

Highways—General Road Funds, Expenditures Of—Bond Issue, Expenditure of Within Cities and Towns.

General road funds cannot be expended upon road ways within the limits of an incorporated city or town.

Proceeds from a bond issue cannot be expended upon road ways within the limits of an incorporated city or town. State Highway Commission,

March 11, 1920.

Helena, Montana.

Gentlemen:

I am in receipt of your letter asking that I advise you if a county may expend general road funds within an incorporated city or town for road or bridge construction, and also if money voted under a bond issue may be expended on roads or bridges, within incorporated cities or towns.

General road funds and bridge funds are separate and distinct funds, each being raised by separate and distinct tax levies having no connection with each other. Sec. 1 of Chap. II of Chap. 141, Sess. Laws 1915, as amended by Sec. 2 of Chap. 172, Sess. Laws 1917, provides for the levying of a tax for the construction, maintenance and improvement of public highways, while Sec. 2 of Chap. V. of Chap. 141, Sess. Laws 1915, provides for the levying of a tax for the construction, maintenance and repairing of free public bridges.

GENERAL ROAD FUND.

Section I of Chapter II. of Chap. 141, Sess. Laws 1915, as amended by Sec. 2 of Chap. 172, Sess. Laws 1917, requires the Board of County Commissioners of each county to annually levy and cause to be collected a general tax upon the taxable property in the county for the purpose of raising revenue for the construction, maintenance and improvement of public highways, but contains a provision exempting from such tax property within incorporated cities and towns which, by ordinance, provide for the levy and collection of a like general tax for road, street and alley purposes. As I understand your question, you desire to know if the money in the general road fund of a county derived from this tax may be expended for the construction, maintenance, or improvement of the streets within an incorporated city or town, when such tax has been levied against the property in such city or town by reason of such city or town not levying or collecting a like tax for street and alley purposes.

The term "highway" is a generic term for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges, ferries and navigable rivers (1 Elliott Streets and Roads, Sec. 1), and when a statute speaks of a street, and does so with reference to a town or city, it must be taken to mean a street in the true sense of the term. The character which the location of a public way in a town or city impresses upon it so distinguishes it from an ordinary suburban way that one applying

to a street the same rules which govern a country road, or invariably construes a statute containing the word "highways" as embracing streets, must often go far astray, and it is therefore not to be assumed in all cases that streets are referred to when a statute speaks of highways, the presumption, on the contrary, some times arising that the statute refers only to ordinary public roads under the control of local highway officers where there is no intention to include streets, and that intention cannot be inferred from the scope and object of the statute (1 Elliott Roads and Streets, Sec. 22.)

In 1 Elliott Roads and Streets, Sec. 503, it is said with reference to the control of streets in a city or town by county officers:

"It is obvious that the officers having control of county affairs cannot justly be permitted to control the streets of a city, and for this conclusion there are at least two satisfactory reasons. It would violate the principle of local self-government to permit officers elected to govern one corporation to control the public ways within another and distinct corporation, for the officers of one corporation cannot be considered the representatives of another and different corporation. * * * Officers chosen to conduct county or township affairs cannot, in the nature of things, be presumed to possess such authority as will enable them to control streets, and the liability of a town or city is radically different from that of a county or township."

Again in Sec. 504 he says, speaking with reference to the control of cities and towns over streets within their borders:

"The creation of such a corporation is, in truth, simply the creation of a new instrumentality of government; it comes into existence with the rights, powers and duties of a governmental subdivision, and it is but reasonable to conclude that as to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other governmental corporations is excluded. * * * It is indeed by no means clear that officers chosen by a county can be placed in charge of streets which it is the duty of a town or city to maintain safe and convenient for passage; it is not, at all events, just to do so, and this result ought to be avoided by holding, as in truth sound principle requires that the courts should hold, that the creation of a municipal corporation does, in the absence of clear words to the contrary, imply that it shall have control of the streets within its territorial limits to the exclusion of the county and township officers."

Again, in Secion 505, speaking of the same subject, he says:

"In vesting 'the inhabitants of a locality with the government thereof' is a change in the political or governmental subdivisions, and the natural and reasonable intendment is that when a new governmental instrumentality is established, it takes control of the territory and affairs over which it is given authority to the exclusion of other local governmental instrumentalities. It displaces the old, and takes its place as its legal

successor and not as auxiliary. * * * The object of incorporating a city or town is to invest the inhabitants of the locality with the government in all matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought therefore to be presumed that they pass under the exclusive control of the municipality as soon as it comes into existence."

Examining our laws we find that incorporated cities and towns have been granted authority, which is apparently exclusive, over the streets and public ways within their borders. Section 3259 grants an incorporated city or town the power to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets and alleys and vacate the same (subdiv. 6); to provide for lighting and cleaning the same, to regulate the use of sidewalks, to require the same to be kept free and clear of snow, ashes, garbage, etc., (subdiv. 7); to provide for and regulate street crossings and to regulate and prevent the obstruction of streets and sidewalks (subdiv. 8); to regulate and prohibit traffic upon the streets and sidewalks (subdiv. 9); to regulate and provide for the construction of sidewalks (subdiv. 650); to grant rights of way through the streets for street and other railroads (subdiv. 66); to establish and change the grade of streets (subdiv. 68); to provide for sprinkling the streets (subdiv. 69); to permit the use of the streets for the purpose of laying down gas, water and other mains (subdiv. 73); to condemn private property for opening, establishing, widening or altering any street or alley (subdiv. 75); to create special improvement districts (subdiv. 80). Section 3289 provides, that in certain cases, the city or town shall be liable for any injury or loss caused by reason of any defect in any street, there being no such liability on the part of a county. Section 3479 authorizes a city or town council to abandon or vacate a street or alley, or any part thereof, the following section prescribing the procedure therefore. From all of these provisions there can seem no doubt but what an incorporated city and town has exclusive control over its streets and public ways for all purposes.

