

**Carey Land Act Board, Powers Of—State Arid Land Grant Commission, Construction of Contracts By.**

The Carey Land Act Board is given the power to perform the same duties pertaining to the unfinished contracts of the State Arid Land Commission as were imposed upon said Commission, so far as may be necessary to complete said contracts and to protect the interests of the State therein. With such qualification, the Carey Land Act Board is in exactly the same situation, so far as reviewing the acts of the Commission are concerned, as the Commission itself would be.

If the Commission entered into a contract to deliver bonds in excess of the limitation imposed by law then the contract is not binding upon the State, nor upon the Carey Land Act Board, and cannot be enforced, and any act done by the Commission towards the enforcement of the illegal portion may be reviewed by the Carey Land Act Board. (Opinion of December 30, 1904, modified.)

The party dealing with the Arid Land Grant Commission was charged with the duty of ascertaining, at its peril, whether the proposed act, that is the delivering of the bonds in question, was within the scope of the authority which the law conferred upon said Commission.

The State is never estopped by the acts of its agents or officers in excess of their authority.

February 7, 1905.

Carey Land Act Board, City:

Gentlemen:—Your letter of January 25th duly received, in which you ask for the opinion of this office regarding your powers as the successors of the State Arid Land Grant Commission with reference to the contract heretofore entered into by said Commission covering the lands in District No. 4, and under which certain bonds were issued.

It seems from your letter that your Board has made demand for the return of a part of said bonds upon the alleged ground that they were illegally issued by the State Arid Land Grant Commission in excess of the amount permitted by law, and also that you have made demand that the contractors complete the contract and remedy all existing defects.

You refer in your letter to an opinion rendered by Attorney General

Donovan on June 21, 1903. holding that the Carey Land Act Board has authority to act in such a manner as would protect the State's interest, and state that all the steps taken by your Board have been according to your understanding of what was necessary to protect the interests of the State.

You also refer to a later opinion rendered Dec. 30, 1904. holding that the Board had not authority to make demand for the return of the bonds as being in conflict with the former opinion, and also inconsistent with action taken by the Attorney General in instituting suit to nullify bonds issued against District No. 2.

It appears from the First Biennial report of your Board, reference to which is made in your letter, that the contract was originally made with L. D. Beary, who assigned it to the Dearborn Canal Company, and that under the terms of the contract the work was to be paid for upon engineer's estimates in bonds against said district; that "as the contract is construed by this Board the contractors (Beary and the Dearborn Canal Company) were overpaid by our predecessor, who issued, on engineer's estimates, \$207,800 in bonds"; that "there should be returned by the contractor \$125,645."

As to the rights of your Board, with reference to the unfinished contracts of the Commission, they are defined by Section 2 of the law creating your Board, (Chapter CXIV., Laws 1903), and your Board is required "to perform the same duties pertaining to unfinished contracts of said Commission as were imposed upon said Commission, under the law creating said Commission and defining its powers and duties, so far as the same may be necessary to complete such contracts or to protect the State's interest."

If the Commission would have had a right, under the law creating it and defining its powers and duties, to review its own acts and to demand a return of a portion of the bonds that they had paid, then the Carey Land Act Board would have a right to do so, and not otherwise. The Carey Land Act Board, as the successor of the Arid Land Grant Commission, is in exactly the same situation. so far as reviewing the acts of the Commission are concerned, as the Commission itself would be.

It is the contention of the Carey Land Act Board that the amount of bonds already delivered to the Dearborn Canal Company is largely in excess of the total amount which the Commission had the right to deliver under the law, and that the acts of such Commission, so far as they are not authorized by law, are absolutely void, and, therefore, that such excess of bonds should be returned.

The act creating the Arid Land Grant Commission provides that the total amount of bonds issued in payment of the expense of reclamation of any of the Carey lands shall not exceed \$12.50 per acre for all lands reclaimed. (Section 3353, as amended, Laws 1897, p. 183.) This is a limitation which cannot under any circumstances be transcended by the Arid Land Grant Commission or by its successor, the Carey Land Act Board.

