

Taxation — Highways — Streets — Ordinances — Cities and Towns.

Failure of a town council to levy a tax for street purposes where the town has an ordinance providing for such a tax, under section 1617, R. C. M. 1921, does not authorize the county commissioners to levy a tax upon the property within the corporate limits of such town.

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My dear Mr. Jones:

You have requested my opinion on the question whether the board of county commissioners of your county is authorized to levy a general and special road tax upon property within the corporate limits of the town of Pony, the town of Pony having provided by ordinance for the levy and collection of a general and special tax within the limits of such town for road, street and alley purposes, and if so, whether the money so collected is required to be expended upon the roads, streets and alleys within the corporate limits of said town.

Section 1617, R. C. M. 1921, provides as follows:

“For the purpose of raising revenue for the construction, maintenance, and improvement of public highways, the board of county commissioners of each county in this state shall annually levy and cause to be collected a general tax upon the taxable property in the county of not less than two mills, and not more than five mills on the dollar, which shall be payable to the county treasurer with other general taxes. There is also established a general road tax of two dollars per annum on each male person over the age of twenty-one years, and under the age of fifty years, inhabitant within the county, and payable by each person liable therefor at any time within the year. The collection of these taxes shall be under the direction of the board of county commissioners; taxes from freeholders to be collected the same as other taxes, and from non-freeholders as commissioners may direct; provided, that the foregoing provisions of this section shall not apply to incorporated cities and towns which, by ordinance, provide for the levy and collection of a like general tax and a like special tax within such cities and towns for road, street and alley purposes. All moneys collected under the provisions of this act shall belong to the general road fund of the county.”

Under the provisions of this section the board of county commissioners is required to levy for the construction, maintenance and improvement of public highways upon all territory of the county outside of the corporate limits of those cities and towns which, by ordinance, have provided for the collection of a like general and special tax, a tax for the benefit of the general road fund.

The question presented by you is whether, by reason of the fact that the town of Pony has failed to levy any tax for road, street and alley purposes, the county commissioners are authorized to levy a tax upon the territory included within the corporate limits of Pony, the same as though no provision had been made by ordinance for the collection of a general and special tax for road, street and alley purposes.

The purpose of section 1617 in excluding the general county levy for road purposes in incorporated cities and towns providing by ordinance for the collection of a road, street and alley tax, is to leave to the local government the question of the amount of tax which shall be collected for such purposes and to permit the locality to expend all moneys so collected within its corporate limits for the purposes for which the tax was levied.

The town having failed to make a levy although having an ordinance providing for such a levy, the question occurs whether a taxpayer of the town of Pony could not, by proceedings in mandamus, compel the city council to levy the tax. If the council has any discretion in the matter its action cannot be controlled by mandamus and in such case it would follow that the board of county commissioners could not levy the tax.

Section 5216 requires the city council to, on or before the fifteenth day of September of each year, by resolution, determine the amount of taxes for all purposes to be levied and collected on all taxable property in the town.

One of the most important duties assumed by an incorporated city or town is to establish, extend and keep in repair streets and alleys within its limits.

Section 1617, in recognition of the same obligation resting on counties as to roads, provides for raising the necessary revenue to enable them to perform that duty. It also recognizes the obligation resting on cities and towns to raise the necessary revenue for street purposes, and exempts from taxation by the county all cities and towns that have made such provision.

Our supreme court, in speaking of the obligation of a city to establish and properly maintain streets within its limits, in the case of *Snook vs. City of Anacanda*, 26 Mont. 128, 134, said:

“The defendant, the city of Anaconda, was organized under provisions which now appear in chapter XXII of the fifth division, general laws, compiled statutes of 1887. By section 325 of that chapter the defendant, through its council, was empowered to lay out, establish, open, alter, widen, extend, pave, or otherwise improve the streets within its limits; and by section 435 the exclusive control of the streets was a power confided to the city. The same chapter provides means, through taxation, by which these powers may be exercised. Similar powers are granted by sections 4800, 4875, 4876, 4877, 4878, 4879 and 4880 of the political code. Section 4700 provides that ‘a city or town is a body politic and corporate, with the general powers of a corporation, and the powers specified or necessarily implied in this title, or

in special laws heretofore enacted.' The power to repair, coupled with the exclusive control of the streets, made it the ministerial duty of the city to exercise ordinary care to the end that the streets might be reasonably safe for travel. The duty thus imposed is not legislative or judicial in character, but ministerial. Having the power to keep its streets in repair, the defendant was bound to exercise it. The duty corresponds with, and is not less than, the power."

Section 5219 provides for a road poll-tax in cities and towns, and section 5222 provides for its expenditure for street purposes in the city or town, and further provides that:

"No street or alley in a city or town is a county road or a part thereof, nor constitutes a part of a road district of a county."

Since this town has provided by ordinance for the levy and collection of a tax for street purposes, and since the duty to open, extend and keep in repair its streets is ministerial (Snook vs. City of Anaconda, supra,) and since it has exclusive control over its streets, it follows that the duty to levy and collect the necessary taxes for such purposes is also ministerial and may be compelled by mandamus.

The failure of a city council to perform its plain duty in failing to levy the tax does not, in my opinion, have the effect of repealing the ordinance providing for its levy and collection so as to give the county commissioners power to make the levy as in cases where no ordinance has been enacted. The ordinance is still a valid, existing ordinance, and failure on the part of the city council to observe its provisions does not have the effect of repealing the ordinance.

The remedy is by a proceeding by a taxpayer of Pony to compel the city council to perform its plain duty under the ordinance, and it necessarily follows that if the council may be compelled to make a levy, the county has no right to make it.

It is, therefore, my opinion that the board of county commissioners has no right to make a levy for road purposes under the provisions of section 1617, R. C. M. 1921, upon property within the corporate limits of a town which has, by ordinance, made provision for the levy and collection of a general road tax, but which has failed to make the levy as provided for in the ordinance.

Very truly yours,

L. A. FOOT,

Attorney General.