

2834.

BRIDGES—LOCATED PARTLY WITHIN MUNICIPALITY AND PARTLY WITHOUT SAME—REPAIRS AND MAINTENANCE DISCUSSED—SPECIFIC PROJECT IN ATHENS COUNTY DISCUSSED.

*SYLLABUS:*

1. *Where a bridge was constructed in 1876 over a stream located at the edge of a municipality, by the county commissioners on what is now a state road and an extension thereof, a part of said bridge lying within a municipal corporation, and at the time of said construction a railroad contributed toward the same, the said bridge being constructed so as to carry the highway over said railroad, which is within the corporation, thereby eliminating a grade crossing, and it is not such a bridge as the Director of Highways may properly initiate proceedings to relocate, reconstruct or realign under Section 1229-19 of the General Code, it is the duty of the Director of Highways, if the public safety requires it, to reconstruct that portion of said bridge which lies outside of the municipality.*

2. *The county is required to maintain and keep in repair the portion of said bridge situated within the limits of the municipality, except that portion thereof which the railroad is required to maintain.*

3. *Under Section 1229-19, General Code, as amended in 112 O. L. 504, it is the duty of the railroad company to maintain and keep in good repair that portion of said bridge which carries the highway over its tracks, which would include rebuilding of said structure if the circumstances require it.*

4. *The state may co-operate with the county, as to the portion the county is required to maintain within the municipality.*

5. *The county may co-operate with the state in the reconstruction of that portion of said bridge which lies outside of the municipality.*

6. *The city may voluntarily co-operate with the county, or may co-operate with both county and state as to the portion of said bridge within the municipality which the railroad is not required to maintain.*

COLUMBUS, OHIO, November 3, 1928.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

“There is a public highway bridge south of Athens which spans both The B. & O. S. W. R. R. tracks and the Hocking river. This bridge is commonly known as the South bridge and is constructed in a northeasterly and southwesterly direction. The southwesterly corporate boundary of the city of Athens extends to and is the low water mark on the northeasterly side of the river. The Hocking river and the territory immediately adjacent thereto on the southwest is without the city of Athens and within and constitutes a part of the county of Athens. The B. & O. tracks and right-of-way lie northeast of said river and within the corporation of the city of Athens. This South bridge constitutes a part of the Athens-Pomeroy highway and the Athens-McArthur highway and over and across which said bridge Federal Route No. 50 and State Route No. 31 are located. The state highway department has never constructed, taken over or repaired any of the streets over and along which State Route No. 31 and Federal Route No. 50 are directed. The city of Athens neither demands nor receives any part of the bridge fund levied upon property therein and neither has it so demanded or received for and during many years last past.

On or about the year 1876 and for a number of years immediately prior thereto, a bridge was then located across the Hocking river near the location of the present bridge. This earlier bridge was much lower than the present one and built so near the water level in said Hocking river as to enable and enabling the northeast end thereof to rest on the ground at a point southwest of what is now the B. & O. tracks and right-of-way, and the approach at the northeast end of said lower bridge crossed such railroad tracks at grade. During the year 1876 the county commissioners of Athens county renewed this bridge, raised the abutments and threw the northeast end thereof, over said railroad tracks and right-of-way, causing the northeast end of said bridge to strike the ground at a point lying north and east of such railroad property and at a height thereover sufficiently great to enable trains to operate under said bridge, and then and there building an abutment or support under said bridge at a point where the northeast end thereof formerly struck the ground and which said abutment was built on or near the corporate boundary of said city, thus raising and removing the road across said railroad tracks which theretofore had constituted a grade crossing into that of an overhead crossing. The bridge so constructed in 1876 has heretofore been replaced but its construction has been at all times such as to permit the free and unobstructed operation of railroad trains thereunder. Recently certain so-called bridge engineers and experts have condemned this bridge and especially that portion of it immediately overlying the tracks of the B. & O. railroad. Certain other so-called experts have said that the bridge was safe. Whether this bridge be safe or unsafe, there is no official, either railroad, city, county or state willing to assume the consequences should this bridge collapse.

