

The fact that on the books of the school district certain portions of the moneys on deposit are credited to certain funds does not make the bank the debtor of each individual fund. Its obligation is to the school district alone and the matter of the segregation of the fund is immaterial in so far as it is concerned.

From your statement it appears that the board had executed a note to the bank for \$3,000 to pay for a portable building and that there still remains due thereon a balance of \$1,000, with interest of \$17.50. I note that you state you do not know what authority, if any, the board had for giving this note. Assuming, without passing upon, the validity of this obligation, I am of the opinion that the superintendent of banks, in charge of the liquidation of this bank, may properly set off the amount of this note against the claim of the board for the amount of the deposit. I am further of the opinion that the fact that the building fund on the books of the board only shows a balance of \$7.58 cannot operate to defeat the right of the superintendent of banks to make such offset. The note is a general obligation of the board for which the faith and credit of the school district is pledged and if the amount thereon is now due, the superintendent of banks is clearly entitled to credit it against the claim for the deposit.

I might further suggest that, since the board has evidently secured all the money on the note and used it, there would be considerable difficulty in now resisting the claim of the bank thereon on the ground of illegality.

Answering your question specifically, I am of the opinion that the state superintendent of banks, in charge of the State Bank of Amsterdam, may properly charge off against the deposit of the board of education of Amsterdam Village School District the amount of any legal and valid obligation of the board to said bank.

Respectfully,

EDWARD C. TURNER,
Attorney General.

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GRADE CROSSING ELIMINATION—APPLICATION OF FISHER ACT.

SYLLABUS:

1. *Where all through traffic upon an inter-county highway or main market road within a municipality is already carried over certain railroad tracks by means of a viaduct, the provisions of Sections 6956-22, et seq., of the General Code (commonly known as the Fisher Act) are not applicable to the separation of the crossing at grade of such railroad tracks and the public way still existing under such viaduct, but now used solely for purely local traffic.*

2. *Whether or not a proposed grade elimination or separation is necessary and expedient under sections 6956-22, et seq., General Code is a question of fact in each individual case.*

COLUMBUS, OHIO, April 5, 1927.

HON. CHARLES P. TAFT, 2nd, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date, which reads as follows:

“In connection with the rebuilding of the Eighth street viaduct, in the city of Cincinnati, county of Hamilton, state aid has at one time been allowed; and a further application for such aid is now pending before the Director of Highways.

I hereby request your opinion as to whether or not the Fisher Act, Section 6956-22 et seq. applies to this situation."

To your letter is attached a copy of memorandum prepared and furnished by the surveyor of Hamilton county containing certain data as to the facts bearing upon the question asked in your letter. This data was obtained from public records of Hamilton county, Ohio, and establishes these facts as to the creation of a street now known as West Eighth Street:

"Eighth street west of Freeman avenue as a public street or highway dates back to 1818 when the administrator of Israel Ludlow, deceased, subdivided the Ludlow property extending from Freeman avenue west to the old channel of Mill creek and from Eighth street south to the river. This subdivision made under court proceedings shows a street not named or dedicated as a street along the north line of the tract, but by subsequent deeds and subdivisions is easily identified as Eighth street. In the Cincinnati directory of 1819 by Oliver Farnsworth, it is shown on the map of the city as 'Road to mill creek lower ford'. In 1837, Anderson and Sturgis subdivided the territory west of Harriett street, deed book 75, page 196, and on it shows and dedicates 'London' street now Eighth street from a point near Harriet street west to Mill creek. In 1864 in case No. 16163 Superior Court 'Anderson vs. Ewing et al.' Eighth street and adjacent streets were laid out (P. B. 2/209 R. O.) and dedicated by court in deed book 291, p. 577 R. O. This dedication of Eighth street extended west from about 300 feet of McLean avenue to the old channel of Mill creek, which was the west corporation line of the city under the act of legislation passed in January, 1802, incorporating the town of Cincinnati."