If the terms of the contract entered into by the Commission require

the Commission to deliver bonds in excess of this limitation, then, to that extent, the contract is not binding upon the State, or upon the Carey Land Act Board, and cannot be enforced, and any act done by the Commission towards the enforcement of the illegal portion may certainly be reviewed by the Carey Land Act Board. The determination of the question of whether or not there has been delivered bonds in excess of \$12.50 per acre for the lands reclaimed is a question of fact, and one which must be settled between the Board and the Dearborn Canal Company.

The Arid Land Grant Commission was a public board and its members were State officers. (State, ex rel. *Armington v. Wright*, 17 Mont. 565, 44 Pac. 89.)

The contracts entered into by it were for the benefit of the State, and only to enable the State to take advantage of the Carey Land Act. (State ex rel. *Nolan v. Marshall*, 20 Mont. 510, 52 Pac. 268.)

The authority of the Board to act in behalf of the State is created by the law providing for the Commission and defining its powers and duties, and unless so created and conferred it cannot exist. (Mechem, *Public Offices and Officers*, Section 828.)

The Dearborn Canal Company, and its predecessors in interest, in dealing with the Arid Land Grant Commission was charged with the duty or ascertaining, at its peril, whether the proposed act, that is the delivery of the bonds in question, was within the scope of the authority which the law conferred upon the Board. (Same, Section 829.)

"The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implication, and such is the well established rule. There can be no occasion or excuse in such a case for indulging in presumptions or relying upon appearances, but the authority must be traced home to its source and must be shown actually to exist. The fact, therefore, that the same act might have been within the scope of the authority if created by a private principal is not conclusive." (Same, Section 830.)

"So where the law authorizing the officer to act or contract fixes limits to his authority, his act or contract in excess of the limits fixed is not binding on his principal. Here, as in other cases, the party dealing with him is bound, at his peril, to observe the limitations which the law prescribes." (Same, Section 832.)

"It is a necessary conclusion from the principles already stated that the public, whether it be the national, state or lesser municipal government, can be bound by the acts and contracts of its officers and agents only when such officer or agent has acted strictly within the scope of his authority as created, conferred and defined by law, and that it is not bound where such officer or agent has transcended or exceeded his lawful and legitimate powers." (Same, Section 834.)

It seems clear from the foregoing that the State Arid Land Grant Commission did not have authority, under the law or under any contract which they might have made, to deliver bonds to an amount exceeding

\$12.50 per acre for all lands reclaimed, and in determining this question it is not necessary to look to the terms of the contract actually entered into between the said Commission and the predecessor in interest of the Dearborn Canal Company, for the reason that if such contract provides for the delivery of any greater amount of bonds it is not binding.

If it be claimed that the present board is estopped by the acts of its predecessor, the Commission, in making such excessive delivery of bonds in question, the reply is that the State, of which the Commission was the agent, can never be estopped by the acts of its agents or officers in excess of their power.

"The government is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known, rendering such a consequence impossible. So that the government is bound only when there is an actual authorization." (Bishop on Contracts, Section 993).

Neither can there be a ratification of such an act by another board or officer, for the reason that the act is in violation of an express limitation imposed by the law itself, and there can be no other officer or board having the power to do this act in the first instance; therefore, no one who could ratify it. (Mechem, Public Offices and Officers, Section 838).

I would therefore say that it is the duty of the Carey Land Act Board, not only to make demand for any bonds that have been illegally issued in excess of the amount authorized by law, but also to take such other steps as may be necessary to recover or annul such excessive issue; also that it is the duty of the Board to take all steps necessary to complete the unfinished contracts of the State Arid Land Grant Commission, and to protect the State's interests therein.

The opinion of Dec. 30, 1904, must therefore be modified consistently with the opinion of June 27, 1904, and with the action of this Department in bringing suit concerning the bonds of District No. 2.

Yours very truly.

ALBERT J. GALEN,  
Attorney General.