It appears from the commissioners' records kept and maintained for and during the year 1876, that the present B. & O. property was then owned by The Marietta & Cincinnati Railroad Company, and that such railroad company and commissioners entered into an agreement relative to the constructing and maintaining of the bridge so constructed during the year 1876. The minutes of the commissioners' meetings appear in their regular journal and bearing date of March 7, 1876, insofar as the same pertains to such agreement and consideration therefor, are in the words and figures following, to-wit:

The county commissioners having completed and opened for use the new bridge across the Hocking river near to and on the up-stream side of the old South bridge forming a part of the road now known as the Albany road and abandoned and vacated the use of the road at that point as a grade crossing of The Marietta & Cincinnati Railroad and substituted therefor by means of said new bridge a crossing over said railroad according to the terms and conditions of the contract made with The Marietta & Cincinnati Railroad Company as reorganized and evidenced by the written obligation of said company bearing date May 15, 1875, by which among other things it was stipulated that said new overhead bridge should be perpetually maintained by the county of Athens and all care and risk and the expense of such maintenance be assumed by said county, and it is now ordered that on payment of said five thousand dollars, said obligation be surrendered to said company with the proper official receipt of the county commissioners endorsed thereon and that the county auditor be authorized and required to make his draft on said railroad company in favor of the county treasurer for said sum of five thousand dollars, and to deliver to said company the obligation and receipt aforesaid.

In the matter of the five thousand dollars due from Marietta & Cincinnati Railroad Company as per contract for construction of a bridge over Hocking river and railroad track at Athens, Ohio. Said company having this day paid into the county treasury the said five thousand dollars, receipts were given and contract surrendered, having been satisfactorily complied with.

This railroad property is now owned by The Baltimore & Ohio Southwestern Railroad Company and I am not advised as to when the present owners acquired this property nor from whom it acquired it, neither am I advised as to what extent, if at all, the contract entered into between The Marietta & Cincinnati Railroad and the commissioners of Athens County would inure to the benefit of the successor or successors of The Marietta & Cincinnati Railroad Company.

*QUERY:*

1. Is the State of Ohio through its Director of Highways obligated to rebuild or repair this bridge or any part thereof?
2. Should you decide that the State of Ohio should rebuild only part of this bridge, then what part should they build and who or what combination should build the remaining portion?
3. Is it the duty and legal obligation of the county commissioners of Athens County, Ohio, to build this bridge or any part thereof?
4. Should you decide that it is the duty of the commissioners to build only a part of this bridge, then who or what combination should build the remaining portion thereof?
5. To what extent, if at all, should the B. & O. Railroad Company contribute toward the reconstruction of this bridge?
6. What part of this bridge, if any, and if not all, should the city of Athens build?

I herewith enclose a plat and diagram of a part of the bridge and surroundings. This diagram will show the railroad property, the corporation boundaries of the city, as well as the location of the Hocking river."

From the statements in your letter, together with the complete plat which you enclose and additional information obtained from a conference with certain officials of the highway department, it appears the bridge in question was constructed in its present status in 1876 by the county commissioners; that the railroad company paid five thousand dollars (\$5,000.00) toward the cost of said construction and the county commissioners, in express terms, agreed perpetually to maintain the bridge; and that the span over the railroad is located within the municipal limits of the city of Athens, including the substructure.

It further appears that originally there was a grade crossing over the railroad prior to the construction of said bridge in its present form and that said separation was not done in pursuance to any statutes expressly dealing with the subject. Also, based upon impressions received from the highway department, it will be assumed, for the purposes of this opinion that the highway existed before the construction of the railroad. Furthermore, it appears that it is not considered by the Department of Highways as being feasible to relocate or reconstruct such crossing, in whole or in part, without the present right of way.

