

Board of County Commissioners, Jurisdiction of. Cities and Towns. Construction and Maintenance of Bridges in. Bridges in Cities and Towns, Construction and Maintenance of.

It is no part of the duty of a board of county commissioners, nor within the jurisdiction of such boards, to expend public money in the construction or maintenance of a bridge within the incorporated limits of a city or town.

November 25, 1913.

Hon. J. L. Slattery,
County Attorney,
Glendive, Montana.

Dear Sir:

On August 11th, 1913, this department in answer to the following question submitted by you:

"Is it within the jurisdiction and duty of the board of county commissioners to provide for the construction and maintenance of bridges in incorporated cities and towns?"

Reached the conclusion that it was not within the jurisdiction of the board of county commissioners to expend county moneys for the construction and maintenance of bridges in incorporated cities and towns. Since that time extended discussion has been had relative to the question presented, and while we are not able to reach any substantially different conclusions, it has been deemed advisable that the result of the discussion, with a list of the authorities considered, be expressed in writing in order to expedite any future research that may be necessary in considering similar questions.

As stated in the former opinion to you, the city and town councils are given extensive power and authority relative to jurisdiction over

streets, alleys, avenues, etc., within the city or town limits (Secs. 3259 and 3479, Revised Codes), and such jurisdictions are also given authority by special assessment to provide for the construction and maintenance of bridges within their limits, and such tax so levied applies only to property within the city or town.

Sec. 3376, Revised Codes.

Chap. 72 of the Session Laws of 1913 is a general road law of the state, and is for the most part a re-enactment of already existing law. By the provisions of Sec. 1, Chap. 5, of said Chap. 72:

"All public bridges are maintained by the county at large, under the management and control of the board of county commissioners,"

And in the succeeding section it is provided that the board of county commissioners may levy a special tax, etc., for the purpose of constructing and maintaining and repairing free public bridges. This tax so levied appears to operate throughout the county, including incorporated cities and towns. In the former opinion addressed to you, it was stated that this enactment of 1913 did not confer any additional power upon the boards of county commissioners so as to enable them to invade the precincts of an incorporated city or town, and hence that the county board, as such, did not have jurisdiction to construct or maintain a bridge within the corporate limits of a city or town. The numerous authorities presented on this question are somewhat conflicting, and as stated in those authorities, the question is one of local concern, which must be determined by the statutory and constitutional provisions of the state.

In *Skinner v. Henderson*, 26 Florida, 12; 8 L. R. A. 55, the Supreme Court of Florida, under a statute substantially similar to ours, reached the conclusion that cases might arise where county boards not only had the authority, but that it was their duty to construct and maintain free public bridges for general county purposes within the limits of an incorporated city or town.

And a similar doctrine was announced in *Whitall v. Freeholders of Gloucester County*, 40 N. J. L. 302.

The same question is discussed in *Elliott on Roads and Streets*, 3rd Ed. paragraphs 34, 503, 504, 505 and 543.

See also *City of Flemingsburg v. Fleming Co.*, 127 Ky. 120, and dissenting opinion on p. 130.

Nelson Co. v. Bardstown, 30 Ky. L. Rep. 870.

Bell v. Foutch, 21 Iowa, 119.

Oskaloosa Steam Engine Works v. Pottawattamie Co., 72 Iowa, 134.

The authorities above cited contain a general discussion of the principles involved and consider at some length the duty and advisability of county boards to establish and maintain all necessary highways and bridges required for county purposes, irrespective of whether the same are located within or without incorporated cities or towns, and some of the arguments are to the effect that it is inequitable to require a city to be out the expense of constructing and

operating free public bridges within its limits when the same are principally for the use and benefit of the county at large, and also that it is inequitable to require the city to maintain its own streets, alleys, bridges, etc., and in addition thereto to pay taxes for the construction of bridges without the limits of such city. However, there are authorities to the contrary. In *Nelson v. Board of Commissioners of Garfield Co.*, 40 Pac. 474, the Supreme Court of Colorado reached the conclusion that

"Where counties and municipalities are, within their respective limits, given full power and control, in the one case over highways, and in the other over streets and bridges, the county cannot construct a bridge within a town, only accessible over streets and highways controlled by the town."

McCullon v. Blackhawk County, Iowa, was an action for personal damages against the county, arising from an alleged defect in a certain bridge. It appears from the record that a certain county road had been established and maintained; that on such road was a bridge across a certain stream. This road and bridge had been constructed by the county, and was maintained by the county up to the time of the accident. On March 1st, 1865, the city of Cedar Falls was incorporated. On the 19th of that month the accident occurred, and suit was instituted against the county for damages, but the supreme court held that in as much as the city was fully incorporated prior to the time of the accident, the county was not liable, for by such incorporation it lost jurisdiction over the bridge.

McCullon v. Blackhawk Co., 21 Iowa, 409.

In *Gallagher v. Head*, 72 Iowa, 173, the supreme court held that county supervisors have no authority to establish a highway within the limits of an incorporated city or town, and discussed at some length the confusion that might result from conferring concurrent authority upon city councils and boards of county commissioners in the control of public highways within a city.

See also *Philbrick v. University Place*, 106 Iowa, 352.

Shields v. Ross, 158, Ill. 214.

37 Cyc. 57.

Barker v. Hovey (Kan.), 26 Pac. 585.

The Supreme Court of Montana has repeatedly passed upon questions involving the power and authority of cities, and in no one of these cases is there any intimation that the power of the city is concurrent with that of some other tribunal. But the decisions are uniformly to the effect that the city has and may exercise the full power and authority conferred upon it by the statute.

In *re. Ford v. Great Falls*, 46 Mont. 292.

Stadler et al. v. City of Helena, 46 Mont. 128.

Read v. Lincoln Co., 46 Mont. 31.

A bridge is only a part of the public highway, and while it may be given a general classification for the purpose of taxation, yet nowhere in our statute is there any intimation that this or any other part of the highway within a city or town is within the jurisdiction

of a board of county commissioners. If it is unjust that the inhabitants of a city should be taxed to aid in the construction or maintenance of bridges outside of the city or town, then a question arises which should be presented to the legislature. Under the provisions of the statutes of this state, I am not able to reach the conclusion that it is any part of the duty, or within the authority of a board of county commissioners, as such, to expend public county money in the construction or maintenance of a bridge within the incorporated limits of a city or town. When those municipalities took on incorporation they took it with all the rights and privileges, and charged with all the duties and responsibilities which follow from such incorporation. We have not here discussed or considered the question which might arise relative to the duty of a county to maintain a bridge already owned by the county, and now situate within a municipality, and it is not impossible but what a case might arise where the electors of a county might be justified in authorizing the expenditures of county money to aid in the construction of a bridge within a city or town, or even without the county, when it is very apparent that the welfare of the county will be enhanced thereby. This is also a question which is not here discussed, nor considered; but if such power exists at all it is only in extreme cases, and for the protection of county officials, its exercise cannot be advised, at least without an expression of the electors of the county.

Yours very truly,

D. M. KELLY,
Attorney General.