

County Commissioners, Authority of to Grant Use of Public Highway for Railway Purposes. Highway, Public, Authority of Commissioners to Grant Right-of-way over. Juveniles, Jurisdiction over Juvenile Delinquents.

The board of county commissioners has authority to grant the use of the public highway under such terms and conditions as they may deem for the best interest of the county for the use of a railroad. The railroad company having the right to take the public highway by condemnation the board has this authority to grant such right without condemnation proceedings.

Justice courts have no jurisdiction to try juvenile delinquents for any public offense but sit only as committing magistrates. Chapter 122, Session Laws of 1911 provides an exclusive remedy for the trial of juvenile delinquents.

February 28, 1912.

Honorable Desmond J. O'Neil,
County Attorney,
Roundup, Montana,

Dear Sir:

I acknowledge receipt of your letter of the 14th inst., submitting for my opinion three questions.

Your first question relates to the validity of a bond issue of school district No. 6, of your county, under a statement of facts contained in your letter. In reply to this question I will say that I have taken this matter up with the state board of land commissioners and am

today informed that this bond issue has been properly submitted to the board of land commissioners and has been favorably passed upon by this office and the board will in all probability make a bid for the issue. This fact eliminates the necessity of determining whether or not the bond issue would be valid under the statement of facts contained in your letter, although I am inclined to agree with you in your position.

In your second question you state that a petition has been filed with the board of county commissioners for a franchise granting the use of certain public highways and two county bridges on these highways for the use of a railroad to be constructed, and request my opinion as to whether or not the board of county commissioners has such authority. In reply I will say that under the provisions of Sec. 1357, Revised Codes, the board of county commissioners has general supervision over highways in their county. The right which the public has in land used for a public road or highway is usually simply an easement granted to the public by the individuals owning the fee. An easement or right-of-way so granted to the public is under the general supervision and control of the board of county commissioners, of the particular county in which the road is situated.

Under the provisions of sub-division 5 of Sec. 4275, Revised Codes, every railroad company has power:

"To construct their road across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

It is apparent from the provisions of the above section that a railway company would have the right to acquire by condemnation proceedings whatever easement or right the county may have in the highway and if the railroad may condemn this right by such a proceeding, it is my opinion that the right to use the public highway may be granted by the county commissioners without such condemnation proceedings being had—if in their judgment it is for the best interest of the county to do so.

The county not having title to the fee in the lands over which the highway extends the board of county commissioners could not, of course, grant to the railway company the right to use the fee for railway purposes, but such right would have to be obtained from the owners of the land either by grant or condemnation proceedings. This matter is fully discussed in an opinion addressed to Hon. Thos. J. Walker, County Attorney, Silver Bow county, dated Oct. 29, 1909, and found in Opinions of Attorney General 1908-10 at page 216.

The public bridges of the county constitute a part and portion of the public highway and if the county commissioners deem it for the

best interest of the county to permit a railroad line to cross the bridges they may do so in my opinion upon such terms and conditions as they deem advisable and best for the interest of the county. If the bridges are insufficiently strong to carry the increased weight, the board of county commissioners could require the railroad company to reinforce them or to make such improvements thereon as they might deem best for the interest of the county, and might make such other rules and regulations for the use of such bridges as they may deem for the best interest of the county.

It appears to me that if the railway company can condemn a right-of-way along or across a public highway in this state, that it can obtain such right-of-way by grant from the county through its board of county commissioners.

In answer to your third question as to whether or not a justice of the peace has jurisdiction to try a child under the age of 17 years of age for hunting without a license, it is my opinion that you are correct in your conclusion that the provisions of Chapter 122, Session Laws of 1911, are exclusive. Sec. 1 of this act in defining "delinquent child" or "juvenile delinquent person" includes any child 17 years of age or under who violates any law of this state, or any city ordinance of any city or town in this state. By the provisions of Section 6 of the act, when any child 17 years of age or under is taken into custody, such child shall be taken directly before the district court or if the district court is not then in session, it may be taken before the justice of the peace or police magistrate and the justice of the peace or police magistrate acts only as a committing magistrate and has no jurisdiction to try the child for the offense alleged to have been committed.

Yours very truly,

ALBERT J. GALEN,

Attorney General.