Taxes, Delinquent; Collection of. County Division, Collection of Delinquent Taxes. New County, Authority to Collect Delinquent Taxes. Bridges, Whether Assessable as County Bridge. Public Bridges, Not Assessable Against County. Division of County Property, Bridges Not Considered.

1. Taxes delinquent on property situate in new county should be collected by such new county.

2. In the division of property between an old and new county, public bridges should not be considered as property.

January 9th, 1914.

Hon. C. R. Tisor,
County Attorney Custer County,
Miles City, Montana.

Dear Sir:

I am in receipt of your letter of the 7th instant wherein you state that you have under consideration, in connection with the creation of the new county of Fallon County, from Custer County, the following two questions:

> "First—On whom devolves the duty of a collection of delinquent taxes on property situate within the new county; and to which county do these taxes belong when collected?
>
> "'Second—In an apportionment of the indebtedness between the County of Custer and the new County of Fallon, where there exists a bonded indebtedness for the special purpose of construction of bridges, are the bridges themselves to be taken into consideration as an asset of the old county, in determining the liability of the respective counties upon the bond issue, where such bonded indebtedness, or a portion thereof, exists at the time of the creation of the new county?"

You state that in considering the first question you had before you the opinion of my predecessor, Hon. Albert J. Galen, under date of March 22nd 1912, wherein in a letter to Hon. Victor R. Griggs, county attorney at Havre, Montana, Mr. Galen discussed a like question, and reach the conclusion that Sec. 2850, Revised Codes of Montana, 1907, governs. This section reads:

> "When a county is divided, or a boundary is altered, all taxes levied before the division was made or boundary changed must be collected by the officers of, and belong to, the county in which the territory was situated before the division or change."

And you question the correctness of the conclusion there reached.

After careful consideration, I am of the opinion that the criticism directed by you against that opinion is just, for under the provisions of Sec. 9 of Chap. 112 of the Session Laws of the Twelfth Legislative Assembly, the section of the code upon which he relies, viz. 2850, was undoubtedly impliedly repealed, and the section of the latter law upon the same subject should have governed. Sec. 9 of Chap. 133, Session Laws of the Thirteenth Legislative Assembly, is a re-enactment of Sec. 9 of Chap. 112 of the Session Laws of the Twelfth Legislative Assembly. It reads as follows:

> "After the creation of a new county, as herein provided, its officers shall proceed to complete all proceedings necessary for the assessment or collection of the state and county taxes for the then current year, and all acts and steps theretofore taken by the officers of the old county or counties prior to the creation of the new county shall be deemed and taken as having been performed by the officers of the new county for the benefit of the new county; and upon the creation of the new county it shall be the duty of the officers of the old county or counties to immediately execute and deliver to the board of county commissioners of such new county copies of all assessments or other proceedings relative to the assessment and collection of the current state and county taxes of property in such new county. Such copies shall be filed with the respective officers of the new county who would have the custody of the same if the proceeding had been originally had in the new county, and such certified copies shall be taken and deemed as originals, and original proceedings, in the new county, and all proceedings therein recited shall be taken and deemed as original proceedings in the county and shall have the same effect as if the proceedings therein stated had been had at the proper time and in the proper manner by the respective officials of the new county, and the officials of the new county are hereby authorized and directed to proceed thenceforth with the assessment and collection of said taxes as if the proceedings originally had in the old county or counties had been originally had in the new county."

Since this section is a later enactment, it follows that Sec. 2850 being inconsitent therewith, must be regarded as no longer in force by virtue of the general repealing clause of Sec. 16 of the act, which impliedly repeals it. Delinquent taxes should, therefore, be collected by the officials of the new county, and when collected they belong to the new county.

Second—The consideration heretofore given by this department to similar questions has been under special laws, varying both in direct and implied provisions. No general law existed prior to March 6, 1911. Some of these special laws specially provide that bridges shall be considered; others refer to "all real and personal property" without any qualifying words as to kind of ownership, character of

property or the use and purposes thereof; and still others are so meager or incomplete as to require recurrence to the provisions of Sec. 3, Art. XVI, State Constitution, as the sole guide.

The question here submitted must be considered under the provisions of the general law as now existing without regard to the provisions of any of these special enactments. This general law is now embodied in Chaps. 133 and 135 of the Session Laws of 1913, read and construed in connection with Sec. 3, Art. XVI, of the State Constitution. We take it as fundamental that the legislature, subject to the provisions of the constitution, has plenary power to prescribe the terms and conditions under which new counties may be created.

Washington Co. v. Weld County, 12 Colo. 152; 20 Pac. 273.

Sec. 3, Art. XVI, of the State Constitution provides:

> "In all cases of the establishment of a new county, it shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which it is formed, less the ratable proportion of the value of the county buildings, and property of the county or counties from which it is formed * * *."

