

**Taxation—Highways—What Property Taxable for Construction of Highways in County—Statutes Construed, Chap. 172, of the Session Laws of 1917.**

Sections 1 and 2 of Chap. 172 of the Session Laws of 1917 construed.

March 16th, 1918.

Mr. E. M. Niles,  
County Attorney,  
Livingston, Montana.

Dear Sir:

I am in receipt of your letter of recent date submitting for my opinion the following question?

"Chapter 172 of the Session Laws of 1917, seems to be the law with reference to Highways in this state. It is proposed that this county shall issue its bonds for the purpose of building highways in the county. The question arises as to whether all of the property in the county is taxable for the payment of the principal and interest of such bonds, if issued, or whether only all property in the county outside of the corporate limits of incorporated cities and towns is taxable for such purpose? The bonds to be issued are to be in payment for work done on the highways in the county as a whole and not with reference to any particular location or improvement district."

Sections 1 and 2 of Chapter 2 of Chapter 172, Session Laws of 1917, are re-enactments of Sections 1 and 2 of Chap. 2 of Chap. 141, Session Laws of 1915, the only change being made in Sec. 1, where the age limit for payment of poll tax is reduced from 60 to 50 years, while Sections 1 and 2 of Chapter 141, Session Laws of 1915 were in turn re-enactments of Section 1 and 2 of Chap. 2 of Chapter 72, Session Laws of 1913.

By Section 1, for the purpose of raising revenue for the construction, maintenance and improvement of public highways, the board of County Commissioners must annually levy a tax upon the taxable property in the county of not less than two mills, and not more than five mills on the dollar. This section also provides for a general road tax of \$2.00 on each male inhabitant of the county over 21 years and less than 50 years of age. This section, however, expressly exempts from such taxes property and inhabitants within incorporated cities and towns when such incorporated cities and towns by ordinance provide for the levy and collection of like taxes on the property and inhabitants within such incorporated cities and towns for road, street and alley purposes.

Clearly it was the intention of the legislature, by the provisions of this section, that all of the property and the inhabitants, between certain ages, within the county, whether such property and inhabitants are within or without incorporated cities or towns shall be taxed, in the manner provided by such section, for the purpose of raising revenue for the construction, maintenance and improvement of the public highways; and, if the property and inhabitants within an incorporated city

or town are, by such city or town, taxed in such manner for the purpose of raising revenue for the construction, maintenance and improvement of the public highways within such city or town, then such property and inhabitants within such city or town shall not be taxed by the county for the purpose of raising revenue for the construction, maintenance and improvement of the highways thruout the county, but if the property and inhabitants within an incorporated city or town are not taxed in the manner provided by this section for the purpose of raising revenue for the construction, maintenance and improvement of highways within such city or town, then such property and inhabitants within such city or town shall be so taxed by the county. In other words it was the intention of the legislature that all such property and inhabitants within the county should be taxed, as provided in such section, either by the county or by an incorporated city or town, no property or inhabitants, between such ages, within the county being permitted to escape such taxation.

In the case of *Edwards vs. Lewis and Clark County*, 53 Mont. 359, 165 Pac. 297, Lewis and Clark County, had, during the years 1914 and 1915, levied and collected the taxes provided for by Section 1, Chap. 2 of Chap. 72, Session Laws 1913, and by Sec. 1, Chap. 2 of Chap. 141, Session Laws 1915, none of the property or inhabitants within the City of Helena having been taxed by the county for the reason that such city levied and collected like taxes for the construction, maintenance and improvement of the highways within the limits of such city. The county in addition to expending the funds derived by it from the collection of these taxes had expended a large additional amount for the construction, maintenance and improvement of the highways in the county outside of the corporate limits of the city of Helena, for which amount warrants had been by the county commissioners of such county issued against the road fund of the county. Thereafter the county commissioners attempted to fund such road warrant indebtedness by the issuance of bonds, which were to be general bonds of the county the principal and interest of which was to be paid by taxes levied against all property within the county, including the property within the corporate limits of the city of Helena. The appellant, Edwards, contended, first that such indebtedness could not be funded without the question of the funding of the same being submitted to and authorized by the electors, and second, that such warrants being payable only from funds derived from taxes levied against property within the county, but outside of the corporate limits of the city of Helena, the county could not, for the purpose of funding such warrant indebtedness, issue general bonds of the county and tax the property within the limits of the city of Helena for the purpose of raising funds with which to pay the interest and principal of such bonds. The court decided the case on the first question consequently did not pass on the second question.