The surveyor states that the Baltimore & Ohio Railroad was built in 1872; that the Cincinnati Southern Railroad was built in 1878 and the Chicago subdivision of the Chesapeake & Ohio Railroad was built in 1902. These railroad crossings were constructed across West Eighth street and are located westwardly from the east terminus of the present viaduct, which is now at McLean street, along the present line of Eighth street leading to the western terminus of said viaduct, hereinafter referred to as Evans street, which is now the west terminus of said viaduct, as follows: The Chicago division of the Chesapeake & Ohio Railroad at a point approximately eleven hundred (1100) feet from the said McLean street, the Cincinnati Southern Railroad at a point approximately fifteen hundred (1500) feet from the said McLean Street, and the Baltimore & Ohio Railroad at a point approximately fifteen hundred and eighty (1580) feet from the said McLean street. It will be observed that these railroad crossings were constructed at grade by the respective companies or their predecessors in title after the establishment of West Eighth street.

Information was received on July 9, 1926, by the department of highways and public works in a letter from the surveyor of Hamilton county, to the effect that the viaduct located above West Eighth street between McLean street and Evans street was constructed in about the year 1894, for the primary purpose of raising Eighth street above the high water level, thus providing the street with a lower and an upper line of traffic.

In the letter of July 9, 1926, the surveyor further states that the portion of West Eighth street underneath the viaduct between McLean and Evans streets has been used as a street for the purpose of traffic pertaining to certain industries located adjacent thereto.

Information has been received that said street has not been used for through traffic over Inter-county Highway No. 7, all of the through or inter-county traffic

proceeding over the viaduct. The highway over the viaduct is paved and that portion of it lying underneath said viaduct is not paved, so that it is evident there would be no inducement for traffic proceeding over Inter-county Highway No. 7 to use the highway underneath said viaduct, especially in view of the fact that said traffic would be compelled to proceed over three railroad tracks.

The answer to your question will be based upon the premise that all the facts as outlined above and which are made the basis of this opinion are correct.

Section 6956-22, General Code, provides:

"Any county may raise or lower, or cause to be raised or lowered the grade of any main market road or inter-county highway above or below the tracks of railroads, or railroads and parallel and adjacent interurban railroads within such county, and may require any railroad company operating a railroad in such county, and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad, to raise or lower the grade of its tracks, above or below any main market road or inter-county highway, and may construct ways or crossings for such road or highway above the tracks of any railroad or railroads and parallel and adjacent interurban railroad, or require the railroad company and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad to construct ways or crossings therefor that are to be passed under its tracks, may require such railroad company and any interurban railroad company operating an interurban railroad parallel and adjacent to said railroad to erect permanent piers, abutments or any other appropriate supports for any of the above works in main market roads and inter-county highways within the county, whenever in the opinion of the board of county commissioners, the raising or lowering of the grade of any such railroad or railroads and parallel and adjacent interurban railroad tracks or the raising or lowering or construction of such roads or highways or supports may be necessary; upon the terms and conditions hereinafter set forth in this act."

West Eighth street is an extension of Inter-county Highway No. 7, and the state of Ohio, through the department of highways and public works, has been requested under authority vested in it by virtue of Section 1197-1, General Code, to grant aid in the constructing of a new viaduct to replace the present existing viaduct.

Sections 6956-22, et seq., of the General Code, commonly known as the Fisher Act and found in 110 O. L., 231, make it necessary for the county commissioners to obtain the sanction of the director of highways and public works as to the necessity and expediency of a grade separation project which will accomplish the elimination of an existing grade crossing on state roads and highways.

The act then provides the procedure as to the steps to be taken to cause a separation of the grades by agreement or by court proceedings as therein set forth.

Section 6956-22, General Code, refers to either main market roads or inter-county highways.

It cannot be contended seriously that since the construction of the viaduct in 1894 all through or inter-county traffic proceeding over West Eighth street, which is an extension within the city of Cincinnati, Ohio, of Inter-county Highway No. 7, has not proceeded over the viaduct.

Section 6956-24, General Code, provides:

"As a condition precedent to the exercise of jurisdiction under the terms of this act by a board of county commissioners, such commissioners shall transmit to the director of highways and public works a full written description of the grade crossing which it is proposed to abolish, showing its loca-

tion, the reasons which tend to make necessary the elimination of the same, the names of the railroad or railroads or interurban railway or railways owning the tracks crossing said main market road or inter-county highway and the manner in which it is contemplated the improvement proposed should be accomplished.

