**Constitutional Law — Railroads — Crossings — Rights-of-Way—Highways.**

A railroad can be compelled to construct and maintain at its own expense a grade crossing over its right-of-way for a highway laid out subsequent to the railroad without first being compensated for an easement for the passage of the highway under Section 6625 R.C.M. 1921, which section is a valid and constitutional enactment.

Board of Railroad Commissioners, August 8, 1929.
Helena, Montana.

Gentlemen:

You have requested the opinion of this office on the following question:

> "May a railroad company be compelled to construct and maintain, at its own expense, a grade crossing over its right-of-way for a highway laid out subsequent to the railroad without first being compensated for a right-of-way, or easement, for the passage of the highway?"

Section 6625 R.C.M. 1921 provides as follows:

> "At all places in the State of Montana, outside of incorporated cities and towns where a lawfully established public highway now crosses or shall hereafter cross any railroad, it shall be the duty of the railroad company, owning or operating such railroad to construct and thereafter maintain, in proper condition, a good and safe crossing."

That section makes no provision for compensating the railroad for the construction of the crossing nor for damages for the crossing, nor, for that matter, for even a condemnation proceeding to secure a right-of-way. It is very plain; it merely provides that when a lawfully established highway crosses a railroad the railroad shall construct and maintain a good and safe crossing.

This office is unable to find any basis for the contention of the railway company that a right-of-way must be procured. Section 1647, enacted in 1895, provides that the railroad company is entitled to no compensation for the right of a highway to cross its right-of-way when the railroad is on public land and has no application.

There is no question of a right-of-way or easement involved in the language of Section 6625, supra. However, in view of the contention of the railway company that it need not construct the crossing until a right-of-way is condemned, we assume that it regards Section 6625 as unconstitutional and does not mean what it says.

That a statute of the nature of Section 6625 is constitutional was determined so long ago as 1889, in the case of New York & N. E. Ry. vs. Town of Bristol, 151 U.S. 556. This case was decided twenty years before the enactment of Section 6625. In this case an act of the legislature of Connecticut was objected to by the railroad company as unconstitutional. This act ("An Act Relating to Grade Crossings"—Conn. Pub. Laws, 1889, Chapter 220, p. 134) provided in part:

> "The selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway may bring their petition in writing to the railroad commissioners therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the sight of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what

alterations, changes, or removals, if any, shall be made, and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expense of such alterations or removals, including the damages to any person whose land is taken and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid by the railroad company owning or opening the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount not exceeding one quarter of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway; if, however, **the highway affected by such order last mentioned has been constructed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one half of the whole expense of such alteration, change or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway.**"

In disposing of the objections of the railroad that the act was unconstitutional the Supreme Court of the United States said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. Boston Beer Co. vs. Massachusetts, 97 U.S. 25, (24:989); Northwestern Fertilizing Co. vs. Hyde Park, 97 U.S. 659 (24:1036); Barbier vs. Connolly, 113 U.S. 27 (28:923); New Orleans Gas Light Co. vs. Louisiana Light & H. P. & Mfg. Co., 115 U.S. 650 (29:516); Mugler vs. Kansas,

123 U.S. 623, (31:205); Budd vs. New York, 143 U. S. 517 (36:247); 4 Inters. Com. Rep. 45.

"As observed by Mr. Justice Miller in Davidson vs. New Orleans, 96 U.S. 97, 104 (24:616), the 14th Amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of justice of the decision against him, and of the merits of the legislation on which such a decision may be founded'. To use the language of Mr. Justice Field in Missouri Pac. R. Co. vs. Humes, 115 U.S. 521, 520 (29:463, 465); 'It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures'.

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. Nashville, C. & St. L. R. Co. vs. Alabama, 128 U.S. 96; Georgia R. & Bkg. Co. vs. Smith, 128 U.S. 174; Minneapolis & St. L. R. Co. vs. Beckwith, 129 U.S. 26; Dent vs. W. Va. 129 U.S. 114; Charlotte, C. & A. R. Co. vs. Gibbes, 142 U.S. 386."

This case more firmly established this well-known principle of law: Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging of private property without just compensation.

C. B. & Q. Ry. Co. vs. Illinois, 200 U.S. 561,
50 Law Ed. 596;
Union Bridge Co. vs. United States, 204 U.S. 364,
51 Law Ed. 523;

N. P. Ry. Co. vs. Minnesota, 232 U.S. 430,
58 Law Ed. 671.

Section 6625 is a police regulation and as such is not susceptible to the constitutional objections as contended by the railway company. A New York statute authorizing the construction of highways across railroad tracks without compensation has long been held not to violate the constitutional provision against taking property for public use.

Railroad Co. vs. Brownell, 24 N.Y. 345;

Boston A. & R. Co. vs. Village of Greenbush,
5 Lansing, 461.

Similar statutes have been upheld in

Ry. Co. vs. Sharpe, 38 Ohio State, 150;

Lake Shore Ry. vs. Cincinnati Ry., 30 Ohio State, 604;

Thorpe vs. Ry. Co. 27 Vermont, 140.

