

Opinion No. 160.**County Commissioners — Highways —
Easements—Ultra Vires.**

HELD: The interest which a board of county commissioners is allowed to obtain in private lands for highway purposes is an easement only, and when it assumes to secure a fee simple title for the county it exceeds its powers under the law and is guilty of an ultra vires act.

April 13, 1933.

In your statement to us of recent date, it is said that the board of county commissioners of Missoula County purchased 9.2 acres of land for highway purposes at a total cost of \$3,296.00 and obtained from the owner a deed in fee thereto without the appraisal required by subdivision 8 of Section 4465 as amended by Chapter

100, Laws of 1931. The legality of the transaction is questioned by you for that reason and our advice sought.

The board of county commissioners is a specially created tribunal, possessing only such authority as is conferred upon it expressly, and such additional authority as is necessarily implied from that which is granted expressly. It is a body of limited powers and must in every instance justify its action by reference to the provisions of law defining and limiting these powers. (*Stange v. Esva*, 67 Mont. 301; *Yellowstone Packing & Provision Co. v. Hays*, 83 Mont. 1).

What authority, then, does the board possess so far as highways are concerned? The answer is found in our Codes and Session Laws. It is empowered to lay out, maintain, control and manage public highways and bridges within the county (subdivision 4 of Section 4465, above); to exercise general supervision over highways within the county (Section 1622, R. C. M. 1921, as amended by Chapter 59, Laws of 1929); to cause to be surveyed, viewed, laid out, recorded, opened, worked and maintained such highways as are necessary for public convenience (subdivision 3, Id.), and to contract, agree for, purchase, or otherwise lawfully acquire the right of way over private property for the use of public highways, and for that purpose institute, when necessary, proceeding under Sections 9933 to 9958 of the Code of Civil Procedure, paying for such right of way from the general road fund of the county. (Subdivision 5, Id.) The authority so granted to procure the right of way must be exercised in the manner and under the circumstances indicated by Sec. 1635-1651, Revised Codes 1921, and not otherwise. (*State ex rel, McMaster v. District Court*, 80 Mont. 228). By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining the same. (Sec. 1616 R. C. M. 1921; *Wright v. Austin*, 76 Pac. 1023; *Gurnsey v. Northern Cal. Power Co.*, 117 Pac. 906; 29 C. J. 540, 541).

It is clear, therefore, from a reading of the highway laws of the state and the decisions of the courts that the interest which a board of county com-

missioners is allowed to obtain in private lands for highway purposes is an easement only. When it assumes to secure a fee simple title for the county, it exceeds its powers under the law and is guilty of an ultra vires act. (*Flynn v. Beaverhead County*, 54 Mont. 309).

It may be suggested that as the board of county commissioners acquired a fee simple title in this instance it was constrained to proceed according to the second clause of subdivision 8 of section 4465 and have three disinterested citizens appointed to appraise the land. But that would be tantamount to saying it has authority to make an outright purchase of land for highway purposes and would involve a contradiction. Moreover, our court held in the case of *Flynn v. Beaverhead County* that the subdivision has no application to the acquisition of a right of way for highway purposes.

The authority for the appointment of appraisers must, therefore, be found in Sec. 1635-1651, if at all. As no such authority is revealed the interposition of appraisers was not required.

Our view is, therefore, that it was not necessary to have appraisers appointed to value the land in question but that the board of county commissioners went beyond its power in acquiring a fee simple title thereto. Whether Missoula County paid more for the land than it would for an easement in it is, of course, another matter.