

Fireman Disability Fund—Taxes—Cities and Towns.

Under Section 1, Article 12, of the constitution the legislature has authority to levy taxes for state purposes. Section 4, Article 12, prohibits the legislature from levying taxes for county, city or town purposes. The authority to levy taxes for county, city and town purposes is vested by the constitution, and legislative acts pursuant thereto, in the counties, cities and towns alone. The act of 1899, p. 73, and the act of 1903, p. 210, attempting to divert a part of the taxes received from levies made by a county for county purposes to another use than that for which they were levied is unconstitutional and void.

Helena, Montana, Nov. 2, 1905.

Hon. W. D. Clark, Chairman, Board of County Commissioners, Butte, Montana.

Dear Sir:—Your letter of the 14th ult., enclosing opinions from the county attorneys of Silver Bow and Lewis and Clark Counties, relating to the disposition of taxes levied under section 681, Civil Code, on fire insurance companies for excess of premiums received over losses and ordinary expenses, and requesting the opinion of this office on such question, received. We are also in receipt of a letter from the county attorney of Fergus County enclosing an opinion by him on this question.

After carefully considering all of these opinions, the constitutional questions raised therein and the law upon this subject, we have reached the following conclusions:

Section 681, Civil Code, provides that "insurance corporations and companies transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed," etc. Chapter CXIII, laws 1903, provides that "all excess premiums collected in any county by any fire insurance company shall

be deemed **personal property** for the assessment by county assessors," etc.

From these provisions it is clear that such excess premiums are liable for all state and county taxes the same as any other personal property, except live stock, found within the county.

Section 1, article 12, of the state constitutions, provides that "the necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation," etc. Section 4, of said article 12, provides that "the legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town, or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes."

Pursuant to the provisions of said section 4, article 12, the legislative assembly has by law vested in the corporate authorities of counties, cities and towns the power to assess and collect taxes for the purposes of such counties, cities and towns. Such power is vested in counties to levy taxes for **county purposes** by divisions 4, 5 and 13 of section 4230, Political Code. Under division 13, of said section 4230, the county commissioners are vested with the power "to levy such taxes annually on the taxable property of the county, for **county purposes**, as may be necessary to defray the **current expenses thereof**, including salaries otherwise unprovided for, not exceeding 16 mills on each dollar of the assessed valuation for any one year," etc. The taxes collected under the levy authorized by said division 13 of section 4230 is placed in the general or county fund of the county. In our opinion the clauses "general fund levy of taxes" and "general fund of such county," as used in section 17, CXIII, laws 1903, clearly show that the intention of such act was to apply to the maintenance of volunteer fire departments or the disability fund for firemen that portion of the annual tax on excess premiums which may be collected under the levy authorized by said division 13 of section 4230 for county purposes and which would be a part of the general fund of the county.

Has the legislative assembly authority, under our constitution, to pass an act requiring a part of the taxes levied under division 13 of section 4230 for county purposes to be diverted and used for the purpose of maintaining a volunteer fire department, or creating a disability fund for firemen, in cities or towns?

In our opinion the legislative assembly has no such authority, and house bill No. 17, laws 1899, p. 73, and chapter CXIII, laws 1903, p. 210, in so far as they attempt to divert taxes levied for county purposes to the use of fire departments in cities and towns, are unconstitutional and void.

Section 4, of article 12, of the constitution clearly prohibits the legislative assembly from levying taxes "upon the inhabitants or property in any county, city or town, or municipal corporation for county, town or municipal purposes." For the legislative assembly to pass a law requiring taxes collected pursuant to a lawful levy by county authorities for county purposes to be used for city or town purposes, or for the benefit

of the fire department of a city or town would be, in effect, the same as an act of the legislative assembly levying taxes upon property in a county for county, city or town purposes. The legislative assembly has no authority to do indirectly that which the state constitution expressly prohibits it from doing directly. Under said section 1, article 12, the legislative assembly is authorized to levy taxes for **state purposes**, and under section 4, of said article, it is expressly provided that it cannot levy taxes for county, city or town purposes, and that the corporate authorities of such county, cities or towns alone may be vested with the power to levy taxes for county, city or town purposes.

These provisions of the constitution cannot be set aside by the legislative assembly either directly or indirectly.

