

Counties, Contracts, Ultra Vires. Boards of County Commissioners, Powers of. Bridge, Purchase of.

A county, acting through its board of commissioners, is not authorized to enter into a contract for the purchase of an existing privately owned bridge conditional upon the bridge being repaired by the owner at a cost approximating \$2,200, with the understanding that when so repaired the county will purchase the bridge at a price to be fixed by a board of appraisers appointed in conformity with the provisions of Sec. 1452, Revised Codes, since all contracts for the construction or repair of bridges exceeding \$400 must be let to the lowest responsible bidder under Sec. 1, Chap. 9, Eleventh Session Laws.

June 28th, 1913.

Hon. W. A. Beebe,
Chairman Board of County Commissioners,
Thompson Falls, Montana.

Dear Sir:

On the 25th inst., you wrote to this office requesting an opinion as to the legal right of Sanders County to acquire by purchase a certain bridge at Perma. Your letter recites a statement of facts upon which an opinion is desired. Briefly summarized, the facts are:

(a) On February 24th, 1913, Hon. Edward Donlan addressed a letter to you from Helena conveying the information that he was the owner of a bridge at Perma and that he desired to sell the same to Sanders County at a price not to exceed \$9,900.00, inclusive of the cost of raising the bridge from its present foundation a distance of four feet; the cost of which was stated would probably be \$2,200.00. The offer

of sale was in the alternative; that is to say, either he would repair the bridge at his own expense and then sell it to the county at a cost not to exceed \$9,900.00, or he would consent that Sanders County might repair the bridge and deduct from the purchase price the cost of such repairs.

(b) On March 5th, 1913, the board of county commissioners for Sanders County, after considering the offer (a) made the following entry in the Commissioners' Journal, to-wit:

"In the matter of the communication from Edward Donlan, dated February 24th, 1913, relative to the county taking over the Perma bridge at a cost not to exceed \$9,900.00, including the cost of raising the bridge, the commissioners hereby agree to purchase said bridge after it has been raised by the present owner five feet from the present level and suitable approaches provided; the purchase price to be fixed by seven commissioners, as provided in Sec. 1452 of the Revised Codes of Montana, it being understood that the total cost to Sanders County will not exceed \$9,900.00, and the clerk is hereby ordered to notify Edward Donlan of the action of the board." Commissioners' Journal, Regular Term, 5th day of March, 1913, page 583.)

(c) Pursuant to the matters contained in (b) the county clerk of Sanders County on said 5th day of March notified said Edward Donlan, in writing, of the action taken by said board

(d) On the 10th day of March, 1913, said Edward Donlan notified the chairman of said board that he accepted the proposition as made by said board, as contained in the journal entry aforesaid and as set forth in the letter of the county clerk.

(e) Thereafter said Edward Donlan immediately began the raising of said bridge and did pursue said work to completion, and at the regular June meeting of said board he did advise them that he had fully complied with the terms of the offer theretofore made, and did then request the board to proceed to appoint commissioners as provided for under Sec. 1452 of the Revised Codes. That the board at said meeting, being satisfied that Mr. Donlan had raised said bridge and furnished suitable approaches, proceeded to and did appoint three commissioners for the purpose of appraising said bridge, and Mr. Donlan did then likewise appoint three commissioners, and thereafter the judge of the district court, sitting in said county, did appoint the seventh commissioner.

(f) Said commissioners, so appointed, are now ready to act and appraise the bridge in question.

Under this statement of facts I am requested to advise your board as to whether the proceedings so far had are legal, and if said board can purchase said bridge at the appraised value and at a sum not to exceed \$9,900.00.

Heretofore, upon request of Hon. Gerald Young, county attorney of your county, this office rendered an opinion as to the right of your county to purchase the bridge in question, and the conclusion reached was that no valid contract existed between Sanders County and Mr. Donlan. That opinion was based upon a statement of facts as contained in (a) and (b) and (c) above, and I am called upon now to render an opinion supplementary to the one then rendered upon the full statement of facts as herein set forth.

I have given careful consideration to the additional facts. As to the matters contained in (d) I am of the opinion that the powers of county boards must be exercised by them as boards, and not as individuals. An individual member, unless expressly authorized, cannot bind the county by his acts, and notice to or knowledge by an individual member not shown to have been imparted to the board, is not binding upon the latter.