Examining the provisions of Chapter 141, Sess. Laws 1915, as amended by Chapter 172, Sess. Laws 1917, we find that while the word "highways" is used, all of the powers therein granted are granted exclusively to the board of county commissioners, and all of its provisions are applicable solely to urban or rural roads. Provision is made for opening and establishing highways, abandoning and vacating the same, which are radically different from those provided for establishing, opening, vacating and abandoning streets within incorporated cities and towns. It is therefore apparent that this "General Highway Law", as it is designated in Sec. 1 of said Chapter, applies only to rural and urban roads, and has no application whatever to streets or public ways within the limits of incorporated cities or towns.

This "General Highway Law" nowhere contains any provision whereby the county may pay over to a city or town any of the funds derived by it from the levy of the tax provided for by Sec. 1 of Chap. 11., and a city or town having the exclusive control of its streets, the

board of county commissioners certainly could not enter upon any thereof for the purpose of improving the same in any manner. It is, therefore, my opinion, that no part of the road fund derived from the collection of such tax can be expended upon the streets within an incorporated city or town, even though such city or town does not, by ordinance, provide for and collect a like tax for street and alley purposes, and the property within such city or town is taxed for such county road purposes. This may seem a hardship on those cities and towns which do not levy and collect such a tax for street and alley purposes, and in which the property is taxed by the county for such purpose, but it is one which can be easily avoided by such cities and towns making provision for the collection of such a tax for street and alley purposes.

BRIDGE FUND.

Sec. 2 of Chap. V. of Chap. 141, Sess. Laws 1915, which provides for the levying of a tax not exceeding two mills on the dollar of taxable property of the county for bridge purposes, does not contain any provision exempting from such tax, property within the corporate limits of cities or towns which may levy a like tax, such as is found in the section providing for the levying of a tax for road purposes, consequently this tax is levied against all taxable property in the county, both that within and without the corporate limits of cities and towns, without any exception whatever. Some few years ago the question was raised as to whether or not the funds derived from such tax levy might be expended by the board of county commissioners for the construction, repair and maintenance of bridges, both within and without the corporate limits of cities and towns, and this question seems to have been called to the attention of the legislature in 1917, as an act was passed in that year, Chap. 63, Sess. Laws 1917, providing that every bridge necessary to be constructed and maintained in any city or town as a part of a main highway in any county leading over a natural stream from one part to another of such county shall be constructed and maintained by the county at large and be under the direction and control of the board of county commissioners, the city or town being required to pay the whole, or such part thereof, not less than one-half, to be determined by the board of county commissioners, of planking, re-planking, paving or re-paving such bridges from time to time, and also being required to construct and maintain and keep in repair the approaches.

I am, therefore, of the opinion that a board of county commissioners may expend the funds derived by the tax levied under the authority of said Sec. 2 of Chap. 5 of Chap. 141, for the construction, maintenance and repair of any bridge within the limits of incorporated cities and towns, when such bridge is a part of a highway leading from one part of a county to another part, such board being compelled to construct, maintain and repair the same, using for that purpose either the funds derived from such tax levy, or from the special tax levy authorized by Sec. 4 of Chap. 63, Sess. Laws 1917, the city or town, however, being required to construct and maintain the necessary approaches and also to pay at least one-half of the cost of planking, re-planking, paving or

repaving the same from time to time, but that a board of county commissioners cannot expend any of the funds derived from the levy of the tax authorized by said Sec. 2 of Chap. 5 of Chap. 141, for the construction, maintenance or repair of bridges within incorporated cities and towns, other than those bridges specified in Chap. 63, Sess. Laws 1917.

What I have heretofore said with reference to the expenditure of general road funds derived from the tax levy authorized by Sec. 1 of Chap. 141, as amended, also applies to the expenditure of funds derived from the issuance and sale of general county bonds for highway purposes, and I am of the opinion that no part of the proceeds of such a bond issue can be expended upon the streets within an incorporated city or town. At first blush this would seem unfair to the inhabitants of such a city or town and the persons owning property therein which will be taxed for payment of interest on and the principal of said bonds, but when we consider that a city or town cannot live within itself, but must depend for its support and prosperity upon the surrounding country, and that the extent of the trade which will come to the merchants and inhabitants thereof depend to a very large extent upon the condition of the highways running out from such a city or town into the country tributary thereto, it is apparent to us that while their property may be taxed for the construction, maintenance and improvement of such highways, the benefits which they receive, in nearly every instance, equal, if not greatly exceed, the amount which they are compelled to pay out for such taxes.

Truly yours,

S. C. PORTER,

Attorney General.