Your inquiries present a number of complicated questions in view of the present status of the law governing the state and county highways. It is believed pertinent at this point to give consideration to the provisions of Section 1229-19, General Code, as enacted in 112 O. L. 504, which relates to the power of the Director of Highways

to initiate proceedings to relocate and reconstruct certain separated crossings. In my opinion, No. 2661, issued on October 1, 1928, a copy of which is herewith enclosed, it was held, as disclosed by the syllabus, that :

“Section 1229-19 of the General Code does not authorize the director of highways to relocate and reconstruct or widen, reconstruct or realign a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, or Sections 6956-22 to 6956-39 of the General Code, where it is not proposed to relocate and reconstruct such crossing in whole or in part without the right of way of the state highway, or where the highway was in existence prior to the railway.”

From the foregoing, it will be seen that Section 1229-19 above referred to has no application to the situation at hand insofar as the Director has authority to initiate proceedings to relocate, reconstruct, etc. The separated crossing being considered was not constructed in pursuance to the provisions of Sections 8863 to 8894, or was not constructed under the authority of Sections 6956-22 to 6956-39 of the General Code, which sections were mentioned as an exception in Section 1229-19, supra. In examining the legislative history of the group of sections above mentioned, it must be concluded that they have no application, for the reason that they were not in existence at the time of the construction under consideration. Sections 8863 et seq. were first enacted in the year 1893 (90 O. L. 359), and there was no similar law in existence prior thereto. Likewise, Sections 6956-22 et seq. were first passed in their present form in 110 O. L. 231, although there was similar legislation in the enactment of Section 6956-22 in 106 O. L. 574.

Thus, it will be seen we must search for further authority, insofar as the powers and duties of the highway director are concerned, in connection with your inquiry. At this juncture of the discussion, it is believed pertinent to consider Section 1224 of the General Code, which, as amended in 112 O. L. 453, provides :

“The director shall maintain and repair to the required standard, and, when in his judgment necessary, shall widen, reconstruct, resurface, repair or maintain all highways comprising the state highway system and bridges and culverts thereon. In repairing the state highway system the director shall not be limited to the use of the material with which such highways or roads and bridges and culverts thereon were originally constructed, but may reconstruct, widen, repair, resurface and maintain such highways or roads and bridges and culverts thereon by the use of any material which he deems proper. Nothing in this act shall be construed so as to prohibit the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said highways.”

The section last quoted, together with related sections, were under consideration by this department in a lengthy opinion, No. 1674, rendered February 4, 1928, to Hon. John H. Houston, prosecuting attorney of Brown County. Said opinion considered, among others, Sections 1178, 1184, 1197, 1224, 2421 and 7557. The following is quoted therefrom :

“I therefore conclude that so much of the provisions of Sections 2421 and 7557 as make it the duty of county commissioners to keep in repair necessary bridges and culverts over streams and public canals on *state* roads were repealed by Section 1224 and related sections of the General Code, as amended by the 87th General Assembly in House Bill No. 67, and that it is the duty

of the Director of Highways to maintain and repair all roads and highways and the bridges and culverts thereon in the state highway system.

Insofar as bridges and culverts on county roads are concerned, the provisions of Sections 2421 and 7557, supra, to the effect that the commissioners shall construct and keep in repair certain bridges over streams and public canals on county roads are entirely consistent with the provisions of Section 7464, as amended, and 7467 which provides that the county commissioners shall maintain all roads in the county highway system. There can be no question, therefore, but that it is the duty of county commissioners to maintain and keep in repair bridges on county roads."

While the said opinion primarily dealt with "maintenance and repair," it is believed that what was said therein upon that subject would, by analogy, apply to the reconstruction of a bridge, because Section 1224, supra, as last amended, specifically mentions reconstruction. It follows that it is the duty primarily of the Director of Highways to reconstruct bridges, when necessary, on roads that form a part of the state highway system.