Section 2 of Chap 2 of Chap. 172, Session Laws 1917, authorizes the board of county commissioners, whenever in the judgment of the board it becomes necessary or advisable for the construction or improvement of any Main Highway or State Highway in such county, to raise revenue in addition to that furnished by the taxes and licenses author-

ized by said act, that is by Section 1 of Chap 2 of the act, to issue and sell its bonds, but there is no provision in such section exempting the property within incorporated cities or towns from taxation for the purpose of raising funds to pay the principal and interest of such bonds.

Reading Sections 1 and 2 of Chapter 2 of this act together it appears that it was the intention of the legislature by Section 1 to provide revenue for the construction, maintenance and improvement of public highways of all kinds by a tax against all property and inhabitants, within certain ages, within a county, such taxes to be levied and collected either by the county on all property and inhabitants within the county, or by the county on all property and inhabitants within the county, outside of incorporated cities and towns, and by such cities and towns upon all property and inhabitants within their corporate limits, and by Section 2 to provide a method or means for raising additional revenue for the construction or improvement of Main Highways or State Highways when the taxes levied and collected by the county or by the county and the incorporated cities and towns, under Section 1, are deemed insufficient for such purpose.

In my opinion to levy and collect the taxes provided for by Section 1 for the construction, maintenance and improvement of all public highways, whether such taxes be levied and collected by the county, or by the county and incorporated cities and towns, and then to tax all of the property in the county for the purpose of raising additional revenue for the construction and maintenance of Main and State Highways, is an entirely different proposition from that of the county incurring a warrant indebtedness for the construction, maintenance and improvement of all public highways in the county, which warrant indebtedness can only be paid by taxing the property in the county outside of incorporated cities and towns, and then attempting to fund such indebtedness by the issuance of bonds to be paid by taxes levied against all property in the county. In the first instance all of the property is taxed alike for the same general purpose, that is for the construction, maintenance and improvement of public highways of all kinds, whether the same be taxed by the county or by the cities and towns, and all property within the county, both that within and that outside of the incorporated cities and towns, is then subject to an additional tax for the construction and improvement of certain classes of highways only, Main and State Highways, while in the second instance the indebtedness is incurred in the construction, maintenance and improvement of public highways of all kinds, the fund to defray such cost and indebtedness being derived from taxes levied against all property in the county, except property within incorporated cities and towns levying and collecting like taxes, and to fund such indebtedness by the issuance of funding bonds payable from taxes levied against all of the property in the county would simply be doing indirectly what the county could not do directly.

I am, therefore, of the opinion that while a county cannot incur a warrant indebtedness for the construction, maintenance and improvement of public highways of all kinds, which warrant indebtedness is

payable from taxes levied against property in the county outside of incorporated cities and towns levying taxes for such purposes, and then fund such warrant indebtedness by issuing bonds payable by taxation against all property in the county, including the property within such incorporated cities and towns, yet, when the taxes provided for by Section 1 of Chap. 2 of Chap. 172, Session Laws 1917, have been levied by a county, or by a county and the incorporated cities and towns within such county, and the county desires to raise additional revenue for the purpose of constructing or improving Main or State Highways, such county may issue and sell its general bonds for such purpose and levy taxes against all of the property within the county for the purpose of raising the revenue necessary to pay the interest and principal or such bonds.

Respectfully,

S. C. FORD,

Attorney General.