Therefore, in specific answer to your question, you are advised that it is proper for the City of Cincinnati or the Rapid Transit Commission to pay to the Telephone Company the item of Workmen's Compensation premium.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

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3814.

BRIDGES AND CULVERTS—WHERE RAILROAD COMPANY ERECTS AN OVERHEAD CROSSING PRIOR TO ENACTMENT OF GRADE CROSSING ELIMINATION STATUTES—DUTY OF RAILROAD COMPANY TO KEEP UP REPAIRS—WHEN COUNTY MAY AND SHOULD MAKE REPAIRS—HOW PAID—LEGAL PROCEDURE.

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 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.*

COLUMBUS, OHIO, December 20, 1922.

HON. F. M. CUNNINGHAM, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—You have asked the opinion of this office as to the following matter:

> "The county commissioners of Warren County have requested me to present a matter for your consideration. In March, 1877 the county commissioners entered into a contract or agreement with the superintendent of the Cincinnati & Muskingum Valley R. R. Co., concerning the erection of overhead bridges across the railroad. A copy of said agreement is herewith inclosed for your examination.
>
> Section 8869, General Code, is as follows:
>
> 'After the work is completed, the crossing and its approaches are to be kept in repair as follows: When the public way crosses the railroad by an overhead bridge, the frame work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the surface of the bridge and its approaches, by the municipality or county in which they are situated. When the public way passes under the railroad, the bridge

and its abutments shall be maintained and kept in repair by the railroad company, and the public way and its approaches, by the municipality or county in which they are situated.'

The board of county commissioners desire to know whether the agreement made with said railroad company, in March, 1877, will have the effect to relieve them of the repairs mentioned in said section 8869."

The agreement referred to in your letter, as shown by the copy submitted, is as follows:

"In the Matter of the Cadwalader and Hicks Station Bridges, C. and M. V. R. R. Co.

It is hereby agreed by O. O. Waite, Superintendent of the Cincinnati & Muskingum Valley R. R. Co. to rebuild said bridges in a good and substantial manner, by the commissioners of Warren county appropriating one hundred dollars ($100) for each bridge out of the Bridge Fund of said county as a voluntary contribution to the purpose of building new bridges on the old sites where the present bridges now stand. Said sums to be drawn as other moneys are drawn from said fund but not until said railroad company shall have completed the building of said bridges respectively, nor shall this appropriation be taken as a precedent or concession as to any obligation on the part of the commissioners to build bridges at the railroad crossings in this county."

Further information from you since the receipt of your request is to the effect that since the time of the rebuilding of the bridges in question, as specified in said agreement, the county has not paid for any repairs on said bridges; and that while your commissioners are not advised whether any repairs have been made, they state that if made, such repairs must have been paid for by the railroad company.

The statute quoted in your letter, section 8869 G. C., is part of a group of sections (sections 8863 to 8873) relating to the alteration or elimination of railroad grade crossings. Immediately following said group of sections there is another group, sections 8874 to 8891, dealing with the same subject matter. The difference between the two groups of sections is that the former relate to proceedings amicable in their nature as between the public and the railroad company; whereas the latter authorizes adversary proceedings on the part of the public. The latter group contains a section, 8889, somewhat similar in its provisions to section 8869.

It is important to note from the history of present sections 8863 to 8891 that they did not find their way into the statutes until the year 1893. At that time the General Assembly passed an act entitled "An act to provide for the abolition of dangerous grade crossings." See 90 O. L. 359. From that act our present grade elimination statutes have been evolved.

The agreement referred to in your letter was entered into long before the passage of any grade elimination statutes, and the rebuilding of the two bridges as contemplated by said agreement took place long before the passage of any grade elimination statutes.

The general powers of railroad companies in the matter of occupying public roads, streets, etc. are dealt with in sections 8763 et seq. The courts have held

with reference to the grant of power in those statutes that municipal authorities have not the right to agree with the railroad company for the permanent and exclusive occupation of a public street with the abutments to support an overhead crossing. See Railroad Co. vs. Elyria, 69 O. S. 414; R. R. Co. vs. Defiance, 52 O. S. 262; R. R. Co. vs. Cincinnati, 76 O. S. 481.

Similarly, there has long been a part of the statutes, present section 2424 G. C. which reads as follows:

> "If a bridge or any state or county road, or any public building, the property of or under the control or supervision of a county, is injured or destroyed, or when any state or county road or public highway has been injured or impaired by placing or continuing therein, without lawful authority, any obstruction, or by the changing of the line, filling up or digging out of the bed thereof, or in any manner rendering it less convenient or useful than it had been previously, by a person or corporation, such person or corporation shall be subject to an action for damages. The board of commissioners of the proper county may sue for and recover of such person or corporation the damages which have accrued by reason thereof, or such as are necessary to remove the obstruction or repair the injury."

And, see R. R. Co. vs. Commissioners, 31 O. S. 338; State ex rel. vs. R. R. 36 O. S. 434.