Prior to the recodification of the highway laws in 1927 (112 v. 430), it was generally conceded that streets and bridges within a municipality were in a different status than those without, insofar as state control, construction and maintenance were concerned, and it is believed said enactment did not in any wise change the rule in this respect. In fact, Section 1224-1a would seem, in express language, to show intent to continue said rule. The following is quoted from said section:

" \* \* \* The director may at his discretion construct, reconstruct, improve, maintain or repair any continuation of a highway on the state highway system through the limits of a municipal corporation, and the bridges and culverts thereon, but he shall first obtain the consent of the legislative authority of such municipal corporation before proceeding with such work. He may also if he deems it to the best interest of the public, upon obtaining the consent of the legislative authority of any city, maintain or repair any continuation of such road or highway within such city, and he may construct or reconstruct the bridges and culverts thereon, and pay the portion agreed to of such work from state funds. \* \* \* "

In my Opinion No. 2331, issued July 6, 1928, it was pointed out that Section 7464, General Code, which among other things provides:

" \* \* \* State roads shall include the roads and highways on the state highway system. \* \* \* "

had no bearing whatever upon the duty of the respective subdivision with respect to maintenance, etc., of streets within municipalities which may be continuations of either state or county roads.

Also in my Opinion No. 2557 issued on September 7, 1928, as disclosed by the syllabus it was held:

"It is the primary duty of the county commissioners to maintain and repair bridges within the boundaries of a municipality located upon extensions of state roads, while it is the duty of the director of highways to maintain and repair bridges upon state roads located outside of the boundaries of municipalities. Where a bridge is located partly within and partly without a mu-

municipality, the duty of maintenance and repair of that portion without the municipality rests upon the director of highways, and a similar duty rests upon the county commissioners with respect to that portion located within the boundaries of the municipality."

It, therefore, seems clear that it is the primary duty of the state to maintain in proper condition for public travel that portion of said bridge which lies outside of the corporate limits of the city being considered. It further follows that it is the primary duty of the county to maintain in proper condition for public travel that portion of said bridge which lies within the municipal limits, except insofar as the status of the matter may be affected by the existence of the railroad in question, which phase of the situation will be later considered herein.

As heretofore indicated Section 1224-1a, supra, authorizes the Director of Highways in his discretion to co-operate, if he desires to do so, as to the portion within the city. Also, as pointed out in my Opinion No. 1423, reported in Opinions, Attorney General for the year 1927, Vol. IV, page 2600, the county may co-operate with the state under Section 1191, General Code, as amended in 112 Ohio Laws, page 500, "in the construction or reconstruction of bridges and viaducts within municipal corporations." In such cooperation the commissioners may pay such portion of the cost as may be agreed upon between said commissioners and the Director of Highways.

From the foregoing it will be seen that there is no legal duty upon the city to reconstruct said bridge. As held in an opinion reported in the Reports of the Attorney General for 1919, Vol. II, page 1622:

"2. Municipal corporations, both cities and villages, are under the duty of maintaining bridges on streets established by the city or village for the use and convenience of the municipality and not a part of a state road, county, road, free turnpike, improved road, abandoned turnpike or plank road.

Whether or not such cities may voluntarily co-operate with the state, the county or both, is not so easy to determine. However, it will be noted that by the terms of Section 3677, General Code, municipal corporations have power to appropriate real estate for bridges, aqueducts, viaducts and approaches thereto. Under Section 3629 they have power to improve, keep in order and repair, light, clean and sprinkle bridges and viaducts within the corporation; under Section 3939 they have power to acquire real estate and to construct or improve viaducts, bridges and culverts; and under Section 4325 the duty of supervising the improvement and repair of bridges, viaducts and aqueducts is in cities charged upon the director of public service. Therefore, it would seem that the city may construct or repair any bridge within a municipality, although there is no primary duty to do so as to those upon state or county roads.

The foregoing conclusions have been drawn without consideration to the obligations, if any, of the railroad company. It has heretofore been pointed out that, in view of the facts, Section 1229-19 could have no application, insofar as initiating a proceeding to reconstruct by the Director of Highways is concerned. Attention is directed to the case of *State vs. The Pennsylvania Railroad Co.*, decided by the Court of Appeals of Noble County in November, 1926, which case is unreported. The facts in that case as stated by the court in its opinion, are as follows:

"The facts important to a proper understanding and determination of the issues are briefly as follows: North street is one of the traveled thoroughfares in the village of Caldwell, sixty-six feet in width. The railroad was constructed about the year 1869, and it was built on the private right of way of the com-

pany, and at which point it passes through a cut about eighteen to twenty feet below the surface of the ground on each side of its right of way.

