

Board of County Commissioners—Funds Raised by Bond Issue for “Construction of Necessary Highways”—Authority to Use Money for “Upkeep of Roads”—Refusal of County Clerk to Draw Warrants.

Money raised on the sale of a bond issue for the purpose of the “construction of necessary public highways” may not be expended by the Board of County Commissioners solely for maintenance and upkeep of old roads not included in a systematic improvement of a road system.

A County Clerk may not refuse to draw the warrants when properly allowed and ordered paid by the Board of County Commissioners and approved by the Auditor.

Board of County Commissioners,
Missoula, Montana.

Gentlemen:

You have asked my opinion as to whether money raised on the sale of a bond issue of September 2, 1919, for the purpose of the "construction of necessary public highways" in the County of Missoula may be expended solely for maintenance and upkeep of old roads.

It is well settled that money voted for one purpose cannot be used for another.

19 R. C. L. 311;
Anderson v. Beall, 113 U. S. 227;
Cairo v. Zane, 149 U. S. 122.

The rule is stated in 15 C. J. 584 as follows:

"Where special county funds are authorized, and are in fact raised for a particular purpose, they must be applied thereto and cannot be diverted to any other purpose, * * *"

The difficulty is not in recognizing or understanding this general rule, but in applying the same.

In the case of *State ex rel. Edwards v. Millar*, 96 Pac. 747, the Supreme Court of Oklahoma held that the words "the construction of waterworks in said city," printed on ballots, were sufficiently comprehensive to include such work as re-equipping, and making extensions to, the city's existing waterworks system. The court said:

"In this case we have an insufficient waterwork plant; the city wishes to re-equip and extend it. It seems to us that the term 'construction of waterworks' includes within its meaning work of the above class, and that the people would be sufficiently informed, by its being printed on the ballot of 'the character of work to be performed and the nature of the indebtedness they were voting to incur.'"

In that case other authorities are referred to which tend to support the conclusion reached by the court.

In *Weston v. Hancock*, 54 So. 307, the Supreme Court of Mississippi had under consideration the question as to whether a statute authorizing the issuance of bonds for "constructing public roads" was sufficiently comprehensive to authorize the issuance of bonds for raising money to be used for the maintenance and betterment of roads already in existence. The court, in holding that the terms of the statute permitted the issuance of bonds for the maintenance and betterment of the roads, said:

"When the statute speaks of 'constructing public roads,' it uses the term in its most comprehensive sense. It does not mean merely the building of roads not before having an existence, but it means the maintenance and betterment of

roads already in existence, and for this purpose the bonds of the county may be issued, if authorized by the board and not vetoed by the taxpayers in the method allowed by law."

While the above cases tend to enlarge the meaning of the term "construct" as used in the statute, there are also cases restricting its meaning, and whether the decisions above referred to have any particular value in reaching a conclusion on the question which you have submitted depends somewhat upon the wording of our statute. The authority to issue bonds is found in Subdivision 6, Section 2, of Chapter 15 of the Extraordinary Session Laws of 1919, which provides as follows:

"6. They may, in their discretion, but subject to the limitations and provisions in the Constitution and Revised Codes provided, issue bonds upon the faith and credit of the county for the construction or improvement of main highways, state highways and bridges."

Under Sub-Chapter II of Chapter 172 of the Laws of 1917 the Board of County Commissioners is given authority to levy taxes for the "construction, maintenance and improvement" of public highways. That the Legislature did not intend to authorize the issuance of bonds for the maintenance of highways is evidenced by the fact that the word "maintenance" is not included in the provisions of Chapter 15, supra, while in Chapter 172 the word "maintenance" is included.

In the case of *Shea v. Skagit County*, 122 Pac. 1061, the Supreme Court of Washington had under consideration the question whether a county was authorized to borrow money by the issuance and sale of bonds for the purpose of generally repairing all existing roads of the county. The statute provided for the creation of an indebtedness "for strictly county purposes" and likewise authorized the issuance of bonds "for the purpose of making a new road or roads, bridge or bridges, or improving established roads within said county." It was conceded that under the latter provision bonds could not be issued for general repairing of existing roads, but it was contended that they should be authorized under the statute permitting the issuance of bonds "for strictly county purposes." In discussing the proposition, the court said:

"It is, no doubt, true that the construction of a new road or the improvement of an established road is different from the general repair of existing roads. Elliott on Roads and Streets, Sec. 576. * * * If the statute relied upon by the appellant is broad enough to include the authority of the county to issue bonds for the repair of roads, the subsequent special statute, authorizing 'county commissioners to issue bonds for road purposes,' seems to make it clear that such authority is limited to making new roads or bridges or improving established roads, and excludes the idea that such bonds may be issued for the mere repair of roads."