On receipt of such description the state highway director shall conduct a hearing as to the necessity and the expediency of the proposed improvement after thirty days' notice in writing of the time and place of the holding of such hearing has been given to the county commissioners and to the railroad or interurban railway company or companies concerned in such proposed elimination, such notice to be served by the sheriff upon the railroad or interurban railroad company, or companies, in the manner provided for by law for the service of summons in civil actions, and if, after such hearing, the state highway director is of the opinion that such improvement is reasonably necessary and expedient, he shall so certify in writing to said county commissioners, sending a copy of such certificates to all railroad or interurban railway companies involved. But if said director is not of such opinion he shall so state in his certificate, and thereupon no further proceedings shall be taken upon said application to said director."

This section makes it mandatory that a hearing be had by the director of highways and public works for the purpose of determining from the facts presented at said hearing whether or not a proposed grade separation is necessary and expedient. The necessity for such a finding as to the necessity and expediency of a proposed grade elimination is further emphasized in Section 6956-25, General Code, in that said section makes provision for a further hearing as to the necessity and expediency of such project before the board of county commissioners of the county in which such grade crossing or crossings are located. This action follows the certification to the county commissioners of the finding on the part of the director of highways and public works that such a grade elimination is necessary and expedient.

The word "necessity" is defined in Webster's Dictionary as:

1. The quality of being necessary or absolutely requisite; inevitableness; indispensableness; * * *
2. The condition of being needy or necessitous; pressing need; * * *

"Expediency" is defined in the same dictionary as:

"The state or quality of being expedient; fitness or suitableness to effect a purpose intended; desirableness; advantage."

The necessity and expediency as contemplated in this act means that from all the facts a showing will be made that the presence of a grade crossing in an inter-county highway or main market road is a menace to the public traveling over the same, and that a separation of the tracks from the highway by constructing an overhead viaduct over said tracks or by constructing a way or crossing under said tracks will eliminate the hazards incident to a crossing at grade, which will be beneficial not only to the public but likewise to the railroad company or companies affected by such separation of the grades.

Inasmuch as this act applies only to the elimination of grade crossings in inter-county highways or main market roads, it is apparent that it was the intention of the legislature to cause grade eliminations in those highways that were subjected to the greatest amount of traffic and where the menace to public safety was the greatest.

The facts must show a substantial necessity for and an advantage to be gained by a grade separation.

Applying the test of necessity and expediency to the facts at hand, it will be seen that there is no through traffic over that portion of West Eighth street lying underneath the viaduct now in existence, and that the only traffic over that portion of said West Eighth street as aforesaid has been and is now local in character and confined exclusively to that traffic which has some connection with the business of certain industries located adjacent thereto. The facts as hereinbefore stated show that all the through or inter-county traffic has been carried over the viaduct which was constructed in 1894.

From these facts, and applying the spirit and intendment of the law, it is my opinion that inasmuch as there is no through or inter-county traffic over that portion of West Eighth street lying underneath said viaduct, and that all of said through or inter-county traffic has been moving over said viaduct, the Fisher Act (Sections 6956-22, et seq., of the General Code) is not applicable.

Respectfully,

EDWARD C. TURNER,
Attorney General.

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BOARD OF PARK COMMISSIONERS—NOT COUNTY BOARD—AUTHORITY
TO PAY TRAVELING EXPENSES OF SECRETARY.

SYLLABUS:

1. *A board of park commissioners, not being a county board within the purview of Section 2917, General Code, may lawfully employ counsel other than the prosecuting attorney to represent it.*

2. *If a board of park commissioners in its sound discretion believes that such travel is necessary and proper in the carrying on of the business of the park district, such board may allow and pay the traveling expenses of its secretary, when the trip or journey in which such expenses were incurred is necessarily implied in or reasonably and directly incident to the duties of the secretary, but traveling expenses incurred by such secretary in attending conventions, or on like trips, cannot be allowed and paid out of the public funds.*

COLUMBUS, OHIO, April 5, 1927.

HON. OSCAR A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated March 29, 1927, which reads as follows:

“In Summit county the park commissioners organized pursuant to the provisions of law, are known as The Metropolitan Park Board; they have jurisdiction over the entire county with the exception of two districts, to-wit, Hudson village and Twinsburg township. Recently the members of the board being confronted with some legal questions, conferred with a firm of local attorneys and thereafter the attorneys duly rendered a bill to the board in the sum of two hundred dollars for legal advice.

Our first question is whether this bill may be legally paid or whether the prosecuting attorney is the legal advisor to the park board. In the Opinions of the Attorney General of 1919, Volume 1, at page 217, et seq. is an opinion holding that the prosecuting attorney of a county is not compelled to furnish