

**County Surveyor—Surveyors—Highways — Bridges —
County Commissioners.**

House bill 241 is not local or special legislation within the meaning of section 26, article V of the constitution of Montana.

House bill 241 is not objectionable as an arbitrary classification or distinction between counties.

House bill 241 has modified the personal liability of county commissioners for injuries resulting from defects in public highways.

Since the enactment of house bill 241 county commissioners still retain the powers given them by section 1635, et seq. of the code to "establish, change, or discontinue any common or public highway," within the county. The work of actually constructing or grading any such highway must be done by the county surveyor under the broad powers given him by house bill 241. The power of the county commissioners extends only to the extent of ordering the work to be done.

House bill 241 has repealed that portion of section 1632 which authorizes the board of county commissioners to direct some member or members of the board to inspect the condition of any proposed highway or highways or work on any highway or bridge within the county during the progress of the work and to receive payment for such inspection.

The board of county commissioners is absolutely divested by house bill 21 of all authority to fix either the number or compensation of deputies, men or teams employed by the county surveyor on road work.

Tim Kearney, Esq.,
Chairman, Board of County Commissioners,
Butte, Montana.

May 20, 1927.

My dear Mr. Kearney:

You have submitted copy of the opinion of the county attorney of Silver Bow county regarding various questions relating to the meaning

and effect of house bill 21 enacted by the recent session of the legislature.

I agree with the conclusion of the county attorney upon the following points:

1. That the act is not local or special legislation within the meaning of section 26 of article V of the constitution of Montana.

2. That the act is not objectionable as an arbitrary classification or distinction between counties.

3. That the act has modified the personal liability of county commissioners for injuries resulting from defects in public highways.

4. While the question is perhaps debatable, and probably should be submitted to the courts for decision, it is my opinion that a careful reading of the act in question will disclose that it does **not** divest county commissioners of the power given them by sections 1635 to 1651 of the code relative to the establishment, alteration and vacating of public highways. The words "exclusive control, supervision and direction of all highways, bridges and causeways within his county," which appear in section 1 of the act, are followed by language which signifies how this supervision, control, and direction shall be exercised by the county surveyor. An analysis of section 1 of the act indicates that the county surveyor is given power by the act to do the following things:

- (a). Keep highways and bridges clear of obstruction.
- (b). Cause highways to be graded where needed.
- (c). Maintain and repair highways.
- (d). **Make** bridges and causeways when needed and maintain them in good repair.
- (e). Renew bridges and causeways where destroyed.
- (f). Make surveys, establish grades, prepare plans, keep costs, approve claims against the county for highway, bridge and causeway construction, maintenance or repair.
- (g). Employ and discharge deputies, men and teams and regulate their work.
- (h). Purchase highway and bridge machinery, tools, supplies and materials with the approval of the board of county commissioners.
- (i). Make reports and estimates when required by the board of county commissioners and perform such other duties as may be required by law.

You will note that with the exception of the word "make", which I have underscored above and which is expressly limited to bridges and causeways, there is not a word in the act to indicate that the legislature intended to give the county surveyor power to create or originate a public highway.

The act seems to deal, except as to bridges and causeways, with an existing thing, and to confer on the county surveyor power to control, supervise and direct a thing already in existence, to-wit: public highways.

It is therefore my opinion that since the enactment of house bill 241 county commissioners still retain the powers given them by section 1635, et seq. of the code to "establish, change, or discontinue any common or public highway" within the county. The work of actually constructing or grading any such highway must, in my opinion, be done by the county surveyor under the broad powers given him by house bill 241. The power of the county commissioners extends only to the extent of ordering the work to be done.

5. It is also my opinion that house bill 241 has repealed that portion of section 1632 which authorizes the board of county commissioners to direct some member or members of the board to inspect the condition of any proposed highway or highways or work on any highway or bridge within the county during the progress of the work and to receive payment for such inspection. Since the enactment of house bill 241 county commissioners no longer have anything to do with the work on either highways or bridges. It seems, therefore, to follow of necessity that they should not be permitted to charge the county for inspecting such work.

6. I do not find myself in agreement with the conclusion of the county attorney regarding your question number 5 with reference to the power of the county commissioners in the matter of the employment of deputies, men and teams.

In my opinion the language of house bill 241 is clear and explicit and admits of no question as to its meaning. The county surveyor is given power to "employ deputies and men and teams and discharge at his pleasure such deputies, men and teams, and determine how, when and where such deputies, men and teams shall work." I think this language clearly indicates that the board of county commissioners are absolutely divested of all authority to fix either the number or compensation of such deputies, men or teams. It is my further opinion that chapter 82, session laws of 1923, amending section 4874, is not applicable to the employment of deputies, men and teams under the authority of house bill 241.

The latter act is plainly inconsistent with, and cannot be reconciled with, the provisions of chapter 82, insofar as they relate to the employment of deputies, men or teams by the county surveyor. Therefore, house bill 241, being the later act and a special act, must control. The conclusion reached on this question renders unnecessary any discussion of your question as to whether a road foreman is a "deputy."

7. Answering your last question, in my opinion the language you quote from section 2 of house bill 241 has not the effect of reducing the salary of the county surveyor to the level of a salary of a road supervisor where the county surveyor is carrying out the functions of a road supervisor under the provisions of house bill 241.

The act does not, in my opinion, deal with the subject of the salary of the county surveyor. Furthermore, that official is still the county

surveyor and entitled to the salary of the office while engaged in discharging the duties imposed upon him by house bill 241.

Very truly yours,

L. A. FOOT,
Attorney General.