

District High Schools, Right of to Refund of High School Levy. County Free High School, Right of District High Schools.

The division of a county after the levy of a tax for county free high school purposes in the old county, is not abrogated by the fact of the county division, and it is the duty of the county treasurer who collects such taxes to pay over to the district high school entitled thereto a proportional share of the moneys collected thereunder in accordance with Chapter 76, Session Laws of 1913.

January 28, 1915.

Hon. H. A. Davee,
Supt. of Public Instruction,
Helena, Montana.

Dear Sir:

I am in receipt of your communication under date the 26th instant, inquiring as to the right of school district No. 6 of Wibaux County, formerly of Dawson County, to refund of seventy-five per cent of the taxes paid from that district for county high school purposes. It seems that at the regular time for levying taxes in 1914, the county of Dawson levied a tax of two mills for county free high school purposes. After this tax was levied, and before it was collected, the county of Wibaux was organized, largely from Dawson County, and the taxpayers residing in the District in question, paid the school tax to the Treasurer of Wibaux County, under the provisions of Chapter 133 of the Session Laws of the Thirteenth Legislative Assembly. The question now is: Can this district, which maintains three years of high school work, accredited by the State Board of Education, claim a refund of seventy-five per cent of the moneys collected under a levy for high school purposes, under the provisions of Section 2112 of Chapter 76 of the Session Laws of the Thirteenth Legislative Assembly? Neither the provisions of Chapter 133 of the Session Laws of 1913, nor the provisions of Chapter 76 of that year have made any specific provision for a case of this kind. The nearest point at which the legislature has indicated anything as to the disposition of school moneys upon the division of counties, is found in Section 10 of Chapter 133 of the Session Laws of 1913, which is in part as follows:

"The Superintendent of public schools of the old county or each of the old counties respectively shall furnish the superintendent of the public schools of the new county with a certified copy of the last school census of the different school dis-

tricts in the territory set apart to form the new county, and shall certify to the board of county commissioners the amount due, and said board shall order a warrant drawn on the treasurer of his county in favor of the treasurer of the new county, for all the money that is or may be due by any apportionment or otherwise to the different school districts embraced in the new county."

This seems to indicate an intention on the part of the legislature that the school moneys collected by a new county by virtue of a levy made by the old county previous to the division, shall be distributed among the school districts of the new county in accordance with the usual rule based upon the school census.

There is a general principle applicable which may give a solution. That principle is:

"That where there is no privity, statutory or contractual between a city and the county where such county had collected money for taxes belonging to the city, an action to recover same would be sustained upon the principle that an obligation rests upon all persons, natural or artificial to do justice independent of any statute, so that if the county obtained money or property of others, without authority of the law, it will be compelled to make restitution."

Humbolt Co. v. Lander Co. 56 Pac. 228;

Salem vs. Marian Co. 46 Pac. 163;

Chapman vs. Douglass Co. 107 U. S. 357;

Pimental v. City of San Francisco, 21 Cal. 362.

A consideration of the status of counties and school districts strengthens the principle above announced. Both counties and school districts are political divisions of the State, established for administrative purposes; each within its own sphere is of equal importance and independence. It is true that the county is in a way made a fiscal agent of the school district, that is, it collects the taxes for the school district in much the same manner that it may collect taxes for a city. The duties of the county in this matter, however, are only ministerial. The right of the school district to receive its share of the high school levy does not depend upon the judgment or discretion of the Board of County commissioners, or any other officer of the county. Neither does it depend or flow from the fact that a particular school district happens to be within a particular county. The right to receive this portion of school moneys is by virtue of the school law, and not under any law relative to the government of counties or their creation. Since, therefore, the school district is a political division of the state, independent in government from the county, and getting none of its rights, or prerogatives from the county, its rights to taxes levied, is not abrogated or changed because of the change in the county boundaries. It is as much the duty of the treasurer of the new county to pay the proportionate share of the high school levy over to the district entitled thereto, as it would have been the duty of the treasurer of the old county had no division taken place. As to the remedy, the general rule seems to be as follows:

"The duty of settling accounts between the state and county, or between different municipalities, is ordinarily committed to a public officer or board, whose decision if not appealed from or brought up for review is conclusive. But the duties to be performed by such officer or board are ministerial, and if such officer or board neglect to perform such duty, the amount due to one of the parties in interest may be ascertained in any other manner that will satisfactorily establish it, and hence by an action at law in the nature of an accounting * * * in which as the suit is equitable in its nature, such relief may be granted as the facts at the close of the litigation will warrant."

37 Cyc. 1596.

The same authority holds that this action may be maintained as soon as the liability of the county becomes fixed and absolute.

37 Cyc. 1539.

In this case, of course, this right would accrue when the taxes were collected by the new county.

All that has been said above has been upon the assumption that Wibaux County had a right to collect the two mill levy for high school purposes made by Dawson County. There may be a question as to the legality of the action of the officers of Wibaux in collecting such a tax, in as much as it would amount to the collection of a tax for a purpose which did not exist unless it was levied to take care of *bonded indebtedness* for free county high school purposes:—that is, what right would Wibaux County have to collect a tax for high school purposes, without having a high school, to the support of which the funds could be applied.

Another question not considered in the above discussion is the right of anyone now to attack the legality of the tax in question. Undoubtedly it was legal when levied by Dawson County, and so far as we know was paid without protest. Not having the facts involved in these two questions before us, we have not attempted to discuss these matters. They would doubtless be raised upon any attempt of District No. 6 to get the refund.

On the sole question of the right of District No. 6 to the refund, so far as that right might be affected by the division of the county, I am of the opinion that such division did not abrogate its right to the refund, and that leaving the question of the legality of the collection of the tax and the right of anyone now to attack it, that it is the duty of the county treasurer to pay over to District No. 6, the proportional share of the moneys collected thereunder, in accordance with the provisions of Section 2112, Chapter 76, Session Laws of 1913. .

Yours very truly,

D. M. KELLY,

Attorney General.