At the time of the building of the railroad the locality in question was not within the village limits, but by an extension of municipal lines it is now included. Therefore, at the time the railroad was constructed there was no highway across the right of way of the company at the point in controversy, nor were the lands at each side of and adjacent to the right of way laid out in town lots at the time. The lands east of and adjacent to the right of way were platted, and North street extended westerly from the village to near the railroad right of way in, perhaps, 1881. The lands west of and adjacent to the right of way were platted and North street was extended from the west line of the right of way westward in 1896.

In 1895 the County Commissioners began a proceeding in the Probate Court to condemn a right of way across the railroad right of way at the point herein involved, but by some satisfactory arrangement between the railroad company and the County Commissioners the suit was withdrawn and a contract entered into, by the provisions of which the County Commissioners were to construct, and did construct, the present bridge over the right of way, the same being 108 feet in length and having its foundation or abutment at either end entirely off the right of way of the railroad company, in consideration of which the company agreed to pay, and did pay, the sum of four hundred and fifty dollars to the construction of the bridge.

This constituted a separated, or overhead crossing of the railroad, which was used for public travel prior to December 8, 1924, at which time the highway being used for rather heavy traffic, and being an extension of Inter-county Highways Numbers 353, 386, 390 and 391, the bridge upon examination, was declared unsafe for the use of the traveling public and was closed to the same, and so remains to date.

The topography of the location of this crossing is such as to render it practically out of the question to make a grade crossing, due to the fact that the railroad at this point runs through the cut above mentioned, and some twenty feet below the surface. It has become necessary, therefore, to either properly repair, or replace the present bridge by a new one, and it is to require the railroad company so to do that this action is brought."

The state in an exhaustive brief contended that it was the duty of the railroad to reconstruct the bridge under Section 8843, General Code, which then provided :

"Companies operating a railroad in this state, shall build and keep in repair good and sufficient crossings over or approaches to such railway, its tracks, sidetracks and switches at all points where any public highway, street, lane, avenue, alley, road or pike is intersected by such railway, its tracks, sidetracks or switches; also good and sufficient sidewalks on both sides of streets intersected by their roads, the full width of the right of way owned, claimed or occupied by them. Crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine as to their kind and extent, and the time and manner of constructing them."

The court held that said section did not apply because it related to grade crossings as contradistinguished from so-called separated crossings. The court further held that Sections 8869 and 6956-34, both of which are a part of the grade separation statutes, and both of which provide that, after the completion of a separated crossing,

when the public way crosses a railway by an overhead bridge, the cost of maintenance must be borne by the county or state as provided by law, were determinative of the question. The following is quoted from said opinion:

"Having in mind the provisions of 8843 it becomes apparent that the same relates to grade crossings, as held by the court below; while on the other hand, the other two sections apply to the situation here, and which places the burden upon the authorities, having the highway in charge.

The old bridge was practically constructed by the County Commissioners with the voluntary aid of the Railroad Company, and that arrangement which was complied with by the railroad company imposed no further obligation, and it would seem that the County Commissioners have not kept the present structure in repair as they were required to do up to the time of the passage of the sections of the statute last above named; however, the present situation is one relating to the proper repair of the old or construction of a new bridge, and evidently the rights of the parties are fixed by the statutes last above named.

Such being the case the burden of the responsibility of such change as may be necessary is imposed, as above stated, upon the authorities having the highway in question, in charge."

A motion was made in the Supreme Court of Ohio to require the Court of Appeals to certify its record, which was overruled.

This decision of course was based upon the law existing at that time. However, attention is called to the latter part of Section 1229-19, supra, which provision was not heretofore discussed in considering the power of the Director of Highways to initiate proceedings to reconstruct, etc., separated crossings under said section. The portion of said section which is pertinent at this time to consider reads:

"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."