The distinction between reconstruction or improvement of a road and the repairing of a road is well stated by Elliott on Roads and Streets, Section 576, as follows:

"As shown in a preceding section, there is, in strictness, a difference between the improvement or reconstruction and the repair of a street, and both the preliminary steps, or the manner of contracting and doing the work, and the mode of obtaining the money to pay for it, or the fund out of which it shall be paid, may depend, under various statutes, upon the answer to the question as to whether the work is one of improvement in the sense indicated or one of repair. The matter may, therefore, be of vital importance, and is worthy of careful consideration. 'Improvement' may ordinarily include 'repair,' but not, as is generally true in such cases, when the two terms are used in contradistinction. To repair seems primarily to mean to mend or to restore to a sound or good state after decay, injury, or partial destruction, while to improve seems to convey more of the idea of making better, generally by addition or change of material, nature or character. The complete reconstruction of an entire street would clearly be an improvement and not a mere repair of the street. On the other hand, merely putting a load of gravel on a gravel road, relaying a few bricks in a brick pavement or a few blocks in a block pavement, or patching a small place in the surface of an asphalt pavement would just as clearly be no more than an ordinary repair. Between these two extremes lies the debatable ground. The question most often arises when a street, or a material part of it, is resurfaced. If a new pavement of a better and more costly kind is laid we think it is reasonably clear that it would be an improvement and not a mere repair of the street. But when the question is narrowed down still more it becomes more difficult and will have to be answered by the authorities. It is generally a mixed question of law and fact."

Our statute authorizes the issuance of bonds for the "construction or improvement" of highways. It is apparent from the distinction drawn by Elliott between "construction or improvement" and the "repair" of highways, that bonds could not be issued under our statute for the purpose of repairing highways. Much less could money be used for that purpose raised by a bond issue by the voters for the "construction of highways."

I am inclined to favor the rule stated by the Supreme Court of Idaho in the case of Independent Highway Dist. No. 2 v. Ada County, 134 Pac. 542. In that case the statute authorized the issuance of bonds by the county for the purpose of constructing and repairing roads and bridges. The court in that case held that the ordinary and usual upkeep of a road could not be paid out of the proceeds of such a bond issue. The court, in speaking of this question, said:

"The ordinary and usual expense of keeping in repair the roads and bridges of the county cannot legally be paid out of the proceeds of said bond issue, but where a systematic improvement of a road system of a county is undertaken and in the prosecution of that work roads and bridges are repaired and put in good condition under such plan or system, the expense thereof may be paid out of the proceeds of such bond issue."

As stated before I believe that this is the proper test to be applied, and if the money was expended upon a part of a highway already in existence but which is embraced within a road system under process of construction, then I believe the expense may properly be paid out of the proceeds of the bond issue, but otherwise not.

You have also asked whether the County Clerk should refuse to draw the warrants in payment of the claims in case the practice is not legal. I believe that under the provisions of Subdivision 3, Section 3045 of the Revised Codes of 1907, it is the duty of the County Clerk to draw the warrants when properly allowed and ordered paid by the Board of County Commissioners and approved by the Auditor. This section provides as follows:

"The county clerk must:

"3. Draw warrants on the county treasurer in favor of all persons entitled thereto in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of county commissioners; also for all debts and demands against the county when the amounts are fixed by law, and which are not directed to be audited by some other person or tribunal."

In the case of *Adams v. Ulmer*, 39 Atl. 347, the Supreme Court of Maine had a similar question under consideration, and in disposing of the question, said:

"In issuing a warrant of distress under the judgment and order of the county commissioners, the clerk acts ministerially. It is his duty to execute the direction of the commissioners, if they had jurisdiction of the subject-matter, and their proceedings are regular in form. It is his duty to extend the formal record of their doings. Errors of the commissioners anterior to their formal judgment and record can be corrected under proper process instituted for that purpose. Their clerk cannot do so by refusing to execute the judgment. In this case the commissioners had undoubted jurisdiction. Their clerk cannot justify his refusal to obey their order by showing mistake or misjudgment of the commissioners. If, in auditing the charges of the agent, the commissioners have allowed illegal fees, as claimed by respondent, advantage of that cannot be taken in defense to this petition. Nor can the clerk in this proceeding raise the question of the sufficiency of the bridge, which had been accepted by the commissioners."

See, also, State ex rel. Dolin v. Major, 58 Mont. 140, and Stearns v. State, 100 Pac. 909.

In my opinion the proper way to raise the question is by a suit by a taxpayer to restrain the issuance and payment of the warrants.

Very truly yours,

WELLINGTON D. RANKIN,

Attorney General.