The first general law relating to the creation of new counties is Chap. 112, Laws of 1911. This act was amended by Chap. 133, Laws of 1913, which repealed all provisions conflicting with the amendatory act. Later Chap. 135, Laws of 1913, was enacted, which by its provisions also amends said Chap. 112, Laws of 1911. But said Chap. 112 was not in existence as law at the time of the enactment of said Chap. 135. That is, Chap. 135 amended the law which had theretofore been repealed, at least in so far as it conflicted with the provisions of said Chap. 133. However, passing this irregularity (if such it is), there is not any provision contained in Chap. 135 conflicting with or which negatives the provisions of Sec. 1 of Chap. 133. That section provides in part:

> "Every county which shall be enlarged or created from territory taken from any other county or counties, shall be liable for a pro rata proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken and shall be entitled to a pro rata proportion of the assets of the county or counties from which such territory is taken to be determined as hereinafter provided."

The title to said Chap. 135 reads:

> "An act to amend Sec. 7 of Chap. 112, of the Session Laws of 1911, relating to the adjustment of liabilities and assets between old and new counties."

In the "hereinafter provided," relating to the method and manner of division, the word "property" is used.

Giving effect to the provisions of both Sec. 1, Chap. 133, and to the provisions of Chap. 135, it seems inevitable that the word "asset" as used therein is a qualifying term, limiting the meaning

of the word "property," as used in Chap. 135, and that term then means "asset property," or property capable of producing assets or revenues, or property that adds to material wealth.

A public bridge is in no sense an asset. It is rather a liability, for it is a continuing expense.

The definition of the word "property," as given in the constitution (Art. XII) and the statute (Secs. 2501, 4425 and 6224) has reference to "assessment and taxation," but neither this law nor Chap. 133 or Chap. 135 assumes to define the character or kind or extent of ownership. It is fundamental that no one not even a county, can rightly be assessed for a greater estate than he owns. What estate does a county own in a public highway or in a public bridge constructed and used as a part thereof? Absolute ownership is the right to exercise despotic dominion over the property owned.

What dominion does a county exercise over public bridges, except in a governmental capacity? Public bridges are constructed from public moneys by the county, acting as a governmental arm of the state, and for the free use of the public. Restrictions in their use, if they exist at all, emanate not from county orders, but by authority of state law. The county has no greater right to the use of the bridge than has the general public, and the bridge as such has no value whatsoever, except as a part of the public highway. The estate or ownership of the county is no greater than that of a trustee holding, protecting and maintaining the property for the free use of the general public, which includes the inhabitants of both the new and old county, after division as well as before division.

"The public and not the local supervisors are the owners of such bridges."

Sec. 52, Elliott on Roads and Bridges.
People v. Town Auditors, 74 N. Y. 310.
State v. Amundson, 135 Pac. (N. D.) 1117.

In the absence of a statute to the contrary, "a public bridge is a part of the highway" which passes over it.

Cascade Co. v. City of Great Falls, 18 Mont. 537.

"A 'ferry' is simply a movable portion of a highway where it crosses a stream."

Reid v. Lincoln Co. et al., 46 Mont. 31, 58.
Hackett v. Wilson, 12 Ore. 25, 5 Pac. 652.

Bonds issued by a county for the general purpose of constructing bridges, highways, ferries and branch roads are issued for "a single purpose."

Reid v. Lincoln Co., supra.

That a bridge is a kind of property is beyond question, and so is a general highway.

There is not any statute declaring a public bridge to be property, separate and distinct from the rest of the highway. The ownership of the entire highway, including the bridge, rests with the public. The county has no more proprietary interest in a public bridge than it has in any other section of the public highway. True, bridges

may require special care and attention and supervision, and so may a cut, fill, tunnel or trestle. Special taxes may be levied or special bonds issued for bridge purposes, and a law might also authorize the same thing to be done relative to any other specific section of the highway. The county has proprietary interest and ownership in the material used in the construction of a bridge, both before the bridge is constructed and after it has ceased to be used as a bridge, but the same is likewise true of any foreign substance used in the construction of any other part of the highway.

A question similar to the one here discussed has been recently considered by the Supreme Court of North Dakota involving the proposition as to the division of county property between the old and new county, in which it is held that only property should be considered in which the old county had a proprietary interest.

> "In other words, that property owned by the public generally, the county having a mere qualified interest therein, * * * was not contemplated by the legislature * * *. We are unable to agree with counsel's statement to the effect that the county has no greater interest or ownership in its court houses or public grounds than it has in its highways and bridges. It is true that each are paid for by public moneys, but as to the court house grounds and other property, the county has a proprietary interest therein, and may under certain conditions sell and transfer it to another. Not so, however, as to roads and bridges. They may not be sold, leased or otherwise disposed of by the county, for they belong to the general public."
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> State v. Amundson et al., 23 N. D. 238; 135 N. W. 1117.

This case contains a very full discussion of the precise question here presented, and cites many authorities. There are conflicting authorities, among which may be cited:

Railroad Co. v. People, 200 Ill. 365, 65 N. E. 715.
Construction Co. v. Cheyenne Co., 90 Neb. 749; also cases cited in.
Sec. 34, Elliott on Roads and Bridges.
11 Cyc. 356.
5 Cyc. 1052.

The conclusion here reached is that public bridges should not be considered as county property within the meaning of Chaps. 133 and 135 of the Session Laws of 1913, and should not, therefore, be taken into account in the division of county property between the old county and the newly created county.

Yours very truly,

D. M. KELLY,
Attorney General.