In analyzing the provisions of this section in connection with the opinion in the Noble County Case, supra, the conclusion is irresistible that said Section 1229-19, General Code, clearly places the burden upon the railroad of maintaining and keeping in repair the portion of said bridge which carries the highway over its tracks; unless said railroad is excused from such duty by virtue of the provisions of the contract to which you refer, to the effect that the county shall forever maintain said bridge.

The section last quoted from evidently was amended to place upon the railroad the burden of maintaining overhead crossings of the class therein defined and such amendment was apparently made in view of the holding in the said Noble County Case.



Section 1229-19, *supra*, refers to crossings, "whether at grade or otherwise." If such language had been used in Section 8843, *supra*, at the time of the decision in the Noble County Case, *supra*, it is believed the opposite conclusion would have been reached by the Court. While the section requires the railroad to "maintain and keep in good repair, good, adequate and sufficient crossings," I have no difficulty in arriving at the conclusion that the language used is sufficiently broad as to include what is tantamount to reconstruction if the same be necessary.

"Maintain" has been defined in 38 Corpus Juris on page 334 as follows :

"As its structure suggests, 'maintain' signified literally, to hold by the hand. While it is a word of common use and said to have a well defined meaning, oftentimes its meaning depends upon the intention of the parties and the context of the instrument. It is variously defined as to bear the expense of, to continue; to furnish means for the subsistence or existence of; to hold in an existing state or condition; to hold or preserve in any particular state or condition; to keep from change; to keep from falling, declining, or ceasing, to keep in existence or continuance; to keep in proper condition; to keep in repair; to keep up, to preserve; to preserve from lapse, decline, failure, or cessation; to provide for; to supply with means of support; to supply with what is needed; to support; to sustain; to uphold. Negatively stated, it is defined as not to lose or surrender; not to suffer or fail or decline."

It is believed that in the use of the language in connection with maintenance of a bridge, maintain relates to the furnishing of the means for keeping such bridge in repair and preserving the same in good condition so as adequately and safely to provide for the traffic of the public over the same. It follows that if it is the duty of the railroad to maintain said bridge and the bridge is in such condition that the only manner in which it may be continued is by rebuilding the same, that duty would be imposed upon the railroad by virtue of the section.

What has preceded necessitates a consideration of the contract which the predecessors of the present railroad company under consideration had with the county commissioners. I do not find any general or special law to have been in effect at that time authorizing the county commissioners and railroad company to enter into such a contract. It may be that such action was regarded as an implied power necessary to carry into effect the special power to construct and maintain roads, bridges, etc. In any event it is believed that said contract is ineffectual insofar as it attempted forever to surrender the rights of the public. To have a railroad maintain its burdens as provided by law. In the case of *The Lake Shore & Michigan Southern Railway Co. vs. The City of Elyria*, 69 O. S. 414, it was held :

"3. Where a railroad company, for the purpose of supporting its overhead crossing of a public city or village street, erects and maintains abutments which occupy a portion of the street, excluding the public therefrom, and claims the right to do so under a contract made with the municipal council, it must appear that the council was authorized by statute in express terms, or by clear implication therefrom to make such contract; and mere general legislation authorizing a railroad company to occupy a street for the purposes of its road, is insufficient for such permanent and exclusive use. *Ravenna vs. The Pennsylvania Co.*, 45 Ohio St., 118, approved and followed.

4. Section 3283, Revised Statutes, does not authorize a city or village council to agree with a railroad company for the permanent and exclusive occupation of a public street with abutments to support an overhead cross-

ing of the railroad; nor can such occupation be rightly gained by means of appropriation; and if the company so occupying the street refuses to restore it to its former condition of usefulness to the public, it may be compelled to do so by mandatory injunction, without a right to compensation for the expense of removal."