11 Cyc. 393.

It will be observed that no contention is made that Mr. Donlan notified the board that he accepted the offer theretofore made by it, but that he notified the chairman thereof and upon the representations made to him by the chairman did proceed to raise the bridge in question.

It may be well here to state a few well established legal principles with reference to the duties and powers of boards of county commissioners, and of individuals dealing with them.

In *Lebeler v. Commissioners of Custer County*, 9 Mont. 315, our supreme court said:

"An individual may contract as to lawful subjects as he pleases. Municipal corporations or public officers are bound by the law. They are authorized by the law of their creation to make certain contracts. They are creatures of the law and not of nature; their contracts obtain validity, only by force of the law authorizing their making. It follows that if they make contracts that the law does not empower them to enter into there is no authority for such contract; **noting for** it to stand upon, and it falls of its own weight; it is void. (citing cases.) Persons contracting with such artificial creations of the law as municipal corporations and public officers are charged with notice of the character and constitution of the entity with which they deal. They know the law and know what are valid acts of such artificial persons. They contract at their peril."

See also *State v. Coad*, 23 Mont. 131.
11 Cyc. 468.

In 11 Cyc. 459, the rule is stated that: "The power of a county to acquire and hold real property being derived from statutes, statutory provisions as to the board or officer by whom such power is to be exercised must be strictly followed. So also provisions as to the mode to be pursued are not simply directory, but operate as a limitation upon the power to purchase and must be followed."

Sec. 1452 under which the power to purchase is claimed to be

exercised was repealed by Chap. 72 of the Session Laws of 1913, approved March 11th, 1913. It is claimed, however, that since the facts as stated in (a), (b), (c) and (d) all occurred prior to the repeal of this statute the board is now empowered to proceed under its provisions to consummate the contract which, it is contended, was lawfully entered into prior to its repeal. For the purposes of this opinion it is unnecessary to decide as to whether or not Sec. 1452 (*Idem.*) applies to toll bridges alone, or to any private bridge. Suffice it to say that it is no longer in force. The only question for determination is: Was there a valid contract between Sanders County and Mr. Donlan for the purchase of this bridge prior to the repeal of the statutes? Or, for that matter, is there such a valid contract now? Under the statement of facts, Mr. Donlan, pursuant to negotiations had with the board, proceeded to and did repair said bridge at a cost which he himself approximated as being about \$2,200.00. In my opinion, any authorization by the board to Mr. Donlan to repair this bridge at such a cost, with the understanding that when so repaired it would be purchased by the county at a price to be fixed by commissioners to be appointed, was *ultra vires* and void in *limivae*.

Sec. 1 of Chap. 9 of the Session Laws of the Eleventh Legislative Assembly provides that "no bridge the cost of * * * repairs of which exceeds the sum of \$400 must be * * * repaired except on the order of the board of county commissioners, and when ordered to be constructed or repaired it shall be done by contract * * *."

This section further provides that before any contract shall be let for repairing a bridge the county commissioners shall advertise for bids and that the contract shall then be let to the lowest responsible bidder. It is apparent on the face of things that such action as contemplated by the statute was not taken with respect to the repair of this bridge, and under the decisions above quoted Mr. Donlan knew the law and proceeded at his peril. Though the board of commissioners might lawfully have purchased the bridge in question as it stood before it was repaired at a valuation to be fixed by a board of appraisers, and though they might have so purchased said bridge without the consent of Mr. Donlan—for Sec. 1452 provides a summary method for so doing and is virtually a condemnation statute—the power to now purchase under said section is gone, for it stands repealed.

I am of the opinion, therefore, that because the board exceeded its jurisdiction in ordering said bridge repaired with the understanding that it would then be purchased by the county in the manner as indicated, the acquisition of said bridge under and by virtue of proceedings already had would be wholly illegal.

In conclusion I will state that the commissioners are without authority to take over this bridge, or order a warrant drawn in favor of Mr. Donlan for the purchase price; that the county clerk should not draw his warrant therefor, nor should the county treasurer honor

the same, and it follows that the commissioners appointed to appraise said bridge are vested with no authority to proceed.

Yours very truly,

D. M. KELLY,
Attorney General.