The principle underlying the rule of law applicable to Section 6625 is stated in the following language in Chicago & N. W. Ry. Co. vs. City of Chicago, 29 N.E. 1109:

> "Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right-of-way. Lake Shore and M. S. R. Co. vs. Cincinnati S. & C. R. Co., 30 Ohio St. 604. In the separate opinion in Chicago & A. R. Co. vs. Joliet, L. & A. Ry. Co., 105 Ill. 388, it was said: 'Unless, therefore, every railroad corporation takes its right-of-way subject to the right of the public to have other roads, both common highways and railways, constructed across the track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude'. If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies, in their relations to highways and streets which intersect their rights-of-way, are subject to the control of the police power of the state,—that power of which this court has said that 'it may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed the 'law of overruling necessity'. Lake View vs. Cemetery Co., 70 Ill. 191. The requirement embodied in Section 8 that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights-of-way is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right-of-way should be constructed by the railroad company, and maintained by it, because of the dangers attending the operation of its road."

Section 8 of "An Act in Relation to Fencing and Operating Railroads" (2 Starr & C. Ann. St. Ill. page 1927) provided:

> "Hereafter, at all of the railroad crossings of highways and streets in this state, the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights-of-way, so that at all times they shall be safe as to persons and property."

Section 6625 clearly does not make the condemnation necessary. If it were necessary to condemn the strip to carry the highway across the railroad right-of-way Section 6625 would not be applicable because if the land were condemned by the county the railroad certainly could not be compelled to construct a portion of the highway on land owned by the county. Section 6625 means nothing more than that the county need only construct the highway up to the railroad right-of-way on either side and the railroad must construct a good and safe crossing across the right-of-way. There is no taking of the company's property. The railroad right-of-way is still open to use by the company for the purpose for which it was acquired. It is to be noticed that Section 6625 applies to crossings outside the corporate limits of a city or town. The purpose is clear. The legislature did not intend that a road might arbitrarily be established to run through buildings or shops of railroad and thus compel the removal or destruction of railroad property, such as would clearly not be justifiable under the police power. (See Southern Kansas Ry. Co. vs. Oklahoma City, 69 Pac. 1050).

A most pertinent case may be found in State ex rel. Minneapolis vs. St. Paul Ry. Co.

98 Minn. 380; 108 N.W. 261;
28 L.R.A. N.S. 301 (and note);
8 Ann. Cases, 1047 (and note);
208 U.S. 583; 52 Law Ed. 630.

In that case the city of Minneapolis had projected a street across the right-of-way of the railroad company by a bridge; the bridge was destroyed by fire. The city then directed the company to erect a bridge at its own cost and expense. The company refused and the city thereupon brought mandamus proceedings to compel the company to erect the bridge. As a defense the railroad company contended that the establishment of the street did not give the city the right to open the same on a grade with the track of the company. In other words, it contended that the street stopped at either side of its right-of-way. The court was of the opinion that the street was laid out across the right-of-way and the city had authority to open the street on the same grade, or by overhead crossing as necessity and public safety required.

In sustaining its decision the court said:

> "The common-law doctrine that where a street or highway is laid over one already in existence, the expense of making the crossing safe rests upon the company or corporation using the new way, had its origin when railroads were unknown, as at a

time when the use of all highways, generally speaking, was of the same general nature, the traffic or use of either not being inherently dangerous to the free use and enjoyment of the other. Not so where a railroad crosses a public street, or a street a railroad. In such a case the operation of trains over the latter, particularly in our large cities, is highly dangerous and a menace to the public using the intersecting street. The railroad company is alone responsible for this condition, and, though it has an unquestioned right to operate its trains in such manner as the practical conduct of its business may require, the dangers resulting therefrom are of its own creation, and on every principle of right and wrong it should bear the burden of protecting the public so far as practicable from accident or injury.

"The principles governing the rights and liabilities of individuals are often in-applicable to railroad companies, or other corporations, clothed as they are by the state with special rights, powers, and privileges not enjoyed by individuals. The nature and character of the business of railroad companies, the numerous hazards and dangers connected with the conduct of their affairs, render the law for the individual inappropriate and inefficient; and the courts, in testing the various pertinent principles in connection with their peculiar features, have, by methods of differentiation and analogy, evolved new and appropriate rules for the determination of their rights and liabilities. 5 Harvard L. Rev. 189.

"In view of the fact that the railroad company takes its franchise subject to the reserved right of the state to lay new streets over and across its track, and in contemplation that it may do so (Chicago & N. W. R. Co. vs. Chicago, 140 Ill. 309, 29 N.E. 1109; Chicago, B. & Q. R. Co., vs. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581; State ex rel. St. Paul M. & M. R. Co., vs. District Ct. supra), and the further fact that the company is solely responsible for the necessity of safety devices at street crossings, the same being occasioned by the operation of its trains over and across the street, and the further elementary principle that he who creates and maintains upon his premises a condition dangerous and inimical to others is under legal obligation to so guard and protect it that injury to third persons may not result therefrom, the rule of the common law as to existing must be held to apply equally to new streets. The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of the railway company, and the obligation to maintain the street intersections in good repair is a continuing one, follows the franchise, and applies to new streets or highways as soon as they come into existence."

In the case of Erie Railroad Company vs. Board of Utility Commissioners, 254 U.S. 394, 65 Law Ed. 322, the Supreme Court said:

"Grade crossings call for a necessary adjustment of two

conflicting interests,—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & R. G. R. Co. vs. Denver, 250 U.S. 241, 246, 63 L. Ed. 958, 962, 39 Sup. Ct. Rep. 450."

Missouri Pac. Ry. Co. vs. Omaha, 235 U.S. 121, 59 Law Ed. 160.

For the foregoing reasons it is the opinion of this office that the county need not condemn a right-of-way across the railroad right-of-way and that Section 6625 does not make such condemnation a condition precedent to the duty imposed therein upon the railroad.

Very truly yours,
L. A. FOOT,
Attorney General.