

Opinion No. 68**County Commissioners—Right of Way
—Condemnation—Jail, Purchase of—
Budget Law.**

HELD: When the Board of County Commissioners purchases any land for any purpose it must first be appraised by three disinterested persons, and the provision of the statute is mandatory upon the Board of County Commissioners in purchasing a right-of-way for highway purposes.

The Board of County Commissioners has no legal power to purchase a jail and improve the same and expend county funds for that purpose in excess of the budget previously adopted and by their ultra vires act in so doing the members of said board have become liable for the penalty provided by the budget law.

February 8, 1933.

You request an opinion upon the following matters:

1. What is your opinion about the duty of the Board of County Commissioners having the right to purchase a right of way for highway purposes without first appointing appraisers to place the valuation on the land purchased?

2. Has the Board of County Commissioners the power to purchase a jail and improve the same and expend county funds for that purpose in excess of the budget previously adopted?

Replying to question number 1, the Board of County Commissioners is governed and controlled by section 4465, R. C. M. 1921, as amended by chapter 100, subdivision 8, Laws of 1931, (Note: Amended by Ch. 74, Laws of 1933, to exclude purchases of real estate under \$100 in value.) and the provisions of that section are that when the Board of County Commissioners purchases any land for any purpose it must first be appraised by three disinterested persons and the provision of the statute is mandatory upon the Board of County Com-

missioners in purchasing a right of way for highway purposes.

Question number 2. To give you a satisfactory opinion on this question, in order that your board may extricate itself from the position it is in without injury to the county for the money already expended, is a difficult one. The first paragraph of section 5 of chapter 148, Laws of 1929, the same being part of the budget act, provides in part as follows:

"The estimates of expenditures, itemized and classified as required in section 2 hereof, and as finally fixed and adopted by said board of county commissioners, shall constitute the appropriations for the county for the fiscal year intended to be covered thereby, and the county commissioners, and every other county official, shall be limited in the making of expenditures or incurring of liabilities to the amount of such detailed appropriations and classifications, respectively;"

The last paragraph of the same section provides in part as follows:

"Expenditures made, liabilities incurred, or warrants issued, in excess of any of the budget detailed appropriations as originally determined, or as thereafter revised by transfer, as herein provided, shall not be a liability of the county, but the official making or incurring of such expenditure or issuing such warrant shall be liable therefor personally and upon his official bond. * * * "

That part of section 6 of the same act that begins with the word "upon" on page 294 of the Session Laws enumerates extreme cases in which the board of County Commissioners are authorized to exceed the amounts as fixed by the budget but it is very doubtful if any of the provisions of this part of the budget law would authorize expenditures to which you refer. Not only is there no provision in the law that specifically authorizes such expenditures as you report but the emergency must be anticipated and provided for in the manner the statute sets out before the expenditure is made. After the expenditure is made we can find no authority for bringing the emergency clause of the law into play to justify such expenditure. If

the Board desired to attempt to provide for an expenditure authorized as an emergency it would have been necessary for them to follow the procedure as outlined in the statute.

From the facts as you have stated them we can find no provision in the budget law that authorized the Board to take any action to justify their expenditures for the jail and the improvements thereon. We find nothing in the transactions that have been carried out that would indicate that there was anything suggesting bad faith or fraud but it is a simple case of violating the budget law and no provision made to remedy the violation and we are unable to give you any advice as to how to meet such a situation as it is our function to advise as to what we think the law is and not how the violation of it can be remedied when no remedy is provided.

We do not suggest that any action be taken by which the county will suffer a loss but it is clearly the opinion of this office that the officials have become liable for the penalty provided in the second paragraph of the budget law recited above.

You will notice by section 8 on page 296, Laws of 1929, being a part of the same act referred to as the budget act, that the state examiner is granted rather extensive powers in making rules and regulations to carry the budget law into effect and a conference or consultation with him might enable you to arrive at some satisfactory conclusion of the matter.