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. It is no answer to the proposition just stated that the General Assembly has seen fit to divide the cost of maintenance as between county and railroad company as to grade crossing elimination structures erected in accordance with sections 8863 et seq. and 8874 et seq.; for we find that sections 8869 and 8889 refer specifically to construction work which is carried out under the respective provisions of sections 8863 et seq. and 8874 et seq. It is very difficult, under these circumstances, to find any implication that sections 8869 and 8889 have any reference whatever to bridges which were erected prior to the passage of the grade crossing elimination statutes. In short, sections 8869 and 8889 deal with a state of affairs which was not even remotely contemplated when the bridges were built.

The views just stated find support in the case of Railway Co. vs. Helber, 91 O. S. 231. The second syllabus in that case reads:

> "2. About thirty years prior to the injury complained of the defendant railroad company or its predecessor in title made a cut in, under and through a public highway and erected a bridge therein over the cut and over its railroad; the company thereafter and until the date of the injury maintained the bridge; Held, Under the state of facts, it was the duty of the company to make every reasonable provision for the safety of the public in the construction and maintenance of the bridge. To this end it was its duty to erect and maintain reasonably substantial guardrails on the bridge to serve as a protection to life and property."

It is quite true that in that case the county was not a party to the litigation, and that the action was one between private individuals and the railroad company; but it is at least worthy of note that the court in the course of the opinion makes reference to the fact that the bridge then in quesion was erected "long prior to the passage of the statutes regulating the construction of railroads across highways above or below grade, and providing for the rights and duties of the company with reference to them."

For the reasons thus briefly indicated, it is the view of this department that the duty of maintaining in their entirety the bridges in question rests with the railroad company and not with the county.

What has been said perhaps answers your question fully; but there is another feature of the matter deserving of mention. Section 2408 G. C. reads:

> "The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain and defend all suits in law or in equity, involving an injury to any public, state or county road, bridge, ditch, drain or watercourse established by such board in its county, and for the prevention of injury thereto. *The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair,* and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county or any money or other property due the county. The money so recovered shall be paid into the treasury of the county, and the board shall take the treasurer's receipt therefor and file it with the county auditor."

It would thus seem that *so far as the public is concerned,* county commissioners are under the duty of keeping roads and bridges in repair, and that a failure to perform that duty may result in liability on the part of the county. It is believed that the county commissioners are not relieved from such primary duty to the public upon the theory that the railroad company may be liable for the repairs. In the recent case of the City of Youngstown vs. Sturgess, 102 O. S. 480, the Supreme Court held, as shown by the syllabi:

> "1. Where a bridge has been constructed by county commissioners, upon a state or county road over a stream within the limits of a city, the city is nevertheless liable under the provisions of Section 3714, General Code, for damages to any person suffering injuries by reason of a nuisance being maintained upon any such bridge or the approach thereto.
>
> 2. The county primarily is obligated to construct and repair bridges upon state or county roads and the approaches thereto over streams within the limits of municipalities, but municipalities are not thereby relieved from their obligation to keep such bridges and the approaches thereto 'open, in repair and free from nuisance;' neither are such municipalities relieved from the duty to safeguard travelers upon such structures within the limits of municipalities against dangerous defects amounting to a nuisance."

It may be true that section 2408, being in derogation of the common law, is subject to strict construction in the matter of liability of the county (see Commissioners vs. Darst, 96 O. S. 163). Perhaps, also, the syllabi just quoted from the

Youngstown case contain a somewhat broader statement of principles than is disclosed in the course of the opinion. Nevertheless, and as a matter of "safety first", it is the belief of this Department that unless and until the courts otherwise decide, the county commissioners should be advised that, so far as the public is concerned, the relative duty of railroad and county as to repairing the bridges in question, is not to be distinguished from the relative duty of county and city as stated in the syllabi of the Youngstown case. Under these circumstances, it would seem that your county commissioners might properly notify the railroad company to make the repairs and that if not made by the company within a given time, the repairs will be made by the county at the expense of the company. If such notice does not produce results, then let the county make the necessary repairs and bring suit against the company if it fails to reimburse the county. An alternative to the procedure just outlined might perhaps be available to the county commissioners, namely, an action by them in mandatory injunction to require the railroad company to make the necessary repairs; this suggestion having reference to Sections 2408, 2424 and 8773, G. C., and the general principles announced in State ex rel. vs. R. R., *supra*.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

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3815.

APPROVAL, CONTRACT OF STATE OF OHIO WITH HARRY LUCAS, COLUMBUS, FOR DECORATING OF SOUTHWEST WING OF COMMITTEE ROOMS FOR SENATE AND HOUSE OF REPRESENTATIVES, STATE CAPITOL BUILDING, AT A COST OF $1,997—SURETY BOND EXECUTED BY J. P. REYNOLDS, COLUMBUS, OHIO.

COLUMBUS, OHIO, December 20, 1922.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (three copies) between the State of Ohio, acting by the Department of Highways and Public Works, and Harry Lucas, of Columbus, Ohio. This contract is for the decorating of southwest wing of Committee Rooms for the Senate and House of Representatives, State Capitol Building, Columbus, Ohio, and calls for an expenditure of One Thousand, Nine Hundred and Ninety-seven Dollars ($1,997.00).

Accompanying said contract is a bond to insure faithful performance, executed by Harry Lucas as principal and J. P. Reynolds, of Columbus, Ohio, as surety.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

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

Respectfully,
JOHN G. PRICE,
*Attorney-General.*