfaces on such highways, for resurfacing such highways, for enabling

> the several counties of the state to properly maintain and repair their roads and for enabling the several municipal corporations of the state properly to maintain, repair, construct, clean and clear the public streets and roads and for the purchase and maintenance of traffic lights and repave their streets, and for supplementing revenue already available for such purposes, and for distributing equitably among those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, * * *."

From this language it clearly appears that the county's share of the revenue so derived may be devoted only to maintenance and repair and not to reconstruction to remove inadequacy. Accordingly, the first part of your second question must be answered in the negative.

The purposes for which the tax imposed by Section 5541, General Code, may be used are stated in the first paragraph of that section which reads in part as follows:

> "For the purpose of providing revenue for supplying the state's share of the cost of constructing, widening and reconstructing the state highways of this state, and also for supplying the state's share of the cost of eliminating railway grade crossings upon such highways, and also for enabling the several counties, townships and municipal corporations of the state properly to construct, widen, *reconstruct* and maintain their public highways, roads and streets, and for paying the costs and expenses of the department of taxation incident to the administration of the motor vehicle fuel laws, and supplementing revenue already available for such purposes, an excise tax is hereby imposed on all dealers in motor vehicle fuel, upon the use, * * *."
>
> (Emphasis added.)

The authorization in this language for both counties and cities to use these revenues to "reconstruct * * * their public highways, roads and streets * * *" is sufficient, I think, to cover the reconstruction with which you are concerned. Especially is this so when it is considered that a highway comprises not only the surface of the pavement but the space above and below. Thus in the Yackee case, 135 O. S. supra, the court said at page 349:

> "A municipal corporation holds the fee in its streets in trust for the purpose of public travel and transportation, subject to the right of the state to direct the method and manner by which such trust shall be administered, and is charged at all times by reason of Section 3714, General Code, with the inescapable duty to keep such streets open, in repair and free from nuisance. This

> duty and requirement extends to the space above as well as to the surface of the street. 'The public right goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon such limits by any person by any means by which the enjoyment of such public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous.' 44 Corpus Juris, 1007, note."

Accordingly, the second part of your second question must be answered in the affirmative.

With respect to your third question, the purposes for which revenues distributed to counties and cities in accordance with Section 6309-2, General Code, may be used are stated in that section which reads in part as follows:

> "* * * In the treasuries of such counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways and maintaining and repairing bridges and viaducts, and for no other purpose, and shall not be subject to transfer to any other fund excepting to the extent temporarily authorized by paragraph (3a) hereof. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway in which the existing foundations thereof are used as a subsurface of the improvement thereof, in whole or in substantial part; and in the treasuries of such municipal corporations such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets, and maintaining and repairing bridges and viaducts, * * *"

With respect to expenditure of the county's share of such revenues, it appears quite clear that the project you have described could not in any sense be considered "maintenance and repair" as defined above. As to the city's share of these revenues I think expenditure for this project is unauthorized also despite the use of the expression "construction and repaving of public streets" since the project is not a new construction but is rather a reconstruction.

Accordingly, your third question must be answered in the negative.

For these reasons, in specific answer to your questions, it is my opinion that:

1. The cooperation of a city, a county, a railroad, and a private organization in sharing the cost of reconstruction of a bridge which

carries the tracks of such railroad over a public way in such city is authorized only in cases where such bridge was originally constructed under the provisions of Section 6956-22, et seq., General Code.

2. In such a project, the revenues received by the political subdivisions concerned from the tax imposed by Section 5541, General Code, may be used by them to defray their respective shares of the cost; but the revenues received by them from the taxes imposed by Sections 5527 and 6309-2, General Code, may not be so used.

Respectfully,

HERBERT S. DUFFY,
Attorney General.