

Opinion No. 153.**Highways—Public Highways—Permanent Highways—County Surveyor—Cities and Towns—Streets and Alleys, Improvement of—General Road Fund—Counties.**

HELD: 1. Where a city or town council lays out or constructs an alley within the limits of the city or town it represents, such alley is a public highway, and may be improved out of the general road fund of the county.

2. County surveyor is vested with authority to act in a supervisory capacity after the city or town council has designated a public highway or street upon which work is to be done, and the type of pavement to be used

July 5, 1935.

Mr. Jack Healy
County Surveyor, Silver Bow County
Butte, Montana

At your request I have examined the opinion of Clarence Hanley, deputy county attorney of Silver Bow County, concerning your powers as county surveyor in the construction and oiling of permanent highways and streets within the City of Butte.

Prior to the passage of Chapter 107, Laws of 1923, not Chapter 103, Laws of 1933, fifty per cent of the net fees for registration of motor vehicles was paid to the particular county from which the registration fees came in the first instance and was credited to its general road fund. Under the provisions of Chapter 107 all of the net fees was paid to the particular county from which the registration fees came in the first instance and was credited to its general road fund. The general road fund was used for the construction, maintenance, improvement and repair of highways in the county outside cities

and towns. Under the provisions of Chapter 88, Laws of 1927, which amended Chapter 107, all of the net fees was paid to the county and was required to be used by it for the construction, repair and maintenance not only of highways outside cities and towns but of streets in cities within the boundaries of the county where such streets formed component parts of arterial highways.

Section 5039, Revised Codes of 1921, provides among other things that "the city or town council has power to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds and vacate the same." (Subdivision 6.) Section 1612, Revised Codes of 1921, defines public highway as follows: "All highways, roads, lanes, streets, alleys, courts, places, and bridges, laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." These two sections must be considered together and in doing so the conclusion cannot be escaped that where a city or town council lays out or constructs an alley within the limits of the city or town it represents, such alley is a public highway. (*State v. District Court*, 80 Mont. 228; see, also, definition of term "alley" in "Words and Phrases.")

It is apparent that the phrase "permanent highways and streets" and the phrase "public highways and streets," found in Section 1 of Chapter 103, Laws of 1933, are used interchangeably and mean the same thing.

As under Section 1 aforesaid the city council has a voice only in the designation of the street or highway upon which the work is to be done, and the type of pavement to be used, it would seem that when the designation is made the county surveyor is vested with authority to proceed to the end in a supervisory capacity.

I agree with all Mr. Hanley's conclusions except the conclusion that the fund cannot be used for the construction of public alleys within a city having a population of 35,000 or

more. I think the legislature intended that "permanent highways and streets" should include "alleys," nothing to the contrary appearing in the statute.

It may be informative to add that Section 1 of Chapter 103, has been amended in some respects by Section 1 of Chapter 38, Laws of Extraordinary Session 1933-34, but the conclusions reached by Mr. Hanley are not affected by the change.