The legislative assembly of Louisiana passed a law requiring that that portion of the taxes levied by the parish, (which is a municipal corporation practically the same as our county) for parish purposes, on property situated within the limits of towns in such parish, be turned over to the authorities of such towns for the purpose of paying certain expenses thereof. The supreme court of Louisiana, in the case of *State v. Police Jury*, 17 Southern 794, in passing upon the constitutionality of this act, said: "We have to be controlled by the special provisions of our own constitution, and reasonings drawn from the general relation which the state, the parishes, and the cities bear to each other in other jurisdictions furnish us little assistance. Article 202 of the constitution declares that the taxing power may be exercised by the general assembly for state purposes, and by parishes and municipal corporations, under authority granted to them by the general assembly, for parish and municipal purposes. * * * We agree in opinion with the district judge that the framers of the constitution intended to keep separate and distinct the taxing power of the state, that of the parishes, and that of the municipal corporations; that they never intended, in declaring that this power should be exercised by the parishes and municipal corporations 'under authority granted to them by the general assembly,' that this authority should extend to empowering either of them to do so for purposes other than those in which each was directly concerned. It is easy to see that through this act the taxing power of the towns could be supplemented by that of the parishes for town purposes. But we fail to see the authority under and by which the general assembly can, after the parishes, in the exercise, within constitutional limits, of their taxing power, have acted for parish purposes, step in, and apply the moneys arising from this legal exercise of their rights, to purposes other than those which, in the opinion of the parish authorities, made the levy of the taxes and the imposition of the licenses necessary,—taxes and licenses which they never would have levied or imposed if they were to be forcedly taken away from them under order of the general assembly."

The supreme court of Tennessee, in the case of *Mayor of Nashville v. Towns*, 37 Tenn. 190, in deciding whether an act of the legislature which provided "that the **county tax** hereafter collected within the city of Nashville, shall be paid over directly, by the collector of the **county** revenue, to the **treasurer of said city**; provided, that the corporation of

Nashville shall pay its proportion of the expenses of the county, circuit, and criminal courts so far as they are a charge upon the county," was in conflict with the provisions of the constitution, which reads as follows: "The General Assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes, for county and corporation purposes respectively, in such manner as shall be prescribed by law," said: "Here is a power expressly delegated to the county court to levy and cause to be collected a tax for county purposes, and in the exercise of that power the fund which is the subject matter of this controversy was levied and collected, and the legal title to it was vested in the county trustee, for county purposes. Now, has the legislature the power to divert the fund from the purposes for which it was levied and collected, and transfer it to another separate and distinct corporation, to be by it appropriated and used at its discretion?"

We think not. This would be an unauthorized interference with vested rights. * * *

The county court levies the taxes with the view of providing for the current expenses of the county, and if the legislature has the power to divert the fund, thus levied, to other and different purposes, it has the power to bankrupt the county at pleasure." (See, also, *State ex rel City of Lima v. Pohling*, 1, O. Cir. Ct. 486).

Furthermore, section 7, of article 12, of the state constitution provides:

"The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation."

It is elementary that the authority to levy a tax for a certain purpose necessarily implies the power to use the tax collected for that purpose. But under the provisions of the act now under consideration, all moneys which are received by taxation on excess premiums of fire insurance corporations, for the benefit of the county fund, are prohibited from being used for the purposes for which they were raised, but are directed to be applied exclusively to the maintenance of the volunteer fire departments of such cities and towns where such business shall be carried on, if there be such fire department there established; and if there be a paid fire department established in any city or town, then the moneys received from said insurance companies shall be paid into the "disability fund" of said paid fire department. Either of these purposes is entirely foreign to the purposes for which the tax was levied and collected. The direct effect of such use of this portion of the money raised by taxation is to prevent the county from having the use or benefit of moneys raised by taxation in this particular class of personal property, and is an indirect manner of taxing this class of personal property for the benefit of these various fire departments and exempting it from any taxes levied for the use of the general fund of the county. Though this tax is levied under authority of the law for the general fund purposes of the county, yet, by the provisions of chapter CXIII, laws 1903, it is directed that the money shall be

used for purposes entirely foreign to that authorized for the levying of taxes for the general fund, viz: for the use and benefit of an entirely distinct municipal corporation—a city or town. Again, if all the money realized from the taxation of this class of personal property must be used for purposes other than county purposes, and over which the county commissioners have no jurisdiction, then it necessarily follows that the remaining property in the county must be subjected to a higher rate of taxation for county purposes to make up the deficiency created by the diversion of this money. This is in effect taxing county property generally for the support of an institution within a city or town, organized and maintained exclusively for the benefit of such city or town, and from which the citizens of the county, outside of such city or town, receive no benefit.

There would be no legal objection to a city levying a special tax and establishing the fund derived therefrom for the purposes named in said chapter CXIII, laws 1903, provides authority therefor was duly vested in it by its charter. But it cannot be successfully contested, and seems absolutely unreasonable, that the legislature may by law authorize a diversion of county funds expressly collected under authority of law for county funds expressly collected under authority of law for county purposes to meet the expenses of a city situated within its boundaries.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.