Said case was cited by the Supreme Court of Ohio in its opinion in the case of *State, ex rel. vs. The Sandusky, Mansfield & Newark Rd. Co., et al.*, 111 O. S. 512, in the following language:

"The public use must, of course, be dominant in the street and must continue to be so notwithstanding the construction of a railroad in or across it. Accordingly this court held in *Lake Shore & M. S. Ry. Co. vs. City of Elyria*, 69 Ohio St., 414, 69 N. E., 738, that a municipal council did not have the power to grant a railway company the exclusive and permanent occupation of a public street; and if such condition were here presented the decisions in that case, and the case of *L. & N. Rd. Co. vs. City of Cincinnati*, supra, would be decisive of the question."

Said Elyria Case, supra, has been cited many times by the Supreme Court of Ohio, and while it dealt with the proposition that a municipality cannot grant away the rights of the public by giving a permanent franchise to use the street under general statutes authorizing them to grant permission to occupy streets, by analogy it is believed said case is authority for the conclusion that the county commissioners had no power in the absence of express statutory authority forever to place the burden upon the county of maintaining a bridge, a portion of which was constructed in such a manner as to be beneficial to the railroad. The highest courts of this state have consistently held that county commissioners possess only such powers as are expressly given to them by statute, and such implied powers as are necessary to carry into effect the express powers conferred.

Based upon the foregoing it is my opinion that:

1. In view of the facts stated and assumed, it is the primary duty of the Director of Highways to repair or reconstruct, if necessary for the public safety, that portion of the bridge under consideration that lies outside the corporate limits of the municipality.
2. The county is required to maintain and repair the portion of said bridge situated within the limits of the municipality, except that portion thereof, which the railroad is required to maintain.
3. Under Section 1229-19, General Code, as amended in 112 O. L. 504, it is the duty of the railroad company to maintain and keep in good repair that portion of said bridge which carries the highway over its tracks, which would include rebuilding of said structure if the circumstances require it.
4. The state may co-operate with the county as to the portion of said bridge which the county is required to maintain within the municipality.
5. The county may co-operate with the state in the reconstruction of that portion of said bridge which lies outside of the municipality.
6. The city may voluntarily co-operate with the county, or may co-operate with both county and state as to the portion of said bridge within the municipality which the railroad is not required to maintain.

In passing it may be stated, however, that since there is a joint obligation upon the state, county and railroad to maintain said bridge, in view of its peculiar situation, undoubtedly the problem of putting said bridge in a safe condition for public travel is one which should be worked out by a common undertaking, participated in by the railroad company and the county and state, and by the city in case the proper authorities of the city deem it proper to co-operate.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

2835.

ATTORNEY—VILLAGE COUNCIL—WHEN LEGAL COUNSEL MAY BE EMPLOYED TO DEFEND POLICE AND BE PAID FROM PUBLIC FUNDS.

*SYLLABUS:*

*A village council may legally expend public funds to pay legal counsel for defending a police officer of the village in a civil action, for assault and battery arising out of the arrest of a person within the confines of a village for a breach of the peace, where it finds that the officer was in good faith attempting to discharge the duties imposed upon him by law as such police officer.*

COLUMBUS, OHIO, November 3, 1928.

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

GENTLEMEN:—This will acknowledge your letter dated March 13, 1928, which reads:

“A police officer of a village was sued in Common Pleas Court for assault and battery arising out of an arrest of the plaintiff for a breach of the peace. The case was defended by legal counsel employed by the village and the evidence disclosed that the officer was not guilty of any wrong but was acting within the line of his duty. The case was dismissed by the court.

The question has arisen as to whether a municipal corporation may pay the attorney for defending the officer, such attorney being retained by the village on a basis which entitles him to extra compensation for law suits.

The syllabus of Opinion No. 1556, page 1395, Opinions of the Attorney General for 1916, reads:

‘The council of a village is without power to employ legal counsel to defend the village marshal against a complaint for shooting with intent to kill, arising out of the performance by the marshal of his duties as a conservator of the peace and in the enforcement of the state law, or of an ordinance passed by the council in the exercise of the police power delegated to it by the state.’

QUESTION. May the village legally pay from public funds the attorney fees in question?”

The opinion to which you refer appears in Volume II of Opinions of the Attorney General for 1918, at page 1395, rather than in Opinions of the Attorney General for 1916.